ARBITRATION BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/23/43

FERNANDO PAIZ ANDRADE AND ANABELLA SCHLOESSER DE LEÓN DE PAIZ

(Claimants)

v.

REPUBLIC OF HONDURAS

(Respondent)

MEMORIAL ON JURISDICTIONAL OBJECTIONS OF THE REPUBLIC OF HONDURAS

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25 February 2025

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I. INTRODUCTION

1. Throughout this brief, the Republic of Honduras ("**Honduras**" or the "**Republic**") demonstrates how the claim brought by Fernando Paiz and Anabella Schloesser de Paiz (the "**Claimants**" or the "**Paizes**") on their own behalf and on behalf of Pacific Solar Energy S.A. de C.V. ("**Pacific Solar**") is beyond the jurisdiction and competence of the Tribunal and should therefore be dismissed in its entirety.

2. The present arbitration constitutes an abuse of the investor-State dispute settlement system by the Claimants that cannot be accepted by the Tribunal, as explained below.

3. To begin, due to certain structural financial problems in the electricity generation market in Honduras, there is a long-standing dispute between Pacific Solar and Empresa Nacional de Energía Eléctrica ("**ENEE**") over the proper interpretation and enforcement of Contract No. 002-2014 entered into between them in 2014 ("**Contract**" or "**PPA**").

4. For reasons unknown to Honduras, the Paizes, who have not yet demonstrated any connection to Pacific Solar, chose to bring that dispute before this Tribunal as if it were a dispute over alleged breaches of the United States-Central America-Dominican Republic Free Trade Agreement ("**CAFTA-DR**" or the "**Agreement**"). The Claimants' attempt to internationalize a dispute that is essentially domestic and is based almost exclusively on Honduras' enactment of Decree 46-2022 in 2022 (the "**Decree 46-2022**," or the "**Decree**").

5. The Decree has in no way modified the PPA. After its enactment, the PPA continues to be executed in the same manner as it has been since its inception, thereby rendering Claimants' artificial maneuvers severe jurisdictional defects. Indeed, the Paizes have failed miserably to bring a dispute within Honduras' consent, as set out in the Treaty and the ICSID Convention.

6. The Republic's present submission begins by briefly explaining the facts relevant to the Tribunal's jurisdiction, correcting Claimants' multiple errors, misrepresentations, and omissions (**Chapter II**). In particular, it details the irregular origins of the Contract in the context of the so-called "Parliamentary Robbery of the Century," along with an objective analysis of its terms (**Section II.A.1.**). It also explains that issues with the execution of the Contract, which constitute the real dispute in this case, are not recent, let alone stemming from Decree 46-2022

(**Section II.A.2.**). Moreover, it is submitted that the Claimants knew or should have known about ENEE's delicate financial situation before the Nacaome Plant started operating (**Section II.A.3.**). Likewise, it is demonstrated that the ownership of the Paizes' alleged investment is uncertain to date and the Claimants have not conclusively proved it (**Section II.A.4.**). Finally, it details the scope of Decree 46-2022 and how it has not affected Pacific Solar or the Paizes in any way (**Section II.B.**).

7. The Republic's jurisdictional objections are subsequently set out (**Chapter III**). Pursuant to the Tribunal's request in Procedural Order No. 3, Honduras submits certain additional objections that were not included in the Bifurcation Request.

8. *First*, the Tribunal lacks jurisdiction on the ground that the Claimants failed to comply with the exhaustion of domestic remedies requirement prior to resorting to arbitration. By ratifying its approval of the ICSID Convention through Decree No. 41-88, the Republic of Honduras conditioned its consent to international arbitration under the ICSID Convention on the prior exhaustion of domestic remedies. This possibility is enshrined in Article 26 of the ICSID Convention, which provides that "[a] Contracting State may require the prior exhaustion of its administrative or judicial remedies." As such, the Paizes should have pursued and exhausted the available domestic remedies for the resolution of their disputes with ENEE prior to initiating the present international arbitration (**Section III.A**).

9. *Second*, the Tribunal lacks jurisdiction because the Claimants' claims are time-barred. According to the Treaty, "[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". As the Republic will demonstrate, the vast majority of the claims raised by Claimants, including non-payment, limitations on energy dispatch, and other alleged contractual breaches, originate prior to the enactment of Decree No. 46-2022 and, in any event, Claimants knew or should have known of them over three years prior to the filing of their notice of arbitration. Indeed, the contractual claims brought by Claimants have an inception date close to Pacific Energy's entry into commercial operation and have extended throughout the life of the contractual relationship (**Section III.B**).

10. *Third*, Claimants have not demonstrated that they own their alleged investment. Moreover, they have not even attempted to support the complex corporate structure under which they claim to indirectly control 100% of Pacific Solar. On the contrary, all available evidence indicates that Pacific Solar is no longer the owner of the investment as it assigned ownership and title to the PPA and the Nacaome Plant to a Honduran bank through the constitution of a guaranteed trust. (**Section III.C**).

11. *Fourth*, Claimants cannot import an umbrella clause through the Most Favored Nation ("**MFN**") clause of the Treaty for at least two reasons. First, Article 10.13(5) of the Treaty expressly excludes government procurement from MFN treatment. Thus, the purchase of electric power under the PPA, being a government procurement, excludes the application of the MFN clause in its regard. Second, and more generally, the MFN clause does not permit the importation of entirely new standards of protection to create substantive rights that are not expressly provided for in the Treaty (**Section III.D**).

12. *Fifth*, Claimants cannot prove that the dispute arises out of an investment agreement under Article 10.28 CAFTA-DR. Although they argue that the PPA, the State Guarantee and the Operations Agreement qualify as investment agreements, these instruments do not meet the requirements set forth in the Treaty for multiple reasons: *First*, ENEE does not constitute a "national authority" as it is an autonomous public enterprise outside the central level of government; *Second*, the agreements were not executed between a Honduran national authority and a covered investment or investor of another Contracting Party, as Pacific Solar was a Honduran company controlled by Honduran nationals at the time of signature; *Third*, the agreements do not grant rights over natural resources controlled by national authorities, as the solar resource cannot be controlled by the State; and *Fourth*, there is a conceptual contradiction in claiming that the same agreements are simultaneously the basis for the investment and the covered investment. Consequently, the Tribunal lacks jurisdiction *ratione materiae* to hear the claim presented (**Section III.E**).

13. *Sixth*, the Claimants' claims are purely contractual and thus not covered by the Treaty. In essence, the Paizes claim the fulfilment of a payment obligation and compliance with contractual provisions by ENEE, which are in dispute. In other words, at no time has ENEE acted

as anything more than a contractual counterparty, which is alleged to have committed a breach, making it impossible for ENEE to have incurred a breach of the Treaty that could be cognizable by the Tribunal. In addition, all the agreements invoked by the Claimants have their own choice of forum and dispute resolution clauses. The Tribunal is bound to give effect to those clauses—as accepted by the Claimants—should it decide that it can hear the contractual claims (**Section III.F**).

14. Finally, Honduras respectfully requests the Tribunal to declare the claims inadmissible and/or outside its jurisdiction (**Chapter IV**). In addition, the Republic requests the Tribunal to order the Claimants to pay all costs of this arbitration, including professional fees and expenses incurred by Honduras, the Tribunal, and ICSID, with interest on those amounts.

II. FACTUAL BACKGROUND

A. The PPA between Pacific Solar and ENEE

15. Claimants omit matters fundamental to the Tribunal's establishment of jurisdiction in their Statement of Claim. This situation obliges the Republic to provide a brief description of the main facts that support its jurisdictional objections and provide clarity to the Tribunal on the true dimension of the present dispute.

16. This Section sets out the circumstances under which the Pacific Solar PPA was approved by the National Congress, and who the proponents of this Contract were (**Subsection 1**). It also demonstrates that the claims presented in this arbitration are merely contractual and have been present since the inception of the PPA (**Subsection 2**), and the true economic cost that the PPA and other supply contracts with electricity generators have had on the finances of the State of Honduras (**Subsection 3**). Finally, it clearly demonstrates the lack of proof of the Claimants' ownership of their alleged investment, which in any case would have been fully assigned to their financiers (**Subsection 4**).

1. The PPA was riddled with irregularities from its inception because it was passed as part of the so-called "Parliamentary Robbery of the Century."

17. The Paizes only indicate that the PPA was signed in January 2014 and that Congress subsequently approved it.[1] At no point do they mention the circumstances under which the PPA was approved by the National Congress. The Claimants conveniently chose to omit entirely that the approval of the PPA—and dozens of other energy supply contracts—resulted in one of the biggest political scandals Honduras has ever seen.[2]

18. The approval of the solar energy contracts was a scandal born out of the hand of now-convicted former president Juan Orlando Hernández who, prior to be elected President of the Republic, was President of the National Congress. Despite being victorious in the 2013 presidential elections, his political party, the National Party, did not win enough seats in Congress to form a simple majority, so his next legislative agenda would have been paralyzed once he came to power.[3]

19. Article 189 of the Constitution of Honduras, which establishes the National Congress, states that it "shall meet in ordinary sessions [...] on January 25th of each year, without notice, and will close its sessions on October 31st of the same year."[4] However, the legislative sessions of Congress can be extended by resolution of the Congress itself.[5] Using this loophole, on 6 September 2013, Congress approved Decree No. 210-2013 by which it established, on a transitional basis, that it would enable a legislative session from 1 November 2013 to 19 January

[1] Memorial on the Merits, ¶ 51.

[2] "Massive approval of contracts and decrees," *El Heraldo* (7 April 2014) (**R-022**). *See also* "Learn about some of the decrees approved in the so called 'Parliamentary Robbery of the Century in Honduras,'" *Criterio* (21 November 2017) (**R-035**).

[3] EU Election Observation Mission: Honduras, Final Report on the General Elections (2013) (**R-020_ENG**), p. [28] ("The results of the elections to the National Congress […] were unprecedented in that never before has the ruling party held such a small number of seats. The National Party, with the greatest number of seats, has just 48 members of Congress, 23 fewer than the 71 it held during the outgoing Congress. As a result it will need to seek alliances with other parties to reach a simple majority (65 votes) necessary for approving legislation.").

[4] Political Constitution of the Republic of Honduras (20 January 1982) (**R-015**), Art. 189.

[5] *Ibid*., Art. 189.

2014.[6] Thus, the National Congress (2010-2014) could only perform valid acts until 19 January 2014. Any decree passed after that date would become unconstitutional.[7]

20. Thus, Juan Orlando Hernández proceeded to dedicate his last two weeks as President of the National Congress to approving all legislative projects that advanced his interests and those of his allies. In just one day - 20 January 2014 - the National Congress, outside its legislative period, **approved 67 legislative decrees**, approving therein around 100 renewable energy generation contracts. Likewise, a series of crucial laws, including the Organic Law of the Legislative Power and the Budget Law of the Republic for the year 2014,[8] which could hinder the illegitimate acts that the president who was about to take office had been forging since he was in Congress, were approved. This was a clear and profound blow against the institutionality of the Republic of Honduras, which was subsequently denounced as the "Parliamentary Robbery of the Century."[9]

21. The decrees passed were targeted at politicians, drug traffickers and well-known businessmen in Honduras. Pacific Solar was no exception, as it was an inexperienced paper company.[10]

22. Pacific Solar lacked experience in the photovoltaic ("**PV**") industry, which explains Claimants' conservative description of it, merely citing Mr. Fernando Paiz's experience in geothermal energy projects in Nicaragua.[11] Indeed, the Claimants themselves state that they invested in Pacific Solar in "February 2015, **after** Pacific Solar entered into the long-term

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[6] Decree Establishing the Ordinary Sessions of the National Congress (Decree No. 210-2013) (13 June 2013) (**R-021**), Art. 1.

[7] Constitutional Justice Act, 2004 (**R-018**), Art. 75 ("Laws may be declared unconstitutional on grounds of form or content [...]. In form, when the legislative process established in the Constitution has not been observed [...].").

[8] "Learn about some of the decrees approved in the so called 'Parliamentary Robbery of the Century in Honduras,'" *Criterion* (21 November 2017) (**R-035**).

[9] "Deputies present evidence of what they call the 'Parliamentary Robbery of the Century in Honduras'" *Criterio* (Nov. 21, 2017) (**R-036**); "Learn about some of the decrees approved in the so called 'Parliamentary Robbery of the Century in Honduras,'" *Criterio* (Nov. 21, 2017) (**R-035**).

[10] "State turns renewable energy into a business for politicians, drug traffickers and entrepreneurs," *Radio Progreso* (5 November 2021) (**R-057**).

[11] Memorial on the Merits, ¶ 49.

Agreements [...]."[12] In other words, it was not the Paizes who carried out the procedures to conclude the PPA, the State Guarantee or the Operations Agreement, but rather, Pacific Solar's founders, [redacted],[13] the latter being the one who actually signed the PPA.[14]

23. Nowhere in its Memorial do the Claimants refer to the experience of Pacific Solar or its original executives in the electricity market prior to the subscription of the PPA. The reason is simple; such experience does not exist. As the Claimants' Memorial indicates, Pacific Solar was incorporated on 30 September 2013 "[t]o pursue the opportunities in renewables that emerged after the enactment of the 2013 Renewables Law.[15]

24. One of the businessmen who benefited from the "parliamentary theft" was [redacted],[16] who not only obtained the approval of Pacific Solar's PPA, but also of the company Producción de Energía Solar y Demás Renovables, S.A. (PRODERSSA).[17]

25. Thus, with the clear intention of selling this power purchase agreement to the highest bidder, [redacted] sold all their shares in Pacific Solar to [redacted] and Mr. Fernando Paiz on 19 December 2014.[18] Despite clear indications of irregularities surrounding the approval of the contracts,[19] the Claimants decided to ignore these indications and allegedly purchased shares in Pacific Solar.

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[12] Memorial on the Merits, ¶ 50.

[13] Articles of Incorporation of Pacific Solar Energy S.A. de C.V. (10 September 2013) (**C-072**), p. 5 [PDF].

[14] Contract No. 002-2014, between Empresa Nacional de Energía Eléctrica and Pacific Solar Energy, S.A. de C.V. ("**Contract No. 002-2014**") (16 January 2014) (**C-001**), p. 4.

[15] Memorial on the Merits, ¶ 49.

[16] "Callejas' son-in-law posted bail in New York," *El Heraldo* (18 December 2015) (**R-030**).

[17] "ASJ 'strips' solar power business and the Hospitals Czar," *Proceso* (Nov. 22, 2018) (**R-045**).

[18] Certification of Minutes No. 4 of the General Shareholders' Meeting of Pacific Solar Energy S.A. de C.V. (19 December 2014) (**R-027**).

[19] "Massive approval of contracts and decrees," *El Heraldo* (7 April 2014) (**R-022**).

2. Claimants knew or should have known that their contractual claims have been present since the inception of the PPA.

26. In their Statement of Claim, the Claimants describe the rights and obligations under the PPA without providing any context as to the disagreements that have existed since the inception of the contractual relationship between ENEE and Pacific Solar, as well as the alleged breaches of the PPA.

27. Honduras demonstrates below that most of the alleged breaches of the PPA have been under discussion between the parties long before Claimants filed their Notice of Arbitration and thus make it clear that the 2022 Energy Law is a mere pretext for bringing an entirely contractual dispute to this arbitration which, in any event, is outside the jurisdiction of the present Tribunal.

a. The PPA is a commercial agreement for governmental purposes for the provision of a public service.

28. Through the PPA, ENEE contractually committed to purchase the electrical energy and power delivered by the PV plant to be built by Pacific Solar, a commercial company incorporated under the laws of the Republic of Honduras.[20] ENEE is an autonomous public service organization, with legal personality and capacity, as well as its own assets.[21] Furthermore, according to the General Law of Public Administration, ENEE qualifies as a public company, created to develop economic activities in the service of various purposes, which does not take the form of a traditional commercial company.[22]

29. For these purposes, Pacific Solar undertook, at its own risk and expense, to construct, operate and maintain a generating plant, which would be located in the Nacaome Valley in the southern region of Honduras (hereinafter the "**Nacaome Plant**"), in accordance with the technical specifications set out in the PPA.[23] According to the PPA, the Nacaome Plant would have

[20] Contract No. 002-2014 (**C-001**), Clause 2.1.

[21] Act Establishing the Empresa Nacional de Energía Eléctrica, 1957 (Decree No. 48 of 1957) ("**Decree No. 48 of 1957**") (27 February 1957) (**C-006**), Art. 1.

[22] Ley General de la Administración Pública (Decreto No. 146-86) (29 October 1966) (**C-061**), Art. 53.

[23] Contract No. 002-2014 (**C-001**), Clause 2.1 and 2.2.

a maximum installed capacity of 49.90MW.[24] The PPA also states that it will have a life of 20 years from the date of commencement of commercial operation.[25] These are all contractual specifications regarding the operation of the Nacaome plant.

30. Notwithstanding the Claimants' attempt to artificially elevate this dispute to an international dispute, the reality is that all the actions to which they refer could only be characterized as breaches of contractual commitments,[26] as will be discussed in more detail in Section III.F below.

b. The State Guarantee and the Operations Agreement are ancillary documents that do not provide the guarantees alleged by the Claimants.

31. The Claimants present the PPA as part of what they call "the Agreements," which would include the State Guarantee, and the Operations Agreement, in an unsuccessful attempt to elevate the status of the PPA to a legal stability framework agreement of some sort, that would completely limit the State's inherent right to regulate its industrial sectors. This characterization is manifestly incorrect.

(1.) The State Guarantee is not a guarantee of legal stability.

32. Claimants erroneously contend that the Solidarity Support and Guarantee Agreement (hereinafter "**State Guarantee**") constitutes a broad guarantee by the State of Honduras, which not only covers ENEE's obligations under the PPA, but would also guarantee the long-term stability of Claimants' investment.[27] This interpretation contradicts the specific nature and purpose of the document, which is limited to being a financial support agreement.

33. The State Guarantee, signed on 1 October 2014 between the State - represented by the Attorney General's Office and the Secretary of State in the Office of Finance - and Pacific Solar, has a clearly defined and limited scope: to guarantee the payment of ENEE's monetary

[24] Contract No. 002-2014 (**C-001**), § C.

[25] Contract No. 002-2014 (**C-001**), § B.

[26] Memorial on the Merits, ¶¶ 189-192.

[27] Memorial on the Merits, ¶ 56.

obligations vis-à-vis Pacific Solar.[28] This agreement, covered by Article 4 of the 2007 Renewable Energy Law[29] and provided for in Annex X of the PPA,[30] specifically states that "[t]he State's payment obligation hereunder shall be joint and several with respect to the obligations owed by ENEE."[31] It is telling that, despite emphasizing this provision,[32] the Claimants have not brought a single instance in which they have sought to enforce the Aval Solidario against the State of Honduras.

(2.) The Operations Agreement is not a guarantee of legal stability either.

34. Claimants erroneously argue that the Operations Agreement for the Generation, Transmission and Commercialization of Electric Energy (hereinafter the "Operations Agreement"),[33] entered into between Pacific Solar and the Secretary of State in the Offices of Natural Resources, Environment and Mines (hereinafter "**SERNA**") on 23 February 2014, establishes new commitments by the State.[34] However, this document is essentially a technical instrument that simply authorizes the construction, ownership and operation of a power plant, without creating additional substantive obligations for ENEE or the State beyond those already contemplated in the PPA.[35] On the contrary, the Operations Agreement mainly imposes conditions on Pacific Solar with respect to the technical specifications it must comply with.

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[28] Support Agreement and Guarantee of Solidarity of the State of Honduras for the fulfillment of the Contract of Supply, between Empresa Nacional de Energía Eléctrica and Pacific Solar Energy Contract No. 002-2014 (Decree No. 113-2014 ("**Decree No. 113-2014**") (19 November 2014) (**C-002**).

[29] Law Promoting the Generation of Electricity with Renewable Resources ("**Decree No. 70-2007**") (2 October 2007) (**C-004**), Art. 4.

[30] Contract No. 002-2014 (**C-001**), Clause 9.7.

[31] Decree 113-2014 (**C-002**), Art. 4.2.

[32] Memorial on the Merits, ¶ 61.

[33] Operations Agreement between Pacific Solar and the Ministry of Energy, Natural Resources, Environment and Mines (Decree No. 109-2015) ("Operations Agreement") (26 October 2015) (**C-003**).

[34] Memorial on the Merits, ¶ 62.

[35] Operating Contract (**C-003**).

35. The Claimants attempt to distort the scope of the Operations Agreement by claiming that it guarantees certain rights and incentives,[36] when in fact it only makes general references to benefits already contemplated in the PPA. In particular, the provision stating that "the Secretariat shall provide the necessary assistance for the Generating Company to obtain the exemptions and support established in the provisions contained in the decrees"[37] refers specifically to tax exemptions, not to general economic guarantees as alleged by the Claimants. Moreover, their argument about the alleged mandatory dispatch of energy ignores that this obligation was conditioned on "the Operating Regulations of the National Interconnected System not having been officially issued,"[38] that entered into force on 18 November 2015,[39] almost a year before Pacific Solar began operations, establishing the power of the National Dispatch Centre to make limitations for reasons of operational security.[40]

c. Pacific Solar's contractual claims are not new, much less generated by Executive Order 46-2022.

36. The Claimants conveniently present Pacific Solar's compensation model as a situation that is not in dispute between the parties to the PPA.[41] While Honduras does not dispute the price of energy (US$114.14/Mwh) and the applicable incentives (additional 10%) under the PPA, it does take issue with Claimants' interpretation of the limitations on compensation payments, and their narrative that Pacific Solar's failure to pay its invoices began only after Decree 46-2022 came into force.[42]

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[36] Memorial on the Merits, ¶ 62.

[37] Operating Contract (**C-003**), Clause 1.4.7.

[38] *See also* Memorial on the Merits, 62 ("The Operations Agreement further provided that Pacific Solar must deliver to the CND all available power generation capacity of the Plant, and the CND must receive and dispatch all generated electricity at the delivery point agreed to in the PPA").

[39] CREE - Regulation on the Operation of the System and Administration of the Wholesale Market (18 November 2015) (**R-029**).

[40] *Ibid*., Art. 116.

[41] Memorial on the Merits, ¶ 54.

[42] Special Law to Guarantee the Service of Electric Energy as a Public Good of National Security and an Economic and Social Human Right ("**Decree No. 46-2022**") (16 May 2022) (**C-010**).

(1.) The non-payment of invoices and interest claimed by the Claimants pre-dates Decree 46-2022.

37. According to the Claimants, "the 2022 New Energy Law codified the State's intention to repudiate its compensation [...]."[43] However, this narrative lacks merit given that Pacific Solar itself has claimed payment of bills and interest prior to Decree No. 46-2022.

38. As noted by the Claimants' expert, the debt began to accrue in 2018.[44] Indeed, since 2020, Pacific Solar has claimed payment of the debt generated by unpaid invoices and accrued interest, proving that the debt began to accrue in 2018.[45] Therefore, it is incorrect to state that the non-payment of invoices began as a result of Decree 46-2022. Regardless, ENEE has, to the extent of its capability, been consistent in the proportional payment of its debt with the generators.[46]

(2.) The claim for compensation for limitations in the dispatch of electricity is not new and is also not justified.

39. The Claimants seek to give the impression that reductions in the dispatch of electricity by the National Dispatch Centre is an issue that arose after Decree 46-2022 came into force, when, as established above, this dispute arose much earlier.

40. Firstly, reductions in power dispatch have been a constant reality in the operation of the Nacaome Plant since 2017.[47] Pacific Solar was fully aware of this possibility, having expressly confirmed, prior to the start of operations, that the plant could be disconnected or its

[43] Memorial on the Merits, ¶ 125.

[44] First Expert Report of Miguel A. Nakhle (Compass Lexecon) ("**Nakhle Report**") (Sept. 20, 2024) (**CER-01**), ¶¶ 44-45, Figure 6.

[45] Letter from R. Barahona (PSE) to G. Perdomo (ENEE) (10 July 2020) (**R-049**) ("[...] since 13 December 2018, the amount corresponding to the capital is [redacted] and the value of the interest is [redacted] so we need to know when the payment of this debt will be made since we have to cancel the loans with local and foreign banks").

[46] ENEE Payment Vouchers to Pacific Solar Energy (2020) (**R-008**); ENEE Payment Vouchers to Pacific Solar Energy (2021) (**R-009**); ENEE Payment Vouchers to Pacific Solar Energy (2022) (**R-010**); ENEE Payment Vouchers to Pacific Solar Energy (2023) (**R-011**); ENEE Payment Vouchers to Pacific Solar Energy 2024) (**R-012**).

