

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

FERNANDO PAIZ ANDRADE AND ANABELLA SCHLOESSER DE LEÓN DE PAIZ

and

REPUBLIC OF HONDURAS

ICSID Case No. ARB/23/43

DECISION ON THE BIFURCATED JURISDICTIONAL OBJECTIONS

Members of the Tribunal

Prof. Nicolas Angelet, President of the Tribunal

Mr. Stephen L. Drymer, Arbitrator

Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal

Ms. Gabriela González Giráldez

Date of dispatch to the Parties: 20 July 2026

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TABLE OF SELECTED ABBREVIATIONS AND DEFINED TERMS

ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings in effect from 1 July 2022
Assets Trust Agreement	Assets Trust Agreement between Pacific Solar, [REDACTED], DEG and FMO dated 12 January 2018
[REDACTED]	[REDACTED]
C-[#]	Claimants' Exhibit
CAFTA-DR or the Treaty	Dominican Republic-Central America-United States of America Free Trade Agreement, which went in effect on 1 March 2006 and subsequently entered into force for the Republic of Honduras on 1 April 2006 and for the Republic of Guatemala on 1 July 2006
CL-[#]	Claimants' Legal Authority
Claimants	Mr. Fernando Paiz Andrade and Ms. Anabella Schloesser de León de Paiz
Claimants' 30 April 2025 Request	Claimants' Request for the Tribunal to order measures dated 29 April 2025, received by the Centre on 30 April 2025
Claimants' Memorial	Claimants' Memorial on the Merits dated 20 September 2024
Claimants' Statement of Costs	Claimants' Statement of Costs dated 20 November 2025
CND	Honduras National Dispatch Center (in Spanish, <i>Centro Nacional de Despacho</i>)
Counter-Memorial on Jurisdiction	Claimants' Counter-Memorial on Jurisdiction dated 5 May 2025
Decision on Bifurcation or PO3	Tribunal's Procedural Order No. 3 dated 20 December 2024
DEG	German Investment and Development Corporation
Electronic Bundle	Parties' joint electronic hearing bundle of the entire case file

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ENEE	Honduran National Company of Electric Energy (in Spanish, <i>Empresa Nacional de Energía Eléctrica</i>)
FMO	Dutch Entrepreneurial Development Bank
Hearing on Jurisdiction	Hearing on Jurisdiction held in Washington, D.C. from 17 to 19 September 2025
Honduras or the Respondent	Republic of Honduras
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Loan Agreement	Common Terms Agreement between Pacific Solar, DEG and FMO dated 14 December 2017 (excerpts)
Memorial on Jurisdiction	Respondent's Memorial on Jurisdiction dated 25 February 2025
MFN	most-favoured-nation
Observations on the Request for Bifurcation	Claimants' Observations on the Request for Bifurcation dated 20 November 2024
Operations Agreement	Operations Contract between Pacific Solar and the Ministry of Natural Resources and Environment of Honduras dated 23 February 2014 (Decree No. 109-2015 dated 26 October 2015 and published in the Official Gazette on 27 November 2015)
Pacific Solar	Pacific Solar Energy, S.A. de C.V.
PO1	Tribunal's Procedural Order No. 1 dated 22 July 2024
PO2	Tribunal's Procedural Order No. 2 dated 22 July 2024
PO4	Tribunal's Procedural Order No. 4 dated 4 April 2025
PO5	Tribunal's Procedural Order No. 5 dated 28 May 2025

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Decision on Bifurcation of Additional Objections or PO6	Tribunal's Procedural Order No. 6 dated 31 July 2025
PO7	Tribunal's Procedural Order No. 7 dated 26 August 2025
PPA	Contract No. 002-2014, Power Purchase Agreement between <i>Empresa Nacional de Energía Eléctrica</i> and Pacific Solar Energy, S.A. de C.V. dated 16 January 2014
Pre-Hearing Organizational Meeting	Pre-hearing organizational meeting held by videoconference on 12 August 2025
President's 30 April 2025 Order	Order issued by the President of the Tribunal on 30 April 2025
R-[#]	Respondent's Exhibit
Rejoinder on Jurisdiction	Claimants' Rejoinder on Jurisdiction dated 4 July 2025
Reply on Jurisdiction	Respondent's Reply on Jurisdiction dated 4 June 2025
Request	Claimants' Request for Arbitration dated 24 August 2023
Request for Bifurcation	Respondent's Summary of Jurisdictional Objections and Request for Bifurcation dated 22 October 2024
Respondent's Statement of Costs	Respondent's Statement of Costs dated 20 November 2025
RL-[#]	Respondent's Legal Authority
Share Trust Agreement	Share Trust Agreement between [REDACTED], [REDACTED], DEG and FMO dated 12 January 2018
State Guarantee	Support Agreement and Guarantee of Solidarity of the State of Honduras for the fulfilment of the Contract of Supply, between <i>Empresa Nacional de Energía Eléctrica</i> and Pacific Solar Energy dated 1 October 2014
D#:P#:L# (speaker)	Revised Transcripts of the Hearing on Jurisdiction

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Tribunal	Arbitral Tribunal constituted on 13 May 2024
Trust Agreements	The Share Trust Agreement and Assets Trust Agreement
US NDP Submission	Written submission of the United States of America as a non-disputing treaty party in accordance with CAFTA-DR Article 10.20.2, dated 20 March 2025

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I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Dominican Republic-Central America-United States of America Free Trade Agreement, which went into effect on 1 March 2006 and subsequently entered into force for the Republic of Honduras on 1 April 2006 and for the Republic of Guatemala on 1 July 2006 (“**CAFTA-DR**” or the “**Treaty**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
2. The request for arbitration was submitted by Mr. Fernando Paiz Andrade (hereafter, “**Mr. Paiz**”) and Ms. Anabella Schloesser de León de Paiz (hereafter, “**Mrs. Schloesser**”), natural persons having the nationality of the Republic of Guatemala (together, the “**Claimants**”, or the “**Paizes**”).
3. The Respondent is the Republic of Honduras (“**Honduras**” or the “**Respondent**”).
4. The Claimants and the Respondent are collectively referred to as the “**Parties**.”
5. The present decision addresses the jurisdictional objections raised by the Respondent which were bifurcated in Procedural Orders No. 3 and 6. It gives an overview of the procedural history (**Section II**), and sets out the Parties’ claims and requests for relief (**Section III**) and the *dramatis personae* (**Section IV**), before addressing each objection in turn (**Sections V to IX**) as well as the costs of the proceeding (**Section X**). The decision’s *dispositif* is set out in **Section XI**.
6. The summary of the Parties’ positions in this decision does not purport to be an exhaustive narrative of all the allegations of fact or arguments made by the Parties in this proceeding. The Tribunal emphasizes that it has considered and taken into account the entirety of the Parties’ written and oral submissions, irrespective of whether or not they are expressly referred to herein.

II. PROCEDURAL HISTORY

7. On 24 August 2023, ICSID received a request for arbitration dated 24 August 2023 from the Claimants against Honduras (the “**Request**”). The Request included a request for the arbitration to be conducted under ICSID’s Expedited Arbitration Rules.

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8. On 13 September 2023, the ICSID Acting Secretary-General registered the Request in accordance with Article 36 of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Acting Secretary-General invited the Parties to proceed to constitute an arbitral tribunal without delay in accordance with Rule 7(c) of the ICSID Institution Rules.
9. By email of 25 September 2023, the Centre invited Honduras to submit its comments to the Claimants' request for the application of ICSID's Expedited Arbitration Rules. By letter dated 26 September 2023, received by the Centre on 27 September 2023, Honduras opposed the Claimants' request to apply ICSID's Expedited Arbitration Rules.
10. On 28 September 2023, ICSID took note of the Parties' lack of agreement on the application of ICSID's Expedited Arbitration Rules. The Centre also took note of the fact that, in their Request, the Claimants invoked CAFTA-DR Article 10.19.1, which establishes the number of arbitrators and method for their appointment, and that the Parties had not agreed otherwise. CAFTA-DR Article 10.19.1 provides that:

Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
11. The Centre noted that, in the Request, the Claimants appointed Mr. Stephen L. Drymer, a national of Canada, as co-arbitrator. ICSID informed the Parties that, in accordance with ICSID Arbitration Rule 19(2), it would seek Mr. Drymer's acceptance of his appointment.
12. On 6 October 2023, the Parties were informed that Mr. Drymer had accepted his appointment as arbitrator.
13. On 11 October 2023, Mr. Drymer supplemented his declaration under paragraph 4(b) of the Arbitrator Declaration.
14. On 13 November 2023, the Claimants requested the ICSID Secretary-General to appoint the Respondent's party-appointed arbitrator in accordance with CAFTA-DR Article 10.19.3.¹ On 14 November 2023, ICSID invited the Claimants to confirm by 17 November 2023 whether they

¹ CAFTA-DR, **CL-001-EN (Resubmitted)**, Article 10.19.3: "If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed."

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requested the Secretary-General to appoint all the arbitrators not yet appointed in this proceeding and reminded the Parties that, until the appointment process was completed, they retained their right to appoint any missing arbitrators in accordance with the established method of constitution of the Tribunal.

