

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

FERNANDO PAIZ ANDRADE AND ANABELLA SCHLOESSER DE LEÓN DE PAIZ

Claimants

v.

REPUBLIC OF HONDURAS

Respondent

ICSID Case No. ARB/23/43

CLAIMANTS' REJOINDER ON JURISDICTIONAL OBJECTIONS

4 July 2025

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I.	INTRODUCTION.....	1
II.	THE TRIBUNAL SHOULD AFFIRM ITS JURISDICTION BASED ON THE TEXT OF THE CAFTA-DR AND THE AVAILABLE RECORD	12
III.	RESPONDENT’S BIFURCATED OBJECTIONS ARE INCONSISTENT WITH THE CAFTA-DR AND SHOULD BE DISMISSED	15
A.	Respondent’s Recycled Exhaustion Objection Is Meritless	15
1.	Respondent’s Consent to Arbitrate the Present Dispute Is Not Conditioned on the Exhaustion of Local Remedies.....	15
(a)	Honduras’s Mere “Willingness” to Require Exhaustion in the Future Is Not a Valid Exercise of ICSID Convention Article 26	17
(b)	Decree 41-88 Did Not Require or Imply Exhaustion of Local Remedies as a Condition of Honduras’s Subsequent Consent to ICSID Arbitration	24
(c)	An Exhaustion Requirement Is Fundamentally Incompatible with Honduras’s Consent to Arbitrate in the CAFTA-DR	31
(d)	Honduras Should Be Estopped From Relying on the Declaration in Decree 41-88 to Negate its Consent to Arbitrate this Dispute	40
2.	In Any Event, Exhausting Local Remedies Is Not Required Because It Would Be Futile.....	43
B.	The Tribunal has Jurisdiction Over Claimants’ Umbrella Clause Claim, Imported Through the MFN clause.....	50
1.	MFN Treatment Extends to Substantive Treaty Protections, Including the Umbrella Clause in Third-Party BITs.....	51
(a)	The Phrase “in like Circumstances” Does Not Require Showing an Actual Investor (or Investment) in Similar Circumstances as Claimants (or Their Investment).....	55
(b)	The Object and Purpose of the CAFTA-DR and the MFN Clause Undermines Respondent’s Restrictive Reading.....	61
2.	The CAFTA-DR’s Procurement Carve-Out Does Not Apply	65
C.	The Agreements Squarely Fit Within the Definition of an “Investment Agreement” Under the CAFTA-DR	73
1.	The Agreements Record in Writing a Binding “Exchange of Rights and Obligations”	75
2.	The Agreements Were Executed Between Honduran Central Level Authorities and Pacific Solar, a Covered Investment	84
(a)	All Entities that Signed the Agreements on Behalf of the Honduran State are Part of the “Central Level” of Government.....	85

TABLE OF CONTENTS

	<u>Page</u>
(b) The Agreements Were Signed by Pacific Solar, a Protected Investment, and There is no Basis to Apply a Separate Temporal Requirement.....	89
3. The Agreements Confer Pacific Solar—a Protected Investment—Rights over Natural Resources or Other Assets that Honduras Controls.....	93
4. Claimants Relied Upon the Agreements’ Rights to Acquire Pacific Solar and its Assets, Which Are Distinct from the Agreements	95
IV. RESPONDENT’S “ADDITIONAL OBJECTIONS” DO NOT WARRANT BIFURCATION, AND IN ANY EVENT, SHOULD BE DISMISSED	96
A. Claimants’ Claims Are Not Time Barred	104
1. The Treaty’s Limitation Period Begins to Run from Claimants’ Knowledge of Both a Treaty Breach and Resulting Loss or Damage	107
(a) Article 10.18(1) of the Treaty Requires Sufficient Certainty of the Breach and Loss Before the Limitations Period Is Triggered.....	107
(b) State Conduct Pre-Dating the Enactment of the New Energy Law Can Be Considered as Factual Background to Respondent’s Treaty Breaches	110
2. Claimants First Acquired Knowledge of the Breach and their Loss or Damage in 2022, Well After the Cut-Off Date.....	114
(a) Respondent Breached the Treaty and Caused Claimants Damage with its Measures Starting in 2022.....	115
(b) Prior to Mid-2022, Claimants Could Not Have Acquired Knowledge of Honduras’s Treaty Breaches that Started in 2022	119
3. Claimants’ Claims Fall Within the Treaty’s Limitation Period Because Honduras’s Actions Are Properly Classified as Continuous or Composite Acts.....	123
(a) Claimants’ Claims Are Timely Because the New Energy Law Forms Part of a Composite Act.....	126
(b) Claimants’ Claims Are Timely Because the Challenged Measures Are Also Continuous Acts.....	131
B. Claimants’ Claims Arise Out of Respondent’s Violations of the CAFTA-DR.....	139
1. The Paizes’ Claims Are Based on Respondent’s Breaches of the Treaty, Even If Respondent Is Also in Breach of the Agreements	142

TABLE OF CONTENTS

Page

2.	Honduras Did Not Act as a Mere Contractual Party When It Misused Its Sovereign Powers to Render the Agreements Ineffective	145
3.	It Is Irrelevant Whether Claimants Can Resort to the Dispute Resolution Clauses in the Agreements, But in Any Case They Cannot	149
C.	Claimants Own and Control Their Investments, and Respondent Misstates the Legal Standard and Facts in its <i>Ratione Materiae</i> Objection	152
1.	Respondent Misrepresents the Applicable Legal Standard	154
(a)	Respondent Misrepresents the Legal Standard for Ownership	157
(b)	Respondent Misrepresents the Legal Standard for Control ...	159
2.	Claimants Own or Control the Investment	162
(a)	Claimants Have Established that They Are Beneficial Owners of Their Investment in Pacific Solar	166
(b)	Claimants Also Control Their Investment in Pacific Solar ...	176
V.	RESERVATION OF RIGHTS.....	179
VI.	REQUEST FOR RELIEF	180

***Fernando Paiz Andrade and Anabella Schloesser de León de Paiz v.
Republic of Honduras***

CLAIMANTS' REJOINDER ON JURISDICTIONAL OBJECTIONS

1. Claimants, Mr. Fernando Paiz Andrade and Ms. Anabella Schloesser de León de Paiz, nationals of Guatemala, acting on their own behalf and on behalf of Pacific Solar Energy, S.A. de C.V. (**"Pacific Solar,"** or the **"Enterprise"**), a Honduran company that Claimants own and control in accordance with Article 10.16.1(b) of the Central America - Dominican Republic - United States Free Trade Agreement (**"CAFTA-DR"** or the **"Treaty"**),¹ hereby submit their Rejoinder on Jurisdictional Objections (**"Rejoinder on Jurisdiction"**) in response to the Reply on Jurisdictional Objections (**"Reply on Jurisdiction"**)² that Respondent, the Republic of Honduras, filed on 4 June 2025.³

I. INTRODUCTION

2. As Claimants have explained, this case arises from Honduras's arbitrary and unreasonable violation of and backtracking from long-term specific commitments towards Pacific Solar. Honduras had enshrined these commitments in various instruments, the terms of which the State approved in the Renewables Laws, executed through various governmental agencies, and later ratified by the National Congress. Through these instruments, which Claimants refer as the Agreements,⁴ Honduras sought to attract, authorize, and protect Claimants' substantial

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

² Capitalized terms have the same meaning as in Claimants' Counter-Memorial on Jurisdiction dated 5 May 2025 (**"Counter-Memorial on Jurisdiction"**).

³ Procedural Order No. 3 dated 20 Dec. 2024; Annex B of Procedural Order No. 1 amended as per the Tribunal's decision of 20 Jan. 2025; Tribunal's decision on additional jurisdictional objections in Procedural Order No. 4 dated 4 Apr. 2025.

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

investments for the construction and subsequent operation of the Nacaome I Plant—a 50 MW PV plant—to help address the State's energy supply constraints. Since Claimants acquired Pacific Solar, Claimants have been and continue to be the owners, controllers, and ultimate beneficiaries of these substantial investments via a corporate structure of entities that has been illustrated, and that the Tribunal can trace and verify through ample evidence that is detailed herein.⁵

3. Claimants have also detailed how, despite benefitting from the clean energy that Claimants' Plant has generated for Hondurans, Honduras has enacted a series of measures that have backtracked on its long-term commitments. These measures include the enactment of the 2022 New Energy Law and actions in furtherance thereof that have rendered the Agreements—a critical asset in Claimants' investments—worthless and have placed a “dark cloud” over the viability of the Plant's continued operations and Claimants' property interests.

4. These circumstances have prompted Claimants to bring claims against Honduras for various violations of the CAFTA-DR on their own behalf and on behalf of Pacific Solar. As detailed in Claimants' Memorial on the Merits, through this misconduct, Respondent has violated the minimum standard of treatment, unlawfully expropriated Claimants' investments, and failed to accord Claimants' investments with most-favored nation treatment. Respondent's arbitrary and unreasonable measures further breached the terms of the Agreements, which are also actionable under the CAFTA-DR because they constitute a protected “investment agreement” as defined in the Treaty and because they violate Honduras's commitment to observe all obligations assumed with respect to Pacific Solar (a standard of treatment that Honduras extends to other foreign investors in investment treaties and that is incorporated into the Treaty via its MFN clause).

5. Rather than rectifying its misconduct and making Claimants and Pacific Solar whole, Respondent has raised several jurisdictional objections that are subject to this bifurcated phase. These objections, which Claimants already addressed in their Counter-Memorial on Jurisdiction, are:

- **Respondent's recycled and meritless objection that Decree No. 41-88 conditions Honduras's consent to arbitration in the CAFTA-DR to the exhaustion of local remedies.** As Claimants demonstrated in their Counter-Memorial on the Merits, Claimants were not required to exhaust local remedies prior to resorting to this

published in the official Gazette on 27 Nov. 2015) (the “**Operations Agreement**,” together with the PPA and the State Guarantee, the “**Agreements**”) dated 23 Feb. 2014.

⁵ Counter-Memorial on Jurisdiction § II.D; *see infra* § IV.C.

international arbitration because Article 26 of the ICSID Convention reverses any exhaustion of remedies requirement unless a State has expressly conditioned its consent to arbitration on that basis.⁶ Furthermore, and consistent with the unequivocal finding of the Tribunal in *Próspera v. Honduras*, CAFTA-DR's waiver provision—requiring a claimant to waive its right to initiate or continue any local administrative or judicial proceedings before submitting a claim to arbitration—is inconsistent with an exhaustion requirement and the CAFTA-DR prevails over Honduras's Decree.⁷ In any event, even if Honduras had effectively conditioned its consent to arbitrate on this basis—which it has not—resorting to local remedies in Honduras would be an entirely futile exercise.⁸

- **Respondent's meritless objection that Claimants cannot import—via the Treaty's MFN provision—umbrella clauses from the Switzerland-Honduras and the Germany-Honduras BITs.** As Claimants showed in their Counter-Memorial on Jurisdiction, pursuant to the Treaty's MFN clause, Claimants are entitled to any substantive protections available to investors from other countries, and to their investments, that are more favorable than those contained in the CAFTA-DR.⁹ This includes the umbrella clause set forth in the Switzerland-Honduras and the Germany-Honduras BITs.¹⁰ In their Counter-Memorial on Jurisdiction, Claimants further rebutted Respondent's argument that the CAFTA-DR carves out MFN claims based on "procurement" issues, since Claimants' Memorial on the Merits makes clear that their claims arise from Honduras's arbitrary and unreasonable backtracking of its commitments under the Agreements, which have rendered them meaningless and worthless.¹¹
- **Respondent's assertion that the Agreements cannot constitute an "investment agreement" under the CAFTA-DR, even though they squarely meet this definition under the Treaty.** As Claimants detailed in their Counter-Memorial on Jurisdiction, under Article 10.28 of the CAFTA-DR, an "investment agreement" is one that: (i) is a "written agreement," meaning that it is executed by two parties and "creates an exchange of rights and obligations, binding on both parties under [Honduran law];" (ii) "takes effect on or after the date of entry into force of the [CAFTA-DR];" (iii) is "between a national authority of [Honduras]," meaning an authority at the "central level" of government and a "covered investment or an investor of another Party;" (iv) "grants the covered investment or investor rights . . . with respect to natural resources or other assets that a national authority controls;" and (iv) the covered investment or the investor relies on those rights "in establishing or acquiring a covered investment other than the written agreement itself."¹² As Claimants demonstrated, the

⁶ Counter-Memorial on Jurisdiction § II.A.1.

⁷ *Honduras Próspera Inc., St. John's Bay Development Company LLC, and Próspera Arbitration Center LLC v. Republic of Honduras*, ICSID Case No. ARB/23/2, Decision on Preliminary Objections Under Article 10.20.5 of CAFTA-DR dated 26 Feb. 2025 (CL-201) ¶¶ 110-120.

⁸ Counter-Memorial on Jurisdiction § II.A.2.

⁹ Counter-Memorial on Jurisdiction § II.B.

¹⁰ Counter-Memorial on Jurisdiction § II.B.

¹¹ Counter-Memorial on Jurisdiction § II.B.4.

¹² Counter-Memorial on Jurisdiction § II.C; CAFTA-DR (CL-1), Art. 10.28, nn. 12-13.

Agreements satisfy these criteria because they: (i) were made in writing and entailed an exchange of rights and obligations; (ii) took effect after the date of entry into force of the CAFTA-DR; (iii) were entered into between Pacific Solar (a Honduran entity that qualifies as a “covered investment” under the CAFTA-DR) and Honduran authorities at the “central level” of government (namely, ENEE, SERNA, the Attorney General’s Office and SEFIN); (iv) grant Pacific Solar rights over the use of solar resources and access to the SIN; and (v) Claimants relied on the rights under the Agreements to acquire Pacific Solar.¹³

6. In their Reply on Jurisdiction, Respondent has largely rehashed the same position that it had previously advanced in its Memorial on Jurisdiction. To purportedly rebut Claimants’ responses, Respondent attempts to shift the burden of proof to establish its jurisdictional objections onto the Claimants, ignores the plain meaning of the terms of the CAFTA-DR, and advances restrictive interpretations that are inconsistent with international law and the Treaty’s context and purpose. In this Rejoinder of Jurisdiction, Claimants therefore re-affirm the position that they had already advanced in the Counter-Memorial on Jurisdiction and focus on addressing the “repackaged” (and a few novel) meritless assertions included with Respondent’s Reply on Jurisdiction. For example:

- **Regarding Respondent’s objection that its consent to arbitrate is conditioned on the exhaustion of local remedies**, aware that the tribunal in *Honduras Próspera v. Honduras* (“*Próspera*”) already rejected this very objection, Respondent now argues that it could require exhaustion of local remedies in accordance with ICSID Convention Article 26, through a mere expression of “willingness” in Decree 41-88, and that the Declaration’s terms are automatically applicable to all Honduras’s future consents to ICSID arbitration.¹⁴ Respondent likewise contends that the dispute resolution provisions of the CAFTA-DR are compatible with the exhaustion of local remedies and, that the doctrine of estoppel does not apply. As explained below, each of these arguments is flawed because: (i) a mere expression of “willingness” to require exhaustion in future arbitration agreements fails to create a condition of consent under Article 26 of the ICSID Convention;¹⁵ (ii) as Honduras admits, Decree 41-88 does not constitute Respondent’s consent to ICSID arbitration, and cannot create an implicit condition of consent automatically applicable to all Honduras’s subsequent instruments consenting to ICSID arbitration; (iii) a requirement to exhaust local remedies is fundamentally incompatible with the CAFTA-DR, namely the waiver, fork-in-the-road and three-year prescription period; and (iv) in any event, Respondent’s prior conduct by failing to ever invoke the alleged exhaustion requirement until 2023, contradicts the

¹³ Counter-Memorial on Jurisdiction § II.C.

¹⁴ Reply on Jurisdiction ¶¶ 61, 76, 83.

¹⁵ See *infra* § A.1.

position it now seeks to advance—such that it is estopped from invoking the alleged condition now.¹⁶

But even assuming *arguendo* that Respondent did require the exhaustion of local remedies as a condition of its consent to arbitrate this dispute (it did not), Claimants would not be required to exhaust local remedies because doing so would be a futile exercise. As Claimants detail herein, there are well documented concerns relating to Honduras's judicial system, which is plagued by systemic delays and corruption—a concern expressed by Honduras's own presiding justice of the Supreme Court.¹⁷ That this endeavor would be futile is compounded by ENEE's recent efforts to retroactively wipe out all arbitration clauses included in agreements that the Honduran State had concluded.¹⁸

- **Regarding Respondent's assertion that the CAFTA-DR's MFN clause cannot import substantive treaty protections and / or that the Procurement Cave-Out to the MFN clause applies,** Respondent repeats its baseless arguments that the MFN clause cannot create new rights or standards beyond those already in the Treaty. It also adds that the phrase “in like circumstances” in that clause requires a factual comparison of treatment between Claimants and investors from other States—an interpretation Respondent claims aligns with the object and purpose of both the MFN clause and the Treaty.¹⁹ As explained in this submission, this argument fails.²⁰ Respondent not only ignores Claimants' authorities that confirm arbitral practice allowing the importation of more favorable treaty standards into the base treaty, but Respondent continues to rely on two outlier decisions that have been widely criticized.²¹ Likewise, Respondent tellingly fails to engage with the negotiating history of the CAFTA-DR, which confirms the Treaty Parties' intention to allow investors to invoke the MFN clause to import more favorable substantive protections from other treaties.²² Instead, Respondent asks the Tribunal to treat its own submissions and those of the United States—a non-Party to this arbitration that has acted as a respondent in other claims under the same or similar treaties—as determinative of the Treaty's object and purpose, a position that is untenable and has been repeatedly rejected.²³

Respondent, moreover, insists that the Procurement Carve-Out to the MFN clause applies. In an effort to shoehorn Claimants' claims into the Procurement Carve-Out to the MFN, Respondent invokes the VCLT as a *carte blanche* to construct alternative definitions to the already defined term “procurement” in Article 2.1 of the Treaty as the “**process**” by which the State acquires goods and services.²⁴ The Tribunal should

¹⁶ See *infra* § A.1.

¹⁷ See *infra* § A.2.

¹⁸ See *infra* § A.2.

¹⁹ Reply on Jurisdiction ¶ 280.

²⁰ See *infra* § III.B.1(a).

²¹ Counter-Memorial on Jurisdiction ¶ 85.

²² Counter-Memorial on Jurisdiction ¶¶ 90-91.

²³ See *infra* § III.B.1(b).

²⁴ See *infra* § III.B.2(b).

therefore find that Respondent's position is baseless and uphold Claimants' invocation of the MFN clause to import more favorable treatment.

- **With respect to Respondent's baseless assertion that the Agreements do not meet the definition of "investment agreement,"** Respondent continues to rely solely on the indefinite article "a" to contend that the CAFTA-DR does not recognize an exchange of obligations carried out in multiple instruments as "an investment agreement."²⁵ As Claimants further detail herein, that an "investment agreement" can comprise various—undisputedly interconnected—instruments is consistent with, *inter alia*, principles of contract law, the jurisprudence of investment tribunals, as well as treaty practice and commentary.²⁶ It is also at odds with the "well understood drafting convention at both the international and national level that the singular can be used to include the plural, and *vice versa*["]."²⁷

Respondent's additional recycled assertions with respect to other criteria in the definition of "investment agreement" continue to fail because they are inconsistent with the terms of the Treaty, the evidence in these proceedings, and Respondent's own concessions.²⁸ For example, Claimants show that in accordance with the Treaty and international law, all agencies that executed the Agreements, including ENEE, exercise sovereign authority at the national or "central level" of Government.²⁹ Despite the Treaty's language and context, as well as Respondent's own concessions as to ENEE's functions and purpose supporting Claimants' position, Respondent relies on administrative law provisions of Honduran law to contend that ENEE is an autonomous entity and not a "central level" authority. In so doing, nonetheless, Respondent is ignoring it had committed under Article 1.2 of the CAFTA-DR to interpret the Treaty solely under international law. As another example, Respondent disputes that the Agreements concern State-controlled "natural resources" noting that it does not regulate "solar light," (*i.e.*, irradiance) but only "solar energy."³⁰ Leaving aside that Respondent's position is inconsistent with scientific literature (and its own law), Respondent's position is irrelevant because even if solar energy is somehow not a "natural resource," it also qualifies as an "asset" (*i.e.*, property or an item of value) that Respondent concedes is under its control.³¹ The Agreements therefore, squarely fit within the definition of "investment agreement."³²

²⁵ See *infra* § III.C.1.

²⁶ See *infra* § III.C.1.

²⁷ *Giovanni Alemanni et al., v. Argentina*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Admissibility dated 17 Nov. 2014 (**RL-165**) ¶ 270 (emphasis added); see also *id.* ¶ 186 (finding that the respondent's textual argument was "unconvincing" because "it is a common drafting convention that the singular . . . is deemed to include the plural.").

²⁸ See *infra* § III.C.

²⁹ See *infra* § III.C.2(a).

³⁰ See *infra* § III.C.3.

³¹ See *infra* § III.C.3.

³² See *infra* § III.C.

7. Claimants therefore reiterate in their Request for Relief that these objections should be dismissed.

8. Respondent has also reasserted other jurisdictional objections that the Tribunal had not considered when it ruled on bifurcation (the so-called “**Additional Objections**”), and that the Tribunal asked the Parties to brief under specific limits set forth in Procedural Order No. 4.³³ As Claimants have explained, based on the way that Respondent has framed and expanded these objections in its jurisdictional pleadings, these objections do not meet the standard for bifurcation because they are intertwined with the merits and go well beyond the Tribunal’s instructions in Procedural Order No. 4. Indeed, Respondent’s voluminous sections addressing the Additional Objections undermine its position, as they show that its Additional Objections are contingent on Respondent’s mischaracterization of Claimants’ claims and would require substantive factual determinations that are not appropriate at this juncture. For the sake of efficiency, however, Claimants respectfully request that the Tribunal dismiss Respondent’s Additional Objections in the terms set forth in this submission, or alternatively, postpone its decision to the merits phase.³⁴ The foregoing is justified for the following reasons:

- **Respondent’s argument that Claimants’ claims are purportedly time-barred.** As Claimants explained in their Counter-Memorial on Jurisdiction, it is undisputed that Claimants submitted their Request for Arbitration on 24 August 2023, well within three years after Honduras’s enactment of the New Energy Law in May 2022, and its adoption of concurrent measures that breached the Treaty.³⁵ This is fatal to Respondent’s temporal limitation objection, as it was then that Honduras enacted measures triggering Claimants’ Treaty claims.³⁶

Aware of this flaw, Respondent continues to recast Claimants’ Treaty claims as mere contractual claims over unpaid invoices and energy curtailment under the PPA—starting in 2018 and 2017 respectively—to argue that the limitation period under the

³³ In Procedural Order No. 4, the Tribunal included the following instructions for the Parties’ briefing of the Additional Objections. With respect to the limitations period issue, the Tribunal asked the Parties to: (i) address this objection on the “assumption that the facts alleged by Claimants qualify as violations of the Treaty” and (ii) whether if so, how the limitation period applies to continuous and to composite acts. Regarding the contract claims objection, the Tribunal asked the Parties to “[f]ocus on the legal question whether, and if so, under what conditions, the Tribunal has jurisdiction over purely contractual claims.” Finally, regarding the ownership objection, the Tribunal asked the Parties to address two “well-circumscribed” issues, namely: (i) whether Claimants own and control the investment through the various corporations that are mentioned in the Claimants’ Memorial and (ii) whether Claimants have transferred their rights over Pacific Solar, to a third party, [REDACTED]. Procedural Order No. 4 dated 4 April 2025 ¶¶ 41, 43-44, 55.

³⁴ See *infra* § IV.

³⁵ Counter-Memorial on Jurisdiction § III.A.

³⁶ Counter-Memorial on Jurisdiction § III.A.

CAFTA-DR was triggered then. It does so all the while ignoring its assurances to Claimants that payments would be forthcoming (and that Claimants are not claiming that those delays are violations of the CAFTA-DR).³⁷ Under international law, the limitation period runs from when a party acquires knowledge with sufficient certainty of a breach and resulting loss. Claimants could have only acquired said knowledge after Honduras enacted a series of measures starting in 2022, including the enactment of the New Energy Law in May 2022 and concurrent actions that have harmed and cause significant uncertainty to certain generators, including Pacific Solar.³⁸ Claimants' claims are thus timely even if the Tribunal considers Honduras' actions to be composite or continuous acts. If composite, Honduras's actions—which ultimately crystallized in the New Energy Law and subsequent measures—are all legally distinct actions that, when considered cumulatively, and give rise to a composite act that triggers Honduras's breaches of the Treaty.³⁹ If continuous, Honduras's non-payment of the invoices and energy curtailments which pre-dated the enactment of the Energy Law continued—albeit with a changed nature—upon the State's measures in 2022, including the enacted of the New Energy Law.⁴⁰

- **Respondent's contention that Claimants' claims are purportedly contractual, as opposed to Treaty-based claims.** As Claimants detailed in their Counter-Memorial on Jurisdiction, Respondent's position mischaracterizes Claimants' claims.⁴¹ Respondent's defense hinges on its admission that ENEE has failed to abide by the PPA, including by failing to make timely payments before the cut-off date, while simultaneously ignoring the measures that the Honduran State has taken to implement the declared agenda of Honduras's President (who assumed office in 2022) against certain power generators, including Pacific Solar.⁴²

In its Reply on Jurisdiction, Respondent has continued its approach of recasting Claimants' claims and raising arguments that are intertwined with the merits. In essence, it argues that the dispute between the Parties is **purely** contractual because it is limited to payments due under the PPA.⁴³ Respondent's position goes well beyond the request that the Tribunal made in its Procedural Order No. 4 to only brief it on the "legal question" of under what conditions the Tribunal has jurisdiction "over purely contractual claims."⁴⁴ As Claimants explain herein and as they explained in their Memorial on the Merits, Respondent's sovereign actions have, *inter alia*, repudiated critical rights set forth in the Agreements, forced renegotiations of the PPA under threats of expropriation and termination, and threatened generators with criminal proceedings if they interrupt energy supply.⁴⁵ Claimants' briefing of these facts and

³⁷ Reply on Jurisdiction ¶ 479; *id.* ¶¶ 523-529.

³⁸ See *infra* § IV.A.2(b).

³⁹ See *infra* § IV.A.3(a).

⁴⁰ See *infra* § IV.A.3(b).

⁴¹ Counter-Memorial on Jurisdiction § III.B.

⁴² Counter-Memorial on Jurisdiction § III.B.

⁴³ Reply on Jurisdiction § III.E.2.

⁴⁴ Procedural Order No. 4 dated 4 Apr. 2025 ¶ 55(3)(a).

⁴⁵ See *generally* Memorial on the Merits §§ IV.A.2, IV.A.3, IV.B.2-IV.B.4, IV.C.3; *id.*, ¶¶ 334-336.

the various obligations of the CAFTA-DR that they breach—on its face—show that Claimants' claims stem from a situation that goes well beyond a "purely" contractual claim.

- **Respondent's unsupported objection that Claimants have failed to prove that they own and control their investment.** As Claimants demonstrated in their Counter-Memorial on Jurisdiction, Claimants have owned and controlled Pacific Solar since they acquired Pacific Solar's shares in 2015, including, critically on the date in which Claimants submitted their Request for Arbitration.⁴⁶ Claimants have proffered sufficient evidence to prove that they indirectly or directly own and control all of Pacific Solar's shares through a corporate structure comprising seven entities, including—among others—(i) a corporate chart outlining the full chain of ownership between the Paizes and Pacific Solar; (ii) a [REDACTED] between Mr. Paiz and [REDACTED] as trustee; (iii) corporate ledgers for each entity in the holding structure, identifying shareholders, shareholdings, and in many cases, percentage interests—covering the entire period since each entity's incorporation, and crucially, as of the date of the Request for Arbitration (*i.e.*, 24 August 2023); and (iv) a witness testimony from Mr. Paiz corroborating the same.⁴⁷

Given this record, in its Reply, Respondent attempted to cast doubt on this evidence alleging that Claimants' it was purportedly not reliable because the documents do not comply with technicalities (*e.g.*, it argues that the documents are not certified by "an official authority or registrar," are not in Spanish, or that they do not show whether the companies exist or are in good standing at present), forcing Claimants to produce unnecessary documents to address these groundless allegations. As Claimants explain herein, there is no support to Respondent's evidentiary allegations, which do not otherwise discharge its burden to prove its objection.

Respondent further rehashes its argument that two trusts (the "[REDACTED] Trust Agreements") that Pacific Solar's shareholder and Pacific Solar constituted to place shares and assets as security for a project finance loan allegedly show that Claimants no longer own or control their investment.⁴⁸ This is wrong in both law and fact. While Respondent argues that [REDACTED] or the "Trustee") is now the true owner of Pacific Solar's shares and assets, the Trustee's role is strictly limited to holding those assets as a custodian to use them as collateral only if the Lenders notify the Trustee of an event of default on the

⁴⁶ Counter-Memorial on Jurisdiction § II.D.1.

⁴⁷ Ownership Structure Chart for Pacific Solar Energy, S.A. de C.V. dated 13 July 2023 (Exh. C-27); Pacific Solar's Corporate Documents (Exh. C-256); [REDACTED] Corporate Documents (Exh. C-257); [REDACTED] Corporate Documents (Exh. C-258); [REDACTED] Corporate Documents (Exh. C-259); [REDACTED] Corporate Documents (Exh. C-260); [REDACTED] Corporate Documents (Exh. C-261); [REDACTED] Corporate Documents (Exh. C-262); The [REDACTED] dated 30 June 2015 (Exh. C-263); Share Trust Agreement (Exh. C-266); Assets Trust Agreement (Exh. C-267); Common Terms Agreement (Exh. C-268); Paiz WS II ¶¶ 4-8.

⁴⁸ Security Share Trust Agreement between [REDACTED] the German Investment and Development Corporation ("DEG"), and the Dutch Entrepreneurial Development Bank ("FMO," and, together with DEG, the "Lenders") dated 12 Jan. 2018 ("Share Trust Agreement") (Exh. C-266); Administration and Guarantee Trust Agreement between Pacific Solar, [REDACTED] DEG and FMO dated 12 Jan. 2018 ("Assets Trust Agreement") (Exh. C-267).

loan (which has not occurred). The existence of the [REDACTED] Trust Agreements does not affect Claimants' beneficial ownership over their investment and control over the operations of Pacific Solar and its project in Honduras. Claimants continue to be the ones with ultimate control over the trust assets and those who will ultimately enjoy or suffer the fortunes of the trust assets. In addition, Claimants make all important decisions related to Pacific Solar, including day-to-day operations, and instructions to the Trustee. In so doing, Respondent is articulating "ownership" and "control" standards that have no basis on the CAFTA-DR and investment jurisprudence. Respondent's *ratione materiae* objection should therefore be rejected.

9. With respect to the interplay between Respondent's contractual claims objection and Claimants' claims pursuant to the imported umbrella clauses and the investment agreement provisions in the CAFTA-DR, Claimants further note that it is uncontroversial that the arbitrary and unreasonable sovereign conduct summarized above not only violates the CAFTA-DR, but also directly violates the terms of the Agreements themselves. As Claimants have detailed in their Memorial on the Merits and in these bifurcated proceedings, Honduras's measures starting in 2022 violate not only the expropriation and FET protections in the Treaty, but are also actionable under the Treaty pursuant to the protections afforded to "investment agreements" and through the incorporation of umbrella clauses through the MFN clause of the Treaty. As this submission makes clear, this does not mean that Claimants' claims are "merely contractual." Indeed, for instance, there have been many cases where investors have sought relief under both the FET and umbrella clause provisions in a treaty, which is inconsistent with Respondent's insistence that submitting a claim for a breach of an investment agreement or umbrella clause renders the treaty dispute subject to dismissal as a "purely contractual" claim.

10. Respondent's jurisdictional objections are particularly troubling in view of its recent and ongoing actions to shut down investors' access to dispute resolution mechanisms under State contracts and public statements singling out those that have resorted to international arbitration before ICSID, including Claimants.⁴⁹ Honduras's actions in this regard, have included

⁴⁹ Minister Tejada, *Renegotiations Allow the State to Extinguish ICSID Proceedings*, X (FORMERLY TWITTER) dated 22 May 2024 (Exh. C-93) ("4 ICSID arbitrations were initiated in the energy sector some time ago, for two of them, their companies entered into the process of renegotiating their contracts and, the addenda [to their PPAs] represent a significant reduction in the price of energy, in addition, there was a suspension of the [ICSID] process, with a promise to discontinue [the process] if the addenda were approved by @Congress_HN . . . **the other . . . ICSID arbitrations that have been initiated are from . . . the photovoltaic company Pacific Solar . . . this means that, the process of renegotiating contracts to lower energy prices also allows the State of Honduras to extinguish two ICSID arbitrations.**") (emphasis added); Noticieros Hoy Mismo, *Interview with the Vice Foreign Minister of the Government Regarding ICSID Denunciation* dated 1 Mar. 2024 (Exh. C-164), at 2:10-2:37; Honduras's Revenue Administration Service, *We should free ourselves of our gross external and internal debt*, X (FORMERLY TWITTER) dated 2 Mar. 2024 (Exh. C-177) (publishing an excerpt of President Xiomara's Castro speech at the Eighth Summit

its withdrawal from the ICSID Convention,⁵⁰ and have now also added ongoing efforts to retroactively invalidate ENEE's contractual arbitration clauses before the Honduran Supreme Court.⁵¹

11. Despite reinstating many of the same arguments that Respondent had raised with its Memorial on Jurisdiction, it is apparent that Honduras has failed to substantiate its position that the present arbitration constitutes a purported "abuse of the investor-State dispute settlement system."⁵² Respondent has also failed to include any assertions aimed at casting doubt on Claimants' legitimacy and alleged irregularities in the approval of the Agreements.⁵³ Respondent's omissions speak volumes. It cannot deny that critical provisions of the regulatory framework that authorized the Agreements were in fact approved during the administration of President Zelaya—a time for which Respondent does not appear to advance allegations of misconduct. It also cannot deny that Claimants' substantial investments for the construction and operation of the Plant and their acquisition of Pacific Solar's shares were made in reliance of the specific commitments the Honduran State enshrined in the Agreements. And it clearly cannot find support to attack the reputation and long-lasting impact that Mr. Paiz's investments and philanthropy have had in Honduras and Central America.

12. Claimants thus, respectfully asks the Tribunal to dismiss Respondent's objections so it can promptly hear and rule on the merits of Respondent's multiple violations of the CAFTA-DR and grant the remedies that Claimants seek and Honduras has deprived them of.

of the Community of Latin American and Caribbean States, in which she stated that Honduras should "free [itself] from [its] gross external and internal debt," and "denounce . . . international arbitration centers that violate [the State's] sovereignty"); *see also* Government of Honduras, *Credit Should Not Be Granted to Companies That Have Conflicts with the State*, X (FORMERLY TWITTER) dated 10 Feb. 2025 (**Exh. C-346**) (stating that "[a]ccess to credit should not be given to companies that have conflicts with the State. Many States are subjected to economic terrorism by companies and others who sue the State internationally when they oppose sovereign regulatory measures."); *see also* Honduras Accuses ICSID of Illegality in Proceedings in Zede Prospera Case, DINEROHN dated 31 May 2023 (**Exh. C-94**) (noting that Honduras's Secretary of Finance describes an investor that has brought forth an ICSID case as "enemies [that] are going to lose at the national and international level").

⁵⁰ *See, e.g.*, Noticieros Hoy Mismo, *Interview with the Vice Foreign Minister of the Government Regarding ICSID Denunciation* dated 1 Mar. 2024 (**Exh. C-164**) (where the Vice-Minister describes ICSID as behaving in a way that "ultimately affects States" to the "benefit of private interests"); ICSID News Release, *Honduras Denounces the ICSID Convention* dated 29 Feb. 2024 (**Exh. C-166**).

⁵¹ Unconstitutionality Complaint Filed by ENEE on 30 Jan. 2025 (**Exh. C-347**), at 15.

⁵² Memorial on Jurisdiction ¶ 2.

⁵³ Memorial on Jurisdiction § II.

II. THE TRIBUNAL SHOULD AFFIRM ITS JURISDICTION BASED ON THE TEXT OF THE CAFTA-DR AND THE AVAILABLE RECORD

13. There is no dispute that Claimants bear the burden of proving that the Tribunal has jurisdiction to hear its claims. This is in accordance with the principle of *onus probandi incumbit actori*: each party bears the burden of proving its claim or defense.⁵⁴ As Claimants detailed in their Memorial on the Merits and recent submissions, Claimants have met this burden.

14. The principle of *onus probandi incumbit actori*, however, is a “coin with two sides” and as a result, it is the respondent that bears the burden of proving jurisdictional objections.⁵⁵ As the *Pac Rim Cayman v. El Salvador* tribunal observed, “if there are positive objections to jurisdiction, the burden lies with the Party presenting those objections, in other words, here the Respondent.”⁵⁶ As this submission makes clear, Respondent has either not satisfied this burden either because its objections are unsupported or because as it has framed them, they cannot be decided at this stage of the proceedings.

⁵⁴ See *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (CL-283), ¶ 2.11 (“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. Of course, if there are positive objections to jurisdiction, the burden lies on the Party presenting those objections, in other words, here the Respondent.”).

⁵⁵ *Vito G. Gallo v. The Government of Canada*, UNCITRAL, Award dated 15 Sept. 2011 ¶ 277 (CL-324) (“[T]he maxim ‘who asserts must prove,’ or *actori incumbit probatio*, applies also in the jurisdictional phase of this investment arbitration: a claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. . . . But the principle *actori incumbit probatio* is a coin with two sides: the Claimant has to prove its case, and without evidence it will fail; but if the Respondent raises defences, of fraud or otherwise, the burden shifts, and the defences can only succeed if supported by evidence marshalled by the Respondent.”) (emphasis in original); see also *Bernhard Friedrich Arnd Rüdiger von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award dated 28 July 2015 ¶ 174 (CL-325) (“The general rule is that the party asserting the claim bears the burden of establishing it by proof. Where claims and counterclaims go to the same factual issue, each party bears the burden of proof as to its own contentions. There is no general notion of shifting of the burden of proof when jurisdictional objections are asserted. The Respondent in this case therefore bears the burden of proving its objections. Conversely, the Claimants must prove any facts asserted in response to the Respondent's objections and bear the overall burden of establishing that jurisdiction exists.”); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No. ARB/11/12, Award dated 10 Dec. 2014 (CL-316) ¶ 299 (“Regarding burden of proof, in accordance with the well-established rule of *onus probandi incumbit actori*, the burden of proof rests upon the party that is asserting affirmatively a claim or defense. Thus, with respect to its objections to jurisdiction, Respondent bears the burden of proving the validity of such objections. The Tribunal accepts that if Respondent adduces evidence sufficient to present a *prima facie* case, Claimant must produce rebuttal evidence, although Respondent retains the ultimate burden to prove its jurisdictional objections.”).

⁵⁶ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (CL-283) ¶ 2.11.

15. As Claimants has shown, Respondent and Claimants unequivocally consented to submitting this dispute to ICSID arbitration by ratifying the CAFTA-DR and submitting their Request for Arbitration, respectively.⁵⁷ Moreover, consistent with the terms of the CAFTA-DR, Claimants, in turn, showed that they have standing to bring claims on their own name and on behalf of Pacific Solar since they directly and indirectly own and control a 100% interest in Pacific Solar, an entity incorporated in Honduras.⁵⁸ Claimants likewise have explained that they complied with the Treaty's notice and timing requirements, including by filing claims—as articulated in their Memorial on the Merits—within the three year statute of limitations under the CAFTA-DR.⁵⁹ Lastly, in addition to bringing claims for international standards of treatment set forth in Section A of Chapter Ten of the CAFTA-DR, Claimants have further invoked the protections that Honduras afforded Pacific Solar under the Agreements, after explaining that those Agreements meet the definition of an “investment agreement” that is actionable under the CAFTA-DR.⁶⁰ It is therefore up to Respondent to show that the Tribunal does not have jurisdiction.

16. Before delving into Respondent's objections, it is critical to also set forth the standard that would apply for any factual determinations to be made in the proceedings at this stage. In this regard, in its Procedural Order No. 4, the Tribunal observed that the *Phoenix v. Czech Republic* tribunal had considered two “hypothesis,” for those factual determinations. Specifically, the first one is that “if the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level.”⁶¹ As the tribunal in *Saipem v. Bangladesh* observed with respect to facts that concern the merits of the case, the Tribunal must “assess whether [the claimant's] case is reasonably arguable on its face” and “[i]f the result is affirmative, jurisdiction will be established but the existence of breaches will remain to be litigated

⁵⁷ See Memorial on the Merits § III.A; Counter-Memorial on Jurisdiction § II.A; *infra* § III.A.

⁵⁸ See Memorial on the Merits § III.B.; Counter-Memorial on Jurisdiction § II.D; *infra* § IV.C.

⁵⁹ See Memorial on the Merits § III.C.; Counter-Memorial on Jurisdiction § III.A; *infra* § IV.A.

⁶⁰ See Memorial on the Merits § III.B.3; Counter-Memorial on Jurisdiction § II.C; *infra* § III.C. Claimants have also explained that they can invoke more favorable protections in other investment treaties that Honduras has entered into with third States (namely, the inclusion of umbrella clauses) via the Treaty's MFN clause. Memorial on the Merits § IV.C.1; Counter-Memorial on Jurisdiction § II.B; *infra* § III.B.

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

on the merits.”⁶² The second “hypothesis” is that if on the contrary, “jurisdiction rests on the existence of certain facts, [those facts] have to be proven at the jurisdictional stage.”⁶³

17. Considering the above standard and based on the record before this Tribunal, the Tribunal is well-placed to rule on the objections based on the: (i) exhaustion of local remedies; (ii) MFN clause; and (iii) investment agreement definition without the need for extensive factual findings or assumptions. In this regard, Claimants confirm that they have submitted all evidence required for the Tribunal to find jurisdiction and resolve these issues without the need for factual assumptions and Respondent has otherwise not proven its objections.

18. Subject to Claimants' position as regard bifurcation set forth below in Section IV, the so-called Additional Objections that Respondent did not submit with its Request for Bifurcation require a more nuanced approach if they were to be decided during this phase, in line with the Tribunal's findings in Procedural Order No. 4 and the above noted jurisprudence.

- Regarding the factual inquiries associated with the **contractual claims and limitations objections**,⁶⁴ as Respondent has framed them, they either: (i) cannot be resolved at this stage because they are intertwined with the merits or (ii) should be dismissed at this juncture if the Tribunal **assumes**, as it may, that Claimants' factual allegations—as Claimants have pled them—would violate the Treaty, if proven. In other words, as the *Saipem* tribunal observed, the Tribunal could only determine that Claimants' claims are “reasonably arguable” to establish jurisdiction and postpone the merits of those claims to the subsequent phase of these proceedings.
- With respect to the **ownership objection**, Claimants have submitted all evidence for the Tribunal to establish that Claimants own and control their investments in Honduras through a chain of corporations and have not transferred that ownership and control to a third party.⁶⁵ As detailed below in Section IV.C, this includes (i) a corporate chart outlining the full chain of ownership between the Paizes and Pacific Solar; (ii) the [REDACTED]; (iii) corporate ledgers for each entity in the holding structure, identifying shareholders, shareholdings, and in many cases, percentage interests—covering the entire period since each entity's incorporation, and crucially, as of the date of the Request for Arbitration (*i.e.*, 24 August 2023); and (iv) a witness statement from

⁶² *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures dated 21 Mar. 2007 (CL-326) ¶ 91.

⁶³ Procedural Order No. 4 dated 4 Apr. 2025 ¶¶ 31-32.

⁶⁴ *See infra* §§ IV.A, IV.B.

⁶⁵ *See infra* § IV.C.

Mr. Paiz corroborating the same.⁶⁶ Respondent's vague and unsupported allegations to the contrary fall well below the threshold of proving its objection.⁶⁷

19. In its Reply on Jurisdiction, as regard burden of proof, Respondent contends that Claimants cannot unilaterally define "when a limitation period start to run" and whether their claims "are contractual or non-contractual."⁶⁸ They also disagree with the approach that facts related to the merits must be accepted on a *prima facie* basis.⁶⁹ As detailed below in Section IV, Respondent argument illustrates that its objections hinge on a re-characterization of Claimants' claims without due regard to the briefing instructions set forth by the Tribunal in its Procedural Order No. 4 and the above-noted findings from investment tribunals regarding the approach for factual determinations in bifurcated phases.

III. RESPONDENT'S BIFURCATED OBJECTIONS ARE INCONSISTENT WITH THE CAFTA-DR AND SHOULD BE DISMISSED

A. RESPONDENT'S RECYCLED EXHAUSTION OBJECTION IS MERITLESS

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

20. Respondent's objection rests on the flawed premise that Claimants were required to exhaust local remedies.⁷⁰ As Claimants demonstrated in their Counter-Memorial, this is incorrect. The ICSID Convention reverses the customary international law rule regarding exhaustion of local remedies: its default presumption is that exhaustion of local remedies is *not* a prerequisite to a State's consent to arbitration.⁷¹ The sole exception—set out in Article 26—

⁶⁶ Ownership Structure Chart for Pacific Solar Energy, S.A. de C.V. dated 13 July 2023 (Exh. C-27); Pacific Solar's Corporate Documents (Exh. C-256); [REDACTED] Corporate Documents (Exh. C-257); [REDACTED] Corporate Documents (Exh. C-258); [REDACTED] Corporate Documents (Exh. C-259); [REDACTED] Corporate Documents (Exh. C-260); [REDACTED] Corporate Documents (Exh. C-261); [REDACTED] Corporate Documents (Exh. C-262); [REDACTED] (Exh. C-263); Share Trust Agreement (Exh. C-266); Assets Trust Agreement (Exh. C-267); Common Terms Agreement (Exh. C-268); Paiz WS II ¶¶ 4-8.

⁶⁷ See *infra* § IV.C.

⁶⁸ Reply on Jurisdiction ¶ 47.

⁶⁹ Reply on Jurisdiction ¶¶ 50-51.

⁷⁰ Reply on Jurisdiction ¶ 54.

⁷¹ International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* dated 18 Mar. 1965 (CL-205) ¶ 32; CHRISTOPH H. SCHREUER *et al.*, *Chapter II: Jurisdiction of the Centre*, in THE ICSID CONVENTION – A COMMENTARY (3d ed. 2022) (CL-183), at 617 ("Article 26 reverses the situation under traditional international law:

permits a State to require exhaustion only if it does so expressly and as a condition of its consent to arbitrate.⁷² Any such requirement, accordingly, must be contained in the State's instrument of consent.⁷³ Respondent did not do this. This is unsurprising, given that any such requirement to exhaust local remedies would have been inherently incompatible with the express conditions to arbitration contained in the CAFTA-DR, requiring the waiver of an investor (and investment's, in certain circumstances) right to commence or continue domestic challenges to the measures challenged in arbitration and the three-year prescription period. Indeed, the *Próspera* tribunal recently recognized this when it rejected Respondent's same objection raised in that arbitration.⁷⁴ Thus, and in any event, as the later-in-time instrument, the provisions of the CAFTA-DR prevail over Honduras's Decree. In its Reply on Jurisdiction, Respondent simply ignores the *Próspera* tribunal's findings, as its position is irreconcilable with the Treaty's plain terms, as recognized by that tribunal.

21. Respondent now argues in its Reply that it could require exhaustion of local remedies, in accordance with ICSID Convention Article 26, through a mere expression of

the Contracting States waive the requirement of exhaustion of local remedies unless otherwise stated.”); *see also id.*, at 544 (“The exclusive remedy rule of the first sentence implies that there is no need to exhaust local remedies before initiating ICSID arbitration ‘unless otherwise stated.’”); *Honduras Próspera Inc., St. John’s Bay Development Company LLC, and Próspera Arbitration Center LLC v. Republic of Honduras*, ICSID Case No. ARB/23/2, Decision on Preliminary Objections Under Article 10.20.5 of CAFTA-DR dated 26 Feb. 2025 (“*Próspera*”) (CL-201) ¶ 29 (“[T]he ICSID Convention reverses the traditional customary international law requirement of exhaustion of local remedies by enacting Article 26.”); *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 Sept. 2003 (CL-179) ¶¶ 13.4-13.5 (“The first sentence of Article 26 secures the exclusivity of a reference to ICSID arbitration vis-à-vis any other remedy. A logical consequence of this exclusivity is the waiver by Contracting States to the ICSID Convention of the local remedies rule.”).

⁷² Counter-Memorial on Jurisdiction § II.A. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“**ICSID Convention**”) (RL-48), Art. 26 (“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”).

⁷³ *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction dated 26 Apr. 2005 (CL-182) ¶ 69 (“Under Article 26 of the Convention, for entering into play, exhaustion of local remedies shall be **expressly required** as a condition of the consent of one party to arbitration under the Convention. Absent this requirement, exhaustion of local remedies cannot be a precondition for an ICSID Tribunal to have jurisdiction.”) (emphasis added).

⁷⁴ *Próspera* (CL-201) ¶¶ 110-120 (finding that the requirement in CAFTA-DR that an investor waive its right to initiate or continue any local administrative or judicial proceedings, is inconsistent with the purported exhaustion of local remedies requirement in Decree 41-88). *See also id.* ¶ 119 (“The recognition in Article 10.18.2 of CAFTA-DR of these two avenues for investors is incompatible with the Republic’s case: CAFTA-DR’s provision forcing an investor to renounce all domestic proceedings in the host State (whether already initiated or yet to be initiated) before it is authorized to proceed to international arbitration is **incompatible with the Exhaustion Requirement in Decreto 41-88.**”) (emphasis added)).

“willingness” in Decree 41-88 to require exhaustion for future consents to ICSID arbitration.⁷⁵ Respondent thus maintains that, it “provided for the exhaustion of local remedies as a jurisdictional condition in its legislation approving the ICSID Convention,” and “its terms and conditions are naturally applicable to all arbitration agreements referring to ICSID and involving the Republic of Honduras,” “whether or not the condition was expressly included in the instrument of consent.”⁷⁶ Additionally, Respondent alleges that CAFTA-DR is compatible with the exhaustion of local remedies, and that the doctrine of estoppel does not apply.⁷⁷ Each of these arguments lacks merit. Furthermore, even if Honduras had conditioned its consent to arbitrate on exhausting local remedies—which it has not done—any such requirement cannot bar jurisdiction here, because complying with the requirement would be futile. Accordingly, the objection must be dismissed.

(a) Honduras’s Mere “Willingness” to Require Exhaustion in the Future Is Not a Valid Exercise of ICSID Convention Article 26

22. As explained, Article 26 of the ICSID Convention reverses the customary international law rule regarding the exhaustion of local remedies and makes arbitration the exclusive remedy under the ICSID Convention, unless a State—in the instrument providing for its consent to arbitration—expressly conditions its consent on exhaustion.⁷⁸ It is undisputed that the

⁷⁵ Reply on Jurisdiction ¶ 61.

⁷⁶ Reply on Jurisdiction ¶ 76, ¶ 83.

⁷⁷ Reply on Jurisdiction § III.A.

⁷⁸ *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction dated 26 Apr. 2005 (CL-182) ¶ 69 (“Under Article 26 of the Convention, for entering into play, exhaustion of local remedies shall be **expressly required** as a condition of the consent of one party to arbitration under the Convention. Absent this requirement, exhaustion of local remedies cannot be a precondition for an ICSID Tribunal to have jurisdiction.”) (emphasis added); *IBM World Trade Corporation v. República del Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction dated 22 Dec. 2003 (CL-327), ¶ 80 (“The provision of **article 26 of the Convention authorized the Ecuadorian Government to establish certain conditions for the applicability of an International Treaty; i.e., the Ecuadorian Government should have included, as previous requirement, the condition of exhausting the administrative or judicial channels, at the moment it ratified the BIT.** And it has not. On the contrary, the first part of article 26 of the Convention, as well as number 2 of article 11 of the BIT, excluded the possibility to call on the national judges if the ICSID arbitration has been sought first.”) (emphasis added); *see also Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 Sept. 2003 (CL-179) ¶¶ 13.4-13.5 (“A logical consequence of this exclusivity is the waiver by Contracting States to the ICSID Convention of the local remedies rule, so that the investor is not compelled to pursue remedies in the respondent State’s domestic courts or tribunals before the institution of ICSID proceedings. This waiver is implicit in the second sentence of Article 26, which nevertheless allows Contracting States to reserve its right to insist upon the prior exhaustion of local remedies as a condition of its consent. **Any such reservation to the Ukraine’s consent to ICSID arbitration must be contained in the instrument in which such consent is expressed, i.e. the BIT itself.**”) (emphasis added). *See also* CHRISTOPH H. SCHREUER *et al.*, *Chapter II: Jurisdiction of the Centre*, in *THE ICSID CONVENTION – A COMMENTARY* (3d ed. 2022) (CL-183), at 619 (“A State may make the exhaustion of local remedies a condition of its consent to arbitration. The condition may be expressed in a bilateral investment treaty offering consent to ICSID arbitration . . . in national legislation providing for ICSID arbitration . . . or in a contract with the investor containing an ICSID arbitration

Treaty—which constitutes the instrument containing Respondent's consent to arbitrate—does not condition Respondent's consent on the prior exhaustion of local remedies. Article 26 of the ICSID Convention thus requires that the Tribunal deem Respondent's consent to arbitration to be to the exclusion of local remedies.⁷⁹

23. Critically, Decree 41-88 does not constitute Respondent's consent to ICSID arbitration. Therefore, the Declaration it contains is not a valid exercise of Respondent's prerogative under Article 26 of the ICSID Convention. It follows that Decree 41-88 cannot limit Respondent's consent to arbitration that it provided in the CAFTA-DR.⁸⁰

24. Respondent now acknowledges that Article 26 reverses the traditional international law rule requiring the exhaustion of local remedies.⁸¹ In addition, Respondent concedes that Decree 41-88 does not constitute its consent to arbitration (albeit maintaining, incorrectly, that the terms of Decree 41-88 nonetheless apply to its instrument of consent, as further addressed in Section III.A.1(b) below).⁸² Respondent's concession that Decree 41-88 does not constitute its consent to arbitration is by itself dispositive of its objection, as it confirms that the reference to the exhaustion of local remedies in Decree 41-88 was not made as a condition of Respondent's consent to arbitration in accordance with Article 26 of the ICSID Convention.

clause. . . . The condition that local remedies must be exhausted before ICSID arbitration can be instituted may be expressed by a State party to the Convention only up to the time consent to arbitration is perfected but not later . . . A State may also give advance notice that it will require the exhaustion of local remedies as a condition for its consent to ICSID arbitration by way of a general notification to the Centre. But a general notification of this kind is a statement for information purposes only.”).

⁷⁹ CHRISTOPH H. SCHREUER *et al.*, *Chapter II: Jurisdiction of the Centre*, in *THE ICSID CONVENTION – A COMMENTARY* (3d ed. 2022) (CL-183), at 544 (“The exclusive remedy rule of the first sentence implies that there is no need to exhaust local remedies before initiating ICSID arbitration ‘unless otherwise stated.’”); International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* dated 18 Mar. 1965 (CL-205) ¶ 32 (“It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26.”).

⁸⁰ Counter-Memorial on Jurisdiction ¶ 28.

⁸¹ Reply on Jurisdiction ¶ 63 (“On this point, it goes without saying that the Republic of Honduras has never denied this circumstance.”).

⁸² *Id.* ¶ 76 (“[T]he 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. The point is, that DL 41-88 being the legislation approving the ICSID Convention in Honduras, its terms and 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—the DR-CAFTA.”).

25. In its Reply on Jurisdiction, Respondent attempts to salvage its objection by giving Article 26 an unprecedented and overly broad interpretation. Specifically, Respondent now asserts that a State seeking to reverse the ICSID Convention's presumption that arbitration is the exclusive remedy may do so with a simple written declaration: "[a]t best, all that is required is for the receiving State to express its willingness to require exhaustion of local remedies in writing."⁸³ This is an unavailing effort to ignore the terms of Article 26.

26. On its face, Respondent's position is inconsistent with the plain meaning of Article 26. The second sentence of Article 26 expressly provides that "[a] Contracting State may require the exhaustion of local remedies as a **condition of its consent to arbitration** under the Convention." A mere expression of "willingness" to require exhaustion cannot constitute a condition of consent to ICSID arbitration; at most, it may reflect the State's intention to require exhaustion as a condition to a future consent to ICSID arbitration.

27. Respondent attempts to bolster its position by misrepresenting Claimants' position and making irrelevant assertions. Respondent, for instance, remarks that Claimants are arguing "that States must use a certain sacramental formula to express their will."⁸⁴ That is incorrect. The only requirement is what Article 26 itself requires, *i.e.*, that any exhaustion requirement be made as a condition of the State's consent to ICSID arbitration. A declaration that is not conditioning the State's consent is insufficient.

28. Respondent also incorrectly suggests that Claimants have argued that an exhaustion requirement must be contained in "a single, indivisible instrument of consent,"⁸⁵ and asserts that "parties may consent to ICSID arbitration by means of separate or even unilateral instruments" and "a host State might express its consent to the Centre's jurisdiction through a provision in its national legislation."⁸⁶ This is another strawman argument. As Claimants explained in the Counter-Memorial, it is well-established that a State may express consent to ICSID arbitration through separate or even unilateral instruments—such as national legislation or investment

⁸³ *Id.* ¶ 61.

⁸⁴ *Id.* ¶¶ 63.

⁸⁵ *Id.* ¶ 56; *see also id.* ¶ 61 n. 49 (citing S. Schill *et al.* (RL-107) in support of the statement that "[i]t is generally accepted that the parties may give their consent to ICSID arbitration by means of different or even unilateral instruments, as long as such consent is in writing.").

⁸⁶ Reply on Jurisdiction ¶ 61, n. 49.

treaties—and that investors may accept such offers in writing.⁸⁷ However, while an exhaustion requirement may be valid if it is included as a condition within the same instrument of consent, it does not follow that any general legislative declaration—untethered to a specific consent—can suffice.⁸⁸ Article 26 requires that the exhaustion of local remedies be a condition of a State's consent, not a general or abstract expression of willingness.

29. Respondent continues to mischaracterize various legal authorities that acknowledge that a State may consent to ICSID arbitration in its national legislation (*i.e.*, through an investment law). These authorities confirm that a State may impose an exhaustion requirement within such legislation only when it serves as the instrument of consent. Respondent, however, relies on these same authorities in support of its contention that its unilateral declaration in Decree 41-88 constitutes a valid exercise of restricting its consent to arbitration, in accordance with Article 26. This, too, is incorrect.

30. Contrary to Respondent's suggestion, *Lanco International v. The Argentine Republic* ("**Lanco**") does not stand for the proposition that there can be a valid exhaustion requirement in national legislation that does not contain the State's consent to ICSID arbitration. As Claimants explained in the Counter-Memorial, the tribunal in *Lanco* confirmed that an exhaustion requirement must be "(i) in a bilateral investment treaty that offers submission to ICSID arbitration, (ii) in domestic legislation, or (iii) in a direct investment agreement that contains an ICSID clause,"⁸⁹ *i.e.*, in one of the well-established forms that an instrument of consent to ICSID arbitration may take. The reference to domestic legislation means legislation containing a State's consent to arbitration (such as a foreign investment law); nothing in the *Lanco* award suggests otherwise. Respondent likewise fails to respond to Claimants' observation that the *Generation Ukraine v. Ukraine* tribunal shares its understanding of the *Lanco* tribunal's reference to domestic

⁸⁷ See, *e.g.*, Counter-Memorial on Jurisdiction ¶ 49 (citing *Lanco Int'l Inc. v. Argentina*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction of the Arbitral Tribunal dated 8 Dec. 1998 (**RL-58**) § 43).

⁸⁸ See, *e.g.*, *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction dated 26 Apr. 2005 (**CL-182**) ¶ 69 ("Under Article 26 of the Convention, for entering into play, exhaustion of local remedies shall be **expressly required** as a condition of the consent of one party to arbitration under the Convention. Absent this requirement, exhaustion of local remedies cannot be a precondition for an ICSID Tribunal to have jurisdiction.") (emphasis added).

⁸⁹ Counter-Memorial on Jurisdiction ¶ 24 n. 73 (citing *Lanco Int'l Inc. v. Argentina*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction of the Arbitral Tribunal dated 8 Dec. 1998 (**RL-58**) § 39).

legislation as referring to legislation containing a State's consent to arbitration.⁹⁰ Indeed, the *Generation Ukraine* tribunal directly excluded the possibility that a requirement to exhaust local remedies may be validly made anywhere other than in the instrument of consent "*i.e.*, the [treaty] itself."⁹¹

31. In the Counter-Memorial, Claimants further explained the error in Respondent's argument that the ICSID Convention's *travaux* reveals that the drafters intended to allow States to require exhaustion simply by "express[ing] their willingness to give primacy to the exhaustion of local remedies."⁹² In advancing its argument, Respondent ignores text in the very same passage of the *travaux*, which confirms that it is only "[w]hen parties consent . . . to arbitration" that "they would be free to stipulate . . . that local remedies must first be exhausted."⁹³

32. Respondent also relies on a statement by Mr. Aron Broches, who became the First Secretary General of ICSID, concerning the possibility for a State to include an exhaustion requirement in a "unilateral provision of their domestic law,"⁹⁴ and continues to wrongly suggest that the *travaux* "expressly envisaged the possibility for States to express such intention in a unilateral provision of their domestic law, which—naturally—will be integrated into any consent that such State may subsequently grant."⁹⁵ Once again, however, Respondent confuses domestic legislation containing the State's unilateral consent to arbitration with other legislation.⁹⁶ It is clear

⁹⁰ Counter-Memorial on Jurisdiction ¶ 24; *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 Sept. 2003 (CL-179) (quoting *Lanco* approvingly for the proposition that exhaustion of local remedies may be required as a condition of consent in a BIT, domestic legislation, or a direct investment agreement in support of its conclusion that exclusion of the exhaustion requirement must be contained in the instrument in which such consent is expressed).

⁹¹ *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 Sept. 2003 (CL-179) ¶¶ 13.4-13.5 (explaining that the second sentence of Article 26 "allows Contracting States to reserve its [*sic*] right to insist upon the prior exhaustion of local remedies as a condition of its [*sic*] consent. **Any such reservation to the Ukraine's consent to ICSID arbitration must be contained in the instrument in which such consent is expressed, i.e. the BIT itself,**" and that once the investor has accepted the State's offer to arbitrate (whether in a BIT, national legislation, or direct agreement), "no further limitations or restrictions on the reference to arbitration can be imposed unilaterally.") (emphasis added).

⁹² Counter-Memorial ¶ 22; Memorial on Jurisdiction ¶ 82.

⁹³ History of the ICSID Convention, Vol. II-1 (1968) (RL-55), at 241 ("When parties consented to arbitration, they would be free to stipulate either that local remedies might be pursued in lieu of arbitration, or that local remedies must first be exhausted before the dispute could be submitted for arbitration under the Convention.").

⁹⁴ Reply on Jurisdiction ¶¶ 64-65, n. 53 (citing History of the ICSID Convention, Vol. II-2 (1968) (RL-56), at 756-757).

⁹⁵ Reply on Jurisdiction ¶ 67.

⁹⁶ See Reply on Jurisdiction ¶¶ 64-65 (quoting History of the ICSID Convention, Vol. II-2 (1968) (RL-56), at 756-757).

that, in his remark, Mr. Broches was referring to an investment law providing the State's offer of ICSID arbitration.⁹⁷ The *travaux* does not support the proposition that a State may require exhaustion simply by expressing such an "intention" in a unilateral provision in domestic legislation, and that this "intention" will automatically apply to subsequent consents to arbitration.⁹⁸ Indeed, as Claimants also explained, Mr. Broches later confirmed that "when a State had entered into an agreement with an investor containing an arbitration clause unqualified by any reservation regarding prior exhaustion of local remedies, the State could not thereafter demand that the dispute be first submitted to the local courts."⁹⁹ Respondent notably fails to address this point or explain how its position can be reconciled with this basic proposition underlying the ICSID Convention.

33. Respondent also continues to rely on an editorial by former ICSID Secretary-General Ibrahim F.I. Shihata, which mentions that States may include exhaustion requirements directly into agreements with investors and in investment treaties, and, that "[a]nother way to accomplish the same objective might result from a declaration made by a Contracting State at the time of signature or ratification of the Convention that it **intends to avail itself of the provisions of Article 26 and will require, as a condition of its consent to ICSID arbitration**, the exhaustion of local remedies."¹⁰⁰ As Claimants have already explained, however, Respondent can hardly derive support from this editorial. Mr. Shihata's use of the terms "intends" and "will require" indicates his understanding that future action would be required by the State in order to condition its consent to arbitration in any instrument containing an offer to arbitrate. Honduras has no response to this.¹⁰¹

34. Finally, Honduras fails to address Professor Schreuer's explanation of how States may apply Article 26 of the ICSID Convention in his seminal commentary on the ICSID Convention, cited in the Counter-Memorial, which conclusively addresses all of Respondent's

⁹⁷ History of the ICSID Convention, Vol. II-2 (1968) (RL-56), at 756-757 ("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).

⁹⁸ Reply on Jurisdiction ¶¶ 64-67.

⁹⁹ Counter-Memorial on Jurisdiction ¶ 21 n. 65 (quoting History of the ICSID Convention, Vol. II-2 (1968) (RL-56), at 973-974.

¹⁰⁰ Ibrahim Shihata, *ICSID and Latin America*, I-2 NEWS FROM ICSID (1984) (RL-62), at 2 (emphasis added).

¹⁰¹ See Reply on Jurisdiction ¶¶ 69-70.

counter-arguments.¹⁰² Professor Schreuer confirms that any condition to consent must be included in the instrument providing consent to ICSID arbitration, and that a State's general declaration asserting that it will require exhaustion of local remedies resembles a notification under Article 25(4) (the provision allowing Contracting States to specify which types of disputes they are willing to submit to ICSID arbitration) and, accordingly, "[i]f a State subsequently consents to ICSID arbitration in terms inconsistent with the prior general notification, the consent will prevail over the notification."¹⁰³

35. In sum, it is undisputed that Decree 41-88 does not constitute Respondent's consent to arbitration and, therefore, the Declaration it contains does not qualify as a condition of any consent to ICSID arbitration. At most, the Declaration expresses a willingness by Respondent to eventually require exhaustion of local remedies in a future consent to ICSID arbitration—an intent that is plainly insufficient under Article 26 to have conditioned Respondent's consent to arbitration in the CAFTA-DR, particularly since there was not yet any consent to arbitration by Respondent to which such a condition could have applied.

¹⁰² Counter-Memorial on Jurisdiction ¶ 39 n. 100 (CHRISTOPH H. SCHREUER *et al.*, *Chapter II: Jurisdiction of the Centre*, in *THE ICSID CONVENTION – A COMMENTARY* (3d ed. 2022) (CL-183), at 619 (“A State may make the exhaustion of local remedies a condition of its consent to arbitration. The condition may be expressed in a bilateral investment treaty **offering consent to ICSID arbitration** . . . in national legislation **providing for ICSID arbitration** . . . or in a contract with the investor **containing an ICSID arbitration clause** A State may also give **advance notice that it will require the exhaustion of local remedies as a condition for its consent to ICSID arbitration by way of a general notification to the Centre. But a general notification of this kind is a statement for information purposes only.**”) (emphasis added)).

