THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

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In the Matter of Arbitration            :
Between:                                :
                                        :
FERNANDO PAIZ ANDRADE AND               :
ANABELLA SCHLOESSER DE LEON DE PAIZ,    :
                                        :
          Claimants,                    : ICSID Case No.
                                        :   ARB/23/43
     and                                :
                                        :
REPUBLIC OF HONDURAS,                   :
                                        :
          Respondent.                   :
- - - - - - - - - - - - - - - - - - - - -x  Volume 1
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HEARING ON JURISDICTION

Wednesday, September 17, 2025

The World Bank Group
1225 Connecticut Avenue, N.W.
C Building
Conference Room C1-450
Washington, D.C.

The hearing in the above-entitled matter

came on at 9:00 a.m. before:

PROF. NICOLAS ANGELET
President of the Tribunal

MR. STEPHEN L. DRYMER
Co-Arbitrator

PROF. BRIGITTE STERN
Co-Arbitrator

ALSO PRESENT:

On behalf of ICSID:

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Secretary of the Tribunal

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1 **P R O C E E D I N G S**

2 PRESIDENT ANGELET: This is the Hearing on
3 Jurisdiction in the case of Mr. Fernando Paiz Andrade
4 and Mrs. Annabella Schloesser de Leon de Paiz v. The
5 Republic of Honduras, ICSID Arbitration Case 23/43.
6 I'm Nicolas Angelet. I have the privilege
7 to chair this Tribunal.
8 My co-arbitrators don't need to be
9 introduced: Arbitrator Stephen Drymer at my left,
10 Professor Brigitte Stern at my right, and our
11 Secretary is Gabriela González Giráldez.
12 The Parties may, perhaps, wish first to
13 introduce their team?
14 For the Claimants?
15 MS. MARCHILI: Of course.
16 Good morning, everyone. Thank you very
17 much, Mr. President. Here on this side of the table
18 you have: Jacob Bachmaier, Mauricio Mourglia, Efat
19 Elsherif, Estefanía San Juan, Andrea Menaker, and
20 myself, Silvia Marchili. Thank you very much.
21 PRESIDENT ANGELET: Thank you very much.
22 And for the Respondent?

1 MR. FIGUEROA: Thank you, Mr. President.
2 Good morning. Good morning, Members of the Tribunal.
3 On the behalf of the Republic of Honduras,
4 we have via Zoom from Tegucigalpa the Attorney General
5 of the Republic of Honduras, Mr. Manuel Díaz Galeas.
6 He's accompanied by Nelson Molina, Director of
7 International Litigations, and Olbin Mejía,
8 Sub-Director of Human Rights. Just for the record,
9 Mr. Mejía was not on the List of Participants, but he
10 is participating today. He will be watching the
11 Opening Presentation.
12 Here in the room we are accompanied by
13 Mr. Marcio Canaca and Ms. Danielle Rueda from the
14 Attorney-General's Office. We are also joined by
15 Mr. Vladimir Rodríguez and Mr. Andy Rivera of the
16 National Electric Energy Company of Honduras, ENEE.
17 Finally, I'm joined by my colleagues from
18 Foley Hoag: Attorneys Mr. Andrés Esteban, Lucas
19 Solimano, Luis Brugal, Mariana Reyes, and Luis
20 Battista, as well as Ms. Marcela Muñoz and Ms. Irene
21 Sorto. Thank you. And, of course, I'm Kenneth
22 Figueroa, Partner, Foley Hoag. Thank you.

1 PRESIDENT ANGELET: Thank you very much.
2 And I understand that a Non-Disputing Party,
3 the United States of America, is not present in the
4 room currently. Thank you.
5 So a few issues of housekeeping, with an
6 emphasis perhaps on the confidentiality issues, which
7 are governed by Procedural Order Number 7. We have
8 received your electronic Hearing Bundle, and we do
9 acknowledge receipt of the USB, both Mr. Drymer and
10 me.
11 As you are aware, the Hearing is being live
12 streamed and subject to moderation. In that respect,
13 we deem it useful to recall that, early on in these
14 proceedings, all the names of the third parties,
15 banks, individuals, have been treated as confidential,
16 so we invite the Parties, and we will also do the
17 utmost, not to mention these names in our
18 presentations, and we assume that it will be possible
19 to clearly identify them as between ourselves without
20 it being necessary to identify them by name. Thank
21 you.
22 Then also regarding confidentiality, we have

1 moderators in the room for the Claimants. That should
2 be Mr. Mourglia. Sorry. Yes, thank you. And as a
3 backup, Ms. El Sherif. Thank you.
4 And for the Respondent, Mr. Brugal and
5 Ms. Reyes. Thank you.
6 Your main of point of contact for the
7 purpose of the red and green flags is our Secretary,
8 and, of course, the whole Tribunal, but the Secretary
9 of the Tribunal is the person handling these issues at
10 a technical level. Thank you.
11 May I also perhaps, before we proceed,
12 recall the Witness Sequestration Rule which is known
13 to you, which is in PO7. Between the start of the
14 Hearing and the end of the respective examination,
15 witnesses shall not be present in the Hearing room,
16 nor shall they access the live stream or the
17 Transcript of the Hearing, and neither shall Counsel
18 for the Parties or their representatives discuss or
19 describe what happens in the Hearing with any witness.
20 Thank you.
21 As an exception to the previous paragraph,
22 witnesses who are Party representatives may be present

1 **in this Hearing Room to attend exclusively the**
2 **introduction and housekeeping. It is also foreseen**
3 **that ICSID will escort the witnesses during the**
4 **Hearing.**
5 **So much for the practicalities. In**
6 **accordance with the agenda, I now give the floor to**
7 **the Respondent for your Opening Statements.**
8 **MR. FIGUEROA: Thank you, Mr. President.**
9 **Before we begin, just a -- two more, quickly,**
10 **administrative matters.**
11 **PRESIDENT ANGELET: Please.**
12 **MR. FIGUEROA: I don't perceive it to be an**
13 **issue because representatives of the United States are**
14 **not here or any other third Parties, but I believe the**
15 **Parties have come to an Agreement, to the extent**
16 **someone arrives during the break, to watch the Hearing**
17 **in person, Parties have come to the Agreement that**
18 **there is one particular section in each Parties'**
19 **presentation concerning the objection concerning**
20 **ownership and custody, which contains most of the**
21 **discussion involving confidential documents.**
22 **So the Parties have come to agreement that,**

1 before we get to that stage, we will pause, if there
2 is someone else -- we will ask the -- that we will
3 respectfully ask the Tribunal to instruct those
4 individuals to just leave for the entire presentation
5 so that people don't have to go back and forth because
6 there will be a lot of jumping around on documents.
7 So if that's okay with the President, I hope that --
8 PRESIDENT ANGELET: Thank you very much.
9 MR. FIGUEROA: And one other Housekeeping
10 Rule. As the Tribunal is aware, each Party during
11 their Briefing presented documents, usually in
12 Spanish, with translations of excerpts of those
13 documents. During this presentation, we will be using
14 some of those documents, but not the translated pages,
15 in other words, pages in the exhibit, in the file but
16 that have not been translated.
17 We have freely translated them for our
18 purposes of our presentation. We are happy to provide
19 extracts, translation of those extracts after the
20 Hearing, if the Tribunal so wishes.
21 PRESIDENT ANGELET: Thank you.
22 No further comments on the part of the

1 Claimants?

2 MS. MARCHILI: None. Thank you.

3 PRESIDENT ANGELET: Thank you.

4 MR. FIGUEROA: Thank you.

5 PRESIDENT ANGELET: You have the floor.

6 OPENING STATEMENT BY COUNSEL FOR RESPONDENT

7 MR. FIGUEROA: Mr. President, Members of the

8 Tribunal, Republic of Honduras's presentation on

9 Jurisdiction and Admissibility will begin with

10 comments in Spanish from the Republic's Attorney

11 General. I therefore suggest that those Members of

12 the Tribunal and other attendees who require

13 translation put on their earphones.

14 I now cede the floor to Attorney General

15 Díaz Galeas. So you have the floor. Go right ahead.

16 MR. DÍAZ GALEAS: Good morning,

17 Mr. President, Prof. Nicolas Angelet, and Members of

18 the Tribunal: Mr. Stephen Drymer, Professor Brigitte

19 Stern.

20 As the Attorney General of the Republic, it

21 is a true honor to lead the Honduran delegation on

22 this occasion, together with our advisors from Foley

1 Hoag, the law firm.
2 Honduras is a State that respects the
3 obligations arising from its international
4 commitments. It's a country open to national and
5 international investment. Which, according to figures
6 from the main international organizations, maintains
7 sustained economic growth and has improved its
8 competitiveness indices in the region.
9 The most recent ECLAC Report on Foreign
10 Direct Investment in Latin America and the Caribbean
11 of 2025 as far as Honduras is concerned shows that in
12 2024, foreign direct investment in the country
13 increased 20.6 percent compared to the previous year.
14 This demonstrates the commitment of the Government of
15 Honduras to the development of the nation and its
16 openness to investments.
17 To date, according to the Ministry of
18 Finance, all the quantitative targets of the IMF
19 program have been met in connection with fiscal
20 deficit, public debt, public investment, current
21 expenditure, the National Loss Reduction Program for
22 the recovery of the National Electric Energy Company

1 and international reserves.
2 The Government of President Iris Xiomara
3 Castro Sarmiento has achieved these goals of
4 recovering the rule of law and the supremacy of the
5 constitution. According to which Honduras' economic
6 system is based on principles of efficiency, in
7 protection of social justice, in the distribution of
8 wealth and national income.
9 Under this premise, public policies have
10 been implemented aimed at complying with the
11 constitutional mandate with the objective of
12 deprivatizing public funds returning them to the
13 single State fund and establishing real, transparent,
14 effective control over the Honduran people's money.
15 In this context, the National Congress in
16 the exercise of its sovereign power passed
17 Decree 46-2022, which contains the special law to
18 guarantee the provision of electricity as a public
19 good of national security and a human right of
20 economic and social nature.
21 This law was enacted with a clear purpose of
22 recovering the electricity subsector comprising the

1 structures of the National Electric Energy Company,
2 ENEE, in order to guarantee the Honduran population
3 access to energy services while seeking to ensure
4 private sector investment in the areas of generation,
5 transmission, and distribution.
6 Now, in the context of this Hearing, we will
7 submit four jurisdictional objections and then I'm
8 going to make reference to two of them that make it
9 impossible for the Tribunal to look at all the Claims
10 presented by the Claimants without prejudice to the
11 arguments of the Republic of Honduras which will be
12 presented by our counsel from Foley Hoag. Firstly,
13 Honduras conditioned its consent to the Jurisdiction
14 of ICSID under Decree 41-88. Specifically, under
15 article 26 of the ICSID Convention regarding
16 exhaustion of local remedies. In this case, the
17 Claimants did not exhaust the domestic remedies for
18 the alleged violations.
19 Members of the Tribunal, as you know, in
20 spite of the fact that the ICSID Convention came into
21 force in 1966, it wasn't until the age of the 1980s,
22 rather, when many States of Latin America adhered to

1 it.
2 In 1984, the Secretary-General of ICSID,
3 Ibrahim Shihata was promoting the advantage of ICSID
4 for Latin America and answering the questions of the
5 participants of the ICSID system in São Paulo in
6 Brazil. As part of his exposition, Mr. Shihata
7 assured that Latin America States could require the
8 exhaustion of domestic remedies through a Declaration
9 of the State Party and that the Republic of Honduras
10 did so in Article 26 of the Convention.
11 Four years after this conference, Honduras
12 signed and ratified the ICSID Convention indicating
13 that all Claimants should exhaust all administrative
14 and judicial remedies as a prior condition to use the
15 mechanisms of the ICSID.
16 Nonetheless, the promise 40 years ago by the
17 General Secretary of ICSID and the irrefutable text of
18 Article 26 of the Convention are at risk in this
19 Arbitration.
20 Therefore, it is regrettable that the
21 condition imposed by Honduras seeks to be ignored by
22 the Claimants.

1 On behalf of the Republic of Honduras, I
2 trust this Tribunal will prevent that the promises of
3 Article 26 of the Convention and the expectations of
4 Honduras when adhering to the Convention be defrauded.
5 I would like to emphasize also, secondly,
6 one of the main premises of the international law on
7 investments. The existence of an investor protected
8 under an international Investment Agreement. This
9 premise only exists if some minimum requirements are
10 strictly complied with, and which show undoubtedly the
11 quality of a foreign investment -- investor of the
12 Claimant. This is important. And I draw it to the
13 attention of the Tribunal.
14 Everyone knows here, that in the past
15 few years, this basic premise of investment
16 arbitration has been overcome, allowing for natural
17 and legal persons to have access to the system that
18 were not otherwise covered under International
19 Investment Law.
20 Honduras has shown and will show in the next
21 few days that it appears that the Claimants did not
22 meet this basic premise of investment arbitration

1 system and, thus, their Claims cannot be addressed by
2 this Tribunal.
3 Honduras respectfully invites the Tribunal
4 to conduct a detailed analysis of the fulfillment or
5 nonfulfillment of the minimal requirements to
6 determine whether Claimants are entitled to acquire
7 the status of protected investors.
8 Mr. President, Members of the Tribunal, all
9 of the eyes of the world are on this type of case
10 where the Claimants are not the Owners nor the
11 controllers of the investment. And of course, this
12 calls into question the legitimacy of the system. As
13 the legal representative of the State of Honduras, I
14 trust that this Tribunal act rigorously to study this
15 case and look in depth this procedure, so that it
16 meets the jurisdictional requirements under the
17 arguments put forth by the Republic of Honduras.
18 Now I'm going to give the floor to
19 Mr. Kenneth Figueroa.
20 MR. FIGUEROA: Thank you very much.
21 As the Tribunal is aware and as the Attorney
22 General indicated, this Arbitration relates to matters

1 of public policy. Very important matters of public
2 policy, specifically the public's right to affordable
3 energy, the State's right to regulate the energy
4 sector, and the State's right to condition its consent
5 to arbitration.
6 These are of fundamental importance to the
7 Republic of Honduras and its citizens, and our
8 discussion of these issues will appropriately be
9 transmitted to the public in accordance with
10 DR-CAFTA's transparency rules. At the same time, some
11 of the issues we will be discussing today which are
12 also important are largely a matter of legal
13 interpretation and international investment law.
14 In light of this, the Republic of Honduras
15 will be making its presentation today in a bilingual
16 format addressing those issues that relate to matters
17 of public policy and those that require an extensive
18 use of Spanish-language documents in Spanish so that
19 individuals online listening to the live stream can
20 better understand these issues.
21 The issues with most legal interpretation
22 will be delivered in English, which we hope will be

1 **more convenient for all Members of the Tribunal.**
2 **Accordingly, we will be dividing our**
3 **presentation this morning in the following manner.**
4 **First, I will pass the floor to my colleague Andrés**
5 **Esteban, who will be making an initial -- an**
6 **introduction of the facts relevant to the**
7 **jurisdictional objections of Honduras.**
8 **Second, I will return to address Honduras's**
9 **jurisdictional objection for lack of exhaustion of**
10 **local remedies. Third, my colleague Lucas Solimano**
11 **will address Honduras's objection regarding the lack**
12 **of ownership and control of the alleged investment.**
13 **Fourth, I will address our objection related**
14 **to the MFN Clause and its carve-out provision, and**
15 **fifth and, finally, my colleague Andrés Esteban will**
16 **discuss the Republic's objection regarding the**
17 **nonexistence of an Investment Agreement and conclude**
18 **our presentation.**
19 **Now, for the benefit of the Tribunal, the**
20 **Interpreters, Stenographers, and other attendees, so**
21 **as to know when to put on your headphones or not, I**
22 **know that the first three parts of the presentation**

1 will be made in Spanish and the last two will be made
2 in English. I also note that for the benefit of the
3 Tribunal, notwithstanding the spoken language of the
4 presentation, our slide presentations will all be in
5 English.
6 Now, before I cede the floor to Mr. Esteban,
7 I would like to take a few minutes to address a
8 critical point regarding the burden of proof at this
9 jurisdictional stage.
10 As expressed by both Parties in this
11 Arbitration, it is undisputed that the Claimants have
12 the burden of proving that this Tribunal has
13 jurisdiction to hear their Claims.
14 However, the Claimants have not done so. In
15 Procedural Order 4, this Tribunal stated that it might
16 invite the Parties to comment on the applicable
17 Standard for purposes of making fact findings at this
18 jurisdictional stage, referring to the Decision in
19 Phoenix v. Czech Republic and the Parties addressed
20 this issue in their written submissions.
21 As you can see on the screen, the Republic
22 shares the Opinion of the Phoenix Tribunal when it

1 explained that the arbitrators "cannot take all the
2 facts as alleged by Claimant as granted facts, and
3 that if jurisdiction rests on the existence of certain
4 facts, they have to be proven at the jurisdictional
5 stage."
6 On the other hand, the Phoenix Tribunal also
7 said that if the alleged facts are facts that, if
8 proven, would constitute a violation of the relevant
9 BIT, they have indeed to be accepted as such at the
10 jurisdictional stage. However, this Scenario is not
11 present here.
12 Indeed, none of the objections to be decided
13 by the Tribunal in these bifurcated proceedings touch
14 upon the facts that underpin the alleged Treaty
15 violations. All of the Republic's objections concern
16 facts that are outside the scope of the Merits. The
17 Republic's objections concerning Decree 41-88 and its
18 condition to consent rely upon facts specific to that
19 issue that do not relate to the Merits of the case.
20 Our Materiae Personae Objection relates to
21 facts specific to Claimants' lack of ownership and
22 control of its alleged investment, all unrelated to

1 **the Merits of Claimant's Claims.**
2 **And, finally, the objections related to the**
3 **MFN Clause and whether the Agreements upon which**
4 **Claimants base their claims are properly Investment**
5 **Agreements under the terms of DR-CAFTA are both issues**
6 **of a legal interpretation that do not require any**
7 **assumption of facts.**
8 **In their Rejoinder, Claimants appear to**
9 **agree with the Republic's position as they claim to**
10 **have presented all the evidence necessary for the**
11 **Tribunal to determine whether there is jurisdiction**
12 **and resolve the Republic's objections without the need**
13 **for factual assumptions.**
14 **However, the Republic rejects Claimant's**
15 **assertion that they have established a jurisdiction of**
16 **the Tribunal and that "it is therefore up to the**
17 **Respondent to show that the Tribunal does not have**
18 **jurisdiction."**
19 **Claimants' attempt to invert the burden of**
20 **proof is incorrect and must be rejected. Investment**
21 **Tribunals have consistently held that a Claimant**
22 **always has the burden of proof regarding the**

1 **jurisdiction of the Tribunal. The Claimants'**
2 **objective opinion of having complied with this**
3 **obligation does not release that obligation.**
4 **Where the State disputes jurisdiction and**
5 **makes prima facie arguments that the facts of the case**
6 **do not meet the jurisdictional conditions of the**
7 **Treaty, as Honduras has done in this case, it is for**
8 **the Claimant to prove the facts establishing that the**
9 **jurisdictional conditions have been met. If Claimants**
10 **fail to do so, their Claims must be dismissed.**
11 **Under no circumstance, is the burden of**
12 **proof of jurisdiction shifted to the Republic.**
13 **As you will see in our discussion with the**
14 **Republic's objections, despite its claims of having**
15 **presented all of the evidence necessary to establish**
16 **the jurisdiction of the Tribunal, the truth is that,**
17 **despite having multiple opportunities to do so,**
18 **Claimants have not proven that the Tribunal has**
19 **jurisdiction.**
20 **And with that, I pass the floor to my**
21 **colleague, Mr. Esteban, who will continue with our**
22 **presentation. Thank you.**

1 MR. ESTEBAN: Thank you, Kenneth.
2 Mr. President, Members of the Tribunal, in
3 the next few minutes I'm going to address the main
4 factual issues that are relevant for this
5 jurisdictional state. First, I will explain the
6 context of the making of the PPA between Pacific Solar
7 and ENEE, the National Company for Electric Energy
8 Honduras. The PPA between Pacific Solar and ENEE is
9 one of the main issues in this controversy, and it was
10 made in a political and economic context that is quite
11 questionable.
12 In 2013, the Administration of former
13 president Porfirio Lobo Sosa who has been accused of
14 corruption and Juan Orlando Hernández has been
15 convicted, he was the President of the National
16 Congress, they passed the Renewable Energy Law of
17 2013, even though there was already a system of
18 incentives for renewables that was passed in 2007.
19 The 2013 law sought to improve further the economic
20 conditions so that politicians, family members, and
21 Companies close to the Government could have good
22 positions in a very lucrative market.

1 MS. MARCHILI: Excuse me, Mr. President, I'm
2 really sorry to have to interrupt, but I am afraid
3 that this is getting into the Merits of the case, and
4 after we had just heard our colleague articulate
5 repeatedly that the objections warranted no finding of
6 facts. I find it a little bit puzzling that then we
7 are listening to this portion of their presentation.
8 Thank you.
9 MR. FIGUEROA: Mr. President, this -- the
10 presentation of facts is merely to provide a context
11 to the Tribunal. We believe that these are important
12 context for the Tribunal to decide ultimately on the
13 jurisdictional objections, that's why they are
14 relevant. It is a brief presentation, and I believe
15 we have the right to present our case as we deem it
16 should be presented to the Tribunal.
17 PRESIDENT ANGELET: Please proceed.
18 MR. ESTEBAN: Thank you.
19 Under Article 3 of the 2013 law, private
20 companies can sell of their own accord their
21 production of energy and capacity to ENEE. ENEE has
22 the obligation to enter into a Contract and to buy the

1 energy and the capacity, and this was the case of
2 Pacific Solar, and all of the other photovoltaic
3 generators under this law.
4 They provided a formal request to ENEE and
5 ENEE was legally bound to enter into these Contracts.
6 ENEE entered into about 100 Energy Contracts, most of
7 them obtained by politicians and businesspersons that
8 had ties with the Government. These were later
9 approved by the National Congress without any kind of
10 scrutiny whatsoever.
11 In the end, only 20 Projects came to
12 fruition, and they led to the construction of energy
13 plants. Amongst them, the one built by Pacific Solar.
14 In essence, the obtention of PPA by Pacific Solar was
15 not the result of an open, competitive, and
16 transparent process. It was a request at the instance
17 of an interested Party facilitated by a law that
18 favored specific economic interests in order to enter
19 into a Contract for the supply of energy. In this
20 case, involving family members of Honduran
21 politicians.
22 There is no dispute amongst the Parties as

1 to who subscribed the PPA, the State Guarantee, or the
2 Operations Agreement. This was an Energy Supply
3 Contract between a Company registered in Honduras and
4 the ENEE that was entered into on 16 January 2014, and
5 the Parties still are the same as of today.
6 Secondly, it is important to mention the
7 nature of the PPA. The PPA is a Sales Agreement for
8 the sale of energy supply, between Pacific Solar and
9 the ENEE, and you can see Clause No. 2, which
10 describes the purpose of the Contract as the supply of
11 energy and capacity by the Seller to the Purchaser
12 during the term of the Contract. This Supply contract
13 is accompanied by two supplementary instruments.
14 (Interruption.)
15 MR. ESTEBAN: This goes hand in hand with
16 two additional instruments, that is, a Support and
17 Aval Solidario [Joint and Several Guarantee] Agreement
18 and an Operations Agreement. On the one hand, based
19 on the deficit situation of ENEE, through Decree 070
20 of 2007 the Procuraduría General undertook to enter
21 into a Aval Solidario [Joint and Several Guarantee]
22 and Support Agreement has to be concluded. This

1 **Agreement guarantees payment to ENEE of the generators**
2 **if the enterprise cannot fulfill its obligations.**
3 **Furthermore, there is the Operations**
4 **Agreement. This Agreement essentially is a technical**
5 **document which simply authorizes the building,**
6 **possession and operation of an electricity plant**
7 **without creating substantive obligations for ENEE or**
8 **for the State beyond those already included in the**
9 **PPA.**
10 **Now, you can see a timeline here on the**
11 **screen with the main facts which are not disputed by**
12 **the Parties.**
13 **I begin from the left to the right. Pacific**
14 **Solar was registered on the 10th of September 2013 as**
15 **an enterprise in Honduras owned and controlled by**
16 **Honduran nationals.**
17 **In January 2014, Pacific Solar and ENEE**
18 **signed the PPA 002 followed by the Support and Joint**
19 **Guarantee Agreement of the same year. All of these**
20 **were signed by ENEE and Pacific Solar as a Honduran**
21 **business and Honduran Shareholders.**
22 **In December 2014, a Honduran company and**

1 Mr. Fernando Paiz acquired shares of Pacific Solar.
2 And in February 2015, the Operations Agreement was
3 formalized, also signed by the Honduran representative
4 of the enterprise.
5 In September 2016, the commercial operation
6 of the plant began, and this led to the beginning of
7 operations of the Plant, Nacaome 1.
8 In January 2018, Pacific Solar informed ENEE
9 that it had assigned all of its rights and assets of
10 the Project to a Honduran bank.
11 And, finally, on the 28th of December of the
12 same year, the final commercial operation of the
13 Plant, Nacaome I, began. On the 16th of May 2022, the
14 National Congress of Honduras issued Decree 46-2022.
15 This law authorizes ENEE to propose the renegotiation
16 of energy supply contracts and created the objective
17 of rescuing the delicate situation of ENEE and to
18 guarantee access to energy for the Honduran population
19 as a public good and a human right.
20 In the midst of this process, on the 24th of
21 August 2023, Mr. Fernando Paiz and Mrs. Annabella
22 Schloesser De Paiz presented the current Request for

1 **Arbitration.**

2 **As the Attorney General said, the PPA**

3 **between Pacific Solar and ENEE continues unchanged and**

4 **in force.**

5 **Thank you, Mr. President, Members of the**

6 **Tribunal. I yield the floor to Mr. Figueroa.**

7 **MR. FIGUEROA: Thank you, Andrés.**

8 **Members of the Tribunal, I will now explain**

9 **the first Jurisdictional Objection of Honduras as to**

10 **how this Tribunal lacks jurisdiction ratione**

11 **voluntatis since the Claimants have not complied with**

12 **the exhaustion of local remedies before coming to**

13 **ICSID Arbitration. For this purpose, I will focus my**

14 **presentation on four fundamental points which the**

15 **Parties have discussed in their written pleadings and**

16 **which confirm that this Tribunal lacks jurisdiction to**

17 **hear the present case.**

18 **As we will see, Article 26 of the ICSID**

19 **Convention expressly permits States to require the**

20 **exhaustion of local remedies as a condition of their**

21 **consent, which Honduras performed through Legislative**

22 **Decree 41-88, through which it approved the ICSID**

1 **Convention.**

2 **Number two, the provisions of DR-CAFTA do**

3 **not annul the declaration contained in Decree 41-88.**

4 **Number three, invoking this condition by**

5 **Honduras does not entail any contradictory behavior,**

6 **much less against good faith.**

7 **And Number four, exhausting local remedies**

8 **would not be a futile requisite as alleged by the**

9 **Claimants.**

10 **These arguments presented by Claimants**

11 **cannot remedy such a jurisdictional defect in their**

12 **case and, for this reason, Honduras's objection should**

13 **be upheld.**

14 **Number one, the ICSID Convention recognizes**

15 **that States have the right to condition their consent**

16 **to the exhaustion of local remedies. This is clearly**

17 **established in Article 26, which we can see on the**

18 **screen. A State may require the prior exhaustion of**

19 **local administrative or judicial remedies as a**

20 **condition of its consent to arbitration under the**

21 **Convention.**

22 **This is a faculty of every contracting State**

1 to preserve the rule of exhaustion of local remedies
2 of international customary law, reflecting the respect
3 of each States' sovereignty, and, accordingly, to
4 avoid being brought to an international Tribunal
5 before its own national judicial organs can state
6 their positions on the claims. This has been clear in
7 the doctrine for many years.
8 This right of option was key so that Latin
9 American States accepted the ICSID Convention. As
10 explained by the former Secretary-General, Dr. Ibrahim
11 Shihata, in the case of countries that have been
12 historically under the doctrine, this possibility of
13 conditioning consent on the exhaustion of local
14 remedies was offered, and this was determinant to
15 obtain their adherence to the system. It is
16 particularly revealing in this case what Dr. Shihata
17 said, which we now see on the screen. Speaking to
18 Latin America States, he said that the option provided
19 under Article 26, which requires the Exhaustion of
20 Local Remedies, can be exercised --and I will
21 translate-- through a declaration to be done at the
22 time of signing or ratification of the Convention.