15. By letter of 17 November 2023, the Claimants reiterated their request for the ICSID Secretary-General to “appoint Respondent’s co-arbitrator, subsequently allowing the presiding arbitrator to be appointed by agreement of the disputing parties”.
16. By letter of 20 November 2023, the Respondent stated that a claim is deemed to be submitted to arbitration from the moment it is registered by ICSID, and that the 75 days referred to in CAFTA-DR Article 10.19.3 should be counted from the registration of the Request and would accordingly elapse on 27 November 2023. The Respondent stated that it was taking the required internal steps to avail of its right to constitute the Tribunal.
17. By letter of 22 November 2023, ICSID acknowledged receipt of the Claimants’ letter of 17 November 2023 and of the Respondent’s letter of 20 November 2023. ICSID referred to CAFTA-DR Article 10.16.4(a)² and recalled that the Request was received by the Secretary-General on 24 August 2023. The Parties’ were thus informed that, in light of the Claimants’ request pursuant to CAFTA-DR Article 10.19.3, the Centre would proceed to appoint all arbitrators not yet appointed and that the Secretary-General would, after consulting with the Parties as far as possible, first proceed with the appointment of the second arbitrator and, subsequently, with the appointment of the third, presiding arbitrator. The Centre reminded the Parties that, until this process was completed, they retained their right to appoint any missing arbitrators in accordance with the method of constitution of the Tribunal.
18. By letter received by the Centre on 27 November 2023, the Respondent appointed Prof. Hugo Perezcano Díaz, a national of Mexico, as co-arbitrator. On 28 November 2023, ICSID informed the Parties that, in accordance with ICSID Arbitration Rule 19(2), it would seek Prof. Perezcano Díaz’s acceptance of his appointment.

² CAFTA-DR, **CL-001-EN (Resubmitted)**, Article 10.16.4(a): “*A claim shall be deemed submitted to arbitration under this Section when the claimant’s notice of or request for arbitration (‘notice of arbitration’): (a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General*”.

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19. On 29 November 2023, Mr. Drymer notified a correction to his Statement Accompanying Declaration pursuant to paragraph 4(b) of the Arbitrator Declaration.
20. On 5 December 2023, the Parties were informed that Prof. Perezcano Díaz could not accept his appointment as arbitrator in this case.
21. By email of 7 December 2023, the Claimants reiterated their request for the Respondent to appoint a co-arbitrator and, if it failed to do so by 12 December 2023, requested that the Secretary-General appoint the Respondent's co-arbitrator. The Claimants also requested the Respondent to disclose the name of the law firm representing it in this matter.
22. On 22 December 2023, the Respondent informed that the *Procuraduría General de la República de Honduras* would be on leave from 18 December 2023 to 5 January 2024 and that the appointment of the co-arbitrator would be made thereafter. The Centre acknowledge receipt of the Respondent's communication on 23 December 2023.
23. On 12 January 2024, the Respondent informed that it would shortly provide information on the candidate to be appointed as co-arbitrator. The Centre acknowledged receipt of said communication on the same date.
24. On 26 January 2024, the Centre requested the Respondent to provide an update on the appointment of a co-arbitrator. On the same day, the Claimants submitted observations on the process for constitution of the Tribunal and the Respondent appointed Prof. Brigitte Stern, a national of France, as co-arbitrator.
25. On 29 January 2024, ICSID acknowledged receipt of the Parties' respective correspondence of 26 January 2024 and informed that, in accordance with ICSID Arbitration Rule 19(2), it would seek Prof. Stern's acceptance of her appointment.
26. On 30 January 2024, the Claimants reiterated their request for the Respondent to disclose the law firm representing it in this matter.
27. On 31 January 2024, the Centre acknowledged receipt of the Claimants' letter and invited the Respondent to make the notification provided for in ICSID Arbitration Rule 2(2), as the case may be. On the same day, the Respondent notified the Centre that Messrs. Kenneth Juan Figueroa and Andrés Felipe Esteban, of the law firm Foley Hoag LLP, would be part of its legal counsel along with the

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Procuraduría General de la República de Honduras. The Centre acknowledged receipt of the Respondent's correspondence on 1 February 2024.

28. On 2 February 2024, the Parties were informed that Prof. Stern had accepted her appointment as arbitrator.
29. On 4 and 6 May 2024, the Parties informed the Centre that they had agreed to appoint Prof. Nicolas Angelet, a national of Belgium, to serve as the President of the Tribunal.
30. On 6 May 2024, ICSID acknowledged receipt of the Parties' correspondence of 4 and 6 May 2024 and informed that it would seek Prof. Angelet's acceptance of his appointment in accordance with ICSID Arbitration Rule 19(2).
31. On 13 May 2024, in accordance with ICSID Arbitration Rule 21(1), the ICSID Acting Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was, therefore, deemed to have been constituted on that date. Ms. Gabriela González Giráldez, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
32. On 28 May 2024, Prof. Angelet notified a disclosure to the Parties.
33. The drafts of Procedural Orders Nos. 1 and 2 were circulated to the Parties by the Secretary of the Tribunal on 31 May 2024; and the Parties' comments were received on 24 June 2024.
34. On 1 July 2024, the Centre informed the Parties that, having been appointed ICSID Secretary-General, Ms. Martina Polasek would continue to recuse herself from any involvement, management, or oversight of the present case, and that all communications in the present case shall be addressed to the ICSID counsel in charge and, when necessary, to Mr. Gonzalo Flores, ICSID Deputy Secretary-General, without copying Ms. Polasek pursuant to the Conflict of Interest Protocol communicated to the Parties.
35. In accordance with ICSID Arbitration Rule 29(1), the Tribunal held the first session with the Parties on 2 July 2024 by videoconference.
36. On 3 July 2024, the Respondent, following up on the President of the Tribunal's request during the first session, provided the Transparency and Access to Information Law and Regulations of Honduras. On 4 July 2024, the Tribunal acknowledged receipt of the Respondent's communication

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and noted the Claimants' observations during the first session regarding the relevance of this legislation. The Tribunal informed the Parties that it was sufficiently informed on said matter.

37. Following the first session and exchanges with the Parties, on 22 July 2024, the Tribunal issued Procedural Order No. 1 ("**PO1**") recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed procedural issues. PO1 provides, *inter alia*, that the applicable ICSID Arbitration Rules are those in effect from 1 July 2022 except to the extent modified and/or supplemented by the CAFTA-DR, that the procedural languages are English and Spanish, and that the place of proceeding is Washington, D.C. Moreover, PO1 sets out three procedural calendars covering scenarios where jurisdictional objections were raised, and a scenario where no request for bifurcation was filed.
38. Procedural Order No. 2 on transparency and confidentiality was also issued on 22 July 2024 ("**PO2**").
39. In accordance with the procedural calendar in PO1, on 20 September 2024, the Claimants submitted a Memorial on the Merits, together with the witness statements of Messrs. Fernando Paiz Andrade and [REDACTED]; the expert report of Mr. Miguel A. Nakhle, of Compass Lexecon, with exhibits MN-001 to MN-074; exhibits C-0043 to C-0239; legal authorities CL-0001 (resubmitted), and CL-0007 to CL-0149; and consolidated indices of exhibits and legal authorities (the "**Claimants' Memorial**").
40. On 22 October 2024, the Respondent filed a Summary of Jurisdictional Objections and Request for Bifurcation, accompanied by exhibits R-0001 to R-0007, and legal authorities RL-0001 to RL-0053 (the "**Request for Bifurcation**").
41. On 19 November 2024, the Claimants submitted a request for non-disclosure of protected information contained in the Notice of Intent, the Notice of Arbitration, and the Claimants' Memorial under CAFTA-DR Article 10.21.
42. On 20 November 2024, the Claimants filed their Observations on the Request for Bifurcation, together with exhibits C-0240 to C-0255, and legal authorities CL-0150 to CL-0200 (the "**Observations on the Request for Bifurcation**").
43. Following the Tribunal's invitation, on 3 December 2024, the Respondent filed observations on the Claimants' non-disclosure request of 19 November 2024. The following day, the Respondent re-submitted its letter, amending some clerical errors.

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44. On 10 December 2024, the Claimants filed their opposition to the Respondent's objections to the non-disclosure request.
45. On 13 and 16 December 2024, the Parties informed that they had agreed to extend the term for seeking agreement over the Claimants' non-disclosure request until 26 December 2024.
46. The Tribunal's Decision on Bifurcation was issued as Procedural Order No. 3 on 20 December 2024 (the "**Decision on Bifurcation**" or "**PO3**"), deciding as follows:

(A) The Respondent's Request for Bifurcation is granted with respect to Preliminary Objections 1 [exhaustion of local remedies], 2 [prior consultation and negotiation], 4 [MFN] and 5 [the existence of an Investment Agreement].

(B) The Respondent's Request for Bifurcation is denied with respect to Preliminary Objection 3 [the alleged premature nature of the expropriation claim].

(C) The arbitration is to proceed in accordance with the schedule for bifurcated proceeding set out in Procedural Calendar No. 2 at Annex B of PO1, unless subsequently modified by the Tribunal.

(D) The Respondent is requested to address any additional jurisdictional objections in its memorial in the bifurcated proceeding.

(E) The issue of costs is reserved for a later stage of the proceeding.

47. On 26 December 2024, the Parties informed the Tribunal that they had agreed on certain redactions to the Notice of Intent, the Notice of Arbitration, the Claimants' Memorial, and the Request for Bifurcation. The Parties further filed a Transparency Schedule in accordance with Annex A to PO2 in relation to the redactions that remained in dispute.
48. On 13 January 2025, the Respondent requested an extension to submit its Memorial on Jurisdictional Objections. Upon the Tribunal's invitation, on 16 January 2025, the Claimants commented on the Respondent's extension request.
49. On 20 January 2025, the Tribunal granted a one-week extension for the Respondent to file its Memorial on Jurisdictional Objections and, on 27 January 2025, an amended procedural calendar was transmitted to the Parties. Additionally, the Tribunal invited the Parties to communicate their availability to hold a pre-hearing organizational meeting between 10-18 July 2025.