[47] To maintain SIN safety margins, Pacific Solar has received orders from the NDC and has experienced technical curtailments since 2017. *See* PSE, Nacaome I Project Executive Report (October 2017) (**R-034**); Letter from L. Bulnes (PSE) to E. Torres and D. Aguilar (PSE) (30 January 2018) (**R-038**).

capacity could be reduced according to the procedures set out in the PPA.[48] Furthermore, the PPA provides for several exceptions to the mandatory dispatch of power, including the "automatic disconnection of the plant by Supplementary Control Schemes (ECS) aimed at maintaining or restoring the stability of the [National Interconnected System]."[49]

41. The Claimants attempt to give the impression that ENEE has an obligation to purchase and dispatch absolutely all the energy that the Nacaome Plant can produce.[50] This is not correct. As mentioned above, the PPA provides for several exceptions. Furthermore, the PPA states that ENEE "**undertakes to purchase and pay [Pacific Solar] for all energy and power billed in accordance with the prices, terms and conditions set forth in this Agreement**."[51] According to the PPA, billed energy means the energy actually delivered by Pacific Solar to ENEE at the point of delivery.[52] Therefore, the total amount of energy that can be produced by the Nacaome Plant is not necessarily the same amount of energy that must be dispatched to, and paid for by, ENEE under the PPA.

42. Secondly, in 2021, Pacific Solar began sending monthly invoices claiming compensation for these reductions, which were rejected by ENEE as lacking legal basis and adequate documentation.[53] These facts demonstrate that Pacific Solar's claims do not arise from Decree 46-2022, but rather reflect a pre-existing operational reality necessary to maintain the integrity of the Honduran electricity system, a reality that, according to transparent technical

[48] Minute No. 03/2016 of the Interoperative Committee of Contract No. 002/2014 (3 August 2016) (**R-031**); Minute No. 01/2018 of the Interoperative Committee of Contract No. 002/2014 (27 December 2018) (**R-046**).

[49] Contract No. 002-2014 (**C-001**), Annex III, Clause 1.1. *See also* Contract No. 002-2014 (**C-001**), Clause 2.4.

[50] Memorial on the Merits, ¶¶ 12, 43, 54, 57.

[51] Contract No. 002-2014 (**C-001**), Clause 2.3.

[52] *Ibid*., Clause 1.1, ¶ 32.

[53] Letter from R. Barahona (PSE) to R. Lean (CIENEE) (5 March 2021) (**R-052**); Letter from R. Barahona (PSE) to R. Lean (CIENEE) (10 May 2021) (**R-053**); Letter from R. Barahona (PSE) to R. Lean (CIENEE) (7 June 2021) (**R-054**); Letter from R. Barahona (PSE) to R. Lean (CIENEE) (7 July 2021) (**R-055**). ENEE has firmly rejected the legitimacy of these invoices since they have no legal basis and did not show sufficient documentation to support the charges. *See* ENEE, Oficio DER-199-XI-2021, Letter from D. Aguilar (Operating Committee) to R. Barahona (PSE) (18 November 2021) (**R-058**).

criteria published daily by the National Dispatch Centre (hereinafter the ‘‘CND’’), applies equally to all generators.[54]

43. The dispute between the Parties over the interpretation of Clause 9.5.1 of the PPA has been ongoing. The Claimants argue, erroneously, that any power curtailment is compensable. However, the PPA clearly states that only curtailments caused by failures in the National Interconnected System are eligible for compensation,[55] and not technical curtailments necessary to maintain the operational security of the electricity grid. The CND, as the System Operator, has the legal and technical obligation to guarantee the continuity of electricity supply and the correct coordination of the system - powers that are contemplated both in the Electricity Industry Law of 2014[56] and in the Framework Treaty of the Central American Electricity Market.[57] In compliance with these obligations, the CND must control the dispatch of energy to avoid transformer overloads and possible system collapses,[58] especially considering that the 17 photovoltaic plants in the southern region of Honduras, including the Nacaome Plant, reach their generation peaks simultaneously.

44. Thus, it is clear that Pacific Solar’s claim regarding reductions in generation from the Nacaome Plant does not arise from the enactment of Decree 46-2022, as such reductions have been a constant reality throughout the life of the PPA, in order to maintain the integrity of the SIN and the continuity of electricity supply in Honduras.

3. Claimants knew or should have known about the financial situation of ENEE and the attempts to rescue the energy sector.

45. In their Statement of Claim, the Claimants completely ignore ENEE’s precarious financial situation, which has been a topic of national discussion for many years, limiting

[54] The NDC seeks to treat all generators equally by publishing daily on its website a report of the reductions made. “Renewable limitations” *CND*, *ENEE* (24 February 2025) (**R-067**).

[55] Contract No. 002-2014 (**C-001**), Clause 9.5.1.

[56] General Law of the Electric Industry, 2014 (“**Decree No. 404-2013**”) (11 April 2014) (**C-008**).

[57] Central American Electricity Market Framework Treaty (**C-107**). Art. 2(e).

[58] Generators must obey all instructions coming from the NDC, otherwise the system is exposed to collapse or critical operating conditions. *See also* CREE - Reglamento de Operación del Sistema y Administración del Mercado Mayorista (18 November 2015) (**R-029**), Art. 9(c).

themselves only to pointing out that ENEE's payments "were at times delayed or incomplete."[59] Furthermore, Claimants attempt to make it appear that, since the enactment of Decree 46-2022, ENEE has only made "sporadic and incomplete payments."[60] This is false. Claimants attempt to hide the impact of ENEE's financial difficulties on the PPA, a recurring phenomenon since the inception of the contractual relationship.

46. In the following section, Honduras explains the financial situation of ENEE during the term of the PPA and also discusses the diagnosis of ENEE's finances, according to the international financial institutions that motivated an attempt by Honduras to rescue the energy sector and improve ENEE's finances through a government-private sector compromise, which subsequently failed.

a. ENEE's financial situation after the parliamentary robbery of the century

47. International financial institutions, particularly the International Monetary Fund (hereinafter "IMF"), determined that ENEE's financial deficit affected Honduras' macroeconomic stability.[61] Although the Claimants do not mention it in their Memorial, since 2010, ENEE has experienced a sustained increase in its economic deficit, which has generated an over-indebtedness of the State in order to meet ENEE's payment obligations.[62]

48. Firstly, the Claimants are aware that ENEE has always been late in paying electricity bills within the time limit set out in the PPA. Although not expressly stated, the documentary evidence is clear that since as early as 2018,[63] i.e. just over a year after Pacific Solar began commercial operation, ENEE was already late in making payments.

[59] Memorial on the Merits, ¶ 87.

[60] *Ibid.*, ¶ 94.

[61] International Monetary Fund, Country Report Honduras No. 19/236 (July 16, 2019) (**C-105**), p. 2 [PDF].

[62] L. Rodríguez, "ENEE's operating deficit grew to L. 4,549 million," *El Heraldo* (Feb. 26, 2018) (**R-040**).

[63] Nakhle Report (**CER-01**), ¶ 44, Figure 6.

49. Secondly, in this arbitration, Pacific Solar is claiming a debt that, according to its own damages expert, has been outstanding since 2018.[64] This is a clear indication that, from the outset, Pacific Solar has been aware that ENEE has been unable to meet its payment obligations. Furthermore, in 2020, at the time of demanding payment of the accumulated debt to date from ENEE, Pacific Solar indicated that ENEE still owed it interest in arrears.[65]

50. ENEE's financial situation was already critical when Pacific Solar started operations. In 2013, when Pacific Solar was incorporated, ENEE was operating with a historical financial deficit, registering losses of 6,963.9 million Lempiras, an increase of 51.52% over the previous year.[66] According to the report of the Superior Court of Accounts, ENEE accumulated total liabilities of 24,133.8 million Lempiras and lacked "capacity to face its short-term obligations."[67] The situation worsened in 2014, when losses amounted to 7,614.1 million Lempiras,[68] with total liabilities of 33,658.3 million Lempiras,[69] representing 76.87% of the company's total assets.[70]

51. By 2018, the IMF identified that PPAs had become one of ENEE's main structural problems, noting that they "restrict ENEE's operational autonomy and its ability to minimize costs in the purchase of electricity."[71] The situation continued to deteriorate until 2019, when the IMF explicitly cited high generation costs as one of the factors in ENEE's financial deterioration,[72]

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[64] *Ibid*.

[65] Letter from R. Barahona (PSE) to G. Perdomo (ENEE) (10 July 2020) (**R-049**).

[66] High Court of Audit, Report No. 41-2014-DFEP-ENEE (26 August 2014) (**R-023**), p. 11.

[67] *Ibid*., pp. 13-14.

[68] High Court of Audit, Report No. 38-2015-FEP-ENEE (July 2015) (**R-028**), p. 8.

[69] *Ibid*.

[70] *Ibid*.

[71] International Monetary Fund, Country Report Honduras No. 18/206 (June 29, 2018) (**R-042**), p. 14, ¶ 22 ("*Existing contracts of energy purchases.* These agreements restrict ENEE's operational autonomy to minimize costs in purchases of electricity.").

[72] International Monetary Fund, Country Report Honduras No. 19/236 (July 16, 2019) (**C-105**), p. 2 [PDF] ("Supported by the Fund program during 2014-17, Honduras made great strides reducing macroeconomic imbalances and strengthening its policy framework. Confidence improved; and Honduras's debt spreads declined steadily and translated into better financing terms for private and public investment. Nevertheless, challenges remain to reduce vulnerabilities and risks, including the still high level of poverty and informality, **the deteriorating financial situation**

noting that Honduras was increasing its external debt just to cover the company's payment obligations.[73] Despite not admitting it in their Memorial, the Claimants are well aware that they are part of this structural problem which the IMF identified as one of the main macroeconomic risks to the Honduran economy.[74]

52. Therefore, the resolution of several structural problems, including the revision of energy prices agreed through PPAs, was necessary. However, even though Honduras and the private sector signed a national pact to address ENEE's problems, it was not honored by the generators, thus resulting in the continuation of ENEE's financial catastrophe.

b. Generators' unfulfilled commitment to renegotiate generation prices.

53. In October 2018, in the face of ENEE's evident financial crisis,[75] various public and private sector actors, including then-President Juan Orlando Hernández, the Honduran Council of Private Enterprise, ENEE, the Honduran Association of Electricity Producers, Empresa Energía Honduras, and the Honduran Association of Banking Institutions, signed the Electricity Reform Agreement.[76] This agreement, which the Claimants mention selectively in their Memorial,[77] set out eight key action points, including the immediate review and urgent renegotiation of contracts

of the public electricity company (ENEE), and the continued need to strengthen the macroeconomic policy framework and improve governance").

[73] International Monetary Fund, Country Report Honduras No. 18/206 (June 29, 2018) (**R-042**), p. 65 [PDF] ("**External debt increased in 2017**. The increase in two percentage points of GDP (from 35½ percent of GDP in 2016 to 37½ percent of GDP in 2017) reflected the above-mentioned bond placement. The procedures from the placement were used to pay liabilities from the public electricity company ENEE.").

[74] International Monetary Fund, Country Report Honduras No. 19/236 (July 16, 2019) (**C-105**), p. 14 ¶ 27 ("The weakening in ENEE's finances arises from below-cost tariff setting, large electricity losses, and high generation costs").

[75] L. Rodríguez, "In 2017, ENEE spent 18,769 million lempiras on energy payments," *El Heraldo* (19 June 2018) (**R-041**). *See also* L. Rodríguez, "ENEE's solar bond arrears rise to 2,372 million lempiras," *El Heraldo* (29 January 2021) (**R-051**); L. Rodríguez, "Clean energy contracts burdened by ENEE for high prices," *El Heraldo* (23 July 2018) (**R-043**); L. Rodríguez, "Private sector asks ENEE to review contracts and fees," *El Heraldo* (31 July 2018) (**R-044**).

[76] Agreement for the Reform of the Honduran Electricity Sector (10 October 2018) (**C-175**), p. 1.

[77] Memorial on the Merits, ¶ 89.

with power generators,[78] recognizing that structural problems in the sector put significant pressure on the State's finances and threatened its ability to finance essential social programs.

54. Despite initial optimism and IMF support for these measures, renegotiation attempts failed.[79] In July 2020, in the context of the COVID-19 pandemic and the impact of two consecutive hurricanes,[80] ENEE proposed, to all generators, a reduction in the cost of energy from 0.14 to 0.08 US cents per kWh, a proposal that was rejected by all generators, including Pacific Solar.[81] As a consequence, ENEE was forced to continue borrowing, including a US$600 million bond issue in 2020 entirely to pay liabilities.[82] These facts demonstrate that the contractual issues between Pacific Solar and ENEE predate Decree 46-2022, which Claimants incorrectly present as the trigger for the present arbitration.

4. The Claimants do not prove ownership of their alleged investment which, in any event, would have been assigned in full.

55. According to the Claimants' own documentation, between 30 September 2013 and February 2015, the shareholders of Pacific Solar reportedly changed from [redacted] to the Paizes.[83] However, although the Claimants attempt to show that they currently own Pacific Solar and its assets, including the PPA, the reality is that it is not apparent from the record that the Paizes are the owners of the company.

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[78] Agreement for the Reform of the Honduran Electrical Sector (10 October 2018) (**C-175**) ("**Immediate review of all contracts with suppliers, which includes: the urgent renegotiation of contracts with Power Generators**.").

[79] L. Rodríguez, "ENEE would save L 1,500 million with the review of contracts," *El Heraldo* (February 17, 2019) (**R-047**); International Monetary Fund, Country Report Honduras No. 19/236 (July 16, 2019) (**C-105**), p. 14 ("**The authorities' plan aims at resolving the complex structural challenges in the electricity sector. The road map is based on the agreement signed by the government, the banking association, the generators association, the business association, and ENEE in October 2018**. The plan involves both institutional reforms, as well as operational and financial measures that will require compromises both from ENEE and from key stakeholders in the electricity sector-private generators and banks, among others."); L. Rodríguez, "Generators will not accept price revisions of contracts," *El Heraldo* (7 March 2019) (**R-048**).

[80] World Bank, "Honduras Public Expenditure Report" (November 2022) (**R-061**), p. 16 ("The 2020 crisis affected Honduras more than other countries in the region and other developing countries globally amid a more complex political and governance context").

[81] L. Rodríguez, "ENEE's solar bond arrears rise to 2,372 million lempiras," *El Heraldo* (29 January 2021) (**R-051**).

[82] World Bank, "Honduras Public Expenditure Report" (November 2022) (**R-061**), p. 33; Memorial on the Merits, ¶ 91.

[83] *See also* Articles of Incorporation of Pacific Solar Energy S.A. de C.V. (10 September 2013) (**C-072**), p. 5 [PDF].

56. Firstly, the only document Claimants submit to prove their ownership of Pacific Solar is a diagram, notarized in English by a Guatemalan notary, showing the corporate structure and chain of ownership from Pacific Solar to Fernando Paiz and Anabella Schloesser de León.[84] The Claimants cannot reasonably believe that a corporate diagram most likely created by them, without anything more, is sufficient to prove their ownership of their alleged investment. The State submits that this document has no probative value whatsoever and does not prove that the Claimants are the owners of Pacific Solar.

57. Secondly, on 12 January 2018, ENEE received a communication from Pacific Solar, the purpose of which was to inform ENEE that Pacific Solar had assigned all its rights relating to the Nacaome Plant as security. Pacific Solar explains that "[i]n order to obtain the necessary financing for the construction, development and operation of the Project, the Company will enter into, respectively, loan agreements with [Dutch Business Development Bank][85] and [German Investment Corporation][86] (together, the "Financial Institutions") [...] the Company will enter into an agreement amending the guarantee trust agreement in favor of [redacted], S.A. [...] for the benefit of the Financial Institutions [...] whereby the **Company assigns as security all rights and assets related to the project, including the Plant (as defined in the PPA) and the economic rights to which it is entitled under the PPA**."[87]

58. The aforementioned communication would serve as the prior notice required under the PPA.[88] From the foregoing, it follows that the Claimants are not the true beneficiaries of the PPA, nor are they the owners of the Nacaome Plant and its assets, as the true owner would be the trustee, i.e. [redacted]. Furthermore, the profits derived from the operation of the Nacaome Plant are directed to the beneficiaries of the trust, i.e. the financial institutions

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

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

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

[87] Letter from Pacific Solar Energy S.A. to J. A. Mejía Arita (ENEE) (12 January 2018) (**R-037**), pp. 2-3.

[88] Contract No. 002-2014 (**C-001**), p. 51, Clause 20.6 ("The SELLER may encumber, pledge, assign or transfer as security this Contract and/or the rights granted to it by this Contract, in favor and/or for the benefit of any Financier who has given the resources covering this Contract, or in the case contemplated in Clause 20.1 Assignment by the SELLER, **by giving prior written notice to the BUYER**") (emphasis added).

indicated.[89] Moreover, Pacific Solar began to request that payments of its invoices be made to an account at [redacted] when previously they received their payments at [redacted][90]

B. Decree 46-2022 did not modify the PPA, let alone present a threat of expropriation for generators.

59. Claimants assert that Decree 46-2022 "crystalized the State's desire to tear up existing PPAs, such as Pacific Solar's.[91] According to Claimants, Decree 46-2022 included "[a] threat to expropriate the generator's plants if "renegotiation" of the PPA's energy Price is not to the State's satisfaction."[92] A reading of the relevant article and ENEE's conduct proves Claimants' assertions to be unfounded.

60. Article 5 of Decree 46-2022 provides:[93]

> The Empresa Nacional de Energía Eléctrica (ENEE) **is authorized**, through the Board of Directors and Management, based on national legislation and contractual clauses, to **propose, under its prerogatives and powers** and for reasons of public interest, **the renegotiation of contracts** and prices at which the State, through the Empresa Nacional de Energía Eléctrica (ENEE), acquires the service of water, solar and wind energy, taking as a reference the prices of the Central American, Caribbean and Latin American region. If renegotiation is not possible, it is **authorized to propose** the termination of the contractual relationship and the acquisition by the state, subject to a price increase.

[89] Letter from Pacific Solar Energy S.A. to J. A. Mejía Arita (ENEE) (Jan. 12, 2018) (**R-037**), at 2-3. According to Article 1035 of the Code of Commerce of the Republic of Honduras, ("The trust implies the assignment of the rights or the transfer of the domain of the assets in favor of the trustee.").

[90] Letter from L. Bulnes (PSE) to J.A. Mejía Arita (ENEE) (Feb. 2, 2017) (**R-032**); Letter from L. Bulnes (PSE) to J.A. Mejía Arita (ENEE) (Feb. 1, 2018) (**R-039**).

[91] Memorial on the Merits, ¶ 116.

[92] *Ibid*., ¶ 116.

[93] Decree No. 46-2022 (**C-010**), Art. 5; Decree No. 46-2022, Article 5 (**Corrected translation of Annex C-10-ENG**) (**R-068**).

61. Article 5 contains two main verbs; the verb *authorize* which is a transitive verb and means "[to] give *or recognize someone the power or right to do something*."[94] Therefore, it needs a direct complement, which in the case of Article 5 is the verb propose, which means to offer or suggest something.[95] Therefore, the cited article only recognizes a power, already provided for in the Contract, to propose renegotiation and, if unsuccessful, to propose the termination of the contractual relationship. Notably, these two verbs in Article 5 are not of a mandatory character that would make even an unsuspecting reader think that the theory of a threat of expropriation suggested by the Claimants could be true.

62. Article 5 defines three scenarios: *The first scenario,* is one in which ENEE raises, proposes or suggests a renegotiation of the contracts related to three renewable technologies: hydro, solar and wind, in particular on the prices at which energy is purchased, but not limited only to tariffs.[96] In case of a successful renegotiation, the parties to the Contract, as other generators have already done, can agree on new prices. The Article establishes clear parameters for price renegotiation, indicating that prices should be adjusted by reference to prices applied in the Central American, Caribbean and Latin American regions. This approach ensures an objective and transparent framework for contractual modifications, reducing risks of arbitrariness.

63. The same Article 5 recognizes, when referring to the proposal for renegotiation, that it must be made "on the basis of national legislation and **contractual clauses**."[97] Therefore, the Contract can only be renegotiated by mutual agreement as provided in Clause 18.1: "This

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[94] Royal Spanish Academy, Spanish Language Dictionary, 23rd edition, definition of "authorize" (2014) (**R-025**). Synonyms include "*permit, consent, grant, concede, accede, assent, approve, tolerate, grant, license, empower, delegate, empower, empower, commission, empower*".

[95] Royal Spanish Academy, Spanish Language Dictionary, 23rd edition, definition of "plantear" (2014) (**R-024**). RAE plantear Its synonyms include proponer, sugerir. Claimants base their interpretation on an incorrect translation of the term "plantear," which they translate into English as "set": "Set" means to establish or set something in place, while "plantear" means to suggest or offer something for consideration, often implying a plan or idea that needs approval; essentially, "fijar" is to set something definite, while "proponer" is to present an idea for potential action. For the Tribunal's convenience, Respondent submits a corrected translation of Art. 5 of Decree 46-2022 and reserves its right to submit additional corrections to the translations submitted by Claimants. *See* Decree No. 46-2022, Article 5 (**Corrected Translation of Exhibit C-10-ENG**) (**R-068**).

[96] Decree No. 46-2022 (**C-010**), Art. 5; Decree No. 46-2022, Article 5 (**Corrected translation of Annex C-10-ENG**) (**R-068**).

[97] *Ibid*.

Contract may be amended **only by written agreement between the Parties**, provided that the procedure set out in the Applicable Laws is observed."[98]

64. The *second scenario* occurs if renegotiation is not possible. In this case, ENEE can propose - i.e. offer or suggest - the termination of the contractual relationship and acquire the power plant, subject to payment of compensation. Notably, the requirement of a *price for compensation* in case of termination reinforces the guarantee of adequate compensation for contractors. At no point does Decree 46-2022 mandate or oblige ENEE to terminate the contractual relationship to acquire the plant from the generators whose renegotiation was unsuccessful. Therefore, Claimants' statement "the State is authorised to unilaterally terminate agreements" is untrue.[99]

65. Finally, *the third scenario* is one in which no renegotiation is achieved due to unwillingness of the parties, and no acquisition of the plant is proposed. In this case, the PPA remains in force between the parties and its terms remain unchanged. This has been the case with Pacific Solar.

66. The Claimants also assert, incorrectly, that Decree 46-2022 is intended to "expropriate the Plant if the PPA's "renegotiation" was not to the State's satisfaction."[100] According to the Claimants, the inclusion of the term "justiprecio" in Article 5 "was in fact a tool to be used by the State to put pressure on the generators to "renegotiate."[101] This is again untrue.

67. *First*, as explained above, the literal meaning of Article 5 leaves no doubt that the legislator's intention was to authorize ENEE to propose a renegotiation, as well as to propose the termination of the contractual relationship.

68. *Second*, at no time has ENEE shown any interest in, or raised the possibility of, acquiring any of these plants. Rather, it is Pacific Solar that expressed its interest in selling its plant

[98] Contract No. 002-2014 (**C-001**), Clause 18.1.

[99] Memorial on the Merits, ¶ 118.

[100] *Ibid.*, ¶ 98.

[101] *Ibid.*, ¶ 119.

to ENEE.[102] After almost three years, this is still the situation. No plant has been acquired, let alone expropriated. Conversely, the renegotiation process has resulted in the approval of 18 addenda to energy contracts between other private generators and ENEE, which contain beneficial conditions for both parties.[103]

69. In conclusion, the Claimants' and their expert's assertion that Decree 46-2022 mandates or threatens an expropriation of the generators' assets, is unsubstantiated.

C. The PPA between ENEE and Pacific Solar continues to be executed without modification after the entry into force of Decree 46-2022.

70. The Claimants have not shown, nor will they be able to show, that the PPA between ENEE and Pacific Solar has been affected in any way by Decree 46-2022. However, they attempt to use Decree 46-2022 as the point of origin of various disputes under the PPA, even though, as explained below, these are entirely contractual.

71. Despite Claimants' assertion that "[t]he 2022 New Energy Law sent a clear message that the full payment of existing debt would not be honored,"[104] ENEE has continued to pay all generators, including Pacific Solar, for energy and power generated under the terms of the PPA. ENEE's payment behavior towards Pacific Solar renders the Claimants' assertions baseless.

72. ENEE has continued to make partial payments to all generators, including Pacific Solar, to meet its debt obligations. A simple look at ENEE's behavior in relation to the amounts paid to Pacific Solar confirms that, following the issuance of Decree No. 46-2022, the change alleged by Claimants do not exist.[105]

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[102] ENEE, "Completing the third round of renegotiations," *Facebook* (2 June 2022) (**C-213**) ("The head of ENEE categorically assured that at no time is the expropriation or nationalization of companies being considered; the law delimits in articles 3 and 4 the fair price, which is precisely why they are at the dialogue tables proposing mutual agreements that result in a fair price").

[103] "Addenda to energy contracts of the state-owned electricity company approved," *Secretaría de Energía* (5 February 2025) (**R-065**).

[104] Memorial on the Merits, ¶ 146.

[105] ENEE Payment Vouchers to Pacific Solar Energy (2020) (**R-008**); ENEE Payment Vouchers to Pacific Solar Energy (2021) (**R-009**); ENEE Payment Vouchers to Pacific Solar Energy (2022) (**R-010**); ENEE Payment Vouchers to Pacific Solar Energy (2023) (**R-011**); ENEE Payment Vouchers to Pacific Solar Energy 2024) (**R-012**).

