

Pedro Barquero

Fernando Paiz Andrade

BY COURIER & EMAIL

October 10th, 2022

Minister Pedro Barquero
Dirección General de Integración Económica y Política Comercial
Secretaría de Desarrollo Económico
Centro Cívico Gubernamental
Boulevard Juan Pablo II
Torre 1, Pisos 8 y 9
Tegucigalpa, Honduras

Re: **Notice of Intent Under the Dominican Republic – Central America – United States Free Trade Agreement**

Dear Minister Pedro Barquero:

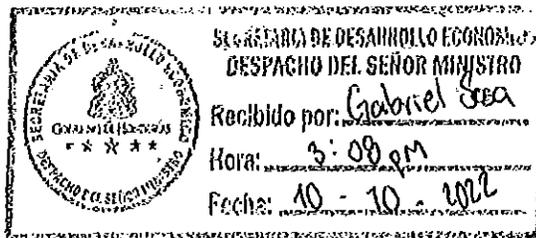
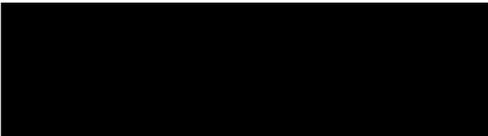
I, Fernando Paiz Andrade (the "Investor"), write to you (i) on my own behalf as a citizen of Guatemala, who has invested in Pacific Solar Energy, S.A. de C.V. ("Pacific Solar Energy" or the "Enterprise"), a company incorporated in the Republic of Honduras ("Honduras") in accordance with Article 10.16.1(a) of the Dominican Republic – Central America – United States Free Trade Agreement (the "Treaty");¹ and, (ii) on behalf of Pacific Solar Energy, pursuant to Article 10.16.1(b) of the Treaty.

In accordance with Articles 10.15 and 10.16 of the Treaty, and with a view towards resolving this dispute amicably through consultation and negotiation, the Investor respectfully submits to Honduras this written notice of its intention to submit a claim to arbitration—on his own behalf and on behalf of Pacific Solar Energy—under Chapter 10 of the Treaty. As further detailed below, the Investor's claims are based on Honduras's breaches of its obligations under Chapter 10 of the Treaty.

The Investor and His Investment

The Investor's name and address are:

Mr. Fernando Paiz Andrade



¹ The Dominican Republic – Central America – United States Free Trade Agreement, as between the Governments of the Republic of Costa Rica, the Dominican Republic, the Republic of El Salvador, the Republic of Guatemala, the Republic of Honduras, the Republic of Nicaragua, and the United States of America (the "Parties"), was signed on May 28, 2004, and entered into force on January 1, 2009, for all Parties.

The name and address of the Enterprise are:

Pacific Solar Energy, S.A. de C.V.
Centro Comercial Los Próceres, 2do. Nivel, Local 204 A
Tegucigalpa, Honduras

The Enterprise is incorporated in the Republic of Honduras.

The Investor has made investments in the renewable energy sector in Honduras. Specifically, the Investor owns a 100% participation in Pacific Solar Energy, which built, operates, and maintains the Nacaome I photovoltaic plant in Nacaome, Honduras (the "Plant"). Pacific Solar Energy sells the energy that the Plant produces to Empresa Nacional de Energía Eléctrica ("ENEE"), pursuant to a Power Purchase Agreement executed by and between Pacific Solar Energy and ENEE in January 2014 (the "PPA").²

In making his investment, the Investor relied on Honduras's legal framework, including *inter alia*, the General Law of the Electricity Sector;³ and the Law Promoting the Generation of Electricity with Renewable Resources ("Renewables Law") and its Amendment, published on October 2, 2007, and August 1, 2013, respectively.⁴ The Renewables Law, for instance, granted investors, among other benefits: tax exemptions, payment of incentives, and the possibility of extending power purchase agreements through a project's complete useful life. The Investor also relied on: (i) the PPA, wherein, among other obligations, ENEE agreed to buy and dispatch all the energy the Plant produced and delivered under the terms specified in the PPA; and, (ii) the State guarantee that confirmed the State's joint liability for ENEE's obligations under the PPA (the "State Guarantee").⁵