¹⁰³ Counter-Memorial on Jurisdiction ¶ 39 n. 100 (CHRISTOPH H. SCHREUER *et al.*, *Chapter II: Jurisdiction of the Centre*, in *THE ICSID CONVENTION – A COMMENTARY* (3d ed. 2022) (CL-183), at 619 (“A State may make the exhaustion of local remedies a condition of its consent to arbitration. The condition may be expressed in a bilateral investment treaty **offering consent to ICSID arbitration** . . . in national legislation **providing for ICSID arbitration** . . . or in a contract with the investor **containing an ICSID arbitration clause** A State may also give **advance notice that it will require the exhaustion of local remedies as a condition for its consent to ICSID arbitration by way of a general notification to the Centre. But a general notification of this kind is a statement for information purposes only.**”) (emphasis added)). Respondent also fails to address *PSEG v. Republic of Turkey*, where the tribunal rejected the respondent's contention that it had qualified its consent to arbitration pursuant to Article 25(4) of the ICSID Convention, holding that such unilateral declarations “always have to be embodied in the consent that the Contracting Party will later give in its agreements or treaties. . . . Otherwise the consent given in the Treaty stands unqualified by the notification.” See Counter-Memorial on Jurisdiction ¶ 39 n. 101 (citing *PSEG Global, Inc., The North American Coal Corp., and Konya Ingin Elektrik Üretim ve Ticaret Ltd. Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction dated 4 June 2004 (CL-216) ¶ 145).

(b) Decree 41-88 Did Not Require or Imply Exhaustion of Local Remedies as a Condition of Honduras's Subsequent Consent to ICSID Arbitration

36. As Claimants explained in their Counter-Memorial, the forward-looking Declaration in Decree 41-88 merely anticipated the possibility that Respondent could require the exhaustion of local remedies in future ICSID arbitration agreements, but did not itself require the exhaustion of local remedies as a condition of Respondent's future consent to ICSID arbitration.¹⁰⁴ It also did not somehow introduce an implied term requiring exhaustion of local remedies in all of Honduras's subsequent instruments of consent to ICSID arbitration, as Respondent alleges.¹⁰⁵

37. In its Reply, Respondent takes issue with Claimants' description of the Declaration in Decree 41-88 as a forward-looking declaration, stating that this "is nothing more than a crude attempt by Claimants to disregard . . . the sovereign will of Honduras."¹⁰⁶ Respondent, however, does not engage with several of Claimants' arguments and/or distorts them, as shown below. Respondent makes four arguments, none of which supports its position.

38. **First**, Respondent acknowledges that Decree 41-88 is merely the legislative act pursuant to which the National Congress of Honduras approved Agreement No. 8-DTTL, whereby the President of Honduras had approved the ICSID Convention, and that its ratification of the ICSID Convention does not constitute consent to ICSID arbitration.¹⁰⁷ It also acknowledges that "a further manifestation of consent by the disputing parties is necessary."¹⁰⁸ Respondent, however, baldly asserts that "DL 41-88 being the legislation approving the ICSID Convention in Honduras, its terms and conditions are naturally applicable to all arbitration agreements referring to ICSID and involving the Republic of Honduras, regardless the instrument of consent."¹⁰⁹ Notably, Respondent offers no explanation in support of its assertion, but its position appears to be that the

¹⁰⁴ Counter-Memorial on Jurisdiction ¶ 30.

¹⁰⁵ Counter-Memorial on Jurisdiction ¶ 34.

¹⁰⁶ Reply on Jurisdiction ¶ 75.

¹⁰⁷ Counter-Memorial on Jurisdiction ¶ 28; Reply on Jurisdiction ¶ 76 ("[T]he Republic of Honduras has never said 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.").

¹⁰⁸ Reply on Jurisdiction ¶ 76.

¹⁰⁹ Reply on Jurisdiction ¶ 76. *See also* Reply on Jurisdiction ¶ 83 ("[T]he 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 is applicable to all arbitration agreements referring to ICSID and involving the Republic of Honduras, **whether or not the condition was expressly included in the instrument of consent.**" (emphasis added)).

purported exhaustion requirement in Decree 41-88 must be deemed to be an implied term, or an implied condition, applicable to all of its subsequent instruments of consent to ICSID arbitration. That is plainly incorrect.

39. Critically, Respondent fails to provide a single source to support its argument. This is unsurprising, as Respondent's argument runs counter to the well-established rule that a State's consent to arbitration must be explicit,¹¹⁰ clear and unambiguous.¹¹¹ If Respondent wished the intent expressed in the Declaration to apply to any subsequent consent to ICSID arbitration, it should have included clear and explicit words to this effect in its instruments of consent to arbitration. Respondent did not do so, however, and its push for implicit incorporation is nothing more than an effort to change the terms of its consent after the fact.

40. In any event, as Claimants explained in the Counter-Memorial, it is apparent that Decree 41-88 was not intended to mandate terms and did not have the effect of doing so. The relevant text—titled “Declaration of the Republic of Honduras”—was plainly styled as a non-binding declaration, which is significant as a matter of international law. As the UN Glossary of terms relating to Treaty actions explains, “declarations merely clarify the state's position and do not purport to exclude or modify the legal effect of a treaty,” and, significantly, “[t]he term [declaration] is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations.”¹¹² In other words, a declaration is a means by which States may express their will, intention, or opinion, and does not create a legal obligation.¹¹³ Notably, Respondent itself describes the Declaration as an expression of its

¹¹⁰ See, e.g., *Abaclat and Others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility dated 4 Aug. 2011 (CL-14) ¶ 258 (“Consent must be given in writing and be explicit.”).

¹¹¹ See, e.g., *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award dated 2 Aug. 2011 (CL-328) ¶ 113 (“Even if there is no requirement that consent to ICSID arbitration should have any characteristic other than to be expressed in writing in accordance with Article 25 of the Convention, it is self-evident that such consent should be expressed in a manner that leaves no doubts.”). See also *id.* ¶ 94 (noting that the terms of Venezuela's investment treaties were “clear and precise.”).

¹¹² United Nations Treaty Collection, *Glossary of terms relating to Treaty actions*, available at https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml (CL-329) (last accessed 4 July, 2025) (definition of “Declarations”).

¹¹³ See also Oliver Dörr, *Declaration*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (CL-330) ¶ 8 (“If subjects of international law refer to a document as a declaration, this might generally suggest that they do not want it to have legal effect. Therefore, most of the statements published as declarations only have a political character and, if at all, political consequences.”); *Declaration*, ROYAL SPANISH ACADEMIA ESPAÑOLA, PANHISPANIC DICTIONARY OF LEGAL SPANISH (CL-331) (“Declaration··· Int. pub. Manifestation of will by a subject of international law.”).

sovereign will,¹¹⁴ even as it studiously avoids referring to it as a Declaration, opting instead to referring generally to Decree 41-88.

41. As explained in the Counter-Memorial,¹¹⁵ the plain language of the Declaration likewise confirms that it was a forward-looking statement that anticipates future steps, with Respondent expressing its intent: (i) to consent to ICSID arbitration in the future (first sentence);¹¹⁶ (ii) to make exhaustion of local remedies a precondition in its future consents to ICSID arbitration (second sentence);¹¹⁷ and, (iii) to make Honduran law the applicable law in any such arbitrations and limit arbitration to nationals of another Contracting State (third sentence).¹¹⁸ In this regard, the Declaration's third sentence is particularly telling. As with a requirement to exhaust local remedies under Article 26, Respondent could not require that Honduran law would be solely applicable to ICSID arbitration because Article 42 of the ICSID Convention requires that an ICSID tribunal apply "such rules of international law as may be applicable."¹¹⁹ On the other hand, neither a declaration nor a subsequent agreement was necessary to limit ICSID arbitration to nationals of another Contracting State, this already being a requirement of Article 25 of the ICSID Convention.¹²⁰ Nothing in the Declaration thus mandates terms and conditions; Respondent was left free to choose not to consent to ICSID arbitration or to structure its subsequent instruments containing its consent to ICSID arbitration with conditions.

¹¹⁴ Reply on Jurisdiction ¶ 75.

¹¹⁵ Counter Memorial on Jurisdiction ¶ 30.

¹¹⁶ Republic of Honduras, *Decree 41-88, Decree on the ICSID Convention* dated 25 Mar. 1988 (**Exh. R-3**), at 7 ("The State of Honduras shall submit to the arbitration and conciliation procedures provided for in the Convention, only when it has previously expressed its consent in writing.").

¹¹⁷ Republic of Honduras, *Decree 41-88, Decree on the ICSID Convention* dated 25 Mar. 1988 (**Exh. R-3**), at 7 ("The investor shall exhaust the administrative and judicial channels of the Republic of Honduras, as a prior condition to the implementation of the dispute settlement mechanisms provided for in this Convention.").

¹¹⁸ Republic of Honduras, *Decree 41-88, Decree on the ICSID Convention* dated 25 Mar. 1988 (**Exh. R-3**), at 7 ("In any case, once submitted to the Tribunal to which the State of Honduras is a Party, the applicable laws shall be those of the Republic of Honduras, and only the natural and legal parties of the States Parties to the Convention may make use of the procedures provided for in the Agreement.").

¹¹⁹ ICSID Convention (**RL-48**), Art. 42(1) ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.").

¹²⁰ ICSID Convention (**RL-48**), Art. 25(1) ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) **and a national of another Contracting State.**") (emphasis added).

42. Respondent, on the other hand, offers no meaningful analysis of the Declaration, other than conclusorily remarking in a footnote that “the expression ‘shall exhaust’ clearly reveals the mandatory nature of the exhaustion condition.”¹²¹ The use of “shall,” however, does not assist Respondent. Indeed, the Declaration uses the same word in the first sentence (“Honduras shall submit to arbitration”) and the third sentence (“the applicable laws shall be those of the Republic of Honduras”), neither of which can be interpreted as a legal mandate independent of a subsequent agreement for the reasons detailed above. To the contrary, the use of “shall” is consistent with a simple declaration of Respondent’s future intent, which did not by itself create any legal obligation.

43. The Declaration’s context is also significant. Decree 41-88 is comprised of two operative articles:¹²² Article 1 consists of the National Congress’s approval of Agreement No. 8-DTTL, the text of which it reproduces between quotation marks. Agreement No. 8-DTTL includes a transcription of the ICSID Convention, with the Declaration tucked between Article 75 and the list of ICSID Signatory States. Article 2 of Decree 41-88 provides that the Decree will come into effect upon publication. Neither Article is concerned with making law as to future arbitration agreements or the terms and conditions thereof, and it is apparent that the sole concern of Decree 41-88 was to approve Honduras’s ratification of the ICSID Convention.

44. Indeed, there is no evidence that Respondent considered that Decree 41-88 gave the Declaration a mandatory legal effect as a matter of Honduran law. The evidence rather demonstrates the opposite, as near contemporaneous legislation shows that Respondent did for a short time elevate the terms of the Declaration into law pursuant to a 1989 investment law that was repealed less than three years later.¹²³

¹²¹ Reply on Jurisdiction ¶ 79 n. 71.

¹²² Republic of Honduras, *Decree 41-88, Decree on the ICSID Convention* dated 25 Mar. 1988 (**Exh. R-3**).

¹²³ Shortly after Respondent’s internal ratification of the ICSID Convention in Decree 41-88, Respondent issued Decree No. 266-89, approving the Law to Promote National and Foreign Investment (*Ley de Fomento a la Inversión Privada Nacional y Extranjera*) dated 15 December 1989 (“**Decree 266-89**”). Unlike some other investment laws, Decree 266-89 did not include a unilateral arbitration offer. Article 29 of Decree 266-89 reproduced the Declaration nearly verbatim. See Decree No. 266-89, approving the Law to Promote National and Foreign Investment dated 15 Dec. 1989 (**Exh. C-353**), Art. 29. While its content remains forward-looking, Article 29 of Decree 266-89 temporarily elevated the terms of the Declaration into law, which would not have been necessary if Decree 41-88 had already done so. Shortly thereafter, however, Respondent issued a new investment law, Decree No. 80-92 approving the Honduran Investment Law (*Ley Hondureña de Inversiones*), dated 29 May 1992 (“**Decree 80-92**”). Article 23 of Decree 80-92 repealed Decree 266-89 in its entirety. See Decree No. 80-92, approving the Honduran Investment Law (*Ley de Inversiones*) dated 12 June 1992 (**Exh. C-354**), Art. 23 (“Repeal Decree No. 266-89 of 15 December 1989.”). See

45. Respondent further complicates matters by asserting that “it is not possible to separate the ICSID Convention from the instrument by which the Republic of Honduras approved and put it into force. Without Legislative Decree 41-88 and the exhaustion condition, there would simply be no consent by the Republic of Honduras to ICSID arbitration.”¹²⁴ Respondent, at the same time, has correctly seemingly abandoned any suggestion that the Declaration constitutes a reservation.¹²⁵ For the avoidance of doubt, the Declaration cannot constitute a valid reservation to the ICSID Convention, as it would be incompatible with the object and purpose of the Convention.¹²⁶ Furthermore, Respondent did not comply with the international law requirements for making a treaty reservation.¹²⁷

also id. Art. 4(13) (“Foreign investors may agree to submit the settlement of their disputes in accordance with international agreements signed by Honduras.”).

¹²⁴ Reply on Jurisdiction ¶ 77.

¹²⁵ See generally Reply on Jurisdiction § III.A. In 2023, shortly after the registration of the first of a new wave of ICSID cases against Honduras, Honduras held a press conference in which it “publicly and legally denounced ICSID,” claiming that ICSID had “violated laws and procedures” by allegedly “disregard[ing] the legal reservation the State registered in . . . 1988.” See Honduras Press Secretary, *We Denounce the Legality of ICSID Proceeding*, X (FORMERLY TWITTER) dated 31 May 2023 (**Exh. C-242**); *Honduras Accuses ICSID of Illegality in Proceedings in Zede Prospera Case*, DINEROHN dated 31 May 2023 (**Exh. C-94**)).

¹²⁶ See VCLT (**CL-133**), Art. 19 (“A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty.”). Setting aside their purely declarative nature, the terms of the Declaration would be incompatible with both Articles 26 and 42 of the ICSID Convention, which provide, respectively that arbitration is the exclusive remedy and that the tribunal will apply both the law of the host State and international law, and establish specific mechanisms by which a State can require the opposite (*i.e.*, as a condition of consent and by party agreement). For a State to simply sidestep these specific requirements through a reservation would be incompatible with the ICSID Convention. See also CHRISTOPH H. SCHREUER, *et al.*, *Chapter II: Jurisdiction of the Centre, in THE ICSID CONVENTION – A COMMENTARY* (3d ed. 2022) (excerpts) (**CL-183**), at 1696-1997 (Writing well-after Decree 41-88, Professor Schreuer observed that “[n]o State party to the Convention has made a reservation” and “for a reservation to be permissible, it must not be incompatible with the object and purpose of the treaty,” and “in the framework of the Convention, the admissibility of any reservation would presumably be judged by the Administrative Council as the ‘competent organ of the organization’ in which all State parties to the Convention are represented.”); CHRISTOPH H. SCHREUER, *et al.*, *Chapter II: Jurisdiction of the Centre, in THE ICSID CONVENTION – A COMMENTARY* (2d ed. 2009) (excerpts) (**CL-106**), at 1270 (“Under customary international law, any reservation to the ICSID Convention would have to be compatible with the Convention’s object and purpose. It is difficult to imagine any reservation that meets this criterion.”).

¹²⁷ See VCLT (**CL-133**), Art. 23(1) (providing that reservations “must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.”); *id.* Arts. 20(2), 20(4)(c) (addressing the requisite consent necessary for reservations to be effective and providing that “[w]hen a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization,” *i.e.*, in this case, consent by ICSID, and that “an act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.”). See also *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 Sept. 2003 (**CL-179**) ¶¶ 13.4-13.5 (“A logical consequence of this exclusivity is the waiver by Contracting States to the ICSID Convention of the local remedies rule, so that the investor is not compelled to pursue remedies in the respondent State’s domestic courts or tribunals before the institution of ICSID proceedings. This waiver is implicit in the second sentence of Article 26, which nevertheless allows Contracting States to reserve its right to insist upon the prior exhaustion of local remedies as a condition of its consent. Any such **reservation to**

46. **Second**, as Claimants explained in the Counter-Memorial, Respondent has acted in a manner inconsistent with its current position that the Declaration conditions its consent to ICSID arbitration on the exhaustion of local remedies. Some of the investment treaties in which Honduras provides its advance offer to ICSID arbitration, for instance, contain fork-in-the-road clauses: requiring an investor to choose between advancing its claim in ICSID arbitration or before local courts is diametrically opposed to requiring the exhaustion of local remedies as a condition to ICSID arbitration.¹²⁸ In at least one other treaty, Respondent conditioned its consent to ICSID arbitration on its ability to demand that the claimant exhaust administrative remedies, but only for a six-month period.¹²⁹ This, too, is inconsistent with Respondent's current interpretation of the Decree.

47. In light of this, Respondent's allegation that Decree 41-88 was "public" (and included in document ICSID/8-F) and, thus, "Claimants have no way to justify their disregard of Legislative Decree 41-88,"¹³⁰ does not withstand scrutiny. As Claimants have noted and the *Próspera* tribunal has remarked, the Declaration was "buried" in a Decree that reproduced the entire text of the ICSID Convention, Honduras failed to publish the Decree anywhere online, and Honduras did not alert ICSID of any alleged "condition" to its consent to arbitrate.¹³¹ This reveals beyond any doubt that Respondent's position in this arbitration is new and disingenuous.¹³²

48. Further, Respondent's reliance on the ICSID/8-F document is unavailing. As Claimants explained in the Counter-Memorial, ICSID listed Decree 41-88 in Document ICSID/8-F, which is titled "Legislative or Other Measures Relating to the Convention (Art. 69 of the

the Ukraine's consent to ICSID arbitration must be contained in the instrument in which such consent is expressed, *i.e.* the BIT itself.") (emphasis added).

¹²⁸ See, *e.g.*, Agreement between the Republic of Chile and the Republic of Honduras for the Reciprocal Promotion and Protection of Investments entered into on 11 Nov. 1996 ("**Chile-Honduras BIT**") (CL-208), Art. VIII (providing that Chilean investors must choose between submitting investment disputes against Honduras to local courts or ICSID arbitration, and that once the investor submits the dispute to local courts or to arbitration, that election shall be definitive); see also Free Trade Agreement between Central America and the Dominican Republic entered into on 16 Apr. 1998 (CL-209), Art. 9.20 (containing similar provisions).

¹²⁹ Central America-Panama Free Trade Agreement entered into on 6 Mar. 2002 ("**Central America-Panama FTA**") (CL-210), Part IV, Art. 10.22 (1)-(2) (providing that arbitration is to the exclusion of other mechanisms, and that a contracting party may require the exhaustion of local administrative remedies, provided that if such a remedy does not conclude within six months the investor may submit claims directly to arbitration).

¹³⁰ Reply on Jurisdiction ¶¶ 78-79 (*citing* Counter-Memorial on Jurisdiction ¶ 28).

¹³¹ *Próspera* (CL-201) ¶ 52; Counter-Memorial on Jurisdiction ¶¶ 45-46.

¹³² *Próspera* (CL-201) ¶ 52; Counter-Memorial on Jurisdiction ¶¶ 45-46; see also ¶¶ 5, 15.

Convention),” and refers to those measures taken by States to make the ICSID Convention applicable in their country.¹³³

49. Honduras gave effect to the ICSID Convention in its territory by ratifying it in Decree 41-88. This is borne out by Respondent’s own description of Decree 41-88 as “legislation approving the ICSID Convention in Honduras.”¹³⁴ Document ICSID/8-F shows nothing more or less than that, as further demonstrated by the fact that it merely cites to Decree 41-88 and does not mention the Declaration or the alleged exhaustion of local remedies requirement.¹³⁵ Accordingly, ICSID treated Decree 41-88 as a measure implementing the Convention—and not as a measure pertaining to Article 26 regarding exhaustion of local remedies.¹³⁶ The Decree is notably absent from Document ICSID/8-D, in which ICSID recorded the notifications made by a few States regarding requirements to exhaust local remedies, but not Honduras.¹³⁷

50. **Third**, Respondent argues that Claimants’ interpretation of the Declaration as a declaration of future intent deprives both Decree 41-88 and Article 26 of meaning, and is therefore contrary to the principle of effectiveness.¹³⁸ Claimants’ interpretation does nothing of the sort. The Parties agree that pursuant to the principle of *effet utile*, treaty provisions must be interpreted in a manner that does not deprive them of meaning.¹³⁹ As an initial matter, however, the terms of

¹³³ See ICSID/8, Contracting States and Measures Taken by Them for the Purpose of the Convention dated 28 Oct. 2022 (CL-226); ICSID/8-F, Legislative or Other Measures Relating to the Convention (Art. 69 of the Convention), at 24 (“Contracting States have communicated to the Centre the following legislative or other measures taken by them, pursuant to Article 69 of the Convention, to make its provisions effective in their territories.”); ICSID Convention (RL-48), Art. 69 (“Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.”).

¹³⁴ Reply on Jurisdiction ¶ 76.

¹³⁵ ICSID/8, Contracting States and Measures Taken by Them for the Purpose of the Convention dated 28 Oct. 2022 (CL-226); ICSID/8-F, Legislative or Other Measures Relating to the Convention (Art. 69 of the Convention), at 24.

¹³⁶ *Próspera* (CL-201) ¶ 52 (“[T]here is **no evidence in the record that Honduras notified this requirement to ICSID**; in fact, ICSID registered *Decreto* 41-88 in Document ICSID/8-F, titled ‘Legislative or Other Measures Relating to the Convention (Article 69 of the Convention)’ **rather than in Document ICSID 8-D, which is used by ICSID to, *inter alia*, register notifications about requirements to exhaust local remedies**, such as those made by Israel, Costa Rica and Guatemala.”) (emphasis added).

¹³⁷ ICSID/8, Contracting States and Measures Taken by Them for the Purpose of the Convention dated 28 Oct. 2022 (CL-226), ICSID/8-D, Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Centre (Art. 25(4) of the Convention), at 12-13 (reporting notifications by Israel, Costa Rica, and Guatemala regarding the exhaustion of local remedies, but not Honduras).

¹³⁸ Reply on Jurisdiction ¶¶ 79-81.

¹³⁹ See RICHARD GARDINER, TREATY INTERPRETATION (1st ed. 2008) (CL-332), at 149 (explaining that it is a fundamental principle of treaty interpretation that all the terms included in the treaty should be given meaning and effect.). The International Law Commission considered the *effet utile* principle to be embodied in Article 31(1) of the VCLT. See *id.* at 160.

the Declaration are not treaty terms and, thus, the VCLT's rules of treaty interpretation do not even apply. In any event, Claimants' reading does not deprive Article 26 of meaning: as explained above, non-binding declarations have meaning, as they serve to express a State's intent. The Declaration likewise is not deprived of meaning under Claimants' interpretation, just because it does not give rise to a binding legal obligation under international law.¹⁴⁰

51. Finally, Honduras relies on the *Próspera* tribunal's determination that the terms used in and the context of Decree 41-88 suggest Honduras' intention to establish a preliminary condition as permitted by the Convention.¹⁴¹ While Claimants respectfully disagree with the *Próspera* tribunal's finding in this regard, Respondent ignores that the tribunal ultimately ruled in favor of claimants on this issue, and dismissed the very same objection that Respondent advances here, finding that CAFTA-DR Article 10.18.2 implies a waiver of any previously-established exhaustion requirement, as explained in the Counter-Memorial and herein.¹⁴²

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

52. It is undisputed that Respondent's consent to ICSID arbitration in this case is provided in Article 10.17 of the CAFTA-DR, and not in Decree 41-88. Not only is there *no* textual support in the CAFTA-DR to support Respondent's proposition that it conditioned its consent to arbitration on an exhaustion requirement, but any such requirement is at odds with the Treaty's express conditions to arbitration.¹⁴³ Specifically, before submitting a claim to arbitration, a claimant must waive its right to initiate or continue any local administrative or judicial proceedings regarding any measure alleged to constitute a breach of the Treaty.¹⁴⁴ The Paizes and Pacific Solar

¹⁴⁰ In any case, the Declaration is legally superfluous on its own terms, as it does not create legal obligations. Following the Declaration, Respondent still would have had to require the exhaustion of local remedies as a condition of consent to ICSID arbitration and entered into an agreement that Honduran law be solely applicable. Both expressions of intent were superfluous as a legal matter because neither was possible without the subsequent acts, and either was possible without the prior Declaration. Moreover, the statement that only nationals of ICSID Member States would have resort to ICSID arbitration was already legally superfluous insofar as this is a basic jurisdictional requirement under the ICSID Convention and needed no further confirmation.

¹⁴¹ Reply on Jurisdiction ¶ 82 (citing *Próspera* (CL-201) ¶ 107).

¹⁴² *Próspera* (CL-201) ¶¶ 119-120. See also Counter-Memorial on Jurisdiction ¶ 5, 40.

¹⁴³ Counter-Memorial on Jurisdiction ¶¶ 34-42.

¹⁴⁴ See Counter-Memorial on Jurisdiction ¶ 34 (citing CAFTA-DR (CL-1), Chapter 10, § B, Art. 10.18.2(b) ("No claim may be submitted to arbitration under this Section unless . . . the notice of arbitration is accompanied, (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers of any right

complied with the waiver requirement,¹⁴⁵ a fact that Respondent does not (and cannot) contest.¹⁴⁶ Article 10.18.4 likewise prohibits investors or their enterprises from claiming for breach of an investment agreement where such a claim has been previously submitted to domestic courts or administrative tribunals.¹⁴⁷ The Paizes on behalf of Pacific Solar likewise are in compliance with this condition for bringing a claim for breach of an investment agreement. As Claimants have explained, these provisions are fundamentally incompatible with Honduras's purported exhaustion requirement, as they expressly restrict the pursuit and/or exhaustion of local remedies.

53. Article 10.18.2 necessarily *presumes* that local remedies have not been exhausted; otherwise, the requirement to waive any right to "initiate or continue" local proceedings would make no sense. Honduras cannot require an investor to exhaust local remedies before initiating arbitration, while simultaneously forcing the investor to renounce its right to initiate or continue local proceedings already underway before proceeding to arbitration.¹⁴⁸ As Claimants have

to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.")).

¹⁴⁵ Counter-Memorial on Jurisdiction ¶ 35 (citing Mr. Fernando Paiz's Waiver Pursuant to CAFTA-DR Article 10.18 dated 22 Aug. 2023 (**Exh. C-37**); Ms. Anabella Schloesser de Paiz's Waiver Pursuant to CAFTA-DR Article 10.18 dated 22 Aug. 2023 (**Exh. C-38**); Pacific Solar's Waiver Pursuant to CAFTA-DR Article 10.18 dated 22 Aug. 2023 (**Exh. C-39**)). Consistent with the terms of CAFTA-DR, the Paizes and Pacific Solar reserve their right to initiate or continue any proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party. See CAFTA-DR (**CL-1**), Art. 10.18.3.

¹⁴⁶ Counter-Memorial on Jurisdiction ¶ 35. Respondent's assertion that "if the Claimants believed that the Republic of Honduras violated their rights by the mere enactment of Decree 46-2022 or because ENEE is seeking a renegotiation, they should have resorted – **and still can resort** – to the Honduran courts" (see Memorial on Jurisdiction ¶ 91, emphasis added) is patently wrong, in light of the Treaty's waiver requirement.

¹⁴⁷ Counter-Memorial on Jurisdiction ¶ 35; CAFTA-DR (**CL-1**), Chapter 10, § B, Art. 10.18.4 ("No claim may be submitted to arbitration (a) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or (b) for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C), if the claimant (for claims brought under Article 10.16.1(a)) or the claimant or the enterprise (for claims brought under Article 10.16.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for adjudication or resolution.").

¹⁴⁸ *Próspera* (**CL-201**) ¶¶ 112, 119; Gabrielle Kaufmann-Kohler and Michele Potestà, *The Interplay Between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework*, in EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW (2020) (**CL-212**) ¶ 100 ("[R]equir[ing] a prior waiver of all domestic proceedings as a condition to access investor-State arbitration . . . ha[s] the effect opposite to the exhaustion of local remedies rule. The choice-of-forum requirements can only be enforced if read as an implied waiver of the local remedies rule."). See also William S. Dodge, *Local Remedies under NAFTA*, in FIFTEEN YEARS OF NAFTA CHAPTER 11 ARBITRATION (2011) (**CL-213**), n. 43 (providing that the U-turn clause in Article 1121 of NAFTA is "inconsistent with a requirement that the investor exhaust local remedies because the act of exhausting such remedies would preclude resort to arbitration under the terms of the treaty."); IISD Best Practices Series, *Exhaustion of Local Remedies in International Investment Law* (2017) (**CL-214**), § 3.1.5 ("[A]lthough not directly waiving the ELR rule itself, Chapter 11 of the NAFTA tacitly waives it, as the text requires investors or investments to 'waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings

explained, reading an exhaustion requirement into the Treaty would deprive Article 10.18.2 of all *effet utile*, contrary to accepted principles of treaty interpretation.¹⁴⁹ Honduras notably fails to respond to this argument.

54. As explained in the Counter-Memorial,¹⁵⁰ the *Próspera* tribunal recently confirmed Claimants' position. The tribunal found that:

The recognition in Article 10.18.2 of CAFTA-DR of these two avenues for investors is incompatible with the Republic's case: *CAFTA-DR's* provision forcing an investor to renounce all domestic proceedings in the host State (whether already initiated or yet to be initiated) before it is authorized to proceed to international arbitration is **incompatible with the Exhaustion Requirement in Decreto 41-88**.¹⁵¹

55. The *Próspera* tribunal concluded that, because any exhaustion requirement and CAFTA-DR Article 10.18.2 cannot coexist, the latter must prevail, because "being subsequent in time, it implies a waiver of the previously established requirement," as a subsequent arbitration agreement can supersede or waive previous conditions.¹⁵² Thus, as the later-in-time instrument, the provisions of the CAFTA-DR prevail over Honduras's Decree.

with respect to the measure of the disputing Party that is alleged to be a breach . . . except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party."); Andrea K. Bjorklund, *Chapter 17 – Waiver of Local Remedies and Limitation Periods*, in BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID (2015) (CL-215), at 238 (stating that "encouraging local recourse while simultaneously permitting investment arbitration would force States to face multiple cases and if not managed properly could allow an investor duplicative recovery. One way States signing investment treaties have dealt with this problem is the so-called 'no-U-turn' approach, which permits an investor to seek relief in local courts first, but if and when the investor shifts to international relief under the treaty the investor must waive its right to initiate or continue litigation in local courts. . . . This is the approach taken [in Article 1121 NAFTA].").

¹⁴⁹ Counter-Memorial on Jurisdiction ¶ 41 (citing VCLT (CL-133), Art. 31 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"); *Próspera* (CL-201) ¶¶ 115-117).

¹⁵⁰ Counter-Memorial on Jurisdiction ¶ 40.

¹⁵¹ *Próspera* (CL-201) ¶ 119 (emphasis added). See also *id.* ¶¶ 110-120.

¹⁵² *Próspera* (CL-201) ¶ 120. In reaching this result, the *Próspera* tribunal also relied on the Honduran Constitution, which mandates that treaties override conflicting domestic laws. See *Próspera* (CL-201) ¶ 120 ("Since the exhaustion requirement and Article 10.18.2 of CAFTA-DR cannot coexist, the latter must prevail because . . . being subsequent in time, it implies a waiver of the previously established requirement; and . . . in accordance with international law, the Honduran Constitution provides that 'In case of conflict between the treaty or convention [in this case, CAFTA-DR] and the law [Decreto 41-88], the former shall prevail.'). See Constitution of Honduras of 1982 with Amendments through 2013 ("Constitution of Honduras") (Exh. R-15) Art. 18 ("In case of a conflict between the treaty or convention and the law, the former shall prevail."). See also International Law Commission Draft Articles on Diplomatic Protection with commentaries (2006) ("ILC Draft Articles on Diplomatic Protection") (CL-217), Art. 15(e) ("Exceptions to the local remedies rule[.] Local remedies do not need to be exhausted where: . . . the State alleged to be responsible has waived the requirement that local remedies be exhausted.") (emphasis

56. Respondent fails to meaningfully engage with the *Próspera* tribunal's findings relied on by Claimants.¹⁵³ In particular, Respondent asserts that the CAFTA-DR's requirements are "in no way inconsistent" with the alleged exhaustion requirement, but fails to respond to a number of Claimants' arguments.¹⁵⁴

57. **First**, Honduras seeks to elevate its forward-looking Declaration to the level of a jurisdictional requirement under Article 25 of the ICSID Convention. Respondent contends that, like ICSID's nationality requirements in Article 25 and the *Salini* criteria to determine the existence of a qualifying investment,¹⁵⁵ Article 26 "establishes jurisdictional limits that prevail over the underlying treaty provisions," and "when a State invokes the exhaustion of local remedies requirement under Article 26," the tribunal must "separately analyse compliance with the conditions imposed by Article 26 of the ICSID Convention and the conditions imposed by the Treaty."¹⁵⁶ Honduras argues that the *Próspera* tribunal's decision is incorrect for not following this approach.¹⁵⁷

58. Respondent's argument is premised on a flawed understanding of the ICSID Convention. Unlike Article 25(2)(a)) of the ICSID Convention—which mandates that an investor be a "National of another Contracting State,"—Article 26 does not create a jurisdictional condition, nor does it contain any requirements or language that could plausibly be construed as adding additional elements to the jurisdictional requirements under Article 25 of the ICSID Convention.¹⁵⁸

added); *Hochtief v. Argentina*, ICSID Case No. ARB/07/31, Decision on Jurisdiction dated 24 Oct. 2011 (**CL-218**) ¶ 95 (confirming that a State may waive the international law exhaustion of local remedies requirement or cure a foreign national's non-compliance through acquiescence).

¹⁵³ Reply on Jurisdiction ¶¶ 93-94.

¹⁵⁴ Reply on Jurisdiction ¶¶ 84-96.

¹⁵⁵ Reply on Jurisdiction ¶ 94

¹⁵⁶ Reply on Jurisdiction ¶¶ 93-94 (citing ICSID Convention (**RL-48**), Art. 25(2)(a); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction dated 16 July 2001 (**RL-59**) ¶ 52). Respondent misrepresents Claimants' position, alleging that Claimants recognized that "Article 26 of the ICSID Convention, like Article 25, establishes jurisdictional limits that prevail over the provisions of the underlying treaties." See Reply on Jurisdiction ¶ 94 n. 92 (citing Claimants' Comments on the Bifurcation Request ¶ 31). Claimants made no such concession. Respondent's assertion is a distortion of the record and is improper.

¹⁵⁷ Reply on Jurisdiction ¶ 93 (citing *Próspera* (**CL-201**) ¶ 119).

¹⁵⁸ *Próspera* (**CL-201**) ¶ 34 ("In a number of cases, State parties to ICSID proceedings have raised the principle of exhaustion of local remedies as a jurisdictional requirement. Professor Schreuer, however, highlights that, up to 2022, these challenges have 'never' been successful."); CHRISTOPH H. SCHREUER *et al.*, *Chapter II: Jurisdiction of the Centre*, in THE ICSID CONVENTION – A COMMENTARY (3d ed. 2022) (**CL-183**), at 329 ("States parties to ICSID proceedings have invoked the principle of the exhaustion of local remedies as a **jurisdictional requirement in a number of cases, but – as discussed further below – never with success.**") (emphasis added).

Rather, as Claimants have explained,¹⁵⁹ Article 26 makes a *renvoi* to the instrument of consent: it creates a limited exception that allows States to condition their consent on the exhaustion of local remedies in the instrument of consent.¹⁶⁰ Article 26 thus does not create “jurisdictional limits that prevail over the underlying treaty provisions.”¹⁶¹ As shown in the Counter-Memorial and further explained in Section III.A.1(b) above, Respondent did not exercise its right under Article 26 to condition its consent to arbitration in the CAFTA-DR on the exhaustion of local remedies. Thus, its purported exhaustion requirement did not create a jurisdictional condition under the CAFTA-DR or the ICSID Convention. Accordingly, Respondent’s reliance on Article 25 of the ICSID Convention and the *Salini* criteria are misplaced.

59. **Second**, Respondent argues that the Treaty’s waiver requirement is not incompatible with the exhaustion of local remedies because the requirement “has been deliberately established for the benefit of the Contracting States to protect them against potential parallel proceedings” and “in no way exempts investors from exhausting domestic remedies.”¹⁶² Whether or not the waiver requirement was established to benefit States is irrelevant to the issue of incompatibility with the exhaustion of local remedies. Whether the objective of the waiver is to avoid multiple proceedings is likewise irrelevant (although, notably, requiring the exhaustion of

¹⁵⁹ *Supra* § III.A.1(a); Counter-Memorial on Jurisdiction ¶ 13 (“Article 26 of the ICSID Convention reverses the traditional requirement of exhaustion of domestic remedies, allowing an exception only where a State expressly conditions its consent to arbitration to require exhaustion. Any such requirement accordingly must be contained in the State’s instrument of consent.”).

¹⁶⁰ *See Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 Sept. 2003 (CL-179) ¶¶ 13.4-13.5 (explaining that Article 26 “allows Contracting States to reserve its right to insist upon the prior exhaustion of local remedies as a condition of its consent. **Any such reservation to the Ukraine’s consent to ICSID arbitration must be contained in the instrument in which such consent is expressed, i.e. the BIT itself.**”) (emphasis added); *IBM v. Ecuador*, Decision on Jurisdiction dated 22 Dec. 2003 (CL-327), ¶ 80 (“The provision of article 26 of the Convention authorized the Ecuadorian Government to establish certain conditions for the applicability of an International Treaty; i.e., **the Ecuadorian Government should have included, as previous requirement, the condition of exhausting the administrative or judicial channels, at the moment it ratified the BIT.** And it has not. On the contrary, the first part of article 26 of the Convention, as well as number 2 of article 11 of the BIT, excluded the possibility to call on the national judges if the ICSID arbitration has been sought first.”) (emphasis added); CHRISTOPH H. SCHREUER *et al.*, *Chapter II: Jurisdiction of the Centre*, in *THE ICSID CONVENTION – A COMMENTARY* (3d ed. 2022) (CL-183), at 544 (“The exclusive remedy rule of the first sentence implies that there is no need to exhaust local remedies before initiating ICSID arbitration ‘unless otherwise stated.’”), at 619 (explaining that “[a] State may make the exhaustion of local remedies a condition of its consent to arbitration. . . in a bilateral investment treaty offering consent to ICSID arbitration . . . in national legislation providing for ICSID arbitration . . . or in a contract with the investor containing an ICSID arbitration clause.”). *See also*, ICSID Convention (RL-48), Art. 26 (“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”).

¹⁶¹ Reply on Jurisdiction ¶ 94.

¹⁶² Reply on Jurisdiction ¶¶ 85-86.

local remedies entails multiple proceedings). Respondent chooses not to address the real issue, which is that the waiver requirement is incompatible with the exhaustion of local remedies requirement that Respondent alleges should be implied into the CAFTA-DR.

60. Likewise, as Claimants previously explained,¹⁶³ exhausting local remedies is also incompatible with the CAFTA-DR, which contains a three-year prescription period, and forms the grounds for one of Respondent's Additional Objections addressed here. While it would be impossible to exhaust local remedies within three years after the date of the breach (and knowledge of damages), Claimants would be precluded from submitting their claim to arbitration if more than three years had elapsed from the date of the breach and when they first incurred damages. This further evidences the incompatibility between CAFTA-DR and Respondent's objection, in addition to the futility of requiring exhaustion of local remedies in this case, which Respondent has failed to rebut.

61. **Third**, Respondent denies that *Metalclad Corporation v. The United Mexican States* ("***Metalclad***") supports Claimants' position that the waiver requirement is incompatible with exhaustion of local remedies.¹⁶⁴ According to Respondent, *Metalclad* can be distinguished from the present case on the grounds that "unlike the Republic of Honduras, Mexico had nowhere required investors to exhaust domestic remedies prior to resorting to arbitration."¹⁶⁵ This purported distinction is irrelevant. The *Metalclad* tribunal observed that Mexico's decision not to insist on the need for exhaustion of local remedies was correct in light of the waiver provision of the North America Free Trade Agreement ("**NAFTA**"), which closely resembles Article 10.18.2 of CAFTA-DR.¹⁶⁶ In this respect, *Metalclad* directly supports Claimants' contention that the waiver provision of the CAFTA-DR is incompatible with any exhaustion of local remedies requirement.

¹⁶³ Counter-Memorial on Jurisdiction ¶ 63.

¹⁶⁴ Reply on Jurisdiction ¶ 87.

¹⁶⁵ Reply on Jurisdiction ¶ 87.

¹⁶⁶ Counter-Memorial on Jurisdiction ¶ 38 (citing *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award dated 30 Aug. 2000 (CL-7), n. 4 ("Mexico does not insist that local remedies must be exhausted. Mexico's position is correct in light of NAFTA Article 1121(2)(b) which provides that a disputing investor may submit a claim under NAFTA Article 1117 if both the investor and the enterprise waive their rights to initiate or continue before any administrative tribunal or court under the law of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in NAFTA Article 1117.")).

62. **Fourth**, Respondent misconstrues the analysis of Article 10.18.2 of the CAFTA-DR in *Corona Materials, LLC v. Dominican Republic* (“**Corona Materials**”) when it asserts that the tribunal concluded that the waiver requirement “did not preclude the claimants in that case from exhausting domestic remedies, because ‘this [*i.e.*, the waiver] requirement is immediately qualified by the article’s [10.16] subparagraph’s [*sic*] 3.’”¹⁶⁷ The *Corona Materials* tribunal, however, did not address exhaustion at all, much less its compatibility with the waiver provision. Rather, the tribunal interpreted the limited exception to the waiver requirement in Article 10.18.3,¹⁶⁸ which allows a claimant to initiate domestic proceedings for interim injunctive relief that does not involve monetary damages, solely to preserve their rights or those of their local enterprise during the pendency of arbitration.¹⁶⁹ *Corona Materials* thus offers no support for Respondent’s position that the waiver in Article 10.18 is compatible with an exhaustion requirement.

63. **Fifth**, Respondent avers that “the *fork-in-the-road* clauses of the CAFTA-DR operate on a different plane than the requirement of exhaustion of local remedies,” asserting that such clauses merely preclude arbitration where the investor “previously claimed an alleged breach of *international law obligations* before domestic courts.”¹⁷⁰ The plain language of the CAFTA-DR makes clear, however, that arbitration can also be barred if an investor has pursued Honduran law causes of action in local proceedings: Article 10.18.4, for instance, precludes investors from submitting claims to arbitration after bringing any local claim “for breach of an investment

¹⁶⁷ Reply on Jurisdiction ¶ 88.

¹⁶⁸ CAFTA-DR (CL-1), Art. 10.18.3 (“Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant’s or the enterprise’s rights and interests during the pendency of the arbitration.” (emphasis added)).

¹⁶⁹ *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 dated 31 May 2016 (RL-172) ¶ 268 (“In the Tribunal’s view, the waiver required to submit a claim to international arbitration pursuant to DR-CAFTA Chapter 10 is clear in its terms. Article 10.18.2 first requires the claimant (whether claiming on its own behalf or on behalf of an enterprise) to waive ‘any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16’, this requirement is immediately qualified by the article’s subparagraph 3 . . . Thus, an action seeking interim injunctive relief not involving the payment of damages is available to a DR-CAFTA claimant (or its enterprise) while it pursues its DR-CAFTA claim for damages.”).

¹⁷⁰ Reply on Jurisdiction ¶ 90.

authorization” or “for breach of an investment agreement,”¹⁷¹ irrespective of whether those claims were governed solely by domestic law.¹⁷²

64. Respondent also is mistaken when it claims that *Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain* (“**Bank Melli**”) supports its position that fork-in-the-road provisions bar arbitration only in cases where investors previously claimed an alleged breach of “international law obligations” before domestic courts.¹⁷³ The relevance of the decision in *Bank Melli* lies in the tribunal’s conclusion that requiring the exhaustion of local remedies was inconsistent with the applicable fork-in-the-road clause.¹⁷⁴ Contrary to what Respondent suggests,¹⁷⁵ the tribunal in *Bank Melli* was not referring to treaty violations when it concluded that “had the Claimants sought redress of the violations impugned here before Bahraini courts, the Tribunal would have been barred from ruling on such claims,”¹⁷⁶ but rather to the “violations of due process in the issue of administrative decisions” which Bahrain contended should have been referred to local courts.¹⁷⁷ Indeed, the tribunal in *Bank Melli* did not conclude that the fork-in-the-road provision would only be triggered by claims for a treaty violation; on the contrary, the tribunal found that the provision bars arbitration “when the investor has ‘primarily referred’ **the dispute** to the courts of the host State.”¹⁷⁸

¹⁷¹ CAFTA-DR (CL-1), Art. 10.18.4.

¹⁷² Christoph H. Schreuer, *Calvo’s grandchildren: the return of local remedies in investment arbitration*, 1 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 1 (2005) (CL-211), at 16 (explaining that fork-in-the-road clauses and the local remedies rule are incompatible because, under a fork-in-the-road provision “the claimant has an irreversible choice between domestic courts and international arbitration,” and thus “any step by the claimant to take the dispute to the national courts would rule out subsequent access to the international forum.”).

¹⁷³ Reply on Jurisdiction ¶ 90 n. 88.

¹⁷⁴ Counter-Memorial on Jurisdiction ¶ 36 (citing *Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain*, PCA Case No. 2017-25, Award dated 9 Nov. 2021 (CL-126) ¶¶ 526-528 (finding “no basis in the BIT or in international law to impose a general requirement to pursue local remedies for an investor to bring a treaty claim” where the treaty contained a fork-in-the-road clause, because “[T]he Contracting Parties have chosen to bar recourse to arbitration when the investor has ‘primarily referred’ the dispute to the courts of the host State and local proceedings are pending or a final judgment has been rendered. Thus, had the Claimants sought redress of the violations impugned here before Bahraini courts, the Tribunal would have been barred from ruling on such claims.”).

¹⁷⁵ Reply on Jurisdiction ¶ 90 n. 88.

¹⁷⁶ *Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain*, PCA Case No. 2017-25, Award (9 Nov. 2021) (CL-126) ¶ 528.

¹⁷⁷ *Id.* ¶ 509.

¹⁷⁸ *Id.* ¶ 528 (emphasis added).

65. Respondent is also not assisted by *Corona Materials*.¹⁷⁹ The issue before the tribunal in *Corona Materials* was whether the claimant could validly claim a denial of justice without having exhausted specific administrative remedies that respondent maintained were necessary prerequisites to the denial of justice claim, as part of its merits defense.¹⁸⁰ In that context, the parties appear to have addressed in their post-hearing briefs whether local remedies would have been prohibited by Annex 10-E of the CAFTA-DR¹⁸¹—the fork-in-the-road provisions only applicable to U.S. investors—and the tribunal concluded that if the investor “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.”¹⁸² This tribunal’s conclusory analysis does not address the applicable question here: whether the exhaustion of local remedies is consistent with the CAFTA-DR’s dispute resolution provisions, including fork-in-the-road, waiver, and the three-year prescription period.

66. Finally, Respondent seeks to bypass the incompatibility issue entirely, asserting that “CAFTA-DR allows Claimants 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.”¹⁸³ The availability of UNCITRAL arbitration, however, does not cure the fundamental flaw in Respondent’s position: an exhaustion requirement is incompatible with Respondent’s consent to ICSID arbitration in the CAFTA-DR and its carefully-negotiated and detailed dispute resolution provisions. If accepted, Respondent’s objection would deprive Claimants of their chosen forum under the CAFTA-DR (*i.e.*, ICSID arbitration).¹⁸⁴ Respondent’s acknowledgment that no exhaustion requirement would apply in an UNCITRAL arbitration under the Treaty, moreover, highlights that its consent to arbitration in the Treaty was *not* conditioned on exhaustion of local remedies and that there is no overriding, critical public policy of Honduras at issue here, since it has acknowledged that it has accepted to arbitrate claims

¹⁷⁹ Reply on Jurisdiction ¶ 88.

¹⁸⁰ *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on Expedited Preliminary Objections by the Defendant under Article 10.20.5 of DR-CAFTA dated 31 May 2016 (**RL-172**) ¶¶ 248 *et seq.*

¹⁸¹ *Id.* nn. 258, 259.

¹⁸² *Id.* ¶ 269 (emphasis in original).

¹⁸³ Reply on Jurisdiction ¶ 96.

¹⁸⁴ Counter-Memorial on Jurisdiction n. 137.

for violations of the Treaty (under a different set of arbitration rules) without requiring exhaustion of local remedies.

(d) Honduras Should Be Estopped From Relying on the Declaration in Decree 41-88 to Negate its Consent to Arbitrate this Dispute

67. As Claimants explained in the Counter-Memorial, it was only in 2023, under President Castro's administration, that Honduras unearthed Decree 41-88. Because Honduras did not raise the Decree as having purportedly conditioned its consent to arbitration for years after its adoption—despite being party to several ICSID arbitrations—and has raised it only belatedly and inconsistently thereafter, it should be estopped from relying on the Decree in this arbitration.¹⁸⁵ Estoppel derives from the international law principle of good faith which prohibits Respondent from raising arguments now that contradict its prior acts, including its consenting to ICSID arbitration in numerous instruments that do not include an exhaustion requirement and, to the contrary, contain provisions that are incompatible with such a requirement, as well the lack of any evidence that it previously raised the exhaustion of local remedies in the ICSID cases brought against it.¹⁸⁶

68. Respondent denies that it is estopped from raising the jurisdictional objection,¹⁸⁷ and attempts to address Claimants' showing in the Counter-Memorial that its current position on Decree 41-88 is new.¹⁸⁸ Specifically, Claimants explained that Respondent historically failed to raise the Declaration to demand the exhaustion of local remedies in any of its prior ICSID cases, and, prior to the wave of cases filed against it starting in 2023, did not otherwise argue that Decree 41-88 established a jurisdictional condition.¹⁸⁹ Respondent responds that it raised an objection in

¹⁸⁵ Counter-Memorial ¶¶ 43-52.

¹⁸⁶ Counter-Memorial ¶ 47 n. 113. Honduras does not appear to have raised this objection in any case prior to 2023, including *Inversiones Continental (Panamá), S.A. v. Republic of Honduras*, ICSID Case No. ARB/18/40, which was registered on 30 Oct. 2018. See ICSID Case Details for *Inversiones Continental (Panamá), S.A. v. Republic of Honduras*, ICSID Case No. ARB/18/40 (**Exh. C-248**).

¹⁸⁷ Reply on Jurisdiction ¶¶ 99-102.

¹⁸⁸ Reply on Jurisdiction ¶¶ 97-102.

¹⁸⁹ Counter-Memorial on Jurisdiction ¶¶ 47-49. Honduras has invoked the Decree as a basis for a jurisdictional objection in the following four cases (in addition to the present one): (i) *JLL Capital S.A.P.I. de C.V. v. Republic of Honduras*, ICSID Case No. ARB/23/3 (filing preliminary objections pursuant to ICSID Arbitration Rule 41 on 18 Aug. 2023); (ii) *Autopistas Atlántico, S.A. de C.V. and others v. Republic of Honduras*, ICSID Case No. ARB/23/10 (filing preliminary objections pursuant to ICSID Arbitration Rule 41(5) on 15 July 2023); (iii) *Honduras Próspera Inc., St. John's Bay Development Co. LLC, and Próspera Arbitration Center LLC v. Republic of Honduras*, ICSID Case No. ARB/23/2 (filing preliminary objections pursuant to Article 10.20.5 of CAFTA-DR on 7 Aug. 2024); and (iv) *Inversiones and Desarrollos Energéticos, S.A. v. Republic of Honduras*, ICSID Case No. ARB/23/40. The *Próspera* tribunal dismissed the objection *Próspera* (CL-201) ¶¶ 126, 139-140; the *JLL* and *Autopistas* tribunals

the *JLL* and *Autopistas* cases under ICSID Arbitration Rule 41 that the claims were manifestly without legal merit on the basis of non-compliance with the alleged exhaustion requirement in Decree 41-88, and that it “has claimed the need to exhaust local remedies” in other arbitrations.¹⁹⁰ Respondent further argues that “[t]he 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.”¹⁹¹

69. Respondent’s assertions miss the point. Respondent’s objection on this basis in *JLL* and *Autopistas* postdates by only a few months its initial assertion in *Próspera*, which it raised for the first time ever in the *Próspera* arbitration on 30 May 2023.¹⁹² As the *Próspera* tribunal confirms, Honduras did not alert ICSID of the alleged “condition” to its consent prior to that date.¹⁹³ Moreover, the principal significance of Respondent not having asserted in previous ICSID cases that Decree 41-88 implied an exhaustion requirement in its consent to arbitration is that it further evidences that Respondent did not previously consider that it had conditioned its consent to arbitration on the exhaustion of local remedies. Indeed, it is not credible that Respondent would not have objected on that basis in prior ICSID cases if it genuinely believed that the claimants in those cases had failed to comply with a condition of consent.

70. Further, Respondent argues that estoppel does not apply in this case because “Honduras has not engaged in any relevant and effective conduct that would allow Claimants to

denied Honduras’s objection under ICSID Article 41(5), holding that the issues were too complex to be decided in an expedited matter. See Lisa Bohmer, *ICSID Tribunal Dismisses Rule 41 Objection in Financial Services Dispute with Honduras*, INT’L. ARB. REP. (29 Dec. 2023) (**Exh. C-286**) (referring to the *JLL Capital* tribunal’s dismissal of Honduras’s Rule 41 objection based on exhaustion of local remedies); Lisa Bohmer, *ICSID Tribunal Rejects Honduras’ Argument that Claims Manifestly Lack Legal Merit Due to Investor’s Failure to Exhaust Local Remedies*, INT’L. ARB. REP. (5 Apr. 2024) (**Exh. C-287**) (referring to the *Autopistas del Atlántico* tribunal’s decision in the same line).

¹⁹⁰ Reply on Jurisdiction ¶ 98.

¹⁹¹ Reply on Jurisdiction ¶ 98.

¹⁹² *Próspera* (CL-201) ¶ 56 (“It appears that Honduras invoked the Exhaustion Requirement in ICSID proceedings for the first time in a letter to the Centre dated 30 May 2023, in which it requested ICSID to dismiss Claimants’ claims in these proceedings on the grounds that the Exhaustion Requirement constituted a ‘*Cláusula de Reserva*’.”).

¹⁹³ *Próspera* (CL-201) ¶ 52 (finding that “a paragraph buried within the transcription of the Convention in the Decreto – inserted between the final article and the signatures – does not seem to be the most transparent way to communicate to the international community that Honduras is exercising its right under Article 26; furthermore, there is **no evidence in the record that Honduras notified this requirement to ICSID**; in fact, ICSID registered *Decreto* 41-88 in Document ICSID/8-F, titled ‘Legislative or Other Measures Relating to the Convention (Article 69 of the Convention)’ rather than in Document ICSID 8-D, which is used by ICSID to, *inter alia*, register notifications about requirements to exhaust local remedies, such as those made by Israel, Costa Rica and Guatemala.”) (emphasis added). See also, Counter-Memorial on Jurisdiction ¶¶ 45-46.

clearly and unambiguously rely on the waiver of the prior exhaustion of local remedies requirement for their consent to ICSID arbitration.”¹⁹⁴ Notably, Respondent’s position presupposes that Claimants should have assumed that there was an exhaustion requirement that Respondent was waiving, whereas in reality there was no such waiver because there was no such requirement.

71. Respondent additionally states that “the defences raised by Honduras in the arbitrations were not directed at Claimants, who therefore could not have relied on such alleged statements.”¹⁹⁵ Respondent misstates the applicable legal standard. Under the well-established doctrine of estoppel in international law, it is not necessary for a State’s inconsistent statements or conduct to have been directed specifically at the party invoking estoppel.¹⁹⁶ What matters is that the State adopted a position, through words, conduct or silence, that is incompatible with the one it now seeks to assert—and that the reversal would prejudice the other party or undermine legal certainty.¹⁹⁷ As Vice-President Alfaro explained in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, “inconsistency of conduct or opinion on the part of the State to prejudice another is incompatible with good faith,” and “the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly

¹⁹⁴ Reply on Jurisdiction ¶ 100.

¹⁹⁵ Reply on Jurisdiction ¶¶ 101-102. Notably, the authority Respondent relies on does not discuss the estoppel principle under international law, through the good faith principle. See L. Díez-PICAZO, *THE DOCTRINE OF PROPER ACTS* (1962) (RL-119), at 206 (discussing a civil law concept under domestic law as opposed to the estoppel principle under international law).

¹⁹⁶ See, e.g., *Nuclear Tests* (Australia v. France), ICJ REPORTS 1974, Judgment dated 20 Dec. 1974 (CL-222), at 269 (holding that France assumed international legal obligations not to continue nuclear testing on the basis of its unilateral declarations, and emphasizing that “to have legal effect, there was no need for [France’s] statements to be addressed to a particular State, nor was acceptance by any other state required.”).

¹⁹⁷ *Documents of the fifteenth session including the report of the Commission to the General Assembly, in II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1963* (1964) (CL-219), at 40 (“The principle of *préclusion* (estoppel) is a general principle of law. . . Under this principle a party is not permitted to take up a legal position that is in contradiction with its own previous representations or conduct, when another party has been led to assume obligations towards, or attribute rights to, the former party in reliance upon such representations or conduct . . . the foundation of the principle is essentially good faith and fair dealing, which demand that a party shall not be able to gain advantage from its own inconsistencies (*allegans contraria non audiendus est*).”); IC MACGIBBON, *Estoppel in International Law* (1958) 7 ICLQ 468 (CL-220), at 468 (“Underlying most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation.”); Andreas Kulick, *About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, in 27 THE EUROPEAN JOURNAL OF INT’L LAW 1 (2016) (RL-92), at 109-111; *Nova Scotia Power v. Venezuela* (I), UNCITRAL, Award on Jurisdiction dated 22 Apr. 2010 (RL-77) ¶ 141 (explaining that the doctrine of estoppel’s “applicability has long been recognized in investment arbitration. . . the doctrine can be applied to the behaviour of States in judicial or arbitral proceedings. In these situations, **if there is an inconsistency between a State’s present claims or allegations and its previous conduct, such divergence violates the principle of good faith**, to which all the State’s action must submit.”) (emphasis added).

contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non ilaet*).”¹⁹⁸ As Bin Cheng also explains, the principle of good faith prohibits a State from “blowing hot and cold”—affirming a position at one time and denying it at another.¹⁹⁹ Respondent’s prior conduct and representations in other arbitrations stand in direct contradiction to the position it now seeks to advance—and the doctrine of estoppel bars it from doing so.

2. In Any Event, Exhausting Local Remedies Is Not Required Because It Would Be Futile

72. Even assuming *arguendo* that Respondent did require the exhaustion of local remedies as a condition of its consent to arbitrate this dispute—which it clearly did not—Claimants would not be required to exhaust local remedies before submitting their claim to arbitration, because doing so would be a futile exercise.

73. Claimants explained in their Counter-Memorial that any requirement to exhaust local remedies is not absolute and that local remedies need not be exhausted when there is no reasonable possibility of effective redress,²⁰⁰ a standard that Respondent does not dispute.²⁰¹ As

¹⁹⁸ *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), ICJ REPORTS 1962, Judgment on the Merits, Separate Opinion of Vice-President Alfaro dated 15 June 1962 (CL-224), at 42; *see also id.* at 39-40; *Argentina-Chile Frontier Case* (Argentina v. Chile), UNRIAA Vol XVI, Award dated 9 Dec. 1966 (CL-225), at 164 (endorsing Judge Alfaro’s opinion).

¹⁹⁹ *See* Bin Cheng, *Chapter 5 – Other Applications of the Principle*, in GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1987) (CL-223), at 141-142 (quoting *Cave v. Mills* (1862) 7 Hurlstone & Norman 913, 927).

²⁰⁰ *See* Counter-Memorial on Jurisdiction ¶¶ 54-55. *See, e.g., Ambiente Ufficio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 Feb. 2013 (CL-187) ¶ 620 (“Given the jurisprudence of the Supreme Court in Argentina and in light of the circumstances prevailing in the present case the Tribunal concludes that having recourse to the Argentine domestic courts and eventually to the Supreme Court would not have offered Claimants a reasonable possibility to obtain effective redress from the local courts and would have accordingly been futile.”); *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award dated 20 Sept. 2021 (CL-228) ¶ 562 (“[T]he exhaustion rule is subject to two categories of exceptions: an aggrieved alien is only required to pursue remedies - which are reasonably available (i), and - which have an expectation that they will be effective, *i.e.* the measure or appeal has a reasonable prospect of correcting the judicial wrong committed by the lower courts (ii).”).

²⁰¹ *See* Reply on Jurisdiction ¶ 107. The sources Respondent invokes are either inapposite or confirm the standard for futility articulated by Claimants. *See, e.g., Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction dated 22 Dec. 2015 (RL-170) ¶ 98 (Respondent citing the case for the proposition that Claimants must show “a manifest waste of effort towards a self-evident, even pre-ordained, lack of success” to prove futility, whereas the issue in the case concerned whether the claimant had an obligation to undertake amicable settlement efforts, not the exhaustion of local remedies, and the tribunal found that the applicable standard was higher in that specific context: “[i]n the context of an express waiting period during which the parties are required to undertake amicable settlement efforts, the doctrine of futility faces a particular high threshold of proof.”); *ICS Inspection and Control Services Ltd. v. The Argentine Republic*, CPA Case No. 2010-9, Decision on Jurisdiction dated

Claimants also explained, the Tribunal does not need to analyze the merits of Claimants' claims or their prospects of success in order to rule on futility; it merely needs to consider whether Respondent offers an adequate system of judicial protection and whether Claimants would have a reasonable possibility of redress by pursuing local remedies.²⁰²

74. Claimants explained that this standard is amply met in the present case, including because (i) the Honduran judiciary is plagued by serious problems; (ii) the current administration has taken steps to control the judiciary; and (iii) Claimants would be unable to obtain an impartial and fair adjudication of their claims given that the judges and administrative bodies that would oversee their claims are beholden to the State.²⁰³ Respondent provides no real answer to these points, making instead general unsupported allegations, and remaining silent on the facts that prove the futility of local remedies, as further explained below.

75. **First**, Honduras fails to refute the fact that its judicial system is plagued by serious problems, a lack of independence, and inordinate delays. Respondent's replies merely confirm the critically deficient state of the Honduran judiciary:²⁰⁴

- Respondent attempts to discredit the significance of its own "National Plan for the Eradication of Judicial Delay" on the grounds that it does not reflect the current state of the Honduran judiciary.²⁰⁵ This is unavailing. This document is an official plan published recently, in 2024, well into the current Administration's term. The National Plan, moreover, expressly acknowledges that **judicial delay "undermines the basis of**

10 Feb. 2012 (**RL-83**) n. 296 (confirming that "[t]he test is not whether a successful outcome is likely or possible, but whether the municipal system of the respondent State is reasonably capable of providing effective relief"); *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award dated 2 July 2013 (**RL-163**) ¶ 8.1.10 (confirming that the burden on a party alleging futility is to show that "recourse to the Contracting State's courts would be futile or ineffective.").

²⁰² See Counter-Memorial on Jurisdiction ¶¶ 53-55. Respondent appears to suggest that the Tribunal should assess whether Claimants' claims are meritorious as a necessary step to rule on futility. See Reply on Jurisdiction ¶ 107 n. 110. The authorities relied on by Respondent do not support this contention. See Borzu Sabahi *et al. Exhaustion of Local Remedies*, in *INVESTOR-STATE ARBITRATION* (Borzu Sabahi *et al.* eds., 2019) (**RL-40**), at 436 (citing the exposition of the standard by Gerald Fitzmaurice: "Lauterpacht propounded the criterion of there being a 'reasonable possibility' that a remedy would be afforded, as being the test of effectiveness—or in other words he suggested that no means of recourse can be regarded as futile from the effectiveness standpoint unless there does not appear to be even a reasonable possibility that it will afford an effective remedy. This test is acceptable provided it is borne in mind that what there must be a reasonable possibility of is the existence of a possibly effective remedy, and that **the mere fact that there is no reasonable possibility of the claimant obtaining that remedy, because his case is legally unmeritorious, does not constitute the type of absence of reasonable possibility which will displace the local remedies rule.**") (emphasis added, italics in the original)).

²⁰³ Counter-Memorial on Jurisdiction § II.A.2.

²⁰⁴ Reply on Jurisdiction ¶ 108.

²⁰⁵ Reply on Jurisdiction ¶ 108 (citing *National Plan to Eradicate Judicial Delay*, PODER JUDICIAL dated 11 Mar. 2024 (**Exh. R-81**)).

effective judicial remedy, constitutes a barrier to guarantee that right[,] and may lead to denial of justice.”²⁰⁶

- Furthermore, Respondent does not deny the veracity of the statements made by the Presiding Justice of Honduras’s Supreme Court regarding the presence of corruption networks and connections with organized crime and drug dealers in the judiciary, as detailed by Claimants in the Counter-Memorial.²⁰⁷ Instead, Respondent tries to discredit the U.S. Department of State’s Investment Climate Report on Honduras—which the Presiding Justice was commenting on—in an attempt to deflect attention from her statements.²⁰⁸ This diversionary tactic is unavailing, particularly considering that Claimants’ citations was to the Justice’s statements, and not on the Report to which she was responding.
- Respondent also fails in its attempt to downplay the overwhelming evidence regarding legal professionals’ perception of corruption in the Honduran judiciary, as described in the March 2025 report issued by the Center for the Study of Democracy. While Respondent focuses on the statement noting “hope for improvements,” it ignores the context surrounding that comment, which emphasized that improvements depend upon “justice operators uphold[ing] their ethical and professional principles,” which is aspirational, given the present state of the judiciary, which is described as “a network of impunity that extends from the lowest levels to the highest spheres.”²⁰⁹ In fact, the World Justice Project’s Index, which Respondent cites to show that Honduras’s rule of law rating has improved,²¹⁰ indicates that corruption remains rampant in the judicial branch²¹¹ and that the civil justice system is not free from corruption, improper government influence, or unreasonable delay.²¹² Indeed, in 2024, Honduras ranked 118 out of 142 nations for adherence to the rule of law in civil justice, making it one of the worst-ranked countries in the world for “resolv[ing] grievances peacefully and effectively through the civil justice system.”²¹³

²⁰⁶ *National Plan to Eradicate Judicial Delay*, PODER JUDICIAL dated 11 Mar. 2024 (**Exh. R-81**), at 12.

²⁰⁷ See Counter-Memorial on Jurisdiction ¶ 56.

²⁰⁸ Reply on Jurisdiction ¶¶ 108-09.

²⁰⁹ See Reply on Jurisdiction ¶ 108 (citing Center for the Study of Democracy, *Perception of Legal Professionals on Corruption in the Judicial System of Honduras* dated Mar. 2025 (**Exh. C-291**), at 45).

²¹⁰ See Reply on Jurisdiction ¶ 108 (citing World Justice Project, Honduras, Country Profile (2024) (**Exh. R-79**)).

²¹¹ See World Justice Project, *World Justice Project Rule of Law Index 2024* (**Exh. C-355**), at 16, 94 (measuring whether “judges and judicial officials refrain from soliciting and accepting bribes to perform duties or expedite processes, and whether the judiciary and judicial rulings are free of improper influence by the government, private interests, or criminal organizations” and indicating that for Honduras’s judiciary, the score for the absence of corruption is 0.37, on a scale where 0 signifies the lowest possible score and 1 the highest).

²¹² See World Justice Project, *World Justice Project Rule of Law Index 2024* (**Exh. C-355**), at 18, 94 (measuring, among other factors, whether “the civil justice system is free of bribery and improper influence by private interests;” whether “the civil justice system is free of improper government or political influence;” and “whether civil justice proceedings are conducted and judgments are produced in a timely manner without unreasonable delay” when evaluating civil justice in Honduras and indicating that Honduras received an overall score of 0.41, on a scale where 0 signifies the lowest possible score and 1 the highest).

²¹³ See World Justice Project, *World Justice Project Rule of Law Index 2024* (**Exh. C-355**), at 34, 94.