73. The same evidence presented by Claimants' expert, Mr. Miguel Nakhle, confirms that ENEE's payments to Pacific Solar continued after Decree No. 46-2022 came into force.[106]

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

A. The Tribunal lacks jurisdiction *ratione voluntatis* because Claimants have failed to exhaust local remedies prior to resorting to arbitration.

74. The Arbitral Tribunal lacks jurisdiction to hear the present case because the Republic of Honduras conditioned its consent to ICSID arbitration on the prior exhaustion of local remedies and the Claimants failed to comply with this jurisdictional condition.

75. Honduras will demonstrate that it conditioned its consent to ICSID arbitration on the exhaustion of local remedies under Article 26 of the ICSID Convention **(Subsection 1**); and that Claimants failed to exhaust domestic remedies in respect of the alleged breaches they claim in this arbitration (**Subsection 2**). Finally, the Republic will demonstrate that Article 26 of the ICSID Convention does not require the condition of the exhaustion of local to be contained in a single, indivisible instrument of consent (**Subsection 3**).

1. Honduras conditioned its consent to ICSID arbitration on the exhaustion of local remedies under Article 26 of the ICSID Convention.

76. According to Article 26 of the Convention, Contracting States may require investors to exhaust local remedies as a precondition for initiating arbitration against them. According to this provision:

> A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.[107]

77. This is an uncontroversial power for any State party to the Convention to preserve the traditional rule of customary international law of exhaustion of local remedies and to avoid

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[106] Pacific Solar Energy, Audited Financial Statements (2023) (**MN-011**), p. 8. Pacific Solar's Audited Financial Statements even show that, in 2023, the company received higher revenues compared to 2022. See also Pacific Solar, "Historical ENEE Invoices and Payments 1607202408.41" (August 2016 to June 2024) (**MN-0032**).

[107] International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules*, WBG Doc. ICSID/15/3 (2022) ("**ICSID Convention and Rules**") (**RL-048**), Convention, p. 12, Art. 26.

being dragged before an international tribunal before its own courts have had a chance to rule on the alleged claims.[108]

78. In exercise of this prerogative, the Republic of Honduras conditioned its consent to ICSID arbitration, at the time of approving and promulgating the ICSID Convention, through Legislative Decree No. 41-88 dated 4 August 1988 (the "**Legislative Decree 41-88**"). The said approving decree clearly states, as a *sine qua non* condition of the consent of the Republic of Honduras, that:

> DECLARATION BY THE REPUBLIC OF HONDURAS. The State of Honduras shall submit to the arbitration and conciliation procedures provided for in the Convention only when it has previously expressed its consent in writing. **The investor shall exhaust the administrative and judicial channels of the Republic of Honduras, as a prior condition to the implementation of the dispute settlement mechanisms provided for in this Convention**. In any case submitted to the Tribunal to which the State of Honduras is a Party, the applicable laws shall be those of the Republic of Honduras, and only the natural and legal parties of the States Parties to the Convention may avail themselves of the procedures provided for in the Convention.[109]

79. By this Legislative Decree, **which the Claimants *did not* disclose to this Tribunal and which they omitted in their Statement of Claim**, the Republic of Honduras chose to expressly preserve the traditional rule of customary international law and to condition its consent to ICSID arbitration on the prior exhaustion of local remedies.[110] Thus, it excluded direct access -

[108] C. F. Amerasinghe, "Basis of the Rule" in *Local Remedies in International Law* (2004) (**RL-006**), p. 58 ("the rule results mainly from recognition of the respondent state's sovereignty in what is basically an international dispute."); I. Shihata, "Towards A Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA" (1992) (**RL-057**), pp. 13-14; M.C. Porterfield, "Exhaustion of Local Remedies in Investor-State Dispute Settlement: an idea whose time has come?" 41 *The Yale Journal of International Law Online* (Fall 2015) (**RL-028**), p. 5 ("The central function of the local remedies rule is to protect the sphere of sovereignty that States are entitled to under international law.").

[109] Republic of Honduras, Decree concerning the ICSID Convention (Decree 41-88) **(R-003**), Art. 75 (emphasis added).

[110] B. Sabahi *et al*. "Exhaustion of Local Remedies," in *Investor-State Arbitration* (2019) (**RL-040**), ¶ 13.01 ("The requirement of exhaustion of local remedies (or local remedies rule) is a longstanding rule of customary international law that was developed in the context of diplomatic protection. Under this rule, where a state commits an act that injures a foreign person, the victim traditionally must exhaust all the effective domestic legal remedies before its home government can espouse its claim in the exercise of diplomatic protection. Exhaustion of local remedies in this sense is a precondition of the admissibility of international claims. The exhaustion of certain local remedies may also be required as a substantive element of some international wrongs, such as denial of justice").

without prior exhaustion of local remedies - to the dispute resolution mechanism under the CAFTA-DR. As observed by previous tribunals:

> [...] it is a general principle of international law that international courts and tribunals can exercise jurisdiction over a State only with its consent. [...] A **presumed** consent is not regarded as sufficient, because any restriction upon the independence of a State (not agreed to) cannot be presumed by courts.[111]

80. As is well known, this requirement is a reflection of respect for the sovereignty of States, precisely to allow them to address, through their own courts, any alleged illegality in the actions of their organs.[112] It would therefore be wholly unacceptable for the Republic of Honduras, having explicitly limited and subordinated its consent to this jurisdictional condition, as authorized by Article 26 of the ICSID Convention, to be dragged into this arbitration without that condition having been fulfilled. In this regard, the Tribunal cannot rely on the ICSID Convention to assume jurisdiction and at the same time ignore the condition that - under the same instrument - the Republic of Honduras imposed in order to accede to this dispute resolution mechanism.

81. The *travaux préparatoires* of the ICSID Convention also confirm that the intention of the drafters was never to prevent States from enforcing the exhaustion of local remedies rule within the ICSID system. On the contrary, it makes clear that States would retain the sovereign power to require the exhaustion of local remedies.[113] The second part of Article 26 leaves no doubt in this regard. As was evident during the discussions that preceded the adoption of the Convention:

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[111] *Wintershall Aktiengesellschaft v. Argentina. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008) (**RL-011**), ¶ 160(3) (emphasis in original); *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Award (22 December 2017) (**RL-035**), ¶ 148 ("consent cannot be presumed; it must be established by an express manifestation of intent or implicitly by conduct that demonstrates consent. Further, the burden of proving the existence of consent is on the Claimants, as they are the ones asserting jurisdiction.").

[112] C. F. Amerasinghe, "Basis of the Rule" in *Local Remedies in International Law* (2004) (**RL-006**), p. 58 ("the rule results mainly from recognition of the respondent state's sovereignty in what is basically an international dispute."); I. Shihata, "Towards A Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA" (1992) (**RL-057**), pp. 13-14; M.C. Porterfield, "Exhaustion of Local Remedies in Investor-State Dispute Settlement: an idea whose time has come?" 41 *The Yale Journal of International Law Online* (Fall 2015) (**RL-028**), p. 5 ("The central function of the local remedies rule is to protect the sphere of sovereignty that States are entitled to under international law.").

[113] ICSID Convention and Rules (**RL-048**), Report of the Executive Directors, p. 38, ¶¶ 32, 33; History of the ICSID Convention, Vol. II-1 (1968) (**RL-055**), p. 162: ("Similarly, Section 16 leaves it open to a State to stipulate that its

> In order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence [of Article 26] explicitly recognizes the right of a State to require the prior exhaustion of local remedies.[114]

82. The *travaux préparatoires* also indicate that the drafters assumed that Contracting States could express their willingness to give primacy to exhaustion of local remedies in various ways.[115] Under Article 26, and as held by the tribunal in *Lanco v. Argentina*, "[a] State may require the exhaustion of domestic remedies as a prior condition for its consent to ICSID arbitration. This demand may be made (*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."[116]

83. It is crucial to understand the historical context that led Honduras to include an exhaustion of local remedies requirement when ratifying the ICSID Convention. In 1964, all Latin American countries voted against the creation of ICSID, due to the strong influence of the Calvo Doctrine, which promoted the resolution of disputes with foreign investors under the law of the host state and through domestic remedies, rejecting foreign diplomatic intervention in these conflicts.[117] This stance, deeply rooted in sovereignty and domestic law, led the region to initially reject the idea of international arbitration administered by an entity such as ICSID.[118]

84. However, in 1984, the then Secretary-General of ICSID, Mr. Ibrahim F. I. Shihata, wrote an editorial in which he argued that the dispute settlement mechanism provided for in the

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undertaking to have recourse to arbitration is subject to the condition that the foreign investor first exhaust his remedies in the State's national courts or administrative agencies.").

[114] History of the ICSID Convention, Vol. II-2 (1968) (**RL-056**), p. 973 (The drafters also noted that "The second sentence of Article 26(1) has been added by the Legal Committee merely to make clear that the first sentence was not intended to cast any doubt on the **right** of States to require exhaustion of local remedies") (emphasis in original).

[115] History of the ICSID Convention, Vol. II-1 (1968) (**RL-055**), p. 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.").

[116] *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal (8 December 1998) (**RL-058**), ¶ 39.

[117] I. Shihata, "Towards A Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA" (1992) (**RL-057**), pp. 13-14.

[118] *Ibid*., pp. 13-14.

ICSID Convention was compatible with the Calvo doctrine.[119] He referred to Article 26 of the ICSID Convention[120] and that the ICSID General Secretariat had prepared model clauses providing for the exhaustion of domestic remedies before proceeding to international arbitration.[121] The Secretary-General made specific reference to the fact that one of the ways to establish the requirement to exhaust local remedies is through a declaration made by the State at the time of signature or ratification of the ICSID Convention,[122] which is exactly what Honduras did.

85. The Republic of Honduras included this jurisdictional condition - as mentioned above - in its legislation approving the ICSID Convention, and has defended it in different cases to which it has been submitted.[123] The exhaustion of local remedies is therefore applicable to all arbitration agreements that refer to ICSID and involve the Republic of Honduras, whatever the instrument of consent, including, of course, the FTA between the Dominican Republic, Central America and the United States.

86. Numerous tribunals have emphasized that failure to comply with such preconditions affects the consent of the host State and, therefore, the jurisdiction of the Arbitral Tribunal.[124] Thus, by way of example, the Tribunal in *ICS v. Argentina*, in the context of a case under an investment protection treaty, stated that:

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[119] I. Shihata, "ICSID and Latin America," 1 *News from ICSID* 2 (Summer 1994) (**RL-062**), p. 2.

[120] ICSID Convention and Rules (**RL-048**), Convention, p. 12, Art. 26 ("A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention").

[121] I. Shihata, "ICSID and Latin America," 1 *News from ICSID* 2 (Summer 1994) (**RL-062**), p. 2.

[122] *Ibid.*, p. 2. ("Another way to accomplish the same objective might result from a declaration made by a Contracting State at the time of signature or ratification of the Convention that it intends to avail itself of the provision of Article 26 and will require, as a condition of its consent to ICSID arbitration, the exhaustion of local remedies.").

[123] The Claimants attempt to undermine the weight of Honduras' argument by having invoked this objection in some of the arbitrations against it before ICSID. Honduras has claimed the need to exhaust local remedies under Article 26 of the ICSID Convention in all cases where, in its view, it was appropriate. Including the cases brought by JLL Capital, Autopistas del Atlántico, Palmerola International, Inversiones y Desarrollos Energéticos, and Fernando Paiz de Andrade. *See* Observations on Request for Bifurcation (18 October 2024), ¶¶ 24-26. *Inversiones y Desarrollos Energéticos, S.A. v. Republic of Honduras*, ICSID Case No. ARB/23/40, Claimant files observation on request to discuss jurisdictional objections as a preliminary issue (18 October 2024) (**R-064**); *Palmerola International Airport, S.A. de C.V. v. Republic of Honduras*, ICSID Case No. ARB/23/42, Respondent Requests to Discuss Jurisdictional Objections as a Preliminary Issue (16 October 2024) (**R-063**).

[124] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Eastern Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013) (**RL-022**), ¶¶ 34-35 ("The history of the BIT's

> [...] the failure to respect the precondition to the Respondent's consent to arbitrate cannot but lead to the conclusion that the Tribunal lacks jurisdiction over the present dispute. Not only has the Respondent specifically conditioned its consent to arbitration on a requirement not yet fulfilled, but the Contracting Parties to the Treaty have expressly required the prior submission of a dispute to the Argentine courts for at least 18 months, before a recourse to international arbitration is initiated. The Tribunal is simply not empowered to disregard these limits on its jurisdiction.[125]

87. Furthermore, the idea that the Republic of Honduras would be precluded from requiring exhaustion of local remedies as a condition to ICSID consent under the doctrine of *estoppel* - as it would have acted in alleged contradiction to such conduct in other arbitrations - is as incorrect as it is irrelevant. As the Claimants themselves acknowledge,[126] Honduras has claimed the need to exhaust local remedies as a preliminary objection in all cases where, in its view, it was appropriate. The Claimants' position is irrelevant because the filing of jurisdictional objections is not an imperative or an obligation, but rather a procedural power whose exercise is at the full

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negotiation and ratification shows that Uruguay deemed domestic litigation requirement to be a critical element of the BIT and an important limitation on the consent to international arbitration. [Consent being the cornerstone of ICSID jurisdiction, any limitations on consent contained in a BIT constitute limitations on the scope of the tribunal's jurisdiction. International jurisprudence, both from the ICJ and other ICSID tribunals, confirms that procedural preconditions like those [...] limit States' consent to jurisdiction."); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 December 2008) (**RL-011**), ¶ 145: ("The circumstance that 'waiting periods' are held in some decisions to be 'procedural' rather than imposing a jurisdictional requirement has no bearing in the present case on the characterization of the eighteen-month requirement before the local Courts as a jurisdictional requirement."); P.M. Dupuy, "Dupuy, "Preconditions to Arbitration and Consent of States to ICSID Jurisdiction," in *Building International Investment Law: The 50 years of ICSID* (2016) (**RL-030**), p. 227 ("The *Wintershall v. Argentina* Award appears as a warning addressed to the community of investor-State arbitrators to remind them of the limits of their powers in the face of consent to arbitration by sovereign States."); *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 December 2010) (**RL-015**), ¶ 149 ("This Tribunal finds the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, 'a procedural rule' or a 'directory and procedural' rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules."); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010) (**RL-014**), ¶ 315: ("[...] by imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an *opportunity* to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction.") (emphasis in the original).

[125] *ICS Inspection and Control Services Limited v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction (10 February 2012) (**RL-083**), ¶ 262.

[126] Observations on Request for Bifurcation, ¶ 25.

disposal of the State. The fact that Honduras has not exercised this power in some cases in no way precludes it from exercising its right to do so in the present dispute. In any event, and as is well known, the standard for granting an *estoppel* claim is high,[127] which is reflected in its low success rate.[128]

88. By virtue of the foregoing, the Claimants' submission must be rejected *in limine* the requirement of the exhaustion of local remedies set by Honduras as a precondition to enable ICSID jurisdiction, has not been complied with, as explained below.

2. The Claimants failed to exhaust domestic remedies for the alleged violations.

89. The Claimants decided not to exhaust the remedies available to them.[129]

90. In this case, the failure to exhaust local remedies is evident and undeniable. The Claimants have not exhausted any local administrative and judicial avenues before submitting their dispute to international arbitration. It is not that they have tried unsuccessfully, but rather that they have not even tried.

91. Therefore, 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[130] or to the Arbitral Tribunals specifically designated as competent to hear disputes arising from the regulatory framework of the energy sector.[131] Likewise, they could - and should - have appealed or filed an administrative claim

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

[128] A. Kulick, "About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals," in 27 *The European Journal of International Law* 1 (2016) (**RL-092**), p. 113 ("With respect to the outcome of the decisions, the tribunal/dissenting arbitrator rejected the estoppel argument in 33 instances, while only nine decisions came out in favour. In the remaining 11 decisions, the matter remained undecided. It is thus fair to say that arbitrators are rather hesitant to endorse an estoppel claim or argument.").

[129] Bifurcation Request, § II.

[130] Political Constitution of the Republic of Honduras (20 January 1982) (**R-015**), Art. 185.

[131] Decree No. 46-2022 (**C-010**), Art. 27 ("The parties may settle their disputes or controversies at any stage through Conciliation and Arbitration").

before the respective public institutions, following the procedures established in the Administrative Procedure Law.[132]

92. Only if, after exhausting local remedies, the Claimants had not obtained the protection they expected for their alleged rights, could they have turned to ICSID to initiate the present international arbitration. However, the Claimants did nothing of the sort.

93. By virtue of the foregoing, the Claimants' submission must be rejected *in limine* as they have not complied with the requirement of exhaustion of local remedies as a precondition to enable ICSID jurisdiction.

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

94. The Claimants assert that the only instrument by which the Republic of Honduras consented to the present arbitration is the Treaty.[133] This position negates the Arbitral Tribunal's clear obligation to analyze whether the jurisdictional conditions of the Convention and the applicable treaty by which the parties consented to international arbitration have been fulfilled.[134] In the present case, Honduras' consent to ICSID jurisdiction has not been perfected.

95. The Claimants seek to dispute this fact, arguing that Honduras should have exercised its Article 26 prerogative by incorporating the exhaustion of local remedies requirement in the same instrument by which it consented to ICSID arbitration[135]

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[132] Administrative Procedures Act, 1987 (Decree No. 152-87) (**R-002**), Arts. 129-145.

[133] Observations on Request for Bifurcation, ¶ 31.

[134] A. Reinisch, "Jurisdiction and Admissibility in International Investment Law," 16 *The Law and Practice of International Courts and Tribunals* 1 (2017) (**RL-094**), p. 30 ("The above-discussed elements are those under Article 25 of the ICSID Convention which in cases brought under the ICSID Rules have to be fulfilled in addition to the jurisdictional requirements stemming from the applicable BIT or international investment agreements (IIA) in which the consent of the parties to the jurisdiction is expressed."). *See also Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) (**RL-076**), ¶ 74 ("It is common ground between the parties that the jurisdiction of the Tribunal is contingent upon the fulfillment of the jurisdictional requirements of both the ICSID Convention and the relevant BIT."); ICSID Convention and Rules (**RL-048**), Convention, pp. 11, 16-27, Arts. 25(1), 41.

[135] Observations on Request for Bifurcation, ¶ 32.

96. However, as will be seen, neither the literal wording of Article 26, interpreted in accordance with the rules set out in the Vienna Convention on the Law of Treaties ("VCLT"),[136] nor the doctrine or case law supports this position.

97. *Firstly*, a reading of the terms of Article 26, interpreted in good faith in its context, and taking into account its object and purpose, shows that the Convention does not provide for any formality for States to exercise the prerogative recognized in that provision.[137] At best, all that is required is that the reserving State express its intent to require the exhaustion of local remedies in writing, as can be concluded from Article 25(1) of the Convention.[138] It is clear that this requirement is fully met in this case.

98. *Secondly*, the Claimants cite *Generation Ukraine* to argue that Article 26 of the Convention would not allow States to unilaterally require exhaustion of local remedies in spite of their consent to arbitration contained in the arbitration agreement with the investor.[139] The discussion in that case, however, was completely different, and hence, the tribunal's conclusions do not apply here in any way.

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

[137] On the contrary, Article 26 of the ICSID Convention is clear in stating that "[c]onsent 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". *See* ICSID Convention and Rules (**RL-048**), Convention, p. 12, Art. 26.

[138] It is generally accepted that parties may consent to ICSID arbitration by means of separate or even unilateral instruments, as long as such consent is in writing. *See* S. Schill *et al*., "Article 25" in *Schreuer's Commentary on the ICSID Convention* (2022) (**RL-107**), ¶¶ 764, 780 ("The Convention's only formal requirement for consent is that it must be in writing. [The possibility that a host State might express its consent to the Centre's jurisdiction through a provision in its national legislation, or through some other form of unilateral declaration, was discussed repeatedly during the Convention's preparation. In response to several questions, Mr. Broches pointed out that unilateral acceptance of the Centre's jurisdiction constituted an offer that could be accepted by a foreign investor and so become binding on both parties (History, Vol. II, pp. 274-275).]"). ICSID Convention and Rules (**RL-048**), Report of the Executive Directors, p. 36, ¶¶ 23-24 ("Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally. [Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.]").

[139] Observations on Request for Bifurcation, ¶ 33, note 111.

99. In the *Generation Ukraine* case, Ukraine did not limit its consent to ICSID by its domestic law or anything comparable, but rather sought to impose the requirement of the exhaustion of local remedies solely on the basis of the provisions of Article 26.[140] That is, as if the same Article established the requirement of exhaustion without States needing to express their intent to impose such a requirement beforehand. Such a position obviously cannot stand. In this case, quite contrarily, Honduras expressly conditioned its consent to ICSID arbitration by means of Legislative Decree 41-88, using the prerogative provided by Article 26 of the Convention, and does not seek to limit its consent solely on the basis of the Convention's provisions. Interestingly, the tribunal in *Generation Ukraine*, citing *Lanco v. Argentina, also referred* to the possibility that the condition of prior exhaustion of local remedies may be included in domestic law.[141]

100. *Thirdly*, Article 26 of the ICSID Convention, like Article 25, establishes jurisdictional limits that prevail over the underlying treaty provisions, as acknowledge by the Claimants.[142] It is a well-established principle that ICSID tribunals must assess whether a dispute meets both the requirements of the treaty and the criteria of the Convention, including the *Salini* test for determining the existence of an "investment"[143] and the strict prohibition on dual nationality set out in Article 25(2)(a) of the Convention.[144] Even where a treaty permits claims by dual nationals, the ICSID Convention excludes them, often forcing investors to seek alternative fora such as UNCITRAL. Similarly, when a State invokes the exhaustion of local remedies requirement under Article 26, as Honduras has done in this case, that requirement becomes a binding condition for consent to any arbitration under the ICSID Convention, even if it is not a binding condition for the other fora available under Article 10.16.3 of the Treaty. The Tribunal must therefore analyze compliance with the conditions imposed by Article 26 of the ICSID Convention separately from the conditions imposed by the Treaty, for example, the requirement of waiver of domestic proceedings.

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[140] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003) (**CL-179**), ¶ 13.

[141] *Ibid*., ¶ 13.5.

[142] Observations on Request for Bifurcation, ¶ 31.

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

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

101. The Claimants refer to the waiver or "*no-turn*" clause (*no-U-turn* clause) set out in CAFTA-DR Articles 10.18.2 and 10.18.4. They argue that such a clause - which requires investors to refrain from initiating or continuing any action with respect to measures they allege to be in breach of the Treaty - would be inconsistent with the requirement of exhaustion of local remedies.[145]

102. The aforementioned waiver, however, has been deliberately established for the benefit of Contracting States to protect them against potential parallel proceedings[146] and in no case exempts investors from exhausting domestic remedies when so required by the consent reflected in the legislation of the respective State, as in the case of Honduras. To interpret this provision otherwise would go against its meaning and purpose, contrary to basic canons of interpretation in the VCLT.[147]

103. On this point, the decision on jurisdiction in *Nova Scotia v. Venezuela (I)* is illustrative of the Tribunal's power to declare itself without jurisdiction to hear a claim when the claimant has not complied with the necessary requirements to accede to the consent offered by the respondent, where the claimant could have resorted to a different forum prior to initiating arbitration.[148]

104. As in *Nova Scotia (I)*, Honduras is not denying the alleged investor a forum to resolve disputes under the FTA. The investor must, however, comply with the conditions imposed by the State under the Treaty and the ICSID Convention, to bring a claim to arbitration. The Treaty

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[145] Observations on Request for Bifurcation, ¶ 32.

[146] M. Kinnear & C. Mavromati, "Consolidation of Cases at ICSID," in *Jurisdiction, Admissibility and Choice of Law in International Arbitration* (2018) **(RL-100)**, p. 244 ("numerous treaties have adopted provisions that reduce the potential for cases arising out of the same measure to proceed in multiple fora. For example [...], to waive their right to pursue a single claim in parallel fora simultaneously, or to elect one dispute resolution forum to the exclusion of others (e.g.: fork in the road or no U-turn clauses)."); G. Kaufmann-Kohler & M. Potestà, "Investor-State Dispute Settlement and National Courts" in *European Yearbook of International Economic Law* (2020) (**RL-103**), ¶ 81 ("In broad terms, fork-in-the-road and waiver clauses pursue the same objectives: avoiding parallel proceedings, which entail duplication of costs, risks of double recovery and of inconsistent outcomes").

[147] 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").

[148] *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (I)*, UNCITRAL, Award on Jurisdiction (22 April 2010) (**RL-077**), ¶ 88 ("A protected investor under the Treaty enjoys a right to file international arbitration proceedings. The question is-which procedure?").

itself provides options other than ICSID, in case the investor does not comply with the requirements of the Convention and decides to submit its claim to arbitration, for example, under the UNCITRAL Arbitration Rules.[149]

105. In conclusion, the Claimants' submission must be rejected *in limine* as the requirement of exhaustion of local remedies as a condition for ICSID jurisdiction has not been complied with.

B. The Tribunal lacks jurisdiction *ratione temporis* because the Claimants' claims were submitted outside the time limit set out in the Treaty.

106. The Claimants' claims are outside the Tribunal's jurisdiction as they were submitted out of time and after the maximum time limit established in the Treaty for this type of claim had passed.