1 **This is exactly what Honduras did through Legislative**
2 **Decree 41-88, thus exercising the prerogative**
3 **recognized in Article 26 of the Convention. We should**
4 **emphasize that that Legislative Decree is not any**
5 **instrument, it is the legislative act through which**
6 **Honduras ratified and implemented the ICSID Convention**
7 **in the country.**
8 **That is precisely one of the formulas used by**
9 **Dr. Shihata, States can use this option to recognize**
10 **Article 26 of the Convention and condition their**
11 **consent to arbitration to the exhaustion of local**
12 **remedies.**
13 **In the first part of the Declaration, we see**
14 **that the State of Honduras shall submit to arbitration**
15 **and conciliation procedures provided for in the**
16 **Convention when it has previously expressed consent.**
17 **Then the Declaration establishes the conditions that**
18 **such consent is subjected to.**
19 **The first one is precisely that the investor**
20 **must exhaust the administrative and judicial channels**
21 **of the Republic of Honduras, as a condition prior to**
22 **initiating the mechanisms of dispute resolution**

1 provided for in the Convention. This possibility is
2 consistent with the peaceful practices of States,
3 under the ICSID Convention, at the moment when States
4 consent to investment arbitration. The preparatory
5 works reflect the Agreement of the States with regard
6 to agreeing to consent through internal laws and also
7 unilateral declarations.
8 Now, the Claimants try, unsuccessfully, to
9 negate this through arguments which are not relevant.
10 First of all, Claimants try to eliminate the
11 preconditions established by Honduras when ratifying
12 the ICSID Convention. Specifically, the Claimants
13 allege that the condition provided under Article 26
14 can only be implemented if it is included in a single
15 and indivisible instrument where the State manifests
16 consent. Nothing in the Convention imposes such a
17 restriction.
18 According to the text of the Convention,
19 nothing prevents that the condition of exhausting
20 local remedies under Article 26 can be exercised
21 through legislation of the host State. And different
22 from the Claimants say, that legislation does not need

1 to be a law or a treaty offering consent to
2 international arbitration.
3 The position of the Claimants has already
4 been rejected in the Próspera v. Honduras case, where
5 Honduras raised the same objection. And the Tribunal
6 decided that Article 26 provides that a Contracting
7 State can require the exhaustion of local remedies as
8 a condition to its consent without specifying the
9 method of implementation.
10 Additionally, the Tribunal in Próspera
11 determined that Decree 41-88 reflects the intention of
12 Honduras to establish a prior condition prior to
13 consent, as allowed for in Article 26 of the
14 Convention.
15 It is therefore clear that the Republic of
16 Honduras conditioned its consent to ICSID Arbitration
17 based on this Legislative Decree 41-88, which is fully
18 in force.
19 Article 26 of the Convention is limited to
20 two requirements: (i) For the State to require the
21 prior exhaustion of administrative and judicial
22 remedies and (ii) that it does so as a condition prior

1 to its consent to arbitration. And Honduras complied
2 with those requirements in Legislative Decree 41-88.
3 Let us now go to the second point. The
4 Claimants attempt that this Tribunal give no effect to
5 Decree 41-88, saying that exhaustion of local remedies
6 would be incompatible with the provisions of DR-CAFTA,
7 especially provisions renouncing procedures and the
8 fork-in-the-road clause.
9 The Claimants significantly rely on the
10 Próspera case, pointing out that that tribunal already
11 rejected the Republic's objection for the same
12 reasoning. Nonetheless, in that sense, respectfully,
13 we dissent from the opinion of that tribunal, and that
14 Opinion does not bind this Tribunal. This Tribunal
15 has the opportunity to assure the right implications
16 of Decree 41-88.
17 In our pleadings, we have mentioned that
18 there are several ways in which the clauses of
19 renunciation and fork-in-the-road can be both
20 consistent, either through actions where there is no
21 monetary requirement (under art. 10.18.3 DR-CAFTA) or
22 claims which do not comply with the triple identity,

1 **but, more importantly, it is critical to maintain a**
2 **distinction between the provisions of ICSID and the**
3 **provisions of the Treaty, such as the distinction**
4 **between the jurisdiction of the Centre and the**
5 **competence of this Tribunal.**
6 **Decree 41-88 would presuppose a prior**
7 **condition to the jurisdiction of the Centre. As the**
8 **Tribunal is well aware, not complying with the**
9 **provisions of the Convention could lead to the lack of**
10 **jurisdiction of arbitral tribunals, without taking**
11 **into account compliance with the provisions of the**
12 **other applicable treaty.**
13 **By way of an example, this is the case Saba**
14 **Fakes v. Türkiye, which referred to the provision of**
15 **claims in ICSID from dual-nationality persons.**
16 **Indicating that Article 25(2)(a) of the**
17 **Convention excludes from the jurisdiction of the**
18 **Centre an investor which has the nationality of a**
19 **country involved in the dispute, even if the investor**
20 **has the dominant nationality of the other State party.**
21 **Even if the Tribunal were to consider that**
22 **the Claim is outside the jurisdiction of the Centre,**

1 **this would not prevent the Claimants to have access to**
2 **international arbitration to present their case.**
3 **DR-CAFTA has different options than ICSID, in the**
4 **event that the investor does not comply with the**
5 **requirements included in the Convention, as well as**
6 **the Treaty and in the event, it decides to submit its**
7 **dispute to arbitration, for example under the UNCITRAL**
8 **Arbitration Rules. Therefore, nothing in Decree 41-88**
9 **establishes an unsolvable incompatibility with**
10 **DR-CAFTA.**
11 **We must recall that an incompatibility with**
12 **a treaty is not alien to ICSID. For example, as we**
13 **have indicated, dual nationality is permitted under**
14 **DR-CAFTA but not under the ICSID Convention. But this**
15 **incompatibility is often accepted as it does not**
16 **impede an investor from going to international**
17 **arbitration, even in another forum.**
18 **The same happens under Article 26 of the**
19 **Convention, when a State includes a precondition to**
20 **its consent to the jurisdiction of the ICSID, and this**
21 **precondition to consent should be respected. If the**
22 **Claimants do not want to comply with the precondition,**

1 there is availability to other arbitral fora included
2 in the DR-CAFTA.
3 Now, let us go to the third point. The
4 Claimants suggest that Honduras, under the estoppel
5 doctrine, should not be allowed to invoke this
6 condition to the jurisdiction of the Centre, since the
7 Republic would not have invoked this objection in
8 other international arbitrations.
9 This position is not correct and irrelevant.
10 As is known, an estoppel argument is a high threshold,
11 as seen in Chevron v. Ecuador. It requires the
12 violation of a clear declaration toward the other
13 party and that it has not proceeded in good faith.
14 Estoppel requires a contradictory behavior
15 with regard to conduct which has been presented to the
16 other party. In this regard, the Republic does not
17 understand how the Paizes can infer an alleged promise
18 of conduct toward them which has been violated.
19 Honduras has never presented conduct directed toward
20 the Claimants that it would not present this objection
21 to its consent. The Claimants in their Rejoinder
22 argue that it is not necessary that this declaration

1 or conduct be directed to them. While this could be
2 discussed, this does not mean that the conduct should
3 not be clear and without ambiguity. And the same
4 cases cited by the Claimants require a high threshold,
5 such as the ICJ case regarding Nuclear Test (Australia
6 v. France), where it was determined that the French
7 Republic had committed publicly by announcing to the
8 entire world a clear intention to hold its nuclear
9 weapons tests. And Members of the Tribunal, Honduras
10 has never made a clear and unambiguous position that
11 it would not invoke a precondition to its consent
12 established under Decree 41-88.
13 It is also not credible that the Claimants
14 assume that the Republic would never raise this
15 objection based on previous arbitration cases with
16 other investors.
17 The Claimants have not produced evidence
18 reflecting the exact conduct of Honduras in the cases
19 they mentioned. This is not surprising because those
20 cases are not public. We see this on the screen.
21 This is from the ICSID web page. These are not public
22 decisions and did not reach a decision. The only case

1 could be Elsamex v. Honduras and Astaldi v. Honduras.
2 Those Awards are public. However, both arbitrations
3 emerged based on a clause in a commercial contract
4 which was not subject to the rules of international
5 law.
6 In that regard, the Claimants cannot allege
7 a supposed breach of trust or contradictory conduct
8 simply because Honduras has not behaved in a legally
9 relevant manner towards the Claimants.
10 In any case, they have not shown that
11 Honduras made a statement or conduct that could
12 compromise it. In conclusion, this estoppel argument
13 is not viable under any circumstances.
14 Lastly, I will explain why exhausting
15 domestic administrative or judicial remedies is not
16 futile.
17 The Republic of Honduras conditioned its
18 consent to ICSID arbitration under Legislative
19 Decree 41-88, which is in force. Despite this
20 precondition to Honduras's consent, the Claimants
21 decided not to exhaust local remedies. It is obvious
22 and undeniable that the Claimants have not exhausted

1 any local, administrative, or other means before
2 initiating this international arbitration proceeding.
3 The Claimants themselves recognize that they have not
4 even attempted this.
5 As a last defense, the Claimants allege that
6 it is not necessary to exhaust local remedies because
7 that would be a futile exercise, in that there is no
8 reasonable possibility of compensating for the alleged
9 damage they have suffered.
10 The Claimants devote several paragraphs to
11 offenses and calumnies against the judicial system in
12 Honduras, a system they have never used.
13 As the Tribunal knows, the threshold to show
14 the futility of a judicial system is also high. On
15 the screen, you can see what the Tribunal said in
16 Apotex v. U.S. which establishes that "futility"
17 requires a true lack of remedies or remedies which
18 lack manifest -- which are manifestly ineffective.
19 More importantly, it determined that it's
20 not enough to mention the absence of a prospect or the
21 improbability of success. If the Claimants think that
22 the Republic violated their rights, either through the

1 issuance of Decree 46-2022, the ENEE requesting a
2 renegotiation or a breach of the PPA, the Claimants
3 have many different means to object to these measures,
4 such as litigating before the judicial tribunals of
5 Honduras.
6 In their Rejoinder, the Claimants go as far
7 as to suggest that they would have sought solutions to
8 their problems before Honduras for years - as you can
9 see on the screen. However, the only document they
10 were able to quote were their own notices of a dispute
11 under CAFTA-DR to initiate mechanisms contemplated in
12 the Treaty. It's evident that such argument lacks
13 force, and that the Claimants never intended to use
14 the Honduran judicial system. They only present such
15 system to strengthen their argument and to avoid the
16 condition of Honduras's consent to ICSID arbitration.
17 In conclusion, Members of the Tribunal,
18 Honduras conditioned its consent to ICSID arbitration
19 under Article 26 of the Convention to the exhaustion
20 of local remedies through Legislative Decree 41-88,
21 and Claimants recognize not having complied with this
22 condition. Accordingly, the Tribunal lacks

1 jurisdiction in the present ICSID forum.
2 I now give the floor to my colleague
3 Mr. Lucas Solimano who will refer to the next
4 objection of Honduras. Thank you.
5 MR. SOLIMANO: Thank you, Ken.
6 PRESIDENT ANGELET: Let me interrupt for a
7 small question.
8 Yes. Perhaps two small points. The first
9 one is that, if one assumes that, on the occasion of
10 the ratification of the ICSID Convention, the Republic
11 of Honduras made clear its position as to the
12 exhaustion of local remedies, is it still possible
13 that, subsequently, by ratifying the CAFTA-DR on the
14 basis of lex posterior rule, the Republic of Honduras
15 changed its position on this point?
16 So what is the governing rule regarding the
17 relationship between the two subsequent treaties?
18 That is my first question.
19 And the second one is, the Claimants allege
20 that, by requiring a waiver of access to domestic
21 remedies, the Republic -- the CAFTA-DR is incompatible
22 with that prior requirement of exhaustion of local

1 **remedies?**

2 **And your argument, if I remember well, is**

3 **that that is not incompatible because the waiver aims**

4 **at preventing subsequent parallel proceedings.**

5 **Could you, perhaps, clarify again what kind**

6 **of parallel proceedings could still be open to a**

7 **Claimant when one must assume that he first exhausted**

8 **all the local remedies?**

9 **So if all the local remedies have been**

10 **exhausted, what can there be in terms of parallel**

11 **proceedings to be used subsequently? Thank you.**

12 **MR. FIGUEROA: Thank you, Mr. President.**

13 **I'll respond in English, I think, because I**

14 **think that will be most convenient for the Tribunal.**

15 **With respect to the first question, it is**

16 **the Republic of Honduras's position that its mere**

17 **ratification of subsequent treaties that may have**

18 **other provisions does not indicate a waiver of the**

19 **condition to its consent to arbitration to ICSID.**

20 **That is solidly stated and planted in Decree 41-88.**

21 **And so, what the position of the Republic of Honduras**

22 **is, that to the extent to which it wished to change**

1 that precondition, it would have to do so in any
2 subsequent treaty. And so what we argue is that
3 Decree 41-88 essentially argues as a precondition
4 embedded within the ICSID Convention, which must also
5 be respected jointly with the Treaty. If that's -- if
6 that is not -- in other words, if the preconditions
7 are not met, then ICSID is not an available forum. So
8 there may be other fora.
9 ARBITRATOR DRYMER: You foresaw my follow-up
10 question and answered it even before I posed it.
11 Thank you.
12 MR. FIGUEROA: Great. That's promising,
13 Mr. Arbitrator.
14 With respect to the second question, yes,
15 the President raises an important point and it's a
16 logical one. If there is, in fact, an exhaustion of
17 local remedies, there effectively would not
18 necessarily be any parallel proceedings with which to
19 deal with.
20 What we raised in our Brief is that, you
21 know, DR-CAFTA does provide certain exceptions to its
22 waiver requirements, particularly with respect to

1 proceedings involving declarations -- declaratory
2 relief not involving damages in assistance of the
3 arbitration.
4 However, we recognize that there may be a
5 situation -- the waiver situation, as the fork in the
6 road, may very well be a situation of incompatibility.
7 In other words, if you can't -- you can't exhaust
8 local remedies and waive them at the same time. We
9 understand that.
10 Well, our primary Claim is that, whatever
11 potential loopholes there may be in DR-CAFTA, the
12 fundamental point is that that incompatibility is not
13 determinative. In other words, it does not
14 necessarily mean that Tribunals should ignore the
15 precondition because the precondition exists. And,
16 hence, like the example of double nationality,
17 incompatibilities are often seen with respect to ICSID
18 and are dealt with and are lived with. And the reason
19 it's lived with is because treaties do, in fact, have
20 other fora and other alternatives. So just like with
21 double nationality, if the requirement is not met, if
22 there is that fundamental incompatibility, well, then

1 **Claimants would still have other fora within which to**
2 **seek their Claims. And so that would be my answer to**
3 **your question, Mr. President.**
4 **PRESIDENT ANGELET: Thank you very much.**
5 **MR. SOLIMANO: Thank you. Good morning,**
6 **Mr. President, Members of the Tribunal. I'm Lucas**
7 **Solimano, and it is an honor for me to represent the**
8 **Republic of Honduras in these proceedings.**
9 **I will present the second Jurisdictional**
10 **Objection with regard to the ownership of the**
11 **Investment. This objection requires the analysis of**
12 **many confidential documents, and we'll both follow the**
13 **rules in the relevant Procedural Order.**
14 **As it has been clear from our written**
15 **pleadings, this objection has two parts: Number one,**
16 **the Claimants have failed to demonstrate control or**
17 **ownership of Pacific Solar; the second part has to do**
18 **with the transfer of their investment to a bank**
19 **through two trusts.**
20 **Any of these two variables can terminate**
21 **this case completely. Let us now go on to the first**
22 **part of this objection.**

1 An objection ratione materiae because the
2 Investor has not been able to prove that it is the
3 Owner of the Investment is not usual. It should be
4 very simple for an investor to prove that it has
5 ownership of the alleged investment, especially if
6 almost $120 million is at stake. An investor should
7 readily have all the precedents that can prove its
8 ownership, and they should produce them from the
9 outset to their Request for Arbitration or their
10 Memorial on the Merits.
11 And here we are. It is not controversial
12 that Claimants have the burden to prove that they are
13 the Owners. As mentioned in many tribunals, it is the
14 Claimant Party to show the basis on which the
15 jurisdiction of the Tribunal occurs. However, the
16 Claimants, consistent with their policy of offering us
17 the least information as possible, presented the
18 evidence by drops. For example, in their Memorial,
19 they only presented one document, and you can see in
20 your screen a redacted version of C-27. This exhibit
21 was the only one the Claimants decided to show the
22 Tribunal. It shows a chart, prepared by Claimants,

1 **including a supposed corporate structure. To give it**
2 **a touch of formality they added a supposed certified**
3 **signature by a Guatemalan lawyer. Honduras already**
4 **explained the defects of this document under**
5 **Guatemalan law, that is, that it does not comply even**
6 **with the minimum requirements in Guatemala under the**
7 **Notary Code (*Código del Notariado*). Regardless, in**
8 **spite of the value that this certificate may have in**
9 **Guatemala, it is obvious that this chart and its**
10 **certification have no value in this Arbitration. How**
11 **can a Guatemalan lawyer certify that this company**
12 **incorporated in the British Virgin Islands controls**
13 **the 100% of an enterprise incorporated in the Bahamas?**
14 **We don't know.**
15 **What precedents does it have to make such a**
16 **statement? Well, if such precedents were relevant,**
17 **why was such relevant information not included in this**
18 **Arbitration? The Claimants do not answer this**
19 **question.**
20 **So this chart, and this chart only, was the**
21 **only information which Honduras had available when it**
22 **submitted its jurisdictional objections. Under this**

1 **scenario, the Republic had no alternative but to**
2 **object to the jurisdiction of the Tribunal, because it**
3 **lacked additional proof regarding the supposed**
4 **ownership of the investment by the Claimants.**
5 **In its Counter-Memorial on Jurisdictional**
6 **Objections, Claimants silently abandoned Exhibit C-27,**
7 **but instead of presenting relevant evidence they now**
8 **decided to introduce a chart for every company in the**
9 **corporate structure. And even though there is more**
10 **information in this one, they still do not prove**
11 **anything.**
12 **Exhibits C-257 to C-262 are registers of**
13 **Shareholders - supposed registries of Shareholders of**
14 **all the enterprises involved, but, with the exception**
15 **of C-160, these are charts which do not include dates,**
16 **there is no signature, no certification, and no**
17 **indication of their authenticity. By way of an**
18 **example, and I will show a document which has been**
19 **assigned confidential.**
20 **(End of open session. Attorneys' Eyes Only**
21 **information follows.)**
22 **CONFIDENTIAL SESSION**

1

16 (End of Attorneys' Eyes Only session.)

17 OPEN SESSION

18 MR. SOLIMANO: Thank you.

19 In its pleadings, the Claimants seem very

20 offended and accused Honduras of requesting new

21 information constantly. However, the reason for this

22 is obvious.

1 The context presented so far did not comply
2 with the minimum standards for an arbitration such as
3 this. When Honduras presented its Reply on
4 Jurisdictional Objections, the Claimants had not
5 presented proof of this ownership and control -- even
6 then, there was no evidence that the supposed
7 companies existed, that they were in effect, or even
8 their most basic data regarding incorporation.
9 Only in the Rejoinder, after having
10 obligated this Party to go through two rounds of
11 pleadings, arguing over incomplete and irrelevant
12 documents, that is, only when Honduras had no ability
13 to respond, then the Claimants presented the relevant
14 documents, Exhibits C-310 to C-330.
15 As the Tribunal will notice, some of these
16 documents are prior to the start of this Arbitration,
17 others were produced recently but at the request of
18 the Claimants themselves. The Claimants could have
19 presented these documents in their Request for
20 Arbitration, but they decided not to do so and wait
21 until their last pleading. The Republic of Honduras
22 reserves its rights through -- to respond to this

1 abusive maneuver of the Claimants.

2 This Hearing is the first time that Honduras
3 has a chance to pronounce itself on these documents.
4 In this sense, the Claimants have failed to prove some
5 very basic points. All of the companies pertaining to
6 the chain of the corporation exist, and they existed
7 before the Request for Arbitration. However, despite
8 this progress, the Claimants can fail to prove its
9 ownership of Pacific Solar. In fact, the Owner seems
10 to be a trust in the [REDACTED].

11 And now we will go back to a confidential
12 document.

13 (End of open session. Attorneys' Eyes Only
14 information follows.)

15 CONFIDENTIAL SESSION

[REDACTED]

12 (End of Attorneys' Eyes Only session.)

13 OPEN SESSION

14 MR. SOLIMANO: On the contrary,

15 Ms. Annabella Schloesser de Leon is a passive

16 beneficiary -- she does not own the assets in

17 , and she doesn't have control over

18 them either, which is held by Mr. Paiz. Therefore,

19 Mrs. Schloesser de Leon does not comply with the

20 requirements under article 10-28 of the Treaty and

21 cannot be considered a protected investor. The

22 Republic of Honduras requests respectfully that she be

1 excluded from the current case.
2 Mr. President, Members of the Tribunal, I
3 will now go on to the second part of our objection
4 regarding ownership of the alleged Investment.
5 As explained before, the Claimants
6 transferred their shareholding ownership to a bank
7 through a series of two trusts. This argument has
8 three aspects which we will now analyze. Firstly,
9 with regard to the ownership of the supposed
10 Investment, which corresponds to a Honduran bank;
11 second, we will show that the theory of the Claimants
12 on beneficial ownership does not help their case; and,
13 finally, we will discuss how the Claimants do not have
14 effective control of the Investment.
15 As a prior matter and to facilitate the
16 explanation, I will refer to the various trusts and
17 relevant agreements. This information has been deemed
18 confidential in this proceeding.
19 (End of open session. Attorneys' Eyes Only
20 information follows.)
21 CONFIDENTIAL SESSION

4 (End of Attorneys' Eyes Only session.)

5 OPEN SESSION

6 MR. SOLIMANO: Thank you very much.

7 ARBITRATOR DRYMER: Pardon me for the

8 interruption, but just to assist us when we're

9 reviewing the Transcript and the file later on, which

10 of these two versions do you rely on? In other words,

11 are you going to be referring us to in the course of

12 the Arbitration.

13 MR. SOLIMANO: We have only one version on

14 record.

15 ARBITRATOR DRYMER: Yeah, on the record.

16 MR. SOLIMANO: So we haven't seen the second

17 version.

18 ARBITRATOR DRYMER: Understood.

19 MR. SOLIMANO: So we cannot rely on the

20 second version.

21 ARBITRATOR DRYMER: Understood. Thank you.

22 MR. SOLIMANO: Thank you.

1 (Interruption.)
2 ARBITRATOR DRYMER: Let me clarify for the
3 record. The exhibit in question...
4 (Interruption.)
5 ARBITRATOR DRYMER: It's a minor point. It
6 is for the record. We are talking about Exhibit 268.
7 MR. SOLIMANO: Yes.
8 ARBITRATOR DRYMER: C-268, as the Common
9 Terms Agreement. Thank you. That is to help me later
10 on.
11 Please continue, Counsel.
12 MR. SOLIMANO: Thank you.
13 Now that we have a general picture of the
14 relevant context, we can discuss who the Owners of the
15 investment are. At first, Honduras does not object to
16 what we have just reviewed. They are all valid
17 agreements done in good faith. In this sense, the
18 Claimants are free to structure the Financing in the
19 way they so choose. In Project Finance, there are
20 different ways of financing and guarantees, but the
21 chosen view taken by the Claimants have consequences
22 under the Treaty. This way, they transfer the assets

1 **in such a way, and they put Claimants outside of the**
2 **scope of protection of the Treaty.**
3 **Secondly, the Republic does not agree that**
4 **any trust has the effect of transferring ownership.**
5 **Trusts in Honduras, particularly, transferred**
6 **ownership to the Honduran Bank, so the signing of this**
7 **trust replacing other existing Guarantee Agreements**
8 **has fatal consequences for the jurisdiction of the**
9 **Tribunal for different reasons.**
10 **Firstly, the right of property on an**
11 **investment has to be according to local laws. There**
12 **are many ways to confirm this position. See *Perenco***
13 **and *Mason Capital*. Secondly, Honduran Law is**
14 **extremely clear that when you establish a trust, the**
15 **trustee, in this case the Honduran bank, has a right**
16 **of property. Let's see. Article 1035 of the**
17 **Commercial Code in Honduras says the Trust is in**
18 **agreement with this transfer of assets in favor of the**
19 **trustee. Also, Article 1036 establishes that, before**
20 **third parties, the trustee will have the condition of**
21 **owner of the assets and rights in the trust. Thirdly,**
22 **and now referring to a confidential document...**

1 (End of open session. Attorneys' Eyes Only
2 information follows.)
3 CONFIDENTIAL SESSION

20 **(End of Attorneys' Eyes Only session.)**

21 **OPEN SESSION**

22 **MR. SOLIMANO: This contractual prohibition**

1 makes sense, since according to Article 170, the sale
2 of something that you do not own is valid in Honduras.
3 Thirdly, the duties to which the trust of the Honduran
4 bank is subject are not established in benefit of the
5 Claimants but on the European banks. In this sense,
6 the Honduran Trusts represent a strong guarantee in
7 favor of the European banks. Pacific Solar, and the
8 company that is situated right above it, have already
9 gotten rid of the shares and assets in favor of the
10 Honduran bank, which maintains them as property. In
11 case of non-compliance with the Financing contracts,
12 the European banks can ask the Honduran banks to
13 transfer the property to them without the necessary
14 agreement of Pacific Solar or any other corporation.
15 This way, only once the credits have been
16 completely paid, the Claimants will have their rights
17 on the investment. Until this condition is met -- and
18 it could not be met, the Claimants do not have any
19 relevant claim on the investment. In fact, at this
20 moment they do not receive any benefit from the
21 investment, and the possibilities of receiving any
22 benefit, again, could depend a future condition, the

1 uncertain and future fact that the credits are paid in
2 full.
3 We will go back to confidential documents
4 for a minute here.
5 (End of open session. Attorneys' Eyes Only
6 information follows.)
7 CONFIDENTIAL SESSION

15 (End of Attorneys' Eyes Only session.)
16 OPEN SESSION
17 MR. SOLIMANO: The fact that Claimants
18 eventually, if they pay their debt, could recover
19 their assets, that doesn't mean that on the date they
20 presented their Request for Arbitration they had done
21 so. And the Claimants would also like that this
22 Tribunal follow the criterion of other cases involving

1 trusts, like Blue Bank or Bozo Castillo, but the
2 situation is different. You can see on the screen a
3 comparison of these situations and how they do not
4 apply here.
5 In those cases, the local law did not
6 provide for the trustee to appear as owner of the
7 Assets. As explained, in Honduras' case, the
8 legislation gives ownership to the trustee, that is,
9 the Honduran Bank. In sum, Claimants have ceded 99.9%
10 of the Shares and assets of Pacific Solar to the
11 Honduran bank, who owns them since 2018.
12 Consequently, the Claimants lack standing to initiate
13 the present arbitration proceedings.
14 All of this should be enough to admit the
15 objection on jurisdiction presented by the Republic of
16 Honduras, however, and they have not presented
17 arguments to the contrary. They say they legitimately
18 can claim because they are beneficiaries of the
19 investment, according to international standards
20 regarding the theory of beneficial owners. Honduras
21 disputes that this is the applicable standard to
22 determine ownership of an investment, as determined in

1 *Mason Capital v. South Korea*, which could be applied
2 to this case.
3 Nonetheless, if the Tribunal wanted to use
4 this standard, the Republic has already shown that
5 Claimants are not the owners of the Assets, but the
6 European banks which have financed the project from
7 the beginning.
8 In their Counter-Memorial on Jurisdictional
9 Objections, Claimants assert that under international
10 law, there can be a difference between the legal owner
11 and the beneficiary of an investment. While this may
12 be true, Claimants are wrong when they say they are
13 the Owners. And to demonstrate this, I will go back
14 to confidential documents.
15 (End of open session. Attorneys' Eyes Only
16 information follows.)
17 CONFIDENTIAL SESSION

11 (End of Attorneys' Eyes Only session.)