76. Respondent, moreover, fails to rebut the fact that, given the well-documented delays in its judicial system, it would have been impossible for Claimants to exhaust local remedies within the CAFTA-DR's three-year prescription period.²¹⁴ As the evidence shows, the Honduran legal system is plagued by delays, with recent reports finding tens of thousands of cases to be in a state of judicial default [*mora judicial*], with over 20,000 cases being over ten years old.²¹⁵ Any exhaustion requirement that is not timebound, as Respondent alleges the Declaration imposes, would render the timely filing of arbitration claims under the CAFTA-DR impossible. Respondent's silence on this point is telling, and serves to underscore that it lacks any basis to contest the applicability of the futility exception in this case.²¹⁶

77. **Second**, Respondent fails in its attempts to contest the fact that the current administration has actively taken steps to control the judiciary. Respondent, in particular, asserts that (i) the enactment of Decree 74-2022 which modified the nomination process for Supreme Court justices—is part of a plan to “strengthen institutions and bring greater independence and transparency to the judiciary;” (ii) the appointment of the Court justices was made by decision of the National Congress and “preceded by negotiations and deliberations,” which was “all in strict compliance with the Constitution;” (iii) statements questioning the credibility of and concentration of power by the Presiding Justice of Honduras's Supreme Court do not demonstrate that there is no reasonable likelihood of redress for Claimants;²¹⁷ and (iv) Mr. Zelaya's statements (*i.e.*, that he had been a protagonist in shaping the Court) are weakened by the enactment of Decree 74-2022.²¹⁸

78. Far from dispelling concerns, Respondent's efforts to reframe the administration's actions reinforce that the judiciary lacks independence:

- Respondent fails to discredit Claimants' contention that Decree 74-2022 was widely interpreted as an attempt by President Castro to stack the Court in her favor.²¹⁹ It is undisputed that Decree 74-2022 modified the nomination process for Supreme Court

²¹⁴ CAFTA-DR (CL-1) Article 10.18.1 (“No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.”).

²¹⁵ See Counter-Memorial on Jurisdiction ¶ 56; see generally *National Plan to Eradicate Judicial Delay*, PODER JUDICIAL (Jan. 2019) (Exh. R-81).

²¹⁶ See Counter-Memorial on Jurisdiction § II.A.2.

²¹⁷ Reply on Jurisdiction ¶ 109.

²¹⁸ Reply on Jurisdiction ¶ 109.

²¹⁹ See Counter-Memorial on Jurisdiction ¶ 58 (citing *The Castro-Zelayas seek to control the Supreme Court of Honduras*, EXPEDIENTE PÚBLICO dated 25 Jan. 2023 (Exh. C-294)).

justices.²²⁰ Also unrebutted are the following facts: (i) the three political parties brokered an agreement to allot all of the seats on the Court amongst themselves;²²¹ (ii) the President of the National Congress, Mr. Luis Redondo—a member of President Castro's coalition—stated that the Nominating Board's ranking was “irrelevant” and that Congress would choose the 15 justices;²²² and (iii) the aunt of President Castro's son-in-law and member of the Libre party was appointed Presiding Justice of the Supreme Court, raising clear concerns over the Supreme Court's independence.²²³

In fact, after the selection and appointment of the Supreme Court justices, in April 2023, the Center for the Study of Democracy issued a report evaluating the process put in place by Decree 74-2022.²²⁴ Among other practices, it condemned limiting the election of justices to only those candidates who were chosen by political parties.²²⁵ The report noted how such a limitation resulted in “a game of interests rather than one of objective discussion regarding the qualifications of the candidates” and the “sidelin[ing of] individuals of proven integrity, competence, and suitability, as they were neither considered nor selected for the composition of the Court,” which, the report highlighted, provides evidence of “the ongoing risks posed by partisan interests influencing the new Court.”²²⁶ Further, notwithstanding the fact that the Honduran Constitution sets out, in general terms, how the National Congress should proceed in electing candidates from the list provided by the Nominating Board, the report

²²⁰ See Counter-Memorial on Jurisdiction ¶ 58 (“In 2022, however, Respondent **enacted Decree 74-2022, modifying the nomination process**, which was widely interpreted as an attempt by President Castro to stack the Court in her favor.”) (emphasis added); Reply on Jurisdiction ¶ 109 (“Contrary to the suggestion of Claimants, Decree 74-2022 does not modify the method of selection of judges, defined by the Constitution, **but only modifies the process for nominating candidates to the Nominating Board.**”) (emphasis added).

²²¹ Yarely Madrid, *Corruption and nepotism. Learn of the history of the justices of the new Supreme Court of Honduras*, EXPEDIENTE PÚBLICO dated 17 Feb. 2023 (**Exh. C-295**).

²²² *The Castro-Zelayas seek to control the Supreme Court of Honduras*, EXPEDIENTE PÚBLICO dated 25 Jan. 2023 (**Exh. C-294**).

²²³ *The Castro-Zelayas are copying the authoritarian manual from Daniel Ortega and Rosario Murillo?*, EXPEDIENTE PÚBLICO dated 20 Mar. 2023 (**Exh. C-356**) (“The last key nomination for the Libre Party was to the Supreme Court of Justice (CSJ). Amid irregularities in the early hours of February 17, Rebecca Lizette was named president of the CSJ. In addition to being a supporter of the governing party, Lizette has a history of money laundering and her daughter has been linked to Juan Matta-Ballesteros, a former Honduran drug lord with ties to the Medellín Cartel who is currently detained in the United States.”); *Honduras elected the 15 new justices of the Supreme Court*, EXPEDIENTE PÚBLICO dated 16 Feb. 2023 (**Exh. C-357**).

²²⁴ Center for the Study of Democracy, *Final Oversight Report on the Selection and Appointment Process of Justices of the Supreme Court: Lessons Learned and Recommendations for Future High-Level Public Official Selection Processes* dated 23 Apr. 2023 (**Exh. C-358**).

²²⁵ Center for the Study of Democracy, *Final Oversight Report on the Selection and Appointment Process of Justices of the Supreme Court: Lessons Learned and Recommendations for Future High-Level Public Official Selection Processes* dated 23 Apr. 2023 (**Exh. C-358**), at 18 (“In making the election of the justices on the basis of a roster, the National Congress limited the possibility of holding individual votes on candidates who were not favored by the political parties. During the voting process, there was a complete absence of individualized discussion regarding the 45 candidates selected by the Nominating Board.”).

²²⁶ Center for the Study of Democracy, *Final Oversight Report on the Selection and Appointment Process of Justices of the Supreme Court: Lessons Learned and Recommendations for Future High-Level Public Official Selection Processes* dated 23 Apr. 2023 (**Exh. C-358**), at 17.

characterizes Honduras's "lack [of] clear and specific provisions regarding the procedure to be followed during the [justices'] selection process" as "bad practice."²²⁷

- Tellingly, Respondent does not rebut the concerns expressed by the Inter-American Commission on Human Rights and the Center for the Study of Democracy regarding the concentration of power that Ms. Rebeca Lizette Ráquel Obando—the aunt of President Castro's son-in-law—holds as the Presiding Justice of Honduras's Supreme Court.²²⁸ Rather, Honduras simply asserts that these concerns do not demonstrate "that there is no reasonable likelihood of redress for Claimants."²²⁹ Respondent's disregard of these facts is revealing. The facts cited further reinforce the lack of judicial independence of Honduras's judiciary and the conclusion that Claimants would not receive impartial redress—particularly given that the Presiding Justice of the Supreme Court is the aunt of President Castro, the architect of the New Energy Law.
- Respondent likewise fails to rebut the statements made by the former President of Honduras and husband and advisor to President Castro, Mr. Manuel Zelaya, regarding his role as protagonist in shaping the Court.²³⁰ Instead, Honduras asserts that these statements "are undermined by the very meaning of Decree 74-2022, which sought to bring greater independence and transparency to the Honduran judiciary."²³¹ That the alleged purpose of Decree 74-2022 was to enhance the judiciary's "independence" and "transparency" does not obscure the reality that the Court is controlled by the current administration, especially when the ruling Libre party, which President Castro's husband leads,²³² reached an agreement with the Liberal and National parties to divide the 15 seats on the Court amongst themselves.²³³

79. **Finally**, contrary to Respondent's suggestion, Claimants futility claim is not an attempt to "fabricate a distorted narrative" or to "use their procedural inactivity to their own advantage by arguing the futility of unexercised local remedies."²³⁴ As explained in the Counter-Memorial²³⁵ and herein, given the systemic dysfunction and lack of independence that plague

²²⁷ Center for the Study of Democracy, *Final Oversight Report on the Selection and Appointment Process of Justices of the Supreme Court: Lessons Learned and Recommendations for Future High-Level Public Official Selection Processes* dated 23 Apr. 2023 (**Exh. C-358**), at 17; see also Constitution of Honduras of 1982 with Amendments through 2013 ("**Constitution of Honduras**") (**Exh. R-15**), Arts. 311-312.

²²⁸ See Breidy Hernández, *Judicial Independence in Honduras: A System Under Political Control*, CRITERIO.HN dated 16 Nov. 2024 (**Exh. C-296**).

²²⁹ Reply on Jurisdiction ¶ 109.

²³⁰ See *Mel Zelaya hopes that the new Court will overturn the re-election*, LA PRENSA dated 20 Feb. 2023 (**Exh. C-300**).

²³¹ Reply on Jurisdiction ¶ 109.

²³² Libre Party, *Party Authorities* (2025) (**Exh. C-359**) (noting that the party's national coordinator is Mr. Jose Manuel Zelaya Rosales, husband and advisor to President Xiomara Castro).

²³³ See Yarely Madrid, *Corruption and nepotism. Learn of the history of the justices of the new Supreme Court of Honduras*, EXPEDIENTE PÚBLICO dated 17 Feb. 2023 (**Exh. C-295**).

²³⁴ See Reply on Jurisdiction ¶ 112.

²³⁵ See generally Counter-Memorial on Jurisdiction § II.A.2.

Honduras's judiciary, Claimants could not have obtained an effective remedy through local proceedings. This is especially the case given that Claimants' recourse would have involved presenting their claims to the very same administrative bodies that continue to breach Honduras's commitments to Pacific Solar.²³⁶ Tellingly, Honduras fails to respond to Claimants' explanation in the Counter-Memorial that Honduras's orchestrated smear campaign against solar generators like Pacific Solar who have sought recourse through international arbitration, and rejected the terms outlined in the Government's "offers," relegating them to "**enemies of the nation**," further confirms bias of the State and the futility of commencing local proceedings.²³⁷ This campaign has included the Government targeting Claimants by threatening unwarranted, improper and intrusive inspections of Pacific Solar's operations.²³⁸

80. Since the filing of Claimants' Counter-Memorial, Honduras's conduct has further confirmed the futility of seeking local recourse in this case: ENEE filed a constitutional action against the Conciliation and Arbitration Law, which provides that the State can resolve its disputes through arbitration.²³⁹ Even though ENEE's constitutionality plea and the grounds for seeking it are highly questionable,²⁴⁰ if ENEE's claim is successful, it would have far-reaching effects, retroactively wiping out all arbitration clauses included in agreements concluded by the State with ENEE and other State entities—including the Agreements at issue in this arbitration.²⁴¹

²³⁶ See Counter-Memorial on Jurisdiction ¶ 60 n. 151 (noting that "the relevant administrative bodies before which Pacific Solar could potentially bring its claims are ENEE, SEFIN, and SERNA").

²³⁷ See Counter-Memorial on Jurisdiction ¶¶ 61-62; Memorial §§ IV.B.2(c), II.F.1(b). See also, ENEE, *Not all generators are enemies of the nation*, X (FORMERLY TWITTER) dated 27 June 2022 (**Exh. C-219**) ("**Not all generators are enemies of the nation, this week we will be announcing some of the generators that are willing to lower the costs of their contracts.**") (emphasis added); Minister Tejada, *Renegotiations Allow the State to Extinguish ICSID Proceedings*, X (FORMERLY TWITTER) dated 22 May 2024 (**Exh. C-93**) (where Minister Tejada publicly criticized Pacific Solar initiating an ICSID arbitration rather than accepting the Government's demand to lower the energy price under the PPA.).

²³⁸ See Letter from UFERCO to the Secretary of State of Energy dated 11 Apr. 2025 (**Exh. C-301**), in which the Honduran anti-corruption agency requested support from the Department of Energy to assist with inspections of photovoltaic plants, with such inspections to be held at the end of April.

²³⁹ *Honduran Chambers of Commerce Defend Arbitration Law Following Unconstitutionality Challenge Promoted by the State Energy Company*, CENTRO AMÉRICA 360° dated 30 May 2025 (**Exh. C-351**); Unconstitutionality Complaint Filed by ENEE dated 30 Jan. 2025 (**Exh. C-347**).

²⁴⁰ ENEE argues that a law passed by the Honduran Government in 2000 is unconstitutional because the Honduran Constitution allows individuals (but not expressly corporations or other entities) to arbitrate their disputes. It also argues that ENEE has entered into agreements with arbitration clauses that are harmful for the State. See Unconstitutionality Complaint Filed by ENEE dated 30 Jan. 2025 (**Exh. C-347**), at 2, 10.

²⁴¹ Unconstitutionality Complaint Filed by ENEE dated 30 Jan. 2025 (**Exh. C-347**), at 15.

81. In response to Claimants' explanation that it would be futile to bring administrative proceedings before the authorities that have ignored Claimants' attempts to settle the dispute for years and continue to breach Honduras's commitments, Respondent advances a contradictory argument: that the fact that Claimants did not present the claims submitted before this Tribunal to Honduras's courts shows "total passivity," but that "the claims that Claimants have chosen to bring in this arbitration are clearly of a contractual nature of which the parties have been aware and [have been] in discussion since the commencement of the commercial operation of the Nacaome I Plant."²⁴² But the conclusion Respondent seeks to draw simply does not follow.

82. When asserting that Respondent has ignored attempts to settle the dispute for years, Claimants were referring to the claims raised in this arbitration, which were notified to Honduras over three years ago. In any case, Respondent raises legally and factually irrelevant and incorrect allegations on the nature of the Agreements and the origin of the dispute, recycled from other jurisdictional objections.²⁴³ As explained in Sections IV.A and IV.B, Claimants' claims arise from Honduras's sovereign acts in breach of the Treaty and the Agreements—claims which only arose following the State's promulgation of the New Energy Law.

83. In conclusion, even assuming *arguendo* that Respondent required the exhaustion of local remedies as a condition of its consent to arbitration in this case—which it has not done—local remedies would be futile, and therefore, Claimants are not required to exhaust them. Claimants have made a convincing showing that there is no effective means of redress in Honduras, amply meeting the applicable standard for a showing of futility.

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

84. It is uncontroversial that the MFN clause in Article 10.4 of the CAFTA-DR entitles Claimants to invoke substantive treaty protections available to investors from other countries, including the umbrella clause. Accordingly, as Claimants explained in their Memorial on the Merits and Counter-Memorial on Jurisdiction, pursuant to Article 10.4 of the Treaty, Claimants are entitled to invoke the umbrella clauses in the Switzerland-Honduras BIT and Germany-Honduras BIT, which constitute more favorable treatment than that provided under the CAFTA-

²⁴² Reply on Jurisdiction ¶¶ 112-113.

²⁴³ See Reply on Jurisdiction ¶ 113 (*citing* Counter-Memorial on Jurisdiction ¶ 60 n. 152).

DR.²⁴⁴ Honduras insists in its Reply on Jurisdiction that Claimants cannot rely on the MFN clause because (i) it cannot be used to import “more favorable substantive clauses” such as the umbrella clause, and (ii) the procurement carve-out for MFN treatment contained in Article 10.13(5)(a) applies to this case.²⁴⁵ These arguments are baseless.

85. As explained below, the CAFTA-DR's MFN provision extends to substantive treaty provisions and does not require a showing of discrimination between Claimants and an actual investor (**Section 1**); and the CAFTA-DR's Procurement Carve-Out does not apply to the present dispute, which concerns Honduras's breach of obligations under the Agreements, not the process by which those Agreements were obtained (**Section 2**).

1. MFN Treatment Extends to Substantive Treaty Protections, Including the Umbrella Clause in Third-Party BITs

86. Article 10.4 of the CAFTA-DR provides that “[e]ach 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.” As Claimants explained in the Counter-Memorial:

- The CAFTA-DR contains a broad-based MFN clause that applies to all “treatment,” without limiting its application to standards already included in the Treaty. Tribunals interpreting similarly broad MFN clauses have consistently held that the term “treatment,” in its ordinary meaning, encompasses access to more favorable substantive protections available under third-party treaties, including umbrella clauses.²⁴⁶

²⁴⁴ Memorial on the Merits ¶¶ 322-324; Counter-Memorial on Jurisdiction ¶ 64.

²⁴⁵ Reply on Jurisdiction ¶¶ 190-191. Respondent also objects to the order in which Claimants present their arguments. *Id.* ¶ 190. This has no bearing on their substance or outcome.

²⁴⁶ Counter-Memorial on Jurisdiction ¶¶ 71-73 (discussing *EDF Int'l S.A., et al., v. Argentina*, ICSID Case No. ARB/03/23, Award dated 11 June 2012 (**CL-8**) ¶¶ 932-933 (holding that the claimant could rely on the umbrella clause of a third-party BIT, and reasoning that to “ignore the MFN clause in [that] case would permit more favorable treatment to investors under third countries, which is exactly what the MFN Clause is intended to prevent[,]” and that to rule otherwise “would effectively read the MFN language out of the treaty.”); *id.* ¶ 935-936 (noting that any “divergence of opinion . . . with respect to application of MFN clauses” arises only with respect to whether an MFN clause reaches “jurisdictional and procedural terms of third-country treaties[.]”); Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 AM. J. INT'L L. 873 (2017) (**RL-99**), at 889 (describing the *EDF* case as reflective of the “**widely shared view** that the essential function of MFN clauses in investment treaties is to import treaty standards.”) (emphasis added); *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 (**CL-97**) ¶ 396 (ruling that the claimant could rely on the umbrella clause in a third-party BIT, and noting that MFN clauses apply to substantive treaty obligations, and it was therefore permissible to “[extend] the more favourable standard of protection granted by the ‘umbrella’ clause in either [the UK-Moldova BIT or the U.S.-Moldova BIT] into the BIT at hand.”); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 (**CL-70**) ¶¶ 103, 187 (accepting importing “the obligation to . . . fulfillment of contractual obligations” from another treaty.);

Claimants, moreover, explained that the cases advanced by Honduras in support of its erroneous narrow interpretation of the MFN clause were inapposite, because unlike the present dispute, these cases concerned (i) either narrowly-drafted MFN clauses that limited the provision to the matters governed by the underlying BIT,²⁴⁷ or (ii) investors' attempts to use MFN clauses to bypass dispute resolution provisions—an entirely distinct issue from importing substantive protections.²⁴⁸ Claimants also disagreed with

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Decision on Annulment dated 21 Mar. 2007 (CL-235) ¶ 64 (holding that “[t]he most-favoured-nation clause in Article 3(1) is not limited to attracting more favourable levels of treatment accorded to investments from third States only where they can be considered to fall within the scope of the fair and equitable treatment standard. Article 3(1) attracts any more favourable treatment extended to third State investments and does so unconditionally.”); *Consutel Group S.P.A. in liquidazione v. People's Democratic Republic of Algeria*, PCA Case No. 2017-33, Final Award dated 3 Feb. 2020 (CL-232) ¶¶ 356, 359 (allowing the claimant to invoke an umbrella clause in a third-party treaty and explaining that the MFN clause “**necessarily** implies that the Claimant can invoke **more favorable clauses included in bilateral treaties** concluded between Algeria and third countries.”) (translation by counsel, emphasis added); *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award dated 13 Sept. 2006 (RL-72) ¶ 92 (“In the absence of language or context to suggest the contrary, the ordinary meaning of ‘investments shall be accorded **treatment no less favourable** than that accorded to investments made by investors of any third State’ is that investor’s **substantive rights in respect of the investment are to be treated no less favourably than under a BIT between the host State and a third State**.”) (emphasis added); Campbell McLachlan *et al.*, *Treatment of Investors, in* INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2017) (RL-95) ¶ 7.308.

²⁴⁷ Counter-Memorial on Jurisdiction ¶ 76 (discussing *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award dated 21 July 2017 (CL-102) ¶ 884; *State Dvlp. Corp. VEB.RF v. Ukraine*, SCC Case No. V2019/088, Partial Award on Preliminary Objections dated 31 Jan. 2021 (RL-104) ¶ 254).

²⁴⁸ Counter-Memorial on Jurisdiction ¶¶ 77-78 (discussing Campbell McLachlan *et al.*, *Treatment of Investors, in* INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2017) (RL-95) ¶ 7.308 (emphasis added); ILC, *Draft Articles on Most-Favoured-Nation Clauses with Commentaries*, 2(2) Y.B. INT’L L. COMM’N (1978) (CL-233), at 23. See, e.g., *A11Y Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction dated 9 Feb. 2017 (RL-96) ¶¶ 94-95 (“The Claimant invokes this most-favored-nation clause to attract the **more favorable dispute resolution provision** found in the Netherlands-Czech BIT. The Tribunal is of the view that an MFN clause can, *a priori*, apply to dispute settlement.”) (emphasis added); *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction dated 8 Feb. 2005 (RL-67) ¶¶ 184, 191 (distinguishing between whether an MFN clause applies to dispute settlement procedures or to substantive protections, and holding that “the MFN provision of the Bulgaria-Cyprus BIT cannot be interpreted as providing **consent to submit a dispute** under the Bulgaria-Cyprus BIT to ICSID arbitration.”) (emphasis added); *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction dated 22 Oct. 2012 (RL-87) ¶¶ 448-450 (distinguishing between provisions that limit the “substantive scope of the provision for arbitration” and provisions that impose procedural conditions that claimant must meet before submitting to arbitration, and that “[t]he Tribunal therefore considers that the **special character of the provision for investor-State arbitration** . . . militate against attributing to Article 3 of the BIT the effect suggested by the Claimant[.]”) (emphasis added); *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction dated 24 Oct. 2011 (RL-16) ¶ 79 (“In the present case, it might be argued that the MFN clause requires that investors under the Argentina-Germany BIT be given MFN treatment during the conduct of an arbitration but that the MFN clause cannot create a **right to go to arbitration** where none otherwise exists under the BIT.”) (emphasis added); *but see Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award dated 22 Aug. 2011 (RL-81) ¶ 216 (“As applied to the German-Argentine BIT, then, **the outer limits** set by the *ejusdem generis* rule **are broad enough** to encompass international dispute resolution within the meaning of the Treaty’s MFN clauses.”) (emphasis added). *DS Construction FZCO v. Libya*, Paris Court of Appeal, Judgment dated 23 Mar. 2021 (RL-105) ¶¶ 101 (setting aside award and holding that the MFN provision of the underlying treaty could not be used to import the arbitrator appointment mechanism from another BIT concluded by Libya, as the applicable treaty did not mention the UNCITRAL Rules, and the MFN clause could not be used to “extend to the **procedural advantages of dispute settlement** provided for in other investment protection treaties.”) (emphasis added); Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 J. INT’L DISP. SETTLEMENT 97 (2011) (RL-79), at 97; Tony Cole, *The Boundaries of*

the U.S. non-disputing Party submission, which the Tribunal is not bound to follow and which is flatly contradicted by both the Treaty's text and consistent arbitral jurisprudence.²⁴⁹

- In accordance with Article 31(1) of the VCLT, a broad reading of the MFN clause comports with the general object and purpose of the CAFTA-DR to protect investors and their investments, as well as with the object and purpose of the MFN clause,²⁵⁰ which is to grant investors and their investments treatment no less favorable than the treatment accorded to investors from third States and their investments, including that provide by treaty protections.²⁵¹ The context of the MFN clause and the negotiating

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

²⁴⁹ Counter-Memorial on Jurisdiction ¶ 74 (discussing Non-Disputing Party Submission of the United States of America ¶ 5.).

²⁵⁰ Counter-Memorial on Jurisdiction ¶ 80 (citing CAFTA-DR (CL-1), Art. 1.2 ("Objectives 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment, and transparency, are to: (a) encourage expansion and diversification of trade between the Parties; . . . (d) substantially increase investment opportunities in the territories of the Parties; . . ."); *id.* Preamble ("ENSURE a predictable commercial framework for business planning and investment; . . ."); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 (CL-70) ¶¶ 103-104 (finding that that the MFN obligation allowed for the invocation of substantive obligations in other BITs concluded by Chile, including the obligation to fulfil contractual obligations, because the MFN obligation "has to be interpreted in the manner **most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments**" and this interpretation "is in consonance with this purpose") (emphasis added)).

²⁵¹ Counter-Memorial on Jurisdiction ¶ 79 (citing RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2nd ed., 2012) (CL-82), at 206 ("The simple goal of MFN clauses in treaties is to ensure that the relevant parties treat each other in a manner at least as favourable as they treat third parties. The normal effect of an MFN clause in a BIT is to widen the rights of the investor."); Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, 111 AM. J. INT'L L. 914 (2017) (CL-230), at 922 ("[T]he objective of MFN clauses is to multilateralize, for beneficiary states and their investors, commitments the granting state makes in international agreements with third countries in respect of substantive standards of treatment."); Martins Paparinskis, *MFN Clauses and Substantive Treatment: A Law of Treaties Perspective of the 'Conventional Wisdom'*, in 112 AM. J. INT'L L. UNBOUND 49 (2018) (CL-231), at 50 (explaining that during the discussions of the ILC regarding the scope and application of MFN clauses "most states to address the issue endorsed, whether explicitly or by necessary implication, application of MFN clauses, to substantive rules in other treaties[.]"); David D. Caron & Esme Shirlow, *Most-Favored-Nation Treatment: Substantive Protection*, in *BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID* (Meg Kinnear *et al.* eds., 2015) (CL-244), at 400 ("As a substantive protection obligation, an MFN clause in a 'base treaty' operates by reference to any more favorable standards of protection accorded by the host State to investors of third party nationality – whether that treatment is accorded in practice ('comparator practice'), or is stipulated in a provision of a treaty between the host State and a third State (a 'comparator treaty')."). *See also UP and C.D Holding Internationale (formerly Le Cheque Dejeuner) v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction dated 3 Mar. 2016 (CL-245) ¶ 162 (confirming that "[t]he self-evident **purpose** of an MFN clause is to ensure that **treatment accorded to investors under one BIT will be no less advantageous than treatment accorded to investors under another BIT.**") (emphasis added); *Mr. Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 (CL-97) ¶ 388 (finding that "[a]ccording to the ordinary meaning of the text, the specific **purpose** of these clauses is . . . to provide investors with the **right to claim the application of any rule of law more favourable** than the provisions of the BIT" and further noting that it was possible to "extend[] the more favorable standard of protection granted by the 'umbrella' clause in either [the UK-Moldova BIT or the U.S.-Moldova BIT] into the BIT at hand." (emphasis added)); *White Industries Australia Ltd. v. The Republic of India*, UNCITRAL, Final Award dated 30 Nov.

history of the CAFTA-DR confirm that, in Article 10.13, the Parties deliberately chose to carve out certain matters like “non-conforming measures,” but did not exclude the importation of substantive protections.²⁵² Applying the interpretive maxim *expressio unius est exclusio alterius*, Claimants explained that this absence of a specific limitation in the MFN clause supports including substantive protections under the Treaty.²⁵³ Legal authority confirms as much.²⁵⁴

87. In its Reply on Jurisdiction, Respondent disagrees that the MFN clause allows Claimants to invoke more favorable provisions from third-party treaties, repeating its baseless argument from its Memorial that the Treaty Parties did not intend for the MFN clause to create new rights or standards not already present in the CAFTA-DR. Respondent also now contends that: (i) the phrase “in like circumstances” in the MFN clause requires a factual comparison of treatment accorded to Claimants or their investments within the host State’s territory and investors (and their investments) from other Treaty Parties or third-party States;²⁵⁵ (ii) its interpretation is confirmed by the object and purpose of the Treaty;²⁵⁶ and (iii) the cases cited by Claimants are distinguishable on account of different treaty language. Respondent’s arguments are wrong.

2011 (CL-145) ¶¶ 11.2.3-11.2.4 (reasoning that importing a more favorable substantive provision “achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause.”).

²⁵² Counter-Memorial on Jurisdiction ¶¶ 89-91.

²⁵³ Counter-Memorial on Jurisdiction ¶¶ 89-91.

²⁵⁴ *Grupo Energía Bogotá S.A. E.S.P. y Transportadora de Energía de Centroamérica S.A. v. Republic of Guatemala*, ICSID Case No. ARB/20/48, Decision on Preliminary Objections dated 24 Nov. 2023 (CL-146) ¶¶ 60, 317 (rejecting the importation of umbrella clauses through the MFN provision only because the State had made a specific exception for that purpose in an annex to the applicable treaty); *National Grid PLC v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction dated 20 June 2006 (CL-257) ¶ 82 (holding “that the MFN clause does not expressly refer to dispute resolution or for that matter to any other standard of treatment provided for specifically in the Treaty. On the other hand, dispute resolution is not included among the exceptions to the application of the clause. **As a matter of interpretation, specific mention of an item excludes others: *expressio unius est exclusio alterius*.**”) (emphasis added); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 (CL-70) ¶¶ 103-104 (holding that importing a clause providing for the “fulfillment of contractual obligations” from another treaty was possible because, while the treaty excluded certain matters, “**other matters that can be construed to be part of the fair and equitable treatment of investors would be covered by the clause.**”) (emphasis added); see also RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2nd ed., 2012) (CL-82), at 209 (“Different conclusions have been drawn from provisions that exclude the applicability of MFN clauses from certain areas (customs unions, free trade areas, economic communities). Under the principle *expressio unius est exclusio alterius*, this could mean that the MFN clause is meant to operate in all other areas, including jurisdictional matters.”).

²⁵⁵ Reply on Jurisdiction ¶ 249.

²⁵⁶ Reply on Jurisdiction ¶ 296.

(a) The Phrase “in like Circumstances” Does Not Require Showing an Actual Investor (or Investment) in Similar Circumstances as Claimants (or Their Investment)

88. Respondent contends that to invoke the MFN clause, Claimants must show that they (or their investment) were treated less favorably than investors (or their investments) from third States in similar circumstances.²⁵⁷ Respondent alleges that the MFN clause requires a “factual analysis” and comparison between the treatment of actual investors / investments in like circumstances and “not a legal analysis of two substantive standards contained in two different treaties.”²⁵⁸ Respondent’s interpretation is without merit.

89. **First**, tribunals have consistently held that MFN provisions with variations of the phrase “treatment in like circumstances” permit the importation of more favorable provisions from third-party treaties, which qualify as treatment, without requiring evidence of treatment accorded to an actual investor or investment in the host State’s territory.²⁵⁹ Respondent’s continued reliance on the outlier decisions by the tribunals in *İçkale v. Turkmenistan* and *Sehil v. Turkmenistan* decisions is misplaced. The *İçkale* and *Sehil* tribunals’ interpretations of the MFN provision under the Turkey-Turkmenistan BIT—as requiring a comparison between the factual situation of an

²⁵⁷ Reply on Jurisdiction ¶ 280. See also *id.* ¶¶ 249-251.

²⁵⁸ Reply on Jurisdiction ¶ 250 (citing *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award dated 8 Mar. 2016 (**RL-91**) ¶¶ 328-329; *Muhammet Çap & Sehil e Ticaret Ltd. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award dated 4 May 2021 (**RL-106**) ¶ 793; Non-Disputing Party Submission of the United States of America ¶¶ 3-5).

²⁵⁹ See, e.g., *Güris İnşaat ve Mühendislik Anonim Şirketi et al., v. Syria*, ICC Case No. 21845/ZF/AYZ, Final Award dated 31 Aug. 2020 (**CL-333**) ¶ 255 (holding that “the natural reading of the ‘similar situations’ test in [the MFN clause] is that it requires a showing of likeness It is an altogether different matter to say that there is a further requirement of identifying an actual investment by an actual investor that has received more-favourable treatment in actual fact.”); *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award dated 27 Aug. 2009 (**CL-69**) ¶ 156 (holding that “the ordinary meaning of the words used in the [MFN clause],” which contains the “in similar situations” language, “show that the parties to the Treaty did not intend to exclude the importation of a more favourable substantive standard of treatment.”); *ATA Construction, Industrial and Trading Co. v. Jordan*, ICSID Case No. ARB/08/2, Award dated 18 May 2010 (**CL-247**) ¶ 125, n. 16 (addressing an MFN clause containing the phrase “in similar situations” and “by virtue of [the MFN clause], the Respondent has assumed the obligation to accord to the Claimant’s investment . . . treatment no less favourable than that required by [the relevant third party BIT].”); *Pope & Talbot Inc. v. Canada*, UNCITRAL/NAFTA, Award in Respect of Damages dated 31 May 2002 (**CL-130**) ¶ 78 (addressing the NAFTA MFN clause which contains the phrase “in like circumstances” and rejecting Canada’s assertion that the clause required proof of factual discrimination, holding that Canada’s interpretation “would, because of [the MFN clause], produce the absurd result of relief denied under [the MFN clause] but restored under the [FET clause].”); *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award dated 9 Jan. 2003 (**CL-10**) ¶ 194 (addressing the NAFTA MFN clause and assuming that the investor could invoke a more favorable legal standard of treatment from another treaty without proof of any factual discrimination.).

investor's investment and that of investments of investors from third States—are outliers.²⁶⁰ Indeed, as Claimants explained in the Counter-Memorial, and as Respondent tellingly ignores, commentators have characterized these decisions as a “swim against the jurisprudential tide.”²⁶¹

90. Notably, in *Güriş v. Syria*, the tribunal—interpreting the Syria-Turkey BIT with identical “in similar situations” language as appears in the Turkmenistan-Turkey BIT applicable in *İçkale* and *Sehil*—found that the MFN clause entitled investors “access to enhanced treaty treatment by reference to **another (‘comparator’) treaty**.”²⁶² The tribunal reasoned that the “similar situations” language requires an investor to show “likeness,” not that an “actual investor that has received more-favourable treatment in actual fact.”²⁶³ Indeed, that tribunal observed that it was “difficult to endorse [the *İçkale*] reading,” as it “would allow the States Parties altogether to defeat their Article III(2) MFN obligations by failing in fact to accord to third-State nationals the treatment to which they are legally entitled.”²⁶⁴ The tribunal further observed that such a reading “would be **antithetical to the core idea of MFN treatment**.”²⁶⁵ Likewise, in *Bayındır v. Pakistan*, the tribunal held that “the ordinary meaning” of the MFN clause—also containing “in similar situations” language—did not preclude “the importation of a more favorable **substantive**

²⁶⁰ See Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, in 111 AM. J. INT'L L 914 (2017) (CL-230), at 933 (remarking that the *İçkale* award and its interpretation of MFN clauses “**is highly problematic and should not be used to query the effect of MFN clauses in IIAs . . .**” and that “**the general international law background, which supports the application of MFN clauses in IIAs to substantive standards of treatment, should be given preference in applying IIAs**, as long as the clauses’ wording and other relevant context so permit.”) (emphasis added); Mark Mangan, *Substantive Protections: MFN*, in THE GUIDE TO INVESTMENT TREATY PROTECTION AND ENFORCEMENT (2nd ed., 2023) (CL-246), at 5 (commenting that these “[t]wo decisions rendered under the Turkey–Turkmenistan Bilateral Investment Treaty (BIT) MFN clause, however, appear to **swim against this jurisprudential tide**.” (emphasis added)).

²⁶¹ Counter-Memorial on Jurisdiction ¶ 548 (citing Mark Mangan, *Substantive Protections: MFN*, in THE GUIDE TO INVESTMENT TREATY PROTECTION AND ENFORCEMENT (2nd ed., 2023) (CL-296), at 5.

²⁶² *Güris İnşaat ve Mühendislik Anonim Şirketi et al., v. Syria*, ICC Case No. 21845/ZF/AYZ, Final Award dated 31 Aug. 2020 (CL-333) ¶ 258.

²⁶³ *Güris İnşaat ve Mühendislik Anonim Şirketi et al., v. Syria*, ICC Case No. 21845/ZF/AYZ, Final Award dated 31 Aug. 2020 (CL-333) ¶ 255 (holding that “the natural reading of the “similar situations” wording in [the MFN clause] is that it requires a showing of likeness It is an altogether different matter to say that there is a further requirement of identifying an actual investment by an actual investor that has received more-favourable treatment in actual fact.”).

²⁶⁴ *Güris İnşaat ve Mühendislik Anonim Şirketi et al., v. Syria*, ICC Case No. 21845/ZF/AYZ, Final Award dated 31 Aug. 2020 (CL-333) ¶ 255 (“The *İçkale* tribunal’s reading seems inapposite under the Treaty, for at least three reasons . . . Secondly, it is difficult to endorse a reading that would allow the States Parties altogether to defeat their Article III(2) MFN obligations by failing in fact to accord to third-State nationals the treatment to which they are legally entitled. That would be antithetical to the core idea of MFN treatment.”).

²⁶⁵ *Güris İnşaat ve Mühendislik Anonim Şirketi et al., v. Syria*, ICC Case No. 21845/ZF/AYZ, Final Award dated 31 Aug. 2020 (CL-333) ¶ 255.

standard of treatment.”²⁶⁶ Indeed, no tribunal applying the CAFTA-DR has adopted the restrictive *İçkale* reading or barred the importation of substantive protections from a more favorable treaty.

91. Respondent’s reliance on the non-disputing Party submission of the United States is equally unavailing.²⁶⁷ Respondent contends that this submission constitutes “any subsequent agreement between the Parties regarding the interpretation of the treaty” and is indicative of “subsequent practice in the application of the treaty which establishes the agreement of the parties its interpretation,” within the meaning of Article 31 of the VCLT.²⁶⁸ This is manifestly incorrect.

92. A non-disputing Party submission in an arbitration is not “an agreement between the Parties” to the CAFTA-DR, which as Respondent’s authority explains, requires a showing of “**a common** understanding regarding the interpretation of a treaty **which the parties are aware of and accept**.”²⁶⁹ That same authority explains that the phrase “subsequent agreement between **the parties**” in Article 31(3)(a) of the VCLT requires that the agreement “be reached by **all** parties to the treaty.”²⁷⁰ Nor can the non-disputing Party submission qualify as “subsequent practice in the application of the treaty,” which establishes the agreement of the parties regarding the Treaty’s interpretation, absent evidence that “**all** the State Parties to a particular treaty [have] expressed a common understanding.”²⁷¹ Respondent identifies no such consensus by all CAFTA-DR Treaty

²⁶⁶ *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award dated 27 Aug. 2009 (CL-69) ¶ 156 (holding that “the ordinary meaning of the words used in the [MFN clause],” which contains the “in similar situations” language, “show that the parties to the Treaty **did not intend to exclude the importation of a more favourable substantive standard of treatment**.”) (emphasis added).

²⁶⁷ Reply on Jurisdiction ¶¶ 277-293.

²⁶⁸ Reply on Jurisdiction ¶ 284.

²⁶⁹ United Nations General Assembly, *Report of the International Law Commission, Seventieth Session*, UN Doc. A/73/10 (2018) (RL-175), at 15 (emphasis added).

²⁷⁰ United Nations General Assembly, *Report of the International Law Commission, Seventieth Session*, UN Doc. A/73/10 (2018) (RL-175), at 28, 30. Respondent relies on a selective excerpt from the same authority (at 30), which states that a “subsequent agreement” under Article 31(3)(a) “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,” to suggest that “individual acts” alone can constitute a subsequent agreement. See Reply on Jurisdiction ¶ 290. This misrepresents the authority’s position, which makes clear that such acts must reflect the common understanding of all Treaty Parties.

²⁷¹ *Daniel W. Kappes and Kappes, Cassidy & Assoc v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on the Respondent’s Preliminary Objections dated 13 Mar. 2020 (CL-151) ¶ 156 (explaining that non-disputing party submissions may be deemed as a “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its application” but that requires “a demonstration that *all* the State Parties to a particular treaty had expressed a common understanding,” which had not occurred in that case, as there was no “unanimous expression of views about the scope and implications” of the particular CAFTA-DR provision.”) (emphasis in original). In this regard, Respondent’s reliance on *Mobil v. Canada* to argue that the “subsequent

Parties. Furthermore, as Claimants explained in their Counter-Memorial, the view of one of the Treaty Parties—that also has been a respondent in other claims under the same or similar treaties—is entitled to little, if any, weight, as it is in the interest of a respondent State to advocate for interpretations that restrict rights granted to investors and, consequently, tribunals should be skeptical of such interpretations.²⁷² The view of a State Party, moreover, is particularly irrelevant when the investors are not nationals of that State, as is the case here.

93. **Second**, for purposes of the MFN clause, a treaty need not contain the same obligation that the claimant seeks to import in order for the “in like circumstances” standard to be met. The MFN clause permits the importation of more favorable standards from other treaties, whether as improvements to existing standards in the applicable treaty, or as additional protections not originally included.²⁷³ Respondent continues to mistakenly rely on *Teinver v. Argentina*, *Telenor Mobile v. Hungary*, and *Vercara v. Colombia*, to argue that the MFN clause “does not allow the importation of obligations not contained in the applicable treaty” and “in the absence of the umbrella clause in CAFTA-DR, there is no similar circumstance between the Claimants and another investor from a third State in relation to the standard contemplated by the umbrella clause in other BITs entered into by Honduras.”²⁷⁴ Honduras thus appears to accept here that the MFN clause permits investors to import treaty standards, and instead focuses on the alleged absence of an umbrella clause in the CAFTA-DR. As Claimants have explained, however, tribunals consistently have rejected Respondent’s interpretation and have permitted reliance on MFN

agreements and practice” is of “considerable relevance to the interpretation of the treaty” is inapposite. See Reply on Jurisdiction ¶ 288. There, all “three NAFTA Parties (Canada, Mexico, and the United States)” “agreed” as regards the interpretation of a certain treaty provision (citing *Mobil Investments Canada Inc. and Murphy Oil Corp. v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Damage (22 May 2012) (CL-47) ¶ 374.

²⁷² Counter-Memorial on Jurisdiction ¶ 74 (citing Anthea Roberts, *Subsequent Agreements and Practice: The Battle over Interpretive Power*, in *TREATIES AND SUBSEQUENT PRACTICE* (George Nolte ed., 2013) (CL-236), at 6 (“[W]hen a treaty creates rights or benefits for non-state actors, the treaty’s creators and beneficiaries are not one and the same. Accordingly, transnational courts and tribunals cannot assume a no-harm-no-foul approach to accepting interpretations because not all of the relevant rights’ holders will have consented to the interpretation.”); Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 1188 (Peter Muchlinski et al. eds., 2008) (CL-237), at 1201 (explaining that, in the context of creating official State interpretations, “States will strive to issue official interpretations to influence the proceedings to which they are parties . . . [T]he home states of disputing investors are less interested in interpretations favourable to their nationals in pending disputes than in interpretations that favour state respondents generally.”); *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award dated 3 June 2021 (CL-238) ¶ 339 (holding that a non-disputing party submission made by Canada “reflect[s] legal arguments put forward in the context of this dispute to advance [its] respective interests.”).

²⁷³ See Counter-Memorial on Jurisdiction ¶¶ 82-87.

²⁷⁴ Reply on Jurisdiction ¶¶ 255-256.

clauses to import additional or heightened protections.²⁷⁵ Respondent notably fails to address these authorities Claimants relied on in the Counter-Memorial.²⁷⁶

94. Claimants have already demonstrated why the cases cited by Respondent are inapposite—an analysis that Respondent, tellingly, makes no effort to engage with:

- Respondent ignores Claimants' explanation that the *Teinver v. Argentina* tribunal arrived at its finding based on the specific language of the MFN clause in the applicable treaty (the Spain-Argentina BIT), which differs from the language in the CAFTA-DR in that it does not contain a provision akin to an umbrella clause and limits the scope of the MFN protection to “all matters governed by **this Agreement.**”²⁷⁷ The *Teinver* tribunal reasoned that “the plain and ordinary meaning of this language is to refer to the various rights or forms of protection contained in **the individual provisions of the Treaty**” and accepted Argentina's objection “[o]n the basis of **the specific language used by the Parties in the Treaty.**”²⁷⁸ The *Teinver* tribunal accepted that the MFN clause could be used to “‘improve’ the standards of protection contained in the Treaty by incorporating more favorable standards from another treaty.”²⁷⁹
- Respondent likewise ignores Claimants' explanation that the BIT at issue in *Telenor v. Hungary* limited consent to arbitration to expropriation claims; the tribunal thus declined to apply the MFN clause to create consent to arbitrate additional categories of disputes that were otherwise excluded—an uncontroversial approach.²⁸⁰ In fact, the

²⁷⁵ Counter-Memorial on Jurisdiction ¶ 87; see also *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Award dated 27 Aug. 2009 (CL-69) ¶ 164 (allowing the importation of an FET provision through the MFN clause where the Turkey-Pakistan BIT did not contain a similar provision); *ATA Construction, Industrial and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award dated 18 May 2010 (CL-247) ¶ 125, n. 16 (“The Tribunal notes also that, by virtue of Article II(2) of the Treaty (the ‘MFN’ clause), the Respondent has assumed the obligation to accord to the Claimant’s investment fair and equitable treatment (see the UK-Jordan BIT) and treatment no less favourable than that required by international law (see the Spain-Jordan BIT).”); *White Industries Australia Ltd. v. The Republic of India*, UNCITRAL, Final Award dated 30 Nov. 2011 (CL-145) ¶¶ 11.2.1–11.2.9 (allowing the importation of an “effective means” standard where the underlying treaty contained only protection for a denial of justice). Respondent references a few blog posts criticizing the *White Industries* award. Memorial on Jurisdiction ¶ 194. These blog posts, however, do not even criticize the decision itself; rather, they criticize **treaties** containing broad MFN language that allows investors to import substantive provisions from other treaties and urge India to adopt different language in new treaties and / or renegotiate its existing treaties. See Prabhash Ranjan, *The White Industries Arbitration: Implications for India’s Investment Treaty Program*, INVESTMENT TREATY NEWS dated 13 Apr. 2012 (RL-84), at 4; Amrit Singh, *Avoiding the MFN Clause: One Step Forward, Two Steps Back?*, KLUWER ARBITRATION BLOG dated 1 Dec. 2018 (RL-102).

²⁷⁶ See *id.* ¶ 87.

²⁷⁷ Counter-Memorial on Jurisdiction ¶ 76 (citing *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award dated 21 July 2017 (CL-102) ¶ 884 (citing Article IV(2) of the Spain-Argentina BIT) (emphasis added).

²⁷⁸ Counter-Memorial on Jurisdiction ¶ 76 (citing *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award dated 21 July 2017 (CL-102) ¶ 884) (emphasis added).

²⁷⁹ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award dated 21 July 2017 (CL-102) ¶ 885; see also *id.* ¶¶ 886–891.

²⁸⁰ Counter-Memorial on Jurisdiction ¶ 73 (citing *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award dated 13 Sept. 2006 (RL-72) ¶ 92).

Telenor tribunal made clear that “in the absence of language or context to suggest the contrary, the ordinary meaning of ‘Investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State’ is that the investor’s **substantive rights** in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State.”²⁸¹

- As for *Vercara v. Colombia*, Claimants explained that the tribunal adopted a minority position when it rejected the claimant’s attempt to import an autonomous FET standard from another treaty, when the applicable treaty tied the standard to the minimum standard under customary international law.²⁸²

95. In any case, as already explained, even *assuming arguendo* that Claimants could not import new standards of treatment from other treaties pursuant to the MFN provision, Respondent’s theory is flawed, given that Article 10.16(1)(a)(i)(C) of the CAFTA-DR provides investors with the right to “enforce the provisions of . . . investment agreement[s],”²⁸³— a standard of protection akin to that provided by the umbrella clauses sought to be imported via the MFN clause²⁸⁴ Respondent likewise fails to engage with this argument.²⁸⁵

96. Contrary to Respondent’s assertions,²⁸⁶ this conclusion is further reinforced by the text of the MFN clause, which extends to treatment “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”²⁸⁷ The protection Respondent grants to Swiss and German investments under the umbrella clauses in the Honduras–Switzerland and Honduras–Germany BITs, qualify as more favorable treatment than

²⁸¹ Counter-Memorial on Jurisdiction ¶ 73 (citing *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award dated 13 Sept. 2006 (RL-72) ¶ 92) (emphasis in original).

²⁸² Counter-Memorial on Jurisdiction ¶ 87 (citing *Neustar, Inc. and Vercara, LLC v. Republic of Colombia*, ICSID Case No. ARB/20/7, Award dated 20 Sept. 2024 (RL-111) ¶ 724).

²⁸³ Kenneth J. Vandevelde, *The Scope of BIT Protections*, in U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009) (RL-12), at 173.

²⁸⁴ CAFTA-DR (CL-1), Art. 10.28 (definition of “investment agreement”). Indeed, a respected scholar explains that the effect of elimination of the umbrella clause in the 1994 U.S. Model BIT was “limited,” precisely because “the investor-state disputes provision **continues to allow investors to submit to arbitration claims arising out of or relating to an investment agreement** or an investment authorization. Kenneth J. Vandevelde, *The Scope of BIT Protections*, in U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009) (RL-12), at 261 (emphasis added).

²⁸⁵ Counter-Memorial on Jurisdiction ¶ 88 (citing *EDF Int’l S.A., SAUR Int’l S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment dated 5 Feb. 2016 (CL-248) ¶ 237). Respondent addresses *EDF* only insofar as it concerns the definition of “treatment,” but sidesteps Claimants’ reliance on the case for the distinct proposition that umbrella clauses fall within the same genus of substantive investment protections as fair and equitable treatment and other similar standards.

²⁸⁶ Reply on Jurisdiction ¶ 296.

²⁸⁷ CAFTA-DR (CL-1), Art. 10.4 (emphasis added).

that accorded to Claimants' investment with respect to its "management, conduct [and], operation," placing the umbrella clauses squarely within the scope of the MFN provision.

(b) The Object and Purpose of the CAFTA-DR and the MFN Clause Undermines Respondent's Restrictive Reading

97. Claimants explained in their Counter-Memorial on Jurisdiction that the object and purpose of the CAFTA-DR is to protect investors and their investments.²⁸⁸ In line with the Treaty, the object and purpose of the MFN clause is to ensure that investors and their investments are granted treatment no less favorable than the treatment accorded to investors from third States and their investments.²⁸⁹ In finding that the MFN provision allowed for the invocation of substantive obligations in other BITs concluded by Chile, including the obligation to fulfil contractual obligations, the tribunal in *MTD v. Chile* explained that the MFN obligation "has to be interpreted in the manner **most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments**" and that this interpretation "is in consonance with this purpose."²⁹⁰ This is in line with the general object and purpose of the CAFTA-DR, namely, to create a framework that protects investors and their investments.²⁹¹

98. Claimants further explained that, while Article 10.13 of the CAFTA-DR expressly excludes certain matters (*e.g.*, "non-conforming measures") from the MFN clause's application, it does not exclude the possibility of using the MFN clause to import substantive protections from other treaties.²⁹² This drafting choice confirms that the Parties clearly understood how to limit the

²⁸⁸ Counter-Memorial on Jurisdiction ¶ 80 (citing CAFTA-DR (CL-1), Art. 1.2 ("Objectives 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment, and transparency, are to: (a) encourage expansion and diversification of trade between the Parties; . . . (d) substantially increase investment opportunities in the territories of the Parties; . . ."); *see also id.* Preamble ("ENSURE a predictable commercial framework for business planning and investment; . . .")).

²⁸⁹ *See* Counter-Memorial on Jurisdiction ¶ 79 (citing authorities).

²⁹⁰ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 (CL-70) ¶ 104.

²⁹¹ Counter-Memorial on Jurisdiction ¶ 80; CAFTA-DR (CL-1), Art. 1.2 ("Objectives 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment, and transparency, are to: (a) encourage expansion and diversification of trade between the Parties; . . . (d) substantially increase investment opportunities in the territories of the Parties; . . ."); *see also id.* Preamble ("ENSURE a predictable commercial framework for business planning and investment; . . .").

²⁹² Counter-Memorial on Jurisdiction ¶ 90. *See also* Vienna Convention on the Law of Treaties ("VCLT") (CL-133) Art. 31(1); *Daniel W. Kappes and Kappes, Cassidy & Assoc. v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections dated 13 Mar. 2020 (CL-151) ¶ 131 (explaining that "any VCLT interpretation must rest not on construction of a treaty provision in isolation, but rather on **that provision in the context of surrounding or otherwise relevant treaty provisions.**") (emphasis added).

MFN clause, but chose not to exclude substantive treatment accorded to investors of third-Party treaties and their investments.²⁹³ As Claimants explained, the Parties' drafting choice reflects the interpretative maxim *expressio unius (est) exclusio alterius*—the express mention of one thing implies the exclusion of others—the decision to enumerate specific exclusions indicates that no others were intended to be excluded.²⁹⁴

99. As Claimants, moreover, explained in the Counter-Memorial, the negotiating history of the CAFTA-DR further confirms this reading.²⁹⁵ At the time of drafting, the CAFTA-DR Parties—including Honduras—were aware that an MFN clause could be relied upon by investors to import more favorable substantive protections from other treaties. By that time, Honduras already had gained experience with ICSID arbitration,²⁹⁶ and tribunals had found that investors could, in principle, rely on MFN clauses in investment treaties to invoke more favorable substantive and procedural protections in other investment treaties.²⁹⁷ Reports from the drafting negotiations—which Respondent misleadingly quotes its Reply—confirm that the Parties, including Honduras, expressed their “understanding and intent” that the MFN clause, while it “does not encompass international dispute resolution mechanisms” would encompass “substantive treatment matters,” consistent with the approach taken in “other recent investment treaties.”²⁹⁸

²⁹³ Counter-Memorial on Jurisdiction ¶ 90 (citing CAFTA-DR (CL-1) Art. 10.13).

²⁹⁴ Alexandre Senegacnik, *Expressio Unius (Est) Exclusio Alterius*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW (2018) (CL-249) ¶¶ 1, 9.

²⁹⁵ Counter-Memorial on Jurisdiction ¶¶ 90-91.

²⁹⁶ See, e.g., ICSID Website, Results of Case Search in Which Honduras is Respondent, available at <https://icsid.worldbank.org/cases/case-database> (Exh. C-245) (including *Astaldi S.p.A. & Columbus Latinoamericana de Construcciones S.A. v. Republic of Honduras*, ICSID Case No. ARB/99/8).

²⁹⁷ See, e.g., *Asian Agricultural Prods Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award dated 27 June 1990 (CL-250) ¶ 54; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award dated 13 Nov. 2000 (CL-239) ¶ 21; *Pope & Talbot v. Government of Canada*, Award on the Merits of Phase 2 dated 10 Apr. 2001 (CL-251) ¶ 117; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award dated 14 Mar. 2003 (CL-252) ¶ 500; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 (CL-70) ¶¶ 103-104.

²⁹⁸ See *ICS Inspection and Control Services Ltd. v. The Argentine Republic (I)*, PCA Case No. 2010-09, Award on Jurisdiction dated 10 Feb. 2012 (CL-253) ¶ 302 (noting that “[t]he parties to the CAFTA-DR went one step further in a footnote to the negotiating history of that instrument’s investment chapter: ‘1. The Parties agree that the following footnote is to be included in the negotiating history as a reflection of the Parties’ shared understanding of the Most-Favored-Nation Treatment Article and the *Maffezini* case. This footnote would be deleted in the final text of the Agreement. The Parties note the recent decision of the arbitral tribunal in *Maffezini (Arg.) v. Kingdom of Spain*, which found an unusually broad most-favored-nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures . . . By contrast, the Most-Favored-Nation Treatment Article of this Agreement is expressly limited in its scope to matters ‘with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.’ **The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms** such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case.

Ultimately, the Treaty Parties **did include** an MFN clause in the Treaty, and specifically chose **not to include** a carve-out for more favorable substantive protections from other treaties. In doing so, Honduras undertook to afford investors (and their investments) treatment no less favorable than that accorded to third-party investors (and their investments)—including those from Switzerland and Germany—thereby opening the door for Claimants to rely on the umbrella clauses in the Honduras–Switzerland and Honduras–Germany BITs.²⁹⁹

100. Respondent fails to meaningfully engage with these points in its Reply on Jurisdiction, and dismisses Claimants' interpretation of the MFN clause in a mere three sentences, asserting that it “is not in line with the object and purpose of the Treaty.”³⁰⁰ Respondent claims that the MFN clause's object and purpose is “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,”³⁰¹ and concludes that it “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.”³⁰² Respondent, however, fails to explain how its interpretation of the MFN clause's object and purpose supports its conclusion that treaty protections cannot be imported. Nor does Respondent clarify how its reading aligns with the object and purpose of the CAFTA-DR.

101. Honduras seeks to support its bald-faced assertion by again relying on the non-disputing Party submission of the United States, to no avail Respondent asserts that “as already

Other recent investment treaties have similarly included provisions explicitly indicating that this language intends to specifically limit the MFN clause to substantive treatment matters.”) (emphasis added). Respondent erroneously relies on the first part of this excerpt (concerning dispute resolution mechanisms) to argue that the “the object of the MFN clause was not to import clauses from other treaties.” Reply on Jurisdiction n. 308. This is misleading. Respondent tellingly omits the last sentence where the Parties express the understanding that the “language intends to specifically limit the MFN clause to substantive treatment matters.”).

²⁹⁹ See Tony Cole, *The Boundaries of Most Favored Nation Treatment in International Investment Law*, 33 MICHIGAN JOURNAL OF INTERNATIONAL LAW 537 (2012) (RL-82), at 556 (“[E]ach BIT negotiation is conducted with both states **fully aware of the terms of the other BITs** that its potential treaty partner has already signed. Any state negotiating a BIT will, therefore, do so **with full knowledge of what it must do in order to ensure that its investors are treated at least as well as, and ideally better than, those of any third state.**”) (emphasis added); Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, 111 AM. J. INT'L L. 914 (2017) (CL-230), at 918 (explaining that “in 1990, ten years prior to *Maffezini*” the tribunal in *AAPL v. Sri Lanka*, “the first known investment treaty arbitration ever, accepted in principle that an investor covered by the MFN clause in the basic treaty . . . could rely on more favorable substantive treatment granted under other Sri Lankan BITs.”).

³⁰⁰ Reply on Jurisdiction ¶ 296.

³⁰¹ Reply on Jurisdiction ¶ 296 (emphasis in original).

³⁰² Reply on Jurisdiction ¶¶ 299, 300.

expressed, both by Honduras and by the US NDP submission,” “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” and concludes that the MFN clause “does not include provisions contained in other international investments treaties.”³⁰³ In essence, Respondent asks the Tribunal to treat its own submissions and those of the United States—a non-Party to this Arbitration that has acted as a respondent in other claims under the same or similar treaties—as determinative of the Treaty’s object and purpose, elevating these submissions over the CAFTA-DR’s negotiating history involving all Treaty Parties.³⁰⁴ Respondent’s approach ignores the interpretative framework under the VCLT and the common intent of all Treaty Parties.³⁰⁵

102. Finally, Respondent invokes *Hochtief v. Argentina* in support of its reading of the object and purpose of the MFN clause, quoting the tribunal’s observation that the clause “dictates the treatment to be accorded to investors who enjoy the rights conferred on 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 under the respective treaty.”³⁰⁶ Respondent’s reliance on *Hochtief* is misplaced. The *Hochtief* tribunal allowed the claimant to rely on the treaty’s MFN clause to circumvent the 18-month local litigation requirement in the treaty’s dispute resolution clause, holding that the 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,” and “the MFN clause stipulates **a standard of treatment** and defines it **according to the treatment of third parties**.”³⁰⁷ Similarly, as Claimants have explained,³⁰⁸ the umbrella clauses that Claimants seek to import are not “a totally distinct right,” but are part of the same genus of

³⁰³ Reply on Jurisdiction ¶¶ 298-299.

³⁰⁴ *ICS Inspection and Control Services Ltd. v. The Argentine Republic (I)*, PCA Case No. 2010-09, Award on Jurisdiction dated 10 Feb. 2012 (CL-253) ¶ 302 (noting that the CAFTA-DR negotiating history reflects the Treaty Parties’ shared understanding that the MFN clause is limited to substantive treatment matters and does not extend to dispute resolution, distinguishing it from the *Maffezini* tribunal’s interpretation of the MFN clause).

³⁰⁵ See also *supra* ¶ 92.

³⁰⁶ Reply on Jurisdiction ¶ 297 (citing *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction dated 24 Oct. 2011 (RL-16), ¶¶ 79, 81).

³⁰⁷ *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction dated 24 Oct. 2011 (RL-16) ¶ 79, see also *id.* ¶ 81.

³⁰⁸ See *supra* ¶ 95.

protections that Claimants are already entitled to under the Treaty, such as fair and equitable treatment, protection against expropriation and breaches of “an investment agreement.”³⁰⁹

103. For the above reasons, Respondent's narrow reading of the MFN clause does not hold water. It ignores the vast majority of arbitral jurisprudence, which has allowed the importation of more favorable substantive treaty standards where the MFN clause contained the phrase “in like circumstances.” It, moreover, disregards the ordinary meaning of the clause, the express structure and drafting of the Treaty—including the Parties' deliberate decision to exclude only specific carve-outs under Article 10.13— and the Treaty's negotiating history, which confirms that the Parties intended the MFN clause to apply to substantive treatment matters. Claimants are accordingly entitled to invoke the umbrella clauses in the Switzerland-Honduras and Germany-Honduras BITs.

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

104. Contrary to Respondent's contention, the Procurement Carve-Out to MFN treatment contained in Article 10.13(5) of the CAFTA-DR does not apply to Claimants' MFN claim. As Claimants explained in the Counter-Memorial, Honduras's position is at odds with the ordinary meaning of the Treaty terms, interpreted in good faith, in their context, and in light of the Treaty's object and purpose.³¹⁰ Article 2.1 of the Treaty defines “procurement” narrowly, limiting it to the formal “**process**” of acquiring goods or services, and does not extend the term's coverage to subsequent stages after a contract is awarded and executed.³¹¹ Here, the dispute concerns Honduras's measures that violate Honduras's commitments under the Agreements, and not measures relating to the “process” by which the Government entered into the Agreements.³¹²

105. Claimants also showed that Respondent's reliance on NAFTA caselaw to advance its arguments that the Procurement Carve-Out applies is misplaced, because the inclusion of a specific definition of “procurement” in the CAFTA-DR—unlike in the NAFTA—reflects a deliberate choice by the Treaty's drafters to depart from the NAFTA approach and confine the

³⁰⁹ *EDF Int'l S.A., SAUR Int'l S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment dated 5 Feb. 2016 (CL-248) ¶ 237.

³¹⁰ Counter-Memorial on Jurisdiction ¶¶ 98-99; VCLT (CL-133), Art. 31(1).

³¹¹ Counter-Memorial on Jurisdiction ¶¶ 99, 101.

³¹² Counter-Memorial on Jurisdiction ¶¶ 98, 105.

scope of the Carve-Out.³¹³ In particular, in all of the NAFTA cases advanced by Respondent, the corresponding tribunal undertook the task of defining the ordinary meaning of “procurement” precisely because the treaty did not contain any definition.³¹⁴

106. In its Reply, Respondent maintains that the Tribunal should ignore the definition of “procurement” in Article 2.1 of the Treaty,³¹⁵ which confines the term to the “**process** by which a government obtains the use of or acquires goods or services.”³¹⁶ While Respondent concedes that Article 2.1 of the CAFTA-DR is “absolutely relevant” to the discussion,³¹⁷ it barely engages with its clear language, or its deliberate departure from the NAFTA’s drafting.³¹⁸ And while Respondent accuses Claimants of interpreting the Treaty in bad faith—by applying the definition of procurement contained therein³¹⁹—Respondent, for its part, misapplies the VCLT’s rules of interpretation and uses dictionary definitions of irrelevant terms to reconstruct its own self-serving definition of procurement. Its approach is fundamentally flawed.

107. As explained above, Respondent bears the burden to prove its jurisdictional objection and the defenses it invokes—namely, that the exception to the MFN clause, the Procurement Carve-Out, applies in the present case.³²⁰ Respondent nonetheless continues to

³¹³ Counter-Memorial on Jurisdiction ¶¶ 103-104.

³¹⁴ *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award dated 24 Mar. 2016 (**RL-31**) ¶ 404 (“Article 1108 [of the NAFTA] excludes the application of non-discrimination standards and performance requirements in the event of ‘procurement by a Party or a state enterprise’. It contains, however, **no definition of the term ‘procurement’**. Accordingly, it falls on the Tribunal to determine the meaning of this term, as part of the phrase ‘procurement by a Party or a state enterprise’.”) (emphasis added); *Resolute Forest Prods. Inc. v. Government of Canada*, PCA Case No. 2016-13, Final Award dated 25 July 2022 (**RL-109**) ¶ 405 (“[W]hile procurement may often be associated with **formal procedures** for the acquisition of goods and services by governments . . . that does not mean that such limitation must be implied **where the text does not provide so**, such as in the case of NAFTA Article 1108(7)(a).”) (emphasis added); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award dated 9 Jan. 2003 (**CL-10**) ¶ 161 (“‘Procurement’ is not defined in NAFTA Chapter 11.”); *Mercer Int’l Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award dated 6 Mar. 2018 (**RL-38**) ¶ 6.34 (“[T]he English word ‘procurement’, as a matter of ordinary English language, is the general act of buying goods and services.”); *id.* 6.37 (“NAFTA’s Chapter 11 does not define ‘procurement’ any further.”).

³¹⁵ Memorial on Jurisdiction ¶¶ 178-179.

³¹⁶ CAFTA-DR (**CL-1**), Art. 2.1 (emphasis added).

³¹⁷ Reply on Jurisdiction ¶ 213.

³¹⁸ Counter-Memorial on Jurisdiction ¶¶ 103-104.

³¹⁹ Reply on Jurisdiction ¶ 32. See also *id.*, ¶ 200.

³²⁰ See *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No. ARB/11/12, Award dated 10 Dec. 2014 (**CL-316**) ¶ 299 (finding that “the burden of proof rests upon the party that is asserting affirmatively a claim or defense” and that Respondent “bears the burden of proving the validity of [its jurisdictional] objections.”); *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, UNCITRAL, Award on Jurisdiction and Admissibility dated 17 Dec. 2015 (**CL-334**) ¶ 495 (holding that, while “it is for the Claimant to allege and prove facts establishing the conditions for jurisdiction under the Treaty,” it is “for the Respondent to prove and

attempt to shift its burden to Claimants.³²¹ Tribunals have consistently found that where there is an exception to a more general provision of a treaty, the party relying on that exception has the burden to prove it,³²² and Respondent's continued efforts to shift its burden to Claimants should not be countenanced. Respondent has failed to discharge its burden of showing that the Procurement Carve-Out applies for the following reasons.

108. **First**, Respondent's interpretation of "public procurement" is inconsistent with the ordinary meaning of the term as defined in the CAFTA-DR, and fails to adhere to the general rule of interpretation in Article 31 of the VCLT.³²³ In particular, Respondent ignores that, when determining the ordinary meaning of treaty terms, Article 31(4) of the VCLT mandates that "[a] special meaning shall be given to a term if it is established that the parties so intended."³²⁴ An express definition in the treaty is the clearest evidence of such intent. As a leading scholar confirms, "[i]n the immediate context of article 31, paragraph (4) provides for a special meaning

allege the facts on which its objections are based; and, to the extent that the Respondent has established a *prima facie* case, for the Claimant to rebut this evidence.") (emphasis omitted); *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award dated 28 July 2015 (CL-325) ¶ 174 (holding that "Respondent in this case therefore bears the burden of proving its [jurisdictional] objections."); *Vito G. Gallo v. The Government of Canada*, UNCITRAL, Award dated 15 Sept. 2011 (CL-324) ¶ 277 (holding that "the principle *actori incumbit probatio* is a coin with two sides: . . . defences can only succeed if supported by evidence marshalled by the Respondent.") (emphasis omitted); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (CL-283), ¶ 2.11 ("As far as the burden of proof is concerned, . . . 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, . . . the Claimant has to prove that the Tribunal has jurisdiction. Of course, if there are positive objections to jurisdiction, the burden lies on the Party presenting those objections, in other words, here the Respondent").