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50. On 10 February 2025, having considered the Parties' availability, the Parties were informed that a pre-hearing organizational meeting would be held on 16 July 2025 by videoconference. An amended procedural calendar was also transmitted to the Parties.
51. On 13 February 2025, the Tribunal issued its decision on the Claimants' request for non-disclosure of protected information contained in the Notice of Intent, the Notice of Arbitration, the Claimants' Memorial and Request for Bifurcation. By letter of the same date, the Tribunal asked the Parties to provide redacted versions of said documents reflecting the Parties' agreed redactions as well as the Tribunal's decision for purposes of publication on the ICSID website.
52. On 26 February 2025, the Respondent filed a Memorial on Jurisdictional Objections, together with exhibits R-0008 to R-0068, legal authorities RL-0054 to RL-0111, and consolidated indices of exhibits and legal authorities (the "**Memorial on Jurisdiction**").
53. By letter of 10 March 2025, the Claimants asserted the Respondent had filed new objections with its Memorial on Jurisdiction and requested that "the Tribunal order that if Respondent wishes to address these new objections during the bifurcated phase of the proceeding, it must first establish that these preliminary objections warrant bifurcation".
54. On 13 March 2025, the Tribunal invited the Respondent to respond to the Claimants' letter by 14 March 2025.
55. By letter of 14 March 2025, the Respondent requested that "the Tribunal reject Claimants' request and confirm that all jurisdictional objections presented in Honduras' Memorial on Jurisdictional Objections will be considered in the bifurcated phase of these proceedings." Upon receipt of the Respondent's letter, the Claimants sought leave from the Tribunal to respond. The Tribunal granted the Claimants leave to respond and, on 17 March 2025, the Claimants filed further observations.
56. On 19 March 2025, the Respondent requested leave to file a brief response to the Claimants' letter. On the same day, the Tribunal granted the Respondent leave to respond to the Claimants' letter by 20 March 2025. The Claimants were also invited to file a reply by 21 March 2025.
57. On 20 March 2025, the United States of America filed a written submission as a non-disputing treaty party in accordance with CAFTA-DR Article 10.20.2 ("**US NDP Submission**").

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58. On the same date, the Respondent filed a response to the Claimants' letter of 17 March 2025. The Claimants filed their reply on 21 March 2025.

59. On 24 March 2025, the Tribunal decided as follows:

Upon careful analysis of the Parties' arguments, the Tribunal requests the Parties to address the additional objections and whether they should, in whole or in part, be bifurcated or joined to the merits, in their respective submissions pursuant to the calendar in Annex B to PO1, as amended per the Tribunal's decision of 20 January 2025.

The Tribunal will then decide whether the additional objections should, in whole or in part, be bifurcated within 30 days from the Rejoinder on Jurisdiction, more than a month ahead of the Hearing on Jurisdiction.

In the interest of procedural efficiency, the Parties are invited to proceed as follows, without prejudice to their right to submit further arguments:

- With respect to the additional objection on the limitation period:

(i) Address the objection based on the assumption that the facts alleged by the Claimants indeed qualify as violations of the Treaty.

(ii) Discuss whether and if so, how, the limitation period applies:

a. To continuous acts.

b. To composite acts.

- With respect to the additional objection on whether the Claimants' claims are purely contractual claims over which the Tribunal has no jurisdiction:

(i) Focus on the legal question whether, and if so, under what conditions, the Tribunal has jurisdiction over purely contractual claims.

- With respect to the additional objection regarding the Claimants' ownership of the Investment, the Tribunal has no further requests at this stage.

60. The Tribunal indicated that a reasoned decision on this issue would follow.

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61. On 4 April 2025, the Tribunal issued Procedural Order No. 4 (“**PO4**”), the reasoned decision addressing the additional issues of bifurcation. The Tribunal decided as follows:

(A) The Parties are requested to address the Additional Objections and whether they should, in whole or in part, be bifurcated or joined to the merits, in their respective submissions pursuant to the calendar in Annex B to PO1, as amended per the Tribunal’s decision of 20 January 2025.

The Tribunal will decide whether the Additional Objections should, in whole or in part, be bifurcated within 30 days after the Rejoinder on Jurisdictional Objections.

(B) Without prejudice to their right to present any additional argument, the Parties are requested to:

1) With respect to Additional Objection No.1 on the Treaty’s limitation period:

a. Address the Objection based on the assumption that the facts alleged by the Claimants qualify as violations of the Treaty.

b. Discuss whether and if so, how, the limitation period applies (i) to continuous acts and (ii) to composite acts.

2) With respect to Additional Objection No. 2 on the Claimants’ ownership and control over the investment:

a. Discuss whether the Claimants had or have ownership and/or control over the investment through the chain of corporations notably referred to in paragraph 167 of the Claimants’ Memorial by reference to Exhibit C-27, for the purpose of determining the Tribunal’s jurisdiction.

b. Discuss the potential impact of the agreement between Pacific Solar and Banco Davi[v]ienda on such ownership and/or control and on the Tribunal’s jurisdiction.

c. Discuss whether, on the assumption that, as the Claimants allege, Pacific Solar was forced by the Respondent’s behaviour to transfer its rights to Banco Davi[v]ienda, this transfer should be disregarded for purposes of establishing the Claimants’ ownership and control over the investment as a condition to the Tribunal’s jurisdiction.

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3) With respect to Additional Objection No. 3 on the alleged purely contractual nature of the Claimants' claims and the lack of jurisdiction of the Tribunal over such claims: a. Focus on the legal question whether, and if so, under what conditions, the Tribunal has jurisdiction over purely contractual claims.

62. On 21 April 2025, the Parties informed the Tribunal that they had agreed on certain redactions to the Observations and the Memorial on Jurisdiction, and filed a Transparency Schedule in accordance with Annex A to PO2 in relation to the redactions that remained in dispute.

63. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

64. [REDACTED]

65. [REDACTED]

66. [REDACTED]

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67. On 5 May 2025, the Tribunal requested an update on the outstanding redacted versions of the Notice of Intent, the Notice of Arbitration, the Claimants' Memorial, and the Request for Bifurcation for publication. The Tribunal also notified its decision on the Claimants' requests for non-disclosure of protected information in the Observations and Memorial on Jurisdiction.
68. On 6 May 2025, the Claimants filed a Counter-Memorial on Jurisdictional Objections, together with the second witness statement of Mr. Fernando Paiz Andrade, exhibits C-0248 (resubmitted) and C-0256 to C-0300, legal authorities CL-0001 (resubmitted), CL-0183 (resubmitted), and CL-0201 to CL-0308, and consolidated indices of exhibits and legal authorities (the "**Counter-Memorial on Jurisdiction**").
69. [REDACTED]
70. [REDACTED]
71. [REDACTED]
72. On 19 May 2025, the Claimants provided redacted versions of the Notice of Intent, the Notice of Arbitration, the Claimants' Memorial, the Observations and the Memorial on Jurisdiction. On 20 May 2025, the Respondent confirmed its agreement with the documents submitted by the Claimants for purposes of publication.
73. On 22 May 2025, ICSID requested the Parties to provide the above-mentioned redacted documents in the exact form in which they should be published on the ICSID website and to confirm whether the Request for Bifurcation should be published in full, without redactions.
74. [REDACTED]
75. On 29 May 2025, upon confirmation from the Parties, ICSID informed the Parties that it would proceed to publish the redacted versions of the Notice of Intent, the Notice of Arbitration, the

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Claimants' Memorial, the Observations and the Memorial on Jurisdiction, as well as a full, unredacted version of the Request for Bifurcation on ICSID's website.

76. On 5 June 2025, the Respondent filed a Reply on Jurisdictional Objections, together with exhibits R-0069 to R-0085, legal authorities RL-0112 to RL-0195, and consolidated indices of the exhibits and legal authorities (the "**Reply on Jurisdiction**").
77. On 9 June 2025, the Parties were invited to confirm their availability to hold the pre-hearing organizational meeting on 12 August 2025. The Parties subsequently confirmed their availability.
78. On 3 July 2025, the Claimants submitted a request for non-disclosure of protected information in the Counter-Memorial on Jurisdiction under CAFTA-DR Article 10.21.
79. On 4 July 2025, the Claimants filed a Rejoinder on Jurisdictional Objections, together with exhibits C-0268 and C-0301 to C-0364, legal authorities CL-0309 to CL-0356, and consolidated indices of exhibits and legal authorities (the "**Rejoinder on Jurisdiction**").
80. On 8 July 2025, in accordance with paragraph 13.4 of PO1, the Tribunal requested the Parties to jointly prepare an electronic hearing bundle of the entire case file (the "**Electronic Bundle**").
81. On 9 July 2025, the Tribunal requested the Parties to confirm their availability for the pre-hearing organizational meeting scheduled for 12 August 2025 at 11:00 AM (Washington D.C. time). The Tribunal also (i) circulated a draft procedural order on the organization of the hearing on jurisdiction, (ii) requested the Parties to submit a joint daily agenda for the hearing, and (iii) requested the Parties to notify the witnesses and experts to be examined at the hearing by 18 July 2025.
82. By letter of 10 July 2025, the non-disputing CAFTA-DR parties were invited to confirm by 8 August 2025 whether they intended to (i) attend the hearing on jurisdiction in person, and (ii) make oral submissions pursuant to CAFTA-DR Article 10.20.2. The Centre also advised that, pursuant to CAFTA-DR Article 10.21.2, the hearing would be open to the public, except for those parts involving protected information, through a video livestream to be made available on ICSID's website.
83. On 14 and 15 July 2025, the Parties confirmed their availability to participate in the pre-hearing organizational meeting on 12 August 2025 at 11:00 AM (Washington D.C. time).