107. In this regard, Article 10.18(1) of the Treaty provides that:

> 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.[150]

108. In their Statement of Claim, the Claimants devote only a few lines to this issue, limiting themselves to stating that "[t]he events giving rise to the Paizes' claims arose within three years prior to the submission of the Notice for Arbitration. The breach of the Treaty by Honduras crystallized in May 2022 [with Decree 46-2022], and the Notice for Arbitration was filed in August 2023, just a year and three months after Honduras's breach occurred."[151]

109. However, as has been pointed out throughout this brief,[152] the Paizes attempt to give an international appearance to a dispute that is eminently domestic in nature regarding the

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[149] CAFTA-DR (**CL-001**), Art. 10.16.3.

[150] *Ibid*., Art. 10.18(1).

[151] Memorial on the Merits, ¶ 182.

[152] *See above* § II.A.2.c.

scope and fulfilment of ENEE's payment obligations under the PPA. However, the real dispute between the parties arose prior to the enactment of Decree 46-2022 and is outside the three-year period established in the Treaty, and therefore outside the jurisdiction of the Tribunal.

110. This Section details why the Tribunal lacks jurisdiction *ratione temporis*. In particular, it briefly explains the meaning and application of the temporal limitation contained in the Treaty (**Subsection 1**); it then explains how, the Claimants' claims are based on alleged breaches that occurred prior to the cut-off date of the Tribunal's jurisdiction (**Subsection 2**) and, in any event, even if the Tribunal considers that it has jurisdiction to hear the Claimants' minimum standard of treatment and expropriation claims, the claims under the umbrella clause are unquestionably outside the Tribunal's jurisdiction (**Subsection 3**).

1. The Court cannot hear any alleged non-compliance that occurred prior to 24 August 2020.

111. The Claimants filed their notice of arbitration on 24 August 2023. Pursuant to Article 10.18(1) of the Treaty, the Tribunal has no jurisdiction to hear any breach of the Treaty that occurred more than three years before that date. In other words, any breach by Honduras prior to 24 August 2020 is outside the Tribunal's jurisdiction.

112. This temporal limitation is not a minor procedural issue, but one of the fundamental conditions of the consent given by Honduras and the other parties to the Treaty. As the *Mobil v. Canada* tribunal noted, such temporal limitations ensure a degree of certainty and finality for the parties to the treaty.[153]

113. In that same sense, and considering the importance of this rule, several courts that have had to interpret treaties with language almost identical to the CAFTA-DR, have pointed out that the temporal limitation is "clear and rigid."[154]

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[153] *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Liability (13 July 2018) (**RL-101**), ¶ 146.

[154] *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**RL-061**), ¶ 63; *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**RL-071**), ¶ 29; *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Liability (13 July 2018) (**RL-101**), ¶ 146.

114. As the tribunal noted in *Infinito Gold v. Costa Rica*, for purposes of deciding a jurisdiction *ratione temporis* objection such as this one, "the Tribunal must answer three questions: (i) first, it must identify the cut-off date for the three-year limitation period; (ii) second, it must determine whether the Claimant knew or should have known of the alleged breach or breaches before that cut-off date; and (iii) third, it must determine whether the Claimant knew or should have known that it had incurred loss or damage before that date."[155]

115. The first element should not be controversial. The cut-off date for the purposes of the Tribunal's jurisdiction is 24 August 2020, i.e. three years before Claimants' Notice of Arbitration. With respect to the next two elements, the following section demonstrates that Claimants not only should have known, but actually did know of the alleged breaches they now claim, as well as of the alleged damages suffered.

116. It is necessary to bear in mind that, for these purposes, and according to the express provisions of the Treaty, what is relevant is the *first* moment in which the investor became aware of the alleged breaches, even if these breaches continue over time. Thus, several tribunals faced with treaties with a wording similar to that of this case, have rejected the attempts of investors to allege continuous breaches or new facts to avoid the temporal limitations of jurisdiction. In this context, the tribunal in *Spence International v. Costa Rica*, which held as follows, stands out:

> While it may be that a continuing course of conduct constitutes a continuing breach, the Tribunal considers that such conduct cannot without more renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims. Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period. This does not comport with the policy choice of the parties to the treaty. While, from a given claimant's perspective, a limitation clause may be perceived as an arbitrary cut off point for the prosecution of a claim, such clauses are a legitimate legal mechanism to limit the proliferation of historic

[155] *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction (4 December 2017) (**RL-098**), ¶ 330.

> claims, with all the attendant legal and policy challenges and uncertainties that they bring.[156]

117. In this regard, and given the disputes that precede it, Honduras submits that the Claimants' emphasis on Decree 46-2022 should be understood as an attempt to escape the temporal limitations on jurisdiction.

2. Claimants knew or should have known of the alleged breaches and alleged damages prior to the cut-off date of 24 August 2020.

118. As a preliminary matter, it is necessary to bear in mind that, for purposes of jurisdiction *ratione temporis*, the Tribunal must not be satisfied with the form in which the Claimants have presented their claim, but rather the Tribunal must independently determine its true nature. In this regard, the tribunal in *Spence International v. Costa Rica*, deciding on precisely such an objection, stated that:

> The relevance of this appreciation for present purposes is that, **in determining jurisdiction, a tribunal cannot rest simply on how a claimant has formulated its case** and the respondent formulated its reply. In an adversarial system, such as operates in investor-State arbitration proceedings, it is the litigation imperative of counsel for each side to formulate their case in the strongest, most uncompromising terms. Their task is not to shine a light on truth. It is to shine a light on the issues, **leaving the tribunal to discern the reality of the case**.[157]

119. The following analysis of each of the facts alleged by the Paizes that would constitute a breach of the Treaty by Honduras, demonstrates that the Claimants, through Pacific

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[156] *Spence International Investments, LLC et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017) (**RL-097**), ¶ 208. In the same vein, *see*, *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Liability (13 July 2018) (**RL-101**), ¶ 157 ("The Tribunal nevertheless sees certain difficulties with this argument. It would render Articles 1116(2) and 1117(2) largely ineffective in cases of a change in regulatory framework, since it could always be argued that each day's instance of application or enforcement of a measure was a separate act.").

[157] *Spence International Investments, LLC et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017) (**RL-097**), ¶ 226 (emphasis added).

Solar,[158] had knowledge of the alleged breached and of the alleged damages suffered, prior to the date of the Tribunal's jurisdiction cut-off date.

120. The Claimants allege, in essence, that Honduras breached the Treaty in the following ways: (i) by failing to pay outstanding invoices and other fees allegedly due under the Contract;[159] (ii) by limiting the power that Pacific Solar could inject into the electricity system;[160] and (iii) by forcing Pacific Solar to renegotiate the PPA.[161] These alleged measures are the basis for all of Honduras' alleged violations of the Treaty.

121. With respect to the first of the alleged breaches, as explained above,[162] the Claimants attempt to disguise a dispute over the performance of obligations under the PPA as a breach of the Treaty. Possibly aware of the jurisdictional problems with their case, the Claimants allege that Decree 46-2022 constitutes a repudiation of ENEE's payment obligations under the PPA,[163] which would be an independent breach of the Treaty.

122. Notwithstanding the fact that, as explained above,[164] the alleged repudiation has no basis as the payments by ENEE have remained unchanged after the issuance of Decree 46-2022, in jurisdictional terms also, this argument of the Claimants is unsupported.

123. The Tribunal should not be left with Claimants' mere characterization of their own case but should investigate its true nature and origin. Behind all the Paizes' argumentation about

[158] As noted in § II.A.4 above, Claimants have not even attempted to show that they control Pacific Solar, which deprives this Tribunal of jurisdiction. For the purposes of this section only, it is assumed that (*quod non*) Claimants are the controlling shareholders of Pacific Solar.

[159] Memorial on the Merits, ¶¶ 125, 190, 215, 314, 340.

[160] *Ibid*., ¶¶ 155, 317, 341.

[161] *Ibid*., ¶¶ 188, 193, 208, 247, 272, 340.

[162] *See above* § II.A.2.c.

[163] Memorial on the Merits, ¶¶ 125, 190, 215, 314, 340.

[164] *See supra* § II.C.

Decree 46-2022, what exists is a simple dispute about the amount that Honduras should pay for the energy and power provided by Pacific Solar.[165]

124. In this regard, as the tribunal noted in *Vieira v. Chile*, a claimant's claim for damages is a relevant element in determining the true nature of the claim submitted.[166] As can clearly be seen from a mere reading of the damages chapter of the Memorial,[167] about [redacted] of the damages claimed by the Claimants relate to the partial payment of invoices, and the interests thereon, issued prior to Decree 46-2022.[168] Thus, Claimants' own assessment of damages shows that their actual claim relates to the payment of amounts that Pacific Solar believes it is owed under the PPA.

125. In this context, when did the Paizes and Pacific Solar become aware of the partial and/or late payment of the invoices issued and that this late payment caused them losses in terms of Article 10.18(1) of the Treaty? As will be seen below, this occurred well before the cut-off date of 24 August 2020.

126. On 10 July 2020, Pacific Solar sent a communication to ENEE claiming payment of the accumulated debt as of that date. This document is already prior to the deadline of 24 August

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[165] *See, e.g.*, Memorial on the Merits, ¶ 314 ("**Second**, Honduras has failed to pay the remuneration as promised to Pacific Solar under the Agreements. Honduras is not compensating Pacific Solar for (i) the energy and capacity that the Plant has delivered, and (ii) the Renewables Incentives and interests that it is owed, as promised under the Agreements.").

[166] *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Award (21 August 2007) (**RL-073**), ¶ 208 ("Indeed, [the Tribunal] agrees with CHILE that the jurisdictional analysis is not limited exclusively to the facts raised by the Claimant in its Memorial on the Merits, Rather, it must include the facts that the Tribunal can assess as relevant to its jurisdiction, whether raised by CHILE or by VIEIRA"), ¶ 213 ("Moreover, in view of the very legal characterization of the claims alleged by VIEIRA and without going into the merits of the issues raised - *i.e.*, without analyzing or determining whether the conduct of VIEIRA and VIEIRA is in breach of the law - the Tribunal's jurisdiction must be limited to the facts that VIEIRA has submitted to the Tribunal, without analyzing or determining whether the conduct referred to in the preceding paragraph is or is not in breach of the AGREEMENT and without analyzing or determining the quantification of the damages that CHILE should pay to VIEIRA in the event that its claims are well-founded-, in conducting its analysis on jurisdiction, and only as a reference to it, this Tribunal will take into consideration the general claim raised by VIEIRA as to the compensation it demands from CHILE, which consists in the payment of 'the totality of the damages suffered by its investment' that it calculates took place since 1990, as is evident from the Economic Report submitted by the Claimant during the proceedings.").

[167] *See* Memorial on the Merits, ¶¶ 374-380 in what Claimants euphemistically refer to as "Pacific Solar's Historical Losses."

[168] In addition, as will be demonstrated in the unlikely event the case proceeds to the merits, Claimants' claim has a serious harm causation problem. Indeed, Claimants fail to explain how damages occurring since 2018 (non-payment of invoices) could have been caused by a breach of the Treaty occurring in 2022 (issuance of Decree 46-2022).

2020. Additionally, the communication itself demonstrates knowledge of a financial loss that had been dragging on for several years. In it, Pacific Solar explicitly states that "in relation to the debt of capital plus interest that [ENEE] has owed to Pacific Solar Energy, S.A. **since 13 December 2018, the amount corresponding to the capital is [redacted] and the value of the interest is [redacted] so we need to know when the payment of this debt will be made as we have to pay off the loans with local and foreign banks**."[169] This is a clear admission that Pacific Solar considered that ENEE would allegedly be in breach of the PPA and be causing economic damage to the company since at least 13 December 2018. Therefore, any claim relating to ENEE's obligation to pay the invoices and interest due to Pacific Solar should have been submitted no later than 13 December 2021, almost two years before the filing of the Notice of Arbitration. Any submission of a dispute after that date, as in the present case, falls outside the jurisdiction of this Tribunal.

127. As regards the second alleged breach, the case is also similar. The Claimants allege that Honduras, after the enactment of Decree 46-2022, would have started to limit the plant's power dispatch in contravention of its contractual rights.[170] They even explicitly point out that "[i]f the Government curtails the Plant's production for more than six hours in a month, under the PPA, ENEE is obligated to compensate Pacific Solar."[171]

128. Once again, Claimants invoke an alleged breach of which they were aware prior to the cutoff date and attempt to present it as if it were a new development. Indeed, Pacific Solar's own reports regarding the progress of the construction of the Second Phase of the Nacaome Plant indicate that as early as 2017, Pacific Solar experienced limitations in excess of six hours.[172] According to the Claimants' own reasoning, these actions would have already caused economic harm reparable under the PPA.[173] Evidently, as early as 2017, almost three years before the cutoff

[169] Letter from R. Barahona (PSE) to G. Perdomo (ENEE) (10 July 2020) (**R-049**). *See also* Letter from R. Barahona (PSE) to G. Perdomo (ENEE) (7 August 2020) (**R-050**).

[170] Memorial on the Merits, ¶ 155.

[171] *Ibid*., ¶¶ 54, 317, 341.

[172] PSE, Nacaome I Project Executive Report (October 2017) (**R-034**). *See also* Letter from L. Bulnes (PSE) to E. Torres and D. Aguilar (PSE) (30 January 2018) (**R-038**).

[173] Memorial on the Merits, ¶ 54.

date, Pacific Solar knew of the very measures about which it now complains. Accordingly, any claims by Claimants based on the limitations on energy injection are beyond the Tribunal's jurisdiction.

129. Finally, the only claim by the Claimants that could fall within the Tribunal's temporal jurisdiction concerns the alleged forced renegotiation of the PPA under Decree 46-2022. As explained above,[174] this claim has no merit as, despite certain discussions between the parties, the PPA has remained unchanged since its signature in 2014. Accordingly, this insubstantial claim by Claimants is formally within the Tribunal's jurisdiction *ratione temporis*, notwithstanding other jurisdictional objections applicable to this claim.

3. Even if the Tribunal considers that it has jurisdiction to hear claims of expropriation and breach of the minimum standard of treatment, it is clear that claims under the umbrella clause are outside the Tribunal's jurisdiction *ratione temporis.*

130. In the unlikely event that the Tribunal agrees with Claimants and finds that only with the enactment of Decree 46-2022 did Claimants have a claim to be brought before this Tribunal, this conclusion should extend only to claims based on expropriation and minimum standard of treatment. Umbrella clause claims, as explained below, are in any event outside the Tribunal's jurisdiction *ratione temporis.*[175]

131. In effect, through the operation of the umbrella clause, the Claimants seek to elevate Honduras' alleged breach of its contractual commitments to an international level[176] and cause a breach of the PPA to automatically become a breach of the Treaty. Notwithstanding that Honduras considers this to be an incorrect interpretation of the umbrella clause, the jurisdictional effect of the Claimants' interpretation confuses the two liability regimes.

132. In other words, with respect to the umbrella clause, the relevant date for purposes of the temporal limitations on the Tribunal's jurisdiction contained in Article 10.18(1) of the Treaty,

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[174] *See above* § II.

[175] As explained in § III.D., Claimants cannot use the MFN clause to import a new standard such as the umbrella clause into the Treaty. However, for the purposes of the discussion of jurisdiction *ratione temporis* only, this section assumes that Claimants can benefit from the umbrella clauses of other Honduran treaties (*quod non*).

[176] Memorial on the Merits, ¶¶ 337-346.

would be the date on which Pacific Solar became aware of the alleged contractual breaches and their detrimental effects. As the two breaches coincide, the date on which Pacific Solar became aware of the alleged breach of contract, must also be understood as the date on which it became aware of the alleged breach of the umbrella clause they seek to import into the Treaty.

133. The Claimants identify three alleged contractual breaches that they purport to elevate to a breach of the Treaty. These are the same as those discussed in the previous section: (i) non-payment of invoices and interest;[177] (ii) reductions in energy dispatch,[178] and (iii) preventing access to benefits and incentives relating to solar generation.[179]

134. With respect to the first and second breaches, as explained in the previous section, all the alleged defaults would have started in the period from 2017 to 2018, well before this Tribunal's jurisdiction cutoff date of 24 August 2020. Moreover, with respect to the collection of invoices and interest, Pacific Solar expressly communicated to ENEE its position with respect to the debt accrued since 2018, thus its knowledge in this regard is undeniable.

135. With respect to the third breach, this claim is entirely superfluous given that, as mentioned above,[180] the benefits and incentives relating to solar generation are already enshrined in the PPA, of which Claimants are alleging a breach. In that sense, prior knowledge of the alleged breach of the payment obligations under the PPA (which include the solar generation incentives) necessarily implies that this claim is also past the cutoff date.

136. Thus, all the Paizes' umbrella clause claims are outside the Tribunal's jurisdiction *ratione temporis.*

C. The Tribunal lacks jurisdiction *ratione materiae* as the Claimants have failed to prove that they are the owners of their alleged investment.

[177] *Ibid*., ¶ 340.

[178] *Ibid*., ¶ 341.

[179] *Ibid*., ¶ 342.

[180] *See above* § II.A.2.b.(2).

137. The Claimants have failed to prove one of the most basic requirements of the Tribunal's jurisdiction *ratione materiae*: ownership of the alleged investment. It is clearly the Claimants' burden to prove that they are the owners of the alleged investment.[181]

138. Claimants merely assert that they indirectly own and control 100% of Pacific Solar,[182] but offer no evidence to that effect. Despite Mr. Paiz's self-presentation as a sophisticated businessman,[183] he chose to present absolutely no background on Claimants' alleged control over their alleged investment.

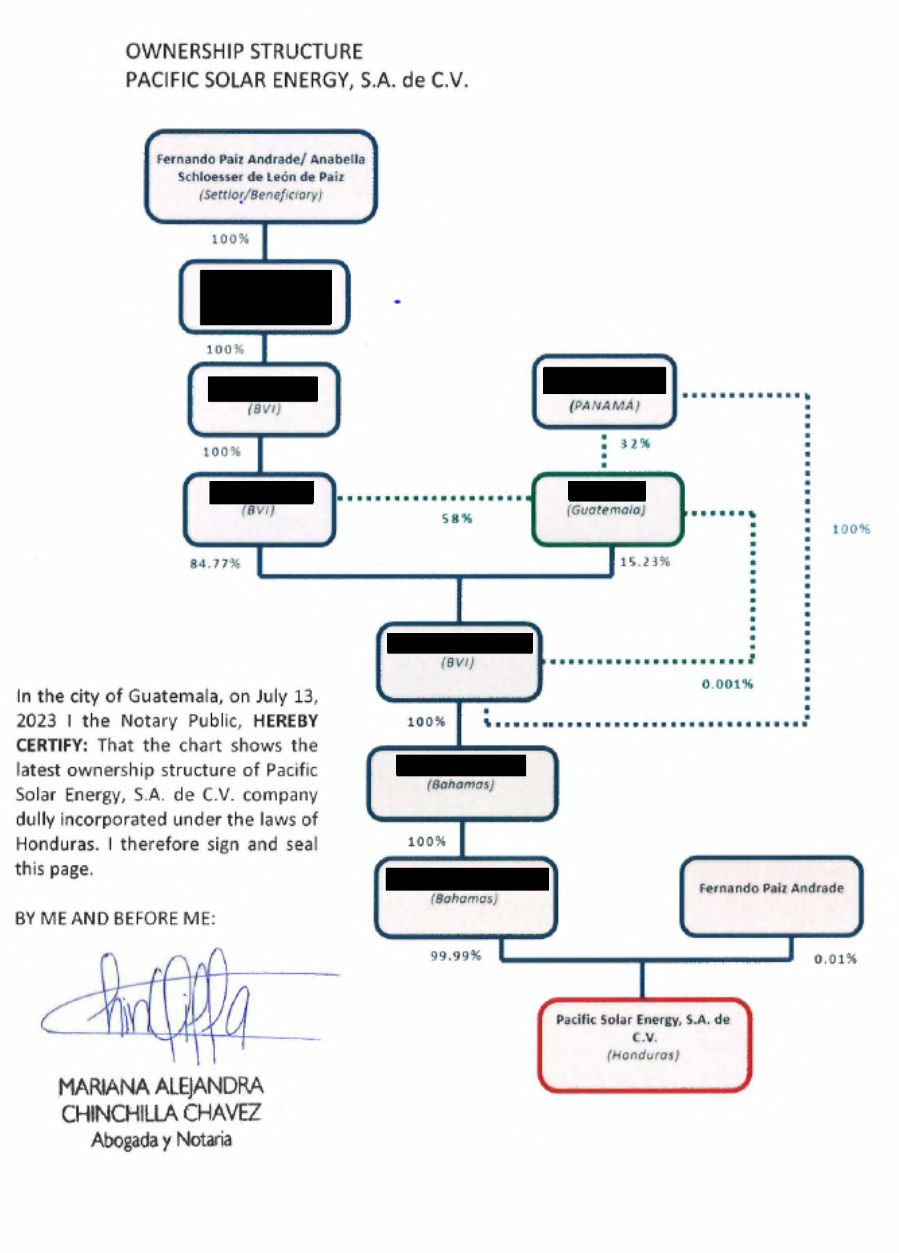
139. The only "evidence" submitted by Claimants in this regard is Exhibit **C-27**, entitled "Ownership Structure Pacific Solar Energy, S.A. de C.V.," which allegedly shows Pacific Solar's corporate structure and Claimants' control, shown below:[184]

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

[182] Memorial on the Merits (20 September 2024), ¶¶ 168-169; Notice of Arbitration (24 August 2023), ¶ 5.

[183] Paiz Declaration (**CWS-02**), ¶¶ 4-10. Moreover, Claimants present no information about Ms. Schloesser de Paiz's professional/economic history beyond being married to Mr. Paiz. Notice of Arbitration (24 August 2023), ¶ 11.

[184] It is also curious and striking that the Claimants have asked the tribunal to prevent the public from being able to see the diagram of their own elaboration by requesting that certain paragraphs of their briefs be struck out. In particular, they requested the deletion of paragraph 167 of their memorial and footnotes 389 and 390, which contain the assertion of indirect ownership of Pacific Solar and refer to Exhibit **C-027**. *See* Organizational Chart of the Shareholder Structure of Pacific Solar Energy, S.A. de C.V. (13 July 2023) (**C-027**). In this regard, Claimants seem determined that as little information as possible about their corporate structure should be disclosed.



140. However, this document is clearly insufficient and fails to prove anything. Indeed, the Claimants do not provide any background information to support the relationship between eight or more partnerships that allegedly exist and the Paizes and Pacific Solar.

141. The diagram submitted by Claimants has a "certification" from a Guatemalan notary that "the chart shows the latest ownership structure of Pacific Solar Energy."[185] This statement is insufficient to address the deficiencies in the submitted diagram, for several reasons.

142. *First*, the alleged "certification" does not comply with the formalities established by Guatemalan law to give value to legalizations. Indeed, in accordance with Article 13 of Decree No. 314 containing the Guatemalan Notarial Code, all legalizations must be in Spanish, be identified by consecutive cardinal numbering and, contain dates expressed in letters, among other formalities.[186] In addition, Article 55 of the same Decree requires the notary to add the words "by me and before me."[187] Thus, a certification in the English language, which does not include such words, such as the one in this case, is worthless under Guatemalan law. Additionally, the same Article requires that, in addition to the signature of the notary, the notary's seal be added, neither of which is present in this ''certification''.

143. *Secondly*, leaving aside the serious formal defects of this "certification," the notary does not indicate how the facts she certifies are known to her. There is no indication of what documents she had before her to be able to assert that this diagram represents Pacific Solar's corporate control structure. This is a completely unsubstantiated assertion, particularly considering that Pacific Solar is incorporated in Honduras and seven of the eight companies involved are allegedly incorporated in the Bahamas, Panama or the British Virgin Islands; all jurisdictions about which the notary does not claim to have any special knowledge.

144. The Tribunal should give no weight to this "certification" and must instead reach its own conclusion on the ownership of the alleged investment, the basic premise of its own jurisdiction. As shown below, the Claimants have not provided any background information that would enable the Tribunal to carry out this task.

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

[186] Notarial Code of Guatemala (Decree No. 314 of 1946) (30 November 1946) (**R-013**), Art. 13.

[187] *Ibid*., Art. 55.

145. The lack of proof is truly astonishing given the allegedly sophisticated investors in this case.[188] If the Claimants did indeed indirectly control Pacific Solar, it should be very simple to prove such a relationship, by means of share certificates, shareholder books, articles of incorporation or any other corporate document. However, as to seven entities in the chain ([redacted] the Claimants did not submit any document.

146. To take just one example from the alleged chain of control, how did [redacted] acquire and own 100% of [redacted]? It is impossible to know. There is no evidence to that effect. The Claimants are completely silent on the matter. This problem repeats itself in all the other links in the chain in the diagram.

147. The only evidence offered by the Claimants relates to the first tier in the diagram. The Claimants submitted the shareholder ledger of Pacific Solar which shows 99.99% ownership by [redacted], a company incorporated under the laws of the Bahamas, and Mrs. Paiz's 0.01% ownership.[189] Evidence of ownership of [redacted]? None.