³²¹ Reply on Jurisdiction ¶ 197.

³²² See, e.g., *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, Award dated 15 May 2019 (CL-335) ¶ 244 (explaining that because the "[t]axation' provision of the ECT relied upon by the Respondent is an exception to the more general provisions of the ECT" it "is clear that the Respondent bears the burden of proof of establishing that the Solar Levy may be characterized as [such an objection]."). See also *Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award dated 1 Dec. 2008 (CL-336) ¶ 138 ("As a general rule, the holder of a right raising a claim on the basis of that right in legal proceedings bears the burden of proof for all elements required for the claim. However, an exception to this rule occurs when a respondent raises a defense to the effect that the claim is precluded despite the normal conditions being met. **In that case, the respondent must assume the burden of proof for the elements necessary for the exception to be allowed.**") (emphasis added).

³²³ Article 31 of the VCLT requires treaties to be "interpreted in good faith in accordance with the **ordinary meaning to be given to [its] terms** in their context and in light of the treaty's object and purpose. . . . A special meaning shall be given to a term if it is established that the parties so intended." Vienna Convention on the Law of Treaties (CL-133) Art. 31(1), (4).

³²⁴ Counter-Memorial n. 245.

to be ascribed to a term if the parties so intended. **The most obvious evidence of such an intention is inclusion of a definition article.**"³²⁵

109. As Claimants explained in the Counter-Memorial,³²⁶ the CAFTA-DR Parties expressly ascribed a special meaning to the term "procurement" by defining it in Article 2.1, under the chapeau "Definitions of General Application," namely, that "[f]or purposes of this Agreement, unless otherwise specified," "procurement means the process by which a government obtains the use of or acquires goods or services, or any combination thereof"³²⁷ Remarkably, Respondent asks the Tribunal to ignore this special meaning—which, by its very definition applies generally throughout the Treaty.

110. The ordinary meaning analysis need not extend beyond the special meaning expressly ascribed by the Parties in the Treaty's definitions. However, Respondent disregards Article 2.1—because it does not support its position—alleging that it cannot be used to ascertain the ordinary meaning of "public procurement" in Article 10.13(5), and is only relevant as "part of the context of the term."³²⁸ Contrary to what Respondent proffers, the Treaty's definition of "procurement" is not only relevant as context when interpreting Article 10.13(5)³²⁹. Article 31(4) of the VCLT mandates that a treaty definition be used to determine the ordinary meaning of that very same term used elsewhere in the treaty.

111. Rather than apply the express definition of the term in the Treaty itself, Respondent instead cherry-picks definitions from the Royal Spanish Academy and Black's Law Dictionary, in an effort to shoehorn the relationship between ENEE and Pacific Solar under the PPA into the Procurement Carve-Out.³³⁰ Remarkably, Honduras relies on the Royal Spanish Academy's definitions of "public sector contract" and "administrative contract" to determine the meaning of

³²⁵ RICHARD GARDINER, TREATY INTERPRETATION (2d ed. 2015) (CL-337), at 15 (explaining the "ordinary meaning of 'ordinary meaning to be given to the terms of the treaty'" in Article 31).

³²⁶ Counter-Memorial ¶ 101.

³²⁷ CAFTA-DR (CL-1) Art. 2.1 (emphasis added); VCLT (CL-133), Art. 31(4) ("A special meaning shall be given to a term if it is established that the parties so intended.").

³²⁸ Reply on Jurisdiction ¶ 213.

³²⁹ Reply on Jurisdiction ¶ 228 (citing *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection dated 7 May 2019 (RL-176), ¶ 80).

³³⁰ Reply on Jurisdiction ¶¶ 214-217.

“public procurement”—a term expressly defined in the Treaty.³³¹ Relying on these definitions, Respondent claims that the “ordinary” meaning of “public procurement” encompasses “any act by which a State entity or agency receives or acquires goods or services for a purpose in the public or state interest.”³³² In doing so, Respondent effectively asks the Tribunal to disregard the Treaty’s carefully negotiated language in favor of dictionary definitions of entirely different terms. That Respondent continues to adopt this remarkable position is telling, confirming that its objection finds no support in the text of the Treaty.

112. In any event, reputed English language dictionaries confirm that the ordinary meaning of the term “procurement” is consistent with the manner in which the Treaty defines the term: the Oxford Dictionary, for instance, defines “procurement” as “**the process** of obtaining supplies of something, especially for a government or an organization,”³³³ a definition which mirrors the CAFTA-DR’s.

113. **Second**, Respondent’s analysis purportedly based on the principles of good faith and *effet utile*, is also deeply flawed. Respondent avers that “a good faith interpretation of Article 10-13(5)” requires the Tribunal to adopt a “reasonableness” approach and to “go beyond a simple verbal and literary analysis of the terms of the treaty,” as “the proper application of the Treaty . . . 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.”³³⁴ In doing so, Respondent implicitly concedes that the plain text of the Treaty does not support its interpretation, compelling it to appeal to “reasonableness” and policy-based reasoning.

114. Respondent has it backwards. As Claimants explained in the Counter-Memorial, it is Respondent’s interpretation that would deprive the Treaty terms of all meaning. Honduras asks the Tribunal to adopt a contradictory and artificially broad definition of “public procurement,”

³³¹ Reply on Jurisdiction ¶¶ 214-215. Respondent notably relies on the Black’s Law Dictionary definition of “procurement contract,” rather than the one for “procurement.” See Reply on Jurisdiction ¶¶ 217, 231.

³³² Reply on Jurisdiction ¶ 218 (“As can be seen from the above [definitions of the Spanish Royal Academy and Black’s Law Dictionary], the ordinary definition of *procurement* refers to any act by which a State entity or agency **receives or acquires** goods or services for a purpose of public or state interest.”) (emphasis in original).

³³³ Oxford Dictionary (Exh. C-361), Definition of “procurement” (“**[T]he process** of obtaining supplies of something, especially for a government or an organization.”) (emphasis added). See also Cambridge Dictionary (Exh. C-362), Definition of “procurement” (“**[T]he process** by which an organization buys the products or services it needs from the organizations,” or “the process of getting supplies”) (emphasis added).

³³⁴ Reply on Jurisdiction ¶¶ 199, 207-208. See *id.* § III.C.1(a).

ignoring the express definition in Article 2.1 and thereby stripping it of all *effet utile*.³³⁵ This is confirmed by Respondent's own authority.³³⁶ The ILC Draft Articles on the Law of Treaties explains that the good faith principle of effectiveness, when "[p]roperly limited and applied . . . does not call for an 'extensive' or 'liberal' interpretation . . . going beyond **what is expressed or necessarily to be implied in the terms of the treaty**."³³⁷ It further observes that adopting an interpretation that contradicts the plain meaning of the text "would not be to interpret **but to revise the treaty**."³³⁸

115. **Third**, Respondent's arguments based on a contextual analysis are equally unavailing. Aware that it cannot escape the definition of "procurement" under the CAFTA-DR, Honduras contends that Claimants "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,"³³⁹ and that Claimants' "interpretation [] simply sticks to the limited literalism and formalism of a treaty term."³⁴⁰ Honduras fails to make any cogent arguments in support of its point. Although it relies on the *Giovanni Alemanni et al. v. Argentina* case, for example, that tribunal rejected Argentina's "formalistic approach," not because the State sought to apply an express definition of a term contained in the applicable treaty, but because it sought to limit the tribunal's jurisdiction over mass claims on the basis that Article 25(1) of the ICSID Convention refers to disputes between "a Contracting State . . . and a national of another Contracting State."³⁴¹

116. To further support its argument, Honduras again relies on the same inapposite definitions from the Royal Spanish Academy and Black's Law Dictionary.³⁴² Honduras's reasons that, because these definitions of "administrative contract" and "procurement contract" refer to **instruments** related to the purchase of goods and services on behalf of the government, the PPA

³³⁵ Counter-Memorial on Jurisdiction ¶ 107.

³³⁶ Reply on Jurisdiction ¶ 201 (citing International Law Commission, *Draft Articles on the Law of Treaties with commentaries*, Vol. II, U.N. Doc. A/6309/1 (1966) (CL-254), at 219).

³³⁷ International Law Commission, *Draft Articles on the Law of Treaties with commentaries*, Vol. II, U.N. Doc. A/6309/1 (1966) (CL-254), at 219. (emphasis added).

³³⁸ International Law Commission, *Draft Articles on the Law of Treaties with commentaries*, Vol. II, U.N. Doc. A/6309/1 (1966) (CL-254), at 219.

³³⁹ Reply on Jurisdiction ¶ 229.

³⁴⁰ Reply on Jurisdiction ¶ 225. See also *id.* ¶¶ 224, 226-229.

³⁴¹ *Giovanni Alemanni et al. v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility dated 17 Nov. 2014 (RL-165), ¶ 270 (cited in Reply on Jurisdiction ¶¶ 224-226).

³⁴² Reply on Jurisdiction ¶¶ 231-232.

falls within the Procurement Carve-Out.³⁴³ The issue to be determined by the Tribunal, however, is whether Claimants' MFN claim pertains to measures by Honduras with respect to "procurement," as defined in Article 2.1 of the CAFTA-DR, and not whether the PPA falls within the Royal Spanish Academy's definition of an administrative contract.

117. **Fourth**, Honduras avers that Claimants ignore the specific purpose of the Procurement Carve-Out, which it describes as preserving "sovereign control over critical areas of economic and social policy,"³⁴⁴ and allowing "greater flexibility in discriminating between foreign investors in relation to the expenditure of public funds."³⁴⁵ This, however, only serves to reinforce Claimants' position. The purpose of the Procurement Carve-Out is to permit discrimination during the selection process for government contracts—*i.e.*, at the stage when the government is choosing amongst bidders to ensure optimal use of public resources. As Respondent's own legal authority makes clear, the carve-out was designed to allow States to "discriminate against and among foreign investments with respect to the expenditure of public funds, **as opposed to the imposition of government regulations**" after the State awards such agreements.³⁴⁶

118. This distinction is critical. The Procurement Carve-Out does not license discriminatory conduct after the contract has been awarded to an investor by the government. Extending the carve-out to cover the performance of contracts or regulatory interference with contracts would undermine legal certainty and expose foreign investors to arbitrary treatment throughout the life of their investment. Such an interpretation would be incompatible with the object and purpose of the CAFTA-DR, which is to foster a stable legal environment and increase "investment opportunities in the territories of the Parties."³⁴⁷ The Treaty's object and purpose thus supports Claimants' interpretation of the Procurement Carve-Out, which does not improperly preclude protection for investors through an overly expansive interpretation of the term

³⁴³ Reply on Jurisdiction ¶¶ 231-232.

³⁴⁴ Reply on Jurisdiction ¶ 236.

³⁴⁵ Reply on Jurisdiction ¶ 204 (citing K. Vandevelde, *The General Treatment Provisions*, in U.S. International Investment Agreements (2009) (RL-152), at 255); *see also id.* ¶ 203.

³⁴⁶ K. Vandevelde, *The General Treatment Provisions*, in U.S. International Investment Agreements (2009) (RL-152), at 255.

³⁴⁷ CAFTA-DR (CL-1), Art. 1.2(d) ("Objectives 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment, and transparency, are to: . . . (d) substantially increase investment opportunities in the territories of the Parties; . . ."); *see also id.*, Preamble ("ENSURE a predictable commercial framework for business planning and investment; . . .") (emphasis in original).

“procurement.” This is confirmed by the NAFTA cases relied on by Honduras,³⁴⁸ such as *ADF v. United States* and *Mesa Power v. Canada*, which all relate to discrimination **during the selection** of a supplier for goods or services to be provided by the State (*i.e.*, in the determination of whom to award a contract to), and are distinguishable from the present case.³⁴⁹ As regards *Mesa Power* in particular, the tribunal considered that the carve-out was intended to “protect [the Contracting Parties’] ability to **exercise nationality-based preferences** in cases of procurement,”³⁵⁰ a prerogative that States logically can only exercise during the selection of vendors. Similarly, in *Mercer v. Canada*, the tribunal applied the procurement carve-out because the discriminatory treatment claimed by the investor pertained to **differences in the contractual terms** between its contract with a State-owned entity and similar contracts with other producers,³⁵¹ as opposed to discriminatory treatment during contract performance.

119. **Finally**, the Procurement Carve-Out acts as an exception to the Treaty’s general rule that investors shall be accorded treatment that is no less favorable than that accorded to investors of other States. Under international law, an exception to a treaty should be interpreted narrowly, to avoid undermining the primary obligations agreed upon by the Parties.³⁵² In

³⁴⁸ See Reply on Jurisdiction ¶ 206.

³⁴⁹ See *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award dated 9 Jan. 2003 (CL-10) ¶ 155 (considering a claim for discrimination brought by a Canadian steel producer that tendered for a highway construction project on the basis of a U.S. federal law that favored domestic producers participating in government-funded state highway projects); *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award dated 24 Mar. 2016 (RL-31) ¶¶ 12-25, 459 (considering that “the Claimant argues that Canada treated the Claimant and its investments (all of which were in the context of the FIT Program) [a program soliciting bids to award renewable energy contracts and setting eligibility criteria] less favorably than other investors in like circumstances” and that “there is a direct nexus between the claims in this arbitration and the FIT Program”).

³⁵⁰ *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award dated 24 Mar. 2016 (RL-31) ¶ 419 (emphasis added); see also *id.* ¶ 420 (noting that “procurement by way of **formal purchasing procedures** is frequently utilised as an **instrument of policy**” and, hence, the procurement carve-out “allows for **preferential treatment of local suppliers**, when a Party is engaged in **formal purchasing** of goods and services.”) (emphasis added).

³⁵¹ *Mercer Int’l Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award dated 6 Mar. 2018 (RL-38), ¶¶ 2.3-2.14, 6.28-6.29, 6.32-6.33 (describing that the claimant operated a pulp mill that produced energy by burning biomass for self-supply and could only sell excess power above a fixed level, whereas competitors had contracts allowing them to sell energy below their self-supply level and purchase cheaper energy).

³⁵² ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2007) (CL-339), at 286 (“That exceptions shall be narrowly interpreted is a proposition emphasised by several authors in the literature . . . If a treaty provision can be interpreted in two different ways, and the provision contains an exception whose extension in one of the two possible meanings is less than it is in the other, then the former meaning shall be adopted.”); *id.* (“If it can be shown (i) that the interpretation of a treaty provision in accordance with interpretation rule no. 1 leads to conflicting results, (ii) that the provision contains an exception to a right or an obligation laid down in said treaty, and (iii) that the extension of the exception in one of the two possible ordinary meanings is comparably greater than it is in the other, then the latter meaning shall be adopted.”); see also *Canfor Corp., Terminal Forest Prods. Ltd., Tembec et al. v. United*

accordance with this principle, in the face of two interpretations of a treaty exception, the narrower interpretation must prevail—namely, Claimants' interpretation of the Procurement Carve-Out.³⁵³

120. Claimants' claims do not arise from State conduct related to the process of awarding the Agreements or from any alleged discrimination based on differential treatment provided by those Agreements as compared with Agreements provided to other generators. Given that the dispute here revolves around measures that violate Honduras's commitments under the Agreements after the parties executed them and at the performance stage—and not measures relating to the process by which the Government entered into the Agreements—the Procurement Carve-Out does not apply.

121. The Procurement Carve-Out, moreover, has no relevance where the MFN treatment being invoked does not concern public procurement at all. Here, Claimants invoke the MFN clause based on Respondent's more favorable treatment of Swiss and German investors and their investments under the Switzerland–Honduras BIT and Germany–Honduras BIT, by providing umbrella clause protection—a benefit not available to Claimants under the CAFTA-DR. The fact that Claimants and their investment do not benefit from similar treatment under the CAFTA-DR is a matter of discriminatory treatment—not public procurement—and, thus, falls entirely outside the scope of the Procurement Carve-Out.

122. For the above reasons, the Tribunal should find that Claimants are entitled to import the umbrella clauses of the Switzerland–Honduras BIT and the Germany–Honduras BIT through the MFN provision contained in the Treaty, and that the Tribunal has jurisdiction over Claimants' claims for Respondent's breaches of its commitments.

C. THE AGREEMENTS SQUARELY FIT WITHIN THE DEFINITION OF AN “INVESTMENT AGREEMENT” UNDER THE CAFTA-DR

123. In their prior submissions, Claimants have established that the Agreements, including the PPA, satisfy the Treaty's requirements for an “investment agreement.” Under Article 10.28 of the CAFTA-DR, an “investment agreement” is one that satisfies the following criteria:

States of America (Consolidated), Decision on Preliminary Question dated 6 June 2006 (CL-340) ¶ 187 (concurring with the GATT Panel's decision in “Canada – Import Restrictions on Ice Cream and Yoghurt,” finding that “exceptions [are] to be interpreted narrowly.”).

³⁵³ ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2007) (CL-339), at 286.

- **First**, it is a “written agreement,” meaning that it is executed by two parties and “creates an exchange of rights and obligations, binding on both parties under [Honduran law].”
- **Second**, it “takes effect on or after the date of entry into force of the [CAFTA-DR].”
- **Third**, it is “between a national authority of [Honduras],” meaning an authority at the “central level” of government and a “covered investment or an investor of another Party.”
- **Fourth**, it “grants the covered investment or investor rights . . . with respect to natural resources or other assets that a national authority controls.”
- **Fifth**, the covered investment or the investor relies on those rights “in establishing or acquiring a covered investment other than the written agreement itself.”³⁵⁴

124. The Agreements satisfy these criteria because they: (i) were made in writing and entailed an exchange of rights and obligations; (ii) took effect after the date of entry into force of the CAFTA-DR; (iii) were entered into between Pacific Solar (a Honduran entity that qualifies as an “investment” under the CAFTA-DR) and Honduran authorities at the “central level” of government (namely, ENEE, SERNA, the Attorney General’s Office and SEFIN); (iv) grant Pacific Solar rights over the use of solar resources and access to the SIN; and (v) Claimants relied on those rights to acquire various assets in Honduras that also form part of their protected investment. Respondent has not disputed the above noted criteria and has conceded that the second element (*i.e.*, the only temporal requirement set forth in the definition of “investment agreement”) is met.³⁵⁵

³⁵⁴ Memorial on the Merits ¶¶ 172-179; Counter-Memorial on Jurisdiction ¶¶ 110-112. CAFTA-DR (CL-1), Art. 10.28 (“[I]nvestment 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.”), n. 12 (defining a “[w]ritten agreement” as “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 [Honduran law].”), n. 13 (defining “national authority” as “an authority at the central level of government.”).

³⁵⁵ Memorial on Jurisdiction ¶¶ 207-208 (“[F]or the instruments to fall within the meaning of an investment agreement under CAFTA-DR, the agreements must, (i) be in writing, (ii) take effect as of the date of entry into force of CAFTA-DR, (iii) be entered into between a national authority of a Contracting Party and a covered investment or an investor of another Contracting Party (*i.e.*, executed by both parties), (iv) give the covered investment or the investor rights with respect to natural resources or other assets controlled by a national authority, and, (v) give the covered investment or the investor rights on which the covered investment or the investor relies to establish or acquire a covered investment other than the written agreement itself. . . . Honduras does not dispute that the PPA, the State

125. Yet, in its Reply on Jurisdiction, Honduras rehashes several arguments that Claimants had already addressed in prior submissions, attempting to impose additional requirements not found in the Treaty and misconstruing the plain meaning of the above-noted criteria. As explained in the following subsections that individually cover each of the disputed criteria, Respondent's position remains inconsistent with the terms of the Treaty and the evidence in these proceedings.

1. The Agreements Record in Writing a Binding "Exchange of Rights and Obligations"

126. In their Memorial on the Merits and Reply on Jurisdiction, Claimants showed that the Agreements were executed "in writing," and provide for "an exchange of rights and obligations" that are "binding on both parties" under Honduran law.³⁵⁶ The Agreements document the investment that the Honduran State sought to attract and authorized through the Renewables Laws and then executed through various agencies and ratified through Congressional approval.³⁵⁷ In essence, they record Pacific Solar's agreement to build and operate a 50 MW PV plant in exchange for various commitments from the Honduran State, which included, *inter alia*, Pacific Solar's right to generate energy using solar power and to be connected to the SIN, and Honduras's obligations to dispatch all energy produced by the Plant, and to purchase that energy at a pre-established and stable price, as mandated by the 2013 Renewables Law.³⁵⁸

127. With respect to this first criterion, Respondent does not dispute that the Agreements are recorded in writing and that they are binding under Honduran law.³⁵⁹ Respondent also does not dispute that the PPA, on its own, records an "exchange of rights and obligations" under Honduran law.³⁶⁰ Nonetheless, in its Reply on Jurisdiction, Respondent continues to assert that

Guarantee and the Operations Agreement are in writing and were entered into force after the date of entry into force of CAFTA-DR").

³⁵⁶ Memorial on the Merits ¶¶ 173, 175; Counter-Memorial on Jurisdiction ¶¶ 113-119.

³⁵⁷ Memorial on the Merits ¶¶ 173, 175; Counter-Memorial on Jurisdiction ¶¶ 113-119; 2007 Renewables Law (Exh. C-4), Art. 3(2); 2013 Renewables Law (Exh. C-5), Art. 2 (amending Art. 3(2) of the 2007 Renewables Law); Published Gazette Version of Pacific Solar's PPA (Decree No. 376-2013 published on 10 May 2014) dated 10 May 2014 (Exh. C-95), at A.1; State Guarantee (Exh. C-2), at A.1; Operations Agreement (Exh. C-3), at A.1.

³⁵⁸ Memorial on the Merits ¶¶ 8-10, 12-14, 73-85, 179; Counter-Memorial on Jurisdiction ¶¶ 106, 117.

³⁵⁹ Memorial on Jurisdiction ¶ 208 ("Honduras does not dispute that the PPA, the State Guarantee and the Operations Agreement are in writing.").

³⁶⁰ Reply on Jurisdiction ¶ 219 (explaining that "the object of the PPA was the acquisition by ENEE . . . of 'all the energy and electrical power generated by the Plant that is delivered, measured and invoiced by' Pacific Solar");

the CAFTA-DR purportedly does not allow an “investment agreement” to be comprised of “multiple instruments,” because the Treaty refers to the term “agreement” in singular.³⁶¹ Respondent also seeks to downplay the significance of the State Guarantee and the Operations Agreement, noting that they are purportedly not reciprocal because the PPA has an independent existence and that the Operations Agreement and the State Guarantee do not generate “substantive obligations” on Pacific Solar.³⁶²

128. In light of Respondent’s position and with respect to the State Guarantee and the Operations Agreement, the dispute pertaining to this first criterion is thus limited to deciding whether:

- under the CAFTA-DR, the term “a written agreement” can be understood to encompass more than one instrument; and
- the State Guarantee and the Operations Agreement create an “exchange of rights and obligations” between the Honduran State and Pacific Solar.

129. As Claimants have already demonstrated and further explain below, the answer to both inquiries is yes, and Respondent’s arguments to the contrary are baseless.

130. **First**, it is commonly accepted that the term “agreement” or “investment agreement” (in singular) can mean rights and obligations set forth **in more than one** instrument.³⁶³

id. ¶ 308 (explaining that “the PPA . . . is the agreement that establishes the contractual relationship for the purchase and sale of energy.”).

³⁶¹ Reply on Jurisdiction ¶¶ 312-321.

³⁶² Reply on Jurisdiction ¶ 308.

³⁶³ See, e.g., Lavier, J.P., *Chapitre VII. Les régimes des accords d’investissement*, PROTECTION ET PROMOTION DES INVESTISSEMENTS, (Graduate Institute Publications, 1985) (CL-341), n. 1 (explaining that the term “investment agreement” a “generic and functional one”); *Chevron Corp. et al., v. Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility dated 27 Feb. 2012 (CL-261) ¶¶ 4.30-4.32 (finding that a 1973 Oil Concession and a 1995 Settlement and Release Agreement constituted an investment agreement due to the “inextricable link” between the two, which, when viewed together, formed a single investment agreement); *Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/06/10, Award dated 17 May 2010 in ICSID REVIEW (2011) (CL-342) ¶¶ 134-139 (finding that a set of contracts form a unified contractual scheme in cases where, *inter alia*, one contemplates the conclusion of others or acknowledges its provenance from others); C. SCHREUER, THE ICSID CONVENTION: A COMMENTARY, (2001) (CL-343) at 245 (“[A] series of interrelated contracts may be regarded, in functional terms, as representing the legal framework for one investment operation.”); CHITTY ON CONTRACTS (35th ed., 2021) (CL-344), at 16-016 (stating that the “terms of a contract may be contained in more than one document.”); WILLISTON ON CONTRACTS (2025) (CL-345) § 45.10 (“In determining whether there was a single assent to a contract consisting of various promises, the test is whether the parties consented to all the promises as a single whole so that there would have been no bargain whatever if any promise or set of promises were deleted. If striking any promise or set of promises would destroy the basis of the bargain, or if the contract is ‘to take the whole or none,’ it is indivisible.”); Uniform Commercial Code (CL-346), § 1-106 (“[U]nless the statutory context otherwise requires . . . words in the singular number include the plural, and those in the plural include the singular.”); see also Vienna Convention on the

As a result, both commentators and case law have confirmed that an “investment agreement” can similarly “encompass a plurality of contracts, depending on the complexity of the operation.”³⁶⁴

131. This is further consistent with the finding of the *Chevron v. Ecuador (II)* tribunal, which found that two separate instruments—despite being executed more than 20 years apart—can comprise a single “investment agreement.”³⁶⁵ The first agreement, executed in 1973, was a concession agreement relating to oil exploration and development rights in a region of Ecuador, whereas the second one, signed in 1995, released the oil company of its obligations and liability for environmental impact in exchange of undertaking environmental remedial work.³⁶⁶ While Ecuador argued that these two instruments were independent of each other, the tribunal concluded that, when viewed together, “there [was] an inextricable link” between the two instruments because the subsequent agreement “**would not have come into existence without the former**” and, thus, had to be “treated as a continuation of the earlier . . . agreement.”³⁶⁷

Law of Treaties (“VCLT”) (CL-133), Art. 2(1)(a) (“treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation); CORBIN ON CONTRACTS (2025) (CL-347), § 2.10, n. 19 (establishing that it is “well settled that a contract may result from a series of [documents]” and that it is “not important that all the terms of the agreement be set out in one instrument.”), § 24.13 (stating that “**when a contract consists of multiple instruments**, they are interpreted together to determine the parties’ intent.”) (emphasis added); L. DIEZ-PICAZO, FUNDAMENTOS DE DERECHO CIVIL PATRIMONIAL (2007) (CL-348) at 524-525 (explaining that “*contratos coligados*” are those contracts “where the parties combine several standard contracts in a single transaction, in an attempt to achieve, through the union of all of them, the practical purpose they pursue or intend” and that they constitute “a true economic unit” and “a single contract”); Stoffel-Munck P., Aynès L., Malaurie P., *Chapitre IV – Groupes de contrats*, DROIT DES OBLIGATIONS (2024) (CL-349) ¶ 509(1) (“An economic operation often requires the multiple contracts: sale and financing (loan, lease, financial lease...); financing and guarantees (real or personal security); sale and supply, or maintenance . . . These contracts form a ‘contractual ensemble’ due to their common purpose.”).

³⁶⁴ Laviec, J.P., *Chapitre VII. Les régimes des accords d’investissement*, PROTECTION ET PROMOTION DES INVESTISSEMENTS, (Graduate Institute Publications, 1985) (CL-341), n. 1 (citing *AGIP S.p.A. v. People’s Republic of the Congo*, ICSID Case No. ARB/77/1, Award dated 30 Nov. 1979 in RIVISTA DI DIRITTO INTERNAZIONALE, VOL. 64 (1981) (CL-350), at 862–879 (describing a complex investment agreement composed of a transfer of shares dependent on the State’s acceptance of a support agreement guaranteeing the investor certain payment and a trademark agreement); *Holiday Inns S.A. and Others v. Morocco*, ICSID Case No. ARB/72/1, in Pierre Lalive, *The First ‘World Bank’ Arbitration (Holiday Inns v. Morocco) - Some Legal Problems*, BRITISH YEAR BOOK OF INTERNATIONAL LAW, VOL. 51, 1980 (CL-351), at 123–161.

³⁶⁵ *Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility dated 27 Feb. 2012 (CL-261) ¶ 4.32.

³⁶⁶ *Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility dated 27 Feb. 2012 (CL-261) ¶¶ 3.6, 3.17.

³⁶⁷ *Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility dated 27 Feb. 2012 (CL-261) ¶ 4.32 (“[T]he [1995 Settlement Agreement] would not have come into existence without the [1973 Concession Agreement]; and, accordingly . . . it is not possible to divorce one from the other.”).

This tribunal, therefore, held that the subsequent instrument formed part of the overall 'investment agreement'" that the claimant in that case was invoking.³⁶⁸

132. In its Reply, Respondent seeks to distinguish the finding of the *Chevron v. Ecuador (II)* tribunal by arguing that the underlying investment treaty in that case (*i.e.*, the U.S.-Ecuador BIT) did not include a specific definition of "investment agreement."³⁶⁹ Respondent, however, fails to acknowledge that, just as the CAFTA-DR does, the dispute resolution provision in the U.S.-Ecuador BIT (*i.e.*, Article VI), referred to "an investment agreement" in singular.³⁷⁰ Thus, contrary to Respondent's contention, the treaty language at issue in *Chevron v. Ecuador (II)* further supports Claimants' position that multiple instruments can be deemed a single investment agreement.³⁷¹

133. Respondent also argues that separate cases addressing the unity of investment principle are supposedly irrelevant to this inquiry.³⁷² Respondent's argument, however, ignores that the term "investment agreement" includes the term "investment," which has a broad meaning under the CAFTA-DR. Moreover, as Claimants detailed in their Counter-Memorial on

³⁶⁸ Compare Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment entered into on 27 Aug. 1993 ("**U.S.-Ecuador BIT**") (**Exh. R-17**), Art. VI (providing that "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," which "the national or company concerned may choose to submit . . . for settlement by binding arbitration: (i) to [ICSID] . . .") with CAFTA-DR (**CL-1**), Art. 10.16 (providing that "[i]n 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 . . . an investment agreement[.]").

³⁶⁹ Reply on Jurisdiction ¶ 335. Respondent also seeks to distinguish *Chevron v. Ecuador II* by arguing that the agreements at issue in that case "contemplated a new exchange of obligations between the State and the investor[.]" Reply on Jurisdiction ¶¶ 336-337. Respondent cites to no authority supporting its position that separate instruments must create "new" rights and obligations to be jointly deemed an investment agreement. Nonetheless, as set forth below and contrary to Respondent's suggestions, each of the Agreements contains a specific set of rights and obligations that are critical to the overall operation and further underscore their interconnected nature.

³⁷⁰ See U.S. Model BIT (2004) adopted in Nov. 2004 (**CL-258**), Art. 1, n. 4 (definition of "written agreement"); Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment entered into on 4 Nov. 2005 ("**U.S.-Uruguay BIT**") (**CL-264**), Art. 1, n. 5 (definition of "written agreement"). See also Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area entered into on 19 Jan. 2006 ("**U.S.-Oman FTA**") (**CL-265**), Art. 10.27, n. 9.

³⁷¹ Respondent's position is even more strained considering that it relies on various cases arising out of the U.S.-Ecuador BIT to support its separate position that an investment agreement must be entered (i) directly by the foreign investor, and not by its covered investment, and (ii) with a covered investment that is owned or controlled by an investor at the time the agreement is executed. Reply on Jurisdiction ¶¶ 380, 383; Memorial on Jurisdiction ¶¶ 206, 226, 228; Request for Bifurcation ¶ 66. In any event, as explained in Section III.C.1 *infra*, Respondent's reliance on this treaty for this separate point fails because, unlike the CAFTA-DR, this treaty does not recognize instruments entered between investments (*i.e.*, local enterprises) and the State as investment agreements.

³⁷² Reply on Jurisdiction ¶¶ 322-332.

Jurisdiction, multiple ICSID tribunals have also found that a series of linked contracts can constitute a single investment.³⁷³

134. That the terms “investment agreement” and “written agreement” can refer to multiple instruments is also in line with the additional language that the United States included in its 2004 U.S. Model BIT—published a few months after the CAFTA-DR was executed.³⁷⁴ This model clarified that “a written agreement” can be embodied in a “**single instrument or in multiple instruments**, that create[] an exchange of rights and obligations, binding on both parties under the law applicable[.]”³⁷⁵ While the definitions of “investment agreement” and “written agreement” under Article 10.28 of the CAFTA-DR do not contain this additional language, nothing in those definitions restricts parties from recording their reciprocal rights and obligations in a single instrument. This is why commentators have observed that, even though some U.S. treaties (including the CAFTA-DR) do not “specify[] that an investment agreement may be in a single

³⁷³ See e.g., *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction dated 24 May 1999 (CL-262) ¶ 72 (“An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment.”); *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Award dated 20 Dec. 2023 (CL-191) ¶ 520 (noting that “an investment typically consists of several interrelated economic activities which, step by step, finally lead to the implementation of a project.”); *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction dated 14 Jan. 2004 (CL-162) ¶ 70 (“[A]n investment is indeed a complex process including various arrangements, such as contracts, licences and other agreements leading to the materialization of such investment, a process in turn governed by the Treaty.”); *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v. The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 Feb. 2013 (CL-187) ¶ 428 (“[W]hen a tribunal is in presence of a complex operation, it is required to look at the **economic substance of the operation** in question **in a holistic manner**.”) (emphasis added); *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Award dated 21 Oct. 1983 (CL-352) ¶ 21 (“The Arbitral Tribunal is competent to rule on both the main claim and the counterclaim, taking into consideration this Establishment Convention, which forms an inseparable whole with the Protocol of Agreement and the Supply Contract.”); *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction dated 1 Feb. 2006 (CL-353) ¶¶ 131, 135 (upholding its jurisdiction pursuant to the unity-of-the-investment principle); *Société Ouest-Africaine des Bétons Industriels v. The Republic of Senegal*, ICSID Case No. ARB/82/1, Award dated 25 Feb. 1988 (CL-354) ¶¶ 4.13 (finding that the agreements between the parties other than the framework agreement are implicitly included in such framework agreement), 4.16-4.17 (explaining that the agreements included the construction of social housing on the one hand and the establishment of a factory to produce the materials for that housing, on the other. The tribunal found that both agreements could not be dissociated and were a *conditio sine qua non* for the existence of each other. The tribunal also rejected the State’s hypothetical argument that the agreements could be separated, as it was contradicted by reality).

³⁷⁴ U.S. Model BIT (2004) (CL-258) (adopted in Nov. 2004); CAFTA-DR (CL-1) (adopted in August 2004).

³⁷⁵ U.S. Model BIT (2004) adopted in Nov. 2004 (CL-258), at Art. 1, n. 4.

instrument or multiple instruments,” this should not “preclude the written agreement from being embodied in multiple instruments.”³⁷⁶

135. Finally, Claimants' position—unlike Respondent's—is also consistent with reality.³⁷⁷ States carry out their functions through various specialized agencies and it would be illogical and, in many cases, unfeasible for investors to demand that States encapsulate all exchanges of rights and obligations related to an investment operation in a single instrument. This is particularly the case where, as here, domestic law requires that different authorities execute different instruments to authorize, protect, and allow the operation of a substantial investment.³⁷⁸

136. As Respondent has submitted to the Tribunal, consistent with the VCLT, “the ordinary meaning of the terms subject to be interpreted cannot be taken with completely formalistic and literal interpretations.”³⁷⁹ Yet, that is precisely what Respondent does when it relies on the dictionary definition of the indefinite article “a” as the sole support for its restrictive interpretation

³⁷⁶ See KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009) (**RL-12**), at 176 (explaining that “[t]he Morocco FTA, at Article 10.27, adopts the definitions in the 2004 model, with several changes . . . In the footnote defining ‘written agreement,’ the Morocco FTA omits the language specifying that an investment agreement may be in a single instrument or multiple instruments, although nothing in the definition would preclude the written agreement from being embodied in multiple instruments. . . . The CAFTA-DR, at Article 10.28, employs the same language as the Morocco FTA, except that in both definitions it refers to ‘another Party’ rather than the ‘other Party.’”); see also *id.* at 175 (commenting the same with regards to the U.S.-Chile FTA).

³⁷⁷ See, e.g., *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Award dated 20 Dec. 2023 (**CL-191**) ¶ 520 (noting that “an investment typically consists of several interrelated economic activities which, step by step, finally lead to the implementation of a project.”); *Société Ouest-Africaine des Bétons Industriels v. The Republic of Senegal*, ICSID Case No. ARB/82/1, Award dated 25 Feb. 1988 (**CL-354**) ¶¶ 4.13 (finding that the agreements between the parties other than the framework agreement are implicitly included in such framework agreement), 4.16-4.17 (explaining that the agreements included the construction of social housing, on the one hand, and the establishment of a factory to produce the materials for that housing, on the other, and that both agreements could not be dissociated and were a *conditio sine qua non* for the existence of each other); Pierre Lalive, *The First ‘World Bank’ Arbitration (Holiday Inns v. Morocco) - Some Legal Problems*, BRITISH YEAR BOOK OF INTERNATIONAL LAW, VOL. 51, 1980 (**CL-351**), at 123 (“It is well known, and it is being particularly shown in the present case, that investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others. It is particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out.” (citing *Holiday Inns v. Morocco*)).

³⁷⁸ 2013 Renewables Law (**Exh. C-5**), Art. 2 (amending Art. 3(2) of the 2007 Renewables Law) (mandating ENEE to enter into PPAs with renewable energy generators); 2007 Renewables Law (**Exh. C-4**), Art. 4 (providing that the Attorney General's Office shall enter into a State guarantee on behalf of the State to guarantee the fulfillment of the PPAs entered into with renewable energy generators); Electricity Law of 1994 (**Exh. C-56**), Art. 66 (establishing that generators of any kind in Honduras can only operate through operations agreements entered into with the Secretariat for Communications, Public Works, and Transportation [a competence which was then transferred to SERNA and which now lies with the Ministry of Energy]).

³⁷⁹ Reply on Jurisdiction ¶ 226 (citing *Giovanni Alemanni et al. v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility dated 17 Nov. 2014 (**RL-165**), ¶ 270). See also Reply on Jurisdiction ¶¶ 223-225.

of the term “investment agreement.”³⁸⁰ In any event, Respondent’s position fails because it is **inconsistent** with, in the words of the *Alemanni v. Argentina* tribunal, the “**well understood drafting convention at both the international and national level that the singular can be used to include the plural, and vice versa**[.]”³⁸¹

137. **Second**, Respondent does not and cannot dispute that the State Guarantee and the Operations Agreement are, in the words of the investment tribunals referred to above, inextricably linked or that they form part of the same economic transaction that the State envisioned and approved. In fact, Respondent has conceded the interconnected nature of the Agreements in its prior submissions, noting, *inter alia*, that: (i) the State Guarantee and the Operations Agreement are “clearly derivative and supplementary to the PPA,”³⁸² (ii) the State Guarantee assures Pacific Solar that it will be remunerated in the event that ENEE fails to comply with the PPA, and this is “explicitly provided for in Annex X of the PPA;”³⁸³ and (iii) the Operations Agreement includes

³⁸⁰ See Reply on Jurisdiction, n. 382 (citing Royal Spanish Academy, Spanish Language Dictionary, (23rd ed., 2001) (**Exh. R-71**), Definition of “*uno/una*”). Respondent further relies on the principle of “effective interpretation” and “good faith,” to argue that not every document or domestic contract should be deemed an “investment agreement.” See Reply on Jurisdiction ¶¶ 319-320. While the content of these principles is not disputed, neither of them supports Respondent’s overly restrictive and formalistic reading of the term “a written agreement.” As reflected in Chapter One of the Treaty, one of the declared objectives of the CAFTA-DR is to “substantially increase investment opportunities in the territories of the Parties.” Similarly, the Preamble to the Treaty provides that one of the objectives is to “ensure a predictable commercial framework for business planning and investment,” something which in the Paizes’ and Pacific Solar’s case materialized through the Agreements. See CAFTA-DR (**CL-1**), Preamble, Sixth Whereas, Art. 1.2(d). The Paizes and Pacific Solar invested in building and operating a 50 MW PV Plant in reliance of the Agreements, which memorialize in three different instruments key aspects of the same underlying economic transaction with the State. See, e.g., Pierre Lalive, *The First ‘World Bank’ Arbitration (Holiday Inns v. Morocco) - Some Legal Problems*, BRITISH YEAR BOOK OF INTERNATIONAL LAW, VOL. 51, 1980 (**CL-351**), at 123 (referring to the principle of “general unity of an investment operation” when, as in the present case, a transaction crystallizes through different transactions); *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction dated 24 May 1999 (**CL-262**) ¶ 72 (reasoning that “[a]n investment is frequently a rather complex operation, composed of **various interrelated transactions**, each element of which, standing alone, might not in all cases qualify as an investment” and that “there can be an investment dispute “even when it is based on a transaction which, standing alone, would not qualify as an investment . . . **provided that the particular transaction forms an integral part of an overall operation** that qualifies as an investment.”) (emphasis added).

³⁸¹ *Giovanni Alemanni et al., v. Argentina*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Admissibility dated 17 Nov. 2014 (**RL-165**) ¶ 270 (emphasis added); see also *id.* ¶ 186 (finding that the respondent’s textual argument was “unconvincing” because “it is a common drafting convention that the singular . . . is deemed to include the plural.”).

³⁸² Memorial on Jurisdiction ¶ 212; Reply on Jurisdiction ¶ 308.

³⁸³ Memorial on Jurisdiction ¶ 212; Reply on Jurisdiction ¶ 343, n. 405; see also PPA (**Exh. C-1**), Annex X.

the Honduran State's authorization to build and operate the Plant (*i.e.*, the one that is subject to the PPA) subject to "conditions" the State set forth for Pacific Solar.³⁸⁴

138. Despite acknowledging the above, Respondent separately contends that the PPA has an "exists independently" from the State Guarantee and the Operations Agreement.³⁸⁵ This is incorrect.

- As regard the **State Guarantee**, the PPA not only included the terms of the State Guarantee in its Annex X, but also provided in its Clause 9.7 that: (i) ENEE had to "collaborate" with Pacific Solar to ensure that it could execute the State Guarantee with SEFIN and Honduras's Attorney General, and (ii) the State Guarantee would have the same duration as the PPA and would be "valid and effective" until the PPA's "final and firm conclusion."³⁸⁶ The State Guarantee, in turn, recorded the Honduran Attorney General's statement that the State Guarantee was a "condition" for Pacific Solar to enter into the PPA as "the Generator . . . had required that the State provide security in the compliance of ENEE's obligations[.]"³⁸⁷
- Similarly, with respect to the **Operations Agreement**, the PPA provides that the Operations Agreement is a condition for Pacific Solar to operate the Plant and, thus, to perform its obligations under the PPA.³⁸⁸ The Operations Agreement's importance stems from fact that it records the right of Pacific Solar to "use and usufruct the solar resource required" for the Plant's operation and to "connect to the SIN to either sell energy to ENEE under the PPA or to other third parties."³⁸⁹ Simply put, without the

³⁸⁴ Memorial on Jurisdiction ¶¶ 34, 213; Reply on Jurisdiction ¶¶ 308, 350; *see also* Operations Agreement (**Exh. C-3**), §§ 1.4.4-1.4.7; Electricity Law of 1994 (**Exh. C-56**), Art. 66.

³⁸⁵ Reply on Jurisdiction ¶¶ 345, 350.

³⁸⁶ PPA (**Exh. C-1**), Cl. 9.7 (providing that the State Guarantee "shall remain in effect for the duration of this Contract plus an additional three (3) months. Notwithstanding, it shall continue to be in force and produce effects in any judicial or extrajudicial action commenced during its term, until its final and binding conclusion. The Support Agreement is attached hereto as Annex X").

³⁸⁷ State Guarantee (**Exh. C-2**), Third Recital ("For its part, the Office of the Attorney General of the Republic states that as a condition for the Generator to commit to the PPA, it has required that the State provide security to comply with the obligations of ENEE and/or its successors under the PPA."); *see also id.* § 2, Cl. 1.1(1) (defining "Support Agreement" [State Guarantee] as a "Document executed between [Pacific Solar] and the Office of the Attorney General of the Republic, with the joint guarantee of the Secretariat of Finance, for the fulfillment of this contract covering up to the quantities of power and electrical energy specified therein, in the format included in the Annexes.").

³⁸⁸ PPA (**Exh. C-1**) Cl. 4.2 (referring to the obligation to have the Operations Agreement executed before the Plant can be put in operation); *id.* Cl. 4.5(h) (providing for the early termination of the PPA by ENEE if the Operations Agreement is terminated for any reason); *id.* Cl. 4.6(d) (providing for the early termination of the PPA by Pacific Solar if the Operation Agreement is not executed within 12 months after the effective date of the PPA). In this respect, Respondent's assertion that Honduras's obligation to allow to connect to the SIN was already contemplated in the PPA is false. *See* Reply on Jurisdiction ¶ 350. As a matter of Honduran law, only SERNA, through a validly executed operations agreement can authorize the operation of a power plant. *See* Electricity Law of 1994 (**Exh. C-56**), Art. 66; 2007 Renewables Law (**Exh. C-4**), Art. 15; 2013 Renewables Law (**Exh. C-5**), Art 10.

³⁸⁹ *See* Operations Agreement (**Exh. C-3**), §§ 1.4.8 ("[Pacific Solar has the] exclusive right to use and usufruct the solar resource required for the operation of the Plant."), 1.4.4 ("[Pacific Solar] shall submit to the Grid Operator all the available electric generation capacity of the Plant, including any capacity not reserved under physical contracts

Operations Agreement, the Plant would be an empty shell from an operational perspective.

139. **Finally**, considering the above explanation and Respondent's admissions, Respondent cannot seriously question that the State Guarantee and the Operations Agreement comprise the same broader transaction and are a critical part of the "exchange of rights and obligations," between the Honduran State and Pacific Solar. For completeness, however, it is worth noting that Respondent's attempt to downplay the content and reciprocal nature of these Agreements (signed by both the Honduran State and Pacific Solar) fails because:

- Under the **State Guarantee**, Honduras committed to "comply with the due and timely observance and fulfillment of ENEE's payment obligations" arising out of the PPA,³⁹⁰ upon the "sole failure of payment . . . on the due dates" or if ENEE became insolvent.³⁹¹ The terms of the State Guarantee, in turn, make clear that its terms are contingent on Pacific Solar "build[ing], operat[ing] and maintain[ing] an electricity generation project,"³⁹² as otherwise there would be no payment obligation that could be triggered.
- Meanwhile, in the **Operations Agreement**, Pacific Solar undertook to, *inter alia*, (i) operate the Plant in accordance with the SIN's regulations and in an efficient and secure manner, and (ii) deliver all energy generated and not committed to third parties to the System Operator.³⁹³ In turn, Honduras committed to (i) receive and dispatch all energy

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

³⁹⁰ State Guarantee (**Exh. C-2**), Cl. 4.2.

³⁹¹ State Guarantee (**Exh. C-2**), Cls. 4.2. ("The Secretary of Finance, on behalf of the State of Honduras and in consideration of the provisions of the **PPA** signed between the Generator and **ENEE**, hereby and in order to provide certainty as to the fulfillment of the obligations undertaken by **ENEE** and/or its Successors, irrevocably and unconditionally becomes a **JOINTLY AND SEVERALLY LIABLE GUARANTOR** of **ENEE** and agrees to comply with the due and timely observance and fulfillment of ENEE's payment obligations contained in and derived from the PPA. The payment obligation undertaken by the State hereunder shall be joint and several with respect to the obligations of **ENEE** and/or its Successors, and shall arise and be demanded with the sole failure of payment by ENEE to the Generator on the due dates on which payment corresponds according to the **PPA** or as established by a competent court."), 4.3 ("State unconditionally guarantees compliance with the **PPA** in the event that ENEE and/or its Successors file a voluntary petition in any bankruptcy, insolvency, dissolution or liquidation proceedings, or are adjudged bankrupt or insolvent, or are subject to reorganization in any bankruptcy, insolvency, dissolution or liquidation proceedings in accordance with any provision of authority or law in force or coming into force during the term of the **PPA**.") (emphasis in the original).

³⁹² State Guarantee (**Exh. C-2**), Preamble ("The Generator hereby represents that it intends to build, operate, and maintain an electricity generation project, hereinafter referred to as the "**Project**", in order to generate electricity using solar energy, which shall be supplied to the Empresa Nacional de Energía Eléctrica,") (emphasis in the original).

³⁹³ Operations Agreement (**Exh. C-3**), § 1.4.4 (The Operations Agreement requires Pacific to "operate the Plant observing the Operation Rules of the National Interconnected Grid (SIN) . . . [and to] submit to the Grid Operator all the available electric generation capacity of the Plant, including any capacity not reserved under physical contracts with third or private parties.").

the Plant produces, (ii) compensate Pacific Solar for any emergency situation of the system, and (iii) “provide the necessary assistance” so that Pacific Solar can enjoy the tax exemptions and economic benefits contemplated under the Renewables Laws.³⁹⁴

140. Together with the PPA, these instruments are accordingly part of the same economic transaction, as one cannot exist or would be rendered meaningless without the others. In fact, they were so important to each other that the PPA expressly provided that it could be terminated if other organs of the Honduran State did not also execute the Operations Agreement or the State Guarantee with Pacific Solar, among other instruments.³⁹⁵

2. The Agreements Were Executed Between Honduran Central Level Authorities and Pacific Solar, a Covered Investment

141. As Claimants have shown, the Agreements were also executed between a “national authority” of Honduras (which the CAFTA-DR further defines as an “authority of the **central level** of government”) and a “covered investment.”³⁹⁶ On the one hand, Pacific Solar—an enterprise that Claimants own and control and which qualifies as an “investment” under the Treaty—signed all of the Agreements.³⁹⁷ On the other hand, the Honduran State—through various agencies that are part of the “central level” of the government of Honduras³⁹⁸—committed to the Agreements. Specifically, (i) Honduras’s Attorney’s General Office and SEFIN, in the case of the State

³⁹⁴ Operations Agreement (**Exh. C-3**), §§ 1.4.4 (Honduras, as Grid Operator, “undertakes to dispatch and receive all the electric power generation produced and placed by the Plant at the SIN’s point(s) of delivery” and “[i]f, as a result of actions taken during a System Emergency event or any circumstance mentioned in Section 70 of the Electricity Subsector Framework Law, the Generation Company sustains economic damage, the State, within three (3) months following the Emergency event, shall compensate such damage to the Generation Company. This compensation shall cover the entire period in which contract conditions changed for the Generation Company as a result of the emergency. . . Such compensation shall include loss of profit, any other damage caused to the Generation Company or any damage caused to and claimed by third parties towards whom the Generation Company has responsibility.”), 1.4.7 (“[SERNA] shall provide the necessary assistance for the Generation Company to secure the exemptions and support set out in the decrees referred to herein.”). The Operations Agreement included other key rights and obligations. For instance, Pacific Solar enjoys the rights to (i) “connect to the National Interconnected Grid and/or use third-party transmission and/or distribution facilities;” (ii) “use and usufruct the solar resource required for the Plant’s operation;” and (iii) “research, study, develop, build, own, operate, and maintain any facility required to produce and transmit the electricity generated by the Plant.” See Operations Agreement (**Exh. C-3**), §§ 1.4.5, 1.4.8. Honduras also bears the obligation to “facilitate” Pacific Solar’s sale of its electric power supply “to regional market agents or buyers outside” the territory of Honduras. See *id.* § 1.4.5.

³⁹⁵ PPA (**Exh. C-1**) Cl. 4.6(d).

³⁹⁶ Memorial on the Merits ¶¶ 173, 177; Counter-Memorial on Jurisdiction § II.C.2.

³⁹⁷ Memorial on the Merits ¶¶ 167-169, 173, 177; Counter-Memorial on Jurisdiction §§ II.C.2, II.D; PPA (**Exh. C-1**), at 9; State Guarantee (**Exh. C-2**), Cl. 5; Operations Agreement (**Exh. C-3**), § 10.

³⁹⁸ CAFTA-DR (**CL-1**), Art. 10.28, n. 13 (defining “national authority” as “an authority at the central level of government.”)

Guarantee; (ii) SERNA, in the case of the State Guarantee; and (iii) ENEE, in the case of the PPA.³⁹⁹ As noted above, the Honduran Congress later ratified all three Agreements.

142. As Claimants have also detailed, under the CAFTA-DR, the term “central level” of government refers to the **national** level of government, as opposed to the regional or local levels.⁴⁰⁰ Moreover, in various annexes, the CAFTA-DR confirms that SEFIN, SERNA, and ENEE are all part of the “central level” of Honduras’s government.⁴⁰¹ As set forth below, Respondent’s arguments that the Agreements do not satisfy this criterion are baseless.

(a) All Entities that Signed the Agreements on Behalf of the Honduran State are Part of the “Central Level” of Government

143. In its Reply on Jurisdiction, Respondent does not dispute that its Attorney’s General Office, SEFIN, and SERNA qualify as “national authorities” that are operating at the “central level” of government, as defined in the CAFTA-DR.⁴⁰² Nor could it do so.⁴⁰³ Respondent, however, argues that ENEE is not part of the “central level” of Government because, as a matter of Honduran law, ENEE is a “public enterprise” that is “not part of the central level of government.”⁴⁰⁴ To justify its reliance on Honduran law in this regard, Respondent points to Article 10.22 of the CAFTA-DR, which provides that “when a claim is submitted” under an investment agreement, the Tribunal shall apply “the rules of law specified in the pertinent investment agreement” or, if not specified, “the law of the respondent” and “such rules of international law as may be applicable.”⁴⁰⁵ Respondent’s arguments that the Agreements do not

³⁹⁹ Memorial on the Merits ¶ 177; Counter-Memorial on Jurisdiction § II.C.2; PPA (Exh. C-1), at 9; State Guarantee (Exh. C-2), Cl. 5; Operations Agreement (Exh. C-3), § 10.

⁴⁰⁰ Counter-Memorial on Jurisdiction ¶ 129.

⁴⁰¹ Counter-Memorial on Jurisdiction n. 319, ¶ 129; *see also* CAFTA-DR Annex 9.1(b)(i), Schedule of Honduras (RL-63), at 1, 6 (showing that the “*Secretaría de Estado en el Despacho de Finanzas* [SEFIN]” and the “*Secretaría de Estado en los Despachos de Recursos Naturales y Ambiente* [SERNA]” are “entities of the central level of government” in Honduras); CAFTA-DR (CL-1) Annex I, Schedule of Honduras, at I-HO-12.

⁴⁰² Reply on Jurisdiction ¶ 341 (“The Republic also demonstrates why the State Guarantee and the Operations Agreement are not relevant to the present analysis and the Tribunal should focus its attention solely on the PPA.”).

⁴⁰³ ENEE is an institution of the State and the sole purchaser of electricity in Honduras. SERNA is the Secretariat of Natural Resources and Environment, the ministerial department in charge of the Government of Honduras’s energy policies (now succeeded in that role by the Ministry of Energy). SEFIN is the Secretariat of Finance within the Government of Honduras. The Attorney General’s Office is the legal representative of the State of Honduras pursuant to the Constitution, as well as Respondent’s counsel of record in this Arbitration.

⁴⁰⁴ Reply on Jurisdiction ¶¶ 359-361, 371.

⁴⁰⁵ Reply on Jurisdiction ¶¶ 360, 364-367.

constitute an “investment agreement” because the PPA was executed by ENEE, do not withstand scrutiny.

144. **First**, as Claimants established in their Counter-Memorial on Jurisdiction, a finding that the Agreements together form an integrated “investment agreement” is sufficient to dispose of Respondent’s objection that ENEE, which executed the PPA, is not a Honduran “national authority.” Indeed, as Claimants have explained, the Honduran State specifically authorized the terms of each of the Agreements through legislation and instructed various agencies exercising sovereign powers to execute and carry them out, and, ultimately, ratified the Agreements via Congressional approval. The PPA was therefore not a one-off transaction conducted by an autonomous entity with another private party, as Respondent purports it to be, but rather the crystallization of the same State policy through multiple instruments.

145. **Second**, Respondent’s reliance on Honduran law to determine the scope of the term “central level” of government, as used in the CAFTA-DR, is inappropriate. Article 1.2 of the CAFTA-DR makes clear that the Treaty Parties must “interpret and apply the provisions of this Agreement in the light of its objectives . . . and in accordance with applicable **rules of international law**.”⁴⁰⁶ This provision makes no reference to the domestic law of the State Parties. Therefore, any dispute regarding the meaning of a term in the Treaty—including the meaning of “central level” of government—must be resolved based on the Treaty itself and international law.⁴⁰⁷ This term thus must be interpreted according to its ordinary meaning, in its context, which includes other provisions of the CAFTA-DR.⁴⁰⁸

⁴⁰⁶ CAFTA-DR (CL-1), Art. 1.2; *see also* Lavieć, J.P., *Chapitre VII. Les régimes des accords d’investissement, PROTECTION ET PROMOTION DES INVESTISSEMENTS*, (Graduate Institute Publications, 1985) (CL-341), n. 1 (explaining that the term “investment agreement does not correspond to a defined category in domestic law.”). In the same vein, international investment tribunals have consistently found that the terms of an international treaty must be interpreted applying the relevant treaty and international law, not domestic law. *See, e.g., Rupert Joseph Binder v. Czech Republic*, UNCITRAL, Award on Jurisdiction dated 6 June 2007 (CL-319) ¶ 74 (holding that the term “permanent residence” in the Germany-Czech Republic BIT “should be considered to be **a treaty concept and should as such be given an autonomous meaning** and be interpreted according to the principles of the Vienna Convention on the Law of Treaties,” and **deeming it “[in]appropriate” to determine its meaning “on the basis of the national law of one of the Contracting Parties.”**) (emphasis added); *Orascom TMT Investments S.à.r.l. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award dated 31 May 2017 (CL-320) ¶ 298 (holding that the term *siège social* contained in the applicable treaty “does not refer to domestic nationality rules, but **embodies an autonomous treaty-specific meaning**.”) (emphasis added).

⁴⁰⁷ This is also consistent with Article 27 of the VCLT, which provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” VCLT (CL-133), Art. 27.

⁴⁰⁸ 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.”). *See also*,

146. **Third**, when considering the ordinary meaning of the CAFTA-DR's terms, in context, the only conclusion is that ENEE is indeed an authority of and operates at the "central level" of the Honduran Government. Specifically:

- With respect to its **ordinary meaning**, the Royal Spanish Academy Dictionary, on which Respondent itself relies, defines "central" as the quality of "exert[ing] its action over an entire field or territory," using as an example of the use of such term, the phrase "Central Government."⁴⁰⁹ This phrase implies an exercise of authority in the totality of a territory. Based on the record of these proceedings, it cannot be disputed that ENEE exercises Governmental authority at the national or "central" level, like any other organ of the Honduran State's Executive branch⁴¹⁰—even vested with the power to set the expropriation of the power plants, a quintessential example of State's sovereign power.⁴¹¹
- The plain language of other provisions of Chapter Ten of the CAFTA-DR confirms this understanding. As Claimants have already established, Article 10.13 of the CAFTA-DR concerning non-conforming measures divides the government into three horizontal

e.g., Honduras Próspera Inc., St. John's Bay Dvlp. Co. LLC, and Próspera Arbitration Center LLC v. Republic of Honduras, ICSID Case No. ARB/23/2, Decision on Preliminary Objections Under Article 10.20.5 of CAFTA-DR dated 26 Feb. 2025 (**CL-201**) ¶ 118 (interpreting the CAFTA-DR and giving weight to the purpose of Article 10.18.2 therein, in holding that "a good faith reading of this provision, based on the ordinary meaning of its terms, serves this purpose [to protect Contracting States from parallel proceedings]."); *The Czech Republic v. European Media Ventures SA*, 2007 EWHC 2851 (Comm), Judgment of the High Court of Justice of England and Wales dated 5 Dec. 2007 (**CL-355**) ¶ 17 (observing that "[t]he search for a common intention is likely to be" (1) "[e]lusive, because the contracting parties may never have had a common intention: only an agreement as to a form of words[,] and (2) "[u]nnecessary, because the rules for the interpretation of international treaties focus on the words and meaning and not the intention of one or other contracting party, unless that intention can be derived from the object and purpose of the treaty, its context, or a subsequent agreement as to interpretation or practice which establishes an agreement as to its interpretation.").

⁴⁰⁹ Royal Spanish Academy, Spanish Language Dictionary, (23rd ed., 2001) (**Exh. C-363**), Definition of "central" (defining "central" as "[t]hat which exercises authority over an entire field or territory[, for example, a] Central Government."). The Royal Spanish Academy also defines "nivel" ('level') as "horizontality." See Royal Spanish Academy, Spanish Language Dictionary, (23rd ed., 2001) (**Exh. C-363**), Definition of "nivel" (2001).

⁴¹⁰ See, *e.g.*, Law Creating Empresa Nacional de Energía Eléctrica (Decree 48-1957 dated 20 Feb. 1957), published in the Official Gazette dated 27 Feb 1957 (**Exh. C-6**), Arts. 2(a) (explaining that ENEE's purpose includes the "operation and management of any electrification project or works that belongs to the State), 2(c) (establishing that one of ENEE's objectives is to act in "representation of the Government"); Electricity Law of 1994 (**Exh. C-56**), Arts. 1 (defining the National Dispatch Center as "ENEE's department responsible for the operation of the National Interconnected System (SIN)"), 9 (granting ENEE exclusive powers to operate and dispatch energy in Honduras), 15 ("The State reserves the right to operate the Transmission System and Dispatch Center [controlled by ENEE]"), 28 ("The Dispatch Center shall have the following additional obligations: a) coordinate, supervise, control and analyze the operation of SIN, including international interconnections; b) coordinate the programming of preventive maintenance of SIN facilities; and, c) obtain and process the information necessary to fulfill its functions; as well as to produce monthly reports to be presented to the companies of the sector and CNEE, respecting the operation taken and planned of SI");

⁴¹¹ New Energy Law (**Exh. C-10**), Art. 5 ("[ENEE] is authorized to set under its prerogatives and powers . . . the renegotiation of the contracts and prices at which the State, through the National Company of Electric Energy (ENEE), acquires the service of energy . . . If negotiation is not possible, [ENEE] is authorized to set the termination of the contractual relationship and the acquisition by the State, subject to the payment of a *justiprecio*." (emphasis added)).

“levels:” (i) “central;” (ii) “regional;” and (iii) “local.”⁴¹² This also shows that the Parties intended the reference to “central level” to mean an authority that extends throughout a country’s territory (*i.e.*, nationwide), as opposed to only certain portions of that territory.⁴¹³

- Likewise, this understanding is confirmed by Honduras’s Schedule to Annex I (which forms a part of the **Treaty’s context**),⁴¹⁴ in which Honduras set forth a non-conforming measure related to market access (under Chapter 11 of the Treaty) at the “Central” level and expressly indicated that it pertained to activities reserved for the “**Honduran Government, through the *Empresa Nacional de Energia Electrica* [ENEE].**”⁴¹⁵

147. **Fourth**, this conclusion is also fully aligned with principles of attribution under international law and Respondent’s position in the present case.⁴¹⁶ Respondent does not and cannot dispute that ENEE’s actions are attributable to the Honduran State under international law. For example, some highlights of its status include that the Honduran State created ENEE through legislation⁴¹⁷ and assigned ENEE essential governmental functions that are exclusive to the State under Honduran law, including the transmission, and dispatch of electricity.⁴¹⁸ Furthermore, half of the members of ENEE’s board of directors are ministers,⁴¹⁹ and its General Director, Mr. Erick

⁴¹² CAFTA-DR (CL-1), Art. 10.13.

⁴¹³ CAFTA-DR (CL-1), Art. 10.13.

⁴¹⁴ See, *e.g.*, *Fireman’s Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Decision on the Preliminary Question dated 17 July 2003 (CL-356) ¶ 75 (confirming that NAFTA’s Annexes constitute an integral part of the Agreement, and in the view of the Tribunal, the definitions and classifications there set out are useful in construing the provisions of the Agreement.”); *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award dated 30 Aug. 2000 (CL-7) ¶ 71 (referring to NAFTA Chapter 18 when interpreting Article 1105).

⁴¹⁵ CAFTA-DR (CL-1), Annex I, Schedule of Honduras, at I-HO-12.

⁴¹⁶ Of note, the ILC Articles of State Responsibility similarly divide a government between “central” government and “territorial unit[s].” See ILC ARTICLES ON STATE RESPONSIBILITY (CL-79), Art. 4 (noting that “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State” and that “[a]n organ includes any person or entity which has that status in accordance with the internal law of the State.”).

⁴¹⁷ Law Creating Empresa Nacional de Energía Eléctrica (Decree 48-1957 dated 20 Feb. 1957), published in the Official Gazette dated 27 Feb 1957 (Exh. C-6), Arts. 1 (“An autonomous public service body, with personality, legal capacity and its own assets, shall be established for an indefinite duration, to be called the ‘Empresa Nacional de Energía Eléctrica,’ and shall be governed by the present Law, its regulations, and in so far as is not provided for, by the other laws of the country applicable to it.”), 45 (defining ENEE as “an organ of the State”).

⁴¹⁸ Electricity Law of 1994 (Exh. C-56), Arts. 15-16 (“The State reserves for itself the management of the operation of the Transmission System and the Dispatch Center. Companies that own facilities forming part of the National Interconnected System (SIN) must operate them in accordance with the provisions issued by ENEE through its Dispatch Center.”), 27 (“The planning, coordination, supervision, and control of the operations of generation plants, transmission lines, and substations belonging to the SIN shall be carried out by ENEE through its Dispatch Center.”).

⁴¹⁹ Law Creating Empresa Nacional de Energía Eléctrica (Decree 48-1957 dated 20 Feb. 1957), published in the Official Gazette dated 27 Feb 1957 (Exh. C-6), Art. 7 (noting that ENEE’s management and governance “shall be vested in a Board of Directors,” which in turn shall be composed of six officers, five of which are high-rank public

Tejada, simultaneously serves as the Minister of Energy of Honduras.⁴²⁰ Moreover, Respondent itself conceded in its Request for Bifurcation and elsewhere in its submissions that “it cannot be disputed that the purchase of electricity by the ENEE includes a government purpose,” and that ENEE “is considered an entity of the State.”⁴²¹

148. **Finally**, Respondent’s refusal to accept that ENEE qualifies as an entity at the “central level” of government under the CAFTA-DR also is at odds with its position in this Arbitration that the State Guarantee—provided by entities that are undisputedly part of the “central level” of government—purportedly does not contain obligations or new rights to the PPA parties.⁴²² It also contradicts its argument that the PPA also authorizes Pacific Solar’s connection to the SIN and the Operations Agreement does not create any new obligations for the Honduran State “different to the ones provided in the PPA.”⁴²³ Indeed, Respondent’s stance necessarily implies that ENEE and the Honduran State are either one and the same or, at a minimum, have equal standing.⁴²⁴

(b) The Agreements Were Signed by Pacific Solar, a Protected Investment, and There is no Basis to Apply a Separate Temporal Requirement

149. As regards this criterion, in its Reply on Jurisdiction, Respondent does not dispute that Pacific Solar executed each of the Agreements. Respondent, however, rehashes its prior argument that to qualify as a “covered investment” for purposes of an “investment agreement,” the relevant local entity that signs the instrument must already be a protected investment at the time

servants, including three ministers: a) **the Secretary of State in the Offices of Communications, Public Works, and Transportation; b) the Secretary of State in the Office of Natural Resources; c) the Secretary of State in the Offices of Finance and Public Credit**) the Executive Secretary of the Higher Council for Economic Planning; and d) the President of the Central Bank of Honduras) (emphasis added). Further, under President Castro, the General Manager of ENEE (Erick Tejada) is also simultaneously serving as Minister of Energy.