Factual Basis for the Investor's Claim

Honduras's conduct, including through the Ministry of Energy, the Ministry of Finance, ENEE, and various Honduran officials, has harmed the Investor's investment. Among other things, Honduras has:

² Contrato 002-2014 "Suministro de Potencia y Energía Eléctrica Asociada suscrito entre la Empresa Nacional de Energía Eléctrica y la Sociedad Mercantil Pacific Solar Energy, S.A. de C.V.," dated January 16, 2014, and published in Honduras's Official Gazette on May 10, 2014 (the "PPA").

³ Decree No. 404-2013, "Ley General de la Industria Eléctrica," published in Honduras's Official Gazette on May 20, 2014.

⁴ Decree No. 70-2007, "Ley de Promoción a la Generación de Energía Eléctrica con Recursos Renovables," published in Honduras's Official Gazette on October 2, 2007 (the "Renewables Law"); Decree No. 70-2007 was later amended through Decree No. 138-2013, published in Honduras's Official Gazette on August 1, 2013.

⁵ "Acuerdo de Apoyo y Aval Solidario del Estado de Honduras para el Cumplimiento del Contrato de Suministro, entre la Empresa Nacional de Energía Eléctrica y Pacific Solar Energy, S.A. de C.V. Contrato 002-2014," ratified on October 1, 2014 (the "State Guarantee").

- Been jeopardizing the viability of the investment by failing to compensate Pacific Solar Energy for dispatched energy, interest, and energy curtailments; and arbitrarily curtailing the Plant's energy dispatch, in violation of the PPA⁶ and the State Guarantee.⁷
- Further eroded the value of the investment by enacting the "New Energy Law" in May 2022 to the detriment of the Investor and the Enterprise. Specifically, the New Energy Law imposed the "renegotiation" of agreements with power generators, including the PPA, to reduce prices at which Honduras, through ENEE, purchases energy and power generated by renewable energy plants, including solar plants.⁸ The New Energy Law also threatened the Investor and the Enterprise by authorizing ENEE "to propose the termination of the contractual relationship and the acquisition at a fair value price [*justiprecio*]," in the event that "renegotiation is not possible."⁹ While the New Energy Law acknowledged ENEE's staggering debt to generators like Pacific Solar Energy, it only mandated ENEE to reconcile late payments with generation companies "with whom it has delays of up to one year."¹⁰
- Acted arbitrarily and without transparency. Before the National Congress approved the New Energy Law, Honduras called Pacific Solar Energy for a meeting with the Minister of Energy, the Minister of Finance, and ENEE. During the meeting, ENEE handed to the Enterprise a piece of paper entitled "Offer," which indicated a significantly lower price of energy and eliminated key rights under the PPA. Additional meetings occurred, but amidst uncertainty and a lack of transparency. For example, Honduras did not even confirm the framework under which the discussions were taking place. Moreover, Honduras sent invitations to meet from personal e-mail accounts, and published the results of the "renegotiations" with generators under the New Energy Law via social media. The informality and unpredictability of these meetings, the mixed messages on the Government's goals and implications, and the lack of technical and legal support, have resulted in a non-transparent setting to negotiate a solution.

Notwithstanding the detrimental implications of Honduras's "Offer" and the lack of transparency during the discussions, we engaged with Honduras in good faith to explore mutually beneficial solutions. However, in a recent meeting, held at ENEE's headquarters on July 28, 2022, Honduras announced that it would unilaterally impose an energy price that is lower than the one set under the PPA, eliminate the payment for capacity and the "legal incentive" for renewable energy, and

⁶ PPA, Clauses 2.3, 2.4, 9.1, 9.2, 9.5.1, 9.6.3; *see also id.*, Section I, Letter G.

⁷ State Guarantee, Clause 4.2.