12 OPEN SESSION

13 MR. SOLIMANO: Therefore, it is
14 indisputable, that, if the beneficiaries were relevant
15 to determine the ownership of the investment, they are
16 not the Claimants, but the European banks are. This
17 entails necessarily the dismissal of the claim because
18 of a lack of legitimacy. As various authors have
19 stated, if the final beneficiary is not the one that
20 has the correct nationality, in this case they are not
21 part of DR-CAFTA, the Claim must be dismissed.
22 Now we move onto the final part of my

1 statement. Finally, Claimants argue that in any case,
2 the Tribunal has jurisdiction
3 PRESIDENT ANGELET: If I could interrupt
4 you. Perhaps, we may have a break now. How
5 many -- and Prof. Stern has a question, and I also
6 have a question.
7 MR. SOLIMANO: As you wish. I have five,
8 six minutes left, so we can have a break now or you
9 can wait for me five minutes.
10 PRESIDENT ANGELET: Perfect. You may
11 proceed. Thank you.
12 MR. SOLIMANO: Thank you very much.
13 PRESIDENT ANGELET: Do you want a question
14 now or after?
15 ARBITRATOR STERN: I can wait five minutes.
16 MR. SOLIMANO: Thank you very much.
17 (Comments off microphone.)
18 MR. SOLIMANO: I'll do my best.
19 Finally, Claimants allege that, at any rate,
20 the Tribunal has jurisdiction because they control the
21 investment. This argument fails as well. The main
22 support for this assertion is the testimony of

1 Mr. Paiz. The circular nature of this argument is
2 impressive. The Paizes, through their Counsel, say
3 that they are the owners and that they control Pacific
4 Solar. As evidence of this statement, they offered
5 the Statement of Mr. Paiz on his own behalf saying
6 that he's the Owner and the person that controls
7 Pacific Solar. The Tribunal has to attach no value to
8 these cross-references.
9 Additionally, Claimants allege that they
10 control investments for the following reasons: First,
11 the Share Trust allows them to participate and vote on
12 the Pacific Solar meetings; two, Mr. Paiz has been the
13 president of the Board of Directors of Pacific Solar
14 since 2015; and, third, Mr. Paiz and Mr. [redacted],
15 manager of Pacific Solar, manage the day-to-day
16 operations and they make payments necessary for the
17 project to continue. These arguments do not have a
18 lot of merit.
19 For this, we're going to look at some
20 confidential documents now.
21 (End of open session. Attorneys' Eyes Only
22 information follows.)

1 **CONFIDENTIAL SESSION**

(End of Attorneys' Eyes Only session.)

OPEN SESSION

MR. SOLIMANO: In sum, the majority of the evidence showing that Mr. Paiz has the control of the investment is nothing more than the execution of mere obligations imposed by the Trust as part of the Financing Agreement.

Consequently, the Claimants have not shown that they are investors protected by the Treaty, and thus the Tribunal does not have jurisdiction in this case to hear their claims. Accordingly, the following has been demonstrated:

First, Claimants are not owners of the corporate structure they claim, and, particularly, Ms. Schloesser de Leon does not exercise any control over them.

Two, the Claimants ceded their rights to the investment in 2018 before any alleged breach.

Three, the Honduran Bank is the owner of the alleged investment.

1 And, four, if it were relevant to find out
2 who the beneficiaries are, well, the beneficiary
3 should be the Banks, the European banks.
4 And, five, the Claimants do not exercise any
5 relevant control over the alleged investments.
6 Members of the Tribunal, this would be a
7 good time for a break. If not, I can give the floor
8 to Mr. Figueroa who will address the next objection by
9 Honduras.
10 PRESIDENT ANGELET: Thank you very much.
11 Now perhaps a few questions from
12 Prof. Stern.
13 ARBITRATOR STERN: Yes. I have a few
14 questions. I will refer to C-267, so I don't know if
15 we have to make it confidential.
16 MR. SOLIMANO: Yes, the document is fully
17 confidential.
18 (End of open session. Attorneys' Eyes Only
19 information follows.)
20 CONFIDENTIAL SESSION

3 (End of Attorneys' Eyes Only session.)

4 OPEN SESSION

5 ARBITRATOR STERN: Okay. It is stated: "In
6 consideration of the aforementioned background, the
7 Company hereby notified ENEE of the following: That
8 the Company will enter into the financing documents in
9 accordance with the right granted by Section 20.6 of
10 20th clause of the PPA."

11 Article 20.6, as you know, probably,
12 embodies an agreement of the Parties that "any
13 assignment, pledge, or encumbrance of the Contract
14 and/or right shall not be understood as a transfer of
15 ownership to this Contract."

16 So there is a contradiction between
17 Article 26 (20.6?) and what has been done in C-267.

18 So if there is a contradiction, I suppose
19 that Honduran law should apply, to try to know what is
20 the solution? Or how do you see this to be settled?

21 MR. SOLIMANO: Thank you, Ms. Stern.

22 Honduras -- if there is a contradiction, it

1 is only a partial contradiction. At Clause 20.6
2 covers only ownership over the Contract. The Asset
3 Trust is bigger than that. And also transferring
4 property, all movable and immovable property, which is
5 not covered by this. Also, this clause does not cover
6 in any way the Share Trust. So that's the framework
7 of a possible contradiction.
8 That being said, I would say the only
9 possible contradiction means to the position as party
10 of the Contract in the sense of, as we explained,
11 Honduras does not want a bank running the Plant. So
12 that's the thing that cannot be ceded to a third
13 party. But the economical rights under the Contract
14 are, indeed, ceded. So that's the only thing that
15 could be a possible contradiction. It's a very minor
16 point that the running of the plant is not ceded, and
17 that --
18 ARBITRATOR STERN: Yes, this I understood.
19 MR. SOLIMANO: -- it is kept on Pacific
20 Solar.
21 ARBITRATOR STERN: But then probably
22 Honduran law, if there is a contradiction, even though

1 a minor one, Honduran law should apply, I guess --

2 MR. SOLIMANO: Yes. Yes.

3 ARBITRATOR STERN: -- of the definition.

4 MR. SOLIMANO: Additionally, maybe to see

5 this problem, what happen is that it is not that

6 Pacific Solar keep something, it ceded everything, it

7 is a *comodato* (in Spanish), a lease agreement where it

8 get back the practical part of the administration of

9 the plant.

10 ARBITRATOR STERN: Thank you.

11 So my second question, you mentioned a

12 beneficiary. I mean, legal title, beneficial title.

13 The fact that Pacific Solar is a third-ranking

14 beneficiary is of a certain importance, I imagine?

15 MR. SOLIMANO: Yes. As we explained,

16 Pacific Solar could eventually get all his rights

17 back, but that is a future event. We don't know if

18 it's going to happen. Now it doesn't receive any

19 benefit and might not get any benefit in the future.

20 It might, but we don't know.

21 ARBITRATOR STERN: Okay. My last question,

22 which is completely theoretical, if, for example, at

1 the end of this case the Tribunal, let's imagine,
2 would give some money, some damages to the Claimants,
3 wouldn't that be -- I mean, if the Claimant received
4 the money -- would receive the money, you know, I'm
5 not deciding anything, of course, yet. It is just a
6 hypothetical position because I want to understand how
7 all this works.
8 So let's suppose the Claimants receive some
9 money from this Tribunal, isn't that the way to have
10 the money escape from the estate of the Trust?
11 MR. SOLIMANO: Thank you very much. That's
12 a very good question. We have several levels on the
13 answer.
14 First, we assume there must be some
15 agreement between the European banks and Pacific
16 Solar, or Mr. Paiz. We haven't seen it. So it might
17 be a specific answer. We don't know it. We haven't
18 seen that.
19 That being said, yes, that is one of our
20 concerns that particularly the Asset Trust does not
21 include a possible payment to Claimant, and that could
22 be a way to bypass the assets and probably the Banks

1 will not see that money.

2 Subject to a possible agreement that we

3 don't know of its existence or contents.

4 ARBITRATOR STERN: Okay. Thank you very

5 much for the clarifications.

6 ARBITRATOR DRYMER: One quick follow-up as

7 regards Prof. -- and then a second question later.

8 One quick follow-up to Prof. Stern's question

9 regarding the applicability of Honduran law. Am I

10 correct to understand that the Republic's position is

11 that, in respect of the interpretation and potential

12 contradiction between any of the Honduran legal

13 instruments, it is Honduran law, commercial

14 instruments -- it is Honduran law that must prevail?

15 MR. SOLIMANO: Generally, yes.

16 ARBITRATOR DRYMER: Does that mean there's

17 an exception?

18 MR. SOLIMANO: Well, there is -- the

19 document you asked at first are governed by New York

20 law.

21 ARBITRATOR DRYMER: Yes.

22 MR. SOLIMANO: We don't know what they said

1 because it's so heavily redacted that there might be a
2 contradiction there. We haven't seen it.
3 ARBITRATOR DRYMER: All right.
4 MR. SOLIMANO: So and that --
5 ARBITRATOR DRYMER: Actually, Honduran legal
6 instruments in the Contract. I guess that --
7 MR. SOLIMANO: What?
8 ARBITRATOR DRYMER: I think I understand
9 your answer. Thank you very much.
10 MR. SOLIMANO: Yeah.
11 ARBITRATOR DRYMER: My second question is
12 one I would have raised later on, but since we are
13 taking a moment now, I heard you say earlier -- and I
14 understand the point that Honduras reserves its right
15 in respect of what you would say the "tardy," the late
16 production of a series of documents going to
17 ownership. I don't know what my colleagues think. I
18 haven't discussed this with them, but I raise it now
19 because, in my mind, it would seem to me that the
20 Hearing is the time not to continue to reserve rights
21 but to state the rights and your position in respect
22 of them. You don't need to resolve that now, but I

1 raise it at this point because it is something you may
2 want to consider with your team.
3 MR. SOLIMANO: Can I have --
4 ARBITRATOR DRYMER: Of course. I said you
5 don't have to raise it, respond, but you may respond.
6 (Pause.)
7 MR. SOLIMANO: Thank you for your question.
8 Maybe my reservation of right wasn't clear enough.
9 I think we are reserving our right to a very
10 distant possibility that the Tribunal rejects our
11 jurisdictional objections, and then when we get to the
12 Merits, we see even more information that might be
13 contradictory what we see, because we didn't have a
14 full record to comment on, and the record can be even
15 expanded later.
16 ARBITRATOR DRYMER: Fair enough.
17 MR. SOLIMANO: That's the only scope of the
18 reservation.
19 ARBITRATOR DRYMER: Thank you very much for
20 that. Much appreciated.
21 Thank you, sir, those are my questions.
22 PRESIDENT ANGELET: Perhaps, also a few

1 **questions, not on the possible transfer but on initial**
2 **ownership. For example, it appears from Exhibit C-13,**
3 **which dates back to 2015, that ENEE was informed of**
4 **the purchase of Shares in Pacific Solar by, I believe,**
5 **Mr. Paiz, and that ENEE was informed of the fact that**
6 **he would chair the Board.**
7 **Subsequently, while we know that the**
8 **Honduran bank, the European Development Banks, I**
9 **assume, consider Mr. Paiz as being the Owner of the**
10 **investment. Is this relevant to determine the initial**
11 **ownership? And I might say, in a way, is the evidence**
12 **that you adduce to prove the transfer, not also**
13 **evidence for the fact that Mr. Paiz was the initial**
14 **owner?**
15 **MR. SOLIMANO: Well, we have two-fold**
16 **answer. First, we don't have any evidence that**
17 **Mrs. Paiz, Ms. Schloesser de Leon de Paiz, was ever**
18 **owner of anything or controlled anything. That being**
19 **said.**
20 **Then, yes, with the caveat that we don't**
21 **have a full record and we don't have access to the**
22 **initial documents about the original form of**

1 financing. That might change my question, but, yes,
2 we agree that until 2018 Pacific Solar owned the whole
3 assets in the Contract and ████████ -- I don't
4 remember the name, sorry -- ██████████ was
5 the Shareholder of Pacific Solar. That changed in
6 2018, and -- but, as obvious, the only Relevant Date
7 is the date of the initiation of this Arbitration.
8 Our answer in a nutshell would be, it might
9 have been. We haven't seen the full record. But even
10 if it was, it is irrelevant, because the Relevant Date
11 is almost five years after the Honduran trust with the
12 presentation of the Request for Arbitration.
13 PRESIDENT ANGELET: Thank you very much.
14 So I suggest that we now suspend the Hearing
15 for a 15 minutes' break. That will be until -- let me
16 see -- 5 past 11:00.
17 Thank you.
18 MR. FIGUEROA: Mr. President, just a point
19 of order, would the Secretary mind just telling us the
20 time used?
21 SECRETARY GONZÁLEZ: You have used 1 hour
22 and 14 minutes. You have remaining 45 minutes.

1 MR. FIGUEROA: Thank you.

2 (Brief recess.)

3 PRESIDENT ANGELET: Thank you very much.

4 My personal apologies for the delay, which

5 is due to my ankle.

6 We can proceed, if you are ready?

7 MR. FIGUEROA: Yes, Mr. President. Thank

8 you.

9 Mr. President, Members of the Tribunal, the

10 remaining presentations will be in English, so it will

11 be safe to remove any headsets. I will now address

12 Claimant's MFN Claims, through which Claimants purport

13 to incorporate umbrella clauses from two other

14 Treaties in which Honduras is a Party.

15 I will explain why Claimant's attempt to

16 rely on DR-CAFTA's MFN Clause fails and should be

17 dismissed.

18 In particular, my remarks will address two

19 fundamental questions: First, does the MFN Clause

20 apply at all? And, two, if it applies, may it be used

21 to import provisions from other Treaties?

22 With regard to the first question, the

1 Parties to the DR-CAFTA expressly excluded the
2 application of the MFN Standard to any disputes
3 arising out of Government procurement. The Power
4 Purchase Agreement, subscribed between Pacific Solar
5 and ENEE, falls squarely within this Carve-Out and,
6 therefore, the MFN cannot be applied to this case.
7 Even if the Tribunal were to determine that
8 the Power Purchase Agreement does fall
9 within the -- does not fall within the Government
10 Procurement Carve-Out and that the MFN Clause applies,
11 the answer to the second question is that the MFN
12 Clause cannot be used by Claimants as an "a la carte"
13 instrument to import any other substantive Standard
14 from any Treaty, and certainly not when the Standard
15 sought to be imposed was deliberately not included by
16 the State Parties to the DR-CAFTA.
17 Let's turn to the first question. On screen
18 we have Article 10.13.5 of the DR-CAFTA, which
19 expressly excludes the application of the MFN
20 provision to procurement. The issue, of course, is
21 what is "procurement"? Both Parties recognize that
22 DR-CAFTA in its Article 2.1 contains a definition of

1 "procurement" which we see on the screen now.
2 It reads: "Procurement means the process by
3 which a Government obtains the use of or acquires
4 goods or services, or any combination thereof, for
5 governmental purposes and not with a view to
6 commercial sale or resale, or with a view to use in
7 the production of supply of goods or services for
8 commercial sale or resale."
9 Notably, nowhere in the Counter-Memorial or
10 Rejoinder do Claimants dispute the fact that the Power
11 Purchase Agreement constitutes a form of procurement
12 Contract, and that makes sense, given that PPAs are
13 prime examples of Government Procurement Contracts.
14 More than that, the Power Purchase Agreement
15 between Pacific Solar and ENEE clearly meets the
16 definition of an exempted procurement under DR-CAFTA.
17 Under the PPA, ENEE, a Government entity, is
18 the buyer. ENEE obtains the use of and acquires
19 electrical energy and power delivered by Pacific
20 Solar's PV Plant, the Seller. This purchase is made
21 for a governmental purpose, namely to supply the
22 National Grid for distribution to Honduran citizens

1 and residents, consistent with Honduras's recognition
2 of energy as a human and social right.
3 Critically, this distribution cannot be
4 deemed a commercial sale or resale because ENEE's
5 distribution of energy is made at deeply-discounted
6 and regulated prices. Its distribution is essentially
7 a public service. Indeed, consistent with these
8 Public Services, ENEE, by law, is a nonprofit public
9 entity. Thus, the PPA clearly meets the criteria for
10 the Procurement Carve-Out.
11 Claimants, however, focus on the word
12 "process" in the Article 2.1 definition of
13 "procurement" to argue that the Procurement Carve-out
14 only applies -- and here I quote them -- "to the
15 formal procedure set forth by a State to regulate the
16 acquisition of such goods such as the determination of
17 tender processes, the requirements to qualify as a
18 bidder, and to be awarded Contract, the assessment of
19 qualifications, et cetera."
20 But according to Claimants, it does not
21 relate to subsequent stages after the Contract has
22 been awarded and signed.

1 According to Claimants, then, the carve-out
2 is inapplicable to issues concerning Contract
3 performance and breaches, and issues related to the
4 management, conduct, and operation of the Contract.
5 In short, once the Contract is signed, everything
6 becomes fair game for MFN, and, in turn, for attempts
7 to import other Treaty Standards such as an umbrella
8 clause as Claimants seek in this arbitration.
9 But nothing in DR-CAFTA mandates Claimant's
10 clearly self-interested interpretation of the
11 Procurement Carve-Out. Indeed, Claimant's
12 interpretation is nothing more than an attempt to
13 rewrite the Treaty's definition of "procurement."
14 Where the definition states "procurement means the
15 process," Claimants want the Tribunal to read
16 "procurement means the formal procedures set forth by
17 a State to regulate the acquisition of goods and
18 services."
19 But that's not what the definition says. It
20 says something much broader, which necessarily
21 incorporates the performance and potential breaches of
22 Procurement Contracts. Now, I'll return to this point

1 shortly. But what is clear is that Claimants'
2 interpretation not only modifies the actual text of
3 the Treaty, it also effectively guts the plain meaning
4 of the text and object and purpose of the Carve-Out.
5 The Republic of Honduras submits that an
6 interpretation of the "Procurement Carve-Out" of
7 Article 10.13.5 that is in line with Article 31 of the
8 Vienna Convention of the Law of Treaties, that is in
9 good faith, in accordance with the ordinary meaning of
10 its terms, its context and object and purpose,
11 demonstrates the natural and logical conclusion
12 presented in our written submissions.
13 That the PPA is, without a doubt, a
14 Government Procurement Contract that fits clearly
15 within the Carve-Out and thus, cannot be the basis of
16 an MFN Claim under DR-CAFTA.
17 As we have demonstrated in our Pleadings,
18 the Procurement Carve-Out is generally understood as
19 intended to protect a State's ability to exercise
20 nationality-based preferences in cases of procurement,
21 which gives effect to a State's will to procure goods
22 and services in a way that "yields maximum benefits

1 for the local economy."
2 This of course aligns with another general
3 purpose stated in DR-CAFTA and stated in its preamble
4 which is to preserve the contracting Parties'
5 flexibility to safeguard areas of economic and social
6 policy.
7 Critically, despites -- Claimants'
8 assertion, the object and purpose does not end with
9 the formal procedures of selecting and awarding a
10 Contract.
11 Let's look at the definition of
12 "procurement" in the DR-CAFTA, once again. Note that
13 the definition incorporates the "process by which" a
14 Government "acquires goods or services" or any
15 combination thereof.
16 Well, in many Procurement Contracts, and
17 certainly in a PPA, the "process of acquiring goods
18 and services" is a recurring one. Under the PPA
19 specifically, Pacific Solar must deliver the energy
20 generated by the Plant to the National Grid, subject
21 to oversight by the Regulator, and, in return, ENEE
22 provides payment in accordance with the Contract.

1 In short, the "process of acquiring goods
2 and services" can be properly understood as the
3 transactions by which such goods and services are
4 acquired, transactions that are repeated over time and
5 governed by the PPA. The Carve-Out covers not just
6 the forming of the Contract but each and every one of
7 those transactions as structured or codified, if you
8 will, by the Contract or PPA.
9 And it makes sense that the Carve-Out
10 necessarily extends to Contract performance.
11 Otherwise, a State would be protected from MFN Claims
12 only at the Tender or contracting phase, but left
13 completely vulnerable and captive to an investor once
14 the Contract is in place. What if a State or
15 State-owned entity that once contracted with only one
16 Company for certain goods and services decides to
17 contract a second Company of a different nationality,
18 thereby reducing the first Company's sales?
19 This scenario involves a State's sovereign
20 decision to take nationality-based Measures to procure
21 goods and services to benefit its local economy. But
22 under Claimant's interpretation, despite the plain

1 wording of the Treaty, the contracting Parties would
2 be entitled to use the MFN Clause to assert Claims
3 that would disrupt those sovereign decisions, in
4 contravention of the Carve-Out's object and purpose.
5 The clear intent of the State Parties to
6 DR-CAFTA was to exclude these types of Measures from
7 MFN Claims precisely to provide States with the
8 necessary latitude and flexibility in their
9 procurement.
10 And, of course, it's not just about
11 nationality-based decisions. As Claimant has asserted
12 in its Counter-Memorial, "the relevant question for
13 treaty interpretation is what the DR-CAFTA Parties'
14 presumably with full knowledge of all that had gone
15 before under prior Treaties actually decided to do in
16 DR-CAFTA by virtue of adopting particular Treaty text
17 they did."
18 Well, it is undisputed that Arbitral
19 Tribunals had permitted the use of MFN Clause -- of
20 the MFN Clause in Treaties to input substantive and
21 even procedural provisions in the principal Treaties,
22 which opened up States to a broader range of claims

1 **and potential liability.**
2 **In light of this, it makes perfect sense,**
3 **indeed it is only logical, that State Parties would**
4 **want, first, to ensure that "procurement" be defined**
5 **broadly, as it is in DR-CAFTA, and, second, to ensure**
6 **that such procurement, given its sensitive and**
7 **critical nature be completely excluded from the**
8 **potential misuse of the MFN Clause.**
9 **In this regard, it is worth noting that**
10 **Claimants engage in a contradiction in their argument.**
11 **Claimants appear to assert that the Procurement**
12 **Carve-Out is only relevant to nationality-based**
13 **decisions during the selection of bidders or**
14 **Contractors, and, thus, view the Carve-Out as meant to**
15 **address the MFN Clause as a purely antidiscrimination**
16 **clause.**
17 **That's the only way that argument makes**
18 **sense. That is, in order to avoid allegations of**
19 **national discrimination, at this pre-contractual**
20 **stage, the State Parties included the Carve-Out. Yet,**
21 **once a Contract is signed, Claimants assert a much**
22 **broader view of MFN, which permits importation of**

1 standards without a factual comparison of
2 circumstances to determine discrimination.
3 I'll address the Claimant's broader view in
4 detail shortly. But for now I wish to point out that
5 Claimants can't have it both ways. Either MFN
6 requires a factual comparison of investors in like
7 circumstances, both before and after contracting, or
8 it is something broader, both before and after
9 contracting.
10 Claimant cannot pick and choose the scope of
11 MFN based on timing, and certainly the plain meaning
12 of the text of the DR-CAFTA, considering its context,
13 object, and purpose, does not make such a distinction.
14 In short, pursuant to Article 10.13.5, MFN
15 is intended to be excluded from all procurement,
16 regardless of whether it is prior to or after the
17 signing of the Contract. This of course, is further
18 supported by a careful analysis of the ordinary
19 meaning of term "procurement" independent of its
20 defined term in Article 2.1.
21 And to be clear, because Claimants criticize
22 the Republic for its analysis of the plain terms in

1 its Brief. And to be clear, of course the Republic
2 agrees that the term of "procurement" in Article 2.1
3 controls here, it governs here. But what the Republic
4 has done in its pleading is show further support as to
5 why its interpretation of the plain meaning of the
6 definition is further borne out when compared to an
7 independent analysis.
8 Thus, for example, as we can see on screen,
9 we have the ordinary definition of "procurement," or
10 "procurement contract," which means the act of getting
11 or obtaining something and a Contract in which a
12 Government receives goods or services. This is the
13 general and legal dictionary's definition of these
14 terms. The definition share the central element of
15 the definition of "procurement" in Article 2.1 of
16 DR-CAFTA.
17 That is, the act or process or contract of
18 obtaining goods or services. Notably, nothing in
19 DR-CAFTA narrows a defined conduct to a specific
20 procedural or formal moment. Indeed, if anything, the
21 addition of the term "process" by which a Government
22 obtains or acquires broadens the scope of the meaning.

1 **In any event, as noted earlier, the**
2 **definition of "procurement" should not be limited**
3 **because "procurement" is an ongoing relationship**
4 **between a public buyer and a private seller.**
5 **In sum, as I stated earlier, a good faith**
6 **interpretation of Article 10.13.5 and its definition**
7 **in Article 2.1, based on the plain meaning of the**
8 **Treaty's text, and in light of its context, object,**
9 **and purpose, can lead us to only one appropriate**
10 **conclusion.**
11 **The Government Procurement Carve-Out applies**
12 **to all procurement and at all stages of that**
13 **procurement, not just the precontractual stage, but**
14 **also the actual performance and potential breaches of**
15 **a Procurement Contract. Any other conclusion would**
16 **render the Procurement Carve-Out meaningless and moot**
17 **its object and purpose.**
18 **Again, the State's sovereign decisions to**
19 **select who and what to purchase and when would be**
20 **obstructed.**
21 **Again, Claimant has not disputed that the**
22 **PPA is a Procurement Contract and the Republic has**

1 established that this PPA falls within the definition
2 of "procurement" under the CAFTA-DR. Because
3 Claimant's Claims ultimately arise from the PPA,
4 Claimants' MFN Claims are expressly excluded by the
5 Treaty and must be dismissed.
6 The Republic of Honduras submits that this
7 should be the end of the analysis, however, for the
8 sake of completeness. Yes?
9 PRESIDENT ANGELET: Excuse me. Let me,
10 perhaps, interrupt with a few questions on this first
11 part of your argument.
12 (Comments off microphone.)
13 PRESIDENT ANGELET: Thank you. First,
14 perhaps, a very technical one. Both Parties refer to
15 the rules on treaty interpretation. I assume that the
16 Vienna Convention does not apply, per se, to the
17 interpretation of the CAFTA-DR, since the United
18 States, if I'm not mistaken, are not a party to the
19 Vienna Convention. Do the Parties agree that the
20 principles of interpretation including Article 31(4)
21 on the special meaning reflect customary international
22 law?