⁴²⁰ Memorial on the Merits ¶ 16.

⁴²¹ Request for Bifurcation ¶¶ 58, 60; *see also* Memorial on Jurisdiction ¶¶ 160, 165, 175, Reply on Jurisdiction ¶ 232.

⁴²² Reply on Jurisdiction ¶ 343 (stating that the State Guarantee “contains no new obligations or rights for the parties to the PPA[.]”).

⁴²³ Reply on Jurisdiction ¶ 348 (arguing that “the Operations Agreement . . . does not impose any new obligations on ENEE or any other Honduran State entity that were not already contained in the PPA.”), 349 (“Claimants are unable to indicate what obligations Honduras would have acquired other than those provided for in the PPA.”).

⁴²⁴ *See, e.g.*, Request for Bifurcation ¶¶ 58-59.

of execution.⁴²⁵ Respondent's attempt to include a temporal limitation to the definition of "investment agreement" is inconsistent with the Treaty's plain meaning and does not withstand scrutiny.

150. As Claimants have established, Respondent's position that Pacific Solar had to be owned and controlled by foreign nationals when it signed the Agreements, as a condition to obtain protection under Article 10.28, effectively entails adding a temporal requirement that is not present in the Treaty. Article 10.28 of the CAFTA-DR provides that an "investment agreement means a written agreement, that takes effect on or after the date of entry into force of [the CAFTA-DR] 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 . . . upon which the covered investment or the investor relies in establishing or acquiring a covered investment."⁴²⁶ Meanwhile, a "covered investment" is defined as "every asset that an investor **owns or controls**, directly or indirectly, that has the characteristics of an investment[.]"⁴²⁷

151. The use of the present tense "owns or controls" in the definition of "investment" clarifies that what matters for determining whether an entity qualifies as a "covered investment" is the investor's current ownership or control of the investment. Further, Respondent's interpretation, if true, would render the reliance requirement (*i.e.*, the last criterion in the definition of "investment agreement") set forth in the CAFTA-DR meaningless. According to Honduras, for agreements to qualify as an investment agreement under the CAFTA-DR, an investor must *first*, invest in a local entity, and *then*, the local entity would enter into the agreement. This interpretation cannot be correct, as it seeks to impose a new requirement which is not contemplated in the Treaty.⁴²⁸ More importantly, it would prevent an investor to acquire an investment relying on an

⁴²⁵ Reply on Jurisdiction ¶¶ 375-378. Respondent has seemingly abandoned its prior contention that the counterparty to an investment agreement "must not be of the same nationality" as the host State of the investment, an interpretation which is at odds with the CAFTA-DR. See Memorial on Jurisdiction ¶¶ 225-226; Counter-Memorial on Jurisdiction ¶¶ 132-134.

⁴²⁶ CAFTA-DR (CL-1), Art. 10.28 (definition of "investment agreement") (emphasis added).

⁴²⁷ CAFTA-DR (CL-1), Art. 10.28 (definition of "investment") (emphasis added).

⁴²⁸ As one tribunal has put it, "the **only temporal limitation** on covered investments is that they must have existed on or after the date upon which the Agreement [being the CAFTA-DR] came into force." See *David R. Aven and Others v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award dated 18 Sept. 2018 (CL-6) ¶ 12 ("As between U.S. investors and Costa Rica, the DR-CAFTA came into force on January 1, 2009. DR-CAFTA Chapter 10 applies to measures adopted or maintained in relation to all 'covered investments.' The only temporal limitation on covered investments is that they must have existed on or after the date upon which the Agreement came into force. Claimants have stated that all investments claimed in the arbitration satisfy this requirement. In addition, all of the measures at issue were adopted or maintained after January 1, 1999.").

investment agreement, which would be at odds with the definition of “investment agreement” under the CAFTA-DR.⁴²⁹

152. As Claimants further indicated in their Counter-Memorial on Jurisdiction, their position is consistent with the finding of the tribunal in the analogous *Freeport McMoRan v. Peru* case. In that case:

- The relevant investment agreement was signed in 1998, before the applicable treaty (*i.e.*, the U.S.-Peru TPA) entered into force in 2009. Therefore, as here, at the time of its execution, the relevant agreement did not benefit from the protection of an international treaty when it was executed.⁴³⁰
- The relevant investment treaty defined investment agreement to include a “written agreement between a national authority or a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself.”⁴³¹
- Similar to the case at hand, Peru contended that the enterprise in that case, SCMV, was not a covered investment under the relevant treaty when it entered into the investment agreement.⁴³²

⁴²⁹ CAFTA-DR (CL-1), Art. 10.28 (requiring, that an “investment agreement” under CAFTA-DR is, *inter alia*, a “written agreement . . . upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself”) (emphasis added).

⁴³⁰ *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/08, Award dated 17 May 2024 (CL-266) ¶ 639.

⁴³¹ The relevant treaty in *Freeport McMoRan v. Peru*, the United States–Peru Trade Promotion Agreement (“U.S.-Peru FTA”), contains a very similar definition of investment agreement and written agreement to the ones provided for in the CAFTA-DR. *Cf.* U.S.–Peru FTA (CL-195), Art. 10.28 (defining ‘investment agreement’ as “a written agreement between a national authority of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor: (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution or sale; (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government[.]”), n. 16 (defining ‘written agreement’ as “an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2.”) with CAFTA-DR (CL-1), Art. 10.28 (defining ‘investment agreement’ as “a written agreement that takes effect on or after the date of entry into force of this Agreement between a national authority of a Party and a covered investment or an investor of another Party that grants the covered investment or investor rights: (a) with respect to natural resources or other assets that a national authority controls; and (b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself[.]”), n. 12 (defining and ‘written agreement’ as “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.”).

⁴³² *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/08, Award dated 17 May 2024 (CL-266) ¶ 617.

- Interpreting the nearly-identical definition of “investment agreement,” the *Freeport* tribunal concluded that the reference to “covered investment” comprised any investment “in existence as of the date of entry into force of the Agreement or **established, acquired, or expanded thereafter,**” and, critically, that there is “**no basis to consider that there is a temporal limitation to investments covered by the TPA.**”⁴³³

153. The *Freeport* decision thus confirms that the only temporal limitation on a “covered investment” is that it be in existence on or after the entry into force of the treaty.⁴³⁴ The *Freeport* tribunal’s conclusion thus clearly is not, as Respondent contends, a “fundamentally differently”⁴³⁵ situation.

154. Rather, a “fundamentally different” situation is at issue in the cases on which Respondent relies, which applied the U.S.-Ecuador BIT.⁴³⁶ Unlike the CAFTA-DR and the U.S.-Peru TPA at issue in *Freeport*, the U.S.-Ecuador BIT did **not** allow a protected investment to be the relevant signatory of the investment agreement.⁴³⁷ Thus, the findings reached in those cases that no investment agreement existed because the **investor itself** had not signed the relevant agreement is wholly irrelevant to deciding the issue at hand.⁴³⁸

⁴³³ *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/08, Award dated 17 May 2024 (CL-266) ¶¶ 638-639.

⁴³⁴ *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/08, Award dated 17 May 2024 (CL-266) ¶ 639 (“The Tribunal disagrees with the Respondent’s argument that SMCV and the Concentrator are not “covered investments” because the TPA had not yet entered into force at the time the investment was made. The plain wording of the definition of a “covered investment” under the TPA contradicts the Respondent’s argument and shows that an investment could have already been in existence at the date of entry into force of the TPA.”).

⁴³⁵ Reply on Jurisdiction ¶ 384.

⁴³⁶ Reply on Jurisdiction ¶ 383 (citing *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award dated 18 Aug. 2008 (CL-42); *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction dated 2 June 2010, (RL-14), *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN 3481, Award (3 Feb. 2006) (RL-139)).

⁴³⁷ U.S.-Ecuador BIT (Exh. R-17), Art. VI (providing that “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[.]**”) (emphasis added). Cf. CAFTA-DR (CL-1), Art. 10.28 (defining “investment agreement” as “[a]greement between a national authority of a Party **and a covered investment or an investor of another Party . . .**”) (emphasis added).

⁴³⁸ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award dated 18 Aug. 2008 (CL-42) ¶ 183 (“[F]or the purposes of Article VI, an investment agreement has to be one that “is between a State Party and a national or company of the other State Party”. In this case, the PPAs were entered into by INECEL – a state-owned entity – and Electroquil, a company incorporated in Ecuador”) (citation omitted); *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction dated 2 June 2010, (RL-14) ¶ 235 (“[U]nder Article VI(1), the Treaty provides that the ‘investment agreement’ must be entered into ‘between [a] Party and [a] national or company of the other Party.’ In accordance with this requirement, the PSCs are not investment agreements.”); *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN3481, Award dated 3 Feb. 2006 (RL-139) ¶ 167 (“[T]he participation contracts were not concluded . . . by the investor in these proceedings,

3. The Agreements Confer Pacific Solar—a Protected Investment—Rights over Natural Resources or Other Assets that Honduras Controls

155. In their Counter-Memorial on Jurisdiction, Claimants showed that, through the Agreements, Honduras granted Pacific Solar rights over natural resources and other assets that Honduras controls. Specifically, Honduras's legal regime, which includes the General Environmental Law and the 2014 Electric Power Industry Law, makes clear that the State exerts control over solar energy resources in its territory, including solar energy.⁴³⁹ It also provides that generators must seek a "concession" for the use of those natural resources in the form of operation agreements.⁴⁴⁰ Claimants further detailed how the Agreements, including the PPA, provide Pacific Solar rights over assets that Honduras controls, including because they allow Pacific Solar to be connected to the Honduran grid over which Honduras exercises absolute control.⁴⁴¹

156. In its Reply on Jurisdiction, Respondent appears to concede that the reference to "control" in Article 10.28 of the CAFTA-DR pertains to "legal," as opposed to "physical," control over a natural resource or asset.⁴⁴² That is, control means the "exercise of power or authority over" and the ability "[t]o regulate or govern" a particular asset.⁴⁴³ Respondent nonetheless contends that neither Decree No. 138-2015 nor the General Law of the Electrical Industry provides that the Honduran State regulates "sunlight," but rather provides that it regulates the "energy []

EnCana, but by its third-State-incorporated subsidiaries. There is thus no basis under Article XIII(3) for this Tribunal to assume jurisdiction over the claim.").

⁴³⁹ 2014 Electric Power Industry Law (**Exh. C-8**) Recitals, Arts. 4-5, 7(D), 8-9, 11; General Environmental Law, Decree No. 104-93 dated 8 June 1993 (**Exh. R-16**), Arts. 28, 78.

⁴⁴⁰ Counter-Memorial on Jurisdiction ¶¶ 144-147; Electricity Law of 1994 (**Exh. C-56**), Art. 66 (establishing that generators of any kind in Honduras can only operate through operations agreements entered into with the Secretariat for Communications, Public Works, and Transportation [a competence which was then transferred to SERNA and which now lies with the Ministry of Energy]; 2013 Renewables Law (**Exh. C-5**), Art. 3 (amending Art. 22 of the 2007 Renewables Law) (providing that renewable energy generators "shall obtain the concession for the use of the natural resource utilized for power generation and the relevant area where the renewable natural resource, the development, and the project's installations are located through the respective Operation Agreements; Operations Agreement (**Exh. C-3**) § 1.4.8 ("[Pacific Solar has the] exclusive right to use and usufruct the solar resource required for the operation of the Plant.").

⁴⁴¹ Counter-Memorial on Jurisdiction ¶¶ 143-149; Reply on Jurisdiction ¶ 391. *See also* 2013 Renewables Law (**Exh. C-5**), Art. 3 (amending Art. 22 of the 2007 Renewables Law); 2014 Electric Power Industry Law (**Exh. C-8**), Recitals, Arts. 4-5, 7(D), 8-9, 11; Electricity Law of 1994 (**Exh. C-56**), Arts. 2, 3, 7, 14-16; Operations Agreement (**Exh. C-3**) §§ 1.4.5, 1.4.8; PPA (**Exh. C-1**), §2, Cl. 7.1, Annex II.

⁴⁴² Reply on Jurisdiction ¶ 391 ("First, the arguments presented by Claimants themselves concede that Honduras does not control 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.' This is the same definition from which the State has already demonstrated that it exercises no control over the Solar Resource.").

⁴⁴³ Reply on Jurisdiction ¶ 391.

generate[d]" by solar light and the "parameters for its distribution and integration to the Honduran energy grid."⁴⁴⁴ Respondent also argues that if it had sought to exercise "legal or physical control" over "solar resource," it would have expressly stated so in its legislation as it did with hydrocarbons, which Respondent argues are under the "direct . . . domain of the State."⁴⁴⁵ Respondent's position is not credible.

157. To begin with, Honduras's eleventh-hour distinction between "solar light" (or irradiation) and "solar energy" is artificial. Scientific literature indicates that there is no such distinction between solar light or irradiation and solar energy, and that both terms are equivalent, as "the term irradiance is used to describe the solar power."⁴⁴⁶ In any event, as solar energy can generate value and be subject to a property interest, it would also fit the definition of an "an asset."⁴⁴⁷ Thus, even if Respondent is correct, which it is not—that solar energy does not qualify as a "natural resource," Respondent cannot dispute that energy generated in Honduras is an "asset" that it regulates and it is thus, under its control. Therefore, However Respondent attempts to frame the concept of "solar energy," it is undeniable that it squarely fits the definition of "investment agreement."

158. As Claimants further explained in their Counter-Memorial on Jurisdiction,⁴⁴⁸ several laws regulate the generation of energy using Honduras's solar resources. The 2014 Electric Power Industry Law confirms that the generation of electricity through "different sources of energy" is an activity regulated by the State of Honduras.⁴⁴⁹ And more specifically, the 2013 Renewables Law (that Respondent conveniently fails to refer to) contemplated that renewable

⁴⁴⁴ Reply on Jurisdiction ¶ 396.

⁴⁴⁵ Reply on Jurisdiction ¶¶ 399-400.

⁴⁴⁶ *Solar resources for concentrating solar power (CSP) system*, CONCENTRATING SOLAR POWER TECHNOLOGY: PRINCIPLES, DEVELOPMENTS AND APPLICATIONS, (2nd ed. 2021) (Exh. C-364), § 3.2.1 ("The term **irradiance** is used to describe the solar power (instantaneous energy flux) falling on a unit area per unit time, e.g., in W/m². The term **irradiation** is used to consider the amount of solar energy falling on a unit area over a stated time interval such as a day or a year.") (emphasis added).

⁴⁴⁷ Oxford Dictionary (Exh. C-361), Definition of "Asset" (A "thing that is valuable or useful to somebody/something.").

⁴⁴⁸ Counter-Memorial on Jurisdiction ¶¶ 143-144, 147.

⁴⁴⁹ 2014 Electric Power Industry Law (Exh. C-8), Arts. 1.A.I ("The purpose of this Law is to regulate the activities of generation, transmission, distribution, and commercialization of electricity within the territory of the Republic of Honduras[.]"), 1.C.VIII (defining generation as "the production of electricity through the utilization and transformation of energy derived from various types of sources."). See also Reply on Jurisdiction ¶¶ 403-404.

energy projects using solar resources shall obtain a concession for exploitation of such resource in the corresponding area where the generation plant is located.⁴⁵⁰

159. Similarly, Honduras's comparison of solar energy with hydrocarbons is misplaced.⁴⁵¹ As Honduras accepts, the CAFTA-DR does not require any physical control over the natural resource, but rather the ability to regulate a particular resource or asset.⁴⁵²

160. In any event, assuming *arguendo* that somehow the State's exclusive power to regulate solar energy is not enough to satisfy this criterion, the Agreements grant rights over other assets that Honduras also admittedly controls. Indeed, Respondent concedes that the Agreements grant rights of access to the national grid and other transmission infrastructure, which are indisputably State-controlled assets.⁴⁵³

4. Claimants Relied Upon the Agreements' Rights to Acquire Pacific Solar and its Assets, Which Are Distinct from the Agreements

161. In its Reply on Jurisdiction, Respondent rehashes its prior unsubstantiated position that Claimants do not satisfy this requirement because they have allegedly not demonstrated that they relied on the Agreements to acquire an asset that is distinct from the Agreements themselves.⁴⁵⁴ Respondent's position is baseless, as it ignores Pacific Solar's substantial assets that are distinct from the Agreements.

162. The relevant part of Article 10.28 requires that the covered investment or the investor relies on the investment agreement's rights "in establishing or acquiring a covered investment other than the written agreement itself."⁴⁵⁵ In simple terms, this phrasing merely

⁴⁵⁰ 2013 Renewables Law (Exh. C-5), Art. 3 (amending Art. 22 of the Electricity Law of 1994) ("Renewable Energy Generation projects that use domestic natural resources other than hydraulic power from national waters—such as wind, solar, biomass, geothermal, marine or tidal energy and urban waste—shall be exempt from all fees for the use and exploitation of the renewable resource and shall obtain the concession for the use of the natural resource utilized for power generation and the relevant area where the renewable natural resource, the development, and the project's installations are located [.]")

⁴⁵¹ Reply on Jurisdiction ¶¶ 398-402.

⁴⁵² Reply on Jurisdiction ¶ 391. Yet another red herring is Respondent's argument that "anyone can use [solar] resource to generate its own energy." See Reply on Jurisdiction ¶ 402. There cannot be any debate that in the present case, the Parties are not dealing with the use of natural resources by individuals located in Honduras (*e.g.*, water, solar, wind), but rather, Honduras's undisputed regulation of the use of natural resources for the generation of energy at a utility scale.

⁴⁵³ Reply on Jurisdiction ¶¶ 308, 350.

⁴⁵⁴ Reply on Jurisdiction ¶ 410.

⁴⁵⁵ Memorial on the Merits ¶¶ 172-179; Counter-Memorial on Jurisdiction ¶¶ 110-112; CAFTA-DR (CL-1), Art. 10.28, nn. 12-13. Note 12 to Chapter Ten of the CAFTA-DR, in turn, defines a "[w]ritten agreement" as "an

requires an investor or an investment (*i.e.*, a Honduran enterprise) to rely on the investment agreement to acquire or establish an asset beyond the rights that are set forth in the agreements.

163. Here, this is clearly satisfied, as Claimants relied on the Agreements and the Renewables Laws to acquire Pacific Solar and its assets—which go beyond the Agreements themselves and include Pacific Solar's shares, among other assets. Relying on the State's long-term legal and contractual commitments and, Claimants acquired an equity interest in Pacific Solar and invested millions to develop the Plant, an investment they would not have made in the absence of those commitments.⁴⁵⁶ Respondent, therefore, cannot credibly dispute that Claimants also satisfy this criterion.

164. For the foregoing reasons, the agreements fit squarely within the definition of "investment agreement" under the CAFTA-DR.

IV. RESPONDENT'S "ADDITIONAL OBJECTIONS" DO NOT WARRANT BIFURCATION, AND IN ANY EVENT, SHOULD BE DISMISSED

165. As it is undisputed, in Procedural Order No. 4, the Tribunal instructed the Parties to address Respondent's "Additional Objections" in their written submissions and deferred its decision on whether these objections should be bifurcated until 30 days after the submission of Claimants' Rejoinder on Jurisdictional Objections.⁴⁵⁷ The Tribunal also made clear that its request for the Parties to address the Additional Objections in their submissions was to allow it to "determine . . . whether such objections should be addressed together with any of the Initial Objections that the Tribunal had decided to bifurcate, or whether they should be joined to the merits."⁴⁵⁸ In so doing, the Tribunal further rejected Respondent's assertion that the terms of

agreement in writing, executed by both parties, that creates an exchange of rights and obligations, binding on both parties under the law applicable under [Honduran law]." CAFTA-DR (CL-1), Art. 10.28, n. 12. Note 13 to Chapter Ten, moreover, defines "national authority" as "an authority at the central level of government." CAFTA-DR (CL-1), Art. 10.28, n. 13.

⁴⁵⁶ See, *e.g.*, Memorial on the Merits ¶¶ 179, 305-308.

⁴⁵⁷ See Procedural Order No. 4 dated 4 Apr. 2025 ¶ 55 (holding that "[t]he Tribunal will decide whether the Additional Objections should, in whole or in part, be bifurcated within 30 days after the Rejoinder on Jurisdictional Objections."); Reply on Jurisdiction § IV.

⁴⁵⁸ Procedural Order No. 4 dated 4 Apr. 2025 ¶ 20; see also *id.* ¶ 48 (observing that "the written phase of this bifurcated proceeding will greatly assist the Tribunal in determining whether the Additional Objection should be decided upon in the bifurcated proceedings or joined to the merits.").

Procedural Order No. 3 had recognized that the Additional Objections could be in fact decided (not only briefed) in the bifurcated proceedings.⁴⁵⁹

166. It is also undisputed that the Tribunal included the following instructions for the Parties' briefing of the Additional Objections:

- With respect to the **limitations period** issue, the Tribunal asked the Parties to: (i) address this objection on the "assumption that the facts alleged by Claimants qualify as violations of the Treaty" and (ii) whether if so, how the limitation period applies to continuous and to composite acts.⁴⁶⁰
- Regarding the **contract claims** objection, the Tribunal asked the Parties to "[f]ocus on the legal question whether, and if so, under what conditions, the Tribunal has jurisdiction over purely contractual claims;"⁴⁶¹ and
- Regarding the **ownership objection**, the Tribunal asked the Parties to address two "well-circumscribed" issues, namely: (i) whether Claimants own and control the investment through the various corporations that are mentioned in the Claimants' Memorial and (ii) whether Claimants have transferred their rights over Pacific Solar, to a third party, [REDACTED]⁴⁶²

167. It is further undisputed that to warrant bifurcation, a preliminary objection should: (i) materially reduce time and cost; (ii) dispose of all or a substantial part of the dispute; (iii) not be so intertwined with the merits that it would make bifurcation impractical; and (iv) be *prima facie* serious and substantial.⁴⁶³

168. In their Counter-Memorial on Jurisdiction, Claimants explained why both the limitations and the contractual claims objections did not warrant bifurcation and observed that

⁴⁵⁹ See Procedural Order No. 4 dated 4 Apr. 2025 ¶ 19 (finding that "[u]nlike what the Respondent asserts, PO3 cannot be interpreted as meaning that any additional objections which the Respondent would raise in its Memorial on Jurisdictional Objections would necessarily be decided upon in the bifurcated proceeding.").

⁴⁶⁰ Procedural Order No. 4 dated 4 Apr. 2025 ¶ 55.

⁴⁶¹ Procedural Order No. 4 dated 4 Apr. 2025 ¶¶ 41, 55.

⁴⁶² Procedural Order No. 4 dated 4 Apr. 2025 ¶¶ 43-44 ("Additional Objection 2 is concerned with ownership and control over the alleged investment. In the Tribunal's preliminary understanding, the objection has two limbs . . . [T]he Tribunal considers that the establishment of the Claimants' uninterrupted ownership and control of the investment through the chain of corporations identified in their written submissions hitherto, appears to be a rather well-circumscribed issue presenting no relation with the merits.").

⁴⁶³ Reply on Jurisdiction ¶ 586; see *id.* § IV. Observations on Request for Bifurcation ¶ 4; see generally *id.*, § II; Procedural Order No. 3 dated 20 Dec. 2024 ¶ 31 ("Pursuant to ICSID Arbitration Rule 44(2), which applies to requests of bifurcation relating to a preliminary objection, the Tribunal shall, in determining whether to bifurcate, 'consider all relevant circumstances, including whether: (a) bifurcation would materially reduce the time and cost of the proceeding; (b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and (c) the preliminary objection and the merits are so intertwined as to make bifurcation impractical.'"); Procedural Order No. 4 dated 4 Apr. 2025 ¶ 30.

Respondent had not disproven this issue.⁴⁶⁴ With respect to the limitations objection, Claimants explained that CAFTA-DR tribunals had generally only bifurcated preliminary objections based on the limitations period set forth in Article 10.18(1) when the Treaty mandated it; that is, when Respondent invoked Article 10.25.5 of the CAFTA-DR or Rule 41 of the ICSID Arbitration Rules, triggering automatic bifurcation.⁴⁶⁵ Claimants further showed that, in those circumstances, multiple tribunals had ultimately dismissed these limitations objections similarly relying on assumptions that the facts that the claimants had alleged qualified as violations of the Treaty.⁴⁶⁶

169. With respect to the contractual claims, Claimants further showed that Respondent's allegation that Claimants' claims are purportedly contractual is, by definition, intertwined with the merits.⁴⁶⁷ Moreover, with respect to the legal question that the Tribunal did ask the Parties to address (*i.e.*, whether the Tribunal has jurisdiction over purely contractual claims), Claimants explained that it would be inefficient to address this issue without considering the nature of

⁴⁶⁴ Counter-Memorial on Jurisdiction §§ III.A, III.B.

⁴⁶⁵ Counter-Memorial on Jurisdiction ¶¶ 195-196; *see also Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (**CL-283**) ¶ 1.17 (deciding an objection based on Article 10.18(1) of the CAFTA-DR after the respondent had brought objections to jurisdiction under ICSID Arbitration Rule 41(1)).

⁴⁶⁶ Counter-Memorial on Jurisdiction ¶¶ 196-198; *see also Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections dated 13 Mar. 2020 (**CL-151**) ¶ 220 (finding that under the time-limitation provision in Article 10.18.1 "the relevant inquiry is whether 'more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant . . . has incurred loss or damage' by reason of that breach. This determination cannot be made without a predicate determination of what particular breach has been alleged."); *id.* ¶¶ 222-223 (relying on claimants' allegations that they were not claiming for facts that occurred prior to a certain date and noting that "[t]he Tribunal takes Claimants at their word regarding what breach they in fact are alleging, and what breach they are not alleging."); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (**CL-283**) ¶¶ 3.35 ("[T]he Parties strongly disagree as to what is the relevant dispute and the time when it arose."), 3.36 ("[T]he Tribunal has determined that the relevant dispute as regards the Claimant's claims (as now pleaded and clarified in these proceedings) arose on 13 March 2008, at the earliest."), 3.37 ("The Tribunal's determination has several consequences for the Ratione Temporis issue . . . the relevant measure alleged by the Claimant will necessarily focus on unlawful acts or omissions under CAFTA that allegedly took place not earlier than March 2008."), 3.38 ("Such being the Tribunal's analysis, the debate between the Parties concerning: . . . (ii) the three-year time limit under CAFTA as invoked by the Respondent become irrelevant for the purpose of deciding the Ratione Temporis issue."); *see also The Renco Group, Inc. v. The Republic of Peru (II)*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections dated 30 June 2020 (**CL-284**) ¶ 147 (reaching a similar decision when faced with an expedited preliminary objection under Article 10.20.5 of the U.S. – Peru Trade Promotion Agreement, which is nearly identical to the CAFTA-DR, on the application of the Treaty's timing provisions. The tribunal ruled that it could not accept the respondent's allegations as to the claimant's FET and indirect expropriation claims at that stage, without having examined the merits of the dispute. The tribunal noted that it would need to closely scrutinize the parties' accounts of the claimant's claims when it turns to the merits, and that the respondent's "assertions are insufficient [at the preliminary phase are] to deprive the tribunal of jurisdiction to examine these claims altogether.").

⁴⁶⁷ Counter-Memorial on Jurisdiction ¶ 200; *see also* Procedural Order No. 4 dated 4 Apr. 2025 ¶ 51 ("Respondent itself observes that this objection is intertwined with the merits.").

Claimants' claims under the Treaty.⁴⁶⁸ Claimants, however, made clear that if the Tribunal were to accept (as it should)—on a *prima facie* basis—that their claims, as pled, fall within the scope of the CAFTA-DR, are timely, and that Claimants have properly demonstrated their ownership and control of their investments, the Tribunal can and should dismiss Respondent's Additional Objections at this stage.⁴⁶⁹

170. In its Reply on Jurisdiction, Respondent purports to agree with the Tribunal's instruction to assume that "the facts alleged by Claimants qualify as violations of the Treaty" (regarding the limitations objections)⁴⁷⁰ and that the contractual objection should only be geared to address the above-noted "legal question."⁴⁷¹ Respondent's Reply, however, contradicts the Tribunal's instructions as it devotes dozens of pages to discussing merits and evidentiary issues and expanding the basis of its objections well beyond the four corners of Procedural Order No. 4. For example, in the introduction to the Reply, Respondent contends that the "starting point" to the Tribunal's analysis of its limitations and contractual objections is the so-called "nucleus" of Claimants' claims.⁴⁷² Respondent then devotes multiple pages to articulate its own interpretation of the factual basis of Claimants' claims, which Respondent contends are strictly based on an old-age contractual dispute, which Claimants somehow never actioned upon.⁴⁷³ Tellingly, while purporting to describe Claimants' claims, Respondent does not refer at all to Honduras's detrimental policies and measures against generators that started in 2022, including its repudiation of critical rights under the Agreements, forced renegotiations under the PPA under threats of expropriation and termination, and threats of criminal proceedings if generators interrupted supply, among several other concurrent measures.⁴⁷⁴ Respondent's time limitation and contractual objections therefore hinge on Respondent's self-serving characterization of the Treaty breaches.

⁴⁶⁸ Counter-Memorial on Jurisdiction ¶¶ 7, 194, 203, 212, 258.

⁴⁶⁹ Counter-Memorial on Jurisdiction ¶¶ 602-603.

⁴⁷⁰ Counter-Memorial on Jurisdiction ¶ 603.

⁴⁷¹ Reply on Jurisdiction ¶¶ 584, 600-601.

⁴⁷² See, e.g., Reply on Jurisdiction ¶¶ 11-12.

⁴⁷³ See, e.g., Reply on Jurisdiction ¶¶ 11-23, 441, 445-461.

⁴⁷⁴ See, e.g., Memorial on the Merits ¶¶ 4-5, 15-24, 93-94, 98 116-154. As Claimants explained, "[t]he 2022 New Energy Law placed front and center the State's intent to (i) repudiate its compensation and other key obligations towards Pacific Solar; and (ii) expropriate the Plant if the PPA's 'renegotiation' was not to the State's satisfaction. Within hours of the 2022 New Energy Law's approval, at a meeting with multiple generators with PPAs, Government officials handed Pacific Solar a one-page 'offer,' which threatened Pacific Solar's rights under the Agreements. That Honduras handed Pacific Solar an 'offer,' mere hours after the 2022 New Energy Law was approved, makes plain that the term 'renegotiation' is nothing more than the unilateral imposition of lower energy prices and elimination of

171. In any event, accepting Respondent's recasting of Claimants' claims would necessarily require delving into issues that go to the heart of the merits, which is not appropriate for a bifurcated phase. In fact, Respondent concedes as much arguing that "the Tribunal should not leave it to [Claimants' hands] to assess issues such as which facts form the basis of the claims and which are [the facts that are] relevant to the analysis of certain jurisdictional issues."⁴⁷⁵ In the words of Respondent, "[t]his must be the result of an independent and objective analysis."⁴⁷⁶

172. Separately, Respondent raises various arguments to dispute Claimants' legal support on the treatment of limitations objections under CAFTA-DR and similarly-worded treaties. Respondent, for example, claims that Claimants "purporting to establish a general rule" that the Tribunal dismiss Respondent's bifurcation request and limitations objection based on two CAFTA-DR cases.⁴⁷⁷ This misconstrues Claimants' position. As their Counter-Memorial and the above summary make clear, Claimants have pointed to cases where the tribunals had no choice but to hear limitations claims on a preliminary basis, but ultimately dismissed those objections on the *prima facie* assumption that the claimants' claims—as pled—qualified as violations of the CAFTA-DR or nearly identical treaties.⁴⁷⁸

incentives in the PPA—conditions being imposed upon Pacific Solar under the threat of forced acquisition by the State." *Id.* ¶ 98. Indeed, "after enacting the 2022 New Energy Law, the State engaged in conduct that substantially harmed the Paizes and Pacific Solar, by (i) pushing for nothing other than terms that eliminate Pacific Solar's key rights; (ii) weaponizing the State's significant and outstanding debt to Pacific Solar, forcing Pacific Solar into a precarious situation with its lenders and to restructure its project finance loans in an attempt to salvage the project; and (iii) engaging in a public smear campaign against generators." *Id.* 116.

⁴⁷⁵ Reply on Jurisdiction ¶ 606.

⁴⁷⁶ Reply on Jurisdiction ¶ 606.

⁴⁷⁷ Reply on Jurisdiction ¶ 611.

⁴⁷⁸ Counter-Memorial on Jurisdiction ¶¶ 196-198 ("CAFTA-DR tribunals have generally only bifurcated preliminary objections based on the limitation period in Article 10.18(1) when it was mandated by the Treaty"); *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections dated 13 Mar. 2020 (CL-151) ¶¶ 220, 222-223; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (CL-283) ¶¶ 3.35-3.38. Respondent also incorrectly describe Claimants' reliance on the *Renco v. Peru* award. In its Reply, it notes that Claimants' reliance on *Renco* is misplaced because it was not based on the CAFTA-DR. Reply on Jurisdiction ¶ 611. Respondent's position, however, fails to address the fact that the applicable investment treaty in *Renco*, the Peru-U.S. TPA, sets forth an identical limitations period provision and a nearly identical clause providing for mandatory bifurcation. See Free Trade Agreement Between the United States of America and Peru dated 12 Apr. 2006 (CL-195), Arts. 10.18 (providing that "[n]o 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."), 10.20 ("[w]ithout prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal's competence, a tribunal shall

173. Respondent further contends that the *Spence Int'l Investments & Berkowitz v. Costa Rica* case “categorically refutes Claimants’ narrative” because that tribunal “bifurcated” a temporal limitation without invoking either Article 10.20.5 of the CAFTA-DR or Rule 41 of the ICSID Arbitration Rules.⁴⁷⁹ Respondent is wrong. In that case, “[n]o application for bifurcation was made and jurisdictional issues were pleaded alongside the merits.”⁴⁸⁰ Indeed, by the time that the *Berkowitz* tribunal ruled on Costa Rica’s limitations objection (among others), the tribunal had the benefit of the parties’ submissions and had held a hearing on **both** jurisdiction and merits.⁴⁸¹

174. Respondent’s reliance on the *Tennant Energy v. Canada* case to support its position that the limitations objection should be bifurcated is also misplaced. Respondent quotes a sentence from one of that case’s procedural orders, which stated that, in the circumstances of that case, “[t]he Tribunal need[ed] 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[.]”⁴⁸² Respondent nonetheless, ignores this same tribunal had previously found that it would be more appropriate to hear this objection with the merits if the tribunal had to “substantially engage in the facts of the dispute, and to establish certain facts and connections between these facts” or “involve significant testimony” from witnesses.⁴⁸³ In fact, the *Tennant* tribunal only agreed to rule on the limitations objection after the parties’ submissions on jurisdiction had finalized and the tribunal was satisfied that it did not have to “delv[e] into or prejudg[e] the merits of Claimant’s claim.”⁴⁸⁴

175. Finally, as noted above, Claimants took note of the Tribunal’s instruction in Procedural Order No. 4 that Respondent may raise its objection concerning ownership and control

address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.”).

⁴⁷⁹ Reply on Jurisdiction ¶ 611.

⁴⁸⁰ *Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected) dated 30 May 2017 (**CL-286**) ¶ 7.

⁴⁸¹ *Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected) dated 30 May 2017 (**CL-286**) ¶¶ 8-9, 15 (describing Costa Rica’s arguments on the merits and referring to a 5-day “hearing on jurisdiction and merits” held in Washington D.C.). As explained below in Section IV.A, this tribunal ultimately found that some of claimants’ claims fell within the limitations period. *Id.* ¶¶ 270, 286; *infra* § IV.A.

⁴⁸² *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 9 dated 10 Mar. 2021 (**RL-179**) ¶ 36.

⁴⁸³ *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 9 dated 10 Mar. 2021 (**RL-179**) ¶ 9 (citing *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 8 dated 12 Nov. 2020 ¶ 43).

⁴⁸⁴ *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 9 dated 10 Mar. 2021 (**RL-179**) ¶ 36.

over the investment to assess two “well-circumscribed” issues, namely: (i) whether Claimants own and control the investment through the various corporations that are mentioned in the Claimants’ Memorial and (ii) whether Claimants have transferred their rights over Pacific Solar, to a third party, [REDACTED].⁴⁸⁵ Claimants’ position on both issues and Respondent’s ever-expanding ownership objection is detailed in Section IV.C below.⁴⁸⁶

176. Nonetheless, contrary to Respondent’s allegations, Claimants have not “conceded” that this objection is adequate for bifurcation.⁴⁸⁷ Rather, Claimants have abided by the Tribunal’s instruction to address those two limited issues in this phase while recognizing that the Tribunal also observed that it had not yet “decide[d] whether to bifurcate [this] issue or not.”⁴⁸⁸ Based on its Reply, however, Respondent appears to have understood that it was at the liberty of raising arguments that were well-beyond the two “well-circumscribed” issues set forth in the Tribunal’s Order.

177. Indeed, as detailed below in Section IV.C, Respondent’s position on this issue went from six pages in its Memorial on Jurisdiction to 28 in the Reply.⁴⁸⁹ Claimants have proven ownership and control over the shares and their investments. Nevertheless, Respondent has demanded numerous corporate documents to purportedly verify compliance with formalities.⁴⁹⁰ In addition, Respondent takes issue with a project finance structure to secure loans for the development of the project by arguing that a trustee or Pacific Solar’s lenders are the true owners of Claimants’ investment.⁴⁹¹ In light of Respondent’s baseless assertions, Claimants have had no choice but to introduce into the record many financing documents and to submit a witness testimony to further confirm that Claimants’ ownership and control over their investment remains unchanged. In the circumstances, Respondent has effectively transformed what could have been a circumscribed objection into a fishing expedition and at a minimum, a dispute that is highly facts

⁴⁸⁵ Procedural Order No. 4 dated 4 Apr. 2025 ¶¶ 43-44 (“Additional Objection 2 is concerned with ownership and control over the alleged investment. In the Tribunal’s preliminary understanding, the objection has two limbs. . . . [T]he Tribunal considers that the establishment of the Claimants’ uninterrupted ownership and control of the investment through the chain of corporations identified in their written submissions hitherto, appears to be a rather well-circumscribed issue presenting no relation with the merits.”).

⁴⁸⁶ See *infra* § IV.C.

⁴⁸⁷ Reply on Jurisdiction ¶¶ 595-596.

⁴⁸⁸ Procedural Order No. 4 dated 4 Apr. 2025 ¶ 44.

⁴⁸⁹ See *infra* § IV.C; see also Memorial on Jurisdiction ¶¶ 137-153; Reply on Jurisdiction ¶¶ 115-186.

⁴⁹⁰ See Reply on Jurisdiction ¶¶ 117-138; see *infra* § IV.C.2(a).

⁴⁹¹ See Reply on Jurisdiction ¶¶ 139-182; see *infra* §§ IV.C.2(a), (b).

intensive, as “issues of control . . . inevitably require extensive factual checks.”⁴⁹² Put simply, this is precisely the “overly burdensome evidence-intensive determination[] in an incidental proceeding with . . . short deadlines and a . . . short hearing,” that the Tribunal’s Procedural Order No. 4 had sought to prevent.⁴⁹³

178. Despite Respondent’s expansion of its objections, Claimants recognize and support the Tribunal’s observation that it “should aim at making the most efficient use of time that has been allocated to the bifurcated proceeding in the procedural calendar.”⁴⁹⁴ For the foregoing reasons and as further detailed in this submission, Claimants respectfully request that the Tribunal dismiss Respondent’s Additional Objections for the reasons articulated in Sections IV.A, IV.B and IV.C below. To do so, the Tribunal would only need to recognize that:

- As Claimants’ Memorial on the Merits shows, Claimants’ claims in fact arise from the State policy and measures enshrined in the New Energy Law from May 2022 and the subsequent conduct pursued in furtherance thereof.⁴⁹⁵ Therefore, these claims—as pled—are timely and within the jurisdiction of the Tribunal.
- Regarding the Tribunal’s question of whether, and if so, under what conditions, the Tribunal has jurisdiction over purely contractual claims, as Claimants explained in their Memorial on the Merits and further detail below in Section IV.B, Respondent’s sovereign actions have, *inter alia*, repudiated critical rights set forth in the Agreements, forced renegotiations of the PPA under threats of expropriation and termination of the same, and threatened generators with criminal proceedings if they interrupt energy supply.⁴⁹⁶ In any event, Claimants’ briefing of these facts and the various obligations of the CAFTA-DR that they breach—on its face—show that Claimants’ claims stem

⁴⁹² In *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, the tribunal analyzed an ownership objection (related to nationality) and found that although “this objection complie[d] with the requirement of being prima facie, serious and substantial, and . . . ha[d] the significance such as to be able to dispose of the case in a relevant way, if it is considered to be founded,” bifurcation was not warranted because “the possibility of separating the question from the background analysis . . . appear[ed] . . . significantly compromised.” *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Procedural Order No. 2 Decision on the Request for Bifurcation dated 2 Dec. 2022 (CL-159) ¶ 86. The tribunal explained that “the analysis of the nationalities of the different natural and legal persons involved in the case, and of the issues of control . . . would inevitably require extensive factual checks.” See *id.* ¶ 87 (noting that “although attempts were made to confine the Tribunal’s analysis to disentangling whether the Treaty contains an implicit prohibition on the investor (foreign) being either held or controlled by nationals of the host State,” such analysis “would be a very arduous task, involving a possible search for evidence relating to the negotiations of the Treaty, among other extremes.”).

⁴⁹³ See Procedural Order No. 4 dated 4 Apr. 2025 ¶ 30 (recognizing that “tribunals must strive to avoid making findings at the stage of objections to jurisdiction that they may revise at the merits phase” and that “one should also avoid overly burdensome evidence-intensive determinations in an incidental proceeding with relatively short deadlines and a relatively short hearing.”).

⁴⁹⁴ Procedural Order No. 4 dated 4 Apr. 2025 ¶ 30.

⁴⁹⁵ See *infra* § IV.A.2(b).

⁴⁹⁶ Procedural Order No. 4 dated 4 Apr. ¶ 55(3)(a).

from a situation that goes well beyond a “purely” contractual claim.⁴⁹⁷ The Tribunal can therefore, affirm jurisdiction over these claims.⁴⁹⁸

- Claimants (i) indirectly own or control their investment in Pacific Solar, which they have established by producing evidence confirming that they indirectly own 99.99% of Pacific Solar's shares while Mr. Paiz directly owns the other 0.01%, that they are the ultimate beneficial owners of Pacific Solar's shares and assets, and (ii) control their investment by making all important decisions related to Pacific Solar, including its day-to-day operations, among others.

179. Alternatively, if the Tribunal ought to engage in detailed consideration of the Parties' respective positions on the merits to address any of the Additional Objections, Claimants ask that the Tribunal postpone its decision to the merits phase of these proceedings.

A. CLAIMANTS' CLAIMS ARE NOT TIME BARRED

180. Contrary to Respondent's assertions, Claimants' claims are not time-barred. As Claimants explained in their submissions, Respondent's breaches arose in May 2022, through Honduras's adoption of various measures against certain power generators, including Pacific Solar. These measures included Respondent's enactment of the New Energy Law, a legislative overhaul that fundamentally upended Honduras's electricity sector.⁴⁹⁹ As Claimants explained, Honduras's enactment of the New Energy Law (i) subjected Claimants' investment to expropriatory measures in breach of Article 10.7 of the Treaty⁵⁰⁰; denied Claimants the Minimum Standard of Treatment (“MST”) under Article 10.5 of the Treaty⁵⁰¹; and breached Honduras's commitments under the Agreements, which constituted a breach of Article 10.4 of the Treaty (pursuant to which Claimants import the umbrella clauses under the Switzerland-Honduras BIT and the Germany-Honduras BIT) as well as Articles 10.28 and 10.16(1)(b)(i)(C) of the Treaty, which provisions confer upon Claimants a right of action to claim for Honduras's breaches of the

⁴⁹⁷ See generally Memorial on the Merits §§ IV.A.2, IV.A.3, IV.B.2-IV.B.4, IV.C.3; *id.*, ¶¶ 334-336.

⁴⁹⁸ This was the finding of the *Saipem v. Bangladesh* tribunal, which upheld the jurisdiction of the Tribunal despite the respondent's attempts to argue that the claimant's claims were “in reality a contractual claim dressed up as a treaty claim.” *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures dated 21 Mar. 2007 (CL-326) ¶¶ 139-140. As the *Saipem* tribunal determined in this regard that the claimant was not requesting relief under the contract and observed that “[w]hether [its] treaty claim [was] well-founded [was] a different issue which w[ould] have to be decided with the merits of the dispute.” *Id.* ¶ 141.

⁴⁹⁹ See Counter-Memorial on Jurisdiction ¶¶ 222-230 (citing New Energy Law (Exh. C-10), Arts. 5, 11, 15, 16, 17, 19; Honduran Congress, Debate Regarding 2022 New Energy Law dated 11 May 2022 (Exh. C-76), at 2:09:26-2:11:31).

⁵⁰⁰ Counter-Memorial on Jurisdiction ¶ 234.

⁵⁰¹ Counter-Memorial on Jurisdiction ¶ 235.

Agreements, including the PPA and the State Guarantee.⁵⁰² These breaches came about with the enactment of the New Energy Law and concurrent measures taken by the Castro Administration starting in 2022, and fall squarely within the time limitation period under the CAFTA-DR.

181. There is no dispute between the Parties that Respondent's measures that constitute a Treaty breach must have occurred after 24 August 2020, *i.e.*, three years prior to the Request for Arbitration.⁵⁰³ Aware that the enactment of the Energy Law and concurrent measures undermine its time limitation objection, Respondent continues to recast Claimants' Treaty claims as mere contractual claims over unpaid invoices and energy curtailment under the PPA—beginning in 2018 and 2017, respectively—to argue that the limitation period was triggered then.⁵⁰⁴ This is notwithstanding the Tribunal's instruction in Procedural Order No. 4 that Respondent "address the [time limitation objection] based on the assumption that the facts alleged by the Claimants qualify as violations of the Treaty."⁵⁰⁵

182. Honduras's time-bar defense hinges on its admission that ENEE has failed to abide by the PPA, including by failing to make timely payments before the cut-off date, while simultaneously ignoring the measures taken to implement the declared agenda of Honduras's President (who took office in 2022) against certain power generators, including Pacific Solar. In so doing, Respondent also ignores the Government's contemporaneous representations that bely its objection. When approving the New Energy Law, the Minister of Energy and General Manager of ENEE declared before the National Congress that the New Energy Law constituted a radical departure from the prior policy and aimed to "regain" ENEE from private generators.⁵⁰⁶ In furtherance of the Government's new way, the Minister characterized the New Energy Law's provisions for termination of the PPAs if generators do not renegotiate and criminally prosecuting generators that "threaten" to suspend supply if ENEE does not pay as "tools" that would enable

⁵⁰² Counter-Memorial on Jurisdiction ¶¶ 236-237.

⁵⁰³ Counter-Memorial on Jurisdiction ¶ 204; Reply on Jurisdiction ¶ 502.

⁵⁰⁴ Reply on Jurisdiction ¶ 479; *id.* ¶¶ 523-529.

⁵⁰⁵ Procedural Order No. 4 dated 4 April 2025 ¶ 55 (B)(1)(a).

⁵⁰⁶ Honduran Congress, Debate Regarding 2022 New Energy Law (**Exh. C-76**), at 2:08:15-2:08:34 ("This Law puts forth elements that **had never been proposed before** because there was no political will to do so after 12 years of living under the terrible cover of dictatorship. **It has never been proposed, as it is currently being proposed** from this Government, the renegotiation of contracts that will lower the conditions of certain contracts of generation that are harmful to the public interest.") (emphasis added); *id.* at 2:13:37-2:14:09 ("Today, with the approval of this law, **the old regime, the terrible night that we lived, the dictatorship, starts to die**, and the new begins to be born, it will be ENEE, the new ENEE, **the ENEE of Xiomara**, the spearhead for us to reform this country.") (emphasis added).

the State to have a “balanced” renegotiation.⁵⁰⁷ Beyond the New Energy Law, since 2022, the Government has also enacted a series of other measures that have rendered the Agreements meaningless.

183. Critically, while Respondent attempts to reduce Claimants’ claims to mere “delayed invoices” and minor “energy curtailments,” it ignores that it previously gave repeated assurances that payment would be forthcoming. Claimants, therefore, cannot be faulted for not having brought a claim earlier, when there was no reason to believe that Honduras would refuse to honor its obligations. Accepting Respondent’s position would set a dangerous precedent—forcing investors to file claims after one delayed invoice, even where the State gives repeated assurances that the debt will be resolved, or else be denied relief pursuant to treaties intended to protect their investments. That is not the standard the CAFTA-DR imposes, and it is not one the Tribunal should endorse.

184. In the following sections, Claimants demonstrate that, while the legal considerations for determining whether claims are time-barred are largely uncontested, Respondent’s characterization of how they apply to the present case is baseless because: (i) the limitation period under the Treaty begins to run upon a party’s knowledge with sufficient certainty that a breach and loss occurred; (ii) it was only upon the Castro Administration’s implementation of its agenda targeting certain generators, including Pacific Solar, through the enactment of New Energy Law in May 2022 and the measures that followed, that Claimants acquired said knowledge; and (iii) even if Honduras’s conduct pre- and post the enactment of the Law were characterized as continuous or composite acts, Claimants’ claims would still fall within the Treaty’s limitation period.

⁵⁰⁷ Honduran Congress, Debate Regarding 2022 New Energy Law dated 11 May 2022 (**Exh. C-76**), at 4:37:58-4:38:50 (“It is also important to mention that, for the State, for the Executive, for the Government, it is important to sit at the renegotiation table with the generators, **with some tools**, in such a way that it is possible for us to establish a balanced negotiation. . . . **We do not want to sit at the renegotiation table . . . with a gun to the head. . . . That is the spirit of those two articles, 4 and 5 [on expropriation].**”) (emphasis added).

1. The Treaty's Limitation Period Begins to Run from Claimants' Knowledge of Both a Treaty Breach and Resulting Loss or Damage

(a) Article 10.18(1) of the Treaty Requires Sufficient Certainty of the Breach and Loss Before the Limitations Period Is Triggered

185. It is undisputed between the Parties that, under Article 10.18(1) of the CAFTA-DR, the limitation period begins to run only when a claimant first acquires knowledge of – or should have acquired knowledge of – (i) the Treaty breach; and (ii) the resulting loss or damage.⁵⁰⁸ It is likewise undisputed that these requirements are cumulative.⁵⁰⁹ Moreover, Respondent does not dispute that, where knowledge of the breach and the resulting damage does not occur simultaneously, the three-year limitation period runs from the later of the two events.⁵¹⁰

186. Instead, Respondent appears to contest the standard of “knowledge” required to trigger the limitation period. Claimants explained in the Counter-Memorial that “knowledge” requires more than just a suspicion of breach or loss.⁵¹¹ In *Gramercy Funds v. Peru*, the tribunal explained that it was “not enough that the claimant suspects that **it might suffer a loss**”⁵¹²; what is required is “knowledge that loss or damage **has been caused**.”⁵¹³ Similarly, the tribunal in *Mobil Investments v. Canada*, whose findings were endorsed by the *Gramercy Funds* tribunal,⁵¹⁴ held that “[k]nowledge entails much more than suspicion or concern and requires a degree of certainty.”⁵¹⁵ Relying on *Eli Lilly v. Canada*, Claimants moreover observed that it would be

⁵⁰⁸ Counter-Memorial on Jurisdiction ¶ 210 (citing CAFTA-DR (CL-1), Art. 10.18(1)); Reply on Jurisdiction ¶¶ 485-486.

⁵⁰⁹ Counter-Memorial on Jurisdiction ¶ 210; Memorial on Jurisdiction ¶¶ 114-115 (citing *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction dated 4 Dec. 2017 (RL-98) ¶ 330).

⁵¹⁰ Counter-Memorial on Jurisdiction ¶ 210; Reply on Jurisdiction ¶¶ 485-489.

⁵¹¹ Counter-Memorial on Jurisdiction ¶ 211 (citing *Gramercy Funds Mgmt. LLC and Gramercy Peru Hldgs, LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Award dated 6 Dec. 2022 (CL-290) ¶ 528 (“[I]t is not enough that the claimant suspects that it might suffer a loss.”); *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility dated 13 July 2018 (RL-101) ¶ 155 (“To suspect that something will happen is not at all the same as knowing that it will do so. Knowledge entails much more than suspicion or concern and requires a degree of certainty.”)).

⁵¹² *Gramercy Funds Mgmt. LLC and Gramercy Peru Hldgs, LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Award dated 6 Dec. 2022 (CL-290) ¶ 528 (emphasis added).

⁵¹³ *Gramercy Funds Mgmt. LLC and Gramercy Peru Hldgs, LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Award dated 6 Dec. 2022 (CL-290) ¶ 528 (emphasis added).

⁵¹⁴ *Gramercy Funds Mgmt. LLC and Gramercy Peru Hldgs, LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Award dated 6 Dec. 2022 (CL-290) ¶ 528.

⁵¹⁵ *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility dated 13 July 2018 (RL-101) ¶ 155 (“To suspect that something will happen is not at all the same as knowing that it will do so. Knowledge entails much more than suspicion or concern and requires a degree of certainty.”).

improper for a tribunal to impute knowledge of a future breach and loss to the claimant, as “[a]n investor cannot be obliged or deemed to know of a breach before it occurs.”⁵¹⁶

187. Respondent, however, contends that the requisite knowledge under Article 10.18(1) is triggered merely by “reasonable knowledge” of so-called “essential facts that are then alleged to be a violation” which, according to Respondent, are sufficient to compel a claimant to “investigate, analyse and . . . act.”⁵¹⁷ To that end, Respondent proposes an “objective criterion” to determine the time limitation period based on allegedly “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).”⁵¹⁸ These arguments conflate distinct legal concepts and find no support in the cases Respondent invokes.

188. While an investor does not need to know the full extent or exact amount of damage it has suffered for the limitations period to begin running, this, however, does not reduce the applicable standard under Article 10.18(1) of the Treaty to mere “reasonable knowledge” of “essential facts.” As Claimants have explained, Article 10.18(1) requires a degree of **certainty** as to both the Treaty breach and the resulting loss or damage – a standard that is plainly not met here. The case law advanced by Respondent confirms as much.⁵¹⁹

189. In *Ansung Housing v. China*, for example, the tribunal – relying on *Berkowitz v. Costa-Rica* – observed that, while the limitation 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.”⁵²⁰ The tribunal’s use of “will be” or “has been” signals that a degree of certainty is required to trigger the limitation period.

190. Similarly, in *Mondev v. Canada*, the tribunal nowhere sets “reasonable knowledge” of “essential facts” as the applicable standard. As Respondent observes, the tribunal was

⁵¹⁶ Counter-Memorial on Jurisdiction ¶ 221 (citing *Eli Lilly and Co. v. Canada*, UNCITRAL Case No. UNCT/14/2, Award dated 16 Mar. 2017 (CL-285) ¶ 167).

⁵¹⁷ Reply on Jurisdiction ¶¶ 499-500. See also *id.* ¶ 498.

⁵¹⁸ Reply on Jurisdiction ¶ 501.

⁵¹⁹ Reply on Jurisdiction ¶ 499.

⁵²⁰ *Ansung Housing Co., Ltd. v. People’s Republic of China*, ICSID Case No. ARB/14/25, Award dated 9 Mar. 2017 (RL-173) ¶ 111 (emphasis added).

concerned with the “extent or quantification of the loss or damage.”⁵²¹ It held 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.”⁵²² As in *Ansung*, the reasoning in *Mondev* presupposes a degree of certainty that loss or damage **has occurred**, even if its full extent and corresponding quantification is unknown. Respondent’s reliance on certain “contemporaneous correspondence” and “document[ation]” concerning delayed payments and limited energy curtailments that were not even invoiced under the PPA,⁵²³ – particularly where Honduras repeatedly assured Claimants that the debt would be resolved – thus cannot sustain its time limitation objection.

191. Respondent also criticizes Claimants’ reliance on *Eli Lilly v. Canada* on grounds that there, the tribunal had concluded that the time limitation period “had not expired because the alleged breach only occurred when the Canadian courts actually enforced it against the investment and their rulings became final.”⁵²⁴ This does not help Respondent’s case. In that case, the tribunal rightly found that the investor acquired the requisite knowledge of Canada’s breach when the Canadian courts officially invalidated two of its patents. The tribunal specifically rejected Canada’s argument that the limitation period should have been triggered earlier, when the claimant faced a risk of invalidation based on the prior cancellation of a different patent. The tribunal clarified that NAFTA’s limitation provision does “not require investors to bring claims for possible future breaches on the basis of potential (and therefore necessarily hypothetical) losses to their investments or the increased risks of such losses.”⁵²⁵

192. Legal authority thus confirms that the limitation period begins to run only when the investor knows – or should have known – with reasonable **certainty** that both the breach and the resulting loss or damage have occurred. As explained in Section IV.A.2 below, Claimants first acquired that knowledge in 2022, upon the implementation of President Castro’s agenda, including in particular the enactment of the New Energy Law and subsequent conduct.

⁵²¹ Reply on Jurisdiction ¶ 499 (citing *Mondev Int’l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award dated 11 Oct. 2002 (CL-9) ¶ 87).

⁵²² *Mondev Int’l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award dated 11 Oct. 2002 (CL-9) ¶ 87.

⁵²³ Reply on Jurisdiction ¶ 503.

⁵²⁴ Reply on Jurisdiction ¶ 514.

⁵²⁵ *Eli Lilly and Co. v. Canada*, UNCITRAL Case No. UNCT/14/2, Award dated 16 Mar. 2017 (CL-285) ¶ 169.

(b) State Conduct Pre-Dating the Enactment of the New Energy Law Can Be Considered as Factual Background to Respondent's Treaty Breaches

193. In their Counter-Memorial on Jurisdiction, Claimants established that facts pre-dating August 2020 (*i.e.*, the “non-payment of bills and energy limitations under the PPA”)⁵²⁶ do **not** form the legal basis for their claims.⁵²⁷ Claimants further explained, however, that the Tribunal may consider these events as background to Respondent's breaches of the Treaty when it implemented the New Energy Law in May 2022.

194. As Claimants indicated in the Counter-Memorial, the *Mondev v. United States* and *Grand River v. United States* tribunals confirmed that events which occurred before the limitation period may be relevant and considered by a tribunal, so long as the alleged treaty breach occurred within the limitation period. In *Mondev*, the tribunal thus observed that “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 relevant date that is itself a breach.⁵²⁸ Similarly, in *Grand River*, the tribunal held that the limitation period should not be “interpreted to bar consideration of the merits of properly presented claims challenging important statutory provisions that were enacted within three years of the filing of the claim and that allegedly caused significant injury,

⁵²⁶ Reply on Jurisdiction ¶ 479.

⁵²⁷ Counter-Memorial on Jurisdiction ¶¶ 208-211.

⁵²⁸ Counter-Memorial on Jurisdiction ¶ 207 (citing *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/22, Award dated 11 Oct. 2002 (CL-9) ¶ 69 (“[I]t does not follow that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of its Chapter 11 obligations by conduct of that Party after NAFTA's entry into force.”); *id.* ¶ 70 (“Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after the date which is itself a breach.”); *see also The Renco Group, Inc. v. The Republic of Peru (II)*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections dated 30 June 2020 (CL-284) ¶¶ 145-146 (“[T]he principle is that, in order not to pass judgment on the lawfulness of conduct predating the entry into force of the Treaty, the allegedly wrongful conduct postdating the entry into force of the Treaty must ‘constitute an actionable breach in its own right’ when evaluated in the light of all of the circumstances, including acts or facts that predate the entry into force of the Treaty.”); *Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected) dated 30 May 2017 (CL-286) ¶ 217 (“[T]he Tribunal considers that CAFTA Article 10.1.3 does not preclude it from having regard to pre-CAFTA entry into force conduct for purposes of determining whether there was a post-entry into force breach of a justiciable obligation.”)).

even if those provisions are related to earlier events.”⁵²⁹ Many other investment arbitration decisions confirm the same.⁵³⁰

195. Respondent takes issue with Claimants' assertion that Honduras's conduct that pre-dates August 2020 does not form the legal basis for Claimants' claims and should be considered as background to Respondent's breaches of the Treaty.⁵³¹ Respondent, in particular, contends that the *Mondev* and *Feldman* tribunals “deal with the non-retroactivity of NAFTA” and “not with statute of limitation clauses.”⁵³² This misses the point.

196. **First**, as a preliminary point, Claimants did not rely on *Feldman* to argue that State conduct prior to the breach should be considered as relevant background in assessing the breach. Rather, Claimants relied on *Feldman* to show that treaty breaches based on continuing acts can renew the limitation period, which discussion was in response to the Tribunal's request that

⁵²⁹ *Grand River Enterprises Six Nations v. United States*, UNCITRAL, Decision on Objections to Jurisdiction dated 20 July 2006 (CL-287) ¶ 86 (emphasis added). See also *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award dated 22 Aug. 2016 (CL-117) ¶ 233 (“[W]hile Art. XII.3 (d) of the Treaty bars claims concerning alleged breaches which occurred before the Cut-Off Date, this does not imply that the measures underlying such breaches become irrelevant. They provide the necessary background and context for adjudicating the case, and the legitimate expectations of an investor may depend crucially on matters that occurred before such Cut-Off Date.”); *id.* ¶¶ 236, 240.

⁵³⁰ Counter-Memorial on Jurisdiction ¶ 207 (citing *Eli Lilly and Co. v. Canada*, UNCITRAL Case No. UNCT/14/2, Award dated 16 Mar. 2017 (CL-285) ¶ 172 (“[M]any previous NAFTA tribunals . . . have found it appropriate to consider earlier events that provide the factual background to a timely claim. As stated by the tribunal in *Glamis Gold v. United States*, a claimant is permitted to cite ‘factual predicates’ occurring outside the limitation period, even though they are not necessarily the legal basis for its claim.”); *Glamis Gold v. United States*, UNCITRAL, Final Award dated 8 June 2009 (CL-125) ¶ 348 (“Both Claimant and Respondent state that a claim brought on the basis of an event properly within the time limit of Article 1117(2) may cite to earlier events as ‘background facts’ or ‘factual predicates.’ The Tribunal agrees.”); *Eli Lilly and Co. v. Canada*, UNCITRAL Case No. UNCT/14/2, Award dated 16 Mar. 2017 (CL-285) ¶ 171 (“Although the alleged promise utility doctrine is not the substantive basis of Claimant's claim, it plays a prominent role in Claimant's submissions. Indeed, one critical element of Claimant's case is establishing that judicial decisions issued from 2002 to 2008 effected a dramatic change in the Canadian utility requirement.”); *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 (CL-11) ¶ 282 (“[E]vents prior to the three-year bar . . . are by no means irrelevant. They can provide necessary background or context for determining whether breaches occurred during the time-eligible period.”); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (CL-283) ¶ 2.105 (“As in *Mondev*, the Tribunal determines that it could remain appropriate for the Claimant to point to the conduct of the Respondent before 13 December 2007. This same approach was adopted by the *MCI [Power v. Ecuador]* tribunal, which did not dismiss acts and omissions completed before the treaty's entry into force as irrelevant. It decided that such acts and omissions may be considered: ‘for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force.’”).

⁵³¹ Reply on Jurisdiction ¶ 504.

⁵³² Reply on Jurisdiction ¶ 505.

Claimants set forth how the limitation period applies to continuous or composite acts. This issue is discussed in more detail below.⁵³³

197. **Second**, although *Mondev* did address the retroactive application of the NAFTA, the tribunal also affirmed that events or conduct pre-dating the treaty's entry into force—and, thus, pre-dating any breach capable of triggering the limitation period—may be relevant to and considered by a tribunal in assessing whether the State subsequently committed a breach.⁵³⁴ As the *Grand River* tribunal remarked, “the *Mondev* and *Feldman* tribunals both considered the merits of claims regarding events occurring during the three-year limitations period, **even though they were linked to, and required consideration of, events prior to the limitations period** or to NAFTA's entry into force.”⁵³⁵

198. **Third**, although Claimants relied on no less than four cases supporting the proposition that conduct falling outside the limitation period may be relevant where the alleged breach occurred within the limitation period,⁵³⁶ with the exception of *Mondev*, Respondent fails to engage with any of these authorities.

199. **Fourth**, Respondent cannot overcome the principle that for purposes of the limitations period, the Tribunal must analyze the breach as Claimants have characterized it. In the Counter-Memorial, and in reliance on *Eli Lilly v. Canada* and *Pac Rim v. El Salvador*, Claimants explained that Claimants' characterization of their claims is determinative for assessing when the breach occurred.⁵³⁷ Rather than addressing the authorities that support this principle, Respondent turns to *Inceysa v. El Salvador* and *CME v. Czech Republic* – both of which are inapposite.

⁵³³ *Infra* § IV.A.3.

⁵³⁴ *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/22, Award dated 11 Oct. 2002 (CL-9) ¶ 69 (“[I]t does not follow that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of its Chapter 11 obligations by conduct of that Party after NAFTA's entry into force.”); *id.* ¶ 70 (“Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.”).

⁵³⁵ *Grand River Enterprises Six Nations v. United States*, UNCITRAL, Decision on Objections to Jurisdiction dated 20 July 2006 (CL-287) ¶ 86 (emphasis added).

⁵³⁶ Counter-Memorial on Jurisdiction ¶ 207, n. 492 (discussing *Eli Lilly and Co. v. Canada*, UNCITRAL Case No. UNCT/14/2, Award dated 16 Mar. 2017 (CL-285); *Glamis Gold v. United States*, UNCITRAL, Final Award dated 8 June 2009 (CL-125); and *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 (CL-11)).

⁵³⁷ Counter-Memorial on Jurisdiction ¶ 211, n. 500 (discussing *Eli Lilly and Co. v. Canada*, ICSID Case No. UNCT/14/2, Award dated 16 Mar. 2017 (CL-285) ¶ 163 (“[T]he ‘alleged breach’ must, in the first instance, be identified by reference to Claimant's submissions.”); *id.* ¶ 164 (“The Tribunal has carefully examined Claimant's

200. Respondent relies on the *Inceysa v. El Salvador* award to argue that whether an act constitutes breach or should instead be considered as background facts should be “based on objective legal analysis, not on tactical characterizations of the parties.”⁵³⁸ The *Inceysa* tribunal, however, was assessing the **legality** of claimant’s investment for the purpose of determining its jurisdiction and explained that it was up to it (and not the parties) to assess whether an investment was made in accordance with the law of El Salvador. *Inceysa* did not address the characterization of a claim – or a measure as a breach – under the underlying treaty.⁵³⁹

201. Respondent’s reliance on *CME v. Czech Republic* to argue that tribunals “must examine the substantive nature of the alleged acts, not the labels assigned to them” is likewise inapt.⁵⁴⁰ Respondent ignores that claimants in that case characterized a certain letter from respondent’s state agency as a treaty violation, and that the tribunal ultimately agreed with claimants’ characterization.⁵⁴¹

202. In sum, the three-year limitation period under Article 10.18(1) begins to run only when a party acquires—or should have acquired—with sufficient certainty, knowledge of both the treaty breach and the resulting loss or damage. As explained in the next section, that moment came in 2022, when President Castro implemented a set of measures against certain power generators, including Pacific Solar, as is abundantly clear from the enactment of the New Energy Law — an

written and oral submissions to evaluate whether Claimant’s characterization of its claim for the purpose of jurisdiction is supported by its position on the merits.”); *id.* ¶ 165 (“Respondent’s attempt to re-characterize Claimant’s case cannot be accepted.”). See also *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections dated 1 June 2012 (**CL-283**) ¶ 2.53 (holding that to determine what State measures are relevant in its analysis of jurisdiction “the Tribunal must necessarily analyse the Claimant’s own pleadings.”); *id.* ¶ 2.72 (holding that for purposes of whether a State act was considered a continuous or composite act, the tribunal should consider “the relevant measure . . . as alleged by the Claimant.”).