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84. The Parties requested and were granted extensions to file the Electronic Bundle and to postpone the notification of witnesses and experts to be examined at the hearing on jurisdiction until two days after the issuance of the decision on bifurcation of the additional jurisdictional objections.
85. On 31 July 2025, the Tribunal issued Procedural Order No. 6 (“**Decision on Bifurcation of Additional Objections**” or “**PO6**”) concerning the bifurcation of the additional objections. The Tribunal decided as follows:
- (A) Additional Objection 1 on the Treaty’s limitation period shall not be bifurcated.*
- (B) Additional Objection 2 on the Claimants’ ownership of and control over the Investment shall be bifurcated.*
- (C) Additional Objection 3 on the alleged purely contractual nature of the Claimants’ claims shall not be bifurcated.*
- (D) The issue of costs is reserved for a later stage of the proceeding.*
86. On 1 August 2025, the Parties submitted their joint proposals to the draft procedural order on the organization of the hearing on jurisdiction.
87. On 4 August 2025, the Respondent notified its intention to call Messrs. Fernando Paiz Andrade and [REDACTED] for cross-examination at the hearing on jurisdiction.
88. On the same day, the Claimants submitted a request for non-disclosure of protected information in the Reply on Jurisdiction and PO4 under CAFTA-DR Article 10.21.
89. On 5 August 2025, the Parties submitted their joint Electronic Bundle and informed that they had not yet agreed on confidentiality designations for exhibits in the bundle.
90. On 8 August 2025, the United States of America informed the Centre that they accepted the invitation to attend the hearing in person but did not intend to make an oral submission at the hearing at this time.
91. On 12 August 2025, a pre-hearing organizational meeting was held by videoconference (the “**Pre-Hearing Organizational Meeting**”).

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92. On 13 August 2025, the non-disputing CAFTA-DR parties were informed that, further to the United States of America's communication of 8 August 2025, the Tribunal decided to reserve a 15-minute time slot on 17 September 2025 for a possible oral submission by the United States of America at the hearing on jurisdiction, thereby allowing it to decide until after the Tribunal's questions, at the latest, whether it wished to use the allocated time slot.
93. On 21 August 2025, the Claimants requested the Tribunal designate supporting documents included in the Electronic Bundle as "confidential" for use at the hearing on jurisdiction.
94. On 25 August 2025, the Tribunal invited the Respondent to comment on the Claimants' request. On the same day, the Respondent stated that it was not in a position to respond to the Claimants' request and requested that the Claimants update their confidentiality requests.
95. On 26 August 2025, the Tribunal invited the Claimants to provide reasons for the designation of each of the documents as confidential by 29 August 2025 and the Respondent to comment thereon by 5 September 2025.
96. On 26 August 2025, the Tribunal issued Procedural Order No. 7 ("**PO7**") concerning the organization of the hearing on jurisdiction.
97. On 29 August 2025, the Claimants filed an update to their request of 21 August 2025. The Claimants also submitted a request for non-disclosure of protected information, namely the President's 30 April 2025 Order, under CAFTA-DR Article 10.21.
98. On 2 September 2025, the Tribunal invited the Parties to provide an update regarding the publication of PO4, the Counter-Memorial on Jurisdiction, and the Reply on Jurisdiction by 5 September 2025. It reminded the Respondent that it may raise objections to the Claimants' request of non-disclosure of protected information in the President's 30 April 2025 Order by 12 September 2025.
99. On 5 September 2025, the Parties confirmed their agreement with respect to the non-disclosure of protected information and submitted redacted versions of PO4, the Counter-Memorial on Jurisdiction, and the Reply on Jurisdiction for purposes of publication.
100. On 6 September 2025, the Respondent filed a response to the Claimants' requests for confidentiality designations of 21 August 2025 as updated on 29 August 2025.

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101. On 9 September 2025, the Tribunal confirmed receipt of the Parties' redacted versions of PO4, the Counter-Memorial on Jurisdiction, and the Reply on Jurisdiction for publication. The Tribunal invited the Parties to confirm by 10 September 2025 whether they requested the non-disclosure of protected information in the Rejoinder on Jurisdiction. On 10 September 2025, the Claimants submitted a non-disclosure request of protected information in the Rejoinder on Jurisdiction under CAFTA-DR Article 10.21.
102. On 11 September 2025, the Tribunal issued a decision concerning the confidentiality designations of certain exhibits in the Electronic Bundle. The Parties were invited to implement the Tribunal's decisions and to provide an updated version of the Electronic Bundle by 12 September 2025. On the same date, the Parties agreed that the President's 30 April 2025 Order shall not be published.
103. On 12 September 2025, the Respondent informed that Mr. Manuel Díaz Galeas, Attorney General of Honduras, would not be able to attend the hearing in person due to professional commitments that required his presence in Honduras. The Respondent therefore requested leave for the Attorney General to participate virtually during the hearing. The Tribunal invited the Claimants to comment on this request by 15 September 2025.
104. Also on 12 September 2025, the Parties submitted the updated Electronic Bundle, including confidentiality designations.
105. On 15 September 2025, the Claimants confirmed that they did not object to Mr. Díaz's portion of Respondent's opening statements being conducted virtually.
106. On 16 September 2025, the Centre confirmed that it had enabled a connection via Zoom for the Attorney General of Honduras to deliver a presentation remotely during the hearing on jurisdiction.
107. A Hearing on Jurisdiction was held in Washington, D.C. from 17 to 19 September 2025 (the "**Hearing on Jurisdiction**"). The following persons were present at the Hearing:

Tribunal:

Prof. Nicolas Angelet
Mr. Stephen L. Drymer
Prof. Brigitte Stern

President
Arbitrator
Arbitrator

ICSID Secretariat:

Ms. Gabriela González Giráldez
Ms. Ivania Fernandez

Secretary of the Tribunal
Senior Paralegal

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For the Claimants:

Ms. Silvia M. Marchili	White & Case LLP
Ms. Estefanía San Juan	White & Case LLP
Ms. Andrea Menaker	White & Case LLP
Ms. Efat Elsherif	White & Case LLP
Mr. Mauricio Mourglia	White & Case LLP
Mr. Jacob Bachmaier	White & Case LLP

Witnesses:

Mr. Fernando Paiz Andrade	Pacific Solar S.A. de C.V.
Mr. [REDACTED]	Pacific Solar S.A. de C.V.

For the Respondent:

Mr. Manuel A. Díaz Galeas ³	Procuraduría General de la República
Mr. Marcio A. Canaca Curry	Procuraduría General de la República
Mr. Nelson Gerardo Molina Flores ⁴	Procuraduría General de la República
Ms. María Daniella Rueda Cárcamo	Procuraduría General de la República
Mr. Olvin Antonio Mejía Cambar ⁵	Procuraduría General de la República
Mr. Kenneth Figueroa	Foley Hoag LLP
Mr. Andrés Felipe Esteban Tovar	Foley Hoag LLP
Mr. Lucas Solimano	Foley Hoag LLP
Mr. Luis Brugal	Foley Hoag LLP
Ms. Mariana Reyes Múnera	Foley Hoag LLP
Mr. Luis C. Battista	Foley Hoag LLP
Ms. Irene Sorto	Foley Hoag LLP
Ms. Marcela Muñoz	Foley Hoag LLP
Mr. Norman V. Rodríguez Paz	Empresa Nacional de Energía Eléctrica
Mr. Andy J. Rivera Zepeda	Empresa Nacional de Energía Eléctrica
<i>Technical Support:</i>	
Mr. Kevin High	Foley Hoag LLP

Court Reporters:

Ms. Virginia Masce	Spanish Court Reporter – DR Esteno
Mr. Leandro Iezzi	Spanish Court Reporter – DR Esteno
Ms. Dawn Larson	English Court Reporter

Interpreters:

Ms. Claudia Bishopp	English/Spanish Interpreter
Ms. Elena Howard	English/Spanish Interpreter
Mr. Daniel Giglio	English/Spanish Interpreter

³ Participating remotely through Zoom.

⁴ Participating remotely through Zoom.

⁵ Participating remotely through Zoom.

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108. During the Hearing on Jurisdiction, the following persons were examined:

On behalf of the Claimants:

Mr. Fernando Paiz Andrade

Pacific Solar S.A. de C.V.

Mr. [REDACTED]

Pacific Solar S.A. de C.V.

109. The Hearing on Jurisdiction was open to the public, except for those parts involving protected information, through a video livestream of the proceeding available on ICSID's website.

110. On 22 September 2025, ICSID circulated a consolidated list of demonstratives used by the Parties during the Hearing on Jurisdiction.

111. On 23 September 2025, the Claimants submitted a request for non-disclosure of protected information, namely PO5, under CAFTA-DR Article 10.21.

112. On 25 September 2025, the Tribunal invited the Parties to agree on any corrections to the transcripts of the Hearing on Jurisdiction by 22 October 2025 and on a deadline for the simultaneous submission of their respective statements of costs thus far in the proceeding.

113. On 8 October 2025, the Parties confirmed their agreement with respect to the non-disclosure of protected information in the Rejoinder on Jurisdiction for purposes of publication.

114. On 22 October 2025, the Respondent informed that it did not oppose the Claimants' request regarding the non-publication of PO5.

115. On the same day, the Parties submitted their agreed corrections to the transcripts of the Hearing on Jurisdiction.

116. By letter of 30 October 2025, the Centre informed that, from 1 November 2025 and until a new Deputy Secretary-General was in place, the function of ICSID Acting Secretary-General in cases under the Conflict of Interest Protocol would be delegated, in accordance with the ICSID Convention, Rules and Regulations, to Ms. Natali Sequeira, ICSID Team Leader and Senior Counsel.

117. On 6 November 2025, the Tribunal submitted additional corrections to the English transcripts of the Hearing on Jurisdiction. On 7 November 2025, the Parties confirmed their agreement with the Tribunal's corrections.