148. Faced with this situation in which the Claimants have not even attempted to prove their ownership of the alleged investments, Honduras has conducted its own investigation in this regard. From the limited background information in the Republic's possession, all indications are that Mr. and Mrs. Paiz are not the owners of the investment they claim.

149. In this regard, although Pacific Solar is the signatory to the PPA, it does not appear to be the beneficiary of the PPA. In January 2018, Pacific Solar informed ENEE that it had entered into a trust agreement with [redacted] as trustee[190]

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[188] In this regard, an additional background to the lack of rigor with which the Claimants have approached compliance with the jurisdictional requirements of this arbitration relates to the failure of Mrs. Schloesser de Paiz to comply with the mandatory requirements of Articles 10.15 and 10.16 of the Treaty with respect to prior mandatory negotiations. This circumstance also confirms the non-existent relationship between the Paiz and Pacific Solar. *See* CAFTA-DR (**CL-001**), Arts. 10.15, 10.16.

[189] Libro de Accionistas de Pacific Solar Energy S.A. de C.V. (22 August 2024) (**C-073**).

[190] By 2016, Pacific Solar had already been authorized to "transfer the rights to the real estate where the project is developed, to a guarantee trust administered by a financial institution". Honduran Institute of Tourism, Resolution No. 033-2016 (24 August 2016) (**C-014**), p. 6.

under which it "assigns as security all rights and assets related to the Project, including the Plant [...] and the economic rights to which it is entitled as derived from the PPA."[191]

150. According to Article 1035 of the Honduran Code of Commerce, "[t]he trust implies the assignment of the rights or the transfer of the domain of the assets in favor of the trustee."[192] Article 1036 of the same Code states that "[f]rom third parties, the trustee shall be considered the owner of the rights or assets in trust."[193] Additionally, the above is ratified by the "Norms for the Constitution, Administration and Supervision of Trusts" issued by the National Banking and Insurance Commission of Honduras (**"Trust Norms**").[194] According to the Trust Norms, akin to the provision in the Honduran Code of Commerce, the trust constitutes "an autonomous and independent patrimony, distinct from the patrimony of the settlor," which in this case would be Pacific Solar.[195] Similarly, the Trust Norms state that one of the effects of the constitution of the trust is "the transfer of ownership of the assets [or rights] from the settlor [Pacific Solar] to the trustee [redacted]."[196]

151. Therefore, the true owner of the alleged investment,[197] i.e. the Nacaome Plant and the PPA, is the trustee and not Pacific Solar. Thus, in accordance with Honduran law, with the constitution of the trust, the ownership of the Nacaome Plant and the PPA passed from Pacific Solar to [redacted][198] In the eyes of third parties such as ENEE, Honduras and the Tribunal itself, the true owner of the alleged investment is [redacted] and, contrary to their assertion, the Paizes have no rights over the PPA or the Nacaome Plant.

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

[192] Código de Comercio de Honduras, 1950 (Decree No. 73 of 1950) (17 February 1950) (**R-014**), Art. 1035.

[193] *Ibid*., Art. 1036.

[194] National Banking and Insurance Commission, Rules for the Constitution, Administration and Supervision of Trusts (27 February 2017) (**R-033**).

[195] *Ibid*., Art. 5.

[196] *Ibid*., Art. 7.

[197] Memorial on the Merits, ¶ 171.

[198] This is without prejudice to the temporary nature of the Trust. While it is possible that ownership of the assets and rights may revert to Pacific Solar Energy with the termination of the Trust, the current situation is that ownership is held by [redacted].

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152. Accordingly, the Claimants have failed miserably to meet their burden of proof and demonstrate that they are the owners of the investments at issue in this dispute. On the contrary, the available evidence shows that the owners and controllers of these investments are third parties unrelated to this arbitration.

153. Thus, the Claimants cannot be considered as an investment holder in terms of Article 10.28 of the Treaty. Likewise, Pacific Solar cannot be considered an investor-controlled company within the meaning of Article 10.16.1(b) of the Treaty.

D. The CAFTA-DR does not permit the importation of umbrella clauses from other treaties, hence Claimants' claims on alleged breaches of contractual obligations fall outside the Tribunal's jurisdiction *ratione voluntatis.*

154. The Tribunal lacks jurisdiction to hear Claimants' claim of alleged breach of contractual obligations.[199] Claimants' arguments erroneously seek to introduce new obligations into the Treaty through an expansive interpretation of the most-favored nation ("MFN") clause set out in Article 10.04. This interpretation contradicts, not only the text and purpose of the Treaty, but also, case law. Article 10.04 of the Treaty states the following:

> 1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[200]

[199] Memorial on the Merits, ¶ 337 ("Considering the text of Article 11 of the Switzerland-Honduras BIT and Article 8(2) of the Germany-Honduras BIT, both of which refer to obligations or commitments entered into "in respect of investments," there can be no doubt that it includes contractual obligations, such as Honduras's obligations under the Agreements, and obligations assumed through laws or in legislation, such as Honduras's 2013 Renewables Law ").

[200] CAFTA-DR (**CL-001**), Art. 10.04.

155. Based on this provision, the Claimants seek to invoke the umbrella clauses contained in the Honduras-Switzerland BIT and the Honduras-Germany BIT.[201]

156. The Claimants' attempt should not be examined in a vacuum. To rule on the importation of standards from other treaties through Article 10.04 of the Treaty, the Tribunal must first determine whether the MFN clause contained in that provision applies. This question was decided by the tribunal in *Mesa Power v. Canada*, where it found as follows:

> **For an MFN clause in a base treaty to allow the importation of a more favourable standard of protection from a third party treaty, the applicability of the MFN clause in the base treaty must first be established. Put differently, one must first be under the treaty to claim through the treaty**. Thus, the Claimant must first establish that the MFN provision of the base treaty applies. Then, relying on that provision, it may be able to import a more favourable standard of protection from a third party treaty. Here, the base treaty is the NAFTA. Thus, the Claimant must first establish that the MFN provision, i.e. Article 1103 of the NAFTA, is applicable. As Article 1108(7)(a) expressly excludes the application of Article 1103 in cases of procurement by a Party or State enterprise, for the Claimant to establish that Article 1103 of the NAFTA applies, it must show that the FIT Program does not constitute procurement.[202]

157. In line with the forecited ratio, Honduras demonstrates that the application of Article 10.04 of the Treaty is excluded in the case of government procurement (**Subsection 1**), and, there is no legal basis for importing standards from other treaties on the basis of an MFN clause such as Article 10.04 (**Subsection 2**).

1. Article 10.13(5) of the Treaty excludes the application of the MFN clause with respect to purchases made by the State.

158. Article 10.13(5) of the Treaty makes it clear that the MFN provisions contained in Article 10.04 do not apply to government procurement:

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[201] Memorial on the Merits, ¶ 324. ("Invoking the MFN clause in Article 10.4 of the Treaty, Claimants rely on the umbrella clauses in the Switzerland-Honduras BIT and the Germany-Honduras-BIT.)

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

(5) Articles 10.3, **10.4**, 10.9 and 10.10 **do not apply to**:

(a) procurement; or

(b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.[203]

159. This express exclusion limits the scope of MFN treatment, protecting the Contracting Parties' sovereignty to manage their procurement and subsidies without outside interference. As the tribunal in *Mesa Power v. Canada* noted, under the similarly structured NAFTA, these provisions "exclude certain measures from the substantive [investment] protections."[204] Based on this same understanding, various tribunals have determined that the order of analysis of these types of exclusions is to (i) define the scope of the reservations and exceptions (in this case, Article 10.13) and then (ii) analyze whether the substantive protections (in this case, Article 10.04) apply.[205] In this case, that analysis confirms that Claimants are not entitled to the protections afforded by Article 10.04 of the Treaty because they are excluded under Article 10.13 since their claims are directly related to a public procurement, namely the sale of electricity to ENEE.

a. The scope of reservations and exceptions in Article 10.13 of the Treaty: the exclusion of government procurement.

160. It is important to note that, as confirmed by numerous arbitration decisions under NAFTA that were made regarding a provision identical to that of the Treaty, the Contracting Parties have made the reservation set out in Article 10.13 to prevent international investors from claiming rights or benefits in connection with transactions that are essentially in the public interest and sovereign responsibility, such as government procurement.

161. Thus, the exclusion in Article 10.13 ensures that Contracting Parties can manage their procurement of goods and services without being subject to additional international

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

[204] *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) (**RL-031**), ¶ 419.

[205] *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Final Award (25 July 2022) (**RL-109**), ¶ 371; *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) (**RL-031**), ¶ 462; *Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award (6 March 2018) (**RL-038**), ¶ 6.27.

obligations. The nature of this exception reflects a consensus among Contracting Parties on the need to preserve sovereign control in critical areas of economic and social policy, such as public procurement.[206] This is because:

> It appears reasonable that a State be free to procure goods or services in a manner that yields maximum benefits for the local economy. Government purchasing of goods and services is an extremely important function, and procurement by way of formal purchasing procedures is frequently utilized as an instrument of policy. To this end, Article 1108(7)(a) allows for preferential treatment of local suppliers, when a Party is engaged in formal purchasing of goods and services.[207]

162. The consequence is that, if an activity qualifies as "public procurement" under Article 10.13(5), "it is excluded from the analysis."[208] As the tribunal explained in *Mesa Power*, these provisions consist of a "'carve-out' rule. Its function is to exclude all procurement activities from the scope of some of the obligations contained in the investment chapters of the treaties.[209] The provision in Article 10.13(5) allows a means of defense to the respondent, who is "entitled to the defence [...] which [...] excludes the application of [certain investment protections] in a case [...] involving governmental procurement by a Party."[210]

163. In other words, the reservation contained in Article 10.13(5) has obvious jurisdictional effects. Therefore, upon verifying that the MFN claim relates to a public

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

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

[208] *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Final Award (25 July 2022) (**RL-109**), ¶ 410.

[209] *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) (**RL-031**), ¶ 427.

[210] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003) (**CL-010**), ¶ 196.

procurement, the Tribunal must declare itself without jurisdiction. This interpretation has also been confirmed by international jurisprudence.[211]

164. Having clarified the purpose of the Article 10.13 exclusion and its jurisdictional effects, it is important to define what is meant by "procurement." On this point, the Tribunal indicated the following in its Procedural Order No. 3:

> The Tribunal observes that this objection requires it to make a finding on the interpretation of the relevant provisions of the CAFTA-DR, as well as on their application to the agreement between Pacific Solar and ENEE. For instance, the objection as formulated by the Respondent requires a finding on **whether a contract with ENEE qualifies as a contract with the State or with a State authority within the meaning of the CAFTA-DR, and on whether the acquisition of electricity for distribution to Honduran citizens is an activity "for governmental purposes**."[212]

165. Following the order of analysis suggested by the Tribunal, Honduras will explain in this section what is meant by government procurement, why the PPA qualifies as a contract with a State enterprise, and why the purchase of electricity for distribution to Honduran citizens is an activity for governmental purposes. In this regard, the text of the World Trade Organization ("WTO") agreements, as well as decisions under them, provide an important point of reference. In particular, the language of Article III.8(a) of the General Agreement on Tariffs and Trade ("GATT") uses language very similar to that proposed by the Tribunal:

> The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.[213]

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[211] *See, e.g, Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award (6 March 2018) (**RL-038**), ¶ 6.50 ("[T]he Tribunal [...] decides that it has no jurisdiction over the Claimant's claims under NAFTA Articles 1102 and 1103 insofar as they concern [...] contractual terms in the 2009 EPA [...], the Tribunal [...] accepts the Respondent's jurisdictional objection under NAFTA Article 1108(7)(a)."); *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) (**RL-031**), ¶ 402 ("For the reasons set forth below, the Tribunal has come to the conclusion that the FIT Program does constitute procurement. Thus, by virtue of Article 1108(7)(a), the MFN provision enshrined in Article 1103 cannot apply.").

[212] Procedural Order No. 3 (30 December 2024), ¶ 51.

[213] General Agreement on Tariffs and Trade (1947) (**RL-054**), Art. III.8(a).

166. *Firstly*, the notion of "government procurement" is broad. The Treaty defines "government procurement" in Article 2.1 as "the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes [...]."[214] Several tribunals under NAFTA,[215] in the face of Article 1108(7) of that agreement which has the same wording as the Treaty, have understood ''government procurement'', in its context and in light of the object and purpose, as "the purchasing of goods or services for or by a State or a state enterprise."[216] The Claimants accept the same definition by confirming that government procurement is "the **process** by which a government obtains the use of or acquires goods or services."[217]

167. *Secondly*, as set out below in Section III.E., the PPA was not signed with a national authority, but with a state-owned company (ENEE). This does not preclude the application of the exclusion set out in Article 10.13(5) since not all public purchases are executed by central government authorities. In the WTO context, for example, it has been confirmed that government procurement may be carried out, in general, by "entities acting for or on behalf of government," and that this is determined on the basis of the "competences conferred on the entity concerned and by whether that entity acts for or on behalf of government."[218] In addition, it may be the case that public procurement is carried out through an intermediary or a combination of multiple entities, which are not government agencies, but private actors or entities owned or controlled by the

[214] CAFTA-DR (**CL-001**), Art. 2.1 (emphasis added).

[215] *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Final Award (25 July 2022) (**RL-109**)(March 25, 2016) (**RL-031**), ¶ 381; *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) (**RL-031**), ¶ 408 ("In reaching its conclusion that the procurement exception applied, the tribunal observed that the term 'procurement' in Article 1108(7)(a) of the NAFTA was to be understood broadly [...].").

[216] *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Final Award (25 July 2022) (**RL-109**), ¶ 390 *citing Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award (6 March 2018) (**RL-038**), ¶ 6.35.

[217] Observations on Request for Bifurcation, ¶ 60.

[218] WTO Appellate Body, *Canada-Determined Measures Affecting the Renewable Energy Generation Sector, Canada-Regulated Rate Schedule Measures*, WTO Doc. WT/DS412/AB/R, WT/DS426/AB/R (6 May 2013) (**RL-088**), ¶¶ 5.60-5.61.

State.[219] This may be the case with regard to "state enterprises," which the Treaty defines as an "enterprise(s) that is owned, or controlled through ownership interests, by a Party."[220]

168. *Finally,* an activity has been interpreted as being "for government purposes" or "for the needs of the public authorities" when the goods or services which are the subject of the respective public procurement are consumed by the government directly or directed by the government to its beneficiaries, in the exercise of their public functions.[221]

b. The substantive protections of Article 10.04 do not apply in this case.

169. In this case, the Claimants' claim arises out of an electricity supply contract between Pacific Solar and ENEE, namely the PPA. The PPA provides that ENEE will purchase the power generated by the Nacaome Plant that is allegedly owned by the Claimants.[222] Thus, the buyer is ENEE and the seller is Pacific Solar.[223] It is clear, then, that the object of the PPA is the supply of energy, and that its parties are ENEE and Pacific Solar. On the face of it, this leaves no room for doubt that the business underlying this arbitration is a public procurement.

170. However, the Claimants object, and draw to that effect an artificial distinction between "measures that violate Honduras's commitments under the Agreements" and "measures relating to the process by which the Government "obtained" the Agreements."[224] This distinction

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[219] Panel Report, *Turkey - Certain Measures Concerning the Production, Import and Marketing of Pharmaceutical Products, Notification of an Appeal by Turkey Pursuant to Article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Pursuant to Paragraph 5 of the Agreed Procedure for Arbitration under Article 25 of the DSU (Arbitration Agreement), and Pursuant to Rule 20 of the Working Procedures for Appellate Review*, WTO Doc. WT/DS583/12 (28 April 2022) (**RL-108**), ¶¶ 7.96-7.97.

[220] CAFTA-DR (**CL-001**), **Art. 2.1**.

[221] Panel Report, *Turkey - Certain Measures Concerning the Production, Import and Marketing of Pharmaceutical Products, Notification of an Appeal by Turkey Pursuant to Article 25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Pursuant to Paragraph 5 of the Agreed Procedure for Arbitration under Article 25 of the DSU (Arbitration Agreement), and Pursuant to Rule 20 of the Working Procedures for Appellate Review*, WTO Doc. WT/DS583/12 (28 April 2022) (**RL-108**), ¶¶ 7.41; WTO Appellate Body, *Canada-Determined Measures Affecting the Renewable Energy Generation Sector, Canada-Regulated Rate Schedule Measures*, WTO Doc. WT/DS412/AB/R, WT/DS426/AB/R (6 May 2013) (**RL-088**), ¶¶ 5.66-5.68.

[222] Contract No. 002-2014 (**C-001**), Clause 2.1.

[223] *Ibid*.

[224] Observations on Request for Bifurcation, ¶ 60.

is unclear and the Claimants have not sufficiently explained its meaning or relevance. Honduras understands the Claimants to mean that the measures alleged to be in breach of the Treaty do not relate to the "process" by which the Government obtains goods or services.[225] By this, the Claimants suggest that the exclusion set out in Article 10.13 requires analysis of "whether the dispute arises out of a process by which the Government obtains or acquires goods."[226] This requirement appears nowhere in the respective provision, thus demonstrating the Claimants attempt to create conditions that are neither foreseen in the Treaty, nor can be derived from its object and purpose. As will be seen throughout this section, Claimants' argumentation to import an umbrella clause is so contrived that they resort to this strategy more than once.

171. In any event, even if the Claimants' argument had some merit (*quod non*), the fact remains that the dispute arises precisely out of a public procurement process, which excludes the Claimants' claim from the scope of the Treaty. Power purchase agreements, or PPAs, are, by definition, the mechanism by which States "procure or acquire" electricity. Hence, they are referred to as power "purchase and sale" contracts. The Claimants themselves have repeatedly acknowledged that their claims essentially derive from the non-payment of invoices under the PPA between ENEE and Pacific Solar.[227] According to the Claimants, although the PPA "has as its object the supply of energy and power,"[228] it does not qualify as an "agreement for the "supply of electric energy" by ENEE."[229] In other words, for the Claimants, although the PPA has the structure, subject matter, and parties of a PPA, it would in fact be something different. Their position is unsupported in fact or in law, either under Honduran or international law, and must be rejected accordingly. Claimants' only attempt to explain their argument is in a single footnote in their Observations on the Bifurcation Request. There, they acknowledge that "the PPA certainly provides for ENEE's obligation to purchase (and pay for) electricity from Pacific Solar," which is

[225] Honduras reserves the right to reformulate its position in the face of any clarification or change by the Claimants to their argument.

[226] Observations on Request for Bifurcation, ¶ 61.

[227] *See, e.g.*, Memorial on the Merits, §§ II(F)(1)(b), II(F)(2)(a), V(B)(1).

[228] Contract No. 002-2014 (**C-001**). Clause 2.1.

[229] Observations on Request for Bifurcation, ¶ 61.

fully in line with Honduras' interpretation, but add that "ENEE's commitments are not limited to these purchasing obligations [...] including the building and commissioning a 50 MW PV Plant."[230]

172. Honduras does not dispute that the PPA provides for other objectives and benefits, which is common in agreements for such complex projects. However, this does not mean that the existence of these other provisions detracts from the nature of the PPA as a public procurement, or that it ceases to be one of the situations excluded from the scope of application of Article 10.13. Moreover, even if one were to accept (*quod non*) that these other provisions could alter the nature of the PPA as a public procurement - which its own text disproves by making it clear that its object is the supply of energy to a State enterprise - the Claimants' claims are directly related to the component of the PPA that refers to this supply, and not to other aspects, such as the construction of the plant. Therefore, there is no basis for characterizing the PPA in this case, and in the context of this dispute, as anything other than a public procurement contract.

173. As is demonstrated below, if the dispute did not arise essentially out of these contractual obligations, the Claimants would not need to insist, through strained and erroneous interpretations of the Treaty, that umbrella clauses can be imported from other treaties. It is manifestly contradictory for Claimants, on the one hand, to demand payment of outstanding invoices for these items and, on the other hand, to argue that the dispute does not arise out of those same obligations. The only explanation for this inconsistency is that the Claimants seek to conceal the true contractual nature of their claim behind a complex sequence of measures - many of which have not even been adopted - to force their claim within the scope of protection of the Treaty. In doing so, they attempt to force open the doors of investment arbitration to litigate a matter that is, in essence, strictly contractual.[231]

174. On the one hand, it is clear that ENEE is a state enterprise. Honduran law, the law by which the entity was created, states in its first article that it is "**an autonomous public service organization.**"[232] In turn, Article 45 of the same law states, unambiguously, that the company is

[230] Observations on Request for Bifurcation, ¶ 61, note 204.

[231] *See below* § III.F.

[232] Decree No. 48 of 1957 (**C-006**), Art. 1.

"a state agency."[233] Article 53 of the General Law on Public Administration indicates that "[p]ublic enterprises are those that are created to develop economic activities in the service of various purposes and that do not take the form of a commercial company."[234]

175. On the other hand, it is clear that electricity is a good that ENEE acquires from the generators and its purpose is to distribute this energy for the fulfilment of a public purpose: to supply electricity to the population of Honduras. Again, the law creating ENEE indicates, in Articles 2 and 3, the object and powers of ENEE, which include "promoting the development of the electrification of the country" and "buying and selling electricity and related services."[235] The Claimants themselves confirm that key actors such as Minister Tejada, and the Respondent itself, have clarified that the objective of the PPA is the "supply of electricity to the country" and that "[i]t cannot be disputed that the purchase of electricity by the ENEE includes a governmental purpose."[236] Thus, this is not a point in dispute between the Parties.

176. It is therefore clear that the transactions that are the subject of the PPA meet the criteria of a government procurement under the Treaty and are expressly excluded from the scope of MFN treatment. If any doubt still remains, international jurisprudence under NAFTA confirms Honduras' position.

177. The decision in *Mercer v. Canada* is of particular relevance in this context, as it also involved a power purchase agreement and the tribunal found that it was excluded under the treaty's reservation on government procurement.[237] Similarly, in *Mesa Power v. Canada*, the tribunal also decided that a program under which the Ontario government purchased energy for final distribution to citizens constituted a "government purchase" under NAFTA.[238] Both cases are

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[233] *Ibid*., Art. 45.

[234] General Law of the Public Administration (Decree No. 146-86) (29 October 1966) (**C-061**), Art. 53.

[235] Decree No. 48 of 1957 (**C-006**), Arts. 2 and 3.

[236] Observations on Request for Bifurcation, ¶ 71.

[237] *Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award (6 March 2018) (**RL-038**), ¶ 6.47 ("Accordingly, the Tribunal finds that Celgar's GBL, as a contractual term (but not otherwise), was integral to the procurement function of the 2009 EPA. Accordingly, the Tribunal (by a majority) decides that Celgar's GBL, as part of the 2009 EPA, falls within the procurement exception in NAFTA Article 1108(7)(a).").

[238] *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) (**RL-031**), ¶ 448. ("On the basis of this description, the Tribunal comes to the conclusion that the FIT Program constitutes

analogous to the dispute underlying the Claimants' claims, and therefore lead to the same result: the government procurement exclusion applies in this case and the MFN provision cannot be invoked.

178. It is particularly telling that, in the face of clear precedents cited by Honduras - which involve a provision identical to that in the NAFTA and an analogous fact pattern - the Claimants merely point out that the NAFTA, unlike the Treaty, does not define the term "procurement," and as such, these precedents are "misplaced and should therefore be given little weight in considering Honduras's MFN carve-out objection."[239] However, the definition of "procurement" is not relevant in this case, since, as is widely known, CAFTA-DR closely follows NAFTA rules as its precursor treaty. In light of this, there is no evidence to suggest that the inclusion of a definition of "procurement" in the Treaty was intended to substantially modify the meaning of the NAFTA carve-out on which it was based.

179. In light of the foregoing, the Tribunal must declare that it lacks jurisdiction to hear the Claimants' claim, as the express exclusion in Article 10.13(5) of the Treaty eliminates any obligation to grant MFN treatment in the context of government procurement. This approach not only respects the text and purpose of the Treaty but also protects the sovereignty of the Contracting Parties and prevents the abuse of the international arbitration system.

2. There is no legal ground for importing standards from other treaties on the basis of an MFN clause such as Article 10.04 of the Treaty.

180. Notwithstanding the submissions in the previous section on "carve-outs," generally speaking, Article 10.04 of the Treaty invoked by the Claimants does not permit the importation of standards from other treaties. An MFN clause is intended to prevent discrimination between investors in like circumstances, not to create substantive rights that are not expressly provided for in the base treaty. As Prof. Douglas states, "[t]he MFN clause operates to secure more favourable

'procurement.' By way of the FIT Program, the Government of Ontario purchases electricity through the OPA for the use of and for the ultimate benefit of the people of Ontario. The FIT Program bears all the hallmarks of procurement that have been described above. It was introduced to create a green economy and stimulate job creation. It was designed following extensive consultations with stakeholders and launched by formal announcements of the Government. Applicants to the Program were rigorously screened through prescribed (and publicized) criteria in a competitive, open process to which any interested person could apply.").