⁵³⁸ Reply on Jurisdiction ¶ 507 (citing *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award dated 2 Aug. 2006 (**RL-143**) ¶¶ 209-211).

⁵³⁹ *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award dated 2 Aug. 2006 (**RL-143**) ¶¶ 209-211.

⁵⁴⁰ Reply on Jurisdiction ¶ 507 (citing *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 Sept. 2001 (**CL-80**) ¶¶ 545-546).

⁵⁴¹ *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 Sept. 2001 (**CL-80**) ¶¶ 545-547 (“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 This letter, therefore, as its clear wording demonstrates, is not just the expression of the Council’s general policy.”) (emphasis added).

unprecedented legislative overhaul that fundamentally altered the regulatory and contractual framework underpinning Claimants' investment.

2. Claimants First Acquired Knowledge of the Breach and their Loss or Damage in 2022, Well After the Cut-Off Date

203. As set forth in the Counter-Memorial on Jurisdiction and as further explained below, Claimants did not acquire knowledge of a Treaty breach and resulting damage until Honduras's measures starting in 2022. Respondent is wrong to contend that Claimants acquired this knowledge before August 2020, when Pacific Solar requested payments from ENEE or complained about occasional and sporadic curtailments, for which Pacific Solar did not even invoice under the PPA. It was only in 2022 that Claimants acquired the requisite knowledge of the Treaty breaches and losses, once Honduras's new administration had been inaugurated and had enacted a series of measures, including in particular the enactment of the New Energy Law, harming Pacific Solar.⁵⁴²

204. In its Reply on Jurisdiction, Respondent continues to rely on two background facts pre-dating the New Energy Law in support of its objection: (i) ENEE's delay in paying certain invoices, which it alleges "began [in] December 2018;" and (ii) ODS's curtailment of the Plant's dispatch of energy, which it alleges "existed since 2017."⁵⁴³

205. As regards the first issue, Respondent contends that a default of a payment obligation and its corresponding loss "arises from the moment non-payment or underpayment occurs, not from when a party in default declares that it will not pay."⁵⁴⁴ Claimants, however, could not have possibly acquired knowledge of the Treaty breaches "from the moment non-payment or underpayment occurs" because Claimants' claims are not linked to a single default of ENEE's monthly payment obligations.⁵⁴⁵ Rather, among other measures, Respondent's Treaty breaches arise from its confirmation that it will not recognize Pacific Solar's outstanding receivables in full,⁵⁴⁶ and that it will impose lower compensation terms on Pacific Solar's PPA,

⁵⁴² Counter-Memorial on Jurisdiction ¶ 214.

⁵⁴³ See, e.g., Reply on Jurisdiction ¶¶ 522, 524-525.

⁵⁴⁴ Reply on Jurisdiction ¶ 518.

⁵⁴⁵ Paiz WS I ¶ 19; Paiz WS II ¶¶ 10-11; October 2018 Agreement (**Exh. C-175**), at 3; ENEE, Legal Opinion No. D.L. 106-6-2020 dated 30 June 2020 (**Exh. C-126**); [REDACTED] ¶ 19.

⁵⁴⁶ See Letter from ENEE to Pacific Solar, No. ENEE GG-1083-X-2022 dated 11 Oct. 2022 (**Exh. C-69**), at 2, ¶ 8 (stating that ENEE would pay "the accumulated debt [with Pacific Solar] within sixty (60) to ninety (90) business days, **from** the execution of the Memorandum of Understanding [with ENEE].") (emphasis added); [REDACTED] ¶ 31

which caused an immediate reduction in the value of Claimants' investments starting in 2022. In fact, Mr. Paiz was discussing the sale of his equity interest in Pacific Solar, but the transaction fell through as soon as the new Government took office.⁵⁴⁷ Moreover, as explained below, until 2022, the Government constantly assured Pacific Solar that it would honor its obligations, including paying its outstanding debt despite there being delays in some payments. As regards the second issue, Respondent argues that Pacific Solar had already reported curtailments in 2017.⁵⁴⁸ However, Pacific Solar had not even invoiced or claimed for those *de minimus* curtailments, and, in any event, the nature, scope, and context was different from the State's current use of curtailments. It was only after the Castro administration took office that the Government recovered control of the grid through ENEE and adopted a curtailment policy against solar generators.⁵⁴⁹ Accordingly, Claimants did not and could not have acquired the requisite knowledge of the Treaty breaches and their corresponding loss.

(a) Respondent Breached the Treaty and Caused Claimants Damage with its Measures Starting in 2022

206. As explained in detail in the Counter-Memorial, Honduras's measures that breached the Treaty started with the change of administration in January 2022 and the enactment

(conditioning payment of [REDACTED] for the possible acquisition of 51% of the Plant on Pacific Solar signing an amendment to PPA); AHER, Report of Meeting between COHEP's Energy Committee and ENEE's General Manager, Minister Tejada dated 7 Sept. 2022 (**Exh. C-189**), at 4 (showing that the Government expressed that **"no plant would be paid until the . . . plants have renegotiated [their contracts—the Government's] conditions for financing" payments**) (emphasis added); ENEE, *Payment to the generators is assured as long as it is a fair price*, X (FORMERLY TWITTER) dated 22 Aug. 2022 (**Exh. C-228**); Government of Honduras, Report Outlining the Government's Plan for Reforming the Electricity Sector Under the New Energy Law dated 15 July 2022 (**Exh. C-11**), at 7 (**"The State does not deny the debt and interest owed [to the generators,] and is willing to make payment arrangements in the short- and long-term under new conditions regarding interests, [arrangements that] will be completed once an equilibrium is reached between the income and expenses of ENEE."**) (emphasis added); ENEE, *The State will pay once the ENEE's revenues and costs are balanced*, X (FORMERLY TWITTER) dated 18 July 2022 (**Exh. C-160**).

⁵⁴⁷ Paiz WS I ¶ 22 ("Around that time, I explored the sale of my equity interest in Pacific Solar. Our conversations with a potential buyer were well advanced, and we had a deal in principle. **That deal fell through once the situation described in the following section occurred.**") (emphasis added); [REDACTED] ¶ 20 ("PSE's fate changed shortly after Xiomara Castro was sworn in as President in January 2022. During her campaign, now President Castro, announced she would implement anti-private sector policies, particularly targeting energy generators that had invested during prior administrations. At that point in time, Mr. Paiz was negotiating the sale of PSE, **but the transaction did not move forward because the potential buyer withdrew when Ms. Castro was elected and began announcing laws and policies affecting the Project.**") (emphasis added); Compass Lexecon Report ¶¶ 105-107; Third Party. Pacific Solar's Binding Offer dated 2 Nov. 2021 (**Exh. MN-51**). See also Memorial on the Merits ¶¶ 91, 397.

⁵⁴⁸ Reply on Jurisdiction ¶¶ 523-526.

⁵⁴⁹ New Energy Law (**Exh. C-10**), Art. 11; ENEE Press Release on Curtailments to Renewables dated 8 July 2022 (**Exh. C-222**).

of the New Energy Law in May 2022.⁵⁵⁰ Beginning in that period, the State violated its obligations to accord the minimum standard of treatment and to not unlawfully expropriate Claimants' investments, failed to comply with its commitments to Pacific Solar, and breached the investment agreement it entered into with Pacific Solar.⁵⁵¹ The New Energy Law and subsequent conduct altered and undermined Pacific Solar's rights: (i) it codified "tools" to pressure generators, including Pacific Solar, to "renegotiate" the PPAs under the threat of termination and expropriation; (ii) it served as justification for the State to repudiate its payment obligations vis-à-vis Pacific Solar; and (iii) it impaired Pacific Solar's safety valves under the Agreements.⁵⁵²

207. Despite having acknowledged in its Memorial on Jurisdiction that the "forced renegotiation of the PPA under Decree 46-2022" is within the CAFTA-DR's limitation period,⁵⁵³ Respondent ignores the other effects of the New Energy Law that Claimants invoked in their Memorial on the Merits and argues that Claimants' position is premised on the States's change in conduct after the New Energy Law was passed.⁵⁵⁴ It further argues that the Government never changed its conduct because it kept paying Pacific Solar's invoices.⁵⁵⁵ This is incorrect.

208. Contrary to Respondent's position that the Law did not alter the PPA,⁵⁵⁶ the record shows that the New Energy Law directly encumbered Pacific Solar's Agreements by codifying principles that clash with them, including: (i) the State's threat of termination and expropriation if Pacific Solar did not renegotiate the PPA with ENEE, including imposition of terms that favor the State, such as reference to a specific price parameter;⁵⁵⁷ (ii) the obligation to dispatch energy to ENEE without interruption under the threat of criminal proceedings, coupled with the State's taking back control over the energy dispatch by granting ENEE the role of national dispatch system operator, which means, among other things, that ENEE now decides from whom to curtail energy

⁵⁵⁰ Counter-Memorial on Jurisdiction ¶¶ 233-240.

⁵⁵¹ Counter-Memorial on Jurisdiction ¶¶ 234-236; *see also* Memorial on the Merits § IV.

⁵⁵² Memorial on the Merits ¶¶ 4, 15-20; Counter-Memorial on Jurisdiction ¶¶ 225-227.

⁵⁵³ Memorial on Jurisdiction ¶ 129.

⁵⁵⁴ Reply on Jurisdiction ¶ 530.

⁵⁵⁵ Reply on Jurisdiction ¶¶ 531-532. In addition, Respondent resorts to a series of baseless allegations against Claimants, including attacks on Mr. Paiz's testimony as self-interested, and accusations that Claimants submitted documents with the "aim of reconfiguring the factual narrative" to "circumvent the time limits." *See* Reply on Jurisdiction ¶¶ 515, 533-534. These accusations are meritless and wholly unsupported by the record.

⁵⁵⁶ Reply on Jurisdiction ¶¶ 530-532.

⁵⁵⁷ Memorial on the Merits ¶¶ 93, 98, 117-118, 188, 218; Counter-Memorial on Jurisdiction ¶¶ 206, 229-230; *see also* New Energy Law (Exh. C-10), Art. 5.

and when to do so;⁵⁵⁸ (iii) the creation of new State surveillance authority against generators;⁵⁵⁹ and (iv) the broadcasting of a clear intent to rewrite debt terms retroactively, such as payment of arrears for only “up to one year,”⁵⁶⁰ and conditioning the payment of the debts owed to the generators on the “renegotiation” of their PPAs to a lower energy price.⁵⁶¹ Concurrently, the Government adopted an explicit policy to curtail energy to solar generators, in order to benefit its State-owned hydroelectric dams.⁵⁶²

209. The New Energy Law was accompanied by other State conduct that reinforced the Law's harmful impact, including the Government's reference to its provisions as “tools” to pressure generators to “renegotiate” lower prices and terms more favorable to the State (including eliminating incentives, payments for capacity, and the interest rate agreed under the PPA), while using the outstanding debt with the generators (including Pacific Solar) as a bargaining chip in the renegotiations by announcing that only those who renegotiate will be paid.⁵⁶³ Indeed, Honduras stated that it would prioritize payments to generators who renegotiate their PPAs under terms favorable to the State,⁵⁶⁴ and that it would pay arrears once ENEE reached a “balance between [its]

⁵⁵⁸ Memorial on the Merits ¶¶ 16, 93, 126, 155-156, 269, 276; Counter-Memorial on Jurisdiction ¶¶ 206, 229-230; *see also* New Energy Law (Exh. C-10), Arts. 11, 15, 19.

⁵⁵⁹ Memorial on the Merits ¶¶ 136, 226, 228, 274, 276; Counter-Memorial on Jurisdiction ¶ 229; *see also* New Energy Law (Exh. C-10), Art. 17.

⁵⁶⁰ Memorial on the Merits ¶¶ 125, 146, 209, 375; Counter-Memorial on Jurisdiction ¶¶ 227, 239, 244; *see also* New Energy Law (Exh. C-10), Art. 16.

⁵⁶¹ Government of Honduras, Report Outlining the Government's Plan for Reforming the Electricity Sector Under the New Energy Law dated 15 July 2022 (Exh. C-11) at 7 (“**The State does not deny the debt and interest owed [to the generators,] and is willing to make payment arrangements** in the short- and long-term **under new conditions** regarding interests, [arrangements that] will be completed **once an equilibrium is reached between the income and expenses of ENEE.**”); at 2-3 (proposing the reduction of base price of energy for all generators, regardless of the generator's energy source, to 0.11 US\$/kWh.). *See also* ENEE, “*The State will pay once the ENEE's revenues and costs are balanced,*” X (FORMERLY TWITTER) dated 18 July 2022 (Exh. C-160).

⁵⁶² ENEE Press Release on Curtailments to Renewables dated 8 July 2022 (Exh. C-222).

⁵⁶³ Memorial on the Merits ¶¶ 4, 17, 28, 116, 148; Counter-Memorial on Jurisdiction ¶¶ 205, 231, 244-245, 254.

⁵⁶⁴ AHPEE, Summary of Meeting with COHEP, AHPEE, AHER and ENEE dated 29 Nov. 2022 (Exh. C-191) at 2-3 (noting that Minister Tejada states that “priority for payments will be given to the companies that have entered into a Memorandum of Understanding which contains the agreements with ENEE” despite AHPEE reminding the Minister that companies who “**did not reach an agreement also need payment, since ENEE owes many of them payments that correspond to more than 13 invoices, and for that reason, find themselves in a financial deficit.**”) (emphasis added); *ENEE's delays in payments to energy generators provokes a notice of intent under CAFTA*, DINERO HN dated 1 Nov. 2022 (Exh. C-170); Radio Interview with Minister Tejada regarding the Government's priority for payments, RADIOHN dated 17 Oct. 2022 (Exh. C-231), at 1:03-1:24 (quoting Minister Tejada as stating that the Government would “meet [its] debt with the generators with whom [it] has come to an agreement . . . the Government's priority”); Radio Interview with Minister Tejada acknowledging that promise of payments is key to unlocking renegotiations, RADIO CADENAS VOCES dated 28 Nov. 2022 (Exh. C-232), at 4:29-4:58 (“We have been clear, it has been a pivotal point to unlocking the renegotiations, that we are going to pay, above all, those who have renegotiated” their PPAs.”).

income and expenses” and a “fair rate that the State and the People are able to pay.”⁵⁶⁵ At the same time, the New Energy Law included a mandate to settle past arrears only for “**up to one year**” with those who renegotiated or with whom ENEE terminated the PPAs.⁵⁶⁶ Respondent seeks to downplay the magnitude of its conduct by alleging that it has paid Pacific Solar after the New Energy Law’s enactment.⁵⁶⁷ Those payments, however, have been incomplete, sporadic, and most importantly, discriminatory. Respondent’s own evidence shows that it is the Ministry of Finance that pays generators, including Pacific Solar.⁵⁶⁸

210. The renegotiated PPAs with other generators and the renegotiation process held with Pacific Solar confirm the Government’s crippling of generators’ rights.⁵⁶⁹ The Government publicly announced that it had already set “the parameters and prices under which the renegotiations [with the private generators] would take place,”⁵⁷⁰ showing that it was not a genuine negotiation process. Consistent with that goal, the State sought to impose unilateral terms, sending one-page “offers” that contained waivers to key rights under the Agreements.⁵⁷¹ During this process, the State rejected Pacific Solar’s counteroffers, providing no technical, economic or legal basis for such rejection, and also discussed the acquisition of Pacific Solar’s Plant. To date, Congress has approved 18 PPAs, of which 8 are with solar generators, and correspond to three

⁵⁶⁵ Government of Honduras, Report Outlining the Government’s Plan for Reforming the Electricity Sector Under the New Energy Law dated 15 July 2022 (**Exh. C-11**), at 5 (stating that the State recognizes the historical debt and “is willing to make payment arrangements in the short- and long-term under new conditions regarding interests, that will be **completed once an equilibrium is reached between income and expenses of ENEE**, as well as agree on a fair tariff affordable for the State and the People considering the state company’s previous 10-year privatization period[.]”) (emphasis added).

⁵⁶⁶ New Energy Law (**Exh. C-10**), Art. 16.

⁵⁶⁷ When Claimants filed their Memorial on the Merits, Honduras owed the equivalent of 15 invoices to Pacific Solar. See Memorial on the Merits ¶ 23; Compass Lexecon Report ¶ 44, Figure 6; see also Asociación para una Sociedad más Justa (ASJ), *State of the Union – The Electrical Subsector: The Worst Crisis of Blackouts in the Last Three Decades* dated 2024 (**Exh. C-169**), at 28 (“According to the generators, the plants that have renegotiated [their contracts] are experiencing delays in payments in between 6 to 12 invoices.”).

⁵⁶⁸ Payment Receipts from ENEE to Pacific Solar dated 2025 (**Exh. R-83**), at 1 (showing that ENEE requests SEFIN to pay Pacific Solar’s invoices within the contractually agreed 45-day period and stating that it will not be responsible for delays in payment); see *id.*, at 2-6 (showing that SEFIN pays in several installments and with delays expanding for six months); see also Payment Receipts from ENEE to Pacific Solar dated 2023 (**Exh. R-11**), at 1-4 (showing that SEFIN pays in several installments and with delays of almost one year); Payment Receipts from ENEE to Pacific Solar dated 2022 (**Exh. R-10**), at 1-3 (showing that SEFIN pays in several installments and with delays of over eight months).

⁵⁶⁹ Memorial on the Merits ¶¶ 129-144; Counter-Memorial on Jurisdiction ¶¶ 231, 235, 270.

⁵⁷⁰ ENEE, *We Set the Parameters of the Renegotiations*, X (FORMERLY TWITTER) dated 3 May 2022 (**Exh. C-206**).

⁵⁷¹ Government’s “Renegotiation” Offer dated 12 May 2022 (**Exh. C-23**); see also Letter from ENEE to Pacific Solar, Official Letter ENEE-GG-1083-X-2022 dated 11 Oct. 2022 (**Exh. C-69**).

groups of companies.⁵⁷² The amended PPAs show that the Government's imposed drastic cuts to the generators' compensation terms, and appears to have secured haircuts on arrears.⁵⁷³

211. Finally, the New Energy Law and subsequent State conduct also have foreclosed the Agreements' mechanisms intended to protect Pacific Solar against ENEE's failure to pay. The Government compels generators to deliver energy to ENEE without interruption under the threat of criminal prosecution, which hampers the possibility of Pacific Solar selling energy to third parties, a remedy provided in the PPA in the event ENEE delays payment for more than four months.⁵⁷⁴ Finally, the State has also failed to observe the State Guarantee, as its signatory, SEFIN, is the entity that manages Pacific Solar's payments.⁵⁷⁵

(b) Prior to Mid-2022, Claimants Could Not Have Acquired Knowledge of Honduras's Treaty Breaches that Started in 2022

212. Claimants' Treaty claims arise from the State's measures starting in 2022. As Claimants explained in the Counter-Memorial, certain communications between Pacific Solar and ENEE that show ENEE's delayed payment of invoices and ODS's curtailments prior to the cut-off date did not trigger the limitations period for purposes of Claimants' claims here.⁵⁷⁶ In particular, as Claimants explained, even though ENEE delayed payment of invoices prior to May 2022, the State at that point did not repudiate its commitments.⁵⁷⁷ To the contrary, ENEE confirmed several times that it was bound by the PPA and had to pay the amounts due.⁵⁷⁸ Similarly, the isolated instances where Pacific Solar experienced curtailments in 2017—but did

⁵⁷² Four of the amended PPAs belong to the Scatec/Norfund Group: (i) Modification No. 1 of PPA No. 003-2014 dated 31 Jan. 2024 (**Exh. C-158**); (ii) Modification No. 1 of PPA No. 018-2014 dated 31 Jan. 2024 (**Exh. C-150**); (iii) Modification No. 1 of PPA No. 020-2014 dated 31 Jan. 2024 (**Exh. C-138**); and (iv) Modification No. 1 of PPA No. 023-2014 dated 31 Jan. 2024 (**Exh. C-136**). Three of them belong to the CMI Energía group: (i) Modification No. 1 of PPA No. 007-2014, dated 24 Mar. 2023 (**Exh. C-157**); Modification No. 1 of PPA No. 008-2014 dated 24 Mar. 2023 (**Exh. C-156**); Modification No. 1 of PPA No. 015-2014 dated 24 Mar. 2023 (**Exh. C-153**). Finally, the last one belongs the Ecoener group: Modification No. 1 of PPA No. 019-2014 dated 15 Mar. 2023 (**Exh. C-148**). See also Decree No. 3-2025 dated 12 Feb. 2025, published in the Official Gazette dated 10 Mar. 2025 (**Exh. C-301**).

⁵⁷³ Based on public information, the amended PPAs entered into with other generators cut energy base prices in half and eliminated capacity payments and incentives in the generators' remuneration. See *What are the 18 renegotiated energy contracts that seek to be modified?*, EL HERALDO dated 27 May 2024 (**Exh. C-172**), at 2-3.

⁵⁷⁴ PPA (**Exh. C-1**) § 2, Cl. 2.5.

⁵⁷⁵ See State Guarantee (**Exh. C-2**) Cl. 4.2; see also Memorial on the Merits ¶¶ 158, 177, 344; Counter-Memorial on Jurisdiction ¶¶ 110, 112, 133.

⁵⁷⁶ Counter-Memorial on Jurisdiction ¶¶ 216-221, 231-232.

⁵⁷⁷ Counter-Memorial on Jurisdiction ¶¶ 217-218, 220; see also Memorial on the Merits ¶¶ 86-91.

⁵⁷⁸ Counter-Memorial on Jurisdiction ¶¶ 217-218, 220; see also Memorial on the Merits ¶¶ 86-91.

not even claim that ENEE compensate for them under the PPA at that time—do not form part of Claimants' claims in this arbitration.⁵⁷⁹

213. Mischaracterizing Claimants' claims again, Respondent argues that Claimants articulate a purported "change of intention" theory, and that: (i) the time limitation provision does not require that the investor know the State's "intention," but only that it knows (or should have known) of a "breach of a legal obligation and its resulting damage;"⁵⁸⁰ (ii) a payment obligation is not legally affected or transformed due to the future intention of breaching it;⁵⁸¹ and (iii) Claimants do not deny that they "knew" of the "breaches" before the cut-off date, but seek to exclude such events from the limitations analysis of the claim because they do not constitute its "legal basis."⁵⁸² Respondent also alleges that Claimants "acknowledge" that curtailments exist since 2017, and that payment delays started on 13 December 2018 and were quantified, and thus Claimants knew of **"ENEE's contractual breach and the resulting damage."**⁵⁸³ Finally, Respondent asserts that Compass Lexecon's calculation of damages proves that a "significant portion" of Claimants' damages relate to historical losses prior to the cut-off date, which confirms that the "legal bases" of the damages are the two breaches that Honduras has identified, and to that end, Respondent proposes that the tribunal should ignore Claimants' claim for Pacific Solar's fair market value ("FMV") altogether.⁵⁸⁴

214. Respondent's position is misguided and stems from a misinterpretation of Claimants' claims and the operation of the limitation period under the CAFTA-DR.

215. **First**, prior to 2022, the State assured Pacific Solar that ENEE would abide by its obligations, and Pacific Solar had reason to believe that the State would renege on its commitments.⁵⁸⁵ As Claimants explained in detail in their Counter-Memorial and the

⁵⁷⁹ Counter-Memorial on Jurisdiction ¶ 232.

⁵⁸⁰ Reply on Jurisdiction ¶ 517.

⁵⁸¹ Reply on Jurisdiction ¶ 518.

⁵⁸² Reply on Jurisdiction ¶ 519.

⁵⁸³ Reply on Jurisdiction ¶¶ 526, 529 (emphasis added).

⁵⁸⁴ Reply on Jurisdiction ¶¶ 18-20.

⁵⁸⁵ [REDACTED] ¶ 19 ("[I]n mid-2020, ENEE made significant catch-up payments to PSE and other generators, preventing the situation from escalating further. These payments led us to believe that the Government would continue to pay us in the future, as it had represented to us in the past.").

contemporaneous evidence shows, various State organs assured Pacific Solar that payment would be forthcoming.⁵⁸⁶

216. **Second**, Claimants have not advanced any “change of intention” theory as Respondent alleges. Claimants’ case is not based on a change in the Government’s “intention” or plan to willfully take away Pacific Solar’s rights; rather, it is based on a series of measures that the Government adopted starting in 2022, including the New Energy Law, that effectively harmed Claimants’ investments, and do not hinge on the Government’s motivations. While the Government has publicly vilified certain power generators, including Pacific Solar, the Government’s actions starting in 2022 are objective and ascertainable. Indeed, the New Energy Law, enacted in May 2022, is a decree that overhauls the energy sector and targets certain PPAs. The Government subsequently singled out 28 PPAs, which included Pacific Solar’s, that were subject to the New Energy Law’s “renegotiation” provision.⁵⁸⁷

217. **Third**, Claimants did not “recognize[]” that there was any Treaty “breach” before 2022. Any event that could qualify as a contractual breach prior to that date does not necessarily or automatically constitute a Treaty breach, and Claimants do not argue otherwise in this case.⁵⁸⁸ Indeed, Respondent ignores that Pacific Solar’s historical losses do not arise from occasional payment delays. Instead, they stem from Honduras’s repudiation of a substantial portion of its historical debt—which occurred **after** the cut-off date—as evidenced by the text of the New Energy Law and contemporaneous statements and actions.⁵⁸⁹ Respondent’s position further

⁵⁸⁶ See Counter-Memorial on Jurisdiction ¶¶ 217-220 (citing Paiz WS I ¶ 19; Paiz WS II ¶¶ 10-11; October 2018 Agreement (Exh. C-175), at 3; ENEE, Legal Opinion No. D.L. 106-6-2020 dated 30 June 2020 (Exh. C-126), at 2, 5; [REDACTED] ¶ 19; Compass Lexecon ¶ 44); see also Memorial on the Merits ¶¶ 86-91.

⁵⁸⁷ *The renegotiation of 28 contracts Pits the Government Against the Generators*, LA PRENSA dated 13 May 2022 (Exh. C-302).

⁵⁸⁸ See *infra* §§ IV.A.3, IV.B.

⁵⁸⁹ See New Energy Law (Exh. C-10), Art. 16 (“The Government of the Republic is hereby authorized, **once the contractual relationship has been renegotiated or terminated** with the generators with whom it has delays for **up to one (1) year**, to proceed to reconcile arrears and to define feasible terms for payment through the National or International Financial System, starting with small and medium-sized generators.”) (emphasis added); AHPEE, Summary of Meeting with COHEP, AHPEE, AHER and ENEE dated 29 Nov. 2022 (Exh. C-191), at 2-3 (noting that Minister Tejada states that “priority for payments will be given to the companies that have entered into a Memorandum of Understanding which contains the agreements with ENEE” despite AHPEE reminding the Minister that companies “**who did not reach an agreement also need payment, since ENEE owes many of them payments that correspond to more than 13 invoices, and for that reason, find themselves in a financial deficit.**”) (emphasis added); ENEE’s delays in payments to energy generators provokes a notice of intent under CAFTA, DINERO HN dated 1 Nov. 2022 (Exh. C-170); Radio Interview with Minister Tejada regarding the Government’s priority for payments, RADIOHN dated 17 Oct. 2022 (Exh. C-231), at 1:03-1:24 (quoting Minister Tejada as stating that the Government would “meet [its] debt with the generators with whom [it] has come to an agreement . . . the Government’s priority”); Radio

ignores that Pacific Solar's damages go beyond historical losses. In fact, the bulk of Pacific Solar's damages claims (*i.e.*, more than 85%) correspond to the reduction of Pacific Solar's FMV as a result of Honduras's measures starting in 2022.⁵⁹⁰

218. It was not until after January 2022—when the Castro administration took office—that the Government implemented a set of measures that followed an agenda against certain generators, including Pacific Solar.⁵⁹¹ This is when the Government began using the historical debt as a bargaining chip to formally amend the PPAs and repudiated a significant portion of its debt to Pacific Solar. Claimant Mr. Paiz, whose knowledge is what is relevant here, testifies that he “did not and could not have known that Honduras would act this way and harm [his] investment until it introduced the New Energy Law in 2022,”⁵⁹² and his testimony is corroborated by contemporaneous evidence.⁵⁹³ Accordingly, Respondent's attempts to undermine Mr. Paiz's testimony are baseless.⁵⁹⁴

Interview with Minister Tejada acknowledging that promise of payments is key to unlocking renegotiations, RADIO CADENAS VOCES dated 28 Nov. 2022 (**Exh. C-232**), at 4:29-4:58 (“We have been clear, it has been a pivotal point to unlocking the renegotiations, that we are going to pay, above all, those who have renegotiated” their PPAs.”). See also Corporación Multi Inversiones (CMI), Press Release Regarding MOU with Government dated 2022 (**Exh. C-215**).

⁵⁹⁰ Compass Lexecon Report ¶¶ 116, 126; Memorial on the Merits ¶¶ 381-383; [REDACTED] ¶¶ 33-35 (explaining that “[t]he enactment of the New Energy Law and President Castro's policies toward renewable energy generators has had a snowball effect on PSE, which we have been unable to mitigate. ENEE's debt to PSE is at unprecedented and untenable levels. ENEE occasionally pays, but the amounts are insufficient and unpredictable. We have tried to sell energy in the spot market, but there are only a handful of transactions in the whole country, which is entirely dominated by ENEE. As to our lenders, we have only been able to pay interest on our loans and have been unable to even reduce the principal. Due to the change that the New Energy Law implicates, we are trying to restructure our loans to alleviate the precarious situation, but even with those attempts, we have been unable to finalize it because of ENEE's erratic behavior as it relates to payments. Given ENEE's arrears, we are at risk of not even being able to pay interest on our loans. To make matters worse, the Government has tightened access to hard currency, and it is quite difficult to access U.S. dollars to make our payments in dollars to make our payments promptly to banks and vendors. The Government also has started to reject PSE's tax exemptions request to which it is entitled, even for concepts that the Government had routinely granted to PSE in prior years. Through its nonpayment and conduct, the Government has simply put PSE in an untenable situation.”).

⁵⁹¹ See, *e.g.*, New Energy Bill (**Exh. C-22**), Statement of Motives, at 1 (stating that the New Energy Law's purpose was to “save the ENEE as a state-owned company” and “diversify the sources of energy generation until 60% of state participation is achieved.”); Presidential Candidate Xiomara Castro, *Government Plan to Relaunch Honduras 2022-2026* dated 5 Sept. 2021 (**Exh. C-33**), at 37-38 (including as part of President Castro's political campaign agenda to “rescue . . . the *Empresa Nacional de Energía Eléctrica*[,] . . . which entails as a minimum: amending and canceling leonine generation contracts after payment.”).

⁵⁹² Paiz WS II ¶ 14.

⁵⁹³ October 2018 Agreement (**Exh. C-175**), at 3; ENEE, Legal Opinion No. D.L. 106-6-2020 dated 30 June 2020 (**Exh. C-126**).

⁵⁹⁴ Reply on Jurisdiction ¶ 515; see October 2018 Agreement (**Exh. C-175**), at 3; ENEE, Legal Opinion No. D.L. 106-6-2020 dated 30 June 2020 (**Exh. C-126**).

219. **Fourth**, certain curtailments prior to the cut-off date also do not serve as the basis for Claimants' Treaty claims. Honduras refers to two reports where Pacific Solar summarized certain curtailments of energy instructed by the ODS (an entity with a certain degree of private participation in charge of the energy dispatch before May 2022).⁵⁹⁵ Such reports, however, do not show that Claimants or Pacific Solar knew of the existence of any Treaty breach. Pacific Solar did not even invoice under the PPA for the curtailments referred to in the reports on which Honduras.⁵⁹⁶ It was not until February 2021 that Pacific Solar started issuing invoices and invoking Clause 9.5.1 to claim compensation from ENEE for energy curtailed above the contractual threshold.⁵⁹⁷ Moreover, as Claimants explained in their Memorial, it was only after the new Administration took office and enacted the New Energy Law that the State (through ENEE) regained control over the energy dispatch and adopted a policy of curtailing solar generators to benefit hydroelectric dams, under the pretext that supporting the electric system created "economic damage" to the State.⁵⁹⁸

3. Claimants' Claims Fall Within the Treaty's Limitation Period Because Honduras's Actions Are Properly Classified as Continuous or Composite Acts

220. In the Counter-Memorial on Jurisdiction, Claimants addressed the Tribunal's instructions to set forth "whether and if so, how, the limitation period applies: a. To continuous

⁵⁹⁵ Reply on Jurisdiction ¶¶ 524-525 (citing Executive Report by Pacific Solar on the Nacaome I Project dated Oct. 2017 (**Exh. R-34**) and Letter from L. Bulnes (Pacific Solar) to E. Torres and D. Aguilar (ENEE) dated 30 Jan. 2018 (**Exh. R-38**)).

⁵⁹⁶ Reply on Jurisdiction ¶¶ 524-525 (citing Executive Report by Pacific Solar on the Nacaome I Project dated Oct. 2017 (**Exh. R-34**) and Letter from L. Bulnes (Pacific Solar) to E. Torres and D. Aguilar (ENEE) dated 30 Jan. 2018 (**Exh. R-38**)). See PPA (**Exh. C-1**) § 2, Cl. 9.5.1 ("If due to failures in the SIN not attributable to the SELLER, the supply of energy is restricted for more than six (6) accumulated hours in a Month, the SELLER shall be compensated with an amount for the energy that the SELLER was unable to deliver due to these causes during that Month, having had the possibility of generating, for a time exceeding the six (6) indicated hours, according to the following structure: 1. Any interruption not attributable to the SELLER that is less than or equal to one (1) hour does not count towards the limit of six (6) hours of permitted interruptions per Month; 2. Any interruption not attributable to the SELLER that is greater than one (1) hour will be accumulated for the calculation of compensation to the SELLER; 3. If the total hours of interruption not attributable to the SELLER are less than six (6) hours in the Month, there will be no compensation to the SELLER."). See also Executive Report by Pacific Solar on the Nacaome I Project dated Oct. 2017 (**Exh. R-34**) (showing that curtailments exceeded one hour without interruption only one day, when it reached to 7 hours, meaning that only one hour could be compensated); Letter from L. Bulnes (Pacific Solar) to E. Torres and D. Aguilar (ENEE) dated 30 Jan. 2018 (**Exh. R-38**)).

⁵⁹⁷ Pacific Solar Compilation of Curtailment Invoices dated 2021 (**Exh. MN-28**); Pacific Solar Compilation of Curtailment Invoices dated 2022 (**Exh. MN-29**); Pacific Solar Compilation of Curtailment Invoices dated 2023 (**Exh. MN-30**); Pacific Solar Compilation of Curtailment Invoices dated 2024 (**Exh. MN-31**).

⁵⁹⁸ See Memorial on the Merits ¶¶ 155-156; see also ENEE Press Release on Curtailments to Renewables dated 8 July 2022 (**Exh. C-222**).

acts. b. To composite acts.”⁵⁹⁹ In response, Claimants demonstrated that, if the Tribunal found that Respondent’s measures were a continuous or composite act, Claimants’ claims would fall within the Treaty’s limitation.

221. This was notwithstanding the fact that Claimants themselves had not so characterized Honduras’s measures on their primary case.⁶⁰⁰ However, and contrary to Respondent’s assertion that Claimants made a “procedural waiver of any argument based on the theory of continuing or composite acts,”⁶⁰¹ Claimants made clear that their submissions on the same were made in the **alternative**.⁶⁰² It is well established that framing an argument in the alternative to a party’s primary case does not amount to a waiver.⁶⁰³ Respondent’s assertion that the Tribunal’s decision on Claimants’ alternative argument in this case would be *extra petita*⁶⁰⁴ is therefore misguided.

222. Claimants explained in their Counter-Memorial on Jurisdiction that a continuous act is a single action that persists over time and continues to violate an international obligation,⁶⁰⁵ while a composite act involves multiple distinct actions that together amount to a wrongful act.⁶⁰⁶ Respondent agrees with this distinction.⁶⁰⁷

⁵⁹⁹ Counter-Memorial on Jurisdiction ¶ 241 (citing Procedural Order No. 4 dated 4 Apr. 2025 ¶ 55(B)).

⁶⁰⁰ Counter-Memorial on Jurisdiction ¶ 241. *See also id.* ¶¶ 242-256.

⁶⁰¹ Reply on Jurisdiction ¶ 535.

⁶⁰² Counter-Memorial on Jurisdiction ¶ 241.

⁶⁰³ *See Saint-Gobain Performance Plastics Europe v. Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum dated 30 Dec. 2016 (**CL-309**) ¶ 565 (holding that “the Tribunal notes that Claimant has raised this claim in the alternative that the Tribunal should find that the expropriation . . . [occurred] on 29 March 2011 when the Expropriation Decree was issued. Given the Tribunal’s finding . . . that PDVSA’s presence at the plant and its memos in early June 2010 mark the start of the expropriation process, there is thus no need to decide on this alternative claim.”).

⁶⁰⁴ Reply on Jurisdiction ¶ 535.

⁶⁰⁵ Counter-Memorial on Jurisdiction ¶ 242 (citing *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections dated 1 June 2012 (**CL-283**) ¶ 2.66-2.67 (explaining that when an internationally wrongful act occurs, one of the situations that can arise is “a ‘continuous’ act, which is the same act that continues as long as it is in violation of rules in force, such as a national law in violation of an international obligation of the State.”)); Reply on Jurisdiction ¶ 538.

⁶⁰⁶ Counter-Memorial on Jurisdiction ¶ 242 (citing *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections dated 1 June 2012 (**CL-283**) ¶ 2.70 (“[A] composite act is not the same, single act extending over a period of time, but is composed of a series of different acts that extend over that period; or, in other words, a composite act results from an aggregation of other acts and acquires a different legal characterisation from those other acts.”)); Reply on Jurisdiction ¶ 538.

⁶⁰⁷ Reply on Jurisdiction ¶ 538.

223. Claimants further explained that under international law, continuous and composite acts are treated differently from isolated acts: A breach for purposes of continuing acts extends over the entire period during which the act continues and remains not in conformity with the international obligation.⁶⁰⁸ This means that an act that begins outside of a treaty's cut-off date and continues into the limitation period will not be time barred. On the other hand, a breach through a composite act occurs with the final action in a sequence that, taken together, is sufficient to trigger the wrongful act.⁶⁰⁹ The limitations period, in such case, will only begin to run from the occurrence of the final action that triggers the wrongful act.

224. Claimants also noted that the distinction between continuous and composite acts is recognized in customary international law, including the ILC Articles on State Responsibility.⁶¹⁰ Respondent, however, disputes that the ILC Articles on State Responsibility should be taken into account when determining the jurisdiction of the Tribunal *ratione temporis*.⁶¹¹ This is not serious and indeed Respondent provides no support for this incorrect proposition. To the contrary, it is common practice for investment treaty tribunals, including those constituted under the NAFTA and CAFTA-DR, to consider the ILC Articles on State Responsibility's definitions of continuous/composite acts when determining jurisdictional issues.⁶¹² For instance, the *Energía y Renovación v. Guatemala* tribunal held that, where the treaty's limitation period provisions "make

⁶⁰⁸ Counter-Memorial on Jurisdiction ¶ 243 (citing International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. INT'L L. COMM'N 31, U.N. Doc. A/56/10 (CL-79), Art. 14; *see also id.*, at 60-61 ("conduct which has commenced some time in the past, and which constituted . . . a breach at that time, can continue and give rise to a continuing wrongful act in the present.")).

⁶⁰⁹ Counter-Memorial on Jurisdiction ¶ 243; International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. INT'L L. COMM'N 31, U.N. Doc. A/56/10 (CL-79), Art. 15.

⁶¹⁰ Counter-Memorial on Jurisdiction ¶ 242 (citing International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. INT'L L. COMM'N 31, U.N. Doc. A/56/10 (CL-79), Art. 14; *see also id.*, at 59-62).

⁶¹¹ Reply on Jurisdiction ¶ 539.

⁶¹² *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Final Award dated 25 Oct. 2022 (CL-310) ¶ 408 ("The characterization of a wrongful act as continuing or composite affects the date on which a breach of an international obligation occurs and how long the breach extends."); *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility dated 30 Jan. 2018 (RL-36) ¶ 158 ("Articles 1116(2) and 1117(2) of NAFTA refer to the time when the breach 'first' occurred. According to the ordinary meaning of the terms used and the object and purpose of the provision (under Article 31 of the Vienna Convention on the Law of Treaties), whether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant. **In terms of Article 14(2) of the Articles on State Responsibility**, '[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.'") (emphasis added).

no distinction between continuous and instantaneous breaches. . . . [I]t is appropriate to rely on the ILC Articles on State Responsibility to inform the [t]ribunal's interpretation regarding the moment from which the limitation period must begin to run.”⁶¹³

225. In that light, in the following sections, Claimants demonstrate that their claims are timely even if the Tribunal considers either: (i) the New Energy Law to form part of a composite act (**Section a**), or (ii) the challenged measures are continuous acts (**Section b**).

(a) Claimants' Claims Are Timely Because the New Energy Law Forms Part of a Composite Act

226. In the Counter-Memorial on Jurisdiction, Claimants explained that their claims would fall within the Treaty's limitation period if the Tribunal considers that the New Energy Law forms part of a composite act.⁶¹⁴

227. Specifically, Claimants demonstrated that a composite act consists of a series of actions that are legally distinct and defined in aggregate as wrongful.⁶¹⁵ In the context of such composite acts, Article 15(1) of the ILC Articles on State Responsibility provides that “[t]he **breach** of an international obligation . . . defined in aggregate as wrongful **occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.**”⁶¹⁶ Claimants further showed that when assessing when a composite act amounts to a treaty breach, tribunals consider the point at which the combined and interconnected actions take on a legal character different from the prior actions viewed in isolation.⁶¹⁷ Respondent agrees with these points.⁶¹⁸

⁶¹³ *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award on the Merits dated 31 Mar. 2025 (**CL-288**) ¶ 243 (relying on Article 14 of the ILC Articles for the purposes of assessing the beginning of the time limitation period applicable of Claimant's claim).

⁶¹⁴ Counter-Memorial on Jurisdiction ¶¶ 253-256.

⁶¹⁵ Counter-Memorial on Jurisdiction ¶ 253 (citing JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* (2002), Commentary to Article 15 (**CL-298**) ¶ 2; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (**CL-283**) ¶ 2.70).

⁶¹⁶ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. INT'L L. COMM'N 31, U.N. Doc. A/56/10 (**CL-79**), Art. 15 (emphasis added).

⁶¹⁷ Counter-Memorial on Jurisdiction ¶ 253 (citing *Interconexión Eléctrica S.A. E.S.P. v. Republic of Chile*, ICSID Case No. ARB/21/27, Award dated 13 Dec. 2024 (**CL-299**) ¶¶ 641-642).

⁶¹⁸ Reply on Jurisdiction ¶¶ 574-575.

228. Respondent seeks to undermine Claimants' submission on the application of limitation periods to composite acts through two main arguments. Neither succeeds.

229. **First**, Respondent disputes Claimants' position regarding the time when a party acquires knowledge that a composite act has occurred. With no reference to any supporting authority, Respondent argues that knowledge of a composite act can be triggered by the **first** act in the series, rather than – as Claimants established – the later act which, when considered together with the prior conduct, gives rise to the Treaty breach.⁶¹⁹ Respondent's position is incorrect.

230. Respondent asserts that Claimants "misleadingly" suggest that the composite act occurs after "the later act."⁶²⁰ But this is correct and not misleading. Claimants established, relying on supporting authorities, that the composite act materializes when a **later** (as opposed to the first or, possibly, the last) act or omission in a series, taken together with the previous acts or omissions, amounts to a treaty breach.⁶²¹ Indeed, the Commentary to the ILC Articles on State Responsibility notes that what is relevant is whether such a subsequent act "is **sufficient** to constitute the wrongful act, **without it necessarily having to be the last in the series.**"⁶²² What matters, in other words, is not that the act constitutive of the treaty breach is the last in a particular series of acts, but whether it serves, together with acts earlier in the series, to crystallize a treaty breach that has (until then) been nascent.

231. Further, Respondent asserts that Claimants "miscite" the authorities and those authorities do not support Claimants' position. Respondent is wrong.

- Respondent takes issue with Claimants' reliance on the Commentary to the ILC Articles on State Responsibility, which states that the composite act occurs "**only after a series** of actions."⁶²³ Not only does the Commentary plainly support Claimants' position that a subsequent act is required, but it also directly contradicts Respondent's position that an investor can acquire knowledge of a composite act with the first act in the series, that is before such series of events unfold. Indeed, the Commentary states that "[a] consequence of the character of a composite act is that the time when the act accomplished **cannot be the time when the first action or omission** of the series takes

⁶¹⁹ Reply on Jurisdiction ¶ 575.

⁶²⁰ Reply on Jurisdiction ¶ 575.

⁶²¹ Counter-Memorial on Jurisdiction ¶¶ 253, 255.

⁶²² JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002), Commentary to Article 15 (CL-298) ¶ 8.

⁶²³ Counter-Memorial on Jurisdiction ¶ 255, n. 633 (citing JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002), Commentary to Article 15 (CL-298) ¶ 7)

place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series.”⁶²⁴

- Respondent's further assertion that the tribunal in *ISA v. Chile* “did not agree that a series of individually considered acts constituted a composite act”⁶²⁵ misses the point. The *ISA* tribunal expressly acknowledged – relying on the ILC Articles on State Responsibility – the international law position on composite acts,⁶²⁶ in line with Claimants' position. That the tribunal ultimately – and based on the specific facts of that case – declined to find a composite act is irrelevant. It did so not because it rejected the legal theory, but because, on the facts, the claimant failed to allege or demonstrate any “pattern of [wrongful] conduct” or “interconnection” among the various state actions. As the tribunal explained, a composite act requires more than a “scattered collection of disjointed harms;” it must reflect a **systematic policy or practice**.⁶²⁷ The tribunal found no such pattern in *ISA v. Chile*, concluding that the individual state measures were unconnected and did not collectively rise to a breach.
- Finally, while Respondent also asserts that Claimants' reliance on *Pey Casado v. Chile*⁶²⁸ is misplaced,⁶²⁹ it does so in a conclusory manner without even setting out its reading of the award.

232. **Second**, Respondent argues that there are limitations as to the kinds of acts that together can form a composite act. Specifically, it argues that composite acts are “limited to breaches of obligations which concern some aggregate of conduct,” and that payment obligations are not of the requisite “nature and therefore have nothing to do with composite acts.”⁶³⁰ This too is incorrect. Article 15 of the ILC Article on State Responsibility does not impose any such

⁶²⁴ JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* (2002), Commentary to Article 15 (CL-298) ¶ 7.

⁶²⁵ Reply on Jurisdiction ¶ 576.

⁶²⁶ *Interconexión Eléctrica S.A. E.S.P. v. Republic of Chile*, ICSID Case No. ARB/21/27, Award dated 13 Dec. 2024 (CL-299) ¶ 642 (stating that “when the violation of an international obligation occurs through a composite wrongful act, the breach takes place when the action or omission that, together with other actions and omissions, is sufficient to constitute the internationally wrongful act” and, citing the ILC Commission, that “Paragraph 1 of article 15 [of the ILC Articles] defines the time at which a composite act ‘occurs’ as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series.”).

⁶²⁷ *Interconexión Eléctrica S.A. E.S.P. v. Republic of Chile*, ICSID Case No. ARB/21/27, Award dated 13 Dec. 2024 (CL-299) ¶¶ 1182-1186.

⁶²⁸ Counter-Memorial on Jurisdiction ¶ 255 (citing *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award dated 13 Sept. 2016 (CL-303) ¶ 209).

⁶²⁹ Reply on Jurisdiction ¶ 253, n. 703 (citing *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award dated 13 Sept. 2016 (CL-303)).

⁶³⁰ Reply on Jurisdiction ¶ 577; see also *id.* ¶ 578.

limitations,⁶³¹ and Respondent's focus on the payment obligations misstates Claimants' case, as noted further below.

233. Furthermore, Respondent asserts that Claimants put forward "a repeated series of instantaneous acts, not composite acts" because these do not result in "a composite act of a distinct legal nature."⁶³² This is also wrong. Respondent's case ultimately rests on the flawed contention that Claimants' "essential claims" (purportedly being the non-payment of invoices and the curtailment of energy) remained the same before and after the cut-off date. But, as Claimants have explained, this mischaracterizes Claimants' position and the relevant facts:

- Honduras's conduct preceding the enactment of the New Energy Law—specifically, its failure to pay invoices and its curtailment of Pacific Solar's energy dispatch to the grid—do not form the basis of Claimants' Treaty claims. This is particularly so because the State made representations that it intended to make those payments;
- With the change of Government and the enactment of the New Energy Law, Honduras introduced a policy to weaponize the State's significant and outstanding debt to renewable energy generators and to curtail the energy generated by Pacific Solar's Plant.⁶³³ Further, Honduras closed all safety valves in the PPA to protect Pacific Solar in the case of non-payment by ENEE, including by (i) threatening Pacific Solar with criminal charges if it ceased supplying energy to the grid; (ii) failing to honor the State Guarantee; (iii) preventing Pacific Solar from selling energy to third parties; and (iv) refusing to compensate Pacific Solar for curtailments.⁶³⁴ Honduras, moreover, has made clear that it does not intend to satisfy the outstanding debt owed to Pacific Solar, unless Pacific Solar agrees to forego its rights through the renegotiation of the PPA.⁶³⁵
- This conduct, along with the enactment of the New Energy Law and subsequent measures are all legally distinct actions that, when considered cumulatively, give rise to a composite act that triggers Respondent's breaches of the Treaty.

234. While Respondent relies on *Pac Rim v. El Salvador*, the tribunal's findings support Claimants' and not Respondent's case.⁶³⁶ In *Pac Rim*, the tribunal ruled out the composite-act

⁶³¹ See Claudia Annacker and Enikő Horváth, *Article 15 of the ARSIWA: Breach consisting of a composite act*, in *GENERAL INTERNATIONAL LAW IN INTERNATIONAL INVESTMENT LAW* (Michael Waibel and Andreas Kulick eds., 2024) (CL-311) ¶ 7 (noting that the proposals to impose limitations on the types of obligations to which Article 15's composite acts are relevant was rejected: "Special Rapporteur James Crawford was in favour of limiting the notion of composite breaches to violations of systematic obligations, i.e. obligations that define the wrongful conduct in composite or systematic terms. The text of Article 15 does not appear to reflect such a limitation, however.").

⁶³² Reply on Jurisdiction § III.F.6.b (heading); *id.* ¶ 578.

⁶³³ New Energy Law (Exh. C-10), Arts. 5, 16.

⁶³⁴ Memorial on the Merits ¶¶ 16, 149-150, 337-355, 405; [REDACTED] ¶ 26.

⁶³⁵ See Counter-Memorial on Jurisdiction ¶ 231; see also *supra* § IV.A.2(b).

⁶³⁶ The same is true with the other two authorities relied on by Respondent. See Reply on Jurisdiction ¶ 578, n. 710. In *LSF-KEB v. Korea*, the tribunal found that "[t]he only candidate for 'composite act' is the allegation of

theory for the claimant's claims based on a *de facto* ban on mining because the acts occurring prior to and after the cut-off date – namely, the State's failure to grant permits and concessions – were “similar acts the aggregation of which does not produce a different composite act under international law.”⁶³⁷ The *Pac Rim* scenario bears no resemblance to the present dispute. Here, Honduras's conduct preceding the enactment of the New Energy Law (specifically, its failure to pay invoices in full and its curtailment of Pacific Solar's energy dispatch to the grid) was accompanied by the State's repeated acknowledgment of its payment obligations and consistent representations that it intended to abide by them. However, once the new Administration took office and enacted the New Energy Law, the State reneged on those representations and introduced a policy to weaponize the State's significant and outstanding debt to renewable energy generators and to curtail the energy generated by Pacific Solar's Plant.⁶³⁸ This is markedly different from the situation in *Pac Rim*, where the State's conduct – in refusing to permit the claimant to mine – remained consistent throughout the period.

235. Lastly, Respondent complains that Claimants have not made arguments on composite acts in the context of Article 10.18.1 of the Treaty, which requires constructive and reasonable knowledge and precludes “[reliance] on legal appearances to circumvent the restrictive nature of the limitation periods.”⁶³⁹ This is incongruous. The concept of composite acts is well-recognized under international law, as Respondent agrees, and Article 18.10.1 contains no express language that would deviate from the international law position on the concept (and Respondent does not suggest that it does).⁶⁴⁰ Respondent has also not explained, let alone established, that

systemic harassment, but in that regard the alleged post-2011 harassment simply added new and different episodes to the Claimants' earlier grievances. . . . In the Tribunal's view, the post-2011 alleged misconduct was repetitive, not transformative. The harassment events as outlined by the Claimants amounted to a ‘series of repeated actions’ and not, as discussed by Professor James Crawford, a legal entity the whole of which represents more than [sic] the sum of its parts.” *LSF-KEB Holdings SCA et al. v. Republic of Korea*, ICSID Case No. ARB/12/37, Award dated 30 Aug. 2022 (**RL-182**) ¶¶ 354-355. In *Valle Ruiz v. Spain*, the claimants relied on the early deposit withdrawals that occurred before and after the cut-off date (*i.e.*, the date when the claimants acquired their respective investments). The tribunal only addressed the composite act argument in *obiter*, and made no finding as to whether the deposit withdrawals, in aggregate, would acquire a different legal characterization from individual instances. *Antonio del Valle Ruiz et al. v. Kingdom of Spain*, PCA Case No. 2019-17, Final Award dated 13 Mar. 2023 (**RL-190**) ¶¶ 401-408.

⁶³⁷ *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (**RL-85**) ¶ 2.88.

⁶³⁸ See *supra* § IV.A.2(b).

⁶³⁹ Reply on Jurisdiction ¶ 579.

⁶⁴⁰ See also *infra* § IV.A.3(b) (further addressing the same argument that Respondent made in relation to Article 10.18.1's alleged departure from customary international law's concept of continuous acts).

Honduras's measures as set forth by Claimants do not amount to such a composite act but to mere "legal appearances" aimed at "circumventing" the Treaty's limitation period.

236. Accordingly, because Honduras's conduct may also be considered as a composite act, Claimants' claim is not time-barred. This is because Claimants acquired knowledge of the composite act that breached the Treaty only once the New Energy Law was enacted and when Respondent concurrently engaged in unlawful conduct in furtherance of the New Energy Law, all of which occurred within the three-year limitation period.

(b) Claimants' Claims Are Timely Because the Challenged Measures Are Also Continuous Acts

237. As set forth in Claimants' Counter-Memorial on Jurisdiction, Honduras's measures (and, specifically, the failure to pay certain invoices and ENEE's limiting the dispatch of energy) can also be classified as continuous acts and, as such, fall within the Tribunal's jurisdiction *ratione temporis* because they are acts that continued with the New Energy Law that was promulgated in May 2022, that is, after the cut-off date.⁶⁴¹ Claimants established that a long line of NAFTA and CAFTA-DR tribunals have found that, where treaty breaches are based on continuing acts, the time bar begins to run only when the conduct ceases.⁶⁴²

238. In its Reply on Jurisdiction, Respondent disagrees and argues that the doctrine of continuous acts "does not establish a general exemption from limitation periods" and submits that the non-payment of the invoices and the curtailment of energy are not "continuing wrongful acts" but are "instantaneous acts" with "mere prolonged effects."⁶⁴³ It also argues that Article 10.18.1 of the Treaty, which provides for the assessment of the start date for the limitation period based on the investor's first knowledge (actual or constructive) of the Treaty breach and the resultant loss, departs from customary international law and precludes reliance on the continuous act concept.⁶⁴⁴ Respondent further disagrees that payment obligations can result in continuous breaches.⁶⁴⁵ Respondent is wrong on all counts.

⁶⁴¹ Counter-Memorial on Jurisdiction ¶ 244; *id.* ¶¶ 245-252.

⁶⁴² Counter-Memorial on Jurisdiction ¶¶ 246-250.

⁶⁴³ Reply on Jurisdiction ¶¶ 539, 541.

⁶⁴⁴ Reply on Jurisdiction ¶¶ 554-560.

⁶⁴⁵ Reply on Jurisdiction ¶¶ 561-572.

239. **First**, Respondent's arguments based on the distinction between acts and their effects do not assist it, simply because Claimants' case does not rely on mere effects continuing (rather than acts occurring) after the cut-off date. Indeed, if Respondent's position is that the New Energy Law was the effect of Respondent's previous failure to pay its obligations (rather than a measure that Respondent adopted well after the cut-off date), the theory is plainly wrong. The authorities that Respondent relies on do not improve on its position.

- Respondent invokes the *Phosphates v. Morocco* PCIJ case to argue that an act with continuing effects is not "automatically transformed" into "a continuing violation."⁶⁴⁶ This case, however, is inapposite. In *Phosphates*, Italy challenged a law establishing a phosphate monopoly, which law France had adopted in 1920, prior to the jurisdictional cut-off date. To attempt to bring the dispute within the Court's jurisdiction, Italy argued that France's subsequent conduct, taken after the cut-off date, presented the final step in implementing the monopoly. The Court rejected Italy's argument. It found that Italy had never "presented" such subsequent acts as ones "which, in themselves, and alone, would constitute ground for any dispute between Italy and France."⁶⁴⁷ It also held that these subsequent acts "in no way altered the situation which had been established in this respect ever since 1920 by the monopoly."⁶⁴⁸

This stands in stark contrast to the present case, where: (1) Claimants challenge the enactment of the Law itself as the measure giving rise to the dispute; and (2) as shown, the New Energy Law radically upended Honduras's electricity system including by (i) instructing ENEE to settle its historical debt owed to the generators only "for up to one year" and only once the PPA at issue was "renegotiated" or terminated,"⁶⁴⁹ (ii) creating a System Operator – an entity wholly controlled by ENEE – with the aim to "return to the State the nucleus for supplying electrical energy,"⁶⁵⁰ and (iii) threatening generators with criminal prosecution and government retribution should they not deliver energy to ENEE.⁶⁵¹

- Further, Respondent insists that the decisions in *Berkowitz v. Costa Rica* and *Mobil v. Canada* are "relevant."⁶⁵² They are not. Here too Respondent relies on these decisions

⁶⁴⁶ Reply on Jurisdiction ¶¶ 541-542 (citing *Phosphates in Morocco (Italy v. France)*, Judgment dated 14 June 1938, C.P.J.I. Series A/B No. 74 (RL-116), at 24).

⁶⁴⁷ *Phosphates in Morocco (Italy v. France)*, Judgment dated 14 June 1938, C.P.J.I. Series A/B No. 74 (RL-116), at 27.

⁶⁴⁸ *Phosphates in Morocco (Italy v. France)*, Judgment dated 14 June 1938, C.P.J.I. Series A/B No. 74 (RL-116), at 27.

⁶⁴⁹ Counter-Memorial on Jurisdiction ¶ 227 (citing New Energy Law (Exh. C-10), Art. 16).

⁶⁵⁰ Counter-Memorial on Jurisdiction ¶ 228 (citing Honduran Congress, Debate Regarding 2022 New Energy Law dated 11 May 2022 (Exh. C-76), at 2:09:26-2:11:31.)

⁶⁵¹ Counter-Memorial on Jurisdiction ¶ 229 (citing New Energy Law (Exh. C-10), Art. 15 ("During the renegotiation process, generators shall ensure the whole and uninterrupted supply of energy to the National Company of Electrical Energy (ENEE), **otherwise the provisions of the Criminal Code and other special laws shall apply.**") (emphasis added); *id.*, Art. 17).

⁶⁵² Reply on Jurisdiction ¶¶ 544-551.

to make a distinction between “instantaneous” measures with prolonged effects and continuous acts.⁶⁵³

Respondent seeks to analogize *Berkowitz* to the present case, arguing that “[j]ust as the failure to compensate for an expropriatory act does not nullify its instantaneous character,” the failure to pay a debt does not “alter the instantaneous nature of a payment obligation.”⁶⁵⁴ This is to no avail. Respondent ignores that the *Berkowitz* tribunal rejected the claimants’ attempt to circumvent the limitations period on grounds that there was no “independently actionable breach” after the expropriation had occurred (which expropriation had occurred prior to the cut-off date).⁶⁵⁵

As Claimants explained in their Counter-Memorial, this bears no resemblance to the present case, where the New Energy Law was enacted within the limitation period and is a measure that breaches the Treaty, which “renewed” the limitation period to the extent the Tribunal considers the Law to be part of a continuous course of conduct.⁶⁵⁶

- Respondent appears to acknowledge that the *Mobil Investments Canada Inc. v. Canada* tribunal held that the claimant’s claims were timely because, although the claimant was aware of the enactment of certain guidelines which pre-dated the cut-off date, the claimant could not have had known – until the Canadian courts had finally disposed of the claimant’s challenge to the guidelines – that the guidelines would be enforced against it and that it would incur loss or damage as a result.⁶⁵⁷ Indeed, Respondent notes that in *Mobil*, the “investor knew of the regulatory measures, but not that they would be applied to them.”⁶⁵⁸ This does not help Respondent’s case – and Respondent stops short of explaining how it could.

Here, Claimants similarly did not know before the new administration came into office, and among other measures, enacted the New Energy Law, that Honduras would not adhere to its prior commitments with respect to the outstanding debt owed to Pacific Solar, not least because of Respondent’s own prior conduct and assurances that the debt would be satisfied. Respondent simply continues to ignore this point. In any event, the New Energy Law was enacted after the cut-off date, rendering the *Mobil* tribunal’s consideration of continuous acts in the context of the enactment of legislation or guidelines irrelevant.

240. Tellingly, Respondent ignores most authorities cited by Claimants and chooses instead to focus narrowly on just a handful of cases in an attempt to rebut Claimants’ position that

⁶⁵³ Reply on Jurisdiction ¶¶ 547. See also *id.* ¶ 564 (“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.”).

⁶⁵⁴ Reply on Jurisdiction ¶ 547.

⁶⁵⁵ *Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected) dated 30 May 2017 (CL-286) ¶¶ 222, 229, 231-232, 270-271. The tribunal found that other claims fell within the limitations period. *Id.* ¶¶ 270, 286.

⁶⁵⁶ Counter-Memorial on Jurisdiction ¶ 252.

⁶⁵⁷ Reply on Jurisdiction ¶ 551; see *id.* ¶¶ 549-550.

⁶⁵⁸ Reply on Jurisdiction ¶ 551.

a continuous act can renew the limitation period.⁶⁵⁹ Specifically, Respondent criticizes Claimants' reliance on *Grand River*, *Feldman* and *UPS*, asserting that Claimants have taken these cases "out of context."⁶⁶⁰ Respondent's critiques are baseless.

- Contrary to Respondent's assertion, Claimants did not invoke *Grand River* to argue that continuing acts renew the limitation period – and, indeed, the *Grand River* tribunal does not address continuous acts.⁶⁶¹
- Respondent's criticism of Claimants' reliance on *Feldman* also misses the point. Respondent claims that the sections cited by Claimants "do not address the figure of continuing acts at all,"⁶⁶² but this misrepresents the *Feldman* tribunal's reasoning. Like in *Mondev*, the *Feldman* tribunal acknowledged that events or conduct predating the treaty's entry into force – and thus predating any applicable limitation period – may fall within the tribunal's jurisdiction where they form part of a "permanent course of action" that continues beyond the relevant date.⁶⁶³ In other words, *Feldman* affirms the principle that acts falling outside a tribunal's temporal jurisdiction may still be subject to the tribunal's jurisdiction, so long as they are part of a continuing pattern that extends into the limitation period.⁶⁶⁴
- Further, Respondent's assertion that Claimants are "mix[ed] up" by the *UPS* decision where they rely on it in the context of statute of limitation⁶⁶⁵ is unavailing. Claimants established that the *UPS* tribunal held that continuous acts can renew the limitation period because the time bar begins to run only when the conduct ceases.⁶⁶⁶ Respondent's reliance on the *Mobil* tribunal's note that the *UPS* approach – treating continuing courses of conduct as continuing breaches – should be "treated with caution"⁶⁶⁷ omits critical context. In *Mobil*, the claimant had argued that the ongoing enforcement of official guidelines **that had been enacted before** the cut-off date

⁶⁵⁹ Counter-Memorial on Jurisdiction ¶¶ 248-249. See, e.g., *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award on the Merits dated 31 Mar. 2025 (CL-288); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (CL-283) ¶ 3.37; *SGS Société Générale S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction dated 29 Jan. 2004 (CL-129) ¶ 167.

⁶⁶⁰ Reply on Jurisdiction ¶ 552.

⁶⁶¹ Reply on Jurisdiction ¶ 552, n. 660 (citing Counter-Memorial on Jurisdiction ¶ 207 that discusses *Grand River*). Claimants cited *Grand River* to support the well-established principle that a tribunal may consider events and State conduct preceding the critical date as relevant factual background to an alleged Treaty breach, without running afoul of the applicable limitation period. Counter-Memorial on Jurisdiction ¶ 207.

⁶⁶² Reply on Jurisdiction ¶ 552.

⁶⁶³ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues dated 6 Dec. 2000 (CL-294) ¶ 62.

⁶⁶⁴ See also *supra* § IV.A.1(b) (establishing the relevance of the NAFTA cases discussing the non-retroactive application of the treaty).

⁶⁶⁵ Reply on Jurisdiction ¶ 553.

⁶⁶⁶ Counter-Memorial on Jurisdiction ¶ 246 (citing *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits dated 24 May 2007 (CL-292) ¶ 28).

⁶⁶⁷ Reply on Jurisdiction ¶ 553 (citing *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Liability dated 13 July 2018 (RL-101) ¶ 161).

constituted a continuing breach. The tribunal rejected that position in the specific context of an already enacted “regulatory framework,” cautioning that under such logic, “it could always be argued that each day’s instance of application or enforcement of such a measure [being the regulatory framework] was a separate act.”⁶⁶⁸

That concern has no relevance here: the regulatory framework at issue, the New Energy Law, was enacted after the cut-off date. There is no suggestion here that Claimants are challenging the continued enforcement of an already-enacted law. Moreover, the *Mobil* tribunal gave “considerable weight” to the fact that all three NAFTA parties – Canada, Mexico, and the United States – had rejected the *UPS* approach in their post-NAFTA practice.⁶⁶⁹ There is no such evidence that all of the CAFTA-DR Parties have expressed any such agreement, and so that point has no bearing here.

- In any event, Claimants have referred to a number of cases where tribunals other than the *UPS* tribunal have held that, in cases of continuing acts, the limitation period is suspended until the unlawful situation ceases.⁶⁷⁰ For instance, in *Energía y Renovación v. Guatemala*, the tribunal explained that, because the alleged treaty violation did not occur at a single point in time, the claimant’s knowledge of the treaty breach and the resulting damage is renewed daily for as long as the violation persists.⁶⁷¹ In so holding, the tribunal relied on Article 14 of the ILC Articles on State Responsibility, finding that it explicitly refers to continuous breaches as breaches that extend in time until the violation ceases.⁶⁷² In *SGS v. Philippines*, the tribunal concluded that it had jurisdiction over breaches that began prior to the treaty’s entry into force and continued thereafter, holding that “the failure to pay sums due under a contract is an example of a continuing breach” which lasts as long as the debt remains unpaid.⁶⁷³ Respondent does not engage with these authorities.