⁸ Decree No. 46-2022, "Ley Especial para Garantizar el Servicio de la Energía Eléctrica como un Bien Público de Seguridad Nacional y un Derecho Humano de Naturaleza Económica y Social," published in Honduras's Official Gazette on May 16, 2022 (the "New Energy Law"), Article 5 ("Se autoriza a la Empresa Nacional de Energía Eléctrica (ENEE) para que, a través de la Junta Directiva y la Gerencia, con base en la legislación nacional y las cláusulas contractuales, plantee bajo sus prerrogativas y facultades y, por razones de interés público, la renegociación de los contratos y los precios a los que el Estado a través de la Empresa Nacional de Energía Eléctrica (ENEE), adquiere el servicio de energía hídrica, solar y eólica tomando como referencia los precios de la región Centroamericana, Caribe y América Latina.").

⁹ The New Energy Law, Article 5 ("En caso de no ser posible la renegociación, se autoriza plantear la terminación de la relación contractual y la adquisición por parte del Estado, previo el justiprecio.").

¹⁰ The New Energy Law, Articles 5, 6, 15-16.

that it had appointed an Audit Commission to review the financial situation of power generators such as the Enterprise. Honduras's conduct is in breach of the Treaty and disregards the rights of the Investor and the Enterprise.

Legal Basis for the Investor's Claim

Through its conduct described above, Honduras has breached numerous obligations under Chapter 10 of the Treaty and has caused damages arising out of those breaches to the Investor and the Enterprise. Honduras's breaches include its Treaty obligations (i) to afford the minimum standard of treatment, including fair and equitable treatment and full protection and security;¹¹ (ii) not to expropriate the Investor's investment directly or indirectly through measures equivalent to expropriation;¹² (iii) not to breach an investment agreement or investment authorization;¹³ and, (iv) to accord the Investor and the Enterprise National Treatment and Most-Favored-Nation treatment.¹⁴

Relief Sought and Damages Claimed

As a consequence of Honduras's breaches, the Investor and the Enterprise have incurred, and are continuing to incur, significant and mounting losses. The Investor anticipates claiming an approximate amount, including damages of [REDACTED] (i.e., US\$150 million), as well as any other applicable relief.

The Investor reserves its rights to amend, supplement, or restate its claims, and to seek further relief as is appropriate, including with respect to future losses and harm resulting from Honduras's breaches of the Treaty and international law, on his own behalf and on behalf of the Enterprise.

Request for Consultations and Negotiations

Article 10.15 of the Treaty provides that the Investor and Honduras shall hold consultations and negotiations in an attempt to resolve the dispute amicably. In good faith and in the spirit of cooperation, the Investor respectfully requests Honduras engage in consultations and negotiations with a view to achieve an amicable, mutually acceptable resolution of the above-described dispute. If such consultations and negotiations with Honduras do not lead to a satisfactory resolution, the Investor reserves its right to submit a claim to international arbitration, on his own behalf and on behalf of Pacific Solar Energy, under the Treaty.

¹¹ Treaty, Chapter 10, Article 10.5 (Minimum Standard of Treatment).

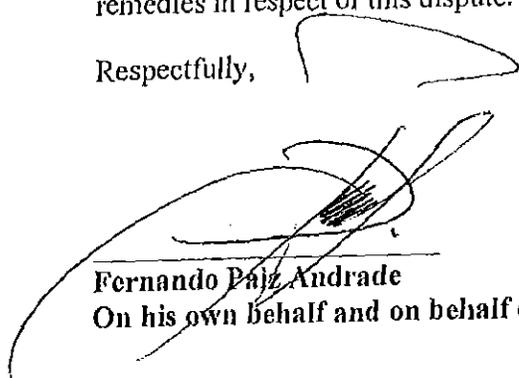
¹² Treaty, Chapter 10, Article 10.7 (Expropriation and Compensation); Annex 10-C (Expropriation).

¹³ Treaty, Chapter 10, Article 10.16 (Submission of a Claim to Arbitration).

¹⁴ Treaty, Chapter 10, Article 10.3 (National Treatment), Article 10.4 (Most-Favored-Nation Treatment).