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118. On 19 November 2025, the final revised transcripts of the Hearing on Jurisdiction were communicated to the Parties.
119. The Parties filed simultaneous submissions on costs on 20 November 2025. The Respondent's submission was accompanied by legal authorities RL-0196 to RL-0201. The Respondent also submitted English translations of the following documents: R-0014-EN (Resubmitted), R-0069-EN (Resubmitted), C-0001-EN (Respondent's resubmission), C-0061-EN (Respondent's resubmission), C-0266-EN (Respondent's resubmission), C-0267-EN (Respondent's resubmission), C-0305-EN (Respondent's resubmission), and C-0306-EN (Respondent's resubmission).
120. On 25 November 2025, the Claimants submitted a request for non-disclosure of protected information in PO6 under CAFTA-DR Article 10.21.
121. On the same date, the Claimants asserted that the Respondent's submission on costs was inappropriate in both scope and nature and exceeded the Tribunal's instruction for the Parties to submit a "statement of costs" under ICSID Arbitration Rule 51, and requested that the Tribunal strike the out-of-scope sections from the record. Alternatively, the Claimants requested leave to address and rebut the Respondent's extemporaneous allegations. The Tribunal invited the Respondent to comment on the Claimants' request by 2 December 2025.
122. On 2 December 2025, the Respondent filed its response to the Claimants' request.
123. On 10 December 2025, the Parties confirmed their agreement with respect to the non-disclosure of protected information in PO6 for purposes of publication.
124. Upon the Tribunal's invitation, on 10 December 2025 the Claimants filed comments on the Respondent's submission on costs. On 13 December 2025, the Respondent filed a response to the Claimants' comments.
125. On 22 December 2025, the Claimants submitted a request for non-disclosure of protected information in PO7 under CAFTA-DR Article 10.21.
126. On 23 December 2025, the Tribunal informed the Parties that it expected to issue its ruling during the first quarter of 2026.

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127. On 7 January 2026, the Parties confirmed their agreement with respect to the non-disclosure of protected information in PO7 for purposes of publication.
128. On 16 January 2026, the Claimants submitted a request for non-disclosure of protected information contained in the transcripts of the Hearing on Jurisdiction under CAFTA-DR Article 10.21. On 3 February 2026, the Parties confirmed their agreement with respect to the non-disclosure of protected information in the transcripts of the Hearing on Jurisdiction for purposes of publication.
129. On 9 February 2026, the Centre acknowledged receipt of the Respondent's notification of appointment of new authorities at the *Procuraduría General de la República de Honduras* and updated the list of representatives accordingly.
130. On 30 March 2026, the Tribunal informed the Parties it continued to draft its ruling and anticipated issuing it by 30 June 2026.
131. By letter of 13 April 2026, the Centre informed the Parties that, following her election as Deputy Secretary-General by the ICSID Administrative Council, Ms. Gabriela Álvarez Ávila assumed office as of 6 April 2026 and had been designated as Acting Secretary-General in this case.
132. On 7 May 2026, Prof. Angelet notified a message to the Parties in the spirit of ICSID Arbitration Rule 19(6).
133. On 29 June 2026, the Tribunal informed the Parties it was in the process of finalizing its ruling and expected to issue it during July 2026.

III. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

134. At paragraph 414 of their Memorial, the Claimants request an award:

(a) declaring that Honduras has breached its obligations under the Treaty, including its obligations:

(i) under Article 10.7 not to expropriate Claimants' investment except if made for a public purpose, in no case discriminatory, on payment of prompt, adequate and effective compensation, and in accordance with due process;

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(ii) under Article 10.5 to accord Claimants and their Enterprise the Minimum Standard of Treatment, including fair and equitable treatment; and

(iii) imported through the most-favored nation treatment clause under Article 10.4 of the Treaty, to observe obligations it entered into with regard to investments;

(b) declaring that the Agreements are investment agreements as defined by the CAFTA-DR and that Honduras has violated its obligations under the Agreements;

(c) ordering the Republic of Honduras to:

(i) pay compensation for the losses arising from Honduras's breaches of the Treaty and the Agreements in accordance with Section V above;

(ii) refrain from aggravating the dispute;

(iii) pay pre- and post-Award interest on any damages awarded in this Arbitration at a rate to be established during its course; and

(iv) pay all the costs of this Arbitration, including without limitation, Claimants' legal costs, expert fees, and in-house costs, the fees and expenses of the Tribunal, and ICSID's costs.

(d) grant[ing] any other relief that the Tribunal may deem just and proper.⁶

135. At paragraph 311 of their Rejoinder on Jurisdiction, the Claimants request a decision:

(a) Rejecting Respondent's bifurcated objections;

(b) Denying Respondent's request to bifurcate the limitations period, contract claims, and ownership objections, or if bifurcation is granted, dismissing all objections during the bifurcated phase;

(c) Finding that Respondent has withdrawn the objection with respect to Ms. Paiz's notice, and it should be precluded from subsequently raising it;

⁶ Claimants' Memorial, ¶ 414.

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(d) Ordering Respondent pursuant to ICSID Arbitration Rule 52 to pay all the costs associated with the bifurcated phase, including without limitation, Claimants' legal costs, expert fees, and in-house costs, the fees and expenses of the Tribunal, and ICSID's costs, with interest running as of the date of the decision at a rate to be established in due course; and

(e) grant[ing] any other relief that the Tribunal may deem just and proper.⁷

136. At paragraph 622 of its Reply on Jurisdiction, the Respondent requests the Tribunal to render an award in which it:

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

2. Orders the bifurcation of the Additional Objections to address or decide all or any of the additional objections as a preliminary matter;

3. Orders Claimants to pay all costs associated with this arbitration, including costs and professional fees incurred by the Republic of Honduras, the Tribunal, and ICSID, with interest.⁸

IV. DRAMATIS PERSONAE

137. The main protagonists of the case may be briefly presented as follows.

138. As already mentioned, Mr. Paiz and his spouse, Ms. Schloesser, are individuals of Guatemalan nationality.

139. The Paizes allege to have invested in Honduras through a chain of corporations registered in various countries of the American continent.⁹

140. The last company in the chain outside Honduras is [REDACTED] (hereafter, "[REDACTED]"), registered in the Bahamas. The Paizes assert that, at the time of their alleged investment in Honduras, they together owned 100% of the shares in [REDACTED].

⁷ Rejoinder on Jurisdiction, ¶ 311.

⁸ Reply on Jurisdiction, ¶ 622.

⁹ Ownership Structure Pacific Solar Energy S.A. de C.V., C-027.

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141. The Paizes assert that, through [REDACTED], they have invested in Pacific Solar, registered in Honduras. More specifically, they aver that, at the time of investment, 99.99% of the shares in Pacific Solar were held by [REDACTED], and 0.01% by Mr. Paiz.¹⁰
142. The Claimants assert that Mr. [REDACTED] has been Pacific Solar's Project Manager since early 2015.¹¹
143. The Paizes' alleged investment was notably financed through loans from two European public development banks, the German Investment and Development Corporation ("DEG") and the Dutch Entrepreneurial Development Bank ("FMO").¹² DEG and FMO are also identified below as the "lenders".
144. As will be further addressed below, at some point in time, shares of [REDACTED] and assets of Pacific Solar were placed in trust, with the Honduran ba [REDACTED] as trustee. With respect to these agreements, [REDACTED] and Pacific Solar are also identified as the "settlers".
145. The *Empresa Nacional de Energía Eléctrica* ("ENEE") is the Honduran National Company of Electric Energy.
146. The Tribunal shall now address in turn each of the Respondent's bifurcated objections.

V. THE EXHAUSTION OF LOCAL REMEDIES

147. The Respondent's objection concerns the alleged requirement of exhaustion of local remedies. As set out hereinafter, this objection is dismissed because Honduras waived this requirement when becoming a State Party to the CAFTA-DR.

A. THE PARTIES' POSITIONS

148. The Parties' respective positions are, in substance, as follows.

¹⁰ Ownership Structure Pacific Solar Energy S.A. de C.V., **C-027**; Claimants' Opening Presentation, slide 59.

¹¹ Rejoinder on Jurisdiction, ¶ 306.

¹² Claimants' Memorial, ¶ 11.

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(1) The Respondent's Position

149. The Respondent objects to the jurisdiction of the Tribunal on the basis that the Claimants failed to exhaust local remedies, *i.e.*, that they failed to respect what will be referred to hereafter as the “exhaustion requirement”, which the Respondent deems applicable in the present instance. The Respondent argues, in substance, as follows:
150. *First*, Honduras conditioned its consent to ICSID arbitration on the exhaustion of local remedies under Article 26 of the ICSID Convention through the declaration contained in Honduran Legislative Decree No. 41-88 ratifying the ICSID Convention.¹³
151. *Second*, Article 26 of the ICSID Convention does not require the exhaustion requirement to be contained in a single, indivisible instrument of consent.¹⁴
152. *Third*, the exhaustion requirement is also compatible with the CAFTA-DR. The requirement in CAFTA-DR Article 10.18.2 that investors waive the right to any other means of redress when initiating treaty arbitration is concerned with parallel proceedings, whereas the fork-in-the-road clause in CAFTA-DR Article 10.18.4 is limited to local proceedings alleging breaches of international law obligations as opposed to a violation of local law.¹⁵
153. Yet, the Claimants have failed to exhaust local remedies for the alleged violations.¹⁶

(2) The Claimants' Position

154. The Claimants dispute the Respondent's objection for, in substance, the following reasons:
155. *First*, Honduras did not validly condition its consent to ICSID arbitration on the exhaustion of local remedies. Legislative Decree No. 41-88 merely expresses Honduras's future intent to require the exhaustion of local remedies when consenting to arbitration and, pursuant to Article 26 of the ICSID Convention, an exhaustion requirement can only be enunciated at the time of consenting to arbitration.¹⁷

¹³ Memorial on Jurisdiction, ¶ 78; Reply on Jurisdiction, ¶¶ 73 ff.