241. **Second**, Respondent contends that Article 10.18.1 of the Treaty and, specifically, its reference to the “first” knowledge (actual or constructive) of the Treaty breach and the resultant loss signals the CAFTA-DR’s departure from the recognition of continuing breaches and their application to the limitation period under the Treaty.⁶⁷⁴ This is incorrect.

⁶⁶⁸ *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Liability dated 13 July 2018 (RL-101) ¶¶ 156-157.

⁶⁶⁹ *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Liability dated 13 July 2018 (RL-101) ¶ 158.

⁶⁷⁰ Counter-Memorial on Jurisdiction ¶ 247.

⁶⁷¹ *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award on the Merits dated 31 Mar. 2025 (CL-288) ¶ 246.

⁶⁷² *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award on the Merits dated 31 Mar. 2025 (CL-288) ¶ 243.

⁶⁷³ *SGS Société Générale S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction dated 29 Jan. 2004 (CL-129) ¶ 167.

⁶⁷⁴ Reply on Jurisdiction ¶¶ 554-560.

242. As Claimants explained in their Counter-Memorial on Jurisdiction,⁶⁷⁵ the tribunal in *Energía y Renovación v. Guatemala* squarely rejected Guatemala's position that, because the CAFTA-DR refers to the date when the investor obtained knowledge of the breach "for the first time," this excluded the continuous act doctrine from the Treaty's scope,⁶⁷⁶ holding that derogation from general international law could not be merely tacit and must be clearly stated.⁶⁷⁷ Respondent simply disregards and does not address this authority in its Reply on Jurisdiction.

243. Instead, Respondent baldly asserts that "the Treaty constitutes a *lex specialis*" and the Parties to it "have expressly departed from customary practice."⁶⁷⁸ This is plainly wrong because the Treaty contains no express exclusion of the application of continuous acts. Respondent also builds a straw-man argument that "[i]f it were accepted that any measure producing continuous effects over time constitutes a continuing act exempt from the statute of limitations, the temporal limitations would be significantly reduced."⁶⁷⁹ But this argument is premised on the flawed contention that Claimants' case relies on mere effects continuing (rather than acts occurring) after the cut-off date. As explained above, Respondent's logic would render the New Energy Law an effect of Respondent's previous failure to pay its obligations (rather than a measure that Respondent adopted well after the cut-off date). This is nonsensical.

244. Respondent also disputes Claimants' reliance on certain decisions of human rights courts (such as *Agrotexim v. Greece*) regarding the limitation periods,⁶⁸⁰ accusing Claimants of "transplant[ing]" human rights law into investment arbitration.⁶⁸¹ There is no reason, however, why an investment treaty tribunal should disregard the application of international law by an international court or tribunal, simply because the underlying treaty is a human rights one and not an investment protection treaty. The purported reasons for doing so that Respondent offers do not

⁶⁷⁵ Counter-Memorial on Jurisdiction ¶¶ 247-248.

⁶⁷⁶ *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award on the Merits dated 31 Mar. 2025 (CL-288) ¶¶ 243, 247-248.

⁶⁷⁷ *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award on the Merits dated 31 Mar. 2025 (CL-288) ¶ 243.

⁶⁷⁸ Reply on Jurisdiction ¶ 556.

⁶⁷⁹ Reply on Jurisdiction ¶ 556.

⁶⁸⁰ Reply on Jurisdiction ¶¶ 557-560.

⁶⁸¹ Reply on Jurisdiction ¶ 558; see also *id.* ¶¶ 557-560.

hold water.⁶⁸² As Claimants made clear in their submissions, the *Agrotexim* case is but one example of “international law as applied by other international courts and tribunals.”⁶⁸³

245. **Third**, Respondent disputes that payment obligations can result in continuous breaches.⁶⁸⁴ It argues – with no authorities to support it – that “[t]he 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.”⁶⁸⁵ This is wrong. For instance, the *SGS v. Philippines* tribunal found that “the failure to pay sums due under a contract is an example of a continuing breach.”⁶⁸⁶ Indeed, commentators explain that “[m]ost investment tribunals also classify failure to pay under a contract as a continuing act.”⁶⁸⁷

246. Respondent’s attempt to rely on *Grand River* is to no avail. Respondent contends that the tribunal in *Grand River* recognized that the failure to make periodic payments “did not, with each payment, renew the statute of limitations.”⁶⁸⁸ This, however, misrepresents the tribunal’s decision. The tribunal did not hold that the failure to make periodic payments could never amount to a continuing breach or that such failures do not result in the renewal of the statute of limitations. Rather, the tribunal found that certain escrow statutes imposed a clear, one-time statutory obligation on manufacturers to place funds into escrow for each year’s cigarette sales, with the duty triggered uniformly across states by the year 2000. Because this statutory obligation

⁶⁸² Respondent asserts that “several investment tribunals . . . decide[d] that they do not have jurisdiction to rule on human rights issues.” See Reply on Jurisdiction ¶ 557. But the question of jurisdiction *ratione materiae* over human rights issues is a far cry from taking guidance on the application of concepts of general international law. Respondent also asserts that while “both systems are structured on the basis of an asymmetrical relationship between state and individual, this gap is considerably smaller in arbitration,” and gives an example of investment treaties including limitation periods which “recognize the sophistication of investors” (*id.* ¶ 557), while ignoring the fact that the European Convention of Human Rights not only contains a limitation period, but one that is considerably shorter than that found in the Treaty. Respondent further claims that the human rights courts and investment tribunals have decided the question of whether an expropriation is an instantaneous or continuous act differently, and so any “analogy” between the two is “legally flawed.” *Id.* ¶ 558. A similar comment could be made about different investment tribunals reaching different outcomes on similar issues and, thus, is no reason to disregard jurisprudence from other international courts or tribunals applying international law.

⁶⁸³ Counter-Memorial on Jurisdiction ¶ 249.

⁶⁸⁴ Reply on Jurisdiction ¶¶ 561-572.

⁶⁸⁵ Reply on Jurisdiction ¶ 562.

⁶⁸⁶ *SGS Société Générale de Surveillance S.A. v Republic of Philippines*, ICSID Case No ARB/ 02/ 6, Decision of the Tribunal on Objections to Jurisdiction dated 29 Jan. 2004 (CL-129) ¶ 167.

⁶⁸⁷ See Claudia Annacker and Enikő Horváth, *Article 15 of the ARSIWA: Breach consisting of a composite act*, in *GENERAL INTERNATIONAL LAW IN INTERNATIONAL INVESTMENT LAW* (Michael Waibel and Andreas Kulick eds., 2024) (CL-311) ¶ 16.

⁶⁸⁸ Reply on Jurisdiction ¶ 564.

was fixed and precisely quantified, the tribunal concluded that the claimants incurred loss or damage as soon as they became subject to it—regardless of whether enforcement occurred later.⁶⁸⁹ Notably, the tribunal rejected the claimants' argument not because it dismissed the concept of continuing breaches, but in part because the claimants had failed to plead their case in a way that identified distinct, timely State action. The tribunal emphasized that the claimants challenged the escrow regime in a generic, undifferentiated manner and did not point to new, timely breaches tied to specific states or acts after the limitation period.⁶⁹⁰

247. **Finally**, as a last resort, Respondent turns to principles of civil law and the Honduran Civil Code, claiming they do not recognize “continuing acts” and that, in such systems, the breach of a payment obligation occurs “automatically with the expiry of the established term or with the making of an incomplete payment.”⁶⁹¹ As a threshold point, Respondent may not rely on domestic time bars to limit Claimants' rights to bring claims under the Treaty.⁶⁹²

248. In any event, Respondent's case further fails as a factual matter. Specifically, Claimants explained that, with respect to the outstanding debt, while Honduras's initial failure to pay its outstanding debt to Pacific Solar pre-dated the enactment of the New Energy Law, this conduct, continued—albeit with a changed nature—once Respondent enacted the New Energy Law.⁶⁹³ In particular, Article 16 of the New Energy Law declared Honduras's intention to repudiate its payment obligations under the PPA, as it instructed ENEE to settle the historical debt owed to the generators only “for up to one year” and only once the PPA was “renegotiated” or “terminated.”⁶⁹⁴ Claimants, moreover, explained that Honduras continued the breach by weaponizing the State's significant and outstanding debt to Pacific Solar and publicly signaling

⁶⁸⁹ *Grand River Enterprises Six Nations v. United States*, UNCITRAL, Decision on Objections to Jurisdiction dated 20 July 2006 (CL-287) ¶ 82.

⁶⁹⁰ *Grand River Enterprises Six Nations v. United States*, UNCITRAL, Decision on Objections to Jurisdiction dated 20 July 2006 (CL-287) ¶ 81.

⁶⁹¹ Reply on Jurisdiction ¶ 566.

⁶⁹² *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability dated 21 Apr. 2015 (CL-312) ¶ 147 (“The Tribunal decides that the Claimants' claims are not time-barred. In arbitration proceedings governed by international law, **only international law - and no domestic law - can introduce time-bars.**”); *Salini Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility dated 23 Feb. 2018 (CL-313) ¶ 82 (“[T]here is no basis in Article 8(7) of the BIT to apply Argentine time limits or the Argentine law of prescription, either directly or by analogy, to Salini Impregilo's international law claims.”).

⁶⁹³ Counter-Memorial on Jurisdiction ¶ 244.

⁶⁹⁴ Counter-Memorial on Jurisdiction ¶ 244 (citing New Energy Law (Exh. C-10) Art. 16).

that payment of arrears would not occur—acts that were in furtherance of the New Energy Law's mandate—forcing Pacific Solar into a precarious situation with its lenders and to restructure its project finance loans in an attempt to salvage the project.⁶⁹⁵

249. With respect to the policy regarding energy curtailment, Claimants explained that, while there had been some curtailments of the energy that Pacific Solar's Plant dispatched to the grid prior to 2022,⁶⁹⁶ upon the enactment of the New Energy Law, the nature of the State's actions changed. This was because, with the passage of the New Energy Law, ENEE gained full control of the grid through the CND (an ENEE-owned entity that replaced ODS), responsible for supplying electrical energy,⁶⁹⁷ which enabled Minister Tejada to announce the State's policy to curtail the energy generated by solar generators on the ground that the dispatchment of their energy had caused great "economic damage" to the State, and in particular to the State-owned hydroelectric dams.⁶⁹⁸ Claimants, moreover, explained that, as envisioned, Pacific Solar's Plant experienced a significant increase in curtailments in 2022.⁶⁹⁹ Honduras has failed to make payments for curtailments and refuses to do so, even though under the PPA, ENEE is required to compensate Pacific Solar if the Government curtails the Plant's production for more than six hours in a month for reasons not attributable to Pacific Solar.⁷⁰⁰

B. CLAIMANTS' CLAIMS ARISE OUT OF RESPONDENT'S VIOLATIONS OF THE CAFTA-DR

250. As explained at length, Claimants' claims arise out of Honduras's measures in breach of the CAFTA-DR.⁷⁰¹ In making its objection that Claimants' claims are not treaty claims, Honduras continues to mischaracterize Claimants' case, stating that the "real dispute before this

⁶⁹⁵ Counter-Memorial on Jurisdiction ¶ 244.

⁶⁹⁶ Counter-Memorial on Jurisdiction ¶ 244.

⁶⁹⁷ Counter-Memorial on Jurisdiction ¶ 244 (citing New Energy Law (**Exh. C-10**), Art. 19: Ch. 4, § 9.A. ("The National Electricity Grid shall be operated by an entity that is designated as Grid Operator. The Grid Operator shall be a state-owned entity that shall be part of the structure of Empresa Nacional de Energía Eléctrica (ENEE).")).

⁶⁹⁸ Counter-Memorial on Jurisdiction ¶ 244 (citing ENEE Press Release on Curtailments to Renewables dated 8 July 2022 (**Exh. C-222**), at 1.

⁶⁹⁹ Counter-Memorial on Jurisdiction ¶ 244 (citing Compass Lexecon, Figure 7). *See also* [REDACTED] ¶ 26.

⁷⁰⁰ Counter-Memorial on Jurisdiction ¶ 244 (citing PPA (**Exh. C-1**) § 2, Cl. 9.5.1; [REDACTED] ¶ 26)).

⁷⁰¹ Memorial on the Merits, § IV; Counter-Memorial on Jurisdiction § II.B.1.

Tribunal revolves around the interpretation of the PPA and the payment of the amounts demanded by Pacific Solar.”⁷⁰² This is incorrect.

251. To assess whether Claimants' claims constitute treaty claims, it is undisputed that the applicable standard is the one set forth by the annulment committee in *Vivendi I* and the *Crystallex* tribunal.⁷⁰³ The *ad hoc* committee in *Vivendi I* found that the tribunal has to consider “the fundamental basis” of the claims.⁷⁰⁴ And the tribunal in *Crystallex* explained that, to do that, the “starting point will be the [c]laimant's prayers for relief and the formulation of its claims.”⁷⁰⁵ That said, the test for assessing the nature of the claim is an objective one.⁷⁰⁶

252. Following this premise and well-established jurisprudence, Respondent acknowledges that (i) an investment tribunal has jurisdiction over the assessment of treaty violations “even if they relate to contractual claims;”⁷⁰⁷ (ii) the mere existence of an underlying contract (or contracts) does not affect the jurisdiction of the Tribunal;⁷⁰⁸ (iii) treaty claims “may relate to the performance of a contract;”⁷⁰⁹ and (iv) treaty and contract claims may “relate to the same facts.”⁷¹⁰ Honduras thus accepts that the sole issue for the Tribunal to determine in this respect is “whether it has jurisdiction over **purely** contractual claims.”⁷¹¹ On these grounds, Respondent's objection should be rejected, because Claimants do not present “purely contractual

⁷⁰² Reply on Jurisdiction ¶ 417.

⁷⁰³ Reply on Jurisdiction ¶¶ 419-421.

⁷⁰⁴ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment dated 3 July 2002 (RL-60) ¶ 101.

⁷⁰⁵ *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated 4 Apr. 2016 (CL-92) ¶ 475.

⁷⁰⁶ *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated 4 Apr. 2016 (CL-92) ¶ 475.

⁷⁰⁷ Reply on Jurisdiction ¶ 424 (“There is no doubt that a cause of action under an international treaty is legally distinct from a contractual cause of action . . . Honduras also recognizes this point. It is equally true that an investment tribunal has jurisdiction over the assessment of ‘treaty violations,’ even if they relate to contractual claims.”).

⁷⁰⁸ Reply on Jurisdiction ¶ 425 (“Honduras's argument is not that the presence of a contract *ipso facto* nullifies the jurisdiction of an investment tribunal. Indeed, such a position would be irrelevant in face of arbitral precedent.”).

⁷⁰⁹ Reply on Jurisdiction ¶ 427 (“[A]llegations of the breach of an investment agreement . . . may relate to the performance of a contract.”).

⁷¹⁰ Reply on Jurisdiction ¶ 427 (“It may even be the case that the claims in one and the other forum [contractual and treaty-based] relate to the same facts.”).

⁷¹¹ Reply on Jurisdiction ¶¶ 425-426.

claims,” and, in any event, the Tribunal already stated that it, “cannot find in the present bifurcated proceeding that the Claimants’ claims are purely contractual.”⁷¹²

253. Honduras sets forth three propositions to assess whether Claimants’ claims are “purely contractual.” Its own propositions, however, undermine its jurisdictional objection:

- **First, Respondent raises the uncontroversial point that not every breach of a contract constitutes a breach of a treaty.**⁷¹³ Yet, Honduras expressly acknowledges the principle, well-established under international law, that a breach of contract may also result in a breach of international law.⁷¹⁴ As explained, Claimants’ claims are not for mere breaches of the Agreements. They involve, amongst others, a series of measures that resulted in the State’s effective repudiation of the Agreements, through the abuse of its sovereign powers, in an arbitrary manner and in breach of Claimants’ legitimate expectations.⁷¹⁵
- **Second, a treaty breach requires a sovereign act in which a State is not acting in a purely commercial capacity.**⁷¹⁶ Claimants have explained in detail that its claims challenge Honduras’s sovereign acts; specifically, Honduras’s abuse of its sovereign authority to repudiate its commitments under the Agreements.⁷¹⁷
- **Third, a claim cannot be based on a treaty if ordinary remedies arising from the contract remain available to the investor.**⁷¹⁸ There is no such rule in international law, and Respondent mischaracterizes a series of authorities that do not stand for such a position in support of its invented proposition. Further, and in any event, the dispute resolution mechanism under the Agreements is not available here because the challenged measures are not contractual. Moreover, the State’s ongoing actions against arbitration and the lack of independence of the Honduran judiciary render the dispute resolution clauses in the Agreements ineffective.⁷¹⁹ Finally, both the Paizes and Pacific Solar waived their right to pursue claims domestically, as required to pursue arbitration under the Treaty,⁷²⁰ and Respondent cannot have it both ways: by both requiring Claimants to pursue domestic remedies and requiring them to waive such remedies to pursue arbitration.

⁷¹² Procedural Order No. 4 dated 4 Apr. 2025 ¶ 51.

⁷¹³ Reply on Jurisdiction ¶¶ 429-430.

⁷¹⁴ Counter-Memorial on Jurisdiction ¶ 263; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Award dated 20 Aug. 2007 (**RL-60**) ¶ 7.3.9; Reply on Jurisdiction ¶¶ 425, 427.

⁷¹⁵ Counter-Memorial on Jurisdiction § III.B.1.

⁷¹⁶ Reply on Jurisdiction ¶¶ 431-433.

⁷¹⁷ Counter-Memorial on Jurisdiction § III.B.2.

⁷¹⁸ Reply on Jurisdiction ¶ 434.

⁷¹⁹ *See infra* § IV.B.3. *See also* Counter-Memorial on Jurisdiction § II.A.2.

⁷²⁰ Mr. Fernando Paiz’s Waiver Pursuant to Article 10.18.2 of the Treaty dated 22 Aug. 2023 (**Exh. C-37**); Ms. Anabella Schloesser de Paiz’s Waiver Pursuant to Article 10.18 of the Treaty dated 22 Aug. 2023 (**Exh. C-38**); Pacific Solar Energy S.A. de C.V.’s Waiver Pursuant to Article 10.18 of the Treaty dated 22 Aug. 2023 (**Exh. C-39**).

254. As explained further below, (i) Claimants' claims are Treaty-based, notwithstanding Respondent's contractual breaches;⁷²¹ (ii) Honduras breached the Agreements and the Treaty acting in its sovereign authority, and not acting as a mere contractual party,⁷²² and (iii) whether the dispute resolution provisions under the Agreements are available is irrelevant for determining whether Claimants' claims are purely contractual and, in any event, Claimants cannot resort to the dispute resolution clauses in the Agreements in connection with this dispute.⁷²³

1. The Paizes' Claims Are Based on Respondent's Breaches of the Treaty, Even If Respondent Is Also in Breach of the Agreements

255. In support of its objection that the Paizes' claims are contract claims, and not treaty claims, Respondent restates its prior position as set forth in the Memorial on Jurisdiction. Respondent's objection hinges on the argument that this is only a dispute under the PPA. To that end, Honduras artificially limits the dispute to what it labels "the Essential Claims," specifically, outstanding debt and curtailments of energy.⁷²⁴ Distorting Claimants' case, Respondent argues that Claimants' submissions acknowledge the contractual nature of their claims. And Respondent takes issue with Claimants' damages claim, asserting that Claimants' damages claim for unpaid invoices indicates that their claim is only a dispute under the PPA. Finally, Respondent continues to assert its baseless position that the Claimants' umbrella clause claim confirms the contractual nature of the claims.⁷²⁵ Honduras is wrong for the following reasons.

256. **First**, Claimants' claims do not arise solely from breaches of the PPA, and they are not limited to the debt owed by the State and the curtailments the Plant experiences.⁷²⁶ The Agreements Honduras has breached are part of a wider legal framework that Honduras put in place to entice renewable energy investments. The 2007 Renewables Law granted investors several economic incentives, mandating that ENEE execute PPAs with private generators to dispatch and receive electricity that generators produced under their PPAs, all with the Central Government's express guarantee of ENEE's compliance with its obligations under the PPAs.⁷²⁷ Later on, the

⁷²¹ See *infra* § IV.B.1.

⁷²² See *infra* § IV.B.2.

⁷²³ See *infra* § IV.B.3.

⁷²⁴ Reply on Jurisdiction ¶¶ 11, 440.

⁷²⁵ Reply on Jurisdiction ¶ 441.

⁷²⁶ Reply on Jurisdiction ¶ 441.a.

⁷²⁷ 2007 Renewables Law (**Exh. C-4**), at A.2-A.5, Arts. 2-4.

2013 Renewables Law made further improvements to the economic regime, to promote and protect investments, including a more attractive tax regime for qualifying renewable energy generators.⁷²⁸ To implement its mandate under the Renewables Laws, the Government entered into specific agreements with investors, including each of the three Agreements with Pacific Solar. In 2022, after Pacific Solar and the Paizes had invested millions in building and operating the Plant, Honduras reneged on its prior commitments under the Agreements and the Renewables Law, and engaged in a series of arbitrary actions against Pacific Solar which essentially rendered the Agreements ineffective. The dispute, therefore, extends well beyond a contractual dispute.

257. **Second**, contrary to Respondent's assertions, Claimants' submissions, including references to Honduras breaching the Agreements and the weaponization of the existing debt to force Pacific Solar to renegotiate the PPA, does not indicate that Claimants' claims are contractual, and not treaty, claims.⁷²⁹ As explained, the fact that Honduras's measures may **also** amount to a separate breach of the Agreements does not deprive Claimants' claims of their character as treaty claims. Indeed, Honduras itself admits that a breach of an international treaty may "relate to the performance of a contract" or "relate to the same facts."⁷³⁰ There may even be "parallel claims under the treaty and under the contract."⁷³¹ Thus, the issue before the Tribunal is not whether Honduras's conduct constitutes a breach of the Agreements (something Respondent concedes),⁷³² but whether Claimants have challenged Honduras's conduct as a breaches of the Treaty standards (which they have). Respondent's position simply ignores that its conduct *vis-à-vis* the Paizes' investment, including its enactment of the 2022 New Energy Law, its repudiation of the Agreements and the legal framework created by the Renewables Laws, and its weaponization of the outstanding debt to force the renegotiation of the PPA on Honduras's own terms, constitute Treaty breaches.

⁷²⁸ 2013 Renewables Law (**Exh. C-5**), at A.12, Art. 13 ("For guaranteeing the promotion and protection of the investment in this strategic sector for the national economy and the legal certainty, the rates of these taxes will not in any moment exceed 10 percent").

⁷²⁹ Reply on Jurisdiction ¶ 441.b (referring to Counter-Memorial on Jurisdiction ¶ 236, and to its own Reply on Jurisdiction ¶¶ 14-17, 527-528).

⁷³⁰ Reply on Jurisdiction ¶ 427.

⁷³¹ Reply on Jurisdiction ¶ 427.

⁷³² See, e.g., Reply on Jurisdiction ¶ 447.

258. **Third**, that Claimants' damages assessment considers ENEE's unpaid invoices, does not render Claimants' claims contractual.⁷³³ Pacific Solar's sole source of revenue from the Project is payment for the electricity sold to ENEE under the PPA (which the State repudiated in breach of the CAFTA-DR). It is therefore unremarkable that, for the assessment of damages, Pacific Solar includes amounts of past and future invoices to show the revenue it was deprived of as a result of Respondent's Treaty violations. Indeed, investment treaty tribunals frequently have awarded compensation for unpaid accounts receivables in cases of breaches of international commitments.⁷³⁴ Moreover, as explained in Section IV.A.2(b), more than 85% of Pacific Solar's damages correspond to the reduction of Pacific Solar's FMV as a consequence of Honduras's internationally-unlawful measures.

259. **Finally**, the invocation of the umbrella clause is not an "implicit recognition" of the contractual nature of Claimants' claims.⁷³⁵ As explained, Honduras's conduct is not only in breach of specific commitments towards Pacific Solar, allowing Claimants to invoke the applicable umbrella clause; it also constitutes a simultaneous breach of other Treaty provisions, including (i) the expropriation provisions of the Treaty,⁷³⁶ and (ii) the Minimum Standard of Treatment obligation.⁷³⁷ Asserting, as Respondent does, that an umbrella clause "is only invoked when the Claimant acknowledges that its complaint is contractual and needs to be 'elevated' to the treaty"⁷³⁸ is unsound. Tribunals have often found States in breach of an umbrella clause **and** other investment treaty standards. On any view, Respondent's position is at odds with its own submissions that treaty claims can be related to the performance of a contract, co-exist with contractual claims, or arise from the same underlying facts.⁷³⁹

⁷³³ Reply on Jurisdiction ¶ 441.c-d.

⁷³⁴ See, e.g., *Tidewater Investment SRL and Tidewater Caribe, C.A. et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award dated 13 Mar. 2015 (CL-321) ¶ 175; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 (CL-66) ¶ 389; *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award dated 10 Feb. 2012 (CL-105) ¶ 180; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II)*, ICSID Case No. ARB/03/19, Award dated 9 Apr. 2015 (CL-104) ¶ 63.

⁷³⁵ Reply on Jurisdiction ¶ 441.e.

⁷³⁶ Memorial on the Merits § IV.A.

⁷³⁷ Memorial on the Merits § IV.B.

⁷³⁸ Reply on Jurisdiction ¶ 441.e.

⁷³⁹ Reply on Jurisdiction ¶ 427.

2. Honduras Did Not Act as a Mere Contractual Party When It Misused Its Sovereign Powers to Render the Agreements Ineffective

260. To sustain its position that the present dispute is purely contractual, Honduras contends that the 2022 New Energy Law (a sovereign act by definition) had no impact on the PPA and did not otherwise affect its contractual relationship with Pacific Solar or its daily operations.⁷⁴⁰ Honduras, in essence, suggests that the 2022 New Energy Law did not alter the its outstanding debts to Pacific Solar or its pre-existing curtailments of energy,⁷⁴¹ and that when it reneged on its payment obligations and further curtailed Pacific Solar's energy, it did so in its commercial capacity.⁷⁴² To rebut Claimants' points regarding the weaponization of debt and forced renegotiation—which Respondent implemented in its sovereign capacity—Honduras argues that these allegations cannot sustain Claimants' characterization of its claims, because the PPA was never renegotiated and it continues to be performed.⁷⁴³ Respondent is wrong.

261. **First**, Respondent misguidedly continues to ignore the radical changes to the legal framework that it introduced via the New Energy Law in 2022. Indeed, the New Energy Law encumbered Pacific Solar's agreements by creating a framework to repudiate the PPA and codifying principles that clash with it, unlawfully interfering with the PPA's termination and modification provisions.⁷⁴⁴ The New Energy Law compelled Pacific Solar to dispatch energy to ENEE in an "uninterrupted manner" under the threat of criminal prosecution, placing itself in control of the dispatch system and blocking Pacific Solar's rights to sell energy to third parties in

⁷⁴⁰ Reply on Jurisdiction ¶¶ 443-461.

⁷⁴¹ Reply on Jurisdiction ¶¶ 445-446.

⁷⁴² Reply on Jurisdiction ¶¶ 447-448.

⁷⁴³ Reply on Jurisdiction ¶¶ 449-461.

⁷⁴⁴ Cf. PPA (Exh. C-1), § 2, Cl. 18.1 ("This Contract may be amended only by written agreement between the Parties, provided that the Parties follow the procedure established in the Applicable Laws section herein."); with New Energy Law (Exh. C-10), Art. 5 ("ENEE is authorized to . . . set under its prerogatives and powers . . . the renegotiation of the contracts and prices at which the State, through the National Company of Electric Energy (ENEE), acquires the service of energy by water, solar and wind taking into account the prices of the Central American, Caribbean and Latin America regions. **If negotiation is not possible, it is authorized to set the termination of the contractual relationship and the acquisition by the State**") (emphasis added).

the event of ENEE's non-payment.⁷⁴⁵ The 2022 New Energy Law, moreover, further expanded the State's control over generators.⁷⁴⁶

262. **Second**, Honduras's objection again depends on improperly limiting Claimants' claims to the existence of outstanding debt and energy curtailments.⁷⁴⁷ As explained above, and contrary to Respondent's unsupported assertions,⁷⁴⁸ Claimants' claims arise out Honduras's sovereign measures against certain solar generators, including Pacific Solar,⁷⁴⁹ that render the Agreements meaningless and harm Claimants' investments in violation of the Treaty, including, but not limited to:

- ***De facto repudiating its historical debt with Pacific Solar:*** Honduras announced that it will only pay for up to one year of historical debt,⁷⁵⁰ all while simultaneously conditioning the payment of the debts owed to the generators on the "renegotiation" of their PPAs to a lower energy price,⁷⁵¹ and prioritizing the payment of outstanding debt to generators that "renegotiate" (i.e., acquiesce to the State's drastic terms) in accordance with the New Energy Law.⁷⁵²

⁷⁴⁵ Both the Agreements and the Renewables Law contained Honduras's commitment to (i) dispatch and pay for all energy the Plant generates and delivers; (ii) pay for curtailments not attributable to Pacific Solar; and (iii) sell its energy to third parties or terminate the PPA if ENEE is four months behind in its payment. Yet, the State has disregarded these commitments through the enactment of the 2022 New Energy Law, which provides that Pacific Solar must continue to dispatch its energy to ENEE, or else face criminal prosecution, in effect foreclosing Pacific Solar's rights under the PPA to sell energy to third parties or terminate the PPA. Cf. PPA (Exh. C-1), § 2, Cls. 2.1, 2.3, 2.4, 2.5, 4.6(c), 6.1, 9.1, 9.5.1; 2007 Renewables Law (Exh. C-4), Art. 9; with New Energy Law (Exh. C-10), Arts. 11, 15.

⁷⁴⁶ See New Energy Law (Exh. C-10), Art. 17 (providing for the creation of the National Audit Commission); see also Government of Honduras, Report Outlining the Government's Plan for Reforming the Electricity Sector Under the New Energy Law dated 15 July 2022 (Exh. C-348), at 6; ENEE, *The State creates the National Audit Commission*, X (FORMERLY TWITTER) dated 20 July 2022 (Exh. C-349); New Energy Bill (Exh. C-350), Statement of Motives, at 3 (anticipating that the Government would conduct audits to "fully identify those responsible for the current disaster and looting present in ENEE[,] and the destruction of the [electricity] subsector.").

⁷⁴⁷ Reply on Jurisdiction ¶¶ 445-446.

⁷⁴⁸ Reply on Jurisdiction ¶¶ 447-448.

⁷⁴⁹ See *supra* § IV.A.2(b).

⁷⁵⁰ See Memorial on the Merits ¶¶ 125, 146-148, 314.

⁷⁵¹ Government of Honduras, Report Outlining the Government's Plan for Reforming the Electricity Sector Under the New Energy Law dated 15 July 2022 (Exh. C-11) at 7 ("The **State does not deny the debt and interest owed [to the generators,] and is willing to make payment arrangements** in the short- and long-term **under new conditions** regarding interests, [arrangements that] will be completed **once an equilibrium is reached between the income and expenses of ENEE.**"); at 2-3 (proposing the reduction of base price of energy for all generators, regardless of the generator's energy source, to 0.11 US\$/kWh.). See also ENEE, "The State will pay once the ENEE's revenues and costs are balanced," X (FORMERLY TWITTER) dated 18 July 2022 (Exh. C-160).

⁷⁵² Reply on Jurisdiction ¶ 450; Letter from ENEE Pacific Solar, Oficio No. ENEE-GG-1083-X-2022 dated 11 Oct. 2022 (Exh. C-69), at 2 ("ENE **undertakes to fully pay the debt accrued with [Pacific Solar] within a term of sixty (60) to ninety (90) business days, as from the signing of a Memorandum of Understanding.**") (emphasis added). See also AHER, Report of Meeting between COHEP's Energy Committee and ENEE's General Manager, Minister Tejada dated 7 Sept. 2022 (Exh. C-189), at 2-4 (noting that Minister Tejada stated to the Honduran Council

- **Limiting the energy Pacific Solar can inject into the energy grid while not compensating it.** Abusing its power as both counter-party and market regulator, Honduras is prioritizing the energy dispatch of State-owned hydroelectric dams instead of solar plants, like Pacific Solar's.⁷⁵³ Honduras has also refused to compensate Pacific Solar for these curtailments in disregard of its commitments under the Agreements and the Renewables Laws.⁷⁵⁴
- **Forcing the re-negotiation of the PPAs under the framework of Article 5 of the New Energy Law.** This is not an ordinary contractual re-negotiation—and, thus, contractual dispute—because the so-called re-negotiation is neither free nor balanced, as Respondent portrays.⁷⁵⁵ Respondent acknowledges that the State could have invoked clause 18 of the PPA (providing for mutual re-negotiation of the contract), but did not do so.⁷⁵⁶ Rather than acting as a commercial actor and engaging in an arms-length contractual re-negotiation under the PPA, the State enacted legislation that authorized it to “set under its prerogatives and powers . . . the renegotiation of the contracts and the prices at which the State, through . . . ENEE . . . acquires the service of energy,” under the threat of termination or expropriation.⁷⁵⁷ In this way, Honduras acted in its sovereign capacity, and not as a mere commercial counter-party, and the ensuing dispute arising out of the failed “re-negotiations” is, accordingly, not a mere commercial dispute.
- **Threatening to criminally prosecute generators if they cease to deliver energy to Honduras.**⁷⁵⁸ Honduras admits that, prior to the enactment of this Law, the legal

of Private Enterprises, of which generators like Pacific Solar are members, that “**no plant would be paid until the 28 plants have renegotiated [their contracts and that] these were the conditions for financing” payments**) (emphasis added); AHPEE, Minutes of the Solar Generators Attending Meeting with the Government dated May 2022 (**Exh. C-57**), at 2; *see also* Radio Interview with Minister Tejada acknowledging that promise of payments is key to unlocking renegotiations, RADIO CADENAS VOCES dated 28 Nov. 2022 (**Exh. C-232**), at 4:29-4:58; AHPEE, Summary of Meeting with COHEP, AHPEE, AHER and ENEE dated 29 Nov. 2022 (**Exh. C-191**), at 2-3; Radio Interview with Minister Tejada regarding the Government's priority for payments, RADIOHN dated 17 Oct. 2022 (**Exh. C-231**), at 1:03-1:24; Corporación Multi Inversiones (CMI), Press Release Regarding MOU with Government dated 2022 (**Exh. C-215**); *ENEE's delays in payments to energy generators provokes a notice of intent under CAFTA*, DINERO HN dated 1 Nov. 2022 (**Exh. C-170**).

⁷⁵³ ENEE Press Release on Curtailments to Renewables dated 8 July 2022 (**Exh. C-222**), at 1 (stating that the State curtails renewables generators' electricity to protect the hydroelectric dams owned by ENEE).

⁷⁵⁴ Memorial on the Merits ¶¶ 43, 54, 57; PPA (**Exh. C-1**), § 2, Cls. 2.4 and 6.1 (contemplating Honduras's obligation to dispatch Pacific Solar's energy), 9.5.1 (providing for ENEE's obligation to compensate Pacific Solar if it curtails its energy production for reasons not attributable to the generator); Operations Agreement (**Exh. C-3**), §§ 1.4.4. (establishing the compulsory dispatch of Pacific Solar's energy and Honduras's obligation to compensate Pacific Solar for curtailments); 2007 Renewables Law (**Exh. C-4**), Art. 9 (providing for the State's compulsory dispatch of energy generated through renewable sources).

⁷⁵⁵ Reply on Jurisdiction ¶¶ 452-453.

⁷⁵⁶ Reply on Jurisdiction ¶ 452.

⁷⁵⁷ *See* 2022 New Energy Law (**Exh. C-10**), Art. 5.

⁷⁵⁸ *See* 2022 New Energy Law (**Exh. C-10**), Art. 15. To justify Articles 5 and 15, Minister Tejada expressly mentioned that, for the Government, it was “important to sit at the negotiation table with the generators, with some tools, so that it is not possible to establish a balance[d] renegotiation” and that “[w]e do not want to sit at the renegotiation table . . . with a gun to the head.” *See* Honduran Congress, Debate Regarding 2022 New Energy Law dated 11 May 2022 (**Exh. C-76**), at 4:37:58-4:38:50; *see also* *Manager of ENEE to thermal generators: ‘We are not going to negotiate with a gun to our head’*, LA TRIBUNA dated 28 Apr. 2022 (**Exh. C-199**) (reporting that Minister

consequence of interrupting production would have been an administrative fine.⁷⁵⁹ As the Tribunal is also aware,⁷⁶⁰ the State recently has launched an “anti-corruption investigation” to “determine the existence of the Plant,” count the number of the Plant’s panels and inverters, and inspect the interconnection point.⁷⁶¹ For that purpose and on the basis of a seven-year-old complaint, the Government inspected the Plant on short notice with multiple prosecutors and State agencies.⁷⁶² In these respects, Honduras has brandished its sovereign power to coerce generators, and has taken legislative and executive action that no commercial party could undertake, and that violates Claimants and Pacific Solar’s rights well beyond the breach of the Agreements.

- **Enacting a smear campaign against generators.**⁷⁶³ In this respect, Respondent’s comment that these acts are, if anything, “ancillary” to a contractual breach⁷⁶⁴ is wrong. Unlike the case in *Bureau Veritas v. Paraguay* and *Waste Management v. Mexico II*,⁷⁶⁵ Honduras’s breaches of the Treaty do not stem solely from its breaches of the Agreements, but are a product of its arbitrary and abusive exercise of its sovereign powers to unilaterally modify the terms of the Agreements, including Honduran public authorities reneging on its commitments in no uncertain terms.

263. This is not the type of behavior a mere commercial party can adopt in a contractual relationship, and it violates rights under international law, in addition to breaching the Agreements. The State sought to leverage its sovereign authority to not only elude its contractual commitments

Tejada threatened criminal proceedings against a thermal plant that warned that ENEE that it may have to cease the generation of energy because ENEE’s lack of payment presented problems in their purchase of bunker).

⁷⁵⁹ Memorial on Jurisdiction ¶ 273 (“[A]ny sanctioning process - those that are already regulated . . .”) (citing 2014 Electric Power Industry Law (**Exh. C-8**), Art. 26.B(c) and (j) (classifying the interruption or reduction of the capacity generation as a “very grave violation”)). The 2014 Electric Power Industry Law provides that the consequence of “very grave violations” is a fine between 0.5 and 1 per cent of the annual turnover of the generation company during the last year. See 2014 Electric Power Industry Law (**Exh. C-8**), Art. 26.C.I.

⁷⁶⁰ Procedural Order by the President of the Tribunal dated 30 Apr. 2025; Procedural Order No. 5 dated 28 May 2025.

⁷⁶¹ Letter from ENEE to Pacific Solar regarding the State’s impromptu inspection of the Plant dated 25 Apr. 2025 (**Exh. C-264**), at 2; Letter from the Special Prosecutor to Pacific Solar regarding the State’s impromptu inspection of the Plant on 30 April 2025 dated 28 Apr. 2025 (**Exh. C-265**). See also Paiz WS II ¶ 16.

⁷⁶² Procedural Order No. 5 dated 28 May 2025 ¶¶ 7, 9.

⁷⁶³ See, e.g., Memorial on the Merits ¶¶ 4, 24, 151, 273.

⁷⁶⁴ Reply on Jurisdiction ¶ 460 (citing cases that do not support the existence of a difference in treatment between the “main” and “ancillary” nature of the State’s conduct, and, instead, unremarkably comment that investment tribunals have jurisdiction if the nature of the claims are treaty-based, something which is uncontroversial). See *Compañía de Aguas del Aconquija S.A. y Vivendi Universal v. República Argentina*, Case No. ARB/97/3, Annulment Decision dated 3 July 2002 (**RL-60**) ¶ 101; *Iskandar Sifa & Akram Sifa v. Hellenic Republic*, ICSID Case No. ARB/16/20, Decision on Jurisdiction and Liability dated 24 July 2020 (**RL-178**) ¶ 330; *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award dated 9 July 2009 (**RL-154**) ¶ 64; *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated 4 Apr. 2016 (**CL-92**) ¶ 475.

⁷⁶⁵ Reply on Jurisdiction ¶¶ 473-474 (citing *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdictional Objections dated 29 May 2009 (**CL-307**) ¶¶ 115-117; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated 30 Apr. 2004 (**CL-24**) ¶ 73).

towards Pacific Solar, but to fundamentally change them under the 2022 New Energy Law, indirectly expropriating Pacific Solar and breaching its MST obligations under the CAFTA-DR. The Government's conduct is consistent with an agenda that reflects an animus towards certain generators, including Pacific Solar, calling them "pirates," as well as "enemies of the nation,"⁷⁶⁶ and demonizing their rights under the PPAs.

3. It Is Irrelevant Whether Claimants Can Resort to the Dispute Resolution Clauses in the Agreements, But in Any Case They Cannot

264. Respondent has abandoned its prior argument that the Tribunal lacks jurisdiction because the appropriate *forum* is the one set forth in the dispute resolution clauses contained in the Agreements.⁷⁶⁷ In light of the weight of authority finding otherwise,⁷⁶⁸ Honduras takes a second bite at the apple and recycles the same argument under a different premise. Honduras maintains that the Paizes' claims are contractual and should have been pursued by Pacific Solar before domestic courts, but now presents this as a prong of the test to distinguish between treaty and contract claims. In Honduras's view, because the dispute resolution clauses of the Agreements are available, the Tribunal has no jurisdiction over a dispute that involving Honduras's departure from its commitments under the Agreements.⁷⁶⁹ This is wrong both from a legal and a factual perspective.

⁷⁶⁶ ENEE, *Not all generators are enemies of the nation*, X (FORMERLY TWITTER) dated 27 June 2022 (**Exh. C-219**) ("Not all generators are enemies of the nation, this week we will be announcing some of the generators that are willing to lower the costs of their contracts[.]); ENEE, *It's Impossible to Rescue ENEE Without Renegotiations*, X (FORMERLY TWITTER) dated 28 Apr. 2022 (**Exh. C-200**). See also Honduran Congress, Debate Regarding 2022 New Energy Law dated 11 May 2022 (**Exh. C-76**), at 2:08:15-2:08:53; *The scenario of legal certainty for renewable generators in Honduras worsens*, ENERGÍA ESTRATÉGICA dated 12 May 2022 (**Exh. C-210**).

⁷⁶⁷ Memorial on Jurisdiction ¶¶ 284-292.

⁷⁶⁸ Counter-Memorial on Jurisdiction ¶¶ 276-280 (citing *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction dated 9 Nov. 2004 (**RL-65**) ¶ 96; *Sempra Energy Int'l v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction dated 11 May 2005 (**CL-185**) ¶ 122; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability dated 2 Sept. 2009 (**CL-48**) ¶¶ 158-159; *Lanco Int'l Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction dated 8 Dec. 1998 (**RL-58**) ¶¶ 26-28; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment dated 3 July 2002 (**RL-60**) ¶ 76; *SGS Société Générale de Surveillance v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction dated 12 Feb. 2010 (**CL-65**) ¶ 180; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction dated 29 May 2009 (**CL-307**) ¶ 127; *TSA Spectrum de Argentina S.A. v. The Argentine Republic*, ICSID Case No. ARB/05/5, Award dated 19 Dec. 2008 (**CL-308**) ¶ 58; *Daimler Financial Services AG v. The Argentine Republic*, ICSID Case No. ARB/05/1, Award dated 22 Aug. 2012 (**RL-81**) ¶ 61).

⁷⁶⁹ Reply on Jurisdiction ¶¶ 434-436, 462-470.

265. Turning again to the seminal decision of the *ad hoc* committee in *Vivendi I* (on which Respondent relies),⁷⁷⁰ “whether there has been a breach of the BIT and whether there has been a breach of contract are different questions” and “[e]ach of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract.”⁷⁷¹ Following that basic distinction, the tribunal in *Telefonica v. Argentina*, when deciding on a similar issue, held that the “claim that the host State has breached the BIT in respect of a given investment can be entertained by this [t]ribunal irrespective of the existence of contractual remedies available to TASA or to Telefónica as provided in the Transfer Agreement.”⁷⁷²

266. Furthermore, in the cases invoked by Respondent⁷⁷³—including *Waste Management II v. Mexico*, *Bureau Veritas v. Paraguay* and *SGS v. Philippines*—the tribunals found the availability of local remedies to be relevant **in determining whether there had been an expropriation or violation of the fair and equitable treatment obligation**, but not to determine if the claim was contractual or treaty-based.⁷⁷⁴ By way of example, the tribunal in *Bureau Veritas* held that the **choice of forum clause in the contract providing for jurisdiction to the local courts did not apply**, because “[t]he issue of fair and equitable treatment, and related

⁷⁷⁰ Reply on Jurisdiction ¶ 419. In *Vivendi*, the underlying concession contract provided for the resolution of contractual disputes concerning both the contract’s interpretation and application, to be submitted to the exclusive jurisdiction of the administrative courts of Tucumán. See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment dated 3 July 2002 (**RL-60**) ¶ 11.

⁷⁷¹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment dated 3 July 2002 (**RL-60**) ¶ 96.

⁷⁷² *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction dated 25 May 2006 (**CL-322**) ¶ 85 (“Telefónica’s investments qualify for investment protection under the BIT, so that recourse to its dispute settlement mechanism provided in Art. X is possible as a matter of right. The claim that the host State has breached the BIT in respect of a given investment can be entertained by this Tribunal irrespective of the existence of contractual remedies available to TASA or to Telefónica as provided in the Transfer Agreement. The exclusive choice of forum clause contained in such contract operates therefore in respect of such contractual claim and cannot prevent the discharge by this Tribunal of its obligations in accordance with the BIT.”).

⁷⁷³ See Reply on Jurisdiction ¶ 434.

⁷⁷⁴ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated 30 Apr. 2004 (**CL-24**) ¶¶ 115–116; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdictional Objections dated 29 May 2009 (**CL-307**) ¶¶ 110, 114, 116–117; *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction dated 29 Jan. 2004 (**CL-129**) ¶ 161.

matters, was not one which the parties to the Contract agreed to refer to the exclusive jurisdiction of the [local] courts.”⁷⁷⁵

267. In any event, as Honduras is fully aware, neither the Paizes nor Pacific Solar has any contractually-available forum to bring the claims submitted to this Tribunal. There are at least four reasons for this: (i) each of the Agreements provides for different dispute resolution fora, including a commercial arbitration before the Conciliation and Arbitration Center of the Chamber of Commerce of Tegucigalpa⁷⁷⁶ and first instance courts of Francisco Morazán,⁷⁷⁷ but none of them provides a forum for resolution of international law violations; (ii) ENEE has recently filed a constitutional action challenging the Conciliation and Arbitration Law, which, if successful, ENEE's actions would retroactively wipe out all arbitration provisions included in contracts entered into with ENEE and other State organs, including the PPA,⁷⁷⁸ (iii) the domestic court forum lacks independence and cannot dispense justice on account of its serious delays;⁷⁷⁹ and

⁷⁷⁵ *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction dated 29 May 2009 (**CL-307**) ¶ 127 (stating that the respondent “has argued that the existence of an agreed forum for the resolution of disputes under Article 9 of the Contract means that it is to that forum that the dispute should go. We disagree. . . . The issue of fair and equitable treatment, and related matters, was not one which the parties to the Contract agreed to refer to the exclusive jurisdiction of the courts of Asunción. The treaty issue is therefore not one for that forum, and there can be no question of an independent or self-standing treaty claim over which we have jurisdiction being inadmissible by reason of the choice of forum for the resolution of a disputes [sic] under the Contract.”).

⁷⁷⁶ PPA (**Exh. C-1**) § 2, Art. 15.4.

⁷⁷⁷ Memorial on Jurisdiction, ¶ 287; State Guarantee (**Exh. C-2**), Cl. 1.2. The Operations Agreement provides, in its Clause 10, for a pathological dispute resolution clause, which simultaneously provides for “binding and final arbitration” or “the remedies set out in the Laws. See Memorial on Jurisdiction ¶ 286; Operations Agreement (**Exh. C-3**), § 10.

⁷⁷⁸ See Unconstitutionality Complaint Filed by ENEE on 30 Jan. 2025 (**Exh. C-347**), at 2, 10, 15. See also *Honduran Chambers of Commerce Defend Arbitration Law Following Unconstitutionality Challenge Promoted by the State Energy Company*, CENTRO AMÉRICA 360 dated 30 May 2025 (**Exh. C-351**). Prior to challenging the constitutionality of arbitration, ENEE opposed any unfavorable decision rendered by independent arbitrators, including by opposing the enforcement of awards. See Attorney General's Office, Press Release dated 11 Dec. 2024 (**Exh. C-352**).

⁷⁷⁹ Counter-Memorial on Jurisdiction § II.A.2; see also Luciana Torchiano, *CPI 2023 for the Americas: Lack of Independent Judiciary Hinders the Fight Against Corruption*, TRANSPARENCY INT'L dated 30 Jan. 2024 (**Exh. C-254**), at 3 (identifying Honduras as an example of “[s]ignificant setback [of] [c]o-optation of power” and lack of judicial independence, noting that it has experienced “a significant weakening of checks and balances.”); *id.*, at 14 (remarking that “the removal of judges and prosecutors without merit by other branches of the state . . . fosters injustice and a system where the law is applied according to the interests of the ruling government and elite.”); *National Plan to Eradicate Judicial Delay*, PODER JUDICIAL dated 11 Mar. 2024 (**Exh. C-289**), at 4; Center for the Study of Democracy, *Perception of Legal Professionals on Corruption in the Judicial System of Honduras*, dated Mar. 2025 (**Exh. C-291**), at 45-46; *Final Report of Oversight on the Process of Election and Selection of Justices of the Supreme Court: Lessons Learned and Recommendations for Future Processes of Electing High Public Officials*, CENTRE FOR THE STUDY OF DEMOCRACY, LAWYERS WITHOUT BORDERS CANADA AND THE DUE PROCESS OF LAW FOUNDATION dated Apr. 2023 (**Exh. C-292**), at 17.

(iv) Claimants as well as Pacific Solar had to waive their rights to commence (or continue) any domestic or administrative proceedings in order to commence this arbitration.⁷⁸⁰

C. CLAIMANTS OWN AND CONTROL THEIR INVESTMENTS, AND RESPONDENT MISSTATES THE LEGAL STANDARD AND FACTS IN ITS *RATIONE MATERIAE* OBJECTION

268. In accordance with the terms of the Treaty, Claimants have established jurisdiction *ratione materiae* in this case because they have presented evidence confirming that they own or control Pacific Solar (their investment in Honduras).⁷⁸¹ Since they acquired their investment, Claimants have been and continue to be the owners, controllers, and ultimate beneficiaries of this substantial investment via several corporate entities.

269. Despite the foregoing and without any legal support, Respondent has continued its fishing expedition and wants more (just as it did in the prior round of briefing),⁷⁸² as it seeks to improperly raise the evidentiary standard that Claimants must meet to “beyond any doubt.”⁷⁸³ In particular, applying this artificially inflated and legally unsupported standard, Respondent erroneously contends that: (i) Claimants have not demonstrated that they are the owners of Pacific Solar;⁷⁸⁴ (ii) all of Claimants’ shares and rights in Pacific Solar were transferred to [REDACTED];⁷⁸⁵ (iii) Claimants are not the beneficiaries of the investment;⁷⁸⁶ and (iv) Claimants do not control Pacific Solar.⁷⁸⁷

⁷⁸⁰ CAFTA-DR (CL-1), Art. 10.18.2(b); Mr. Fernando Paiz’s Waiver Pursuant to Article 10.18.2 of the Treaty dated 22 Aug. 2023 (Exh. C-37); Ms. Anabella Schloesser de Paiz’s Waiver Pursuant to Article 10.18 of the Treaty dated 22 Aug. 2023 (Exh. C-38); Pacific Solar Energy S.A. de C.V.’s Waiver Pursuant to Article 10.18 of the Treaty dated 22 Aug. 2023 (Exh. C-39). See also Memorial on the Merits ¶ 180.

⁷⁸¹ See Counter-Memorial on Jurisdiction § II.D; Request for Arbitration § VI.B; Ownership Structure Chart for Pacific Solar Energy, S.A. de C.V. dated 13 July 2023 (Exh. C-27); Pacific Solar’s Corporate Documents (Exh. C-256); [REDACTED] Corporate Documents (Exh. C-257); [REDACTED] Corporate Documents (Exh. C-258); [REDACTED] Corporate Documents (Exh. C-259); [REDACTED] Corporate Documents (Exh. C-260); [REDACTED] Corporate Documents (Exh. C-261); [REDACTED] Corporate Documents (Exh. C-262); [REDACTED]; Share Trust Agreement (Exh. C-266); Assets Trust Agreement (Exh. C-267); Common Terms Agreement (Exh. C-268); Paiz WS II ¶¶ 4-8.

⁷⁸² See Memorial on Jurisdiction ¶¶ 138-148; Reply on Jurisdiction ¶¶ 121-136.

⁷⁸³ Reply on Jurisdiction ¶ 118.

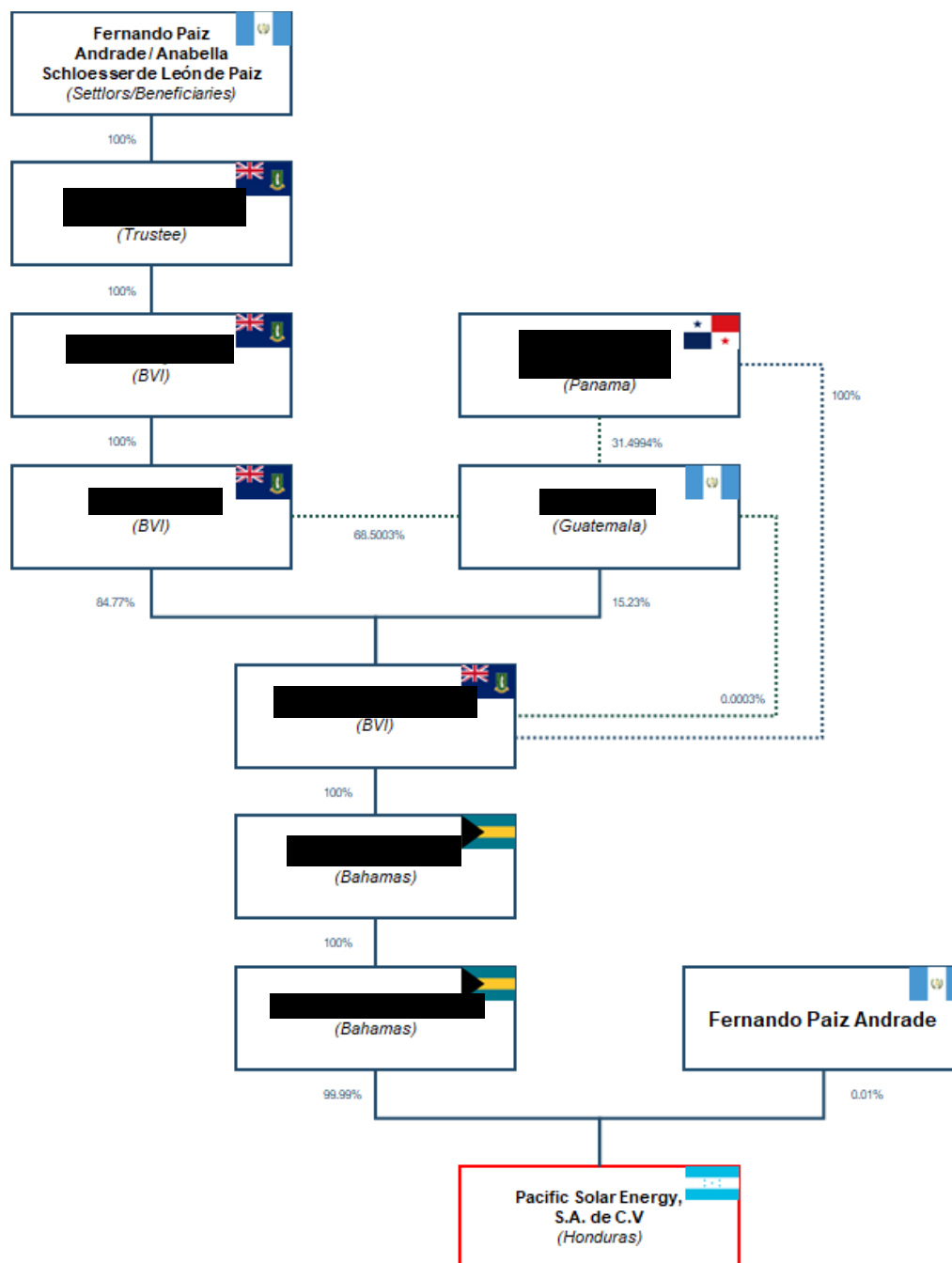
⁷⁸⁴ Reply on Jurisdiction ¶¶ 117-138.

⁷⁸⁵ Reply on Jurisdiction ¶¶ 139-157.

⁷⁸⁶ Reply on Jurisdiction ¶¶ 161-170.

⁷⁸⁷ Reply on Jurisdiction ¶¶ 171-182.

270. Respondent's arguments are inconsistent with the documentary record and cannot change the following basic facts that Claimants indirectly own 99.99% of Pacific Solar's shares while Mr. Paiz directly owns the other 0.01%. The following chart summarizes the corporate structure through which Claimants indirectly own and control Pacific Solar, which is supported by extensive corporate documentation.⁷⁸⁸



⁷⁸⁸ See *infra* § IV.C.2(a).

271. Moreover, and as explained further below, the evidentiary record clearly corroborates that:

- Claimants maintain ultimate ownership of their shares and rights in Pacific Solar. Claimants, through their 100% owned and controlled subsidiaries, placed their interests in the shares and assets of Pacific Solar into trusts as collateral to secure financing for the project.⁷⁸⁹ The trustee's role, however, is strictly limited to holding the shares and assets as a custodian to use them as collateral only if the Lenders notify an event of default on the loan (which has not occurred), absent which [REDACTED] cannot exercise any ownership rights with respect to the shares and assets, which remain with Claimants;
- Claimants are the ultimate beneficial owners of Pacific Solar's shares and assets, as confirmed both by the trust documents themselves and by financing documents, including the guarantee provided by Mr. Paiz (through his 100% indirect interest in another company) to the Lenders to secure Pacific Solar's debt; and
- Claimants control their investment by making all important decisions related to Pacific Solar, including day-to-day operations. In addition, [REDACTED] (indirectly 100% owned by Claimants) retains the right to participate, deliberate and vote in shareholders' meetings and exercises the political and economic rights derived from the ownership of the shares. Moreover, since the purchase of Pacific Solar in December 2014, Mr. Paiz has continuously held the position of president of the board of directors of Pacific Solar.

272. In addition to its factual misrepresentations, Respondent continues to misrepresent the applicable legal standards by inverting the burden of proof and seeking to hold Claimants to an unsupported (and ever increasing) legal standard. Respondent's attempts to deny the Tribunal's jurisdiction in this proceeding must be rejected.

1. Respondent Misrepresents the Applicable Legal Standard

273. Respondent erroneously seeks to invert the burden of proof. It is well-established that the standard for establishing the existence of an investment for jurisdictional purposes is the balance of probabilities.⁷⁹⁰ To establish beneficial ownership, a *prima facie* showing of beneficial

⁷⁸⁹ The trusts, which Claimants explained in detail in prior briefing and will summarize further herein, are collectively referred to as "[REDACTED] Trusts" with [REDACTED] acting as trustee.

⁷⁹⁰ See, e.g., *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Award on Jurisdiction dated 21 Nov. 2022 (CL-314) ¶ 146 ("In the light of the applicable rules of the proceeding, the Tribunal agrees that the applicable standard of proof to the essential requirements of jurisdiction is the balance of probabilities."); *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award dated 5 May 2015 (CL-184) ¶ 255 ("There is no reason, or justification, to adopt presumptions

interest is sufficient.⁷⁹¹ Under the ICSID Rules, the Tribunal retains broad discretion to assess the admissibility and probative value of the evidence presented.⁷⁹² It is undisputed that each party has the burden of proving the facts relied on to support its claim or defense.⁷⁹³ Claimants have satisfied this burden, and it is Respondent that now has the burden to prove its jurisdictional objections.⁷⁹⁴

274. Respondent also attempts to hold Claimants to a heightened standard of proof that has no legal basis. Respondent argues that Claimants “continue to attempt to evade their evidentiary burden **beyond any doubt** that they are owners of the alleged investment”⁷⁹⁵ and insists that the documents that Claimants submitted into the record are somehow insufficient to prove their ownership of their investment. This is baseless, as Claimants are required to prove ownership of the investment for jurisdictional purposes on a balance of probabilities—not on a “beyond any doubt” standard that Respondent wrongly insists upon.⁷⁹⁶ In any event, Claimants have submitted ample evidence to satisfy the jurisdictional requirements of the Treaty and the ICSID Convention in this proceeding, as detailed further herein.

against (or in favor of) a State’s submission to ICSID jurisdiction: the issue is rather to be approached objectively and neutrally, aiming to ascertain the true intentions of the relevant party (or parties) in a particular instrument. Where relevant, the standard of proof is generally held to be a preponderance of the evidence or a balance of probabilities.”); *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award dated 16 Apr. 2014 (**CL-315**) ¶171 (explaining that the “Tribunal must decide this question [of whether claimant owns an investment] finally at the jurisdictional stage on the balance of probabilities.”).

⁷⁹¹ *Theodoros Adamakopoulos, Ilektra Adamantidou, Vasileios Adamopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction dated 7 Feb. 2020 (**CL-190**) ¶ 285 (explaining that “[b]eneficial ownership is a form of legal interest widely recognized by the principal legal systems of the world and by international law” and that “[f]or the purpose of establishing the Tribunal’s jurisdiction, it is sufficient for the relevant Claimant or Claimants to assert and provide *prima facie* evidence of such a beneficial interest.”). See also *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Final Award dated 25 Oct. 2022 (**RL-183**) ¶¶ 379-380 (holding that the burden to establish a change in ownership falls on the party alleging it).

⁷⁹² See ICSID Arbitration Rules (**RL-48**), Rule 36(1) (“The Tribunal shall determine the admissibility and probative value of the evidence adduced.”).

⁷⁹³ ICSID Arbitration Rules (**RL-48**), Rule 36(2).

⁷⁹⁴ See, e.g., *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No. ARB/11/12, Award dated 10 Dec. 2014 (**CL-316**) ¶ 299 (“Regarding burden of proof, in accordance with the well-established rule of *onus probandi incumbit actori*, the burden of proof rests upon the party that is asserting affirmatively a claim or defense. Thus, with respect to its objections to jurisdiction, Respondent bears the burden of proving the validity of such objections. The Tribunal accepts that if Respondent adduces evidence sufficient to present a *prima facie* case, Claimant must produce rebuttal evidence, although Respondent retains the ultimate burden to prove its jurisdictional objections.”).

⁷⁹⁵ Reply on Jurisdiction ¶ 118 (emphasis added).

⁷⁹⁶ See *supra* § II.

275. In addition, Respondent errantly refers to Honduran Law as the basis for the applicable standard for the reliability of evidence.⁷⁹⁷ However, the Tribunal is not constrained by this domestic law standard. In contrast, it is well-established that the applicable standard is set by international law (rather than any domestic law).⁷⁹⁸ Under international law, the Tribunal has full discretion to determine the admissibility and the probative value of the evidence presented, including witness statements.⁷⁹⁹

⁷⁹⁷ Reply on Jurisdiction ¶ 141.

⁷⁹⁸ *Latin American Regional Aviation Holding S. de R.L. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/19/16, Award dated 13 Feb. 2024 (CL-317) ¶¶ 709 (“It does not follow . . . from the fact that Panamanian law is applicable to the substantive conditions of share ownership in a Panamanian company that the rules of this law are also applicable, in an international arbitration, to the question of whether the requirements set by Panamanian law in this regard have been met.”), 710 (“In the present case, the issue in dispute is whether the Claimant can prove that it held shares representing 100% of SARAH’s capital as of the critical date of 15 June 2012. **This issue is a matter of fact which, within the framework of an investment arbitration under the ICSID Rules, does not need to be subject to the evidentiary rules set forth by Panamanian national law.**”) (emphasis added). See *id.* ¶¶ 714-715 (“[A]s correctly stated by the tribunal in the *Soufraki* case, the value of the evidence applied in the context of an arbitration is Rule 34(1) of the ICSID Rules, which states that ‘[t]he Tribunal shall decide on the admissibility of any evidence presented and its probative value.’ Based on Rule 34 of the ICSID Rules, the Tribunal may assess at its discretion the value of evidence. This, of course, does not mean that Respondent is relieved of the burden of proving its ownership of the shares as of the critical date, but rather that **the Tribunal can freely evaluate the evidence presented on this point without being bound by evidentiary rules applied in Panama.**”) (emphasis added); see also *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award dated 7 July 2004 (CL-318) ¶¶ 59-60 (“The Tribunal agrees with Claimant that, as an international Tribunal, it is not bound by rules of evidence in Italian civil procedure. The ‘substantial’ evidence rule, while it may well be required in an Italian court, has no application in the present proceedings.”). In any event, Respondent does not explain how the documents that Claimants submitted do not meet the evidentiary standard under Honduran Law.

⁷⁹⁹ ICSID Arbitration Rules (RL-48), Rule 36(1) (“The Tribunal shall determine the admissibility and probative value of the evidence adduced.”); see *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award dated 7 July 2004 (CL-318) ¶¶ 61-62 (“What weight is given to oral or documentary evidence in an ICSID arbitration is dictated solely by Rule 34(1) of the ICSID Arbitration Rules: The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value. In the present instance, it is thus for this Tribunal to consider and analyse the totality of the evidence and determine whether it leads to the conclusion that Claimant has discharged his burden of proof.”) Respondent also objects to Mr. Paiz’s witness statement corroborating the ownership structure arguing that a witness statement cannot be used as evidence of title, because it is written “by one of Claimants, i.e. a person interested in the outcome of the proceedings.” Reply on Jurisdiction ¶ 135. This argument is meritless. By that logic, no claimant could ever provide testimonial evidence in support of its case; an approach that contradicts established arbitral practice. Tribunals routinely accept witness statements from claimants as valid evidence, provided they attest to personal knowledge of the relevant facts. The one case Respondent relies on confirms as much. See *Case Concerning Territorial and Maritime Disputes Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, ICJ REPORTS 2007, Judgment dated 8 Oct. 2007 (RL-145) ¶ 244 (recognizing the probative value of witness statements if made to “attest to personal knowledge of facts by a particular individual.”). Tribunals have also considered that witness statements are admissible and sufficient evidence to prove ownership of an investment. See, e.g., *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction dated 26 Apr. 2005 (CL-182) ¶¶ 82-84 (holding that the claimant’s production of sworn witness statements referring to corporate charts was sufficient for the tribunal to establish ownership, among other things, because the “production of expert and witnesses reports is common practice in international arbitration” and that “[t]his is in conformity with Arbitration Rule 34, which states that the Tribunal shall be the judge of the ‘admissibility of any evidence adduced and of its probative value.’”).

276. Moreover, pursuant to Article 10.28 of the CAFTA-DR, an “investment” is “every asset that an investor **owns or controls, directly or indirectly.**”⁸⁰⁰ To that end, Claimants must only establish that they either own or control directly or indirectly the investment for the purpose of establishing the Tribunal’s jurisdiction. Here, Claimants own **and** control Pacific Solar. Accordingly, the Tribunal has jurisdiction *rationae materiae* over Claimants’ claims because Claimants satisfy jurisdiction under two independent grounds.

(a) Respondent Misrepresents the Legal Standard for Ownership

277. Claimants have established that international law recognizes the division between “nominal” or “record” ownership and “beneficial” ownership.⁸⁰¹ Where trusts are part of the ownership structure—necessarily dividing ownership between “nominal” and beneficial interests—investment tribunals routinely find jurisdiction with respect to claims brought by the beneficial owner of the property.⁸⁰² Prominent international law scholars confirm the same.⁸⁰³

⁸⁰⁰ CAFTA-DR (CL-1), Art. 10.28 (definition of “investment”) (emphasis added).