[239] Observations on Request for Bifurcation, ¶ 61.

treatment for the claiming party; it does not operate to rewrite the terms of a treaty in respect of which the claimant is not even a signatory."[240] Likewise, in *VEB v. Ukraine*, the tribunal confirmed that the MFN provision "does not import other standards of protection, such as FET. Rather, the MFN provision amounts to a non-discrimination standard that only and specifically precludes the application of measures of a discriminatory character that could interfere with the management and disposal of the investment in question."[241]

181. In this case, the NFM clause cannot be used to import an umbrella clause into a treaty that does not have one. Umbrella clauses allow for raising contractual disputes between the investor and the host state to the level of an international breach under an investment treaty. It is not a disputed fact that the Treaty does not include an umbrella clause. If it did, Claimants would invoke it rather than seek to trigger its application through a contrived argument under Article 10.04 of the Treaty. The dispute then is whether this clause can be imported through the MFN clause. As demonstrated below, it cannot.

182. If the States Parties had intended to include an umbrella clause, they would have done so.[242] However, they did not. Therefore, using MFN clauses to import standards from other

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

[241] *State Development Corporation "VEB.RF" v. Ukraine*, SCC Case No. V2019/088, Partial Award on Preliminary Objections (31 January 2021) (**RL-104**), ¶ 269.

[242] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award (21 July 2017) (**CL-102**), ¶ 884 ("In the Tribunal's view, in interpreting the scope of the MFN Clause contained in Article IV(2) of the Treaty, meaning must be given to the critical words '[i]n all matters governed by this Agreement.' According to Claimants, this language should be interpreted as referring generally to the protection of foreign investors. This interpretation is too broad and disregards the reference to all 'matters' governed by the Treaty. In the Tribunal's view, the plain and ordinary meaning of this language is to refer to the various

treaties results in a *de facto* modification of what the Contracting Parties agreed to. This is crucial since, in interpreting these clauses, the Tribunal must first refer to the intention of the Contracting Parties. The tribunal in *Telenor v. Hungary,* when interpreting an MFN clause, held that the tribunal must first refer to the intention of the Contracting Parties, and went on to state that "what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, **but the intention of the States who are the contracting parties**."[243] Likewise, the tribunal in *Vercara v. Colombia* indicated that, in order to use an MFN clause as an instrument to import standards from other agreements, it must be established that the intention of the parties to the relevant treaty was to "circumvent the more restrictive clause" in order to "instead import a broader obligation."[244] The Claimants have not made, let alone proved, their argument in this regard.

183. Moreover, allowing the importation of standards from other treaties creates a dangerous precedent of *treaty shopping* under which investors could simply select "à la carte" the standards that are most convenient for them to litigate a case, rather than subjecting themselves to what has been expressly agreed by the Contracting Parties. This abuse of the investment arbitration system not only undermines the purpose of the treaties but also threatens to erode confidence in the system.

184. It is manifestly clear that Claimants seek to import an umbrella clause from other treaties because their claim is inherently contractual and thus excluded from Treaty protection. The Claimants themselves confirm this intent by citing cases such as *Enron v. Argentina*, arguing that these tribunals found that "state commitments under both laws and contracts may be covered by

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rights or forms of protection contained in the individual provisions of the Treaty. The Tribunal accepts that the parties to the Treaty were in all likelihood aware of the existence of umbrella clauses and if they had intended to include such a clause in the Treaty, they would have done so. According to Respondent, use of the MFN Clause to incorporate an umbrella clause into the Treaty would result in the incorporation of a new right or standard of treatment not provided for the Treaty. On the basis of the specific language used by the Parties in the Treaty, the Tribunal finds this argument persuasive.").

[243] *Telenor Mobile Communications A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006) (**RL-072**), ¶ 95 (emphasis added).

[244] *Neustar, Inc. and Vercara, LLC v. Republic of Colombia*, ICSID Case No. ARB/20/7, Award (20 September 2024) (**RL-111**), ¶ 726.

an umbrella clause."[245] As previously established, the exception in Article 10.13(5) ensures that Contracting Parties can preserve their sovereignty in matters related to public procurement. Claimants, however, seek to transform a contractual dispute explicitly excluded under the Treaty into an investment dispute by importing standards that are not applicable to this arbitration. The Tribunal must reject this attempt to rewrite the Treaty and consequently confirm its lack of jurisdiction.

185. The Claimants' strategy should also be rejected because it confuses distinctly different standards in different and autonomous agreements. As explained by the tribunal in *Ickale v. Turkmenistan*, among others,[246] the MFN provisions of a treaty:

> [...] **cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State**. The standards of protection included in other investment treaties create legal rights for the investors concerned, which may be more favourable in the sense of being additional to the standards included in the basic treaty, but such differences between applicable legal standards cannot be said to amount to "treatment accorded in similar situations," without effectively denying any meaning to the terms "similar situations."[247]

[245] Memorial on the Merits, ¶ 334.

[246] *Veolia Propreté v. Arab Republic of Egypt*, ICSID Case No. ARB/12/15, Decision on Objections to Jurisdiction (13 April 2015) (RL-089). ARB/12/15, Decision on Objections to Jurisdiction (13 April 2015) (**RL-089**), ¶ 154 ("notwithstanding the contradictory conclusions arrived at by various arbitral awards as to whether the FET standard may be considered in international investment law to cover other standards such as FPS and an umbrella clause, **this Tribunal is of the view that an MFN clause [...] cannot be used to introduce into the treaty other autonomous standards of international investment law such as the FPS clause or the umbrella clause**. Indeed, each of these standards stands on its own and they should neither be conflated nor considered to belong to the same category or the same subject-matter under an MFN clause."); *Société Générale on behalf of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v. Dominican Republic*, LCIA Case No. UN 7927, Preliminary Objections to Jurisdiction (19 September 2008) (**RL-074**), ¶ 41 ("Each treaty defines what it considers a protected investment and who is entitled to that protection, and definitions can change from treaty to treaty. In this situation, resort to the specific text of the MFN Clause is unnecessary because it applies only to the treatment accorded to such defined investment, but not to the definition of 'investment' itself."); *Muhammet Çap & Sehil e Ticaret Ltd. v. Turkmenistan,* ICSID Case No. ARB/12/6, Award (4 May 2021) (**RL-106**), ¶ 789. ("The tribunal in *İçkale v Turkmenistan c*oncluded on the facts in that case that "given the limitation of the scope of application of the MFN clause to 'similar situations', it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State. The Tribunal concurs with this rationale and decision which is equally applicable to this case.").

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

186. These imports are particularly sensitive in terms of admissibility and jurisdiction. In *Tecmed v. Mexico*, the tribunal decided that the admissibility requirements of a NAFTA claim "are necessarily a part of the essential core of negotiations of the Contracting Parties;'' and it should therefore be presumed that they would not have entered into the Agreement in the absence of such provisions" and, therefore such provisions, "fall outside the scope of the most favoured nation clause."[248] This decision is particularly relevant because it highlights the value of consent of States as the basis on which investment agreements operate, and consequently, on which the legitimacy of the investor-State dispute settlement system and the jurisdiction of arbitral tribunals is built.

187. Similarly, in *A11Y Ltd. v. Czech Republic*, the tribunal, relying on the *Hochtief*, *Plama* and *EURAM* decisions, recalled that it is a well-established principle that the MFN clause cannot be used to create consent by treaty parties to claims not covered by the treaty "unless the Contracting Parties clearly and explicitly agreed thereto".[249] Accordingly, in order to rely on Article 10.04 of the Treaty as an instrument to import substantive protections from another agreement, the Claimants would have to demonstrate that this was the intention of the State Parties, but they have failed to do so. This burden should be met by following the rules of interpretation of customary international law, not by indiscriminately citing arbitral awards that appear to support the Claimants' position, when in fact they do not, as they were issued under agreements other than the Treaty and therefore do not reflect the intent of the Treaty's Contracting Parties.

188. Indeed, the precedents cited by the Claimants in purported support of their interpretation of the use of MFN clauses have been heavily criticized. With respect to *Maffezini v. Spain*, the tribunal in *ADF v. United States*, a case under NAFTA - whose provisions are near identical to those of the Treaty - clarified that "*Maffezini* does not set out in any detail the basis for

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[248] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) (**CL-036**), ¶ 74.

[249] *A11Y Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction (9 February 2017) (**RL-096**), ¶¶ 103-104; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005) (**RL-067**), ¶ 198; *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction (22 October 2012) (**RL-087**), ¶¶ 448, 450; *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011) (**RL-016**), ¶¶ 79 *et seq.*

the above ruling and hence does not provide much guidance."[250] Likewise, in *Salini v. Jordan*¸ the tribunal dismissed the investor's argument that sought to extend the tribunal's jurisdiction to contractual claims through an MFN clause. In particular, the tribunal expressed concern about the precedent in *Maffezini v. Spain*, recognizing that this decision had been widely challenged and gave rise to uncertainty and increased risks of *treaty shopping*.[251]

189. Claimants assert that "it is well-accepted that MFN enables the importation of substantive protections in other investment treaties."[252] This is false. Although the Claimants contend that their position is supported by "[m]any tribunals,"[253] they cite only three cases, which are also taken out of context, as explained below. It is telling that, at the same time, they claim that Honduras' position is based "on a minority of arbitral tribunals," without further explanation of what constitutes a minority position.[254] In any event, Honduras points out that it has cited numerous cases confirming its interpretation, while the Claimant repeatedly returns to the same decisions that have been questioned both by the doctrine and by other arbitral tribunals.

190. In this context, it is not surprising that despite having had the opportunity to develop their argument following Honduras' Request for Bifurcation, Claimants merely reiterated the same three cases, which, according to them, represent the opinion of "many investment tribunals" and give rise to a "well-established principle."[255] Undoubtedly, this characterization falls far short of what international law considers to be well-established legal principle.

191. Moreover, the *Arif v. Moldova* and *EDF v. Argentina* cases cited by Claimants are inapposite. The arbitral tribunals in both cases applied a "mechanical" interpretation of the MFN clause, ignoring the will of the State parties and their specific provisions. As Dolzer and Schreuer explain: "[w]hen the MFN rule is applied in [...] a mechanical manner, the effect may be to replace

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[250] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003) (**CL-010**), ¶ 197.

[251] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (9 November 2004) (**RL-065**), ¶ 115.

[252] Memorial on the Merits, § IV.C.1.

[253] *Ibid*., ¶ 325.

[254] Observations on Request for Bifurcation, ¶ 58.

[255] *Ibid*., ¶ 59, note 199.

the negotiated substance of the treaty."[256] That is precisely what happened in both those cases, leading to criticisms of their reasoning and rendering them worthless as legal authorities.[257]

192. As for the case of *White Industries v. India*, the Claimants fail to mention that the discussion on the use of the MFN clause in that arbitration was not related to the importation of procedural rights, let alone an umbrella clause. Rather, the debate centered on the application of the "effective means" standard rather than the "denial of justice" standard contained in the applicable treaty. For the reasons already stated, MFN clauses cannot be used to trade off protections, whether substantive or procedural. However, it is striking that the Claimants fail to

[256] R. Dolzer & C. Schreuer, "Investment Contracts" in *Principles of International Investment Law* (2012) (**RL-017**), p. 207 ("A literal application of an MFN clause may indeed have the effect of transferring a regime into the treaty in an area that the parties specifically negotiated and that they regulated in the treaty in a manner distinct from the substance of the referenced treaty."). *See also Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003) (**CL-036**), ¶ 69 (rejecting the importation of a different treaty provision through an MFN clause because the provision went to "the core of matters that must be deemed to be specifically negotiated by the Contracting Parties" and "directly linked to the identification of the substantive protection regime applicable to the foreign investor [...].").

[257] The award in ***Al Warraq v. Indonesia*** has been specifically criticized for misapplying the rules of interpretation relevant to the MFN clause. *See* S. Batifort & J. B. Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 *American Journal of International Law* 873 (2018) (**RL-099**), pp. 895-896 ("[The tribunal's] analysis is in line with a strong presumption that MFN clauses are designed to import standards of treatment [...]. **The tribunal's approach, however, is not necessarily in line with the interpretive tools that the tribunal purported to apply, which might have counseled a bottom-up, rather than top-down, approach**. As originally formulated, the *ejusdem generis* principle, which the *Al-Warraq* tribunal applied, is not satisfied simply by noting that the third-party treaty is of the same kind as the basic treaty. Instead, [...] the principle of *ejusdem generis* focuses on whether the benefit invoked is of the same kind as that contemplated in the MFN clause. **Applied in this way, the *ejusdem generis* principle directs the interpreter not to the broad purposes of the basic and target treaties, but rather to the specific terms of the MFN clause at issue. This approach would have led the *Al-Warraq* tribunal to grapple with the 'economic activity' language before reaching a conclusion in principle on the ability of the MFN clause to import other treaty standards**.") (emphasis added). *See also Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2011) (**RL-081**), ¶¶ 214-215 (where the tribunal explains that "[o]ne may observe in the two treaties, to use the ILC's words, 'a substantial identity between the subject-matter of the two sets of clauses concerned.' Moreover, there is a clear and logical connection between the subject matter of the clauses and the subject matter of the invoked treaties. [...] The *ejusdem generis* rule merely identifies the outer limit of the clauses' field of application; it cannot tell us which particular subject matters, within that outer limit, the clauses were actually intended to cover. **As stressed by the *Ambatielos* Commission, the latter question 'can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty'. This is so, in the ILC's words, because 'States cannot be regarded as being bound beyond the obligations they have undertaken**.'") (emphasis added). The same criticism applies to *KCI v. Gabon*, where the tribunal based its decision solely on the decision of the *Al-Warraq* tribunal. *See Kontinental Conseil Ingenierie v. Republic of Gabon*, PCA Case No. 2015-25, Final Award (23 December 2016) (**RL-093**), ¶ 169 ("The tribunal constituted in the case *Al Warraq v. Indonesia* has indeed made the same interpretation and application of Article 8 of the Agreement.") (translation by the Republic, original in French: "*Le tribunal constitué dans l'affaire Al Warraq c. Indonésie a d'ailleurs fait la même lecture et application de l'article 8 de l'Accord*.").

note this fundamental difference between the two types of protection and cite *White Industries* as an alleged precedent in support of their position, even though it is clearly not an analogous case.

193. In addition, the Claimants cite a scholarly publication on the *White Industries* decision which, according to them, demonstrates that "the importation of substantive provisions through MFN provisions is not controversial."[258] However, the Claimants' citation is misleading as it omits the content before and after the same sentence, in which the author acknowledges that this use of MFN clauses has been associated with *treaty shopping* and that the importation of dispute settlement mechanisms, such as an umbrella clause, through an MFN clause is, in fact, controversial.[259]

194. Moreover, the literature confirms that the interpretation adopted by the tribunal in White Industries "enabled White Industries to indulge in treaty shopping and arrive at a result that India did not anticipate."[260] Parallelly, several other authors have pointed out that the interpretation of the MFN clause in that case was mechanical, and that the tribunal did not engage in any analysis of the applicable treaty text.[261] Further literature on this case shows that, if anything, the decision gave rise to the Respondent State's concerns about MFN clauses and consequently led to their elimination in the Respondent State's Model BIT.[262] Certainly then, these practices and precedents cannot serve as a basis for the Claimants to endorse the tactical use of MFN clauses.

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[258] Memorial on the Merits, ¶ 328, note 650. *See* I. Kalnina, "White Industries v. The Republic of India: A Tale of Treaty Shopping and Second Chances," 9 *Transnat'l Disp. Mgmt.* 1 (**CL-142**), p. 6.

[259] I. Kalnina, "White Industries v. The Republic of India: A Tale of Treaty Shopping and Second Chances," 9 *Transnat'l Disp. Mgmt.* 1 (**CL-142**), p. 6 ("Similarly, **in the context of MFN treatment, the term "treaty shopping" has been used to refer to importing provisions from third treaties concluded with the host State**. There is no negative connotation to the term per se and, as also observed by the Tribunal in White, **the debate about the appropriateness of MFN use only questions the importation through an MFN clause of dispute resolution mechanisms**, whereas the importation of substantive provisions is not at all controversial") (emphasis added).

[260] P. Ranjan, "The White Industries Arbitration: Implications for India's Investment Treaty Program, Investment Treaty News," *available at* https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/ (13 April 2012) (**RL-084**).

[261] S. Batifort & J. B. Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 *American Journal of International Law* 873 (2018) (**RL-099**), pp. 893-895.

[262] A. Singh, "Avoiding the MFN Clause: One Step Forward, Two Steps Back?" *Kluwer Arbitration Blog*, *available at* https://arbitrationblog.kluwerarbitration.com/2018/12/01/avoiding-mfn-clause-one-step-forward-two-steps-back (1 December 2018) (**RL-102**) ("Now, it is to be noted that based on the previous model, India used to have a MFN provision in the BIT. But the MFN clause has been completely excluded in the new model BIT. Moreover, it is not surprising that India has excluded the MFN provision due to the problems it faced in the White Industries case where

195. The Claimants further argue that since the agreements from which they seek to import the umbrella clause (i.e., the Honduras-Switzerland BIT and the Honduras-Germany BIT) predate the Treaty, foreign investors already enjoyed these rights and, therefore, there is "no doubt" that protections such as an umbrella clause should be extended in the present case as well. They also cite *Lopez-Goyne v. Nicaragua*, stating that the arbitral tribunal under CAFTA-DR already recognized this position.[263] However, the Claimants' reference to this single case is, yet again, out of context. In that arbitration, the dispute concerned the application of a substantive standard (i.e., the FET under Article 10.5 of the Treaty *vis a vis* Article IV.1 of the Spain-Nicaragua BIT), and not its procedural effects (as is the case with the umbrella clause in this dispute). In that case, the tribunal itself considered that the claimants "only allude to the MFN argument cursorily, without discussing the content of the FET standard [...] and much less showing that it is more favorable," consequently holding that "[t]he Tribunal need therefore not deal with this."[264]

196. In this regard, there is no doubt that, if the agreements from which the umbrella clause is sought to be borrowed were subsequent to the Treaty, the use of MFN treatment to incorporate such a clause into an agreement that does not contain it, would be completely unacceptable. As noted by the tribunal in *Tecmed*, such an exercise would not only generate the problems already identified by Honduras, but would also raise serious complications concerning the non-retroactivity of treaties (i.e., applying later treaty standards to agreements that entered into force earlier).[265] However, it is a *non sequitur* to jump from this point to say that, in cases such as

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Australia invoked the 'effective means' provision contained in the India-Kuwait BIT. Now it is very easy to conclude to the fact that India obviously did not want to grant the same remedy of effective means to Australia and that is why India formulated a balanced BIT").

[263] Memorial on the Merits, ¶ 329, note 651.

[264] *The Lopez-Goyne Family Trust et al. v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award (1 March 2023) (**CL-138**), ¶ 431.

[265] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003) (**CL-036**), ¶ 69 ("The Arbitral Tribunal is aware that the Claimant, relying on the decision in the case *Emilio Agustín Mafezzini v. Kingdom of Spain*, refers in its closing statement to the most favored nation treatment provided for in Article 8(1) of the Agreement in order to enable retroactive application in view of the more favorable treatment in connection with that matter which would be afforded to an Austrian investor under the bilateral treaty on investment protection between the United Mexican States and Austria of June 29, 1998. The Arbitral Tribunal will not examine the provisions of such Treaty in detail in light of such principle, because it deems that matters relating to the application over time of the Agreement, which involve more the time dimension of application of its substantive provisions rather than matters of procedure or jurisdiction, due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties. These are determining factors for their acceptance of the Agreement, as they are directly linked to the identification of the substantive protection regime applicable to

the present dispute, where agreements predate the Treaty, then "there can be little doubt that Claimants should be afforded the treatment contained under those treaties."[266] Both scenarios are untenable.

197. The fact that the agreements from which the Claimants wish to import provisions predate the Treaty does not support their tactical use of these protections. If anything, it demonstrates the absurdity of their position. The Claimants seek to take an umbrella clause included in treaties signed in the 1990s and, taking undue advantage of MFN treatment, revive it in the Treaty which was negotiated and signed almost a decade later, despite the fact that the Contracting States expressly decided not to include such a provision. In the interpretation that the Claimants seek to impose on this Tribunal, the CAFTA-DR Member States would be liable for the written and unwritten. This is not the design of the investment protection system or of public international law. What would be the point of States making sovereign decisions on the inclusion or exclusion of certain protections in their treaties if, in the end, they could also be held liable for what they excluded? These uncertainties have led several states to clarify their original position on the expansive use of MFN to import protections from other agreements.[267]

198. Accepting the Claimants' interpretation puts Honduras, and potentially any State, in an almost impossible situation: to defend itself, in all its investment disputes, against the highest standards of protection it has ever been able to negotiate, even if these are different from those clearly agreed to in the disputed treaty. This means also restricting the bargaining power of states to new agreements with improved standards, and *de facto* stripping these treaties of their material legal effects. For this very reason, as noted by the tribunal in *Chemtura v. Canada*, all three NAFTA

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the foreign investor and, particularly, to the general (national or international) legal context within which such regime operates, as well as to the access of the foreign investor to the substantive provisions of such regime. Their application cannot therefore be impaired by the principle contained in the most favoured nation clause.").

[266] Memorial on the Merits, ¶ 329.

[267] Organization for Economic Cooperation and Development, Summary of Discussions of the Future of Investment Treaties Track 2 Meeting (30 November 2022) (**RL-110**), ¶ 21 ("A significant number of delegates also indicated that they viewed language that explicitly excludes dispute settlement arrangements from the scope of MFN as a mere clarification of treaty language in existing treaties and confirmed that unspecified MFN clauses in their jurisdictions' earlier generation treaties should not be interpreted as to include dispute settlement arrangements in the scope of MFN. In that regard, several delegates also explained that their governments did not insist on systematically adding such clarifying language in all of their new treaties as they deemed that their earlier treaty language on MFN -even when dispute settlement arrangements are not explicitly excluded from the scope of MFN- was clear enough.").

states have opposed this interpretation of the respective clause.[268] Honduras sees no compelling reasons, nor have the Claimants offered them, for the Tribunal to depart from this position in the present case.

199. Perhaps the Claimants' most specious argument, is their assertion that in other "cases" where states have rejected this abusive use of the MFN clause, they have done so on the basis of specific reservations.[269] The reality is that the Claimants cite only one case, litigated by the very same law firm that represents them.[270] To suggest that, because in a single case a State based its defense on specific reservations, this becomes a necessary condition to prevent the MFN clause from functioning as a *catch-all* provision, is a fallacy. There is no rule in international law requiring such a requirement, and it would be improper for this Tribunal to conclude that, in order to exercise its right of defense against this argument, Honduras or any other State must be obliged to formulate specific reservations or to negotiate its treaties "on the defensive." The reservations formulated by Guatemala in the case cited by Claimants only demonstrates that, over time, States have had to make greater efforts to avoid such unintended interpretations precisely because of abuses of this clause.

200. In their response to Honduras' Bifurcation Request, and in the face of questions about their attempt to justify the abuse of the MFN clause, the Claimants introduced a new argument that is nothing more than a *post hoc* rationalization and is far from an authentic interpretation of the Treaty. In particular, they assert that "the Treaty already grants investors a standard of protection akin to the ones contemplated under the umbrella clauses invoked by Claimants."[271] This thesis is based on the premise that the protections they seek to incorporate through the umbrella clauses would already be covered within the notion of "investment agreements" provided for in the Treaty.[272] This assertion, however, is incorrect. Honduras will

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[268] *Chemtura Corp. v. Government of Canada*, PCA Case No. 2008-01, Award (2 August 2010) (**CL-012**), ¶ 235 ("The Respondent as well as the United States and Mexico in their Article 1128 interventions [...] firmly oppose of the possibility of importing a FET clause from a BIT concluded by Canada.").

[269] Memorial on the Merits, ¶ 329.

[270] *Ibid*., ¶ 329, note 654.

[271] Observations on Request for Bifurcation, ¶ 59.

[272] *Ibid*.

develop its argument in detail in Section III.E below. It should be noted, however, that the only support cited by the Claimants for this interpretation is a publication that merely provides general explanations of the notion of "investment agreement" and "investment authorization" under the 1994 U.S. Model BIT, without providing any basis to support the Claimants' argument.[273] In fact, the book they cite confirms the very opposite of their argument, which is that, as of this year, the US practice was to opt for more restrictive language by deleting the clause obliging the parties to respect, in general, investment obligations.[274]

201. The Claimants' attempt to import standards of protection from other treaties through the MFN clause of Article 10.04 of the Treaty is without legal basis and should be rejected by the Tribunal. The MFN clause seeks to avoid discrimination between investors in like circumstances but does not allow for the creation of additional substantive rights or the rewriting of the treaty base. Case law has reiterated that this clause cannot be used to incorporate provisions outside the treaty, especially with regard to umbrella clauses, which are more favorable standards of protection or admissibility and jurisdiction requirements.

202. Even assuming *arguendo* that a treaty's MFN clause can be used to import more favorable rights or standards of protection, this can only be done if those rights or standards are established within the treaty containing the MFN clause. Conversely, the MFN clause cannot be used to import rights that are not part of the treaty containing the MFN clause, as established by arbitral tribunals and other authorities.[275] These precedents are directly applicable to the present

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[273] *Ibid*. *See* K. J. Vandevelde, "The Scope of BIT Protections" in *U.S. International Investment Agreements* (2009) (**RL-012**), p. 173.