¹⁴ Memorial on Jurisdiction, ¶¶ 94 ff.; Reply on Jurisdiction, ¶¶ 57 ff.

¹⁵ Reply on Jurisdiction, ¶¶ 84 ff.

¹⁶ Memorial on Jurisdiction, ¶¶ 89 ff.

¹⁷ Counter-Memorial on Jurisdiction, ¶¶ 17 ff.; Rejoinder on Jurisdiction, ¶¶ 20 ff., and 28 ff.

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156. *Second*, an exhaustion requirement is fundamentally incompatible with Honduras’s consent to arbitrate under the CAFTA-DR. Article 10.18.2 provides that investors bringing an arbitration claim must waive their rights to initiate or continue local remedies seeking redress with respect to measures alleged to be a breach of the Treaty, and Article 10.18.4 prohibits investors or their enterprises from claiming for breach of an investment agreement where such a claim has been previously submitted before domestic courts or administrative tribunals. Both provisions are incompatible with an exhaustion requirement.¹⁸
157. *Third*, Honduras should be estopped from relying on the declaration. Honduras, the Claimants argue, “buried” the exhaustion of local remedies language within the text of the ICSID Convention, the entirety of which was reproduced in the Legislative Decree “almost giving the false impression that the Declaration was part of the treaty being ratified”;¹⁹ failed to publish the Legislative Decree online; and did not alert ICSID to this alleged “condition” to its consent.²⁰ Neither did Honduras raise this objection in earlier arbitrations.²¹
158. In any event, exhausting local remedies is not required because it would be futile.²²

B. THE TRIBUNAL’S ANALYSIS

159. As set out hereafter, the Tribunal finds that the declaration is a valid expression of Honduras’s firm intent to submit ICSID arbitration to the exhaustion of local remedies. However, irrespectively of whether the declaration has been validly notified, the exhaustion requirement in the declaration is superseded by the CAFTA-DR.

(1) The intrinsic legal value of the declaration

160. The Parties disagree, first, on the intrinsic legal value of Honduras’s declaration.

a. The legal value of the instrument

161. The Respondent argues that the term “declaration” does not preclude the text from producing legally binding effects. To consider the declaration merely as a prospective statement anticipating an

¹⁸ Counter-Memorial on Jurisdiction, ¶¶ 34 ff.; Rejoinder on Jurisdiction, ¶¶ 52 ff.

¹⁹ Counter-Memorial on Jurisdiction, ¶ 28.

²⁰ Counter-Memorial on Jurisdiction, ¶¶ 5, 15, 45.

²¹ Counter-Memorial on Jurisdiction, ¶¶ 43 ff.; Rejoinder on Jurisdiction, ¶¶ 22 ff., 36 ff., 67 ff.

²² Counter-Memorial on Jurisdiction, ¶¶ 53 ff.; Rejoinder on Jurisdiction, ¶¶ 72 ff.

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eventual conditioning of Honduras's consent contradicts the clear and manifest meaning of the Decree, and is also contrary to the principle of effectiveness "since it would deprive that provision and the second part of Article 26 of the ICSID Convention of any practical effect".²³ The Claimants argue that, as stated in the UN Glossary of terms relating to treaty actions, the term "declaration" refers to a non-binding statement of intent as opposed to a statement aimed at producing legally binding effects.²⁴

162. The Tribunal finds that the use of the term "declaration" to describe an instrument does not on its own prevent the instrument from producing legally binding effects. This already follows from VCLT Article 2(1)(a), which was referred to by the Claimants in another context,²⁵ and which provides that, for the purposes of the Convention, "treaty" means "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." It also finds clear confirmation in the International Court of Justice's judgment of 20 December 1974 in the *Nuclear Tests* case, which was referred to at the Hearing on Jurisdiction.²⁶ The ICJ famously stated that:

*it is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations.*²⁷

163. The same judgment further refers to the parties' "declarations" accepting the jurisdiction of the Court under Article 36(2) of its Statute.²⁸ Declarations under Article 36(2) are also unilateral acts producing legal effects, the subject-matter of which is comparable to that of the declaration by Honduras presently discussed.
164. It follows that there is no basis to consider that the declaration is, by reason solely of its denomination, incapable of producing legally binding effects. Its legal value will therefore depend on its content.

²³ Reply on Jurisdiction, ¶ 79.

²⁴ Rejoinder on Jurisdiction, ¶ 40.

²⁵ D1:P208:L7-14 (Menaker).

²⁶ D1:P42:L3-9 (Figueroa) with respect to estoppel.

²⁷ ICJ, *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, *ICJ Reports 1974*, ("ICJ, *Nuclear Tests*"), CL-222, ¶ 43, emphasis added.

²⁸ ICJ, *Nuclear Tests*, CL-222, ¶ 21.

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b. The legal value of the declaration's content

165. The Respondent argues that the inclusion of the expression “shall exhaust” clearly reveals the mandatory nature of the exhaustion requirement. This, the Respondent says, is further confirmed by the *principle of effectiveness* or principle of *effet utile* in international law. The Respondent further submits that the Claimants’ interpretation of the declaration as prospective, and anticipating only an eventual conditioning of Honduras’s consent, contradicts both the terms of the declaration and the principle of effectiveness. Such an interpretation would deprive the declaration and the second sentence of Article 26 of the ICSID Convention of any practical effect.²⁹ The Claimants, by contrast, assert that its very terms refer to a future occurrence, which shows that it is in fact intended as a declaration of intent to require the exhaustion of local remedies when entering into future agreements providing for ICSID jurisdiction.³⁰
166. While the declaration uses verbs in the future tense, it is important to consider its wording more closely and in its entirety. The declaration states as follows:

*The State of Honduras shall submit itself to the arbitration and conciliation procedures [se someterá a los procedimientos] provided for in the Convention, only when it has previously expressed its consent in writing. The investor shall exhaust the administrative and judicial channels [deberá agotar las vías administrativas y judiciales] of the Republic of Honduras as a precondition for the implementation of the dispute settlement mechanisms provided for in this Convention. In any case, submitted to the Tribunal to which the State of Honduras is a Party, the applicable laws shall be [las leyes aplicables serán] those of the Republic of Honduras and, only natural and juridical persons from the Contracting Parties to the Convention may avail themselves of the procedures provided for in the Convention.*³¹

167. The use of a future tense in legal texts may convey the prospective nature of a statement, as the Claimants argue in the present instance, but it may also convey its mandatory nature, as the Respondent implies. The future tense in the declaration is, therefore, insufficient to conclude that it is merely prospective in nature.
168. The most important phrase for present purposes, then, is the one stating that the investor “shall exhaust the administrative and judicial channels”, which in the Spanish version reads as “*deberá*

²⁹ Reply on Jurisdiction, ¶¶ 79-81 and footnote 71.

³⁰ Counter-Memorial on Jurisdiction, ¶ 30; Rejoinder on Jurisdiction, ¶ 36.

³¹ Decree No. 41-88, **R-003-EN**, emphasis added.

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agotar las vías administrativas y judiciales.” The future tense arguably conveys the legally binding nature of the statement. However, there is an additional and decisive point to be made here, in relation to the subject and the object of the phrase:

- The *subject* of the phrase is the investor. The stated obligation rests on the investor, not on the Republic or the Government of Honduras.
- The *object* of the phrase is the exhaustion of local remedies. The object of the phrase is *not* the insertion of a requirement of exhaustion of local remedies in future treaties to be entered into by Honduras.

169. It follows that the declaration cannot be interpreted as stating that Honduras will, when it agrees to ICSID jurisdiction in the future, require that investors exhaust local remedies. The declaration must be interpreted as stating that Honduras requires now – as at the date of the declaration – that investors shall, in all future cases, exhaust local remedies. This is not a declaration of future intent, but a firm requirement of exhaustion of local remedies for all future cases.
170. This is unaffected by the circumstance that some of the conditions set out in the declaration are, as the Claimants point out, “legally superfluous on its own terms” (those relating to written consent and the nationality requirement) or insufficient to accomplish the required result (the condition relating to Honduran law as the applicable law).³² *First*, these conditions do not make more sense if the declaration is considered as a statement of intent for future undertakings to arbitrate. *Second*, they are severable from the exhaustion requirement, which thus remains unaffected by any deficiency in the other conditions.
171. In conclusion, therefore, the declaration contains a firm requirement of exhaustion of local remedies by investors in all future ICSID arbitration proceedings against Honduras.

c. The possibility of expressing the exhaustion requirement separately from and before consenting to arbitration

172. A further question debated between the Parties is whether the ICSID system allows the expression of the exhaustion requirement in instruments other than those expressing the consent to arbitration.

³² Rejoinder on Jurisdiction, footnote 140.

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173. The Respondent argues that Article 26 of the ICSID Convention does not require that the exhaustion requirement be contained in a single, indivisible instrument of consent.³³ Article 26 does not provide for any formality for States to exercise the prerogative recognized in that provision.³⁴ That the ICSID Convention does not require exhaustion of local remedies unless otherwise stated is irrelevant in this respect. Contrary to what the Claimants assert, Secretary-General Broches did not declare that any exhaustion requirement under Article 26 had to be expressed in the applicable arbitration agreement. On the contrary, Mr. Broches considered that such a requirement could be included in a unilateral provision of a Contracting State's domestic law.³⁵ The case of *Lanco v. Argentina* and the position of Secretary-General Shihata are to the same effect.³⁶
174. The Claimants argue that “Article 26 [of the ICSID Convention] makes a *renvoi* to the instrument of consent”, and rely on Professor Schreuer to posit that the exhaustion requirement must necessarily be expressed in the particular instrument expressing consent to arbitration.³⁷ According to the Claimants, “[t]he phrase ‘may require’ before ‘the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention’ underscores that such a condition may be imposed after a State ratifies the ICSID Convention, when it subsequently consents to ICSID arbitration”.³⁸ For the Claimants, “the ordinary language of Article 26 thus makes clear that a Contracting State may not unilaterally require the exhaustion of local remedies independently of its consent to arbitration that forms part of the arbitration agreement with an investor.”³⁹
175. The Tribunal agrees with the Respondent in this respect.
176. Under international law, the expression of State intent is, in general, not subject to formalities. What matters is whether a State has expressed its will, rather than in what form it has done so. The Parties agree on this point.⁴⁰

³³ Reply on Jurisdiction, ¶¶ 57 ff.