⁸⁰¹ Counter-Memorial on Jurisdiction ¶¶ 167-169.

⁸⁰² See *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award dated 14 July 2010 (CL-272) ¶ 134 (explaining that “[t]he separation of legal title and beneficial ownership rights does not deprive such ownership of the characteristics of an investment within the meaning of the ICSID Convention or the Netherlands-Turkey BIT.”); *Occidental Petroleum Corp. and Occidental Exploration and Prod. Co. v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award dated 2 Nov. 2015 (CL-273) ¶ 262 (rejecting that a “nominee” may be the owner of an investment under international law and confirming that “[t]he position as regards beneficial ownership is a reflection of a more general principle of international investment law” since “the claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties not protected by the relevant treaty.”). See also *Occidental Petroleum Corp. and Occidental Exploration and Prod. Co. v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Dissenting Opinion of Professor Brigitte Stern (Award) dated 5 Oct. 2012 (CL-274) ¶ 148 (explaining that “[a]s far as the position of international law towards beneficial owners, in cases where the legal title and the beneficial ownership are split, is concerned, it is quite **uncontroversial . . . that international law grants relief to the owner of the economic interest.**”) (emphasis added); *id.* ¶ 149 (“[t]he fact that international law favors the beneficial owner has been recognized by the doctrine; the case-law of the Iran-US Claims Tribunal which has always considered the beneficial owner of the legal interest rather than the legal owner when there was a split of title, as well as ICSID tribunals’ decisions.”).

⁸⁰³ See, e.g., David J. Bederman, *Beneficial Ownership of International Claims*, in 38 INT’L & COMP. L.Q. 935 (1989) (CL-275), at 936 (“International law authorities have agreed that the real and equitable owner of an international claim is the proper party before an international adjudication, and not the nominal or record owner. . . . The notion that the beneficial (and not the nominal) owner of property is the real party-in-interest before an international court may be justly considered a general principle of international law.”); SIR ROBERT JENNINGS ET AL. (EDS.), *OPPENHEIM’S INTERNATIONAL LAW* (9th ed. 2008) (CL-276), at 514 (“Where a claim is made in respect of property which is beneficially owned by one person, although the nominal title is vested in another, and they are of different nationalities, it will usually be the nationality of the holder of the beneficial interest which will be the determining factor for purposes of an international claim.”); JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (8th ed. 2012) (CL-277), at 704-705 (“It is clear that the national character of a claim must be tested by the nationality of the individual holding a beneficial interest therein rather than by the nationality of the nominal or record holder of the claim. Precedents for the foregoing well-settled proposition are so numerous that it is

278. Respondent does not contest that investment tribunals have jurisdiction over claims brought by a trust's beneficial (as opposed to nominal) owner, provided the BIT's nationality requirements are met.⁸⁰⁴ In fact, relying on the very same passage from Professor Stern's dissent in *Occidental v. Ecuador* quoted by Claimants in their Counter-Memorial on Jurisdiction, Respondent agrees that "international law favours the beneficiary."⁸⁰⁵

279. However, Respondent seeks to create out of thin air an additional requirement to qualify as a beneficial owner—that Claimants are the direct recipients of the income and economic benefits of the investment.⁸⁰⁶ There is no such requirement under the Treaty or under international law. In fact, it is well established that "ownership" includes ultimate beneficial owners, regardless of whether they are the immediate direct recipients of the income and economic benefits of the investment.

280. Indeed, tribunals have held that beneficial ownership rests with the party who ultimately bears the gains or losses of the trust assets. In *Blue Bank v. Venezuela*, for instance, the tribunal rejected the claimant bank trustee's claims for expropriation of trust assets, which as here, comprised shares in two companies in the host State. And while the local law applicable to the trust provided that title to the trust assets was to be held "in the name of the trustee," the tribunal found that the claimant trustee could not "be considered an owner in any relevant sense of the word," and that ownership rests with the trust's beneficiary, who "enjoy[s] **ultimate control over the trust assets and will ultimately enjoy or suffer**, as the case may be, the fortunes of the trust assets."⁸⁰⁷

not deemed necessary to document it with a long list of authorities.") (citing a decision of the U.S. Foreign Claims Settlement Commission in American Security and Trust Company).

⁸⁰⁴ Reply on Jurisdiction ¶¶ 163-164 (citing M. WHITEMAN (DIR.), DIGEST OF INTERNATIONAL LAW, VOL. 8 (1967) (RL-121), at 1261-1262); David J. Bederman, *Beneficial Ownership of International Claims*, in 38 INT'L & COMP. L.Q. 935 (1989) (CL-275), at 936).

⁸⁰⁵ Reply on Jurisdiction ¶ 163; see also Counter-Memorial on Jurisdiction ¶ 168 (citing *Occidental Petroleum Corp. and Occidental Exploration and Prod. Co. v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Dissenting Opinion of Professor Brigitte Stern (Award) dated 5 Oct. 2012 (CL-274) ¶ 149).

⁸⁰⁶ Reply on Jurisdiction ¶¶ 166-169.

⁸⁰⁷ *Blue Bank International & Trust Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award dated 26 Apr. 2017 (CL-279) ¶¶ 168-170 (emphasis added). The issue before the tribunal was whether, in light of the ownership and control arrangements relating to the Venezuelan companies, the claimant could be considered an investor under the BIT. The trust deed stipulated that any benefits arising from the trust assets would be distributed to a designated beneficiary, who was not a party to the arbitration. That beneficiary also retained the authority to instruct the trustee on how to manage the trust. And while the local law (of Barbados) provided that the title to the trust assets to be held "in the name of the trustee" the tribunal found that the claimant trustee could not "be considered an owner in any relevant sense of the word" and that the person coming "closest to satisfying the

281. This conclusion is hardly surprising because, as the tribunal in *Duke Energy v. Ecuador* confirmed, “payment trusts and collateral trusts are often used in project finance transactions,” as these trusts enable a single lender to oversee all security interests, thereby reducing administration and transaction costs, and “facilitating the enforcement of the security interests.”⁸⁰⁸ It would make little sense to preclude an investor who has assumed risk to invest in a foreign State from treaty protection simply because it used the investment’s assets as collateral to secure project financing.

(b) Respondent Misrepresents the Legal Standard for Control

282. Investment treaty tribunals have consistently held that to determine jurisdiction *ratione materiae*, *de facto* control over an investment is sufficient even in the absence of formal ownership.⁸⁰⁹ Indeed, in *Plama v. Bulgaria*, the tribunal defined control as “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.”⁸¹⁰

283. In the context of a trust, Claimants have established that the ultimate investor and beneficial owner can maintain control even where nominal ownership is transferred to a third party. For example, the tribunal in *Castillo Bozo v. Panama* held that since the claimant—a settlor and beneficiary of a trust—retained political and economic rights as a shareholder of the company, the “ownership” that transferred to the trustee was merely nominal and did not affect the claimant’s

requirements of ownership” was the trust’s beneficiary who “enjoy[s] ultimate control over the trust assets and will ultimately enjoy or suffer, as the case may be, the fortunes of the trust assets.”).

⁸⁰⁸ *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award dated 18 Aug. 2008 (CL-42) ¶ 40.

⁸⁰⁹ Counter-Memorial on Jurisdiction ¶ 169 (citing *Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan Ltd v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/12/31, Award dated 22 Sept. 2015 (CL-278) ¶ 137 (holding that an investor is one that controls the investment through the exercise of management and voting rights and thus rejecting a claim made by a trustee); *Blue Bank Int’l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award dated 26 Apr. 2017 (CL-279) ¶¶ 196-197 (holding that, according to the language of the trust, the trustee claimant could not be deemed to own or control the investment because it could not take relevant decisions on the administration of the company in trust); *Rand Investments Ltd. and Others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award dated 29 June 2023 (CL-280) ¶ 332 (“As Mr. Rand controls Sembi’s contractual interest in the Beneficially Owned Shares, his investment is a covered investment, which is protected by the Treaty.”); see also *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability dated 12 Sept. 2014 (CL-67) ¶ 526 (“In the exceptional circumstances of this case, where except for legal title under Bahamian law, French nationals manifested every indicia of control over the shares of PIL . . . the Tribunal is of the view that it cannot take a formalistic approach to the question of control.”)).

⁸¹⁰ *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction dated 8 Feb. 2005 (RL-67) ¶ 170.

ownership or control of the investment under the applicable treaty.⁸¹¹ The tribunal also considered that the claimant in that case “controlled” the investment because it could instruct the trustee on how to exercise the political rights of the company on his behalf.⁸¹²

284. In its Reply, Respondent relies on *Aguas del Tunari v. Bolivia*, *BRIF Tres v. Serbia* and *Leshkasheli v. Azerbaijan* to erroneously suggest that “control” is exclusively “reflected by the majority shareholding and the capacity to make decisions in the company.”⁸¹³ As Claimants have established, this argument is not only irrelevant (because Claimants are the ultimate owners of Pacific Solar), it is also yet another misrepresentation of the applicable legal standard, which clearly recognizes *de facto* control in addition to *de jure* control.⁸¹⁴ Indeed, none of the cited decisions supports the proposition that control is assessed solely by a shareholder’s holding of majority shares:

- In *Aguas del Tunari v. Bolivia*, the tribunal explained that because the relevant BIT did not require actual day-to-day or ultimate control as part of the “controlled directly or indirectly” requirement, the tribunal was “not charged with determining all forms in which control may take,”⁸¹⁵ and that, as such, “in the circumstances of this case, where an entity has both majority shareholdings and ownership of a majority of the voting rights” control existed.⁸¹⁶ In other words, majority shareholding, while sufficient to establish control, was not a necessary condition.
- In *BRIF TRES v. Serbia*, the tribunal, in the same paragraph cited by Respondent, explained that “control” can be established in one of two ways: either through legal

⁸¹¹ Counter-Memorial on Jurisdiction ¶ 170 (citing *Leopoldo Castillo Bozo v. Republic of Panama*, PCA Case No. 2019-40, Final Award dated 8 Nov. 2022 (CL-281) ¶ 174).

⁸¹² Counter-Memorial on Jurisdiction ¶ 170 (citing *Leopoldo Castillo Bozo v. Republic of Panama*, PCA Case No. 2019-40, Final Award dated 8 Nov. 2022 (CL-281) ¶ 189).

⁸¹³ Reply on Jurisdiction ¶¶ 172-175 (citing *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction dated 21 Oct. 2005 (RL-137) ¶ 264; *BRIF TRES d.o.o. Beograd and BRIF-TC d.o.o. Beograd v. Republic of Serbia*, ICSID Case No. ARB/20/12, Award dated 30 Jan. 2023 (RL-189) ¶ 174; *Zaur Leshkasheli and Rosserlane Consultants Ltd. c. Republic of Azerbaijan*, ICSID Case No. ARB/20/20, Award dated 21 Mar. 2025 (RL-195) ¶ 405).

⁸¹⁴ *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction dated 8 Feb. 2005 (RL-067) ¶ 170 (“[C]ontrol 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.”); *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Arbitral Award dated 26 Jan. 2006 (CL-38) ¶ 106 (holding that a “showing of effective or ‘de facto’ control is, in the Tribunal’s view, sufficient” in light of the NAFTA’s provision that “[a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit [a claim] to arbitration.”).

⁸¹⁵ *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction dated 21 Oct. 2005 (RL-137) ¶ 264.

⁸¹⁶ *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction dated 21 Oct. 2005 (RL-137) ¶ 264.

control, which is based on the percentage of share ownership (whether direct or indirect) and includes an analysis of voting rights and shareholders' agreements, or "**or through actual control**, which requires establishing the capacity to control and direct a company's day-to-day management and activities."⁸¹⁷

- In *Leshkasheli v. Azerbaijan*, the tribunal explained that "the distinction between *de jure* and *de facto* control is well established in investment arbitration."⁸¹⁸ And while the tribunal acknowledged that "*de jure* control derives from majority ownership or other arrangements providing a minority shareholder the legal capacity to control a company," it held that there is "*de facto* control" where "**the decision-making power over the company does not lie with the entity or person having *de jure* control.**"⁸¹⁹

285. Respondent's reliance on *B-Mex LLC v. Mexico* (along with the excerpt in *Gramercy Funds v. Peru* endorsing the *B-Mex* tribunal's findings) to argue that "mere managerial control over the investment is insufficient to obtain treaty protection" is similarly misplaced.⁸²⁰ In *B-Mex*, claimants held no equity interest—neither majority nor minority—in one of the investments and sought to claim protection solely as "managers."⁸²¹ In *Gramercy Funds v. Peru*, one of two claimants sought standing separately as a "Sole Manager" of the other claimant company that owned the investment.⁸²² In this context, the tribunals made clear that managerial control "without ownership is not sufficient to grant protection under the treaty."⁸²³ The reason is straightforward: absent any interest in the investment, the tribunals found that the investors cannot

⁸¹⁷ *BRIF TRES d.o.o. Beograd and BRIF-TC d.o.o. Beograd v. Republic of Serbia*, ICSID Case No. ARB/20/12, Award dated 30 Jan. 2023 (**RL-189**) ¶ 174 (emphasis added).

⁸¹⁸ *Zaur Leshkasheli and Rosserlane Consultants Ltd. c. Republic of Azerbaijan*, ICSID Case No. ARB/20/20, Award dated 21 Mar. 2025 (**RL-195**) ¶ 405.

⁸¹⁹ *Zaur Leshkasheli and Rosserlane Consultants Ltd. c. Republic of Azerbaijan*, ICSID Case No. ARB/20/20, Award dated 21 Mar. 2025 (**RL-195**) ¶ 407 (emphasis added).

⁸²⁰ Reply on Jurisdiction ¶ 176 (citing *Gramercy Funds Management LLC, & Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award dated 6 Dec. 2022 (**CL-290**) ¶¶ 646-647; *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award dated 19 July 2019 (**CL-189**) ¶ 246).

⁸²¹ *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award dated 19 July 2019 (**CL-189**) ¶ 246.

⁸²² *Gramercy Funds Management LLC, & Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award dated 6 Dec. 2022 (**CL-290**) ¶ 610 ("GFM [one of two claimants] also claims that it has standing in this arbitration as Sole Manager of GPH."). GFM sought standing on two separate grounds (i) as minority shareholder of the investment and (ii) as the "Sole Manager" in the company managing the investment. While the tribunal found that claimant would have standing under the former, it found that claimant would not have standing in its capacity as "Sole Manager" because "Claimants have failed to prove that GFM, by assuming the role of Sole Manager of GPH, made any investment in the territory of Peru. There is no evidence (and not even an allegation) that GFM made any contribution . . . to become Sole Manager of GPH."). See *id.* ¶ 615.

⁸²³ *Gramercy Funds Management LLC, & Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award dated 6 Dec. 2022, (**CL-290**) ¶¶ 646-647; *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award dated 19 July 2019 (**CL-189**) ¶ 246.

show that they have made an “investment.”⁸²⁴ As the tribunal in *B-Mex* warned, granting managers investor status “would allow” a non-treaty-protected company to appoint a protected national “as its sole director and for that director then to pursue claims under the Treaty on behalf of” the non-protected company “claiming that she need not be an ‘investor’ herself to pursue such Treaty claim if she exercises *de facto* control.”⁸²⁵ None of this reasoning is applicable here, where the Claimants are the actual beneficial owners of their investment and control their investment.⁸²⁶

286. As explained in the below sections, applying the correct standards under international law, the evidence on the record demonstrates both that Claimants own **and** control the investment, each of which suffices to establish jurisdiction.

2. Claimants Own or Control the Investment

287. With robust evidentiary support, Claimants have established that they own or control their investment in Pacific Solar.⁸²⁷ Respondent continues to contest this point, however, based on a red herring—Claimants’ utilization of a trust structure to secure financing for the Project.

288. In its Reply, Respondent argues that as a matter of Honduran law, [REDACTED] is the owner of Pacific Solar’s shares.⁸²⁸ According to Respondent, because the Treaty

⁸²⁴ *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award dated 19 July 2019 (CL-189) ¶ 246; *Gramercy Funds Management LLC, & Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award dated 6 Dec. 2022 (CL-290) ¶ 659 (explaining that claimant “made a qualifying investment when it indirectly (through its participation in two Cayman Island corporations and in GPH) acquired a [redacted] % participation in the [investment]” and was “thus a protected investor” on that ground but that it however “failed to prove that it made a further protected investment, when in 2011 it accepted the assignment of the role as Sole Manager of GPH.” The tribunal observed that “GFM does not ‘control’ GPH by reason of being GPH’s Sole Manager, with the consequence that GFM does not have standing to claim in this arbitration as GPH’s Sole Manager.”).

⁸²⁵ *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award dated 19 July 2019 (CL-189) ¶ 246.

⁸²⁶ Respondent moreover takes issue with Claimants’ reliance on *Plama v. Bulgaria* on grounds that at the award stage, “the tribunal ultimately determined that the claimant did own the investment, rendering the discussion of control superfluous.” Reply on Jurisdiction ¶ 181 (citing *Plama Consortium Ltd. c. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award dated 27 Aug. 2008 (RL-148) ¶ 92). This cannot be serious. That the tribunal ultimately decided that the claimant owned the investment is irrelevant. The fact remains that, at the jurisdiction stage, the tribunal defined “control” as the **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. *Plama Consortium Ltd. c. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction dated 8 Feb. 2005 (RL-67) ¶ 170.

⁸²⁷ Memorial on the Merits ¶ 167; Counter-Memorial on Jurisdiction ¶¶ 157-165, 172-188.

⁸²⁸ Reply on Jurisdiction ¶¶ 144-157.

does not define “ownership,” the Tribunal should resort to Honduran municipal law to define it.⁸²⁹ This is wrong. As Respondent’s authority observes, while the CAFTA-DR does not define “ownership,” it refers to it repeatedly, and Article 1.2 of the CAFTA-DR makes clear that the Treaty Parties must “interpret and apply the provisions of this Agreement in the light of its objectives . . . and in accordance with applicable **rules of international law**.”⁸³⁰ This provision makes no reference to the domestic law of the State Parties.⁸³¹

⁸²⁹ Reply on Jurisdiction ¶¶ 141-142. Respondent’s reliance on *Perenco v. Ecuador*, *Mason v. Korea* and an excerpt from Zachary Douglas’ treatise is inapposite. In *Perenco v. Ecuador*, while tribunal observed that in the “absence of detailed general or conventional rules of international law governing the organization, operation, management and control of an enterprise a tribunal should in principle be guided by the more detailed prescriptions of the applicable municipal law;” the tribunal observes that “at the same time, international law **does not tend to permit formalities to triumph over fundamental realities**” and that “[b]y way of example, [arbitral tribunals and commissions] **have consistently found that it is the beneficial interest which is deserving of protection**.”). *Perenco Ecuador Ltd. c. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Pending Jurisdiction and Liability Issues dated 12 Sept. 2014 (CL-067) ¶ 522 (emphasis added). Respondent moreover relies on an excerpt from Zachary Douglas’ treatise explaining that “[w]henver 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.” The passage relates to the legal ownership (and not beneficial ownership) of the property at issue, but in any case, the opinion of one author does not undermine the fact that several tribunals have recognized beneficial ownership under international law and granted standing to beneficial owners to present their claims. See ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2009) (RL-149) ¶¶ 101-102. Respondent likewise relies on *Mason v. Korea* for the proposition that the “ownership of assets” can only be determined by reference to the applicable domestic law. Here too, the tribunal was referring to legal, as opposed to beneficial ownership, and acknowledged that the notion of beneficial ownership was a separate issue. The tribunal explained that “[w]hereas **legal ownership** is a uniformly accepted concept that can be determined by reference to municipal law, there is no common definition or understanding of ‘beneficial ownership,’” and continued to review international law. *Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Final award dated 11 Apr. 2024 (RL-194) ¶¶ 969-970.

⁸³⁰ CAFTA-DR (CL-1), Art. 1.2(2); see also CAFTA-DR (CL-1), Art. 10.22.1 (“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**.”) (emphasis added). In the same vein, international investment tribunals have consistently found that the terms of an international treaty must be interpreted applying the relevant treaty and international law, not domestic law. See, e.g., *Rupert Joseph Binder v. Czech Republic*, UNCITRAL, Award on Jurisdiction dated 6 June 2007 (CL-319) ¶ 74 (holding that the term “permanent residence” in the Germany-Czech Republic BIT “should be considered to be **a treaty concept and should as such be given an autonomous meaning** and be interpreted according to the principles of the Vienna Convention on the Law of Treaties,” and **deeming it “[in]appropriate” to determine its meaning “on the basis of the national law of one of the Contracting Parties.**”) (emphasis added); *Orascom TMT Investments S.à.r.l. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award dated 31 May 2017 (CL-320) ¶ 298 (holding that the term *siège social* contained in the applicable treaty “does not refer to domestic nationality rules, but **embodies an autonomous treaty-specific meaning**.”) (emphasis added).

⁸³¹ In addition, the CAFTA-DR includes an “enterprise” as part of the definition of “investment” and expressly defines “enterprise” as “any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, **trust**, partnership, sole proprietorship, joint venture, or other association.” CAFTA-DR (CL-1), Art. 2.1 (definition of “enterprise”) (emphasis added); see also *id.*, Art. 10.28 (definition of “investment”).

289. At the same time, however, Respondent recognizes that, under international law, [REDACTED] is a mere “nominal” owner.⁸³² Relying on that conclusion, Respondent makes an unfounded leap to argue that the Lenders—and not Claimants—are the “beneficial” owners of Pacific Solar and its assets.⁸³³ Respondent also asserts that Claimants have not shown they control Pacific Solar.⁸³⁴ Finally, Respondent spends over seven pages making formalistic and generic objections to the documents Claimants submitted to argue that they are not “sufficient” to prove Claimants’ indirect ownership of Pacific Solar.⁸³⁵

290. Respondent’s objections are meritless and must be rejected. Claimants have established that they placed Pacific Solar’s shares and assets in trust as security for obtaining a project finance loan for approximately [REDACTED] from two well-known and respected public development banks, the German Investment and Development Corporation (“**DEG**”), which is part of the KfW Group, and the Dutch Entrepreneurial Development Bank (“**FMO**,” and, together with DEG, the “**Lenders**”).⁸³⁶ The loan was implemented through a framework agreement called the Common Terms Agreement (“**Common Terms Agreement**”).⁸³⁷ Honduras signed off on this concept contemporaneously.⁸³⁸

⁸³² Reply on Jurisdiction ¶ 166.

⁸³³ Reply on Jurisdiction ¶¶ 161-170.

⁸³⁴ Reply on Jurisdiction ¶¶ 171-182.

⁸³⁵ Reply on Jurisdiction ¶¶ 117-138.

⁸³⁶ Counter-Memorial on Jurisdiction ¶ 164 (citing KfW DEG, *About Us Page* (**Exh. C-48**); FMO, *About FMO* (**Exh. C-54**); Pacific Solar’s Audited Financial Statements, at 23 (**MN-5**); Share Trust Agreement (**Exh. C-266**), [REDACTED]; Assets Trust Agreement (**Exh. C-267**), [REDACTED]).

⁸³⁷ See Common Terms Agreement between Pacific Solar, DEG and FMO dated 14 Dec. 2017 (“**Common Terms Agreement**”) (**Exh. C-268**) § 5.03(c) (providing that execution of the Share Trust Agreement and the Assets Trust Agreement is a condition precedent for the first disbursement of senior loans by the Lenders). Claimants produced excerpts of the Common Terms Agreement to give further context of the project finance transaction with the Lenders, but had no burden to do so, as this document has no bearing on their ownership of the investment and the Tribunal’s jurisdiction. However, Respondent dedicates 3 pages of its Reply to complain about redactions that Claimants included in that document and recklessly suggest that the Tribunal should draw unspecified adverse inferences based on such redactions. See Reply on Jurisdiction ¶¶ 159-160. Respondent’s observations and request for adverse inferences lack merit. Despite Respondent’s incessant requests, this is not a document production phase, let alone an opportunity for a finishing expedition. Claimants produced a document between Pacific Solar and their Lenders that discusses terms of a project finance transaction and by its nature contains commercially sensitive information that Claimants are entitled to keep private. In any case, Claimants confirm that the redacted information includes defined terms in the Common Terms Agreement and condition precedent provisions for the disbursement of one of the loans, which are irrelevant for assessing any of the disputed issues in this arbitration. Claimants remain open on revising their redactions if the Tribunals deems it necessary.

⁸³⁸ Letter Agreement between the Honduran Ministry of Energy (SEN), FMO, DEG and Pacific Solar dated 26 July 2018 (**Exh. C-303**).

291. As Claimants explained and Respondent has failed to rebut, one of Pacific Solar's direct shareholders (in addition to Mr. Paiz), [REDACTED], executed a Security Share Trust Agreement on 12 January 2018 ("**Share Trust Agreement**") wherein it (in its capacity as settlor) placed its shares in Pacific Solar under a guarantee trust that [REDACTED] administers as trustee, and which has the Lenders as first order beneficiaries (while [REDACTED] retained the capacity of second order beneficiary).⁸³⁹ Furthermore, the parties also entered into an Administration and Guarantee Trust Agreement on the same date as the Share Trust Agreement, in which Pacific Solar (acting as settlor) placed its assets under a guarantee trust that was administered by [REDACTED] as trustee, and which had DEG as the first order beneficiary, FMO as the second order beneficiary, and Pacific Solar as the third order beneficiary (the "**Assets Trust Agreement**" and together with the Share Trust Agreement the "[REDACTED] Trust Agreements").⁸⁴⁰ As Claimants have established, the project finance arrangement does not impact Claimants' status as the ultimate beneficial owners of the investment or their ability to control the investment.

292. Despite the foregoing, in its Reply on Jurisdiction, Respondent maintains that this arrangement negates Claimants' status as investors that "own or control" the investment both under international and Honduran law.⁸⁴¹ Respondent's contentions are meritless as (i) Claimants have established that they own their investment; and (ii) they exercise control over their investment in Pacific Solar and its operations.

293. In addition, Respondent argues that the execution of the [REDACTED] Trust Agreements is unrelated to Honduras's measures.⁸⁴² This argument appears to be in connection with the Tribunal's request that the parties discuss "whether, on the assumption that, as the Claimants allege, Pacific Solar was forced by the Respondent's behaviour to transfer its rights to [REDACTED], this transfer should be disregarded for purposes of establishing the Claimants' ownership and control over the investment as a condition to the Tribunal's jurisdiction."⁸⁴³ To clarify, Claimants are not asserting that the creation of the trusts is a result of Honduras's breaches.

⁸³⁹ Counter-Memorial on Jurisdiction ¶ 165.

⁸⁴⁰ Counter-Memorial on Jurisdiction ¶ 165; Share Trust Agreement (**Exh. C-266**), at 1-3; Assets Trust Agreement (**Exh. C-267**), at 1-4.

⁸⁴¹ Reply on Jurisdiction ¶¶ 139-170.

⁸⁴² Reply on Jurisdiction ¶¶ 183-186.

⁸⁴³ Procedural Order No. 4 dated 4 Apr. 2025 ¶ 55(B)(2)(c).

Rather, Claimants are providing context as to how Respondent's breaches have had devastating consequences for Pacific Solar. As ENEE is the sole purchaser of the electricity the Plant produces, Pacific Solar's sole source of revenue comes from the Government. The Government's failure to pay has knock-on consequences for Pacific Solar's obligations to third parties, including the risk of defaulting vis-à-vis the Lenders under the financing agreements, which threatens Pacific Solar's viability. That reality, as Claimants have explained,⁸⁴⁴ has forced Pacific Solar to restructure its loan obligations with the Lenders.⁸⁴⁵

(a) Claimants Have Established that They Are Beneficial Owners of Their Investment in Pacific Solar

294. Claimants, both nationals of Guatemala,⁸⁴⁶ have established that they directly and indirectly own a 100% interest in Pacific Solar, an enterprise incorporated in Honduras, through a corporate structure including entities in the British Virgin Islands ("BVI"), the Bahamas, Panama and Guatemala.⁸⁴⁷ Claimants have already submitted: (i) a corporate chart outlining the full chain of ownership between the Paizes and Pacific Solar; (ii) a [REDACTED]; (iii) corporate ledgers for each entity in the holding structure, identifying shareholders, shareholdings and, in many cases, percentage interests—covering the entire period since each entity's incorporation, and crucially, as of the date of the Request for Arbitration (*i.e.*, 24 August 2023); (iv) the [REDACTED] Trust Agreements and excerpts of the Common Terms Agreement; and (v) a witness statement from Mr. Paiz corroborating the same.⁸⁴⁸ This evidence satisfies Claimants' burden of proof and

⁸⁴⁴ Memorial on the Merits ¶¶ 4, 17, 25; Letter from Claimants to the Tribunal dated 10 Mar. 2025, at 2, n. 12; Counter-Memorial on Jurisdiction ¶¶ 189-192.

⁸⁴⁵ See, *e.g.*, Omnibus Amendment and Waiver No. 2 between Pacific Solar, [REDACTED], Fernando Paiz, Anabella Schloesser de Paiz, DEG, FMO, [REDACTED] dated 19 Dec. 2024 ("**Loan Amendment No. 2**") (Exh. C-304); Amendment to Share Trust Agreement dated 20 Jan. 2025 (Exh. C-305), Recital II, at 6 (providing that the restructuring was caused by "the prevailing situation in the energy sector in the Republic of Honduras, which represents an exogenous factor beyond the control of both [REDACTED] and the company [Pacific Solar], as well as the other parties involved."); Amendment to Assets Trust Agreement dated 20 Jan. 2025 (Exh. C-306), Recital V, at 7-8 (providing for the same).

⁸⁴⁶ Passport of Ms. Anabella Schloesser de Paiz (Exh. C-19); Passport of Mr. Fernando Paiz (Exh. C-18).

⁸⁴⁷ Counter-Memorial on Jurisdiction ¶¶ 157, 159.

⁸⁴⁸ Ownership Structure Chart for Pacific Solar Energy, S.A. de C.V. dated 13 July 2023 (Exh. C-27); Pacific Solar's Corporate Documents (Exh. C-256); [REDACTED] Corporate Documents (Exh. C-257); [REDACTED] Corporate Documents (Exh. C-258); [REDACTED] Corporate Documents (Exh. C-259); [REDACTED] Corporate Documents (Exh. C-260); [REDACTED] Corporate Documents (Exh. C-261); [REDACTED] Corporate Documents (Exh. C-262); [REDACTED] Share Trust Agreement (Exh. C-266); Assets Trust Agreement (Exh. C-267); Common Terms Agreement (Exh. C-268); Paiz WS II ¶¶ 4-8.

shifts the onus onto Respondent to rebut it, as Claimants have established.⁸⁴⁹ Respondent's incessant requests for additional information, despite the voluminous evidence already submitted, is nothing but a fishing expedition and should be disregarded.

295. The Parties agree that the only relevant date for establishing ownership (and control) for the purposes of the Tribunal's jurisdiction is the date of the Request for Arbitration (*i.e.*, 24 August 2023).⁸⁵⁰ As of that date, Pacific Solar's corporate structure can be summarized as follows:

- Mr. Fernando Paiz is settlor and he and his wife, Ms. Anabella Schloesser de Paiz, are beneficiaries of [REDACTED]. Claimants have produced [REDACTED].⁸⁵¹
- Through the trust, the Paizes hold 100% of the shares of [REDACTED], a company incorporated and existing in the BVI. Claimants have produced the corporate ledger of [REDACTED] that shows [REDACTED] as its registered shareholder since 10 June 2015.⁸⁵²
- [REDACTED] directly held 68.5003% of the shares in [REDACTED], a company incorporated in Guatemala, while the other shares were directly held by [REDACTED].

⁸⁴⁹ In its Reply, Respondent has made a series of formalistic observations regarding some of the documents that Claimants produced (in particular, the corporate ledgers of six of the companies in Claimants' corporate structure), contending that these documents have "deficiencies and inconsistencies." Reply on Jurisdiction ¶ 127. Respondent argues that the ledgers are not certified by "an official authority or registrar" and hence there was "no independent verification of the authenticity or certainty of the register," they are not signed by "any officer, director or authorized representative of the company," which Honduras suggests would be "essential" to determine whether "the registers were prepared and approved by the proper authority," and they do not show whether the companies exist or are in good standing at present. See Reply on Jurisdiction ¶¶ 130-132. Respondent's formalistic objections are wrong and misguided. Respondent does not even bother to provide any legal basis as to why the documents should have been certified by an official or independent authority, or signed by anyone to establish ownership. As explained above, Claimants have met their burden to prove ownership and control of Pacific Solar under the balance of probabilities, and that burden shifts to Respondent to prove its objections. Respondent has not shown that the corporate laws of the BVI, the Bahamas, Panama, and Guatemala require any of these formalities.

⁸⁵⁰ See Reply on Jurisdiction ¶ 165 ("The procedural time for proving beneficial ownership is at the time the arbitration claim is filed."); see also Request for Arbitration dated 24 Aug. 2023. Respondent argues that some corporate ledgers that Claimants produced are not sufficient to prove ownership at the time of the Request for Arbitration because they do not have an issuance date. See Reply on Jurisdiction ¶ 131. Such argument is incorrect and misguided. It would make little sense for the corporate ledgers to include an "issuance" date, when the ledgers are ongoing records reflecting entries over time. What matters are the dates of the relevant annotations in the ledgers, which are included in all documents and confirm ownership of Claimants' investment as of 24 August 2023, as shown below. Similarly, Respondent's claim that the ledgers fail to prove the companies' current existence or good standing (*see* Reply on Jurisdiction ¶ 133) is misplaced. Claimants are only required to prove ownership as of 24 August 2023—not the companies' present status.

⁸⁵¹ [REDACTED] While Respondent contests the corporate ledgers produced by Claimants, it does not present any objection [REDACTED] created in the British Virgin Islands. See Reply on Jurisdiction ¶ 126.

⁸⁵² [REDACTED] Corporate Documents (Exh. C-261).

- [REDACTED] (31.4994%) and [REDACTED] (0.0003%). Claimants have produced the corporate ledger of [REDACTED] that shows such ownership.⁸⁵³
- [REDACTED] also directly holds 84.77% of the shares of [REDACTED], a company incorporated in the BVI, while [REDACTED] directly holds the other 15.23%. Claimants have produced the corporate ledger of [REDACTED] that proves such ownership since 27 November 2018.⁸⁵⁴
 - [REDACTED] directly holds 100% of the shares of [REDACTED], a company incorporated in Panama. Claimants have produced [REDACTED] corporate ledger that confirms this ownership since 14 June 2011.⁸⁵⁵
 - [REDACTED] also directly holds 100% of the shares in [REDACTED] a company incorporated in the Bahamas. Claimants have produced [REDACTED] corporate ledger, which confirms this ownership since 9 July 2014.⁸⁵⁶
 - [REDACTED] directly holds 100% of the shares in [REDACTED] another company incorporated in the Bahamas. Claimants have produced [REDACTED] ledger, which proves this ownership since 2 November 2017.⁸⁵⁷
 - Finally, [REDACTED] directly holds 99.99% of the shares in Pacific Solar, while Claimant Mr. Paiz directly holds the other 0.01%. Claimants have produced Pacific Solar's corporate ledger, which also confirms this point.⁸⁵⁸ Notably, Respondent does not dispute this, as it confirms that [REDACTED] and Mr. Paiz are Pacific Solar's shareholders.⁸⁵⁹

296. Accordingly, Claimants have established that they own, directly and indirectly (as beneficial owners), 100% of the stake in Pacific Solar.⁸⁶⁰ The [REDACTED] Trust arrangements do

⁸⁵³ [REDACTED] Corporate Documents (Exh. C-260). On 24 October 2024, after the case was filed, to simplify the holding structure, [REDACTED] transferred all its shares in [REDACTED] to its affiliate [REDACTED]. Consequently, as of that date, [REDACTED] holds 99.9997% of the shares of [REDACTED], and [REDACTED] holds the rest (0.0003%). See *id.* Regarding this part of the ownership chart in particular, Respondent refers to a purported 10% gap in [REDACTED] ownership according to the corporate chart Claimants produced as C-27. See Reply on Jurisdiction ¶ 134 (citing Ownership Structure Chart for Pacific Solar Energy, S.A. de C.V. dated 13 July 2023 (Exh. C-27)). This was a typographical error. As the corporate ledger shows, as of 24 August 2023, [REDACTED] held 68.5003% of [REDACTED] not 58%, with the remaining shares held by [REDACTED] and [REDACTED]. The corrected chart included above reflects the accurate shareholding.

⁸⁵⁴ [REDACTED] Corporate Documents (Exh. C-259).

⁸⁵⁵ [REDACTED] Corporate Documents (Exh. C-262).

⁸⁵⁶ [REDACTED] Corporate Documents (Exh. C-258).

⁸⁵⁷ [REDACTED] Corporate Documents (Exh. C-257).

⁸⁵⁸ Pacific Solar's Corporate Documents (Exh. C-256).

⁸⁵⁹ Reply on Jurisdiction ¶¶ 128, 175. Regarding Pacific Solar's corporate ledger, Respondent mentions that it is "duly certified" and includes [REDACTED] and Fernando Paiz as owners of Pacific Solar. *Id.* ¶ 128.

⁸⁶⁰ Nonetheless, out of an abundance of caution, Claimants produce certificates of incumbency signed by the companies' registered agent that confirm: (i) that all the companies exist and are in good standing; (ii) the identity of their directors and shareholders; and (iii) the number of shares issued by each of them. Claimants also produce public certificates of incorporation of all the companies, and certificates of good standing issued after 24 August 2023.

not negate Claimants' status as beneficial owners of their investment. As explained in the Counter-Memorial on Jurisdiction, both the Share Trust Agreement and the Assets Trust Agreement list [REDACTED] and Pacific Solar (both indirectly owned by Claimants) as the settlors, and the second- and third-order beneficiary, respectively.⁸⁶¹ Both [REDACTED] Trust Agreements also show that, ultimately, every asset placed in trust will be returned to [REDACTED] and Pacific Solar once the Trusts' object (of providing collateral for the loan) is fulfilled.⁸⁶²

297. Respondent devotes 11 pages in its Reply on Jurisdiction to arguing that [REDACTED] is the "owner" of Pacific Solar's shares and assets.⁸⁶³ However, in the same submission, Respondent concedes that [REDACTED] has no beneficial ownership of Pacific Solar, and instead is merely a "nominal" owner.⁸⁶⁴ Respondent thus appears to dispute that Claimants are the beneficiaries of the investment, and instead contends that only DEG and FMO are the beneficiaries because, according to Respondent, they are the recipients of the investment's income and economic benefits.⁸⁶⁵ Respondent's arguments are without merit.

Certificate of Incumbency of [REDACTED] dated 18 Mar. 2025 (Exh. C-307); Certificate of Incumbency of [REDACTED] dated 18 Mar. 2025 (Exh. C-308); Certificate of Incumbency of [REDACTED] dated 18 Mar. 2025 (Exh. C-309); Certificate of Incumbency of [REDACTED] dated 6 May 2025 (Exh. C-310); Certificate of Incumbency of [REDACTED] dated 26 June 2025 (Exh. C-311); Notary Certification of Ledger of [REDACTED], dated 26 June 2025 (Exh. C-312); Certificate of Incorporation of [REDACTED] 19 July 2000 (Exh. C-313); Certificate of Incorporation of [REDACTED] dated 3 Sept. 2004 (Exh. C-314); Certificate of Incorporation of [REDACTED] dated 9 July 2014 (Exh. C-315); Certificate of Incorporation of [REDACTED] dated 27 Jan. 2015 (Exh. C-316); Certificate of Incorporation of [REDACTED] dated 5 Sept. 2017 (Exh. C-317); Certificate of Good Standing of [REDACTED] dated 28 Nov. 2024 (Exh. C-318); Certificate of Good Standing of [REDACTED] dated 27 Nov. 2024 (Exh. C-319); Certificate of Good Standing of [REDACTED] dated 25 Apr. 2024 (Exh. C-320); Certificate of Good Standing of [REDACTED] dated 26 June 2025 (Exh. C-321); Certificate of Good Standing of [REDACTED] dated 26 June 2025 (Exh. C-322); Certificate of Good Standing of Pacific Solar dated 30 June 2025 (Exh. C-323). Claimants also produce the share certificates that confirm the information contained in the corporate ledgers and chart. Share Certificates Issued by Pacific Solar (Exh. C-324); Share Certificates Issued by [REDACTED] (Exh. C-325); Share Certificates Issued by [REDACTED] (Exh. C-326); Share Certificates Issued by [REDACTED] (Exh. C-327); Share Certificates Issued by [REDACTED] (Exh. C-328); Share Certificates Issued by [REDACTED] (Exh. C-329); Share Certificates Issued by [REDACTED] (Exh. C-330).

⁸⁶¹ Counter-Memorial on Jurisdiction ¶ 165 (citing Share Trust Agreement (Exh. C-266), at 1-3; Assets Trust Agreement (Exh. C-267), at 1-4. The Assets Trust Agreement is an amendment to a previous trust agreement executed by Pacific Solar (as settlor and second order beneficiary), [REDACTED] (as trustee) and DEG (as first order beneficiary) on 7 December 2016. See Assets Trust Agreement (Exh. C-267), [REDACTED]).

⁸⁶² Share Trust Agreement (Exh. C-266), [REDACTED]; Assets Trust Agreement (Exh. C-267), [REDACTED].

⁸⁶³ Reply on Jurisdiction ¶¶ 139-160.

⁸⁶⁴ Reply on Jurisdiction ¶¶ 161, 166 ("The nominal ownership of the shares, as well as all the assets of Pacific Solar, including the Nacaome I Plant, is vested in [REDACTED]").

⁸⁶⁵ Reply on Jurisdiction ¶ 161; see also *id.* ¶ 166.

298. That [REDACTED] holds formal title for Pacific Solar's shares and assets does not negate that Claimants are their ultimate beneficial owners. The provisions of the [REDACTED] Trust Agreements themselves, together with relevant provisions of Honduran law, confirm that Claimants retain beneficial ownership over the investment, which is the relevant factor for establishing ownership under international law, as explained above.

299. Indeed, as Claimants explained in the Counter-Memorial on Jurisdiction,⁸⁶⁶ [REDACTED] role in the Share Trust Agreement is limited to holding the shares as a custodian to use them as collateral if the Lenders notify an event of default on the loan.⁸⁶⁷ Only in that case is the trustee allowed to sell the shares in a public auction or transfer them to the Lenders.⁸⁶⁸ Before

⁸⁶⁶ Counter-Memorial on Jurisdiction ¶¶ 173-174, 176.

⁸⁶⁷ Share Trust Agreement (Exh. C-266). [REDACTED]

(Exh. C-267). [REDACTED]

This is further confirmed by the amendments to both Trust Agreements. Amendment to Share Trust Agreement dated 20 Jan. 2025 (Exh. C-305). [REDACTED]

[REDACTED]; Amendment to Assets Trust Agreement dated 20 Jan. 2025 (Exh. C-306), Cl. 2, at 9-10 (providing for the same). See also Honduran Commercial Code (Exh. R-14), Art. 1033 ("A trust is a legal transaction by virtue of which the bank authorized to act as trustee is granted ownership of certain assets, with the **mandatory limitation** of performing only those acts required to fulfill the lawful and **specific purpose** for which [the trust is] intended.") (emphasis added); Igor Alduvin Ruiz López, *The Trust: Historical Background, Concept and Its Regulation in Honduras*, UMH SAPIENTIAE (2020) (Exh. C-331), at 3 ("[U]pon the transfer and perfection of the ownership of the property from the settlor to the trustee, the latter becomes the owner, **but in a limited manner**. The trustee is authorized to use the trust assets **exclusively for the purpose of fulfilling the acts of the trust as established by the settlor and in accordance with the trust's objectives**. Therefore, it can be said that the trustee, as the owner, is **limited and thus becomes an imperfect or conditional owner**." (emphasis added). The fact that the Assets Trust Agreement also has an administration purpose—as Respondent notes (see Reply on Jurisdiction ¶ 147)—does not undermine this, as the trustee administers the assets by instructions and in favor of Pacific Solar. See Assets Trust agreement (Exh. C-267). [REDACTED]

⁸⁶⁸ Share Trust Agreement (Exh. C-266). [REDACTED]

that circumstance occurs, however, [REDACTED] cannot exercise **any** ownership rights with respect to the shares. Among other limitations, it cannot: (i) sell them to anyone;⁸⁶⁹ (ii) encumber them in any way;⁸⁷⁰ or (iii) exercise any political or economic rights inherent to them (such as voting in shareholders' meetings or collecting dividends).⁸⁷¹ In addition, the trustee's "fiduciary ownership" requires that the assets of the trust remain separate from the trustee's own estate, which means that the trustee's creditors cannot foreclose on the assets placed in trust, and the trustee has the obligation to keep separate accounts and to not comingle the trust assets with its own assets.⁸⁷² Once the purpose of the trust is fulfilled, [REDACTED] must return the shares to [REDACTED]⁸⁷³ [REDACTED] has certified that the shares placed in trust "constitute an autonomous fiduciary estate, separate from the Trustee's estate, with the sole purpose of securing the Borrower's obligations towards [the Lenders]" and that "[o]nce payments are completed, the Shares in Trust shall be returned to the Settlor."⁸⁷⁴

300. In any event, Respondent's reference to the trustee's right to exercise "all administrative and judicial rights and actions required for the fulfillment and defence of the Trust" does not imply that the trustee has full ownership.⁸⁷⁵ The exercise of those rights is also limited to the fulfillment of the trust's purpose, which in this case is holding the assets as security for

⁸⁶⁹ Honduran Commercial Code (**Exh. R-14**), Art. 1037(1) ("The trustee shall exercise the ownership powers over the assets and rights given in trust, in accordance with the following conditions: . . . Such powers shall be exercised in accordance with the purpose to be achieved **and not in the interest of the trustee.**") (emphasis added).

⁸⁷⁰ Honduran Commercial Code (**Exh. R-14**), Art. 1048 ("The assets placed in trust are committed to the purpose for which they are intended and, consequently, **only the rights and actions related to that purpose can be exercised over them.** This is with the exception of those rights expressly reserved by the settlor, those derived for the settlor from the trust itself, or those legally acquired concerning such assets prior to the establishment of the trust, by the beneficiary or by third parties.") (emphasis added).

⁸⁷¹ See Share Trust Agreement (**Exh. C-266**), [REDACTED]

⁸⁷² National Banking and Insurance Commission, *Rules for the Constitution, Administration and Supervision of Trusts* dated 27 Feb. 2017 (**Exh. R-33**), Art. 13(a)(2) (providing that trustees must "[e]nsure the complete separation of the trust assets from its own assets, for which it must maintain accounting records that register the transactions derived from the trust assets separately from its own accounts."); see also Share Trust Agreement (**Exh. C-266**), [REDACTED]; Assets Trust Agreement (**Exh. C-267**), [REDACTED].

⁸⁷³ Share Trust Agreement (**Exh. C-266**), [REDACTED]

⁸⁷⁴ Certification by [REDACTED] dated 4 July 2025 (**Exh. C-332**) ¶ 3.

⁸⁷⁵ Reply on Jurisdiction ¶ 151 (citing Share Trust Agreement (**Exh. C-266**), [REDACTED]; Assets Trust Agreement (**Exh. C-267**), [REDACTED]).

payment of the loan.⁸⁷⁶ It is thus clear that [REDACTED] only holds “nominal” ownership as a matter of international law, limited to holding the assets as collateral to foreclose on them if the Lenders notify an event of default, but does not have “beneficial” ownership, as Respondent itself recognizes.⁸⁷⁷

301. Likewise, Respondent’s argument that the Lenders are the beneficial owners of Pacific Solar is also incorrect.⁸⁷⁸ Under the Share Trust Agreement, DEG and FMO have not received and cannot receive Pacific Solar’s shares or any other benefit of the trust unless and until they notify the trustee of an “event of default,”⁸⁷⁹ which has not happened.⁸⁸⁰ Instead, [REDACTED] as settlor and second-order beneficiary⁸⁸¹—will ultimately retrieve Pacific Solar’s shares either (i) once the loan is repaid;⁸⁸² or (ii) if it exercises the right to prevent the auction sale of the shares in the event of a collection by the Lenders at any time before the auction by simply paying the debt to the Lenders.⁸⁸³ Pacific Solar would also be the ultimate beneficiary

⁸⁷⁶ Share Trust Agreement (Exh. C-266), [REDACTED]

⁸⁷⁷ Reply on Jurisdiction ¶ 166.

⁸⁷⁸ FMO, *Project Details: Pacific Solar Energy S.A. de C.V.*, available at <https://www.fmo.nl/project-detail/52255> (last accessed 2 July 2025) (Exh. C-333) (describing Pacific Solar as FMO’s “customer” and stating that “FMO provided senior and sub-senior debt to PSE in order to complete the funding of Phase II and have all phases operational before the end of 2018.”).

⁸⁷⁹ Share Trust Agreement (Exh. C-266), [REDACTED]

⁸⁸⁰ Certification by [REDACTED] dated 4 July 2025 (Exh. C-332) ¶ 5 (“To date, the Lenders have not notified any Event of Default.”).

⁸⁸¹ Share Trust Agreement (Exh. C-266), at 1-3.

⁸⁸² Share Trust Agreement (Exh. C-266), [REDACTED]

⁸⁸³ Share Trust Agreement (Exh. C-266), [REDACTED]

of the proceeds obtained from any sale of the shares that surpass the amount owed to the Lenders.⁸⁸⁴

302. Similarly, under the Assets Trust Agreement, it is Pacific Solar and not the Lenders who are the ultimate beneficiaries of the trust. The assets are placed as collateral of the Lenders' loan and the Lenders only have a contingent right to receive proceeds from their auction sale if they notify the trustee of an event of default.⁸⁸⁵ But the settlor (in this case, Pacific Solar) retains the ultimate right to recover all the assets once the loan is paid,⁸⁸⁶ prevent the sale of the assets by paying the balance of the loan,⁸⁸⁷ or receive all the proceeds that exceed the amount necessary to pay the loan once the auction sale concludes.⁸⁸⁸

303. The financing documents comprising the loan confirm this. For instance, the financing documents define "Ultimate Beneficial Owners" as Fernando Paiz Andrade and Anabella Schloesser de Paiz, and provide that they are indirect shareholders of Pacific Solar.⁸⁸⁹

⁸⁸⁴ Share Trust Agreement (Exh. C-266), [REDACTED]

⁸⁸⁵ Assets Trust Agreement (Exh. C-267), [REDACTED]

⁸⁸⁶ Assets Trust Agreement (Exh. C-267), [REDACTED]

⁸⁸⁷ Assets Trust Agreement (Exh. C-267), [REDACTED]

⁸⁸⁸ Assets Trust Agreement (Exh. C-267), [REDACTED]

⁸⁸⁹ Amended and Restated Sponsor Support and Share Retention Agreement between Pacific Solar, [REDACTED], [REDACTED] Fernando Paiz, Anabella Schloesser de Paiz, the [REDACTED], FMO and DEG dated 19 Dec. 2024 ("Amended Sponsor Support Agreement") (Exh. C-334) [REDACTED]. The Amended Sponsor Support Agreement further provides that the Sponsor (i.e., [REDACTED]), each Shareholder (i.e., [REDACTED] and Fernando Paiz) and each Ultimate Beneficial Owner (i.e., Fernando Paiz and Anabella Schloesser de Paiz) agree that they will not transfer any of the Capital Stock in the Borrower (i.e., Pacific Solar), without the Lenders' approval, thus showing that the Lenders recognize they still hold an ownership interest in Pacific Solar's shares. [REDACTED] In addition, the Common Terms Agreement also provides that Pacific Solar cannot [REDACTED] showing that the Lenders

Further, the financing documents show that the Lenders described the Share Trust Agreement and the Assets Trust Agreement as “Liens,” confirming that their purpose is restricted to serving as security for the Loan.⁸⁹⁰ The financing documents also expressly provide that the Lien in favor of the Lenders is not considered a “transfer” of ownership to the Lenders.⁸⁹¹ Finally, the loan restructuring documents also show that [REDACTED] remains a shareholder of Pacific Solar,⁸⁹² that the Ultimate Beneficial Owners and the Shareholder “directly or indirectly hold[] or own[] [the] Capital Stock of the Borrower,”⁸⁹³ and that Mr. Paiz signs them as the president of the board of Pacific Solar.⁸⁹⁴

304. Following *Blue Bank* and analogous cases summarized above, it is thus [REDACTED] and Pacific Solar, respectively—and not the Lenders—who will “ultimately

recognize [REDACTED] position as shareholder even after the trust is put in place. Common Terms Agreement (Exh. C-268) [REDACTED]

⁸⁹⁰ Common Terms Agreement (Exh. C-268) [REDACTED]

⁸⁹¹ Common Terms Agreement (Exh. C-268) [REDACTED]

⁸⁹² Loan Amendment No. 2 (Exh. C-304), at 1; *see also* Amended Sponsor Support Agreement (Exh. C-334), [REDACTED]

⁸⁹³ Amended Sponsor Support Agreement (Exh. C-334) [REDACTED]

⁸⁹⁴ Loan Amendment No. 2 (Exh. C-304), [REDACTED]

enjoy or suffer, as the case may be, the fortunes of the trust assets.”⁸⁹⁵ The Lenders’ interest in the trust assets is **contingent**—it is perfected only upon the occurrence and notification of an “event of default”—and reflects a security interest for the repayment of their loan. Further, the assets placed in trust only represent a security for the loan, but the Lenders’ rights of payment of principal and interest of the loan are not directly affected by the “fortunes of the trust assets.”⁸⁹⁶ Even if the Lenders were to somehow lose their possibility of collecting this security, they would still be entitled to pursue a claim limited to the amount of the debt owed to them against Pacific Solar, and not the whole value of the investment. On the contrary, [REDACTED] and Pacific Solar directly benefit from the return of Pacific Solar’s shares and assets, respectively, once the loans are paid, and stand to lose them or part of the proceeds obtained from them in the event of an auction sale.

305. The only interest that Respondent identifies as received directly by the Lenders is the funds included in a “Requisition Payment Account” under the Assets Trust Agreement. Respondent misstates that the existence of this account shows that Pacific Solar never receives the proceeds of the sale of energy to ENEE, which is false.⁸⁹⁷ Pacific Solar receives ENEE’s payments in another account—the “Collection Account”—which [REDACTED] administers, but what Respondent omits to mention is that it does so under Pacific Solar’s instructions.⁸⁹⁸ Furthermore, the account receives only a portion of those proceeds, which are later transferred to an offshore account and used to pay the Lenders.⁸⁹⁹ This part of the transaction works as an assignment of accounts receivable to guarantee payment of the debt, which is contemplated in the PPA, which

⁸⁹⁵ *Blue Bank International & Trust Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award dated 26 Apr. 2016 (CL-279) ¶ 170 (emphasis added).

⁸⁹⁶ *Blue Bank International & Trust Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award dated 26 Apr. 2016 (CL-279) ¶ 170.

⁸⁹⁷ Reply on Jurisdiction ¶¶ 168-169.

⁸⁹⁸ Reply on Jurisdiction ¶ 168, n. 210 (partially quoting Clause 1.21 of the Assets Trust Agreement). [REDACTED]

[REDACTED] Assets Trust Agreement (Exh. C-267), [REDACTED]. See also Letter from Pacific Solar [REDACTED] and FMO dated 6 Dec. 2023 (Exh. C-335); Letter from Pacific Solar to [REDACTED] and FMO dated 15 Nov. 2024 (Exh. C-336).

⁸⁹⁹ Assets Trust Agreement (Exh. C-267), [REDACTED]

the parties expressly agreed would not be considered a transfer of ownership,⁹⁰⁰ as Respondent acknowledges.⁹⁰¹ It does not make the Lenders the beneficial owners of Claimants' investment. Accordingly, the only beneficial owners of Pacific Solar's shares and assets are Claimants.

(b) Claimants Also Control Their Investment in Pacific Solar

306. Claimants also undisputably control their investment in Pacific Solar. Not only does [REDACTED] (indirectly owned and controlled by the Paizes) hold a majority of Pacific Solar's shares—as Respondent seems to acknowledge⁹⁰²—but Claimants also exercise all governance, managerial and decision-making functions in the company. As Mr. Paiz confirmed, “I make all the important decisions relating to Pacific Solar. I do so by coordinating almost daily with [REDACTED] of my companies and Project Manager at Pacific Solar, who has played a key role in the development of my investments in energy, and Pacific Solar in particular.”⁹⁰³ [REDACTED] also confirmed that “[f]or the past decade, I have worked very closely with Mr. Paiz in the management of his energy assets,” and “[s]ince early 2015, I have been the Project Manager of [Pacific Solar].”⁹⁰⁴ Additional evidence that the Paizes control Pacific Solar includes the following:

- The Share Trust Agreement confirms that [REDACTED] (indirectly 100% owned by Claimants) retains the right to participate, deliberate and vote in shareholders' meetings.⁹⁰⁵ The Share Trust Agreement also provides that [REDACTED]

⁹⁰⁰ PPA (Exh. C-1) § 2, Cl. 20.6 (“The SELLER may encumber, pledge, assign, or transfer this Contract and/or the rights granted by this Contract as collateral, in favor of and/or for the benefit of any Lender who has provided the resources covered by this Contract, or in the case contemplated in Clause 20.1 Assignment by the SELLER, by informing the BUYER in writing beforehand. **The contractual clauses agreed upon between the BUYER and SELLER will remain in effect.** However, if under any circumstances the encumbered asset is transferred to a third party, the Assignee must ensure that the transferred asset is used to fulfill all obligations derived from the Contract. In the event of non-compliance, the BUYER may enforce all measures established in the Contract. The Parties expressly agree that **in the event of assigning, encumbering, or pledging** this Contract and/or the rights **to the Lender or for the purposes of the financing to be provided by the Lenders**, such assignment, pledge, or encumbrance of the Contract and/or rights **shall not be understood as a transfer of ownership** of this Contract. The Lender to whom such assignment, pledge, or encumbrance is made shall not be required to assume the fulfillment of any of the terms or conditions that the SELLER must comply with under this Contract.”) (emphasis added).

⁹⁰¹ Reply on Jurisdiction ¶ 154.

⁹⁰² While Respondent seems to argue that [REDACTED] allegedly has ownership of Pacific Solar's shares through the trust, at least twice it concedes that [REDACTED] is the majority shareholder in Pacific Solar. See Reply on Jurisdiction ¶¶ 128, 175.

⁹⁰³ Paiz WS II ¶ 6.

⁹⁰⁴ [REDACTED] ¶¶ 5-6.

⁹⁰⁵ Share Trust Agreement (Exh. C-266), [REDACTED]

- ⁹⁰⁶ Claimants explained in the Counter-Memorial that [REDACTED] decides to: (i) discuss, approve, or modify Pacific Solar's balance sheet; (ii) appoint and remove its directors and commissioners, and determine their wages; (iii) amend Pacific Solar's articles of incorporation; and (iv) take any other decisions required by law or the articles of incorporation.⁹⁰⁷ Thus, for all purposes, [REDACTED] remains the direct controlling shareholder of Pacific Solar.
- Since the purchase of Pacific Solar in December 2014, Mr. Paiz has held the position of president of the board of directors of Pacific Solar without interruption.⁹⁰⁸ In addition, Mr. Paiz's close collaborator, [REDACTED] has also been a director since that time.⁹⁰⁹ Since 18 February 2015, when [REDACTED] also acquired Pacific Solar's shares from another company in the group, Mr. Paiz has had a broad power of attorney to act on behalf of Pacific Solar, with full and sufficient powers including the execution of acts of disposition and transfer of assets and contracting, which has never been revoked.⁹¹⁰
 - Mr. Paiz, and [REDACTED] under his instructions, run the day-to-day operations of Pacific Solar, including the payment of taxes, fees related to the Plant's operation and maintenance, customs fees and rental of vehicles, for which [REDACTED] instructs [REDACTED] to transfer funds.⁹¹¹ Pacific Solar (represented by [REDACTED]) also instructs [REDACTED] to transfer funds offshore for paying the Lenders.⁹¹²
 - Mr. Paiz also sends written instructions to the [REDACTED] regarding the payment of the loan to the Lenders.⁹¹³

⁹⁰⁶ Share Trust Agreement (Exh. C-266), [REDACTED]

⁹⁰⁷ See Counter-Memorial on Jurisdiction ¶ 186 (citing Honduran Commercial Code (Exh. R-14), Arts. 168-169).

⁹⁰⁸ Minutes No. 4 of Pacific Solar's Shareholders' Meeting dated 10 Dec. 2014 (Exh. C-337), at 5; *see also* Pacific Solar Account with the Revenue Administration Service (SAR) accessed on 5 May 2025 (Exh. C-338) (showing that Mr. Fernando Paiz Andrade is the president of Pacific Solar's board and its "legal representative," and [REDACTED] and Mr. Paiz are Pacific Solar's shareholders).

⁹⁰⁹ Minutes No. 4 of Pacific Solar's Shareholders' Meeting dated 10 Dec. 2014 (Exh. C-337), at 5; *see also* Pacific Solar Account with the Revenue Administration Service (SAR) accessed on 5 May 2025 (Exh. C-338) (showing that [REDACTED] is Pacific Solar's director).

⁹¹⁰ See Minutes No. 5 of Pacific Solar's Shareholders' Meeting dated 18 Feb. 2015 (Exh. C-339).

⁹¹¹ See Letters from Pacific Solar to [REDACTED] Sending Payment Instructions (Exh. C-340).

⁹¹² See Letters from Pacific Solar to [REDACTED] Sending Payment Instructions (Exh. C-340).

⁹¹³ See, e.g., Letter from Pacific Solar to the [REDACTED] and FMO dated 6 Dec. 2023 (Exh. C-335); Letter from Pacific Solar to the [REDACTED] and FMO dated 15 Nov. 2024 (Exh. C-336).

307. Respondent argues that Claimants lack control because [REDACTED] cannot exercise its voting rights without [REDACTED] granting it a power of attorney or proxy to appear in the shareholders' meetings.⁹¹⁴ This formalistic argument is disingenuous and ignores the reality that, under the Share Trust Agreement, [REDACTED] has the **obligation** to allow [REDACTED] to participate in those meetings.⁹¹⁵ As the shareholders' minutes show, [REDACTED] and Mr. Paiz invariably have appeared as shareholders in all the meetings held after 12 January 2018 and have made substantial decisions regarding the company's operations.⁹¹⁶ The minutes also show that Mr. Paiz plays a substantial role in the meeting discussions, acting as president of the meetings and being particularly active in making proposals that require a resolution.⁹¹⁷

308. In this regard, Respondent's critiques of Claimants' reliance on *Castillo Bozo v. Panama*, on grounds that in that case, "the claimant had no limitation on the use of its voting rights over the investment and was free to instruct the trustee how to exercise the voting rights" are unfounded.⁹¹⁸ As Claimants showed, Claimants, through [REDACTED] and directly, were free to exercise their voting rights and participate in shareholders' meetings without an authorization from [REDACTED]. Unlike in *Castillo Bozo*, in which the tribunal considered the settlor controlled its investment because it could instruct the trustee on how to vote in the

⁹¹⁴ Reply on Jurisdiction ¶¶ 180-181.

⁹¹⁵ Share Trust Agreement (**Exh. C-266**), [REDACTED]

⁹¹⁶ See, e.g., Minutes No. 16 of Pacific Solar's Shareholders' Meeting dated 12 July 2018 (**Exh. C-341**), at 3-4 (showing that both shareholders decided the substitution of one of the board members and the reelection of the other three); Minutes No. 17 of Pacific Solar's Shareholders' Meetings dated 15 Oct. 2019 (**Exh. C-342**), at 4-5 (showing that both shareholders decided the substitution of one of the board members and the reelection of the other three); Minutes No. 19 of Pacific Solar's Shareholders' Meeting dated 19 Jan. 2021 (**Exh. C-343**), at 1-2 (showing that both shareholders decided to revoke a POA in favor of an individual who served as representative of Pacific Solar before, and both decided the appointment of another individual to act as director in Pacific Solar); Minutes No. 20 of Pacific Solar's Shareholders' Meeting dated 19 Jan. 2021 (**Exh. C-344**), at 1-2 (showing that both shareholders granted an authorization for [REDACTED] to enter into a loan agreement on behalf of Pacific Solar); Minutes No. 21 of Pacific Solar's Shareholders' Meeting dated 22 Aug. 2023 (**Exh. C-345**), at 1-2 (showing that the two shareholders unanimously decided to waive Pacific Solar's right to pursue domestic remedies in accordance with CAFTA-DR).

⁹¹⁷ See, e.g., Minutes No. 16 of Pacific Solar's Shareholders' Meeting dated 12 July 2018 (**Exh. C-341**), at 3-4 (showing that Mr. Paiz presided the meeting and proposed the substitution of one of the board members and the reelection of the other three); Minutes No. 17 of Pacific Solar's Shareholders' Meetings dated 15 Oct. 2019 (**Exh. C-342**), at 4-5 (same); Minutes No. 19 of Pacific Solar's Shareholders' Meeting dated 19 Jan. 2021 (**Exh. C-343**), at 1-2 (showing that Mr. Paiz proposed the revocation of a POA and the appointment of an individual to Pacific Solar's board); Minutes No. 20 of Pacific Solar's Shareholders' Meeting dated 19 Jan. 2021 (**Exh. C-344**), at 1-2 (showing that Mr. Paiz proposed the authorization for [REDACTED] to enter into a loan agreement on behalf of Pacific Solar).

⁹¹⁸ Reply on Jurisdiction ¶ 181.

shareholders' meetings, here, [REDACTED] does not even need to give any instruction to [REDACTED] to vote in the meetings because [REDACTED] attends the meetings itself.

309. Finally, Claimants have also established that Pacific Solar itself still has control over the Plant under the Assets Trust Agreement, in particular because it retained the right to operate it, to receive the proceeds from the Plant necessary to conduct those operations, and to exercise all other rights arising from the Agreements.⁹¹⁹ In this regard, Respondent argues that Claimants have not shown that they operate and control the Plant. This is incorrect. As confirmed by Mr. Paiz, he “make[s] all the important decisions related to Pacific Solar.”⁹²⁰ Accordingly, Claimants undoubtedly control Pacific Solar, in addition to owning it.

V. RESERVATION OF RIGHTS

310. Claimants reserve all of their rights, including the right to vary, amend, and/or supplement this Rejoinder on Jurisdiction and/or subsequent pleadings, and in particular its claims for relief, to the full extent permitted by the Treaty, the ICSID Rules, and applicable law, including in light of further actions on the part of Honduras with respect to Claimants' investments.

⁹¹⁹ Counter-Memorial on Jurisdiction ¶ 185; *see also* Assets Trust Agreement (Exh. C-267), [REDACTED].

⁹²⁰ Paiz WS II ¶ 6.

VI. REQUEST FOR RELIEF

311. For the foregoing reasons, Claimants respectfully request a decision:

- (a) Rejecting Respondent's bifurcated objections;
- (b) Denying Respondent's request to bifurcate the limitations period, contract claims, and ownership objections, or if bifurcation is granted, dismissing all objections during the bifurcated phase;
- (c) Finding that Respondent has withdrawn the objection with respect to Ms. Paiz's notice, and it should be precluded from subsequently raising it;
- (d) Ordering Respondent pursuant to ICSID Arbitration Rule 52 to pay all the costs associated with the bifurcated phase, including without limitation, Claimants' legal costs, expert fees, and in-house costs, the fees and expenses of the Tribunal, and ICSID's costs, with interest running as of the date of the decision at a rate to be established in due course; and
- (e) grant any other relief that the Tribunal may deem just and proper.

Respectfully submitted,


White & Case LLP

Counsel for Claimants

4 July 2025