1 **MR. FIGUEROA: Yes. Yes, Mr. President.**
2 **The Republic of Honduras agrees with that.**
3 **MS. MARCHILI: Yes, for Claimants as well.**
4 **PRESIDENT ANGELET: Thank you.**
5 **Now, my second question relates to the**
6 **exception to the exception, with a view to commercial**
7 **sale or resale or "with a view to use in the**
8 **production or supply of goods or services for**
9 **commercial sale or resale". So there is an opposition**
10 **in the provision, I understand, between "governmental**
11 **use" and "not for commercial use," and you just argued**
12 **that the Republic does not buy electricity for**
13 **commercial use because it is sold to the customer at**
14 **heavily discounted rates.**
15 **Now, my question is, how the Tribunal should**
16 **determine whether this is relevant or not to qualify**
17 **the resale as for commercial use or not. If one**
18 **compares with the rules on State immunity, there would**
19 **be two criteria to distinguish between governmental**
20 **and commercial, which would be, one, the nature of the**
21 **operation, and, second -- but, according to the U.N.**
22 **Convention on State Immunity, only in a subsidiary**

1 manner -- the purpose.
2 Now, you have been referring arguably to the
3 purpose. What about the nature, which is a resale?
4 Is this relevant or not? That is my question.
5 Thank you. That will be it for the time
6 being. Thank you very much.
7 MR. FIGUEROA: Thank you, Mr. President.
8 Yes, for purposes of the carve-out, the
9 position of the Republic of Honduras is that it would
10 not be relevant. But the issue is, is this a
11 commercial resale or sale for purposes of DR-CAFTA.
12 SECRETARY GONZÁLEZ: Please.
13 MR. FIGUEROA: For purposes of DR-CAFTA.
14 And, for that, yes, you can look at the actual
15 function or operation of what the distribution of
16 electricity is and looks like. But what is
17 fundamental here is that, within the context of Treaty
18 interpretation, and, in particular, treaty
19 interpretation with DR-CAFTA, as to its object and
20 purpose. So electricity is distributed to customers.
21 It's distributed to customers, however, at a
22 deeply discounted rate and under an express

1 recognition of energy as a human and social right in
2 Honduras. In other words, it is not sold as a
3 commercial product; right?
4 So, in other words, the analysis that
5 Mr. President says, with respect to immunity, while
6 illustrative, I don't think is necessarily relevant
7 for purposes of analysis of
8 DR-CAFTA -- right? -- because it's a different
9 context. And so in this case, it's essentially a
10 distribution of -- the distribution is a public
11 service at a discounted price and -- oh, and without
12 any intention of profit -- right? -- and it is, by
13 law, a nonprofit public entity. And so, in that case,
14 again, the fundamental question really and the litmus
15 test will be under the Vienna Convention. And with
16 respect to that, we believe that the distribution
17 falls within the defined term of the Procurement
18 Carve-Out.
19 PRESIDENT ANGELET: Thank you very much.
20 ARBITRATOR DRYMER: I have one question.
21 Again, I was going to wait, but I'm going to take
22 advantage of the fact that the President asked a

1 similar question when he turned to Claimants and asked
2 whether they agree.
3 We have heard two or three times in the last
4 few minutes that Claimants do not dispute that this is
5 the PPA's a procurement contract. I'm not asking for
6 argument. If possible, and with respect, I'm asking,
7 do you dispute that or do you not? And I ask it now
8 as I'm about to hear the rest of Respondent's argument
9 on the point.
10 MS. MARCHILI: So it is disputed. It is not
11 undisputed.
12 ARBITRATOR DRYMER: Thank you. I'll leave
13 it there for now.
14 MR. FIGUEROA: Okay.
15 ARBITRATOR DRYMER: Please continue,
16 Mr. Figueroa.
17 MR. FIGUEROA: Thank you very much,
18 Arbitrator Drymer.
19 And just for clarity's sake in response to
20 the Tribunal's question, our statement relies on
21 Claimants' written pleadings. There is certainly a
22 section in which they go into analysis about why the

1 carve-out applies and processes. I would refer the
2 Tribunal to look at that section again. Nowhere in
3 that section is there a dispute or a discussion that
4 the PPA is not a procurement contract, but, you know,
5 we take the Claimants' statement at this stage for
6 what it's worth.
7 ARBITRATOR DRYMER: I apologize if I
8 misspoke. I didn't mean to put words in your mouth.
9 Indeed, you said that nowhere in their written
10 submission do they dispute.
11 MR. FIGUEROA: Right. Right. Thank you,
12 Mr. Arbitrator.
13 Now, the Republic of Honduras, as I said,
14 submits that the carve-out should be the end of the
15 analysis, but I'll now address the second question I
16 mentioned at the beginning of this presentation and
17 assume quod non that the MFN Clause is applicable to
18 Claimants' case.
19 If that is so, Claimants' MFN Claims still
20 fail because DR-CAFTA does not allow for the
21 importation of substantive provisions from other
22 treaties via the MFN Clause. And it especially does

1 not permit the importation of a substantive provision
2 that has been expressly excluded from the principal
3 Treaty.
4 On screen, we have the MFN Clause set forth
5 in Article 10.4 of DR-CAFTA that reads, in its first
6 paragraph -- and I'll just read the relevant
7 points -- "that the Parties shall afford treatment no
8 less favorable than it accords in like circumstances
9 to investors with respect to the establishment,
10 acquisition, expansion, management, conduct,
11 operation, et cetera, of investments in its
12 territory."
13 First, let's look at the phrase "in like
14 circumstances." The plain meaning of the phrase
15 expressly requires a comparative exercise to determine
16 whether circumstances are alike, and, if so, whether
17 differential treatment is more or less favorable.
18 This is consistent with the object and
19 purpose of an MFN Clause, which, as stated by the
20 Tribunal in the Içkale v. Turkmenistan, is to prohibit
21 discriminatory treatment of investments. Indeed, it
22 is the object and purpose and the specific text of the

1 MFN Clause in question in that case, which was very
2 similar to that of DR-CAFTA, that led the Tribunal in
3 Içkale to conclude that the terms "treatment accorded
4 in similar situations" suggests that the MFN treatment
5 obligation requires a comparison of the factual
6 situation of the investments.
7 In their Rejoinder, Claimants take issue
8 with the Decision of the Içkale Tribunal, as well as
9 one from Sehil v. Turkmenistan, that decided in the
10 same vein as Içkale, arguing that it is a minority
11 position that finds not support in other case law.
12 Yet Claimants can cite to only one case,
13 Gurix v. Syria, where the Tribunal criticized Içkale's
14 interpretation of the MFN Clause. There is no basis
15 to not give appropriate and significant weight to the
16 findings of Içkale and the Muhammet Çap cases, which
17 we show on screen there -- at least the cover pages.
18 Now, let's go back to Article 10.4 and look
19 at the text at the end of the clause, namely with
20 respect to the establishment acquisition, the
21 expansion, management, conduct, operation and sale, or
22 other disposition of investments in its territory.

1 This language is critical because it means that, not
2 only must there be a comparative exercise to determine
3 like and unlike circumstances, but there must
4 also -- it must exist a specific measure that impacts
5 the specific categories of activities related to the
6 Investment. Nothing in the MFN Clause permits us to
7 infer an intention of the Contracting Parties to
8 permit the indiscriminate importation of substantive
9 standards from other treaties.
10 Indeed, several tribunals have warned
11 against using MFN to expand a tribunal's jurisdiction
12 or to graft new substantive obligations. The risks
13 are well known and discussed in the literature,
14 treaty-shopping, fragmentation, and legal uncertainty.
15 Yet grafting a new substantive obligation is exactly
16 what Claimants seek to do.
17 Claimants' attempt is particularly
18 problematic because the DR-CAFTA contains no umbrella
19 clause; that is, the State Party specifically
20 negotiated a treaty where this standard was excluded.
21 Allowing Claimants to use the MFN Clause to import an
22 umbrella clause from other treaties would effectively

1 rewrite the Treaty, ignore the State Party's careful
2 negotiations, and expand the State's consent by
3 implication.
4 Claimants attempt to justify the argument by
5 engaging in a forced and misleading interpretation.
6 Just as Claimants sought to corrupt the proper
7 interpretation of the Procurement Carve-Out by
8 focusing on the term "process," in this instance,
9 Claimants put the sole spotlight on the word
10 "treatment" and ignore almost the entirety of the
11 remaining text of the MFN Clause, and they argue that
12 the clause includes every substantive protection in
13 any other treaty that Honduras has signed based on the
14 word "treatment."
15 ARBITRATOR DRYMER: So what meaning do you
16 give to the words "or other disposition of
17 investments"?
18 MR. FIGUEROA: Treatment or other
19 dispositions.
20 ARBITRATOR 2: Yeah, in 10.4(1) and (2).
21 You gave us a list, yes? It says it must be in the
22 areas of acquisition, expansion, et cetera, or other

1 **disposition.**

2 **MR. FIGUEROA: Right. And I did a complete**

3 **reading of the sentence when I was giving my speech.**

4 **ARBITRATOR DRYMER: Correct.**

5 **MR. FIGUEROA: Other depositions of**

6 **investment means deposition of investments, the sale**

7 **of the Investments --**

8 **(Interruption.)**

9 **ARBITRATOR DRYMER: "Sale or other**

10 **disposition" is the clause.**

11 **MR. FIGUEROA: Yeah. So sale -- it would be**

12 **either a sale or some other type of activities akin**

13 **where an investor disposes of its investment.**

14 **ARBITRATOR DRYMER: Thank you. I'll leave**

15 **it there.**

16 **MR. FIGUEROA: Okay. So again, by focusing**

17 **on the word "treatment," Claimants seek essentially to**

18 **argue that the MFN Clause permits including any**

19 **substantive protection of any other treaty. But**

20 **what's interesting is that, in order to arrive at**

21 **their interpretation, Claimants must ignore the plain**

22 **meaning of the word "treatment" itself -- and this may**

1 go a bit to what we were just discussing with
2 Arbitrator Drymer.
3 As the Tribunal is plainly aware,
4 "treatment" is a rule or a manner of conduct,
5 meanwhile, an umbrella clause is a standalone
6 procedural provision that elevates contractual
7 undertakings into international obligations. These
8 are two completely different things. In other words,
9 a treaty standard is not treatment. Yet Claimants
10 purposely conflate them, conflate these concepts in
11 order to arrive at their self-serving conclusion.
12 The Arbitral Decisions cited by Claimants is
13 to no avail because, as we can see on the screen, in
14 those cases, the Tribunals analyzed much broader MFN
15 clauses that did not include the specific limitations
16 set forth in Article 10.4 of DR-CAFTA. I also refer
17 the Tribunal to our written pleadings in this regard.
18 Notably, the cases relied upon by Claimant have been
19 widely criticized and have been deemed as one of the
20 principal motivations for the backlash against
21 investment arbitration seen in recent years. Indeed,
22 it was the expansiveness of these Decisions that led

1 the United States in its U.S. Model BIT, as well as
2 other States in their Model BITs, to refine the MFN
3 clauses to limit its scope. And, of course, this is
4 why the United States has expressed its agreement with
5 Honduras's position in its Non-Disputing Party
6 Submission. On your screens, we see some of the
7 excerpts of the United States' NDP and its
8 considerations on the application of the MFN Clause.
9 The U.S. confirms that the MFN Clause
10 requires a comparative exercise to determine the
11 existence of like circumstances. In addition, the
12 U.S. confirms that a Claimant must identify a measure
13 adopted or maintained by a party, and that a State
14 party does not accord "treatment" through the mere
15 existence of provisions in its other international
16 agreements.
17 In short, the MFN Clause is by no means a
18 mechanism to incorporate substantive obligations from
19 other treaties. And if it cannot incorporate any
20 substantive obligations, the clause certainly should
21 not be used to incorporate a standard that the State
22 Parties agreed to exclude from the Treaty, like an

1 umbrella clause.
2 Now, the U.S. NDP is entitled to significant
3 weight as it serves as an interpretive instrument,
4 along with the context of the Treaty. The Republic of
5 Honduras has explained how the NDP can be considered a
6 subsequent agreement or practice between the Parties,
7 and I refer the Tribunal to our Pleadings in that
8 regard.
9 But what is critical is that both Honduras
10 and the U.S., Parties to the DR-CAFTA, have manifested
11 their common understanding that the MFN Clause does
12 not allow the importation of substantive standards
13 from other treaties and that it does require a
14 comparative analysis of specific circumstances and the
15 identification of specific measures related to the
16 activities listed in the clause.
17 Ultimately, Claimants have not met their
18 burden of identifying a specific measure or
19 establishing a factual comparison based on specific
20 circumstances of other investors. Moreover, the MFN
21 Clause cannot be used as a means of rewriting the
22 Treaty by incorporating substantive provisions,

1 particularly those that specifically were not included
2 in DR-CAFTA.
3 Thus, even if the MFN Clause were
4 applicable, which it is not, Claimants attempt to
5 incorporate an umbrella clause must be rejected and
6 their Claim dismissed.
7 So quickly, in conclusion, the present
8 dispute arises from a Government procurement contract
9 in the PPA, in which ENEE, as the public entity buyer,
10 purchases energy from Pacific Solar, the seller, for
11 the public purpose of providing energy to the Honduran
12 population, a public and not a commercial service.
13 By DR-CAFTA's own terms, the MFN Clause does
14 not apply to this specific case.
15 Second, and only in the scenario that the
16 Tribunal considers that the Procurement Carve-Out does
17 not apply, the MFN Clause cannot be used to import an
18 umbrella clause and effectively reengineer DR-CAFTA's
19 substantive regime. The MFN Clause is not a master
20 key. It is a comparative standard that requires the
21 existence of a specific measure, like circumstances
22 between the Claimant, investor, and an investor from a

1 third party, and a comparative analysis.
2 Now, with that, Mr. President, unless there
3 are questions from the Tribunal, I would cede the
4 floor back to Mr. Esteban who will address the
5 Claimants' Claims related to the alleged Investment
6 Agreement and conclude our presentation. Thank you.
7 PRESIDENT ANGELET: Thank you very much.
8 There may be questions from my -- may I ask
9 a few questions on this part of your pleading? Thank
10 you very much.
11 With respect to the position of the United
12 States, my question is, how one should interpret or
13 construe the lack of reaction of the other Parties to
14 the Treaty, and, more specifically, whether their
15 silence can qualify or not as acquiescence?
16 You may know that the International Law
17 Commission in 2018 issued a Report on subsequent
18 agreements and practice in relation to the
19 interpretation of treaties, which contains elements to
20 analyze the meaning of "silence." And I would
21 appreciate if, perhaps, in your Closing Statements you
22 might address this issue: How should we interpret the

1 silence of the other Parties?
2 MR. FIGUEROA: Certainly. We will do that.
3 PRESIDENT ANGELET: Thank you. Just for
4 your information, there is also a recent Article in
5 the British Yearbook of International Law by
6 Prof. Danae Azaria, which you may find interesting,
7 and, of course, this question is also for the
8 Claimants. Thank you.
9 Then, with respect to the question whether a
10 substantive standard can constitute treatment, I see
11 your position and I see the Authorities on which you
12 rely to argue that there is a difference between
13 treatment and the standard of treatment. On the other
14 hand, the International Law Commission -- again, the
15 International Law Commissions Draft Articles on
16 Most-Favored-Nation Clauses, which commentaries 1978
17 provide at Page 44: "The fact of favorable treatment
18 may consist also in the conclusion or existence of an
19 agreement between the granting State and the third
20 state by which the latter is entitled to certain
21 benefits."
22 This seems, in my view, to reflect a

1 different position. The same document on page 54 is
2 also, I believe, to the same effect. And my question
3 is, how should the Tribunal address these possibly
4 contradicting Authorities? Is there a way to
5 reconcile them, or, otherwise, which one should
6 prevail? Thank you.
7 MR. FIGUEROA: Mr. President, thank you.
8 We're happy to address that also in Closing, but just
9 briefly, there is a way to reconcile them in this
10 particular case. And that comes from the text of the
11 DR-CAFTA.
12 In other words, the ILC Articles may very
13 well state a position with respect to general
14 agreements, with respect to certain benefits, but in
15 this particular case, the MFN Clause, specifically,
16 defines its application. And it's the list I listed
17 out before.
18 In other words, it doesn't just say, as most
19 general MFN clauses we've seen from prior generations
20 and treaties, it should just simply say they shall be
21 afforded like treatment or treatment no more favorable
22 then.

1 This Clause, specifically, says that the
2 treatment must relate to the operation management,
3 sale, disposition of the investment. In other words,
4 it is talking about specific activities related to the
5 investment and not to general agreements regarding
6 benefits or standards of treatment in international
7 instruments.
8 PRESIDENT ANGELET: Thank you.
9 Yes, please, you may proceed. Thank you
10 very much.
11 MR. ESTEBAN: Thank you, Mr. President.
12 Mr. President, Members of the Tribunal, as
13 stated, my name is Andrès Esteban, and I will address
14 Honduras's fourth objection that this Tribunal lacks
15 jurisdiction ratione materiae over Claimants'
16 so-called "Investment Agreement" claim.
17 Even if the Tribunal finds that the PPA does
18 not constitute public procurement, Claimants' attempt
19 to bring contractual claims still fails. This is
20 because neither the PPA nor any of the supplemental
21 agreements constitutes an Investment Agreement under
22 Article 10.28 of the CAFTA-DR.

1 The Claimants have presented a built-up
2 argument to fit their claims as an alleged breach of
3 an Investment Agreement. Claiming that a holistic
4 analysis of the PPA, the Support Agreement, and the
5 Operations Agreement constitutes one single Investment
6 Agreement under CAFTA-DR.
7 Using this artificial construction of an
8 Investment Agreement, the Claimants then go on to
9 argue that these documents meet the criteria of
10 Article 10.28 of the Treaty to constitute such an
11 Investment Agreement. The Claimants are, however, in
12 the wrong.
13 The Power Purchase Agreement on which they
14 rely, whether considered alone or, as they suggest,
15 "holistically" with the Support Agreement and the
16 operation agreement does not meet the strict
17 cumulative requirements of Article 10.28 of the
18 CAFTA-DR.
19 To guide the Tribunal through my argument, I
20 will proceed in four propositions:
21 First, that Article 10.28 protects only a
22 narrow category of "Investment Agreements," defined as

1 a single written agreement that expressly sets forth
2 reciprocal, binding rights and obligations.
3 Second, that the PPA was not concluded nor
4 executed by a "national authority" at the central
5 level of Government of Honduras; and that neither the
6 PPA, the support agreement, or the operation agreement
7 were concluded or executed by a covered investor or
8 covered investment at the time of their conclusion.
9 Third, that neither the PPA nor any
10 supplementary instrument grants rights over any
11 natural resource or over any other asset controlled by
12 a Honduran national authority.
13 Fourth, that the so-called "agreements" were
14 not the basis for establishing or acquiring a separate
15 covered investment.
16 Let me begin with my first proposition:
17 That Article 10.28 protects one written agreement.
18 The proper starting point is the text of
19 Article 10.28. As you see on the screen,
20 Article 10.28 defines an "Investment Agreement" in
21 singular terms. A written "agreement." It is not "a
22 set of instruments." Not "several writings read

1 **holistically," and not "a composite arrangement."**
2 **The drafters chose the singular, under VCLT**
3 **Article 31, ordinary meaning prevails. The Parties**
4 **protected only those agreement that a State**
5 **consciously and expressly entered into as an**
6 **"Investment Agreement."**
7 **As my colleague Mr. Figueroa has explained,**
8 **the structure and purpose confirms this narrow gate.**
9 **The CAFTA-DR intentionally omits an "umbrella clause."**
10 **It extends protection to State Contracts only in "very**
11 **specific circumstances," tightly delimited by**
12 **Article 10.28 of the CAFTA-DR, expanding the**
13 **definition to a combination of documents, especially**
14 **supplementary instruments that merely secure payment**
15 **or set technical conditions, defeats that purpose.**
16 **Let me address Claimants' reliance on**
17 **Chevron v. Ecuador (II), which they invoke to argue**
18 **that multiple instruments can "together" constitute an**
19 **Investment Agreement. That case is inapposite for two**
20 **simple reasons:**
21 **First, the U.S.-Ecuador BIT had no**
22 **definition of "Investment Agreement," leaving the**

1 Tribunal free to frame one. However, CAFTA-DR
2 Article 10.28 does have a definition, and it speaks in
3 the singular.
4 Second, both instruments in Chevron, a
5 concession and a settlement, independently contained
6 reciprocal obligations. Their combination did not
7 cure the absence of reciprocity in one by
8 bootstrapping from the other.
9 By contrast, as I have just described,
10 Claimants' own account shows that only the PPA
11 contains a reciprocal exchange, as you can see on the
12 screen. And it refers, specifically, to Clause 2.1
13 that we have previously explained.
14 Then the Support Agreement is a payment
15 guarantee reinforcing PPA Clause 9 obligations,
16 nothing more. And then the Operation Agreement sets
17 technical preconditions for commissioning the PV
18 plant, neither adds a new exchange of rights and
19 obligations between the State and the other Party.
20 On Claimants' best case, those instruments
21 are accessory, not constitutive of an "Investment
22 Agreement."

1 Even if, quod non, a protected agreement
2 could be evidenced by more than one writing,
3 Claimants' two add-ons cannot fix the PPA's
4 independent failures under Article 10.28.
5 As I will show in the next propositions, the
6 PPA does not satisfy the Treaty's cumulative
7 requirements, neither the other supplementary
8 agreements can do it.
9 I come to my second proposition: That the
10 PPA fails the counterparty and authority requirements
11 of Article 10.28 because it was not signed or executed
12 by a national authority at the central level of
13 Government in Honduras. And that neither the PPA nor
14 the Support Agreement or the Operation Agreement were
15 concluded or executed by a covered investor or covered
16 investment at the time of execution.
17 ENEE is not a national authority at the
18 central level of Government. Honduran law is crystal
19 clear. The structure of the Honduran Government under
20 Honduras's General Law of Public Administration, is
21 that the central level comprises, as you can see on
22 the screen, the presidency, the Council of Ministers,

1 **and the Secretariats of State.**
2 **The National Electric Power Company, ENEE,**
3 **is a decentralized public enterprise. It is not a**
4 **National Authority at the central level. Thus, on the**
5 **face of Article 10.28, the PPA cannot be an investment**
6 **Agreement. However, Claimants' attempt to challenge**
7 **the applicable law to determine whether ENEE is a**
8 **"national authority at the central level" by claiming**
9 **the applicable law should be rather be the Treaty and**
10 **the resources of international law such as the ILC**
11 **Articles on State Responsibility.**
12 **Claimants' position finds no support in the**
13 **text of the Treaty. CAFTA-DR Article 10.22.2 that you**
14 **see on the screen provides that, where the dispute**
15 **concerns an "investment authorization" or an**
16 **"Investment Agreement," the law applicable is the law**
17 **chosen in the Agreement, or, failing that, the law of**
18 **the Respondent State.**
19 **The PPA selects Honduran law, and, in any**
20 **event, Article 10.22.2 directs the Tribunal to**
21 **Honduran law to determine whether the counterparty is**
22 **a "national authority at the central level."**

1 At this point, there should be no doubt that
2 ENEE is not a national authority of the central level
3 of Government in accordance to Honduran law.
4 Let me now turn to the requirement that the
5 Agreement be concluded or executed by a covered
6 investor or covered investment at the relevant time.
7 The Treaty text, again, controls. Note 22 requires
8 that the written agreement be "executed by both
9 Parties," a national authority on the one hand, and a
10 "covered investor" or "covered investment" on the
11 other.
12 The crucial term here is "executed," which
13 was drafted in the past tense, or "Ejecutado," in
14 Spanish, in the past tense, as well. It defines the
15 exact moment when an Investment Agreement is signed
16 off by the Parties and, therefore, created.
17 A good faith interpretation according to the
18 ordinary meaning confirms that executed by both
19 Parties means the time of conclusion and execution of
20 the Agreement. The State consents to specialty
21 protections only when it knows it is contracting with
22 a foreign investor covered by the Treaty, not when a

1 purely domestic contract is later purchased.
2 The facts here are undisputed. The
3 so-called "agreements" were executed by Pacific Solar,
4 a Honduran company, then owned and controlled by
5 Honduran nationals. Claimants acquired Pacific Solar
6 almost a year later.
7 However, the Agreements remain in force
8 between a Honduran company and ENEE. As you can see
9 on the screen, the PPA was executed by a Honduran
10 company and controlled by Honduran nationals. A
11 domestic contract cannot be retroactively transformed
12 into an Article 10.28, "Investment Agreement," by the
13 mere acquisition by foreign investors.
14 As several Tribunals have recognized, this
15 logic is well-established. For instance -- you'll see
16 on the screen -- in Duke Energy v. Ecuador, the
17 Tribunal concluded that the relevant agreement, which
18 was also a PPA, could not be considered as an
19 Investment Agreement because it was entered into by
20 Electroquil, a company incorporated in Ecuador at the
21 time of subscription of the agreements, was not owned
22 by foreign investors.

1 Similarly, in Burlington v. Ecuador, the
2 Tribunal concluded that there was no Investment
3 Agreement under the Ecuador-United States BIT, because
4 the Burlington Subsidiaries that entered into the
5 relevant agreement were not incorporated in Bermuda, a
6 non-party to the BIT; and, therefore, were not covered
7 investors under the Treaty.
8 The EnCana Tribunal applied the same logic,
9 concluding that there was no Investment Agreement
10 under the Canada-Ecuador BIT because the Agreement
11 under review had not been entered into by the
12 Claimant, EnCana, but, rather, by its third-State
13 incorporated subsidiaries.
14 Thus, this requirement is also unmet.
15 Let me turn to my third proposition: That
16 neither the PPA nor any supplementary instrument
17 grants rights over any natural resource or over any
18 other asset controlled by a Honduran national
19 authority.
20 As explained, Article 10.28 requires that
21 the Agreement grant rights with respect to natural
22 resources or other assets controlled by a national

1 **authority.**

2 **Article 10.28 further requires and the PPA**

3 **or any other supplementary agreements, do not meet it.**

4 **Claimants' effort to recast the Agreements as**

5 **conferring rights over the solar resource, the**

6 **electricity produced, or the National Grid finds no**

7 **support in the text of the agreements or Honduran law.**

8 **Let us start with solar resource. Claimants**

9 **argue that "control" in Article 10.28 is legal, not**

10 **physical. The distinction is irrelevant here because**

11 **Honduras exercise neither over the solar resource.**

12 **There is no Honduran statute or regulation asserting**

13 **state, dominion, governance, or allocative authority**

14 **over sunlight. We cannot easily turn on or off the**

15 **sun.**

16 **By contrast, Honduras expressly reserves**

17 **direct control over hydrocarbons. For instance, as**

18 **you see on the screen, Article 2 of the Hydrocarbons**

19 **Law reads: "Oil, natural gas, and other hydrocarbon**

20 **deposits are the direct and imprescriptible property**

21 **of the State." No similar provision exists for solar**

22 **radiance. This follows the logic that states only**

1 control exhaustible natural resources, not any type of
2 natural resources.
3 Furthermore, neither of the Agreements
4 confers rights over the energy once generated. To the
5 contrary, Pacific Solar is obliged to deliver all
6 energy at designated interconnection points for ENEE's
7 account and into ENEE's network, nor do the agreements
8 grant any right in the transmission or distribution
9 grid, which remains under absolute public control.
10 The Support Agreement, for its part, is
11 simply a Guarantee of ENEE's payment obligation under
12 the PPA, nothing more. The Operation Agreement sets
13 commissioning milestones and technical standards for
14 the plant to be connected to the grid, but does not
15 grant any right over it.
16 Therefore, neither instrument grants any
17 right over natural resources or any state-controlled
18 asset. This requirement is, therefore, also unmet.
19 I am now coming to my fourth and final
20 proposition, the so-called "Agreements" were not the
21 basis for establishing or acquiring a separate covered
22 investment. Article 10.28 finally requires that the

1 Agreements be the basis upon which the investor
2 established or acquired a separate covered investment.
3 Claimants Pleadings tell two inconsistent stories.
4 Initially they asserted that the "Agreements," the
5 PPA, the Support Agreement, and the Operation
6 Agreement, were themselves both the covered investment
7 and the covered Investment Agreement.
8 When Honduras showed why this was
9 incompatible with the plain text of Article 10.28,
10 Claimants pivoted to assert that the Agreements were
11 the foundation for the later acquisition of Pacific
12 Solar. This is contradictory to what they claim to be
13 their Investment Agreement in their Memorial. And I
14 read: "Pacific Solar, the Plant and the agreements
15 are assets that the Paizes indirectly own and
16 control."
17 There is, however, no evidence that
18 Claimants' acquisition was made "on the basis" of
19 rights granted by the PPA in the sense required by
20 Article 10.28. And even if, quod non, the Tribunal
21 were to accept that assertion, it would not salvage
22 jurisdiction because, as I have shown, the other

1 cumulative requirements, central authority, covered
2 the investment at the time, and rights over
3 State-controlled resource or assets are simply not
4 met.
5 To conclude, Article 10.28 is a narrow
6 gateway. The Treaty drafters did not transform
7 ordinary State Contracts into Treaty-protected
8 "investments agreements." They protect only those
9 singular, written agreements that meet all the
10 following conditions cumulatively.
11 Between a covered investor or a covered
12 investment and a natural authority at the central
13 level that expressly establish reciprocal, binding
14 obligations, that grant rights with respect to natural
15 resources or other assets controlled by a national
16 authority and, that serves as the basis for
17 establishing or acquiring a separate covered
18 investment.
19 As I have demonstrated, the PPA and the
20 other Supplementary Agreements failed these conditions
21 repeatedly. As you can see on the screen, we prepared
22 this chart just to follow up whether any of those

1 **agreements complied with such conditions. This is a**
2 **commercial offtake contract for the sale of energy to**
3 **a decentralized public enterprise, executed when the**
4 **court party was a Honduran company owned and**
5 **controlled by Honduran nationals, conferring no rights**
6 **over any State-controlled resource or asset, and it**
7 **has not been shown to have been the legal basis for**
8 **establishing a separate covered investment.**
9 **For all these reasons, Honduras respectfully**
10 **requests that the Tribunal decline jurisdiction**
11 **ratione materiae over Claimants' allegation of breach**
12 **of obligations under Investment Agreement within the**
13 **meaning of CAFTA-DR Article 10.28.**
14 **All in all, Members of the Tribunal, the**
15 **Republic of Honduras has demonstrated that this**
16 **Tribunal lacks jurisdiction to hear this case, and**
17 **Claimants' Claims are, in any event, inadmissible**
18 **because: First, Claimants failed to exhaust the local**
19 **remedies as mandated by Decree 41-88, therefore, the**
20 **Tribunal lacks jurisdiction ratione voluntatis.**
21 **Second, Claimants failed to demonstrate that**
22 **they own or control Pacific Solar, therefore, this**

1 Tribunal lacks jurisdiction as well.
2 Third, Claimants failed to demonstrate that
3 the Tribunal has jurisdiction ratione voluntatis over
4 the contractual claims via the MFN Clause of the
5 CAFTA-DR.
6 And, finally, Claimants failed to
7 demonstrate that their claims arise out of an
8 Investment Agreement under CAFTA-DR, therefore, this
9 Tribunal lacks jurisdiction ratione materiae.
10 This concludes my presentation and thanks
11 for your attention.
12 PRESIDENT ANGELET: Thank you very much.
13 QUESTIONS FROM THE TRIBUNAL
14 ARBITRATOR DRYMER: With the permission of
15 the President and with your indulgence, Mr. Esteban.
16 MR. ESTEBAN: Absolutely.
17 ARBITRATOR DRYMER: I'd like to go back a
18 couple of minutes to the point of governing law in
19 relation to the question to determine whether ENEE is
20 a national authority. As you will see as we go
21 through this Hearing, I'm always interested in making
22 sure that there are no loose ends and that the Parties

1 **have enjoined the issue. And that each has responded**
2 **to the other's points.**
3 **I know the rule in CAFTA. I know the rule**
4 **generally. You stated that the rules of law are the**
5 **laws of the Respondent, and you cited 10.22(2)(b)(i).**
6 **You criticize your friends opposite for arguing for**
7 **the application of other rules of international law,**
8 **such as the ILC Articles on State Responsibility. But**
9 **I didn't -- if I misheard, forgive me, but I did not**
10 **hear you respond in respect of 10.22(2)(b)(ii), which**
11 **states: "Unless otherwise agreed, the rules of law**
12 **applicable are the laws of the Respondent and such**
13 **rules of international law as may be applicable."**
14 **Is your position that the ILC Articles or**
15 **any other rules of international law are simply**
16 **inapplicable, or that the prevailing rules of law are**
17 **those in the Honduran legal system?**
18 **MR. ESTEBAN: Thank you for your question.**
19 **We considered that the ILC Articles on State**
20 **Responsibility, there are those Articles, that those**
21 **Articles refer to the attribution of Articles of the**
22 **State --**

1 **ARBITRATOR DRYMER: Yes.**
2 **MR. ESTEBAN: -- do not apply to the**
3 **question of whether ENEE is a part of the**
4 **central -- of the central Government.**
5 **ARBITRATOR DRYMER: Okay.**
6 **MR. ESTEBAN: This is a limited definition**
7 **that when Article 10.28 refers to the written**
8 **agreement, the written agreement refers to the**
9 **national authority. Footnote 13 expressly delimits**
10 **national authority as being part of the central**
11 **Government. The fact -- and, actually, we are not**
12 **claiming that, and it is not part of the State. That**
13 **is why there is a public procurement.**
14 **The fact that ENEE is part of the State and**
15 **that there can be attribution over their conduct does**
16 **not mean that ENEE is part of the central Government**
17 **of Authority -- central Government of Honduras,**
18 **according to Article 8 -- according to the definition**
19 **with the DR-CAFTA.**
20 **Therefore, we consider that when**
21 **Article 10.22 refers specifically to claims arising**
22 **out of Investment Agreement, it directly refers first**

1 to the applicable law defined in the text of the
2 Agreement, in this case the PPA -- any of the three
3 agreements referred to Honduran law as applicable law.
4 And in any case, then it refers specifically
5 to Honduran law. And in this case, there is no doubt
6 that ENEE is not part of the central Government of
7 Honduras because is a decentralized authority within
8 the State.
9 ARBITRATOR DRYMER: I understand. Thank you
10 very much. That clarifies matters.
11 MR. ESTEBAN: Thank you.
12 ARBITRATOR STERN: I had a very similar
13 question. I think you almost answered it. My idea
14 was to ask you that you criticize a position of the
15 Claimants saying that international law should apply,
16 and I was going to ask you, but even if we were to
17 apply -- I understood your answer that it is under
18 Honduran law, but even if we were to apply
19 international law, I think the result would be the
20 same, because attribution means -- I mean, you know,
21 what is the essence of the State is defined by the ILC
22 Articles.