³⁴ Memorial on Jurisdiction, ¶ 97; Reply on Jurisdiction, ¶ 61.

³⁵ History of the ICSID Convention, Vol. II-2 (1968), **RL-056**, pp. 756-757:

³⁶ Reply on Jurisdiction, ¶¶ 62-69.

³⁷ Rejoinder on Jurisdiction, ¶ 58 and footnote 160.

³⁸ Counter-Memorial on Jurisdiction, ¶ 19.

³⁹ Counter-Memorial on Jurisdiction, ¶ 19.

⁴⁰ Reply on Jurisdiction, ¶ 63 and Rejoinder on Jurisdiction, ¶ 27.

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177. The ICSID Convention does not, on its face, provide otherwise. More specifically, it does not require Contracting States to express the exhaustion requirement in the instrument containing their consent to arbitration. Article 26 of the ICSID Convention provides:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

178. The second sentence of Article 26 provides that a Contracting State may require the exhaustion of local remedies “as a condition of its consent to arbitration under this Convention”. These terms are relevant in two respects. *First*, the sentence simply provides that a State may require the exhaustion of local remedies “as a condition of its consent to arbitration”, and not *on the occasion* of its consent to arbitration. *Second*, the sentence refers to consent to arbitration “under this [ICSID] Convention” and not, for instance, under a bilateral investment treaty.
179. It follows that the exhaustion requirement need not, per the ICSID Convention, necessarily be expressed in the instrument consenting to ICSID arbitration or on the occasion thereof. The State may express that requirement well before consenting to arbitration.
180. The practical question is whether the earlier expression of the requirement survives the subsequent consent to arbitration. This is, so to say, the flip side of the informal nature of the expression of consent under international law. Since the expression of a State’s intent is not in general subject to formalities, the intent to make ICSID arbitration conditional on the exhaustion of local remedies, expressed in a declaration adopted at the time of ratifying the ICSID Convention, can be validly superseded by a subsequent expression of the State’s sovereign will, which is not subject to specific formalities either.

d. Conclusion

181. It follows from the above that the declaration constitutes a valid expression of Honduras’s sovereign will to make its consent to ICSID arbitration in future cases conditional on the prior exhaustion of local remedies.

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182. It also follows from the above that this expression of Honduras's will can be superseded by a subsequent expression of will, without there being any hierarchy between them based on form or the nature of the instrument. This means that, in case of conflict, the latter in time shall prevail.
183. In the light of the debate between the Parties, it could be analysed further whether Honduras's expression of will has been communicated to ICSID in a manner that makes it opposable to third parties. For the reasons set out hereafter, however, the Tribunal does not consider it necessary to address this issue.

(2) The status of the exhaustion requirement under the CAFTA-DR

184. The further question is whether the exhaustion requirement contained in Honduras's declaration applies under the CAFTA-DR.
185. The Respondent argues that the exhaustion requirement is entirely compatible with the CAFTA-DR. *First*, while CAFTA-DR Article 10.18.2 provides that no claim may be submitted to arbitration unless the investor waives any right to alternative recourses, this aims at preventing investors from initiating *parallel* proceedings and is, therefore, compatible with the declaration's requirement of *prior* exhaustion of local remedies. *Second*, the CAFTA-DR allows investors to choose between various arbitral venues, of which only ICSID arbitration is subject to the exhaustion requirement. Investors thus have the possibility to initiate non-ICSID arbitral proceedings without exhausting local remedies, in perfect harmony with both the declaration on access to ICSID arbitration and the CAFTA-DR's requirement that investors renounce any local remedy as a condition to access to arbitration under the Treaty.⁴¹
186. The Claimants argue that the exhaustion requirement is intrinsically incompatible with the waiver requirement in CAFTA-DR Article 10.18.2.⁴²
187. A similar argument is debated with respect to CAFTA-DR Article 10.18.4, which is a fork-in-the-road clause. While the Respondent argues that it is limited to local proceedings alleging a Treaty

⁴¹ Reply on Jurisdiction, ¶¶ 84 ff.

⁴² Counter-Memorial on Jurisdiction, ¶ 34; Rejoinder on Jurisdiction, ¶¶ 52 ff.

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violation as opposed to a violation of local law,⁴³ the Claimants assert that this is again incompatible with an exhaustion requirement.⁴⁴

188. As noted above and as discussed more fully below, ICSID Contracting States which decided to uphold the exhaustion requirement and notified ICSID accordingly can subsequently waive that requirement. This is effectively what the Respondent did in becoming a State Party to the CAFTA-DR.

a. ICSID Contracting States that have decided to uphold the exhaustion requirement and notified ICSID accordingly can subsequently consent to ICSID arbitration without that requirement

189. It is inherent in Article 26 of the ICSID Convention that a Contracting State can change its mind with respect to the exhaustion requirement. The exhaustion requirement is indeed a procedural power whose exercise is at the full disposal of the State, which it can use or not. The *Prospera v. Honduras* tribunal acknowledged – as did Honduras itself – this possibility of a change in a State’s position relating to the exhaustion requirement:

*In limine, as Claimants assert, States may waive their right to require exhaustion of local remedies under international law. Honduras does not dispute this assertion; in fact, it acknowledges that waiving the Exhaustion Requirement is a possibility.*⁴⁵

190. States that have notified a prior exhaustion requirement, which has been published in Document ICSID/8-D, are not themselves bound by that requirement forever, but only until they retract it with a new notification,⁴⁶ or consent *in any other manner* to ICSID jurisdiction without an exhaustion requirement. Just as they may express the requirement at various times and in various manners, they may waive the exhaustion requirement by different means and on any occasion.

⁴³ Reply on Jurisdiction, ¶¶ 84 ff.

⁴⁴ Counter-Memorial on Jurisdiction, ¶¶ 34 ff.

⁴⁵ *Honduras Próspera Inc., St. John’s Bay Development Company LLC, and Próspera Arbitration Center LLC v. Republic of Honduras*, ICSID Case No. ARB/23/2, Decision on Preliminary Objections under Article 10.20.5 of CAFTA-DR, 26 February 2025, ¶ 111, **CL-201**.

⁴⁶ For example, Document ICSID/8-D, footnote 5, states: “On June 22, 1983, Israel notified the Centre that ‘Israel shall consider submitting to the Centre only disputes related to an approved investment under one of the Israeli Laws for the Encouragement of Capital Investments’ and, with reference to Article 26 of the Convention, that ‘Israel requires the exhaustion of local administrative or judicial remedies as a condition under this Convention.’ Those notifications were withdrawn by Israel by a communication received by the Centre on March 21, 1991.”

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191. Along the same lines, the Respondent itself argues that its past practice in ICSID arbitral proceedings to which it is a party of not systematically raising the jurisdictional objection that an investor failed to exhaust local remedies is to be explained by the fact that Honduras is entitled to rely or not to rely on the requirement from the declaration in any given case.⁴⁷ This can equally be done for an abstract category of possible future cases, in favour of particular States and their investors, which would typically be done in an investment treaty.

b. The CAFTA-DR grants access to ICSID arbitration without prior exhaustion of local remedies

192. The question is now to determine whether the CAFTA-DR allows for the exhaustion requirement set out in Honduras's declaration, or whether it establishes a different regime, incompatible with the declaration. In the latter case, the CAFTA-DR regime will prevail as reflecting the later-in-time expression of the sovereign will of the CAFTA-DR parties, including Honduras, as regards their relations *inter se*.

193. CAFTA-DR Article 10.17.1 plays an essential role in this respect. Article 10.17.1 is headed "Consent of *Each Party* to Arbitration"⁴⁸ and provides that "[e]ach Party consents to the submission of a claim to arbitration under this Section *in accordance with this Agreement*."⁴⁹ This wording is relevant in two respects:

- *First*, the terms "Each Party" indicate that the CAFTA-DR governs the consent of each and any State Party without distinction. In other words, the regime will be the same for all the CAFTA-DR State Parties.
 - *Second*, the terms "in accordance with this Agreement" are to the same effect. They indicate that the regime applicable to all is set out in the CAFTA-DR itself.
194. This is further confirmed by CAFTA-DR Article 10.17.2, which provides that the "consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute". The function of this provision is to state that consent pursuant to Article 10.17.1 and the filing of a claim in accordance

⁴⁷ Reply on Jurisdiction, ¶ 98.

⁴⁸ Emphasis added.

⁴⁹ Emphasis added.

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with CAFTA-DR Section 10 *is deemed* to satisfy the requirements of the Convention and the Additional Facility.⁵⁰ This further confirms that the applicable regime is set out in the CAFTA-DR itself.