[274] K. J. Vandevelde, "The Scope of BIT Protections" in *U.S. International Investment Agreements* (2009) (**RL-012**), pp. 103-104, 261, 360.

[275] *See, e.g.,* C. McLachlan *et al*., "Treatment of Investors" in *International Investment Arbitration: Substantive Principles* (2017) (**RL-095**), ¶ 7.313 ("It is the subject matter scope of the treaty containing the MFN clause that defines the outer boundaries of the operation of the clause. **It is essential to ensure that the provisions relied upon as constituting the more favourable treatment are properly applicable and will not have the effect of fundamentally subverting the carefully negotiated balance of the investment treaty being applied**.") (emphasis added); *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011) (**RL-016**), ¶¶ 79, 81 ("[T]he MFN clause stipulates how investors must be treated when they are exercising the rights given to them under the BIT but does not purport to give them any further rights in addition to those given to them under the BIT. [...] The MFN clause is not a *renvoi* to a range of **totally distinct sources and systems of rights and duties**: **it is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found**."); *Accession Mezzanine Capital L.P. v. Hungary*, ICSID Case ARB/12/3, Award (17 April 2015), Annex A, ¶¶ 73, 74 ("MFN clauses are not and should not be interpreted or applied to create new causes of action beyond those to which consent to arbitrate has been given by the Parties [....] an investor may properly rely

case, as they confirm that the MFN clause cannot be used to extend the scope of the Treaty beyond the rights expressly agreed between the Parties. Following these and other similar decisions, Claimants cannot invoke Article 10.04 of the Treaty to incorporate umbrella clauses from other treaties that create new obligations that were not originally consented to by the Contracting States.

203. In this case, the Claimants attempt to import an umbrella clause to transform a contractual dispute into an investment case, thus distorting the purpose of the Treaty. However, the intent of the Contracting States is at the heart of the interpretation of an MFN clause, and there is no evidence that Honduras has consented to grant broader protections than those expressly agreed to. Allowing Claimants to import umbrella clauses from other treaties would impose obligations on States Parties that they never contemplated when they agreed to the Treaty. It would also create jurisdiction where none was ever granted and encourage *treaty shopping*. Such a result would be plainly wrong, and as such, the Claimants' submission in this regard must be rejected in its entirety.

E. Claimants have failed to prove that the dispute arises out of an investment agreement under CAFTA-DR Article 10.28.

204. CAFTA-DR Article 10.16 provides that ICSID Arbitration is available where the claim is based on the respondent's alleged breach of either "[i] an obligation under Section A, [of the CAFTA-DR Chapter Ten], [ii] an investment authorization, or [iii] an investment agreement," and, such breach has resulted in loss or damage to the claimant.[276]

205. The Claimants argue that the PPA, the State Guarantee and the Operations Agreement fall within the definition of an investment agreement in CAFTA-DR.[277] This position is unfounded and should be dismissed by the Tribunal.

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only on rights set forth in the basic treaty, meaning the BIT to which the investor's home state and the host state of the investment are directly parties, but not more than that"); *Serguei Paushok et al. v. Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011) (**CL-096**), ¶ 570 ("investor cannot use that MFN clause to introduce into the Treaty completely new substantive right.").

[276] CAFTA-DR (**CL-001**), Art. 10.16(1)(a)(i) and (ii).

[277] Memorial on the Merits, ¶ 174.

206. Both CAFTA-DR and arbitral jurisprudence have consistently imposed strict limitations on what constitutes an investment agreement.[278] CAFTA-DR Article 10.28 defines an Investment Agreement as follows:[279]

> **investment agreement** means a **written agreement** that takes effect on or after the date of entry into force of this Agreement **between a national authority** of a Party and **a covered investment or an investor of another Party** that grants the covered investment or investor rights: (a) with respect to natural resources or other assets that a national authority controls; and (b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself.

207. Accordingly, in order for 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.

208. Honduras does not dispute that the PPA, the State Guarantee and the Operations Agreement are in writing and were entered into force after the date of entry into force of CAFTA-DR However, as demonstrated below, Claimants cannot demonstrate that the PPA qualifies as a written agreement (**Subsection 1**), and in any event, the alleged investment agreement does not grant rights with respect to natural resources or other assets controlled by the national authorities of Honduras (**Subsection 2**).

1. Claimants do not prove that the PPA qualifies as a written agreement.

[278] *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (**CL-042**), ¶¶ 182-183; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010) (**RL-014**), ¶ 234.

[279] CAFTA-DR (**CL-001**), Art. 10.28.

209. Preliminarily, the Tribunal must determine which written agreement is subject to scrutiny under article 10.28 of CAFTA-DR. According to the Claimants, the PPA, the State Guarantee, and the Operations Agreement, which they conveniently choose to refer to collectively as "the Agreements" between Pacific Solar and the Honduran State entities, are agreements between the national authorities of the State Party and a covered investment.[280] The Republic does not share this position.

210. As explained below, the only agreement that the Tribunal may consider for purposes of determining whether it meets the definition of investment agreement under Article 10.28 is the PPA (**Subsection a**). The PPA is not a written agreement between a national authority of one Contracting Party and a covered investment of another Contracting Party (**Subsection b**).

a. The PPA, the State Guarantee and the Operations Agreement are not agreements that can be considered separately as written agreements.

211. Claimants' collective naming of the PPA, the State Guarantee and the Operations Agreement as "the Agreements" is an unsuccessful attempt to elevate the status of the PPA to that of a legal stability framework agreement. The Claimants' contention is erroneous.

212. As explained in Section II.A.2.b., the PPA, the State Guarantee, and the Operations Agreement do not constitute agreements of the same rank, as purported by the Claimants, rather, the latter two are clearly derivative and supplementary to the PPA. The PPA represents the agreement establishing the contractual relationship for the purchase and sale of electricity, while the State Guarantee merely acts as a guarantee of payment in case of ENEE's default, without creating new substantive rights, and, being explicitly provided for in Annex X of the PPA.[281]

213. The Operations Agreement is primarily a technical document authorizing the construction and operation of the power plant and imposing conditions on Pacific Solar without

[280] Observations on Request for Bifurcation, ¶ 66.

[281] Decree No. 70-2007 (**C-004**), Art. 4 ("Renewable energy generation projects that sign an Electricity Supply Contract with ENEE shall be entitled to enter into a Support Agreement with the Office of the Attorney General of the Republic for the Compliance of the Contract with the State of Honduras."); Contract No. 002-2014 (**C-001**), Clause 9.7; Decree 113-2014 (**C-002**), Art. 4.2.

establishing new substantive obligations that were not already contemplated in the PPA.[282] This subordinate nature is evidenced by the fact that Pacific Solar never invoked these documents in its contractual relationship with ENEE prior to the arbitration, and by the fact that the alleged additional rights Claimants allege they have under these documents were already included in the PPA or are subject to specific conditions.

214. Therefore, the only written agreement that the Tribunal must analyze to determine whether an investment agreement under CAFTA-DR Article 10.28 is in place, is the PPA between Pacific Solar and ENEE. However, as demonstrated below, the PPA is not a written agreement within the meaning of footnote 12 to Chapter 10 of the CAFTA-DR.

b. The PPA was not executed between a national authority of one Party and a covered investment/investor of another Party.

215. Note 12 to Chapter 10 of the CAFTA-DR sets out what is meant by a written agreement:

> "**Written agreement**" refers to an agreement in writing, **executed by both parties**, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity or a decree, order, or judgment; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.[283]

216. Note 12 of Chapter 10 requires that for an investment agreement in terms of CAFTA-DR Article 10.28 to meet the definition of a written agreement, it must: (i) be in writing, (ii) have been executed by both parties, and (iii) give rise to an exchange of binding rights and obligations.

217. As demonstrated below, the PPA was not executed between a national authority of one Contracting Party and a covered investment or investor of another Contracting Party.

[282] Operating Contract (**C-003**).

[283] CAFTA-DR (**CL-001**), Chapter 10, note 12.

(1.) ENEE is not a national authority because it is not part of the central level of government.

218. Honduras explained in its Request for Bifurcation that, for an agreement to be considered an investment agreement, it "must be entered into by the host state and the foreign investor, and **not by a state-owned entity or a local company established by the investor.**"[284] The Tribunal, in its Bifurcation Decision, correctly pointed to the need to determine whether ENEE qualifies as a "national authority" within the meaning of CAFTA-DR Article 10.28.[285] It is demonstrated below that ENEE is not a national authority under the CAFTA-DR because it is not part of the central level of government, but is a state-owned enterprise.

219. Note 13 of Chapter 10 defines what is meant by national authority under Article 10.28 of the CAFTA-DR as an "authority at the **central level of government.**"[286]

220. The membership of the central level of government must be analyzed in the light of Honduran legislation.[287] In Honduran law, ENEE is not part of the central level of government for at least two reasons.

221. *First*, the General Law of Public Administration of Honduras expressly states that "[t]he Centralized Public Administration is constituted by the organs of the Executive Branch." These bodies include (i) the Presidency of the Republic, (ii) the Council of Ministers, and (iii) the Secretariats of State.[288] This provision does not include state enterprises or any entity of another level of government.

222. *Second*, ENEE's constitutive law establishes that the company is an "**autonomous** public service **organization**, with its own personality, legal capacity and assets, of indefinite

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[284] Bifurcation Request, ¶ 68 (*citing* R. Dolzer & C. Schreuer, "Investment Contracts" in *Principles of International Investment Law* (2012) (**RL-017**), p. 80).

[285] Procedural Order No. 3, ¶ 58.

[286] CAFTA-DR (**CL-001**), Chapter 10, note 13.

[287] *Ibid*., Art. 10.22.

[288] General Law of the Public Administration (Decree No. 146-86) (29 October 1966) (**C-061**), Arts. 9-10. This same designation was made by Honduras under the Treaty when it designated its State Secretariats as "Central Level Government Entities". United States-Central America-Dominican Republic Free Trade Agreement, Annex 9.1.2(b)(i) (5 August 2004) (**RL-063**), p. 6.

duration."[289] Strictly speaking, and as defined by ENEE itself, it is an autonomous public company.[290] The General Law on Public Administration also indicates that "[p]ublic companies are those that are created to develop economic activities in the service of different purposes and that do not take the form of a commercial company."[291] Therefore, despite being a public enterprise, ENEE is not an authority at the central level of government.

223. Consequently, the ENEE cannot be considered as a national authority when analyzing of the existence of an "investment agreement" under Article 10.28 of the CAFTA-DR.

(2.) Neither the Claimants nor their alleged covered investment executed the written agreement.

224. Claimants also argue that the mere fact that the PPA was entered into by domestic authorities of Respondent and the alleged "covered investment" is sufficient to satisfy the CAFTA-DR requirement.[292] Claimants are wrong.

225. The Claimants have failed (and will fail) to prove that, even if the PPA was entered into between a national authority of the Respondent (*quod non*), it was not entered into with a covered investment or investor **of another Contracting Party**, as required by Article 10.28 of the CAFTA-DR.

226. The Tribunals in *Burlington Resources v. Ecuador* and *El Paso v. Argentina Argentina*, had to examine treaties defining an investment agreement as one "between [a] Party and [a] national or company of the other Party"[293] and "a dispute between a Party and a national or company of the other Party arising out of or relating to [...] *an investment agreement between*

[289] Decree No. 48 of 1957 (**C-006**), Art. 1.

[290] What is the ENEE? *ENEE* (24 February 2025) (**R-066**) ("What is ENEE? It is an autonomous public company responsible for the generation, transmission, distribution and commercialisation of electricity in Honduras. It was created by Decree 48 of the Military Government Junta on 20 February 1957").

[291] General Law of the Public Administration (Decree No. 146-86) (29 October 1966) (**C-061**), Art. 53.

[292] Observations on Request for Bifurcation, ¶ 66.

[293] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010) (**RL-014**), ¶ 235.

that Party and such national or company,"[294] respectively. Both tribunals concluded that the other party to the investment agreement must not be of the same nationality as the respondent because of the use of the phrase "other Party." CAFTA-DR draws a similar distinction between "the national authority of a Party" and "a covered investment or an investor of *another* Party,"[295] indicating that the covered investment cannot be of the same nationality as the Contracting Party whose national authority is a party to the PPA at the time of its conclusion.

227. In this case, the parties executing the PPA were, on the one hand, ENEE as an autonomous public enterprise of Honduras and, on the other hand, Pacific Solar, a company incorporated in Honduras, owned and controlled at the time of the execution of the PPA (and its derivative instruments) by Honduran nationals.[296] Importantly, it is not in dispute that the Claimants' alleged involvement in Pacific Solar began only after it had entered into the PPA with ENEE.[297]

228. For the Claimants this situation would be irrelevant, because supposedly the only thing that would matter is the existence of the agreement, regardless of who entered into or when.[298] This position is incorrect. To be considered a covered investment as part of an "investment agreement," it must be owned or controlled by the claimant at the time the PPA was entered. In *Duke Energy v. Ecuador*, the Tribunal noted that **at the time the PPAs were entered into**, the non-state party to the agreement (a company incorporated in the respondent State) **was not owned by foreign investors** and as such, the PPAs cannot be considered investment agreements.[299]

229. The Claimants attempt to dismiss this authority, asserting that the tribunal, constituted under a different treaty, held that a PPA was not an investment agreement because the

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[294] *El Paso Energy International Company v. Argentine Republic*, ICSID Case ARB/03/15, Award (31 October 2011) (**CL-019**), ¶ 193 (emphasis in original).

[295] CAFTA-DR (**CL-001**) Art. 10.28.

[296] *See above* § II.A.1.

[297] Bifurcation Request, ¶ 68; Contract No. 002-2014 (**C-001**).

[298] Observations on Request for Bifurcation, ¶ 66-68.

[299] *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (**CL-042**), ¶ 183.

investor was not a party to the PPA, not because of the obligations contained therein.[300] However, in the present dispute, the "investors" (the Paizes) were also not a party to the PPA at the relevant time and as such, this authority is relevant to the Tribunal's assessment of whether the Agreements were entered into by a "covered investment or an investor of another Party."[301]

230. Furthermore, the importance of being a signatory to an Agreement was highlighted by the tribunal in *Lanco v. Argentina*.[302] Thus, the Tribunal should not allow the *ex post facto* construction of an alleged investment agreement that the Claimants did not execute on their own behalf or through a covered investment.[303]

231. Additionally, it is well established in doctrine and jurisprudence that "**such an agreement must be entered into by the host state and the foreign investor, and not by a state-owned entity or a local company established by the investor**."[304] The Claimants attempt to subvert this authority by asserting that the cases relied upon were cases under the US-Ecuador BIT which does not contain a definition identical to the definition of an investment agreement in CAFTA-DR.[305] However, Article VI of the US-Ecuador BIT provides 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 [...] an investment agreement between that Party and such national or company [...].[306]

[300] Observations on Request for Bifurcation, ¶ 70.

[301] CAFTA-DR (**CL-001**), Art. 10.28.

[302] *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal (8 December 1998) (**RL-058**), ¶¶ 12-16.

[303] Claimants' interpretation would render clause 10.28 of the CAFTA-DR ineffective. Following this interpretation, a contract would not have to be executed by the covered investor/investment and the National Authority at the same time and the State would face a situation where written agreements with local companies could be elevated to "investment agreements" without the consent of the host State.

[304] R. Dolzer & C. Schreuer, "Investment Contracts" in *Principles of International Investment Law* (2012) (**RL-017**), p. 80.

[305] Observations on Request for Bifurcation, ¶ 68.

[306] Treaty between the Republic of Ecuador and the United States of America on the Promotion and Protection of Investments (27 August 1993) (**R-017**), Art. VI.

232. Like the United States-Ecuador BIT, the CAFTA-DR similarly requires that the agreement be "between a national authority of a Party and a covered investment or an investor of another Party."[307] The Claimants' criticism is therefore without merit.

233. In conclusion, neither the PPA, nor the State Guarantee, nor the Operations Agreement can be considered an investment agreement because they were not executed by the Claimants or by a covered investment at the time of its execution.

2. The Claimants have not proved that the alleged Agreement would confer rights with respect to natural resources or other assets controlled by the national authorities.

234. The Claimants allege that the PPA grants Pacific Solar rights with respect to natural resources and assets that Honduras controls,[308] and is therefore not merely a commercial contract. According to them, this is because (i) the PPA grants Pacific Solar rights related to electricity generation which is itself an activity essentially controlled by Respondent's national authorities,[309] and (ii) the Claimants and Pacific Solar relied on the Agreements to establish or acquire the Nacaome Plant.[310]

235. In the event that the Tribunal finds that the Claimants succeeded in proving the existence of a written agreement for the purposes of Article 10.28 of the CAFTA-DR, the following section explains why the PPA does not meet the requirement of granting rights with respect to natural resources (**Subsection a**), and why the PPA could not serve as both a foundation and an investment (**Subsection b**).

a. The PPA or the so-called Agreements do not grant Pacific Solar rights with respect to natural resources.

[307] CAFTA-DR (**CL-001**), Art. 10.28

[308] Memorial on the Merits, ¶ 178.

[309] *Ibid*.

[310] *Ibid*., ¶ 179.

236. The CAFTA-DR definition of an investment agreement requires that the agreement involve state-controlled assets or natural resources.[311] As the relevant doctrine emphasizes, when assessing similar provisions in the US treaties, an investment agreement "excludes commercial agreements between the host state and the investment or the investor."[312]

237. Claimants' allegation that Pacific Solar is granted "rights" with respect to a natural resource that Honduras controls is untenable. The "rights" granted to Pacific Solar under the PPA are as follows:

- Build, operate and maintain a power plant of *its own*;
- Supply energy and electrical power at the Delivery Point to the Buyer; and
- Design, supply, construct and connect the works necessary to make available and/or deliver the energy and power to be supplied at the Delivery Point.[313]

238. While the Claimants' so-called "Agreements" state that they grant Pacific Solar "the 'exclusive right to use and enjoy the solar resource [...],' "[314] the clauses specifying the precise rights and obligations of the Parties to the Agreement, such as those mentioned above, demonstrate that Pacific Solar is granted rights only in relation to the Nacaome Plant it built and owns, and the electricity produced by that plant. The fact that a natural resource is used in the production of electricity is insufficient to elevate these "Agreements" to the status of investment agreements under the Treaty. The so-called "Agreements," which primarily relate to the "supply of electricity and associated electrical energy," are more in line with commercial power purchase agreements than investment agreements.

[311] CAFTA-DR (**CL-001**), Art. 10.28 ("[An] investment agreement means a written agreement [...] with respect to natural resources or other assets that a national authority controls.").

[312] K. J. Vandevelde, "The Scope of BIT Protections" in *U.S. International Investment Agreements* (2009) (**RL-012**), p. 173.

[313] Contract No. 002-2014 (**C-001**), Clause 2.2.

[314] Observations on Request for Bifurcation, ¶ 71.

239. But even assuming that the Agreements would grant Pacific Solar "rights" with respect to the solar resource, the solar resource is not a "natural resource(s) that a national authority controls," as required by Article 10.28 of the CAFTA-DR.

240. *Firstly,* the solar resource is a renewable natural resource. The definition of "natural resources" is "natural substances that serve as inputs for industrial and consumer uses. They are usually classified as renewable or non-renewable and are distinguished from raw materials by the use of labor, which is primarily engaged in their extraction and refining."[315] This definition can be imputed to the definition of natural resources contained in the definition of an investment agreement in Article 10.28 of the CAFTA-DR.

241. To control is to "[e]xercise control over someone or something."[316] The context of the term control that has been developed to determine whether an investor has control over an investment. Tribunals have previously examined the meaning of the term "control" in the context of a legal person. Thus, in *Plama v. Bulgaria,* the tribunal noted that "control includes control in fact, including an ability to exercise **substantial influence** over the legal entity's management, operation and the selection of members of its board of directors or any other managing body."[317]

242. In this case, Honduras cannot exert any influence over the solar resource, let alone control it. Unlike non-renewable resources such as oil whose quantities can be determined and exploitation can be controlled, the solar resource is infinite and indeterminable. Simply put, Honduras cannot control whether the sun shines more or less, or whether the solar panels installed in a photovoltaic plant receive more or less solar radiation under its control.

243. *Secondly*, the absence of state control over a natural resource can be confirmed by analyzing whether the use of the resource is regulated or not. In this case, in addition to being prevented from doing so for obvious reasons, Honduras does not regulate the use of the solar resource through its natural resource regulations, further evidencing that it has no influence or

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[315] Royal Spanish Academy, Diccionario panhispánico del español jurídico, definition of "natural resource" (2023) (**R-062**).

[316] Royal Spanish Academy, Diccionario de la lengua española, 23rd edition, definition of "control" (2014) (**R-026**).

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

control. Decree No. 104-93, which contains a list of natural resources subject to regulation by the state, does not include the "solar resource."[318]

244. It is therefore clear that the natural resources referred to in the definition of an investment agreement in Article 10.28 of the CAFTA-DR must be resources over which the State exercises substantial influence, typically those that are non-renewable.

b. The PPA or so-called agreements cannot be the basis of the investment and also the covered investment simultaneously.

245. The Claimants allege that the PPA, or the so-called Agreements, are a written agreement upon which they relied for the establishment or acquisition of a covered investment **other than the written agreement itself**.[319] Claimants' argument is untenable.

246. Neither the PPA nor the so-called "Agreements" can be considered an "investment agreement" under the terms of the Treaty because an "investment agreement" cannot also simultaneously constitute a "covered investment."[320] In this case, the Claimants allege that what they call "the Agreements" form part of their investment.[321] Their argument renders their claim for the alleged breach of an "investment agreement" unworkable. It is clear from the text of these provisions that the PPA cannot constitute both an "investment agreement" and, at the same time, a "covered investment distinct from the written agreement itself."[322] There is an obvious logical and conceptual contradiction in Claimants' argument.

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[318] General Environmental Law, 1993 (Decree No. 104-93) (8 June 1993) (**R-016**).

[319] Observations on Request for Bifurcation, ¶ 69.

[320] CAFTA-DR (**CL-001**), Art. 10.28 ("(b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment **other than the written agreement itself**.").

[321] Memorial on the Merits, ¶ 171.

[322] K. Vandevelde, "The Investor-State Disputes Provision," *U.S. International Investment Agreements* (2009) (**R-019**), p. 577 ("The term 'investment agreement' is intended to include agreements relating to the establishment or operation of an investment. It was intended, at the same time, to exclude ordinary commercial contracts.").

247. As this dispute does not concern an investment agreement within the meaning of Article 10.28 of the CAFTA-DR, the Tribunal lacks jurisdiction *ratione materiae.*

F. In any event, the Tribunal lacks jurisdiction *ratione materiae* because Claimants' claims are purely contractual.

248. This Tribunal, constituted under Article 10.16 of the Treaty, does not have jurisdiction to hear contractual disputes such as those that the Claimants have brought in this arbitration, as they are incapable of constituting a breach of any of the Treaty's standards of protection. The Claimants have submitted, in this case, a contractual dispute disguised as a dispute under the Treaty.

249. As a preliminary matter, Honduras should clarify a few points about the nature of this objection. In its Summary of Jurisdictional Objections and Request for Bifurcation, the Republic reserved the right to submit in the future jurisdictional objections in addition to those it had already announced in that brief.[323] This reservation was necessary because, in a conservative approach, Honduras had identified additional jurisdictional objections that might not qualify for bifurcation, mainly because there was a risk that the Tribunal would consider them to be linked to the merits of the dispute. The present objection concerning the contractual nature of the dispute is one such objection.

250. Indeed, to ensure the efficiency of this proceeding, this objection would only be raised in two unlikely scenarios: (i) if the Tribunal were to reject the request for bifurcation; or (ii) if despite bifurcating the proceeding, the Tribunal were to reject Honduras' objections. However, in Procedural Order No. 3 the Tribunal "requests the Respondent to raise any additional jurisdictional objections it may have in its memorial in the bifurcated proceeding."[324]

251. Pursuant to the Tribunal's express request, Honduras submits its additional jurisdictional objection *ratione materiae* on the contractual nature of the dispute. The Republic considers that, with the documentation provided in this submission, the Tribunal has all the necessary background information to decide on this objection without going into the merits of the

[323] Bifurcation Request, ¶ 102.

[324] Procedural Order No. 3 (Dec. 20, 2024), ¶ 70.

dispute. However, Honduras understands that the Tribunal may consider that it is not in a position to decide this objection at this stage, as it is linked to the merits of the dispute and may decide to leave it for the next stage in the unlikely event that it rejects all other jurisdictional objections raised.

252. In view of the foregoing, the submission hereon explains how; all of the Claimants' claims refer to disputes of a contractual nature, without any sovereign action on the part of Honduras (**Subsection 1**); the Claimants attempt to disguise the dispute as if it were of an international nature (**Subsection 2**); and the PPA, through which the investment invoked in the present case materialized, contemplates its own specific dispute resolution mechanism, which was accepted by the Claimants, and which therefore requires the dismissal of their claims (**Subsection 3**).