1 MR. ESTEBAN: Yes. Absolutely. We are --
2 ARBITRATOR STERN: So I think -- I mean,
3 both positions arrive probably to the same result.
4 That is why.
5 MR. ESTEBAN: Yes. But one -- and if we
6 follow the structure of Article 10.16, one is the
7 Measure that can breach any of the three options or
8 even the Chapter 10 of the DR-CAFTA or the Investment
9 Agreement. So we think these are in two separate
10 buckets. One is the Measure that is attributable to
11 the State, and the other is The Agreement which has
12 been allegedly breached.
13 And we considered this second -- this
14 Agreement refers specifically to Honduran law. And in
15 this particular case, the ILC Articles on State
16 responsibility are not applicable to a particular
17 question on whether ENEE is a central -- is part of a
18 central Government.
19 ARBITRATOR STERN: Okay. Okay. Now, my
20 second question, so if we start from your analysis
21 according to which the PPA is not an Investment
22 Agreement, because it's not signed with a national

1 **authority, isn't it, however, relevant that the two**
2 **accessory agreements as a Guarantee Agreement and a**
3 **Support Agreement, which are indeed signed with**
4 **national authority -- this is not contested -- are**
5 **included in the PPA, are mentioned in the PPA, and are**
6 **even annexed to the PPA?**
7 **MR. ESTEBAN: Correct. That's -- actually,**
8 **we -- as you can see on the screen when we printed the**
9 **chart, we considered that the other two agreements**
10 **were signed or executed by a national authority.**
11 **However, they were not executed by a covered**
12 **investment at the time of execution of the agreement.**
13 **Neither any of those other agreements grant rights**
14 **over any natural resource or other asset controlled by**
15 **the State.**
16 **ARBITRATOR STERN: Yeah. Okay.**
17 **MR. ESTEBAN: And I understand you're --**
18 **ARBITRATOR STERN: You know it's integrated**
19 **in the PPA so I have a problem here.**
20 **MR. ESTEBAN: Yes. Yes. Absolutely.**
21 **Absolutely. I mean, it is integrated, so even if**
22 **you --**

1 ARBITRATOR STERN: And that might be an
2 answer to a singular agreement. I mean, if they are
3 integrated into the Agreement.
4 MR. ESTEBAN: We considered it even if they
5 might be --
6 ARBITRATOR STERN: They are annexed.
7 MR. ESTEBAN: -- integrated, they are
8 supplemental, they're accessory to the main agreement.
9 There is no operation agreement or State guarantee or
10 Support Agreement without the PPA.
11 ARBITRATOR STERN: Yeah, but also at one
12 point I think you said it doesn't give any -- the
13 Guarantee Agreement doesn't give any rights to Pacific
14 Solar, but they do because they have the right to
15 receive the guarantee of the State.
16 MR. ESTEBAN: And I stand corrected. Our
17 position was that it does not grant reciprocal rights.
18 The Support Agreement grants only --
19 ARBITRATOR STERN: But it's reciprocal
20 rights and obligations, so it's not only reciprocal
21 rights. It is reciprocal rights and obligations.
22 MR. ESTEBAN: Right. Right.

1 **ARBITRATOR STERN: Okay. And another point**
2 **which troubles me a little bit is when you say the**
3 **solar energy is not State-controlled. But nobody can**
4 **use the solar energy without the authorization of**
5 **State.**
6 **Am I mistaken?**
7 **MR. ESTEBAN: Actually, people installed**
8 **panels -- I mean, nobody can -- I mean, people can**
9 **install panels on their houses and that doesn't**
10 **mean --**
11 **ARBITRATOR STERN: Yeah, but to make a**
12 **plant, you need an authorization of the State.**
13 **ARBITRATOR DRYMER: Can they sell to the**
14 **grid?**
15 **MR. ESTEBAN: No. Absolutely not. But the**
16 **natural resource here, the solar resource, is not**
17 **controlled by the State. They can -- I mean, actually**
18 **a plant can have an operational agreement like this**
19 **one to enter those energy once produced to the grid,**
20 **but the solar resource that comes to the solar panels,**
21 **the State doesn't have any control at all over it. It**
22 **then grants this Operation Agreement.**

1 ARBITRATOR STERN: So a solar plant can be
2 installed in Honduras without being granted to do that
3 by the State?
4 MR. ESTEBAN: If it's to be connected to the
5 grid, it needs that Operation Agreement.
6 ARBITRATOR STERN: Yeah.
7 MR. ESTEBAN: If it is connected to a house
8 or -- it doesn't need any such authorization.
9 ARBITRATOR STERN: Thank you, that has
10 partly clarified my concerns.
11 MR. ESTEBAN: Thank you.
12 PRESIDENT ANGELET: And then, if I may, I
13 have a last one before we suspend the Hearing.
14 My question is related to your point that
15 the Agreements do not qualify as an Investment
16 Agreement because at the time of execution, Pacific
17 Solar was a Honduran company controlled by Honduran
18 nationals.
19 Now, I understand -- and you argued that the
20 more so since there is no umbrella clause in the
21 Treaty, the hypothesis of an Investment Agreement is
22 where the State consciously enters into an agreement

1 providing for ICSID jurisdiction -- right -- or for
2 jurisdiction under the Treaty. So I assume, with your
3 clarification now in your pleading, that your idea is
4 that, to borrow from Jan Paulsson, there may be
5 arbitration without privity with respect to treaty
6 claims being unknown investors bringing a claim, but
7 that with respect to Investment Agreements and
8 investment authorizations, it is really arbitration
9 with privity, in the sense that it only applies if the
10 State consciously enters into an agreement knowing
11 that it will give rise to -- it can give rise to
12 Treaty arbitration and that it does give rise to
13 Treaty protection.
14 Now, my question is -- I really see your
15 point. At the same time I wonder, if that is the
16 case, and if the State looks the investor in the eyes,
17 then why do they not put the clause in the very
18 Investment Agreement? They could; right? And if they
19 could, then what is the useful effect of the status of
20 Investment Agreements in the CAFTA-DR?
21 You don't have to answer this now, but I'm
22 wondering.

1 **MR. ESTEBAN: I would preliminarily bring my**
2 **answer, and I reserve my right to complete this answer**
3 **at the Closing Statements.**
4 **Basically the fact that the umbrella clause**
5 **was excluded from the CAFTA-DR is the reason why they**
6 **have this strict cumulative provision of Article -- of**
7 **allowing claims under an Investment Agreement with a**
8 **particularly -- with particular conditions. So**
9 **allowing -- not taking into consideration the timing**
10 **of execution of the Agreement would be against the**
11 **object and purpose of including this Investment**
12 **Agreement claim because it would then be the**
13 **situation, as we are, that later Contracts purchased**
14 **by a foreign investor automatically are elevated into**
15 **an Investment Agreement under the Treaty.**
16 **I don't know if that answers your question.**
17 **I'm happy to follow up.**
18 **PRESIDENT ANGELET: Thank you.**
19 **MR. ESTEBAN: Thank you.**
20 **PRESIDENT ANGELET: Thank you. So now the**
21 **Hearing is suspended until quarter past 1:00 or 20**
22 **past 1:00, as you prefer.**

1 **(Comments off microphone.)**
2 **PRESIDENT ANGELET: Let's be cautious, half**
3 **past 1:00. Thank you very much.**
4 **(Whereupon, at 12:24 p.m., the Hearing was**
5 **adjourned until 1:30 p.m., the same day.)**
6 **AFTERNOON SESSION**
7 **PRESIDENT ANGELET: Thank you.**
8 **Shall we resume the Hearing?**
9 **MS. MARCHILI: Yes.**
10 **PRESIDENT ANGELET: Then for the Claimants'**
11 **Opening Statement, Ms. Marchili. Yes.**
12 **MS. MARCHILI: Thank you, Mr. President.**
13 **OPENING STATEMENT BY COUNSEL FOR CLAIMANTS**
14 **MS. MARCHILI: Claimants Mr. and Mrs. Paiz**
15 **have filed this case to have access to justice with**
16 **respect to the Power Plant in Honduras.**
17 **Now, Honduras is going at great lengths to**
18 **avoid having a neutral and impartial Panel like this**
19 **Tribunal rule on its Treaty breaches, here and in**
20 **other pending cases against it.**
21 **Honduras has withdrawn from the ICSID**
22 **Convention because of this and other cases that were**

1 filed as a result of the conduct in which Honduras has
2 engaged since President Castro took office. Honduras
3 has just challenged, a few days ago an entire Panel in
4 another case.
5 Honduras is also taking steps to render
6 ineffective the Dispute Resolution Clauses in
7 the -- in certain Contracts including the PPA. And,
8 more importantly, for purposes of this Hearing this
9 week, Honduras is grasping at straws to fight
10 jurisdiction, even on grounds like the alleged need to
11 exhaust remedies based on a recently-unearthed Decree,
12 which it had not invoked before this recent wave of
13 cases.
14 Or on the basis of three words in the
15 CAFTA-DR MFN Clause, words by the way that were
16 nowhere to be found in its Bifurcation Brief, which it
17 had 30 days to file when articulating that objection.
18 And that is what brings us here today.
19 Now, meanwhile, Honduras has threatened
20 power generators with criminal actions if they
21 stop -- if they dare stop supplying power for lack of
22 payment, as they can, under the underlying Agreements.

1 **It has threatened to expropriate those Plants if**
2 **generators do not renegotiate the terms of those**
3 **Agreements.**
4 **To the point that Honduras's conduct has**
5 **forced the Paizes to restructure the debt related to**
6 **the Power Plants. Now, Respondent's objections are**
7 **unmeritorious, and Claimants look forward to moving on**
8 **to the Merits Phase of this case and be afforded**
9 **justice.**
10 **Now, having said that, of course, Claimants**
11 **and Counsel for Claimants are thankful for the**
12 **opportunity to be before this Tribunal.**
13 **Now, we certainly did not intend to address**
14 **the facts of this case beyond what would be relevant**
15 **for any of the Objections to Jurisdictions, but**
16 **unfortunately we'll have to briefly take issue with**
17 **one of the slides that was shown this morning at this**
18 **public Hearing.**
19 **So, first, let's be clear: Respondent has**
20 **not made any illegality or corruption allegation in**
21 **this case, and rightly so.**
22 **Second, this notion that there was something**

1 questionable -- I think that was the term
2 used -- about the approval of the PPAs just is not
3 consistent with reality. There were different State
4 entities, different political parties governing the
5 Congress, different Administrations in power as all
6 these Contracts and the relevant laws were approved
7 and enacted.
8 It wouldn't be lost on the Tribunal that,
9 for example, the very Procuraduría, who is
10 representing the Republic today, was executing one of
11 those Agreements, the State Guarantee.
12 These Agreements were also part of a bigger
13 plan that was designed over certain years with the
14 support of, among others, the World Bank and the IFC.
15 And many other investors, sophisticated investors,
16 relied on Honduras's representations. We have some of
17 those on the slide here.
18 Now, going back to what we are to discuss
19 here today, I'll pass on the floor to my colleague
20 Ms. Menaker to address the Exhaustion of Remedies
21 Objection.
22 Thank you very much.

1 MS. MENAKER: Thank you, and good afternoon,
2 Mr. President, Members of the Tribunal.
3 So I'll address the Exhaustion Requirement,
4 and I begin with Article 26 of the ICSID Convention,
5 which, as you know, states that the consent under the
6 Convention -- excuse me, "consent to arbitration under
7 the Convention shall be deemed consent to arbitration
8 to the exclusion of any other remedy."
9 The Default Rule is that, exhaustion of
10 local remedies is not required. And, contrary to how
11 Respondent has framed this Article, this is not a
12 jurisdictional requirement that Claimants have to
13 overcome. There is no requirement in here whatsoever.
14 What it is is stating that the assumption is
15 that when you have an ICSID Arbitration, there will
16 not be a requirement for exhaustion of local remedies
17 but, nonetheless, if a State wants to require that, it
18 can condition its consent to arbitration to make that
19 a condition.
20 So the question before this Tribunal is:
21 Did Honduras condition its consent to arbitration on
22 the exhaustion of local remedies? And it clearly did

1 not do so. And I'll discuss four reasons why that is,
2 indeed, the case.
3 The first is that, in order to condition
4 your consent to arbitration, you have to have the
5 condition to that consent be in the instrument that
6 contains your consent to arbitration. So, in essence,
7 you first need a consent to arbitration, and then you
8 can condition your consent to arbitration.
9 Absent a consent to arbitration, all you
10 have is a Statement or a Declaration of what you may
11 or may not do when you, in the future, decide to
12 consent to arbitration. And this is made clear in
13 numerous Authorities, and to just go over a few,
14 beginning with Generation Ukraine v. Ukraine.
15 In that Case, Ukraine raised an exhaustion
16 of local remedies requirement and said: "Well, we
17 conditioned our consent to arbitration on exhaustion
18 of local remedies." And the Tribunal rejected that
19 proposition, noting that Article 26 -- which is what I
20 just showed -- allows Contracting States to reserve
21 their right to insist upon the prior exhaustion of
22 local remedies as a condition of its consent."

1 And then it went on to state: "That any
2 such reservation to Ukraine's consent to ICSID
3 arbitration must be contained in the instrument in
4 which that consent is expressed, i.e., the BIT
5 itself."
6 So if they had, indeed, conditioned or
7 restricted somehow their consent to arbitration, that
8 would be in the same instrument where they had
9 consented to arbitrate. And that is not the only
10 Authority that says this.
11 You have in PSEG v. Türkiye, and this was
12 dealing with Article 25(4) of the ICSID Convention,
13 which as you know, permits States to restrict the
14 types of cases to which they agree to submit to
15 arbitration.
16 And in that case, much like Honduras here,
17 Türkiye had made a Declaration in its national
18 legislation saying that it would not submit to the
19 jurisdiction of ICSID, or it would only submit cases
20 that arose directly out of investment activities that
21 had obtained all necessary Permits.
22 And it raised this objection and said in

1 **this case, in PSEG, the Permits had not been granted**
2 **by the State, and it said, therefore, it fell outside**
3 **of its consent to jurisdiction. And the Tribunal**
4 **there rejected that objection for much of the same**
5 **reason.**
6 **They stated here -- and let me note also**
7 **that, in that case, Türkiye had submitted internal**
8 **documentation that indicated that its condition to**
9 **signing or ratifying the ICSID Convention was**
10 **dependent upon this Declaration. So they are making**
11 **much the same argument that Honduras makes here.**
12 **But the Tribunal correctly stated that that**
13 **Declaration was a Declaration of intent or of will,**
14 **and it served informational purposes for what Türkiye**
15 **in the future may or may not agree to do.**
16 **And, as it explained, it said: "These**
17 **Declarations do not alter the legal rights and**
18 **obligations under the Treaty, nor do they amend any of**
19 **its provisions. They are simply an instrument that**
20 **allows States to express questions of policy to which**
21 **they are not bound and that do not create rights for**
22 **the other Parties. It follows that, to be effective,**

1 the contents of a notification will always have to be
2 embodied in the consent that the Contracting Party
3 will later give in its Agreements or Treaties.
4 Otherwise, the consent given in the Treaty stands
5 unqualified by the notification."
6 Now, the Tribunal, in fact, went on to say
7 that the whole issue of consent was left to
8 instruments other than the Convention. For example,
9 in Investment Agreements and in BITs, and that's why
10 the article separates notification in Article 26 from
11 the issue of consent. It also answered the objection
12 that Respondent makes regarding the effectiveness
13 saying, in that case, a Declaration would be
14 ineffective and that's not true.
15 The PSEG Tribunal said: "Notifications were
16 useful means to inform beforehand the kind of disputes
17 to which consent for arbitration might or might not be
18 expected by the prospective investor or its State of
19 Nationality. To this extent the notification has a
20 specific purpose, but they don't have a life of their
21 own, and they are not wholly dependent. They are
22 going to be dependent on the consent mechanism."

1 And in much the same way, a State making
2 such a notification, it is not then bound to follow
3 that notification. It can then later decide to
4 consent or not consent, or to restrict its consent to
5 arbitrate certain types of Claims or to require
6 exhaustion, for instance.
7 And then, of course, there's the
8 Lanco v. Argentina Claim that we have also discussed
9 in our Pleadings where "that Tribunal similarly held
10 that an Exhaustion Requirement must be contained in a
11 Bilateral Investment Treaty that offers submission to
12 ICSID Arbitration, in domestic legislation, or
13 indirect Investment Agreement that contains an ICSID
14 clause."
15 And that reference to "domestic legislation"
16 means domestic legislation that provides consent to
17 ICSID Arbitration. That is clear. That contains an
18 ICSID clause refers to that type of domestic
19 legislation and, indeed, if you look at Generation
20 Ukraine, that Tribunal interpreted this language and
21 said that that is clearly what was intended.
22 As further Authorities, you have

1 IBM v. Ecuador. There Ecuador argued that it had
2 consented to ICSID Arbitration conditioned on the
3 investor obtaining a domestic court decision in
4 respect of Contract nullity, and that that was
5 provided for under Ecuadorian law.
6 And the Tribunal similarly rejected that
7 objection holding that "the Ecuadorian Government
8 should have included as a previous requirement the
9 condition of exhausting the administrative or judicial
10 channels at the moment that it ratified the BIT. And
11 that once both Parties' consent is given it can't be
12 unilaterally withdrawn or retroactively conditioned on
13 an Exhaustion of a Local Remedies Requirement."
14 That Tribunal, by the way, also went further
15 and explained that, far from conditioning its consent
16 to arbitration on exhaustion, Ecuador in its consent
17 had authorized investors to elect essentially a
18 fork-in-the-road provision, to elect between pursuing
19 claims before domestic courts or to seek ICSID
20 arbitration directly.
21 So they too found that there's an inherent
22 inconsistency between including a fork in-the-road

1 **provision in a Bilateral Investment Treaty and**
2 **claiming that you've conditioned your consent to**
3 **arbitration on Exhaustion of Local Remedies.**
4 **And Christoph Schreuer in his renowned**
5 **commentary on the ICSID Convention agrees, and he has**
6 **also stated quite clearly that "a State may make**
7 **Exhaustion of Local Remedies a condition of its**
8 **consent to arbitration in a Treaty offering consent to**
9 **ICSID Arbitration or, in national legislation**
10 **providing for ICSID Arbitration, or in a Contract with**
11 **an investor containing an ICSID Arbitration clause."**
12 **So, in other words, in the instrument of the**
13 **consent, you can then restrict or condition that**
14 **consent, but that's where it needs to be.**
15 **The travaux also further confirms this. You**
16 **can see here that, in the history of the ICSID**
17 **Convention, Mr. Broches said that: "When a State had**
18 **entered into an agreement with an investor containing**
19 **an arbitration clause unqualified by any reservation**
20 **regarding the Exhaustion of Local Remedies, the State**
21 **can't thereafter demand Exhaustion of Local Remedies."**
22 **So he's specifically saying, "at what time does the**

1 State need to impose that condition?" It needs to
2 impose that condition when it enters into an agreement
3 with an investor containing an arbitration clause.
4 When did Honduras do that? It did that when
5 it entered into the BIT. That's where it has its
6 consent to arbitration.
7 Likewise, the International Bank for
8 Reconstruction and Development, in its Report on the
9 ICSID Convention, also said: "It may be presumed that
10 when a State and an investor agree to have recourse to
11 arbitration and do not reserve the right to have
12 resource to other remedies or require Exhaustion of
13 Local Remedies then exhaustion is not required."
14 And again, when do they determine whether
15 exhaustion is required is whether it's contained in
16 that instrument of consent. When the State and the
17 investor agree to have recourse to arbitration, that
18 was when Honduras entered into the BIT and when we
19 filed our Request for Arbitration. That's when that
20 Arbitration Agreement was formed.
21 And similarly in the history of the ICSID
22 Convention, they also talk about restricting or

1 conditioning your consent to arbitration when the
2 Parties consent to arbitration. And for the State,
3 that occurs when it entered into, in this case, the
4 Bilateral Investment Treaty.
5 Now -- yes, Mr. President. Do you have a
6 question?
7 PRESIDENT ANGELET: Perhaps, if we may pause
8 just for a second and, perhaps, go back to the
9 previous slide.
10 MS. MENAKER: Yes.
11 PRESIDENT ANGELET: My general question is,
12 what is the ratio legis of the principle you rely on,
13 according to which the condition must be expressed in
14 the instrument consenting to arbitration? What is
15 either the ratio legis or the principle in terms of
16 the Law of Treaties? And I ask this with this slide
17 before us because these are slightly different
18 hypotheses, one might say. Mr. Broches says that,
19 when a State has entered into an agreement providing
20 for arbitration, it cannot thereafter demand that the
21 dispute -- et cetera.
22 The IBRD Report says: "It may be presumed

1 that, when a State consents without making any
2 reservation, there is no reservation." But, here, we
3 face a different situation where arguably the
4 condition has been expressed beforehand. So what is
5 the rule under the Law of Treaties or the ratio legis
6 that warrants that, nevertheless, even if it were
7 expressed in very clear and unequivocal terms, it
8 should be repeated?
9 MS. MENAKER: Yes, Mr. President.
10 ARBITRATOR STERN: Maybe a follow-up.
11 Another way to ask the same question, I was going to
12 ask you where do you read in Article 26 that it has to
13 be the request -- requirement for local remedy has to
14 be in the consent? You just stated: "A contracting
15 State may require the exhaustion of local
16 administrative or judicial remedies as a condition of
17 its consent to arbitration under this Convention."
18 So the exhaustion can be done in any way, I
19 mean, or you have a different understanding.
20 MS. MENAKER: Yes, thank you.
21 ARBITRATOR DRYMER: I won't ask the question
22 a different way. I'll simply state that I have the

1 **same questions.**

2 **MS. MENAKER: Okay. Well, let me group**

3 **them, if I may, and then let me know if I've missed**

4 **something in two different manners.**

5 **So the first is -- and I think the**

6 **President's question, to some extent, presupposed that**

7 **the Declaration constituted a condition to consent to**

8 **arbitration or, hypothetically.**

9 **PRESIDENT ANGELET: For argument's sake.**

10 **MS. MENAKER: For argument's sake. Yes,**

11 **that's what I meant.**

12 **So there -- and I will show you some more**

13 **information on the slides in just a moment -- I think,**

14 **if you look at the language of that Declaration, that**

15 **is not what it does. I think that it is an indication**

16 **or a statement of a future intent to do something, but**

17 **it does not actually condition Honduras's consent. So**

18 **that's the first step.**

19 **The second is, if you disagree with that or,**

20 **let us say in a different hypothetical, a State did**

21 **make a very clear conditional -- you know, conditioned**

22 **its consent in a separate document -- and we don't**

1 **disagree that you can have maybe -- you know, it could**
2 **potentially be in a variety of instruments, but the**
3 **issue is that, here, the "later in time" would**
4 **prevail, and that is under the interpretation of**
5 **treaties. Also, the ILC Articles, for instance, on**
6 **diplomatic protection say that local remedies don't**
7 **have to be exhausted when they've been waived.**
8 **And here, if a State enters into a**
9 **subsequent treaty that is, on its face, inconsistent**
10 **with the Exhaustion of Local Remedies requirement,**
11 **they will have been deemed to have waived any prior**
12 **requirement that they allegedly imposed.**
13 **And also, just as a matter of treaty**
14 **interpretation, when you have two treaties that govern**
15 **the same subject matter of the later -- or, the latter**
16 **prevails, and, particularly also the one with more**
17 **specificity would prevail. And so I believe that,**
18 **under all of those concepts, that would allow the**
19 **CAFTA-DR, which, as I'll show in more detail in a**
20 **moment, does not require the Exhaustion of Local**
21 **Remedies. So that would prevail over any alleged**
22 **earlier condition imposed.**

1 **ARBITRATOR STERN: Yeah. You just said that**
2 **the later Treaty -- if they have the same subject**
3 **matter, the later Treaty prevails. I think Article 30**
4 **of the Vienna Convention is much more complicated and**
5 **complex, and, for example, per Article 2 -- Article 32**
6 **says: "When a treaty specifies that it is subject to**
7 **or that it is not to be considered as incompatible**
8 **with an earlier treaty or later treaty, the provisions**
9 **of that other treaty prevails," for example. So I**
10 **think it's much more complicated. It's not just the**
11 **later Treaty.**
12 **MS. MENAKER: Well, yes. And also the**
13 **Declaration, of course, is not a treaty; right? The**
14 **Declaration is -- well, I think it's just a statement.**
15 **ARBITRATOR STERN: It's included in**
16 **more -- it's included in the Treaty in the Convention**
17 **when it was sent to ICSID.**
18 **(Interruption.)**
19 **ARBITRATOR STERN: You started to mention**
20 **the successive treaties.**
21 **MS. MENAKER: I would say that it is**
22 **not -- it does not become part of the ICSID**