Finally, nothing in this notice should be interpreted as a limitation of the factual or legal bases on which the Investor may rely before an arbitral tribunal. The Investor fully reserves its rights and remedies in respect of this dispute.

Respectfully,



Fernando Paiz Andrade
On his own behalf and on behalf of Pacific Solar Energy

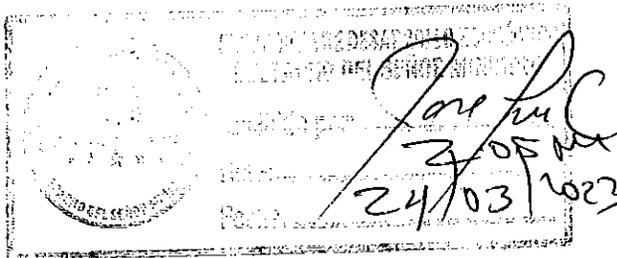
cc: Erick Tejada, Minister of Energy of the Republic of Honduras and General Manager of ENEE
Rixi Moncada, Minister of Finance of the Republic of Honduras
Manuel Antonio Díaz Galeas, Attorney General of the Republic of Honduras
Eduardo Antonio Escobedo Sanabria, Ambassador of the Republic of Guatemala to the Republic of Honduras

Pedro Barquero

WHITE & CASE

March 24, 2023

VIA COURIER



Pedro Barquero
Minister of Economic Development of the Republic of Honduras
Erick Tejada Carbajal
Minister of Energy
Interim Manager of the Empresa Nacional de Energía Eléctrica
Republic of Honduras

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**Re: Notice of Intent to Submit a Claim to Arbitration under the Dominican Republic – Central America – United States Free Trade Agreement (“CAFTA-DR”);
Follow Up Letters**

Dear Ministers,

We write on behalf of (i) Mr. Fernando Paiz Andrade following up on the Notice of Intent to Submit a Claim to Arbitration under the Dominican Republic – Central America – United States Free Trade Agreement (“CAFTA-DR”), of October 10, 2022, and the follow-up letters of November 11, 2022, January 10, 2023, and February 13, 2023 (the “Follow-Up Letters”), attached hereto as **Annex A**, which Mr. Fernando Paiz Andrade sent the Republic of Honduras (“Honduras” or the “Government”), on his own behalf and on behalf of Pacific Solar Energy, S.A. de C.V. (“Pacific Solar” or the “Enterprise”); and (ii) Ms. Anabella Schloesser de Paiz, a national of Guatemala¹ and investor in Pacific Solar (together with Mr. Paiz, the “Investors”), who submits this written notice of her intention to submit a claim to arbitration under Chapter 10 of CAFTA-DR based on Honduras’s breaches harming the investment in Pacific Solar.²

The Government has failed to engage meaningfully with the good-faith efforts to resolve Pacific Solar’s situation and has not responded to these communications, beyond acknowledging receipt. Despite purportedly inviting generators like Pacific Solar to negotiate, the Government continues to drag them along, while retaining compensation duly owed to Pacific Solar and arbitrarily curtailing the plant’s energy dispatch.

In this context, in accordance with CAFTA-DR, the Investors invite Honduras to engage in good faith consultations and negotiations with the Honduras State to resolve the existing dispute.

² Ms. Paiz confirms that the provisions that Honduras breached, the legal and factual basis for each claim, and the relief and approximate amount of damages claimed are the same as those specified in Mr. Paiz’s Notice (Annex A).

For the avoidance of doubt, this letter does not constitute a waiver of any right, and the Investors and Pacific Solar fully reserve their rights under applicable law and instruments.

We look forward to your response.

Respectfully,

White & Case LLP

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cc: **Rixi Moncada**, Minister of Finance of the Republic of Honduras
Manuel Antonio Díaz Galeas, Attorney General of the Republic of Honduras
Eduardo Antonio Escobedo Sanabria, Ambassador of the Republic of Guatemala to the Republic of Honduras
Héctor Manuel Zelaya, Private Secretary to the Office of President Xiomara Castro