1. The claims essentially concern breach of contractual obligations by a state enterprise and are not claims of treaty violation, which require the exercise of sovereign power.

253. The Claimants go to great lengths to demonstrate that their contractual claims amount to an international law dispute.[325] However, the Claimants, from the second paragraph of their Statement of Claim, already announced that their claim consists of a breach of contractual obligations;[326] i.e. a contractual and domestic dispute. As explained in detail in section II.A.2.c above, several disputes existed for years between ENEE and Pacific Solar regarding the correct interpretation and application of the PPA. In essence, the dispute between the parties relates to the alleged non-payment of invoices and interest by ENEE, as well as alleged reductions in power dispatch.

254. The correct interpretation of the PPA, and the payment of the amounts claimed by Pacific Solar, constitute the real dispute between them. As is evident, this is an eminently contractual dispute. It is this contractual dispute that the Claimants have brought before this

[325] Memorial on the Merits, § IV.

[326] *Ibid.* ¶ 2 ("This investment dispute arises from Honduras's breach of critical, specific commitments that it made to the Paizes and Pacific Solar, after benefitting from their investments in the Nacaome I Plant, a photovoltaic plant in Nacaome Valley, Honduras (the 'Plant')"), ¶ 4 ("Honduras is violating its commitments to Pacific Solar under the legal and contractual framework described above [...]").

Tribunal. The Claimants themselves acknowledge this, when in the second paragraph of their Statement of Claim they state that "[t]his investment dispute arises from Honduras's **breach of critical, specific commitments that it made** to the Paizes and Pacific Solar."[327]

255. As explained below, a dispute of a contractual nature, such as the one brought by the Claimants, is outside the jurisdiction of this Tribunal.

256. As the tribunal noted in *El Paso v. Argentina*, a tribunal constituted under an investment protection treaty only has "jurisdiction over treaty claims and cannot entertain purely contractual claims which do not amount to claims for violations of the BIT."[328] Similarly, the tribunal in *Joy Mining v. Egypt*, concluded that "the absence of a Treaty-based claim, and evidence on the contrary that all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction."[329] This position has been adopted by other tribunals.[330]

257. In turn, the *Salini v. Jordan* tribunal explained - in justifying its decision to decline jurisdiction in relation to certain contractual claims advanced by the claimant as alleged violations of the FET standard - that:

> In order that the alleged breach of contract may constitute unfair or inequitable treatment within the meaning of the bilateral agreement, it must be the result of behaviour going beyond that which an ordinary Contracting Party could adopt. Only the State, in the exercise of its sovereign authority (*puissance publique*), and not as

[327] Memorial on the Merits, ¶ 2 (emphasis added).

[328] *El Paso Energy International Company v. Argentine Republic*, ICSID Case ARB/03/15, Decision on Jurisdiction (27 April 2006) (**CL-116**), ¶ 65.

[329] *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) (**RL-064**), ¶ 82.

[330] *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (12 July 2006) (**RL-070**), ¶ 84. *See also* E. Gaillard, "Investment Treaty Arbitration and Jurisdiction over Contract Claims - the SGS Cases Considered" in *International Investment Law and Arbitration* (2005) (**RL-066**), p. 336 ("On the other hand it may seem odd to interpret it as creating a jurisdictional basis for the BIT tribunal in cases where it is not called upon to rule on an alleged violation of that treaty. 336 ("On the other hand, it may seem odd to interpret a treaty as creating a jurisdictional basis for the BIT tribunal in cases where it is not called upon to rule on an alleged violation of that treaty. There is always a danger in divorcing the jurisdictional provisions from the substantive terms of the same treaty in that it may suggest that the arbitral tribunal has jurisdiction but is invited to rule in a vacuum.").

> a Contracting Party, has assumed obligations under the bilateral agreement.[331]

258. As will be seen below, the Claimants' allegations in the present case correspond to claims of a contractual nature that are outside the Tribunal's jurisdiction under the Treaty, and the Tribunal should therefore dismiss the present claim. Moreover, the Treaty does not contain any umbrella clause, nor does it allow for its importation through the MFN clause as explained above, that would lead to a different conclusion.[332]

2. The Claimants' allegations suggest that the dispute is simply contractual, although they endeavor to disguise it as a dispute under the Treaty.

259. The Claimants, probably aware that they have brought a purely contractual dispute, attempt to disguise their case as a dispute under the Treaty. Despite the fact that all of ENEE's actions fall in line with a good faith reading of the PPA, the Claimants unsuccessfully attempt to identify some sovereign act by Honduras that would allow them to assert a claim of an international character.

260. The main sovereign act that, according to the Claimants, would have allegedly violated the Treaty would be the enactment of Decree 46-2022, by which Honduras would have breached the MFN minimum treatment standards and would have committed an indirect expropriation. The facts invoked by the Claimants to justify these assertions are basically the same in both cases, clearly announcing that their claim consists of ENEE's alleged refusal to comply with its contractual obligations.[333]

261. The Republic of Honduras is surprised by Claimants' assertions that these alleged violations occurred upon the entry into force of Decree 46-2022, when these same claims have

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[331] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award (31 January 2006) (**RL-069**), ¶ 155. While in this case, the Claimants allege a breach of the minimum standard of treatment and not fair and equitable treatment, the tribunal's argument is equally applicable.

[332] *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (**CL-042**), ¶ 342 ("At least in the context of provisions other than the umbrella clause, it is now a well-established principle that in and of itself the violation of a contract does not amount to the violation of a treaty.").

[333] Memorial on the Merits, ¶ 98 ("State's intent to (i) repudiate its compensation and other key obligations towards Pacific Solar [...]."), ¶ 217 ("[T]he Government's intentions are clear: to cripple Pacific Solar's rights under the Agreements.").

been aired for years at the contractual level between Pacific Solar and ENEE.[334] Indeed, the enactment of Decree 46-2022 did not entail any modification to the payments under the PPA. Pacific Solar continues to bill, and ENEE continues to pay, in the same manner as has been the case since 2016.[335]

262. The Claimants' insistence on pointing to the enactment of Decree 46-2022, a sovereign act, as the cause of Honduras' alleged breaches is vital to their strategy of claiming that Honduras has breached any obligation under the Treaty or international law. However, as will be seen below, and to paraphrase another tribunal that did not hesitate to reject the contractual claim brought in that case, the Claimants' allegations are nothing more than a contractual dispute "dressed up as a Treaty case."[336]

263. In this vein, the Claimants allege that Honduras breached its Treaty obligations in the following ways: i) failure to pay remuneration promised to Pacific Solar under the PPA;[337] which would amount to an alleged repudiation of its obligations; ii) the "forced" imposition of a renegotiation under Decree 46-2022; which has not occurred;[338] iii) the reduction of energy injected by Pacific Solar into the grid without compensation and the failure to fulfil other contractual obligations.[339]

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[334] Letter from R. Barahona (PSE) to G. Perdomo (ENEE) (10 July 2020) (**R-049**) Letter from R. Barahona (PSE) to G. Perdomo (ENEE) (7 August 2020) (**R-050**); Letter from R. Barahona . R. Barahona (PSE) to R. Lean (CIENEE) (5 March 2021) (**R-052**); Letter from R. Barahona (PSE) to E. Torres (ENEE) (3 September 2021) (**R-056**); ENEE, Oficio DER-199-XI-2021, Letter from D. Aguilar (Operating Committee) to R. Barahona (PSE) (18 November 2021) (**R-058**); ENEE, Oficio DER-0031-II-2022, Letter from E. Torres (ENEE) to R. Barahona (PSE) (22 February 2022) (**R-059**); Letter from R. Barahona (PSE) to E. Torres (ENEE) (28 February 2022) (**R-060**).

[335] See *supra* § II.C; *See also* ENEE Payment Vouchers to Pacific Solar Energy (2020) (**R-008**); ENEE Payment Vouchers to Pacific Solar Energy (2021) (**R-009**); ENEE Payment Vouchers to Pacific Solar Energy (2022) (**R-010**); ENEE Payment Vouchers to Pacific Solar Energy (2023) (**R-011**); ENEE Payment Vouchers to Pacific Solar Energy (2024) (**R-012**).

[336] *Rachel S. Grynberg et al. v. Grenada*, ICSID Case No. ARB/10/6, Award (10 December 2010) (**RL-078**), ¶ 7.3.7.

[337] Memorial on the Merits, ¶¶ 125, 190, 215, 247, 314, 340.

[338] *Ibid*., ¶¶ 188, 193, 208, 247, 272, 340.

[339] *Ibid*., ¶¶ 155, 190, 317, 341.

264. *First*, Claimants state that Decree 46-2022 codifies the State's intent to deny compensation due to Pacific Solar by failing to recognize its debt, interest, and compensation for reductions, which were allegedly promised under the PPA.[340] This is incorrect.

265. Claimants' claim for collection of these items predates the enactment of Decree 46-2022 so their allegation that these violations arise out of that law is unsubstantiated. These items represent a claim of a debt under the PPA that, according to Claimants' own expert, can be traced to its point of origin in 2018.[341] This alone should be sufficient to indicate that the alleged breach predates the enactment of Decree No. 46-2022. Moreover, the contractual disputes between ENEE and Pacific Solar regarding the collection of these items are sufficiently documented.[342]

266. *Second*, Claimants insist that Article 5 of Decree 46-2022 imposes mandatory renegotiation of the PPA, which would entail a breach of the Treaty. The State of Honduras will not go into the merits of that assertion in this section, as they have been dealt with in section II.B above. However, for the purposes of this objection, it is sufficient to note the contractual aspects of this point.

267. The Claimants' argument is based on the illogical premise of assuming that a state enterprise cannot request renegotiation of its contracts, which thus violates the most basic precepts of good faith and the principle of the willingness of the parties.

268. Indeed, Article 18.1 of the PPA provides for the possibility of parties amending the Contract by mutual agreement.[343] Thus, prior to the enactment of Decree 46-2022, ENEE requested renegotiation of the Contract for the first time in 2018, on the basis of a national pact for the reform of the energy sector.[344] However, the Claimants refused to negotiate and the Contract continued

[340] *Ibid*., ¶¶ 125, 313, 314

[341] Nakhle Report (**CER-01**), ¶ 44, Fig. 6.

[342] Letter from R. Barahona (PSE) to G. Perdomo (ENEE) (10 July 2020) (**R-049**); Letter from R. Barahona (PSE) to G. Perdomo (ENEE) (7 August 2020) (**R-050**).

[343] Contract No. 002-2014 (**C-001**), p. 47, Art. 18.1.

[344] *See above* § II.A.3.

without prejudice to Pacific Solar.[345] The same happened after the enactment of Decree 46-2022. ENEE requested the renegotiation of the PPA "based on national legislation and contractual clauses"[346] and after several sessions without reaching an agreement, the parties continue to execute the Contract.[347] In this regard, the Claimants offer no explanation as to why the failed negotiation of 2018 would be the normal exercise of contractual powers, but the failed renegotiation of 2022-2023 would be the abusive exercise of sovereign powers by Honduras.

269. In addition, the Claimants point out - without any basis - that "at no point does the 2022 New Energy Law suggest that the new agreements should be executed by mutual agreement. Quite the opposite."[348] This interpretation runs counter to the literal meaning of the term "renegotiation," which necessarily implies an agreement of wills. Decree 46-2022 in no case unilaterally modifies the terms agreed in the PPA, nor does it empower ENEE, or any other public body, to do so.[349]

270. In this sense, the aforementioned Law does not grant new powers to ENEE but rather authorizes ENEE to do something that it could already do under the PPA itself and that it had even tried to do in the past. A simple reading of Article 5 confirms this idea, as it states that this renegotiation must be carried out "based on national legislation and contractual clauses, [so that ENEE] may propose under its prerogatives and powers [...] the renegotiation of the contracts."[350] Thus, Decree 46-2022 does not require ENEE to act outside its legal and contractual powers, but rather requires it to limit itself to applying them.

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[345] Agreement for the Reform of the Honduran Electricity Sector (10 October 2018) (**C-175**). The Claimants themselves refer to these negotiations in their Memorial on the Merits. *See* Memorial of Claim, ¶ 90. *See also*, L. Rodríguez, "Los generadores no aceptarán revisar precios de contratos." *El Heraldo* (Mar. 7, 2019) (**R-048**).

[346] Decree No. 46-2022 (**C-010**), Art. 5.

[347] ENEE, Oficio ENEE GG-1083-X-2022, Letter from E. Tejada Carbajal (ENEE) to [redacted] (11 October 2022) (**C-069**) ("In this regard, we reaffirm our willingness to remain open to dialogue with the aim of reaching satisfactory agreements for both parties [...]").

[348] Memorial on the Merits, ¶ 118.

[349] *See above* § II.

[350] Decree No. 46-2022 (**C-010**), Art. 5.

271. As explained in more detail in section II.B., contrary to the Claimants' assertion, Decree No. 46-2022 does not contain a threat of expropriation.[351] Evidently, Honduras, like any other sovereign State, has the inherent right to expropriate all kinds of property within its territory, subject to certain conditions. This power is recognized both in the Honduran Constitution[352] and in the Treaty itself.[353]

272. Thus, Honduras had the power to expropriate the Claimants' alleged investment, subject to certain requirements, even prior to the enactment of the aforementioned Law. Again, the Law does not grant new powers to ENEE in this regard but rather authorizes ENEE to propose the termination of the PPA and the acquisition of the plant, upon payment of the price.

273. Additionally, the Claimants attempt to qualify the possibility of criminal prosecution for non-compliance with electricity supply, as a "threat" from the State.[354] Decree 46-2022 aims to protect access to electricity as a human right in the Honduran territory. In that sense, any action against it could be investigated to preserve the fundamental rights of Honduran citizens. Thus, any sanctioning process - those that are already regulated -[355] would be subject to due process under the Honduran Constitution.[356] Furthermore, Honduras has not taken any action of a sanctioning nature in this regard. Thus, any claim or alleged prejudice by the Claimants is unfounded and premature.

274. In conclusion, there is nothing "forced" about ENEE raising the renegotiation of the PPA, as it is a situation arising from the contractual provisions foreseen in the PPA. Moreover, as already mentioned in previous sections, and considering that the parties have not agreed otherwise, the PPA continues to be executed today.[357]

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[351] *See above* § II.

[352] Political Constitution of the Republic of Honduras (20 January 1982) (**R-015**), Art. 106.

[353] CAFTA-DR (**CL-001**), Art. 10.7.

[354] Memorial on the Merits, ¶ 16.

[355] Decree No. 404-2013 (**C-008**), Art. 26.B(c)(j).

[356] Political Constitution of the Republic of Honduras (20 January 1982) (**R-015**), Art. 90.

[357] *See supra* § II.C.

275. *Third*, the Claimants state that Honduras has allegedly violated the Treaty by reducing the amount of power injected by Pacific Solar into the grid. Such allegations make it clear that the Tribunal is dealing with a contractual dispute. It is difficult to imagine a dispute more contractual in nature, than one over the enforcement, strict or otherwise, of a contract. All the issues cited by the Claimants relate to the performance of obligations expressly provided for and regulated in the PPA, as the parties' own correspondence attests.[358]

276. As the tribunal in *Impregilo v. Pakistan* noted, it is clear that "[t]hese are matters that concern the implementation of the Contracts, and do not involve any issue beyond the application of a contract, and the conduct of contracting parties. In particular, the matter does not concern any exercise of '*puissance publique*' by the State."[359]

277. As mentioned above,[360] the reduction of the amount of energy injected by Pacific Solar into the grid is a technical issue. Such action was taken to maintain the stability of the SIN and to avoid a possible failure or overload of the system, a scenario which is also regulated by Annex III and IV of the PPA.[361]

278. In conclusion, these disputes are purely contractual in nature and there has been no sovereign act by Honduras that would engage its international liability. In other words, even if all the facts alleged by the Claimants were true, their claim constitutes, at most, a breach of contract that cannot be qualified as a violation of Honduras' obligations under the Treaty. As the tribunal in *Impregilo v. Pakistan* indicates:

> In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority ("*puissance publique*"), and

[358] Letter from R. Barahona (PSE) to R. Lean (CIENEE) (5 March 2021) (**R-052**); Letter from R. Barahona (PSE) to E. Torres (ENEE) (3 September 2021) (**R-056**); ENEE, Oficio DER-0031-II-2022, Letter from RTorres (ENEE) to R. Barahona (PSE) (22 February 2022) (**R-059**); Letter from R. Barahona (PSE) to E. Torres (ENEE) (28 February 2022) (**R-060**).

[359] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005) (**RL-068**), ¶ 268.

[360] *See above* § II.A.2.c.(2).

[361] Contract No. 002-2014 (**C-001**), p. 58, Annex III, ¶ 1.1.; Contract No. 002-2014 (**C-001**), p. 65, Annex IV, ¶ 2.1.

> not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty.[362]

279. In any event, the conduct attributed to the State with respect to the failure to pay an alleged debt under a contract is insufficient to constitute a breach of the Treaty. As the tribunal in *Bureau Veritas v. Paraguay* stated, "the acknowledgment of the debt by the State - or elements of it - cannot transform the nature of the conduct, which remains a continuing failure to pay the debt and no more."[363]

280. The tribunal expressed the same view in *Waste Management v. Mexico II. Mexico II*:

> For present purposes it is sufficient to say that even the persistent non-payment of debts by a municipality is not to be equated with violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem.[364]

281. The last sentence of this quote leaves the door open to a possible violation of the treaty, if the state's conduct was a "complete and unjustified repudiation." However, as explained in previous sections, Honduras and ENEE have always endeavored to comply with their contractual obligations, and thus, have not acted unreasonably, much less in their capacity as a sovereign entity.[365]

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[362] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005) (**RL-068**), ¶ 260.

[363] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Supplemental Decision on Objections to Jurisdiction (9 October 2012) (**RL-086**), ¶ 270.

[364] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**CL-024**), ¶ 115.

[365] *See supra* § II.C.

282. The above conclusion is reinforced when analyzing the chapters of the Statement of Claim devoted to Honduras' alleged breaches of the Treaty.[366] Despite numerous references to the Treaty and abundant citations of investment tribunal decisions, all of the alleged breaches of the Treaty are invariably traced back to possible breaches of the PPA.

283. In that regard, the Claimants fail to establish that Honduras's alleged breaches of its Treaty obligations arise from sovereign acts. On the contrary, all the alleged breaches cited by the Paizes correspond to acts or omissions within the framework of a contractual relationship.

3. The choice of forum clause in the PPA precludes the Tribunal from hearing this case.

284. Even if the Tribunal were to consider that, in general terms, it could hear claims of a contractual nature such as those asserted by the Claimants, in this particular case, this Tribunal would not have jurisdiction to rule on the present dispute, or the Claimants' claims as they would - in any event - be inadmissible because the PPA, the State Guarantee, and the Operations Agreement a provide for their own specific dispute resolution mechanism, which was accepted without reservation by the Claimants.

285. The PPA establishes a sophisticated and complex dispute resolution mechanism, distinguishing between technical disputes and other types of disputes, with the former requiring special engineering expertise, and the latter including all other disputes.[367] Assuming that Claimants' claims would fall into the second category, the Contract provides as follows:

> In the case of Other Disputes which cannot be resolved by the Operating Committee within sixteen (16) Administrative Business Days from the date on which the Disputes were submitted to it, they shall be resolved by submitting them for resolution to the highest executive officer of the BUYER and the SELLER, who shall be free to agree and resort to the means of settlement and legal procedures which they consider to be suitable and appropriate. If within a period of six (6) weeks said officials have not agreed on a solution procedure, they shall submit to the arbitration procedure at the

[366] Memorial on the Merits, § IV.

[367] Contract No. 002-2014 (**C-001**), p. 44, Art. 15.1-15.2.

> Conciliation and Arbitration Centre of the Chamber of Commerce and Industry of Tegucigalpa and applying the rules of said center.[368]

286. Furthermore, Clause Ten of the Operations Agreement provides as follows:

> **CLAUSE TEN: DISPUTES.** The Parties shall perform their duties and obligations contained in this Agreement in a spirit of mutual cooperation and good faith and shall use their best efforts to resolve any difference, dispute or controversy relating to this Agreement in an amicable manner. If any such difference, dispute or controversy cannot be resolved by the Parties within thirty (30) Administrative Business Days from the date such difference, dispute or controversy was submitted to the other Party, then, unless the Parties agree otherwise, such difference, dispute or controversy shall be resolved by the submission of the Parties to binding and non-appealable arbitration as set forth in Executive Order 161-2000: Conciliation and Arbitration Act or the remedies set out in the Laws.[369]

287. In turn, the State Guarantee states the following:

> 1.2 Legal Force. That this Agreement constitutes a valid, obligatory and enforceable legal obligation of the State in accordance with its terms, the Civil Court of Francisco Morazán being designated as the competent court to hear any legal proceedings.[370]

288. As detailed above, the dispute that the Claimants are pursuing in this arbitration arises out of their alleged investment under the above contracts and is therefore covered by the choice of forum agreements, which prevail over any other. The arbitration clause contained in the Treaty cannot modify this specific agreement of the parties.

289. As the Annulment Committee held in *Vivendi I*, invoking the famous 1903 *Woodruff* decision the US-Venezuelan Joint Commission:

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[368] *Ibid*., p. 45, Art. 15.4.

[369] Operations Agreement (**C-003**), p. 11, Clause Ten.

[370] Decree 113-2014 (**C-002**), p. 3, Clause 1.2.

> In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.[371]

290. In the same vein, the tribunal in *Malicorp v. Egypt*, a case where the contract contained a dispute resolution clause in favor of a local arbitration center, held as follows:

> Investment arbitration was not set up to provide a substitute for contracting partners who refrain from following the ordinary procedure by which they have agreed to be bound, nor as a means of appeal for those who have failed to obtain satisfaction (or full satisfaction) by using that procedure.[372]

291. The aforementioned tribunals determined that those contractual disputes should be submitted to the dispute resolution mechanisms agreed in the above-mentioned clauses, and that in order for the treaty to be applicable, it was necessary to allege a genuine breach of the treaty.[373] In this case, the Claimants bring before the Tribunal a dispute of a contractual nature, disguised as alleged claims under the Treaty, when in fact, it is only a dispute arising from the application of the PPA.

292. Thus, where the contract in question - in this case, the PPA - includes a choice of forum clause, arbitral tribunals have declined to hear claims, giving priority to the dispute resolution mechanism agreed by the parties for each particular dispute. This is precisely what Claimants seek to circumvent, and why this Tribunal cannot assume jurisdiction over the present dispute.

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[371] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Case No. ARB/97/3, Decision on Annulment (3 July 2002) (**RL-060**), ¶¶ 98-99 (According to the Committee, "[...] in the *Woodruff* case, a decision of an American-Venezuelan Mixed Commission in 1903, a claim was brought for breach of a contract which contained the following clause: 'Doubts and controversies which at any time might occur in virtue of the present agreement shall be decided by the common laws and ordinary tribunals of Venezuela, and they shall never be, as well as neither the decision which shall be pronounced upon them, nor anything relating to the agreement, the subject of international reclamation.' The Commission in that case held that Woodruff was bound by this clause not to refer his contractual claim to any other tribunal. At the same time, the exclusive jurisdiction clause did not and could not preclude a claim by his government in the event that the treatment accorded him amounted to a breach of international law.').

[372] *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 February 2011) (**RL-080**), ¶ 103c.

[373] *Ibid*., ¶ 102f.

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293. The dispute submitted by the Claimants is contractual in nature and therefore beyond the Tribunal's jurisdiction, despite the Paizes' attempts to label it as a dispute under the Treaty. In any event, the Tribunal must defer to the choice of forum clause freely agreed to by the parties in the PPA.

IV. REQUEST FOR RELIEF

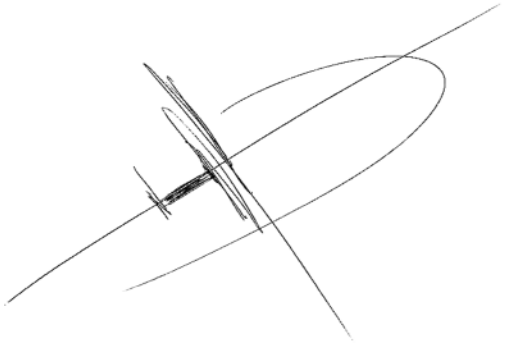
294. For all the foregoing reasons, the Republic of Honduras respectfully requests the Tribunal to render an Award in which it:

i. Dismisses all of Claimants' claims for lack of jurisdiction and/or admissibility; and

ii. Orders Claimants to pay all costs associated with this arbitration, including costs and professional fees incurred by the Republic of Honduras, the Tribunal, and ICSID, with interest.

295. The Republic of Honduras reserves the right to supplement, amend or modify its pleadings and to submit any additional pleadings as may be necessary in accordance with the ICSID Rules, the Procedural Orders and the orders of the Arbitral Tribunal for the purpose of responding to any allegations made by the Claimants in connection with this case. The Republic also reserves the right to raise additional jurisdictional objections in the future based on new evidence adduced or allegations made by the Claimants.

Respectfully



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