1 Convention, this Declaration. First of all, there is
2 nothing to indicate -- it's not a reservation, first
3 of all, which they agree. If it were a reservation to
4 the ICSID Convention to a treaty, it might then become
5 part of it, but it's not. And they agree that it
6 doesn't fit the elements of a reservation. So then
7 it's just a declaration that they have made in their
8 internal law. It does not -- the ICSID Convention
9 does not incorporate by reference all of the National
10 State's ratifications of the Treaty into the
11 Convention itself. That's not part of the Treaty. So
12 I would contest the proposition that this Declaration
13 is part of the ICSID Convention.
14 ARBITRATOR STERN: No, I was -- I mean, when
15 Honduras sent to ICSID its ratification, it included
16 in this Decree, Decree 41-88, the Declaration. So the
17 Convention and the Declaration have been sent at the
18 same time in the same document.
19 MS. MENAKER: Well, it's been sent. First
20 of all, it was not notified. There is a notification
21 process under Article 25 to send to ICSID if you are
22 going to restrict the classes of disputes that you

1 want to go to ICSID Arbitration or to require
2 Exhaustion of Local Remedies. And you'll see that
3 Israel, Guatemala, Costa Rica did so. Honduras did
4 not do so. What they did is what every other State
5 does, which is send in their notification that they
6 had ratified the Treaty. That was done via a
7 different schedule, and, as I will also show in a
8 moment, they did not highlight the substance of this
9 Declaration at all.
10 If one looks at it, it looks like a national
11 law that is ratifying the ICSID Convention because it
12 reproduces the ICSID Convention in its entirety. And
13 then, as we said, tucked between, like right above the
14 signatures, then you have these few sentences of the
15 Declaration. If you were not reading the entirety of
16 it, you would never see that it was there.
17 ARBITRATOR STERN: Well, but then, applying
18 your reasoning that it has to be -- the Declaration
19 has to be in the consent, what do you do with Costa
20 Rica's Declaration and with Guatemala's Declaration?
21 So they inform ICSID that the State required
22 Exhaustion of Local Remedies months, more or less,

1 before they ratified the Convention, and Guatemala is
2 the same.
3 So in your logic, what would you do with
4 that? It's not in the consent. You would also
5 disregard it?
6 MS. MENAKER: Well, I can say that every
7 single tribunal that has been in a case, an ICSID Case
8 where Guatemala or Costa Rica has been a Respondent
9 has not found that their consent was conditioned on
10 Exhaustion of Local Remedies.
11 ARBITRATOR STERN: But maybe it wasn't
12 raised. I don't know.
13 MS. MENAKER: Well, many of them have
14 specifically noted that the DR-CAFTA does not require
15 Exhaustion of Local Remedies. And so, I don't know
16 precisely what their reasoning was. I can pull up
17 some information. If you give us one moment, I can
18 pull up some other slides.
19 ARBITRATOR STERN: I just said I don't need
20 the precedent. I make my own analysis.
21 MS. MENAKER: Yes, but I think that it does
22 help to show that, in each and every one of those

1 cases, the Tribunals recognized -- and a lot of them
2 were under the DR-CAFTA -- that the DR-CAFTA does not
3 require Exhaustion of Local Remedies. And to the
4 extent that there ever was such a requirement, it
5 would have been superseded by the State's entry into
6 the DR-CAFTA without including any conditional consent
7 in that Treaty.
8 PRESIDENT ANGELET: Perhaps a small last
9 point.
10 MS. MENAKER: Yes.
11 PRESIDENT ANGELET: Since you mentioned
12 that, from your perspective, the condition is not
13 incorporated in the Convention, one might consider
14 analyzing it as unilateral declaration, so a
15 unilateral act, and then the question would be whether
16 it satisfies the conditions for international acts to
17 produce legal effects towards third parties, and,
18 perhaps, again, we have ILC Articles on this issue
19 which you may -- and, perhaps, which the Respondent
20 may also wish to consider.
21 Thank you.
22 MS. MENAKER: Yes. And so we will consider

1 that further. I would also look at Article 27 of the
2 Vienna Convention on the Law of Treaties where one
3 cannot rely on their domestic law in order to
4 basically circumvent or get out of international
5 obligations or liability. And here, that is what
6 Honduras would essentially be doing because it has, in
7 an international treaty, agreed to arbitrate without
8 requiring Exhaustion of Local Remedies, and then it
9 would be trying to rely on a domestic law ratifying
10 another treaty to say, "no, we're going to then get
11 out of or condition that consent that we gave."
12 PRESIDENT ANGELET: Thank you.
13 MS. MENAKER: So Honduras, of course,
14 acknowledges that the Decree itself, the Declaration,
15 doesn't constitute its consent to arbitration. So
16 there's no dispute over that. Its consent is
17 contained in the Treaty itself, in the BIT. It's not
18 in this Declaration, and that's just to say, as I have
19 been showing, that, if you agree, which we believe you
20 ought to, that the condition to consent needs to be in
21 the instrument of consent. They agree that this
22 Decree did not constitute their instrument consenting

1 to arbitration.

2 And, as I mentioned, nor was the Declaration

3 notified to ICSID as a condition for Honduras's

4 consent. And so, as I mentioned here, the

5 three States did do that; Honduras did not do that.

6 And when I was characterizing the

7 Declaration itself, if one looks at the plain

8 language, both of the Declaration and also the

9 terminology, it's called "declaration," or the

10 translation in English would be "declaration," and,

11 according to the UN glossary, a declaration

12 is -- "merely clarifies the State's position. It

13 doesn't purport to exclude or modify the legal effect

14 of a treaty, and it's often deliberately chosen to

15 indicate that the Parties do not intend to create

16 binding obligations but merely want to declare certain

17 aspirations."

18 And that is not different from what we saw

19 in PSEG, where the Tribunal there was interpreting a

20 similar type of declaration and saying that it is an

21 indication of what the State intends to do.

22 The Max Planck Encyclopedia says that

1 oftentimes declarations are utilized for political
2 messaging to give that type of political statement,
3 but it's not a legal obligation that flows from them.
4 ARBITRATOR DRYMER: May I ask whether you
5 have a position or argument to make as to the domestic
6 legal effect and force of a declaration, of this
7 particular decreto? Does it bind the Government?
8 Does it not bind the Government? What does it mean
9 within the Honduran legal system?
10 MS. MENAKER: On that I will need to defer.
11 ARBITRATOR DRYMER: And I haven't heard from
12 either party, I don't believe, on that. So that's a
13 question I wouldn't mind hearing an answer to later
14 on, as well.
15 MS. MENAKER: Absolutely.
16 ARBITRATOR DRYMER: Thank you.
17 MS. MENAKER: So I would also note that we
18 have been focused on the one sentence in this
19 declaration --
20 ARBITRATOR DRYMER: That was my next
21 question.
22 MS. MENAKER: Okay.

1 ARBITRATOR DRYMER: Please, continue.
2 MS. MENAKER: Thank you -- regarding
3 Exhaustion of Local Remedies. But that's not all that
4 this mechanism says. If we take a look at it, it
5 says: "The investor shall exhaust administrative and
6 judicial channels as a precondition provided for in
7 the Convention. In any case, once submitted to the
8 Tribunal to which the State of Honduras is a party,
9 the applicable laws shall be those of the Republic of
10 Honduras, and only natural and juridical persons from
11 Contracting Parties to the Convention may avail
12 themselves of the procedures provided for in the
13 Convention."
14 So if we're going to say that all of this
15 conditions Honduras's consent to ICSID Arbitration or
16 that their consent to ICSID Arbitration is conditioned
17 on exhaustion to local remedies, all of this is a
18 condition to their consent.
19 And that, in our view, it doesn't make any
20 sense; right? They are not pushing the argument that
21 this Tribunal is bound to apply Honduran law and only
22 a Honduran law in this Arbitration, nor could it. So

1 how can they say our consent is conditioned on
2 Exhaustion of Local Remedies pursuant to this
3 declaration, but go ahead and apply international law
4 as you see fit?
5 Now -- yes --
6 ARBITRATOR DRYMER: Pardon me, this is not
7 so much for you, but heads-up to Mr. Figueroa and his
8 team, that was going to be my next question. And
9 again, I would appreciate if the Republic could
10 address it later on this week. Thank you. What to
11 make, specifically, of this -- of the words to which
12 Ms. Menaker is drawing our attention right now.
13 MS. MENAKER: And then the last part of
14 that, it is really -- it also doesn't say anything;
15 right? It says that: "Only natural and juridical
16 persons from contracting Parties to the Convention may
17 avail themselves of the procedures provided for in the
18 Convention."
19 I mean, that is what ICSID provides. That,
20 as far as their ineffectiveness argument, this shows
21 that -- I think this undermines it because that
22 sentence has no effectiveness. Without it, it would

1 not change the jurisdiction of ICSID, nor could
2 Honduras have expanded ICSID's jurisdiction by putting
3 in some other nationality requirements in that last
4 sentence.
5 PRESIDENT ANGELET: But, if I may, Counsel,
6 if we revert to the first question --
7 MS. MENAKER: Yes.
8 PRESIDENT ANGELET: -- you announced earlier
9 in your pleading that it was formulated as an intent
10 of future reservations or conditions. How does this
11 appear from the wording of the first sentence, so that
12 it is a declaration of future intent rather than a --
13 MS. MENAKER: So I think that comes again
14 primarily from the title calling it a declaration,
15 which is a statement. And, I think, yes, that
16 is -- and also, it's in the future -- right? -- that
17 the State of Honduras shall submit itself to
18 arbitration.
19 It is not submitting itself to arbitration
20 via this declaration or this Decree. So in the future
21 it shall do so on this condition, but it's not doing
22 so via this instrument.

1 **PRESIDENT ANGELET: Thank you.**
2 **MS. MENAKER: So then to the second reason**
3 **why Exhaustion of Local Remedies is not required in**
4 **this case is because it's inconsistent with the**
5 **DR-CAFTA. And, specifically, with its waiver**
6 **requirement.**
7 **And we see this in other jurisprudence,**
8 **certainly in the Próspera case. The Tribunal**
9 **recognized that forcing an investor to renounce**
10 **domestic proceedings in the Host State is incompatible**
11 **with an exhaustion requirement. Metalclad said the**
12 **same thing. Bank Melli said the same thing.**
13 **And I won't really spend too much time on**
14 **this because this morning, I believe, Counsel conceded**
15 **the point or acknowledged, which, I believe, was for**
16 **the first time that there is an inconsistency between**
17 **requiring an investor to waive its right to initiate**
18 **or continue any local, administrative, or judicial**
19 **proceedings, and at the same time, requiring**
20 **Exhaustion of Local Remedies.**
21 **So they did concede that point. I would**
22 **respond to one point they did make, I think, in**

1 passing this morning but in their submissions where
2 they argued that there wasn't necessarily an
3 inconsistency because tribunals often require
4 satisfaction of a triple identity test when looking at
5 fork-in-the-road provisions.
6 And, typically, when you are before a local
7 court, you are pursuing domestic law Claims and before
8 a tribunal international law Claims; and, therefore,
9 you wouldn't be precluded from doing both. And that
10 is not applicable here for two reasons -- there may be
11 more, but first of all, our provision is not a
12 fork-in-the-road provision. It is what we call a "no
13 U-turn" provision.
14 You have to waive your right to initiate or
15 continue these claims. But you're not waiving your
16 right to initiate or continue certain claims. That's
17 where you get the triple identity issue because the
18 same claim is not being brought before the local court
19 and before the International Tribunal. One is
20 domestic; one is International.
21 Also, the same Claimant is not necessarily
22 there because you often have the foreign investor in

1 the ICSID Tribunal and you have the local investment
2 or the national -- a national of the Host State before
3 the domestic court.
4 If you look at the DR-CAFTA's language, it
5 doesn't talk about claims. It talks about waiving
6 your right to initiate or continue any proceeding with
7 respect to any measure that is alleged to be a breach.
8 It is much broader.
9 So, here, that would capture that; right?
10 You wouldn't run into that problem. And then, of
11 course, you have the Investment Agreement provision
12 where you can bring a claim for breach of an
13 Investment Agreement, and that would also be precluded
14 when you have -- if you have to give a waiver. And
15 there is direct inconsistency between requiring
16 exhaustion and requiring a waiver.
17 It is inconsistent, of course, with
18 fork-in-the-road provisions for much the same reason
19 that are on Honduras's other treaties. It is also
20 inconsistent with the prescription period in the
21 DR-CAFTA because, an Exhaustion of Local Remedies
22 requirement doesn't sit well with the prescription

1 **period, particularly one that is not very, very long.**
2 **Our prescription period is three years. And**
3 **notably Honduras has not said anything -- has not put**
4 **in any evidence in response to what we have argued and**
5 **the evidence that we have said put into the record**
6 **saying that we could not have exhausted within**
7 **three years. They have not said anything about that.**
8 **So, thereto, is an inconsistency.**
9 **Now, to go back to what I mentioned**
10 **earlier -- and, Mr. President, did you have a**
11 **question?**
12 **PRESIDENT ANGELET: Prescription might,**
13 **perhaps, be suspended while proceedings are going on?**
14 **MS. MENAKER: I don't think so. Because,**
15 **especially given the waiver requirement, that is**
16 **really inconsistent with the waiver requirement**
17 **because the waiver requirement anticipates that you**
18 **might be in domestic litigation or administrative**
19 **proceedings because you have to waive your right to**
20 **initiate or continue those proceedings.**
21 **So you have that waiver requirement, and you**
22 **have a prescription period. If you're going to have**

1 to waive your right to continue proceedings, I think
2 it is -- I don't see how one could argue that the
3 prescription period is suspended during the pendency
4 of those proceedings that you are also required to
5 waive.
6 So to go back to what I mentioned earlier is
7 that, even if the declaration were deemed to be, to
8 continue Honduras's consent, it wouldn't matter
9 because there is this inconsistency with the DR-CAFTA,
10 with both its prescription period but even more
11 directly with its waiver requirement and the
12 later-in-time instrument here, it the DR-CAFTA would
13 prevail.
14 And you can see this in a number of
15 Authorities. I mentioned some already, but even
16 looking at the Constitution of Honduras itself, it
17 says that: "In case of conflict between a treaty or
18 the Convention, the former shall prevail."
19 So the Treaty prevails over its domestic
20 law. So there you would have the DR-CAFTA prevailing.
21 In Próspera, they also said here "you can't
22 coexist this waiver requirement and the exhaustion

1 requirement. And the latter must prevail because it
2 is subsequent in time and it implies a waiver of the
3 previously-established requirement."
4 PSEG v. Türkiye said: "Unilateral
5 declarations always have to be embodied in the consent
6 of the Contracting Party"-- this is the point I made
7 earlier -- "but, otherwise, the consent given in the
8 Treaty stands unqualified by the notification."
9 So a slightly different point, but they are
10 saying if you don't incorporate it into your
11 later-in-time consent, that consent remains
12 unqualified.
13 And Christoph Schreuer, he says in
14 his -- again, the Commentary to the ICSID Convention
15 that: "If a State subsequently consents to ICSID
16 Arbitration in terms that are inconsistent with a
17 prior general notification, the consent will prevail
18 over the notification."
19 Yes.
20 ARBITRATOR STERN: What do you say when
21 there is a conflict between a treaty or the
22 Convention, that means the ICSID Convention, the

1 former shall prevail?

2 MS. MENAKER: I don't believe that that term

3 means ICSID Convention.

4 ARBITRATOR STERN: That's what you said.

5 MS. MENAKER: It does say "Convention."

6 ARBITRATOR STERN: But between the Treaty or

7 the Convention, what does it mean? It means nothing.

8 MS. MENAKER: This is in the Constitution,

9 and it is a translation from the Spanish. So let me

10 just look at the correct term because --

11 ARBITRATOR STERN: Because here it doesn't

12 make too much sense.

13 MS. MENAKER: No. I had read that as

14 domestic law, but let me see what the Spanish term is.

15 I'm sorry. It says in case of a conflict

16 between the Treaty or Convention and the law, the

17 former shall prevail."

18 ARBITRATOR STERN: That means the Convention

19 prevails under the law.

20 MS. MENAKER: Yeah, Treaty or Convention and

21 the law.

22 ARBITRATOR STERN: Okay. That makes sense.

1 But I would like to go a little bit deeper into the
2 hierarchy between the ICSID Convention and the CAFTA.
3 First of all, there is an Article in CAFTA,
4 Article 1(3), relation to other agreements. The
5 Parties affirm their existing rights and obligation
6 with respect to each other under the WTO Agreement and
7 other agreements to which such parties are a party."
8 So in CAFTA, it is mentioned that CAFTA
9 recognizes the rights in existing treaties. That's
10 the first point.
11 Then in Article 10.16, it says that: "The
12 Claimant must submit a claim referred to in
13 Paragraph under the ICSID Convention." Doesn't that
14 mean that the conditions for the application of the
15 ICSID Convention have to be realized, have to be
16 recognized?
17 And also in Article 10.17, it's a consent
18 under Paragraph 1: "Shall satisfy the requirement of
19 Chapter 2 of the ICSID Convention." And Chapter 2 of
20 the ICSID Convention includes Article 26 as modified
21 by Honduras.
22 So all this could, you know, give another

1 conclusion than your conclusion and would go to the
2 idea that the ICSID Convention should prevail.
3 MS. MENAKER: I think, first, I don't see
4 any conflict between the ICSID Convention and the
5 DR-CAFTA, and we have never suggested otherwise.
6 There is no conflict there. Article 26 is a default
7 provision that says there is no Exhaustion of Local
8 Remedies, and the DR-CAFTA does not require Exhaustion
9 of Local Remedies.
10 Again, their internal ratification of the
11 ICSID Convention did not become part of the ICSID
12 Convention. That is just their national law.
13 So this declaration does not amend the ICSID
14 Convention in any fashion. And so there's no
15 incompatibility there. And the ICSID Convention, of
16 course, does not consent to arbitration.
17 ARBITRATOR STERN: Of course.
18 MS. MENAKER: So there's -- you have on the
19 one hand the ICSID Convention, which says that the
20 default rule is no Exhaustion of Local Remedies, but
21 if States want to require that, okay. Then you have a
22 State saying in its national law making, I would say,

1 **a statement that, in the future it will require**
2 **Exhaustion of Local Remedies. But then it enters into**
3 **a treaty that clearly doesn't require exhaustion and**
4 **requires waiver, which is inconsistent with**
5 **"exhaustion."**
6 **And so I see no incompatibility whatsoever**
7 **between the ICSID Convention and the DR-CAFTA. But**
8 **what I do see incompatibility with is the argument**
9 **that somehow their consent is conditioned on**
10 **exhaustion when they later entered into a treaty that**
11 **expressly doesn't require exhaustion. In fact,**
12 **requires you to waive your right to actually go to**
13 **court or to continue your court proceeding.**
14 **And this morning when they first -- for the**
15 **first time acknowledged that there was this conflict,**
16 **what they ended up saying was, well, our past**
17 **condition still applies. But they didn't give any**
18 **Legal Authority for that.**
19 **Under what legal principle would your**
20 **alleged condition that you earlier stated apply,**
21 **notwithstanding your later entry into force in the**
22 **CAFTA. They didn't mention a single Legal Authority**

1 **in support.**

2 **Instead, they said: "It's okay because you**

3 **can still go to UNCITRAL." That's not an answer.**

4 **That's not a legal analysis. Yet, as I've just shown**

5 **you, we have all of this Authority that recognizes**

6 **that, if you later consent to arbitration without that**

7 **requirement, then you can either -- you can call it a**

8 **waiver of the earlier condition, or you can call it a**

9 **subsequent agreement that is more specific, that is**

10 **later in time and, therefore, prevails.**

11 **Now, the third reason why the exhaustion**

12 **requirement doesn't apply is estoppel, and as we've**

13 **shown, Honduras only recently raised its alleged**

14 **exhaustion requirement. The Próspera Tribunal**

15 **recognized this, that there were many cases earlier in**

16 **time when Honduras did not make this objection, and it**

17 **only invoked it in a letter in May 2023. And since**

18 **that time, it has then now made this argument.**

19 **Now, this morning we heard for the first**

20 **time that, well, Claimants haven't introduced evidence**

21 **to prove that Honduras didn't make this objection in**

22 **those earlier cases. And they said, well, those cases**

1 are private.
2 Honduras has this information. We obviously
3 do not. What Honduras notably did not do is make any
4 representation to this Tribunal or to the Próspera
5 Tribunal that they had, indeed, made that objection in
6 those cases, nor could they, because they clearly
7 didn't. If they had made it, of course they would
8 have made that representation. So they did not have
9 to answer to this argument and answer to this
10 Tribunal's questions about it and earlier Tribunal's
11 questions about it.
12 And the Declaration, as I noted before, it
13 was not transparent. It was not publicized. It was
14 not notified to ICSID. It was buried in the
15 ratification document that reproduced the entirety of
16 the ICSID Convention. And you can see that here. And
17 then these few sentences are then placed inside there.
18 ARBITRATOR DRYMER: This was a question I
19 had. I was going to ask it later, but you brought us
20 back here, so I'll mention it now to bear in mind
21 later, unless you're able to answer it now.
22 I don't pretend to be an authority on the

1 **Spanish language, but, still, I want us all to engage**
2 **in a textual analysis of an unofficial English**
3 **translation of a Spanish document, let alone a**
4 **Legislative Decree.**
5 **The Spanish terms of the -- my question is,**
6 **is there anything in the Spanish version that might**
7 **assist us? The Spanish version reads "*El Estado de***
8 ***Honduras se someterá a los procedimientos en el***
9 ***Convenio*" et cetera ["The State of Honduras will**
10 **submit to the proceedings of the Convention" et**
11 **cetera].**
12 **I don't know if you have any representations**
13 **to make on the word (in Spanish). I don't know**
14 **whether Honduras may at some point. My high school**
15 **Spanish reminds me that that's the future tense.**
16 **Maybe I'm wrong, but it is a question I've had in my**
17 **mind since I started reading these Pleadings, and I'd**
18 **appreciate if the Parties could address it in due**
19 **course. Again, I'm simply reminded of it because it's**
20 **in my face here, again.**
21 **MS. MENAKER: No. I thank you for that,**
22 **and --**

1 **ARBITRATOR DRYMER: I said that's my high**
2 **school Spanish. It may not be accurate. I'm not**
3 **purporting to interpret this. I'm asking the**
4 **question.**
5 **MS. MENAKER: Okay. My even more**
6 **rudimentary high school Spanish, because I saw -- I**
7 **use these much more often than you do, but "*sometерá*"**
8 **(in Spanish) I also believe is the future tense,**
9 **and -- which is consistent with what I was saying**
10 **before, which is, they will in the future do this;**
11 **right? Which is -- it's a declaration of the intent**
12 **for what they will do. They are not bound to do it;**
13 **right? But that they would they will do it in the**
14 **future. When? When they consent to arbitrate. And**
15 **here they did not do that.**
16 **So the other thing that I want to raise with**
17 **this is that this clearly is not an instance where**
18 **this is a critical public policy concern. We heard**
19 **from the Attorney General this morning, who tried to**
20 **paint it as such, saying that this was integral to**
21 **the -- you know, very, very important to Honduras that**
22 **this was so central. This is why they agreed to**

1 arbitrate because it came with this condition, et
2 cetera.
3 At the same time they are saying: "Well,
4 two years ago, Claimants, you just made the wrong
5 choice. You should have just filed your claim under
6 UNCITRAL and everything would be fine."
7 This cannot be of such central importance or
8 a public policy concern if, as they admit, there is no
9 such condition that they are alleging could possibly
10 apply to the UNCITRAL Arbitration under the same
11 Treaty.
12 And so you are all familiar with the concept
13 of estoppel that a State, when it acts through words,
14 like in a declaration, just making it appear as if
15 this is an indication of a future intent, burying the
16 Declaration inside of the ICSID Convention's text, not
17 raising this as an objection for decades when they are
18 in front of ICSID Tribunals, and now seeking to impose
19 that, that we contend they should be estopped from
20 doing.
21 And, finally, the last reason why the
22 Exhaustion of Local Remedies ought not to reply is

1 because it would be futile for us to seek Exhaustion
2 of Local Remedies, and that is for two reasons. The
3 first is that we could not exhaust within a three-year
4 period. We have a prescription period under the
5 Treaty, and we've put in evidence showing that the
6 judicial system in Honduras is notoriously slow and
7 delayed, and that we could not have done that.
8 Honduras has remained silent on this point.
9 They have not rebutted that point. They have not put
10 in any evidence to contest that or even made a
11 representation saying, yes, you could have done these
12 steps and let us show you, you could have done it in
13 that amount of time. They've been silent.
14 The other end -- I would just mention that
15 the ILC Articles also indicate that local remedies
16 need not be exhausted when the course of justice is
17 unduly slow. They also, of course, find futility when
18 the local courts are lacking in independence or the
19 State does not have an adequate system of judicial
20 protection or the Courts are not reasonably capable of
21 providing relief, and that is, indeed, the case here.
22 And in the interest of time, I won't go into

1 much detail, only to say that we have set this forth
2 in our submissions, and, as you can see, the State has
3 taken some steps which are -- which directly undermine
4 the independence of the judiciary and would indeed
5 render our recourse to any local courts, they are
6 futile.
7 And to just note briefly, President Castro,
8 for instance, adopted a decree that relaxed
9 requirements for those to be nominated to the Supreme
10 Court where, prior to that, those requirements were
11 set forth in the Honduran Constitution which provided
12 that Supreme Court justices had to be elected by
13 Congress from a list that was prepared by a nominating
14 board and then set forth in detail who the members of
15 that nominating board would be, a very wide, diverse
16 array of different interests.
17 But he relaxed those requirements. He also
18 changed scoring criteria as to whom -- for the
19 candidates. And one point of particular note, for
20 instance, he reduced the points to be awarded for
21 personal and professional integrity and for
22 professional ethics. And so what happened after that

1 was the National Congress announced that Congress
2 would appoint all the Supreme Court Justices, ignoring
3 the ranking of this Nominating Board.
4 Like I said, the Nominating Board has
5 representation from the bar associations, from the
6 National University, from the National Committee of
7 Human Rights, et cetera, civil society, a lot. They
8 are going to just ignore that, and they are going to
9 do it themselves.
10 The political parties then agree to allocate
11 the Supreme Court seats among themselves. They then
12 implement and appoint, actually substitute justices
13 where there is no law providing for that in order to
14 rule on certain cases. And the outcome of this is
15 that the aunt of the President's son-in-law is then
16 appointed to be the presiding justice of the Supreme
17 Court.
18 So you can see here all of this. These
19 actions undermining the integrity, the independence,
20 and the impartiality of the Court system. And, you
21 know, it is not just us saying this, of course. In
22 the last year and a half, two years, there have been

1 many, many publications saying, reporting the same
2 thing. And to just note a few, lamenting the
3 concentration of power and the Presidency of the
4 Supreme Court discussing its limited autonomy and its
5 tendency towards abuse of power saying that these
6 changes have excluded individuals who were competent
7 to serve as justices and, instead, are being appointed
8 on the basis of relationships and the like.
9 So for those four reasons, it is our
10 contention that Exhaustion of Remedies is absolutely
11 not required in this case.
12 ARBITRATOR STERN: Last question to
13 finish -- to brush off the question of Exhaustion of
14 Local Remedies. In the Reply on Jurisdiction
15 Paragraph 77, Honduras said the following: "Without
16 Legislative Decree 41-88" --
17 (Interruption.)
18 ARBITRATOR STERN: "So without Legislative
19 Decree 41-88 and the exhaustion condition, there would
20 simply be no consent by the Republic of Honduras to
21 ICSID Arbitration."
22 What is your answer to this?

1 MS. MENAKER: I think that is not the case,
2 because, first, the ICSID Convention is not a consent
3 to ICSID Arbitration. The consent to ICSID
4 Arbitration is contained in the BIT.
5 ARBITRATOR STERN: No, no. They said there
6 is no consent to ICSID Arbitration, not to --
7 MS. MENAKER: You said there was no consent
8 to ICSID Arbitration; right? And the consent to ICSID
9 arbitration is contained in the BIT, not in the ICSID
10 Convention. So with or without that Decree, that does
11 not affect their consent to ICSID Convention which is
12 contained --
13 ARBITRATOR STERN: To ICSID Convention,
14 yeah.
15 MS. MENAKER: Or, to the ICSID Convention.
16 So in that respect, I take it what they might be
17 saying is that, again, that they relied on this
18 condition as a motivation to enter into the ICSID
19 Convention.
20 That's much the same that argument that
21 Türkiye made in the PSEG case. They said, well, it
22 was integral to our Decision to enter into the ICSID

1 Convention, our making this declaration, which was
2 part of their domestic law saying that they would only
3 submit to ICSID Arbitration those classes of claims
4 that dealt with investment disputes where the
5 requisite permits under national law had already been
6 granted. In essence, they wanted to avoid any
7 pre-investment disputes or something where the permit
8 was still pending, something of that nature. And
9 again, the Tribunal there, I think quite correctly
10 rejected that because that was not contained.
11 PRESIDENT ANGELET: Excuse me.
12 MS. MENAKER: Yes.
13 PRESIDENT ANGELET: I'm going to interrupt
14 you. I apologize. We have a problem with the
15 Transcript.
16 MS. MENAKER: I see.
17 PRESIDENT ANGELET: I thought I could let
18 you end your sentence, but the Transcript is not
19 following any further. Sorry. My apologies to --
20 (Brief recess.)
21 PRESIDENT ANGELET: So ladies and gentlemen,
22 I understand that, while we were not seeing the

1 **Transcript live, it has been registered.**
2 **And you were typing it; right? So it is**
3 **somewhere, and you will be able to produce it.**
4 **That being the circumstances, if we don't**
5 **solve the problem right now, I think you could**
6 **terminate your last sentence as it were and we will**
7 **carefully listen. We will see the Transcript**
8 **afterwards, and then we are about to have a break, I**
9 **think, which will be the occasion also to get this**
10 **sorted out.**
11 **Is that okay with you?**
12 **MS. MENAKER: Of course.**
13 **PRESIDENT ANGELET: Thank you. And sorry**
14 **for the interruption.**
15 **MS. MENAKER: I'll just say one sentence**
16 **which is on Paragraph 77, it does, indeed, say:**
17 **"Without Legislative Decree 41-88 and the Exhaustion**
18 **Condition, there would simply be no consent by the**
19 **Republic of Honduras to ICSID Arbitration." So I just**
20 **reiterate that the consent to ICSID Arbitration was**
21 **contained in the BIT itself.**
22 **So, with that, if no more questions, we can**

1 take the break.
2 PRESIDENT ANGELET: Thank you very much.
3 So thank you for your patience. We can take
4 the break, indeed, say, until 3:00 p.m. Thank you.
5 (Brief recess.)
6 PRESIDENT ANGELET: Hello. Good afternoon.
7 MS. MENAKER: Sorry. I'm going to be
8 addressing the Investment Argument Objection.
9 So as the Tribunal is aware, that CAFTA-DR
10 contains a definition of "Investment Agreement," and
11 as well as --
12 (Interruption.)
13 MS. MENAKER: So, as the Tribunal is aware
14 the CAFTA-DR contains a definition of "Investment
15 Agreement" and also some definitions of some of the
16 terms used within that definition. And I will go
17 through some of those elements that need to be
18 satisfied in order to constitute an Investment
19 Agreement, focusing obviously on those that are
20 disputed.
21 So, just for the record, Honduras, as you're
22 aware, acknowledges that the Agreements are in writing

1 **and were executed after the Treaty entered into force.**
2 **Honduras also acknowledges that both the State**
3 **Guarantee and the Operations Agreement were entered**
4 **into by a Central Authority.**
5 **So that leaves the PPA which Honduras**
6 **disputes that it was entered into by a Central**
7 **Authority. And there are two primary reasons why**
8 **Honduras is wrong, in our view.**
9 **First is because ENEE, which is the Party**
10 **that executed the Counter-Party to the PPA, is a**
11 **Central Authority, and the Tribunal this morning**
12 **discussed what ought to be the governing law when**
13 **interpreting that term. And, contrary to Honduras, we**
14 **contend that the term ought to be interpreted as any**
15 **other Treaty term in accordance with general**
16 **principles of treaty interpretation under the Vienna**
17 **Convention on the Law of Treaties.**
18 **And that is because when Honduras points to**
19 **Honduran law, what they are pointing to is the**
20 **provision regarding providing --**
21 **SECRETARY GONZÁLEZ: Please stop.**
22 **(Interruption.)**

1 MR. SOLIMANO: Thank you. The slide has the
2 name of the Honduran representative of Pacific Solar
3 Energy. My understanding is that that's Confidential
4 Information.
5 (Comments off microphone.)
6 MS. MENAKER: Okay. They said it is okay,
7 but thank you for that.
8 MR. SOLIMANO: Sorry. Who said that it is
9 okay?
10 MS. MENAKER: She did.
11 MS. MARCHILI: For purposes of this slide,
12 not that we are waiving.
13 (Comments off microphone.)
14 MR. SOLIMANO: Well, the -- my only point
15 that we went green light to comply with the --
16 MS. MENAKER: Well, then we can --
17 MR. SOLIMANO: And this is a third party.
18 It is the former representative of Pacific Solar.
19 We are at your discretion, Mr. President,
20 but just to point out.
21 PRESIDENT ANGELET: Thank you. Now, how can
22 we handle this concretely?

1 (Interruption.)

2 (Comments off microphone.)

3 ARBITRATOR DRYMER: Maybe switch the slide
4 off for the moment.

5 MS. MENAKER: Sure.

6 ARBITRATOR DRYMER: Thank you. There you
7 go.

8 MS. MENAKER: If you would like us to redo
9 that and put in the confidential thing, I can
10 certainly do that.

11 PRESIDENT ANGELET: Yes. That would be
12 good. Thank you.

13 MS. MENAKER: Okay. So can we go into
14 confidential mode?

15 SECRETARY GONZÁLEZ: We are in confidential
16 mode right now.

17 MS. MENAKER: Thank you.

18 SECRETARY GONZÁLEZ: What I would suggest,
19 is -- did you switch back or forward on the slide?

20 MS. MENAKER: I switched back.

21 SECRETARY GONZÁLEZ: Because I would suggest
22 that you either black out the screen or you switch to

1 the next slide because once we open and you go
2 forward, then the slide that you are trying to not
3 show would be shown.
4 MS. MENAKER: How about I'll just tell you
5 when we're not going to be -- I'll switch to the
6 nonconfidential slide before telling you to go off
7 confidential.
8 SECRETARY GONZÁLEZ: Okay.
9 MS. MENAKER: Okay.
10 So the -- so Honduras does not dispute that
11 the State Guarantee and the Operations Agreement were
12 both signed or entered into by a Central Authority,
13 and the dispute concerns the PPA. And so, there are
14 two reasons why we disagree that that posits or
15 presents any problem for having these Agreements
16 constitute an Investment Agreement.
17 So the first is because ENEE is, in fact, a
18 Central Authority, and the Tribunal this morning
19 questioned Honduras about what law ought to apply when
20 determining who is a Central Authority. And Honduras
21 responded that that ought to be determined by
22 reference to Honduran law.

1 We disagree. The reason we disagree is,
2 when Honduras relies on Honduran law, they are doing
3 so when they look at the provision in the CAFTA that
4 provides the governing law or the law that should
5 govern a dispute over whether an Investment Agreement
6 has been breached. And that should be determined by
7 reference to Honduran law.
8 That does not govern what law applies when
9 interpreting the term in the Treaty, Central
10 Authority. When interpreting that term, just like any
11 other term in the Treaty, the Tribunal should be
12 guided by principles of Treaty interpretation that are
13 embodied in the Vienna Convention on the Law of
14 Treaties, and namely to look at the ordinary meaning
15 of the term.
16 When you look at the ordinary meaning of the
17 term "Central Authority," what does that mean? It
18 means an authority at the central level or national
19 level of Government as opposed to at the regional or
20 local level of Government. And that is exactly what
21 ENEE is.
22 Now, ENEE, as has been described by Honduras

1 itself in its pleadings as an entity of the
2 State -- and we heard that this morning, and, indeed,
3 in its law it is described as an organ of the State.
4 But if you look at the CAFTA-DR Annex 1, of
5 the Schedule of Honduras, here you see in the sector
6 of electricity, you see ENEE mentioned.
7 Now, it says "level of Government central."
8 And that is because ENEE operates at the central level
9 of Government. And then what does it say in the
10 description? The Honduran Government, through ENEE,
11 may -- "only the Honduran Government through ENEE may
12 transmit electricity or operate the electricity
13 transmission system and Dispatch Center." And it
14 operates at the central level of Government as is said
15 in the Annex to the DR-CAFTA itself.
16 So, for that reason, ENEE also is a Central
17 Authority and, therefore, all three instruments were
18 entered into by a Central Authority.
19 But in any event, in our view, that -- also,
20 that doesn't matter. And the second reason is is that
21 national and international law recognizes that an
22 Agreement can be found in several different

1 instruments. It doesn't need to be one particular
2 instrument. And you can see this is a general
3 principle of law founded in many different domestic
4 systems.
5 Here Chitty on Contracts, an English law
6 text, recognizes that the terms of a Contract can be
7 contained in more than one document, Corbin on
8 Contracts in the United States similarly says "it's
9 well-settled that a Contract may result from a series
10 of documents, and it is unimportant that all of the
11 terms of an Agreement be set out in one instrument."
12 A Spanish source similarly says that
13 Contracts may be a combination of several Contracts in
14 a single transaction, and that that is sometimes
15 intended to pursue a true economic unit or a single
16 contractual aim. And a French source similarly
17 recognizes that an economic operation often requires
18 the execution of multiple Contracts.
19 The situation is the same under
20 international law. Now, this morning Counsel for
21 Honduras also relied on particularly the singular
22 tense or the singular term "Agreement" that is used in

1 the DR-CAFTA and stated that, in accordance with the
2 Vienna Convention on the Law of Treaties, we ought to
3 interpret that term in accordance with its ordinary
4 meaning which, in its view, it said, meant that it
5 could only be a single Agreement. But that, too, is
6 incorrect.
7 And in fact, the Vienna Convention on the
8 Law of Treaties itself in Article 21 -- excuse me,
9 Article 2, Article 2(1)(a) states that a Treaty
10 is: "An International Agreement concluded between
11 States in written form and governed by international
12 law, whether embodied in a single instrument or in two
13 or more related instruments and whatever its
14 particular designation."
15 The Alemanni v. Argentina Tribunal
16 recognized the quote: "Well-understood drafting
17 Convention at both the international and national
18 level that the singular can be used to include the
19 plural and vice versa."
20 And so on the heels of these very bedrock
21 principles, you see that Christoph Schreuer in his
22 commentary notes that: "A series of interrelated

1 Contracts may be regarded, in functional terms, as
2 representing the legal operation for one investment
3 operation."
4 And many Tribunals have so agreed.
5 And Laviec similarly states: "With respect
6 to an Investment Agreement, that it may encompass a
7 variety of Contracts depending on the complexity of
8 the transaction."
9 Now, notably just months after the CAFTA DR
10 became effective, the United States revised its Model
11 Bilateral Investment Treaty in 2004. And in that 2004
12 Model BIT, it specifically states a clarification
13 where it writes that: "A written Agreement can be
14 embodied in a single instrument or in multiple
15 instruments that create an exchange of rights and
16 obligations binding on both Parties under the law
17 applicable."
18 Now, Kenneth Vandevelde who had a history at
19 the U.S. State Department and negotiated a lot of
20 Treaties and thereafter is a scholar writing on these
21 types of issues, when looking at this, he addresses
22 this issue on point and makes clear that this is a

1 clarification of what was always the case and is not a
2 difference or not a change in position.
3 And so he notes, for instance, that the
4 Morocco FTA, that it omits this language, that it
5 doesn't contain the language specifying that an
6 Investment Agreement can be in a single instrument or
7 in multiple instruments. And he goes on to say: "But
8 nothing in the definition would preclude the written
9 Agreement from being embodied in multiple
10 instruments," and also observing that the CAFTA DR
11 employs the same language as the Morocco FTA.
12 So again in these scholars' views, in
13 accordance with principles of interpretation adopted
14 by both national Courts but also under international
15 law, the singular can and should be interpreted to
16 encompass both the singular and the plural,
17 particularly in the context of a Contract or an
18 Agreement.
19 And indeed, Tribunals have found an
20 Investment Agreement when more than one written
21 Agreement where the transaction was recorded in more
22 than one written Agreement. And this is the

1 **Chevron v. Ecuador II Case that we have discussed**
2 **earlier and that Honduras spoke about this morning.**
3 **Now, just to give you a little more detail**
4 **about this case, this case concerned a 1973 Concession**
5 **Agreement which related to oil exploration and**
6 **development rights and then a 1995 Settlement**
7 **Agreement. So two decades later the Parties entered**
8 **into a Settlement Agreement regarding remediation, and**
9 **then a dispute arose, and the Tribunal found that**
10 **those two Agreements together constituted an**
11 **Investment Agreement.**
12 **And the reason why they said that was the**
13 **case was because they found that they were**
14 **inextricably linked together and that the latter one,**
15 **the Settlement Agreement would not have existed**
16 **without the former Agreement. They were one and the**
17 **same. You had rights and obligations under the**
18 **original Concession Agreement, which obviously foresaw**
19 **remediation.**
20 **Then you had a Settlement Agreement which**
21 **changed and modified the remediation rights and**
22 **obligations of the Parties, and so they were**

1 inextricably linked together. And so the 1995
2 Settlement Agreement had to be treated as a
3 continuation of the earlier Agreement so that it
4 formed part of the overall Investment Agreement.
5 And two more points to note with respect to
6 this case. The first is that the Tribunal
7 specifically said that it would not be minded to find
8 that Settlement Agreement on its own to constitute an
9 Investment Agreement because it did not contain an
10 exchange of rights and obligations in that respect.
11 So the Settlement Agreement alone was not an
12 Investment Agreement, but together with that earlier,
13 two-decades earlier Concession Agreement, it was an
14 Investment Agreement.
15 The second point is this morning Honduras
16 said that this case was distinguishable or not
17 relevant because it did not contain a definition of
18 the term "Investment Agreement." It is true that it
19 contains no definition of the term "Investment
20 Agreement" but it is very relevant.
21 And that is because in the Dispute
22 Resolution Clause which granted the Claimant a right

1 to bring a claim for breach of an Investment
2 Agreement, it used the term in the singular. It did
3 not say "for breach of Investment Agreements." It
4 said: "You can bring a Claim for breach of an
5 Investment Agreement."
6 So it's the same exact issue that arises in
7 this case. That says an "Investment Agreement," and
8 how do you interpret that term in accordance with
9 Treaty interpretation? Does that mean it needs to be
10 in a singular instrument? And the Tribunal here is
11 saying clearly not.
12 Now, why were these Agreements executed in
13 different instruments? The simple answer is because
14 Honduran law required that. And why were they
15 executed by different organs of the State? Again,
16 because that was a requirement under Honduran law.
17 And specifically the 2013 Renewables Law, it required
18 ENEE, or it designated ENEE as a sole authority to
19 enter into PPAs on behalf of the State.
20 The 2007 Renewables Law designated the
21 Attorney General as the entity to enter into a
22 Guarantee when ENEE has executed a PPA. And the 1994

1 **Electricity Law said that the Secretariat of**
2 **Communications, Public Works, and Transport, which at**
3 **the time was in charge of energy in the country.**
4 **Later, that was transferred to SERNA -- but**
5 **it stated that that was the entity that had to enter**
6 **into Operations Agreements. And you need all of these**
7 **things to work together; right? You can't have a PPA**
8 **without an Operations Agreement. If you can't operate**
9 **the Plant, how are you going to sell electricity**
10 **produced by the Plant.**
11 **And the Guarantee was an integral part of**
12 **the PPA. So all of these things are working together,**
13 **and in fact, the Renewables Law said that you are**
14 **entitled to the Guarantee if you enter into PPA, but**
15 **another organ of the State is going to enter into that**
16 **Guarantee.**
17 **So that's why these instruments are in three**
18 **different documents because that's how Honduran law**
19 **set it forth.**
20 **But there can be no debate that the three**
21 **Agreements are all interconnected.**
22 **I mean, when you look at the PPA, for**

1 instance, the PPA in very short term, conclusionary
2 terms, it basically commits ENEE to acquire and pay
3 for the energy that Pacific Solar produces. So
4 Pacific Solar produces the energy, ENEE purchases it.
5 And an Annex to the PPA is the State Guarantee. So it
6 is part and parcel of that Document. It's an Annex.
7 And then you have there that the PPA is
8 conditioned on the execution of the State Guarantee
9 and can be terminated if the State Guarantee isn't
10 executed. So again, they are tied to one another.
11 The term of the Guarantee is tied to the duration of
12 the PPA, and ENEE, in fact, was obligated under the
13 PPA to collaborate with Pacific Solar to ensure that
14 the State Guarantee was executed.
15 When you look at the Operations Agreement,
16 that governs the building and operation of the Plant
17 that is then going to sell the electricity under the
18 PPA. It's the Operations Agreement that authorizes
19 Pacific Solar to connect to the National Grid, and
20 it's to sell the energy that it is obligated to sell
21 under the PPA to ENEE. So there's a direct connection
22 there.

1 And the PPA itself is conditioned on the
2 execution of the Operations Agreement and, again, may
3 be terminated if the Operations Agreement isn't
4 executed. So all of these are interconnected
5 Agreements. So you can see, once again, there's an
6 exchange of rights and obligations under the
7 Investment Agreement. And I have set that forth here,
8 but I have just basically discussed it.
9 There are different things that the Parties
10 both need to do, what they are entitled to under these
11 Agreements, and what they get in return under these
12 interrelated Agreements. And I'd note here that,
13 although Honduras has repeatedly characterized the PPA
14 as just simply a Procurement Agreement that cannot be
15 identified or constituted or called an Investment
16 Agreement, that's -- it's not the case.
17 And I would direct the Tribunal's attention
18 to the LATAM v. Perú case where that Case concerned a
19 small hydroplant, so also renewable energy Project.
20 Perú in that case had argued that the
21 Contract at issue wasn't an Investment Agreement
22 because they said it was only a long-term power

1 purchase and sale Contract that guaranteed the
2 Claimant the right to receive a tariff for the
3 contracted energy, that the Claimant then agreed to
4 sell or put into the National Grid. But it didn't
5 really confer any right to generate energy, and that
6 right was granted by a final Concession Agreement.
7 And the Tribunal dismissed that objection
8 and it held that "it has little difficulty in deciding
9 that the RER Contract is an Investment Agreement."
10 And why was that? They said it was entered into by a
11 National Authority and a covered investment and then
12 they did go on to say it's not enough that the
13 Contract relates to the use of natural resources.
14 So it considered hydropower, again, which is
15 dependent on rain and water, just like solar power may
16 be dependent on the sun, but that is a natural
17 resource just like solar power is, but it wasn't
18 enough that it was dependent on the use of natural
19 resources.
20 It said it must grant rights regarding one
21 of the areas under the Treaty, and it did so because
22 it granted rights regarding tariffs that they were

1 entitled to, the generation Plant was entitled to be
2 paid for power. It had guaranteed revenues, much like
3 the PPA in our case.
4 And on to the next element, Honduras indeed
5 does exercise control over natural resources and
6 assets over which the Agreements grant rights.
7 And as just some examples, the manner in
8 which Honduras controls and exercises controls over
9 these natural resources and these rights, if you look
10 at the 2014 Electric Power and Industry Law, the
11 provisions there say that the National Grid is
12 operated by an entity as set forth by the State, and
13 that the generation of this energy is governed by the
14 law. So they control the National Grid and who can
15 sell energy to the National Grid.
16 Yeah.
17 ARBITRATOR DRYMER: Let me stop you just for
18 one second to look at the words of the definition of
19 "Investment Agreement" because I wanted to understand
20 the argument here. Right? I'll give you a second to
21 turn it up. Oh, you have it there?
22 MS. MENAKER: Oh, I can put it on --

1 **ARBITRATOR DRYMER: You don't have to. I**
2 **can read it, it means a "Written**
3 **Agreement" -- et cetera, et cetera -- "that grants the**
4 **covered investment or investor rights, (a), with**
5 **respect to natural resources or other assets that the**
6 **National Authority controls."**
7 **Is your clients' submission that the**
8 **power -- I mean, as I understand what you're saying,**
9 **the submission is that the PPA grants the investment**
10 **or investor right with respect to the National Power**
11 **Grid?**
12 **MS. MENAKER: Yes. I mean, there are --**
13 **ARBITRATOR DRYMER: Okay. Among other**
14 **things.**
15 **MS. MENAKER: Among other things. Yes.**
16 **ARBITRATOR DRYMER: Okay.**
17 **MS. MENAKER: With respect to the solar**
18 **resource and also with respect to the National Power**
19 **Grid, which is an asset.**
20 **ARBITRATOR DRYMER: And I'm sure you're**
21 **going to tell us other connections, other rights with**
22 **respect to other assets and controlled by the**

1 **Government. Okay. Thank you.**

2 **MS. MENAKER: Yes. Yes.**

3 **So for instance in the Operations Agreement**

4 **here, you can see that it states: "So the Generator**

5 **Company shall have within the Plant site and**

6 **throughout the term of the Contract the exclusive**

7 **right to use and usufruct over the solar resource**

8 **required for the Plant's operation."**

9 **So there the State is granting them the**

10 **right over the solar resource, the natural resource,**

11 **to operate the Plant, and they are doing that in their**

12 **Operations Agreement. So clearly the State has**

13 **control over that resource if it is granting them the**

14 **right to that resource.**

15 **ARBITRATOR DRYMER: Or at least it purports**

16 **to have such right.**

17 **MS. MENAKER: Correct.**

18 **ARBITRATOR DRYMER: Over the sun.**

19 **MS. MENAKER: Well, over the ability to**

20 **utilize that solar resource to generate energy.**

21 **ARBITRATOR DRYMER: Correct. All right.**

22 **All right. Thank you.**

1 MS. MENAKER: And then if you look at the
2 Renewables Law 2017, it says: "Permits for the
3 construction of generation facilities authorized by
4 SERNA shall grant exclusive rights for the use of the
5 requested renewable resource and the site of the
6 installations for the duration of the Permit."
7 So again, the granting exclusive rights for
8 the use of the renewable resource, the natural
9 resource there.
10 And in the 2013 Renewables Law, what this
11 does is the State actually exempts some of the power
12 generators from paying certain fees, and the converse
13 of that is, of course, if they are going to get an
14 exemption from paying certain fees, they would have
15 the ability to impose fees on them, which means that
16 they regulate and control access to this.
17 So let me just read this out to you,
18 Article 3. It says: "Renewable energy generation
19 Projects that use domestic natural resources other
20 than hydraulic power from national waters, such as
21 wind, solar, biomass, et cetera, shall be exempt from
22 all fees for the use and exploitation of the renewable

1 resource and shall obtain the Concession for the use
2 of the natural resource utilized for power generation
3 through the respective Operation Agreement."
4 So again the State there is granting
5 Concessions for the use of natural resources,
6 including here, Solar Energy, through Operation
7 Agreements. So it is exercising control over that
8 natural resource and the use of that natural resource
9 in the form of Operations Agreement to allow investors
10 to generate energy, Solar Energy or other renewable
11 energy.
12 Now, I'd like to go into a confidential.
13 ARBITRATOR DRYMER: For purposes of
14 particular Plants, no?
15 MS. MENAKER: I'm sorry?
16 ARBITRATOR DRYMER: The right to use -- I'm
17 trying -- I'm going to quote your words: "Purports
18 and allows investors" -- I'm sorry. All right. I'm
19 going to paraphrase, so forgive me if I don't get it
20 right.
21 MS. MENAKER: Please.
22 ARBITRATOR DRYMER: Are you -- I think

1 you're suggesting that these, this demonstrates the
2 State's purported exercise of control over the use of
3 solar resources, you would say. And I ask the
4 question, is that not connected to the commercial
5 operation of certain Plants? In other words, because
6 I'm stuck frankly on the idea that, no matter what
7 these words say, that the State in your submission
8 purports to exercise control over the use of the sun
9 to put it, as your friends put it?
10 MS. MENAKER: But that's -- what we are
11 looking at is whether they exercise control over some
12 assets --
13 ARBITRATOR DRYMER: All right. Yes.
14 MS. MENAKER: Or natural resources either,
15 over which the Agreements grant rights. So the
16 Agreements grant certain rights. They grant the right
17 to build a Plant, to operate the Plant, to sell the
18 energy --
19 ARBITRATOR DRYMER: Right. Right.
20 MS. MENAKER: Produced by the Plant to the
21 Grid.
22 And the question is does the State exercise

1 control over the assets or resources that are the
2 subject of those rights? Clearly, they do because
3 they are granting these rights, and those rights can
4 only be granted by the State.
5 ARBITRATOR DRYMER: That would include the
6 right to operate the Plant, I suppose?
7 MS. MENAKER: Precisely. Precisely.
8 ARBITRATOR DRYMER: Very good.
9 MS. MENAKER: And the right, like they said,
10 maybe you can put a solar panel on your house, but you
11 cannot generate energy and sell it to the Grid without
12 having the State permit you to do that. And that is
13 because they exercise control over that aspect of the
14 Agreement that grants you that right to do it.
15 ARBITRATOR DRYMER: Understood. Thank you.
16 MS. MENAKER: Okay. Thank you.
17 So, now, I'd like to go into confidential
18 mode.
19 (End of open session. Attorneys' Eyes Only
20 information follows.)
21 CONFIDENTIAL SESSION

22 **(End of Attorneys' Eyes Only session.)**

1 **OPEN SESSION**

2 **MS. MENAKER: The other reason is, as a**
3 **legal matter, their argument also fails because there**
4 **is no such timing requirement to constitute an**
5 **Investment Agreement in this sense.**
6 **Now, in the Freeport-McMoRan v. Perú case,**
7 **for example, there, there was an agreement that was**
8 **entered into before the Treaty had even entered into**
9 **force. And what Perú argued there was that this could**
10 **not be an Investment Agreement because it wouldn't**
11 **have met the definition of "Investment Agreement" when**
12 **the Agreement was executed; right? Just like you**
13 **can't have a breach before the Treaty is in existence,**
14 **you wouldn't have an Investment Agreement under the**
15 **Treaty before the Treaty existed. And the Tribunal**
16 **rejected that objection and said that: "An investment**
17 **could have already been in existence at the date of**
18 **entry into force of the TPA, clearly. There is, thus,**
19 **no basis to consider that there is a temporal**
20 **limitation to investments that are covered by the TPA**
21 **unique to Investment Agreement Claims."**
22 **So, by analogy, the same thing is true here,**

1 that the investment, even if it were not the case
2 that -- even in a hypothetical where Claimants were
3 not in the picture at the time an Investment Agreement
4 came into force, you would still have an Investment
5 Agreement, and that would not change later when you
6 made a claim for a breach of an Investment Agreement.
7 Nothing would change there. You would still have the
8 Investment Agreement, just like you still have the
9 investment.
10 Now, I want to also go back to confidential
11 mode for just one more slide.
12 (End of open session. Attorneys' Eyes Only
13 information follows.)
14 CONFIDENTIAL SESSION

9 (End of Attorneys' Eyes Only session.)

10 OPEN SESSION

11 MS. MARCHILI: Claimants rely on the
12 Most-Favored-Nation Clause in the Treaty to benefit
13 from the better treatment provided to other investors
14 and third parties, specifically the
15 Switzerland-Honduras and the Germany-Honduras
16 Bilateral Investment Treaties which contain umbrella
17 clauses, which you have on the screen, that are
18 all-encompassing. They cover -- sorry, they cover all
19 and any other commitment or obligations expressly.
20 And that has been interpreted by tribunals as covering
21 both commitments under laws and under contracts, and,
22 here, we have them all.

1 We have commitments and rights that were
2 granted by a series of laws. We have specific
3 agreements with respect to the Investment, as we just
4 heard from Ms. Menaker, the PPA and the Operations
5 Agreement and the State Guarantee. And these multiple
6 layers of rights would be protected under the Umbrella
7 Clauses, and that's why we invoked them.
8 Now, we have heard today, of course, about
9 the text of the MFN Clause, and I trust that you have
10 read it in detail. So I will turn, to put into the
11 mix, following the Vienna Convention on the Law of the
12 Treaties, the objectives of CAFTA. And these are
13 quite concrete and specifically mention the
14 Most-Favored-Nation Clause. And I'll be reading part
15 of the text that is highlighted on the slide: "The
16 objectives of this Agreement, through its principles
17 and rules, including the Most-Favored-Nation
18 Treatment, establish a framework for further bilateral
19 regional multilateral cooperation to expand and
20 enhance the benefits of this Agreement."
21 Now, what better way to expand and enhance
22 the benefits of this Agreement, if not by allowing

1 investors like Claimants to invoke better treatment
2 including other treaties?
3 I see you have a question.
4 THE PRESIDENT: I intended to ask it later,
5 but, if you go back to the same provision, I also
6 noted (c), "promote conditions of fair competition in
7 the free-trade area," and I wondered -- that may be a
8 question to both Parties -- whether this might impact
9 on the interpretation of the MFN Clause, in particular
10 to terms "promote conditions." Thank you.
11 MS. MARCHILI: Thank you. If you don't
12 mind, I will return to that upon reflecting on it.
13 But thank you for taking me back to the
14 clause as I also wanted to emphasize that again, and
15 this is consistent with the Vienna Convention, that
16 these objectives are to be taken into account and
17 applied when interpreting and applying this Treaty.
18 Now, my first reaction, for what it's worth
19 to the language that you're pointing out to, is, of
20 course, this is not just a Bilateral Investment Treaty
21 or not just a Treaty on investment protection, and
22 there are different ways in which MFN clauses -- or,

1 different MFN clauses are included in the Treaty. And
2 it's a Free Trade Agreement, so there may be room
3 there to interpret that that particular text in (c)
4 refers to, perhaps, trade issues, and less investment.
5 But I'll think about it further before saying that's
6 my final answer. Thank you.
7 Now, just turning to the arguments of
8 Respondent --
9 ARBITRATOR DRYMER: I hate to do
10 this -- well, I don't. That's what we're here for.
11 But I'm looking at 1.2.1. Is your submission that
12 Most-Favored-Nation Treatment is one of the objectives
13 because it's mentioned there, in that chapeau, if you
14 will? Because I read it a bit differently.
15 MS. MARCHILI: I do not suggest that it is,
16 in and of itself, but I'm curious as to how you read
17 it.
18 ARBITRATOR DRYMER: Okay, but -- no, no.
19 First -- I'm curious as to you, first. It is or is
20 not one of the objectives?
21 MS. MARCHILI: I think that the objective,
22 as written here, is that, through the MFN -- the MFN

1 is a means to obtain those objectives which include
2 the rest of the points that I made there.
3 ARBITRATOR DRYMER: Okay. Because I read
4 this just -- well, I'm simply reading the words. I'm
5 not offering an interpretation by the Tribunal by any
6 means, but it says, "the objectives of this Agreement
7 are two," and then the objectives are (a) to (g). But
8 it also says that the objectives are elaborated more
9 specifically through its principles and rules,
10 including MFN. So, to me, this simply says that MFN,
11 just like National Treatment, is one of the principles
12 and rules of the Treaty.
13 MS. MARCHILI: And I agree with that.
14 ARBITRATOR DRYMER: Very good. But the
15 objectives, the specific objectives are enumerated in
16 (a) to (g).
17 MS. MARCHILI: That's my interpretation as
18 well.
19 ARBITRATOR DRYMER: Thank you.
20 MS. MARCHILI: Of course.
21 ARBITRATOR DRYMER: That means I'm
22 presumably on track, subject to what Mr. Figueroa and

1 colleagues may tell me.
2 MS. MARCHILI: We shall see, indeed.
3 But what is important, in any case, is that
4 we take into account this, of course, again, under the
5 Vienna Convention.
6 So the two arguments that I'm going to deal
7 with now are, as we have heard today, the Decision by
8 Respondent that, in particular, the language "in like
9 circumstances" restricts the scope of the MFN to
10 factual discrimination -- if I can use those terms as
11 the Parties have in their Briefs -- as opposed to
12 better -- the possibility of invoking the better
13 treatment in a different Treaty, and then the
14 Procurement Carve-Out. So --
15 And I'm hoping that I'm not misspeaking when
16 I say that we understand that Respondent does not deny
17 that an MFN Clause, in the abstract, can be used to
18 benefit from substantive protections and another
19 treaty -- and, of course, we will hear from our
20 colleagues on the other side, unless they want to
21 react -- nor that treatment cannot include treatment
22 under other treaties. But, as I understand, their

1 argument is that that particular language, with
2 respect to "in like circumstances," makes
3 that -- results in that restriction that we were
4 alluding to. And you won't be surprised that I had
5 shown you the objectives to make the point that that
6 seems inconsistent with the objectives of the Treaty.
7 But we also have the benefit -- and, of
8 course, this Tribunal is not bound by prior Decisions,
9 but it's very attempting to quote one when it is under
10 the same Treaty, and --
11 ARBITRATOR DRYMER: And at least one of the
12 arbitrators is similar, is all I observed.
13 MS. MARCHILI: Indeed.
14 In that case, the Claimants invoked
15 the -- relied on the MFN that is at issue in this case
16 to import what they consider -- and this is an
17 argument in the alternative, what they consider to be
18 potentially better, so to speak, or broader FET
19 standard in other treaties. In this case, it was a
20 Spain-Nicaragua BIT. And the Tribunal -- now, the
21 issue was a very specific one. Nicaragua's position
22 in that case was that the MFN allowed that, but only

1 with respect to treaties that were entered into after
2 the Treaty, the basic Treaty for subsequent -- Treaty,
3 as opposed to the preexisting Treaty. That was the
4 question before the Tribunal, which found that
5 Article 10(4) expressly encompasses the treatment to
6 which investors are already entitled under preexisting
7 treaties. So that, of course, answers the more
8 general question, that that's something that can be
9 done, and that's exactly what we're trying to do here.
10 And it's not just that case under CAFTA.
11 NAFTA has the same language. The MFN Clause in the
12 NAFTA Treaty has the exact same terms. It's
13 identical. And there are many Tribunals -- in fact,
14 no NAFTA Tribunal has taken Respondent's position, let
15 me put it that way. Here, we have, by way of an
16 example, the Pope & Talbot case, which also related to
17 the issue of Minimum Standard of Treatment and the
18 idea that the FET Standard would be a higher one or a
19 better one. So again, the position by Respondent has
20 not been embraced by other tribunals, and that is also
21 reflected in a pretty detailed article that
22 Prof. Schreuer has published on MFNs in general, but,

1 specifically, on NAFTA, noting that NAFTA Tribunals
2 have shown an openness to applying the same text as we
3 are sort of missing here.
4 It's not just NAFTA, it's not just CAFTA,
5 but other tribunals that were deciding cases in which
6 the MFN included similar language also concluded that
7 the better treatment could be imported. In fact,
8 here, we have a case, that we will go back to in a
9 minute, against Syria, in which the Tribunal found
10 that that was the very purpose of the MFN clauses.
11 Now, we've heard this today and we have seen
12 it in the Pleadings, the two Decisions on which
13 Respondent relies, for the point that we should read
14 the MFN in a restrictive way only protecting against
15 factual discrimination, are these two
16 treaties -- sorry, these two cases under the
17 Türkiye-Turkmenistan BIT.
18 Now, those two cases have been thoroughly
19 criticized. Here, we have a quote from the Award that
20 I just showed you against Syria. The Tribunal, there,
21 noted that the way in which we are here invoking the
22 MFN is an uncontroversial proposition that that can be

1 done and that the reference to similar situations and
2 similar language is nothing but a reflection of the
3 showing of likeness or ejusdem generis principle,
4 which, of course, is not disputed would apply in any
5 application of an MFN clause.
6 There are also commentators who have
7 criticized it as highly problematic, those two
8 Authorities on which Respondent relies, and that have
9 described it as swimming against this jurisprudential
10 tide. The jurisprudential tide being the application
11 of the MFN Clause for purposes of invoking better
12 treatment in other treaties.
13 Now, the U.S. has made a submission in this
14 proceeding. Respondent, of course, is relying on it
15 and trying to describe it and encourage you to use it
16 as showing a subsequent practice or subsequent
17 agreement. Now, as the Red Crosses would indicate, we
18 disagree with that, because, by definition, that -- in
19 any of those cases, there would have to be an
20 agreement by all Parties.
21 Now, having said that, Mr. President, you
22 may -- you asked a question about silence, and I'm

1 going to venture into trying to answer that, if I may.
2 The 2018 Report of the ILC, which is
3 actually an Authority submitted by Respondent, RL-175.
4 It's a Report by the ILC that contains the -- I'm
5 going to read it because I always misremember it.
6 It's the text of the draft conclusions on subsequent
7 agreements and subsequent practice in relation to the
8 interpretation of the treaties.
9 And the draft conclusion 10.2, there, notes
10 that: "Silence can be" -- can be -- "subsequent
11 practice when the circumstances call for a reaction,"
12 and I would say that that's not the case here. For
13 your reference, that's at Page 89 of the PDF of that
14 Authority.
15 Now, let me turn briefly, in the interest of
16 time, to the procurement.
17 PRESIDENT ANGELET: Excuse me, perhaps.
18 MS. MARCHILI: Of course.
19 PRESIDENT ANGELET: A related question. I'm
20 not sure. I thought I had read in one of the
21 exhibits, - is that an Article by Simon Batifort in
22 American Journal of International Law on MFN? -, that

1 the U.S. interpretation of the MFN was shared by all
2 the NAFTA Parties; therefore, an authentic
3 interpretation.
4 Unfortunately, I don't have the exact
5 reference here, but I'm quite sure it is in that
6 exhibit. And I would like to -- perhaps you don't
7 have to answer this now, but I would like to make sure
8 this is addressed. Thank you.
9 MS. MARCHILI: Thank you very much. I know
10 to which Authority you are referring to. I do not
11 recall that particular proposition being defended
12 there, but I'll look into that and -- what I would
13 say, for what it's worth -- and it's not directly in
14 response to your point, but I think it does paint the
15 picture, if I can put it that way, is that the two
16 paragraphs contained in the U.S. submission here on
17 MFN contain very formulaic language that the U.S. has
18 had a tradition of submitting in cases in which these
19 type of questions regarding Most-Favored-Nation
20 Clauses have been raised.
21 And it's not particularly attuned or crafted
22 in such a way that it really addresses some of the

1 specific issues here. So, to me, it seems more of a
2 standing of the U.S. Government with respect to
3 certain -- the notion of the MFN Clause as opposed
4 to -- with all respect to the colleagues who in the
5 U.S. department who drafted that, that is tailored to
6 this case and this Treaty, in particular.
7 Now, turning to the issue of procurement.
8 At the risk of stating the obvious, procurement is
9 process.
10 Now, Respondent wants to stretch that to
11 mean Procurement Contracts. And not just Procurement
12 Contract, but Procurement Contract and the performance
13 that follows after the Procurement Contract, an
14 all-encompassing contract, but it is not. Procurement
15 is procurement. Procurement is process, and process
16 is process. Process is not contract performance or
17 anything else.
18 Now, beyond that, a question was raised
19 whether Claimants agreed or not that the PPA is a
20 Procurement Contract. I gave the shorthand answer of,
21 no, but I would like to expand on that, if I may now.
22 Claimants do not agree, because, first, and

1 this is -- I'm alluding to the arguments that my
2 colleague Ms. Menaker made a minute ago about how
3 intertwined the three agreements are in addressing
4 this issue, of course.
5 We cannot just be myopically focusing on one
6 of those agreements as Respondent proposes that we do.
7 So again, our first point is that process is not a
8 contract but, even if you cross that bridge and we
9 entertain that discussion, also contract is
10 not -- whichever one of the Contracts that are invoked
11 in this case, you want to choose.
12 We are not here in a situation where the
13 Government is just buying a good and that's it. In
14 fact, the framework that the Agreements create is more
15 akin to a Concession Agreement than the Contract to
16 buy a good.
17 Through the operations agreement, SERNA,
18 which is the Honduran Ministry of Natural Resources,
19 expressly granted Pacific Solar the exclusive right to
20 use and usufruct solar resources for the Plants to
21 operate. And related to, I think, one of the
22 exchanges that one of core researchers had with my

1 colleague, the 2013 Renewals Law, which is -- if you
2 recall the law landing a little bit more advanced in
3 the Cost of Green Energy and solar plans provided that
4 power generators that use natural resources for their
5 production would receive a concession for the use of a
6 natural resource.
7 So it's not that we need to
8 interpret -- cross too many bridges to understand that
9 that would meet that part of the definition of
10 Investment Agreement that my colleague was raising and
11 to put us far away -- far away from a just Procurement
12 Contract, where the Government is just acquiring a
13 good.
14 The same goes with respect to the Operations
15 Agreement that provides that the national dispatch
16 center, the one that administers at a national level
17 of the power grid must receive and dispatch all the
18 electricity generated by the power plant. And the
19 Pacific Solar, in fact, has to pay a fee. So the
20 point being is that this is a much more complex
21 structure and framework than a contract to buy goods
22 as Respondent purports.

1 Now, one point, if I -- if you would indulge
2 me, that I would like to put into the mix is those are
3 the type of breaches that we are dealing with here.
4 This is not just an acquisition of goods.
5 Respondent is the only offtaker of the
6 electricity that the plant produces. The power plant
7 was built because of that guarantee, and the
8 Government has been manipulating the dispatch system
9 to the detriment of the Pacific.
10 It has threatened to expropriate the Plant,
11 it has passed a law saying that, regardless of what
12 the Agreements provide, the power generators could be
13 prosecuted criminally if they stop generating
14 electricity, even if they are not being paid, or even
15 if they are paid whenever the Government wants them to
16 be paid.
17 So even if you look at just the Agreements,
18 it is clearly not a situation of just a Procurement
19 Contract. And if you look at the breaches, you can
20 tell that's not the case for sure.
21 And just to end, there is nothing artificial
22 or convenient to base an interpretation on the very

1 definition of a term. That is what the Vienna
2 Convention mandates, and that's what we are doing
3 here.
4 Thank you very much.
5 PRESIDENT ANGELET: In the same provision in
6 the definition of "procurement," there is also the
7 exception for commercial sale or resale, which I
8 mentioned earlier.
9 Am I correct that you do not consider that
10 exception to the exception to be applicable?
11 MS. MARCHILI: That's an interesting
12 question. I would say that, while ENEE -- we have
13 heard today from Respondent that ENEE is not of
14 acquiring electricity and selling it with a -- from a
15 commercial objective. And I would agree with that.
16 It is a sovereign. ENEE is acting like a sovereign in
17 coordination with the Government. It is the
18 Government.
19 I don't know if that addresses your
20 question.
21 PRESIDENT ANGELET: Thank you very much.
22 MS. MARCHILI: Thank you.

1 ARBITRATOR STERN: And is it important that
2 ENEE means Empresa Nacional de Energía Eléctrica?
3 Empresa?
4 MS. MARCHILI: It would if it would behave
5 as one, as I think it is telling from -- I think that
6 in any case that I've been involved with where there
7 is a State-owned company, there would be some
8 attribution discussion. There is none here, and I
9 think that that is rightly so because it is, again,
10 the case that the Ministry of Energy is the CEO.
11 There is no real boundary, even if it's called
12 Empresa. And it is not just our position, it is
13 Respondents position, as well.
14 ARBITRATOR STERN: I understand.
15 MS. MARCHILI: Thank you.
16 So if there are no other questions.
17 MR. FIGUEROA: Just for the record because
18 she made a characterization in terms of what our
19 position is, I just want to say that that is not our
20 position. I think she characterized it as -- there is
21 no real boundary, even if it's called "Empresa." I
22 just want to be very clear. That is not our position,

1 but I just want to make sure that the record is clear.
2 Thank you. Sorry, apologies.
3 PRESIDENT ANGELET: Thank you.
4 ARBITRATOR DRYMER: May I? I'm sorry but
5 you prompted me. Again, I wasn't going to go now. I
6 don't mean to delay your participation, Madam, but
7 here I do have a question about whether or not your
8 friends have accurately characterized your position or
9 not, not in respect of this.
10 Ms. Marchili said that "I hope I'm not
11 misrepresenting when I say that we understand that the
12 Respondent does not deny --" then I refer to
13 Slide 46 -- "that an MFN Clause can be used to benefit
14 from substantive protections, et cetera."
15 You can answer now or later.
16 Does Ms. Marchili understand your position
17 correctly?
18 MR. FIGUEROA: No. I think it's a little
19 bit more subtle than that.
20 ARBITRATOR DRYMER: I'm sure. I'm not
21 asking you to plead. Did she correctly state your
22 position or not?

1 **MR. FIGUEROA: No, she did not.**
2 **ARBITRATOR DRYMER: I look forward to**
3 **hearing more later on. Thank you.**
4 **Pardon me.**
5 **MS. SAN JUAN: Thank you. And I do**
6 **appreciate it has been a long day.**
7 **Good afternoon, Members of the Tribunal --**
8 **ARBITRATOR DRYMER: We've been waiting for**
9 **you.**
10 **(Interruption.)**
11 **MS. SAN JUAN: Now, at the outset, I will be**
12 **addressing the ownership and control objection and I**
13 **think it can be only described as an artificial**
14 **objection. Here, we have the natural persons who are**
15 **the Ultimate Beneficial Owners of this Project, and**
16 **Respondent is arguing that they do not own or control**
17 **the investment simply because they obtain project**
18 **finance from European Development Banks.**
19 **This Project finance was an arrangement that**
20 **it was contemplated by the very framework that**
21 **Honduras put in place to incentivize investments in**
22 **the renewable energy sector in Honduras.**

1 **It is also worth noting that in this**
2 **Arbitration, unlike many others, the Claimants here**
3 **are the natural persons, the quintessential owners,**
4 **the people you would point to if you asked: "Who owns**
5 **this asset?" And one of the Claimants themselves will**
6 **be testifying before you tomorrow.**
7 **Now, again, there are multiple reasons in**
8 **the Treaty text, the facts and the case law why these**
9 **Claimants are the owners and controllers of Pacific**
10 **Solar. And we will go over a few of those points**
11 **shortly, but beyond that, they are the Owners as a**
12 **matter of common sense.**
13 **And just briefly note that Respondent's**
14 **artificial objection is not an accident. It is**
15 **consistent with Honduras's conduct to close every**
16 **possible door to grant relief to renewable energy**
17 **investors like the Claimants who relied on Honduras's**
18 **commitments more than a decade ago to invest in a**
19 **solar plant that has been generating Green Energy**
20 **Honduras ever since.**
21 **Now in the rest of my statement I will be**
22 **discussing documentation that the Tribunal has**

1 **designated as confidential. So I kindly ask for us to**

2 **go off the record now.**

3 **(End of open session. Attorneys' Eyes Only**

4 **information follows.)**

5 **CONFIDENTIAL SESSION**

3 (End of Attorneys' Eyes Only session.)
4 OPEN SESSION
5 MS. SAN JUAN: Now, even though a
6 significant number of investment arbitrations involve
7 assets that have project financing, it is quite
8 remarkable for Respondent to argue that the lenders
9 are the real owners. Nevertheless, let's put the
10 objection in context.
11 So in addition to contributing equity,
12 Mr. Paiz secured financing for the Project. And
13 financing solar plans is critical because of their
14 capital-intensive nature that requires significant
15 up-front investments. So this is why solar
16 investments commonly raise long-tenured debt or
17 project finance to fund their investments.
18 And that financing, of course, is paid over
19 time with the Revenues that the asset that is being
20 funded generates over time.
21 Here, Pacific Solar's lenders are DEG and
22 FMO. DEG being the German investment and development

1 **corporation, a German, State-owned Development Bank.**
2 **And you see here on the screen that DEG explains that**
3 **its role is -- in the highlighted part there -- to**
4 **promote the sustainable development and expansion of**
5 **the private sector in these markets, emerging markets.**
6 **Now, in turn, FMO is a Dutch entrepreneur**
7 **Development Bank. FMO uses funds of the Ministries of**
8 **Foreign Affairs and Economy of the Netherlands to**
9 **support private-sector growth in developing and**
10 **emerging markets.**
11 **And in the case of Pacific Solar, as FMO**
12 **itself describes -- and this is relevant -- Pacific**
13 **Investments and FMO's debt funding as contributing to**
14 **a more sustainable electricity generation in Honduras,**
15 **which will reduce Honduras's dependence upon imported**
16 **fossil fuels.**
17 **Here, of course, FMO is referring to its**
18 **role as the funding or financing. And as you can**
19 **imagine, these development banks fund hundreds of**
20 **projects throughout the world that are consistent with**
21 **their development goals.**
22 **By virtue of DEG and FMO's role as lenders**

1 **in Pacific, of course, they are important**
2 **stakeholders. But that doesn't mean they own or**
3 **control Pacific Solar or more broadly Claimants'**
4 **investments. They are simply the lenders. They fund**
5 **and lend, as is apparent from the multiple references**
6 **on the screen and throughout the record.**
7 **Now, turning to Honduras's framework itself.**
8 **That renewable incentive framework that we have been**
9 **discussing throughout and in the Pleadings and that is**
10 **the basis that induced Claimants' investment,**
11 **contemplated and enabled the kind of Project finance**
12 **that we have in this Project.**
13 **In fact, Honduras's renewable incentives law**
14 **of 2013 itself contemplates that Development Banks**
15 **from friendly countries would finance green**
16 **development energy projects to foster development, and**
17 **specifically names DEG and FMO, the lenders of Pacific**
18 **Solar, as well as the World Bank, IFC and Exim Bank,**
19 **as can be seen here in the "whereas" clause that we**
20 **are showing on the screen.**
21 **And the same is true with respect to**
22 **Operations Agreement. You have heard about the**

1 Operations Agreement throughout the day. It provides
2 that: "The generating company may place all or part
3 of this Contract as collateral to the plant's
4 financing Parties."
5 And not only the Operations Agreement, but
6 the PPA itself stipulates very clearly that the
7 Parties, here Pacific Solar and ENEE, expressly agree
8 that encumbering or pledging the PPA for purposes of
9 financing does not transfer ownership of the asset.
10 You see that clearly on Clause 20.6 of the PPA.
11 So again, Honduras's renewable incentives
12 framework contemplated this project finance structure,
13 and not only that, but recognized that it would not
14 alter the ownership.
15 Now, I will turn to the Project finance
16 arrangement itself, which deals with Confidential
17 Information.
18 (End of open session. Attorneys' Eyes Only
19 information follows.)
20 CONFIDENTIAL SESSION

22 **(End of Attorneys' Eyes Only session.)**

1 **OPEN SESSION**

2 **ARBITRATOR STERN: Maybe we are still**

3 **on -- maybe on --**

4 **MS. SAN JUAN: Go back.**

5 **ARBITRATOR STERN: Because I want to ask a**

6 **question on what you just said.**

7 **MS. SAN JUAN: Sure.**

8 **(End of open session. Attorneys' Eyes Only**

9 **information follows.)**

10 **CONFIDENTIAL SESSION**

7 (End of Attorneys' Eyes Only session.)

8 OPEN SESSION

9 MS. SAN JUAN: Thank you.

10 Now, since Respondent raised this objection,
11 which has permutated as we have seen, still
12 importantly, and all the Tribunal has to find to
13 dismiss Respondent's objection, is that the Claimants
14 indirectly own or control the investment within the
15 definition of the DR-CAFTA, a definition that
16 Respondent did not even discuss this morning. And you
17 have here on the screen.

18 The DR-CAFTA defines "investments" in a
19 very -- in very broad terms, as is customary in these
20 types of treaties, as "every asset that an investor
21 owns or controls." This includes a broad non-
22 exhaustive list of assets. Here Claimants'

1 investments being Pacific Solar, the Plant, the
2 Agreements, and related assets.
3 Now establishing that Claimants either own
4 or control the asset is sufficient to meet the
5 Treaty's jurisdictional requirement. And the DR-CAFTA
6 also makes it clear that the way you establish either
7 ownership or control may be indirect.
8 Again, this is why the Concession earlier on
9 is quite relevant.
10 Okay. So you heard this morning also about
11 Honduran law, and this also goes to the question that
12 Prof. Stern just asked.
13 Now, the Treaty and international law
14 governed the meaning of "investments" as is defined
15 and listed in the CAFTA-DR. The Investment Chapter,
16 of course, provides, at Article 10.22, which we have
17 seen for other purposes today, that the Tribunal must
18 decide the issues in dispute in accordance with
19 disagreement, meaning the DR-CAFTA, and applicable
20 rules of international law.
21 And even when you look at municipal law,
22 Authorities cited by Respondent say -- and you can see

1 that it's applying -- it's looked at as a matter of
2 guidance.
3 Now, for determining ownership as a matter
4 of Treaty protection, international law recognizes the
5 division between nominal or record ownership and
6 beneficial ownership. And where trusts are part of
7 the ownership structure, necessarily splitting the
8 ownership between nominal and beneficial interest,
9 investment tribunals have found that jurisdiction with
10 respect to the claims of the beneficial owner is what
11 the Treaty protects.
12 For example, in Occidental v. Ecuador, the
13 Claimant entered into a farmout agreement whereby it
14 transferred part of its interest in an oil production
15 block to other investors not protected under the
16 applicable treaty. They had different nationalities.
17 Now, the Claimant had agreed to act as
18 nominee, or bear trustee, of that third party's
19 interest in the block while the full legal transfer
20 had not been finalized for other reasons.
21 And in the arbitration Claimant claimed
22 100 percent of the damages, including the 40 percent

1 that would have otherwise belonged to the third party.
2 And a majority of the Tribunal there awarded
3 100 percent of the damages, and the dissent pointed
4 out that Claimant shouldn't have been awarded
5 100 percent of the damages, because, as you see in the
6 quote here: "In cases where the legal title and the
7 beneficial ownership are split, it is quite
8 uncontroversial that international law grants relief
9 to the owner of the economic interest."
10 And that Award was challenged and an ICSID
11 Annulment Committee, adopted the reasoning of the
12 dissent, annulling the Tribunal's Decision to award
13 damages, 100 percent of the damages, the totality to
14 Claimant. And it did so on the grounds that: "The
15 third party was the beneficial owner of a portion of
16 the investment, reasoning that the dominant position
17 in international law grants standing and relief to the
18 owner of the beneficial interest, not the nominee."
19 And here in the bottom, you also have
20 another case following this reasoning in Castillo
21 Bozo v. Panamá, the Claimant who was a Dominican
22 national, owned the Shares of a company and put those

1 **Shares in a trust administered by MMG trust as**
2 **trustee. The Claimant was also the seller and**
3 **beneficiary in that case, and the Tribunal held that**
4 **the existence of a Trust and trustee did not sever the**
5 **Treaty protections of the Shareholder who was the**
6 **ultimate beneficiary.**
7 **In its analysis, that you have here quoted**
8 **on the screen, the Tribunal held that: "Ownership of**
9 **Shares in a company typically grants two types of**
10 **rights: Voting or political rights and economic**
11 **rights. And in that case, those remain with the**
12 **Shareholder, notwithstanding the Trust, who was the**
13 **seller and beneficiary of the Trust, such that he had**
14 **ownership for purposes of Treaty protection."**
15 **ARBITRATOR STERN: Maybe a question on this.**
16 **The fact that there is a difference between the legal**
17 **title and the beneficial owner -- of course, I am**
18 **quite familiar with this issue, but does it make a**
19 **difference, you know, in the case that you mentioned**
20 **it was beneficiary, but here in the asset trust,**
21 **Pacific is only the third-ranking beneficiary. So**
22 **doesn't that make a big difference?**

1 **MS. SAN JUAN: It's a very good question.**

2 **So the situation here with respect to these**

3 **trusts are that you have, in the case of the share**

4 **trust, the settlor, being Pacific Solar, and the third**

5 **or second beneficiary, depending on the timing. And**

6 **in the share trust you have --**

7 **MS. MARCHILI: Let's go back to**

8 **confidential, please.**

9 **(End of open session. Attorneys' Eyes Only**

10 **information follows.)**

11 **CONFIDENTIAL SESSION**

4 (End of Attorneys' Eyes Only session.)

5 OPEN SESSION

6 MS. SAN JUAN: The Tribunal held that the
7 real owner of the investment was not the trustee, and
8 declined jurisdiction, as you can see on the screen.
9 It held that the Trust does not manage the
10 Trust Assets on its own behalf. A feature that we
11 also have here. Assets are separate from the equity
12 of the trustee, and that the trustee simply managed
13 them for a particular purpose for the benefit of a
14 third party and that its powers were extremely
15 limited.
16 And here, and very importantly, what the
17 Tribunal concluded is that the real owner is who
18 enjoys the ultimate control over the trust assets and
19 that will ultimately enjoy or suffer the fortunes of
20 the Trust assets. So that's the concept that we were
21 discussing earlier.
22 So, of course, just to recap some of the --

1 We are returning to confidentiality mode
2 now. Thank you.
3 (End of open session. Attorneys' Eyes Only
4 information follows.)
5 CONFIDENTIAL SESSION

22 **(End of Attorneys' Eyes Only session.)**

1 **OPEN SESSION**

2 **PRESIDENT ANGELET: Thank you. Are there**
3 **further questions on the part of my colleagues?**
4 **Earlier this morning I intended to ask more**
5 **questions, but I will spare you. Thank you for the**
6 **high quality of your presentations, and see you**
7 **tomorrow. Thank you very much.**
8 **(Whereupon, at 5:18 p.m., the Hearing was**
9 **adjourned until 9:00 a.m. the following day.)**

POST-HEARING REVISIONS

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR, CRR, CRC Court Reporter, do hereby attest that the foregoing English-speaking proceedings, after agreed-upon revisions submitted by the Parties, were revised and re-submitted to the Parties per their instructions.

I further certify that I am neither counsel for, related to, nor employed by any of the Parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

Dawn K. Larson