195. Thereupon, CAFTA-DR Article 10.18 addresses the “*Conditions and Limitations on Consent of Each Party*”.⁵¹ The conditions and limitations are, by their nature, enunciated in an exhaustive manner. It is undisputed that neither Article 10.18, nor any other provision in the Treaty, formulates a requirement of exhaustion of local remedies.
196. It follows that each of the CAFTA-DR State Parties, including Honduras, has accepted ICSID jurisdiction for investment disputes arising under the CAFTA-DR without a requirement of exhaustion of local remedies.
197. This uniform regime is in line with the object and purpose of the CAFTA-DR, a regional trade agreement by which the State Parties create a specific and favourable regime for economic actors from the other State Parties. The objectives set out in CAFTA-DR Article 1.2, which emphasise the non-discrimination rules of national treatment and most-favoured-nation treatment, the promotion of fair competition in the free trade area and the provision of effective procedures for the settlement of disputes, further underscore this. All these factors contribute to explaining why, in entering the CAFTA-DR, Honduras granted investors from CAFTA-DR parties bringing a claim under the Treaty conditions different from those originally enunciated in its declaration for ICSID arbitration in general.
198. The above analysis remains unaffected by the other CAFTA-DR provisions that explicitly or implicitly refer to the ICSID Convention.
199. Pursuant to CAFTA-DR Article 10.16.3(a), investors may submit a claim to arbitration “under the ICSID Convention”, which in the equally authentic Spanish version reads “*de conformidad con el Convenio del CIADP*”, that is, in conformity with the ICSID Convention. This comprises conformity with Article 26 of the ICSID Convention, according to which ICSID arbitration is not subject to exhaustion of local remedies unless otherwise provided. As discussed, the ICSID Convention allows

⁵⁰ This is further evidenced by the fact that CAFTA-DR Article 10.17.2 further provides that shall be satisfied the requirement of “(b) Article II of the New York Convention for an ‘agreement in writing’ [...]”. This again means that the New York Convention requirement is *ipso facto* deemed satisfied.

⁵¹ Emphasis added.

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States to change their mind with respect to the exhaustion requirement. Accordingly, conformity with the ICSID Convention does not necessarily command respect for the exhaustion requirement once set out in declaration. It commands respect for Honduras's relevant expression of will regarding exhaustion of local remedies, which is contained in the CAFTA-DR.

200. The same applies with respect to CAFTA-DR Article 1.3.4, which provides that the State Parties “affirm their existing rights and obligations with respect to each other under [...] other agreements to which such Parties are party”. The CAFTA-DR State Parties’ decision to grant direct access to ICSID arbitration without prior exhaustion of local remedies is in full conformity with their rights and obligations under the ICSID Convention. It is an exercise of their sovereign right under the ICSID Convention not to require prior exhaustion.
201. The above finding also remains unaffected by the specific provisions of CAFTA-DR Articles 10.18.2 and 10.18.4, which have been amply debated in the present instance.
202. The Claimants argue that Articles 10.18.2 and 10.18.4 are fork-in-the-road provisions which are incompatible with an exhaustion requirement, hence why the declaration cannot apply to arbitration under the CAFTA-DR.⁵²
203. The Respondent argues that these are “no-U-turn” clauses aimed at avoiding *parallel* proceedings, which is different from requiring the prior exhaustion of local remedies.⁵³ The Respondent further argues that “the fork-in-the-road clauses of CAFTA-DR” (which the Tribunal understands as referring to the same provisions insofar as they would constitute fork-in-the-road clauses) do not apply to local proceedings based on local law.⁵⁴ Rather, they “prevent investors from initiating arbitration in cases where they have previously claimed an alleged breach of *international law obligations* before domestic courts” in order “to avoid duplication of proceedings involving the same parties, object and cause of action”.⁵⁵
204. *First*, the Tribunal notes that the Respondent’s argument is incapable of affecting the Tribunal’s earlier conclusion that the express terms of CAFTA-DR Articles 10.17 and 10.18 exhaustively determine the conditions and limitations of each State Party’s consent to ICSID jurisdiction, and that

⁵² Counter-Memorial on Jurisdiction, ¶ 34; Rejoinder on Jurisdiction, ¶¶ 52 ff.

⁵³ Memorial on Jurisdiction, ¶¶ 101-102; Reply on Jurisdiction, ¶¶ 84-86.

⁵⁴ Reply on Jurisdiction, ¶ 90.

⁵⁵ Reply on Jurisdiction, ¶¶ 90-91.

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the exhaustion requirement is not among them. The Respondent's arguments may affect the Claimants' argument based on Articles 10.18.2 and 10.18.4. However, it cannot affect the Tribunal's reasoning that the determining factor is to be found in Article 10.17.1.

205. *Second*, in any event, CAFTA-DR Article 10.18.2 provides that no arbitration claim may be brought unless it is accompanied by a written waiver of “any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, *any proceeding* with respect to any measure alleged to constitute a breach referred to in Article 10.16” (which encompasses the substantive protection standards, investment authorizations and investment agreements).
206. Insofar as this provision requires the investor to waive the right “to initiate or continue” any *local* proceeding, it contradicts the requirement of prior exhaustion of local remedies. In the hypothesis that local remedies have been exhausted, there is no local procedure left to be initiated or continued, whether for a breach of domestic law or for a breach referred to in Article 10.16. This renders Article 18.2 meaningless insofar as it refers to local procedures. Accordingly, the Claimants are right in affirming that Article 10.18.2 confirms that no exhaustion requirement applies under the CAFTA-DR.
207. This remains unaltered by the Respondent's arguments that Article 10.18.2 is a “no-U-turn” clause (rather than a fork-in-the-road clause) that refers to parallel proceedings, and that it only relates to alleged breaches of international law. The point is that, if domestic proceedings have been exhausted, there is no need for a “no-U-turn” clause precluding parallel proceedings based on alleged breaches of international law.
208. *Third*, the same is true of CAFTA-DR Article 10.18.4, which provides that no claim may be submitted to arbitration for breach of an investment authorization or an investment agreement “if the claimant [...] or enterprise [...] has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for adjudication or resolution”.
209. This is not a “no-U-turn” clause but a fork-in-the-road clause, meaning that investors are finally bound by their first choice of forum. Further, the provision does not relate to breaches of the Treaty's substantive protection standards but to the breach of investment authorizations and agreements, which will normally be challengeable before domestic courts.

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210. Again, this provision makes no sense if investors are first required to exhaust local remedies. The point is here that an investor that would satisfy an exhaustion requirement enunciated by a State before it became a party to the CAFTA-DR would thereby be barred from access to ICSID arbitration under the CAFTA-DR. Honduras's declaration means that investors *must* exhaust local remedies, while Article 10.18.4 provides that investors *may not* exhaust local remedies if they want to access ICSID arbitration through CAFTA-DR. There is a clear conflict between these requirements, so that the Respondent's later expression of will, embodied in Article 10.18.4, prevails.
211. The Respondent's argument that the investor may still access UNCITRAL arbitration, which is also made available by the CAFTA-DR and is not subject to the exhaustion requirement, is unconvincing. This does not alter the fact that it would be manifestly unreasonable for a State to first require the exhaustion of local remedies *as a condition for access to ICSID arbitration* (which is what Honduras's declaration sought to do), *then to refuse such access for the very reason that the investor exhausted local remedies* (which would be the effect of Article 10.18.4). Again, this confirms the Tribunal's earlier finding that the exhaustion requirement does not apply under CAFTA-DR.
212. Along the same lines, the Tribunal is not convinced by the Respondent's argument that since the CAFTA-DR allows investors to choose between various arbitral fora, investors can choose between either ICSID arbitration upon exhaustion of local remedies, or immediate access to UNCITRAL arbitration.⁵⁶ As the Claimants observe, this argument shows that prior exhaustion of local remedies is not a fundamental policy requirement on the part of Honduras.⁵⁷ What is more, while it is any State's right to require exhaustion of local remedies for ICSID arbitration only, such a choice does not align well with the object and purpose of the exhaustion requirement, which is to allow States to remedy alleged wrongdoings at the local level and thereby avoid international proceedings. In the light of this *raison d'être*, one would rather expect States to treat all arbitration proceedings under the CAFTA-DR in a similar manner as concerns the exhaustion of local remedies. Honduras's acceptance of UNCITRAL arbitration under the CAFTA-DR without – by its own admission – requiring the exhaustion of local remedies is therefore further evidence that the exhaustion requirement does not apply *at all* under the CAFTA-DR.

⁵⁶ Reply on Jurisdiction, ¶¶ 84 ff.

⁵⁷ Rejoinder on Jurisdiction, ¶ 66.

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213. In conclusion on this point, the Tribunal finds that the requirement of prior exhaustion of local remedies contained in Honduras's declaration is superseded and rendered inapplicable by the CAFTA-DR. This conclusion is based on:

- The ordinary meaning of the terms of the Treaty, in particular Article 10.17, together with Article 10.18 in that it enunciates the conditions and limitations to the Parties' consent.
- The context of these provisions, in particular Articles 10.16, 1.2, 10.18.2 and 10.18.4.
- The object and purpose of the CAFTA-DR as a regional trade agreement creating a specific and favourable regime for investors from other State Parties.
- The object and purpose of the exhaustion requirement, which must be presumed to apply, or not to apply, indistinctively to different international arbitration fora.
- The principle of interpretation in good faith, which precludes interpreting Article 10.18.4 as allowing a State to first enunciate an exhaustion requirement as a condition for access to ICSID arbitration, then to deny access to ICSID arbitration for the very reason that the condition has been satisfied.
- Other relevant rules of international law, notably the ICSID Convention, which allows a Contracting State first to enunciate a requirement of exhaustion of local remedies, then to provide access to ICSID without this requirement.

C. GENERAL CONCLUSION

214. Based on the foregoing, the Tribunal finds that the exhaustion requirement in the declaration set forth in the Honduran Legislative Decree No. 41-88 is a valid and firm expression of Honduras's will to make its consent to ICSID arbitration conditional on the exhaustion requirement. However, irrespective of whether it was validly communicated in a manner that makes it opposable to investors, it is superseded by the CAFTA-DR.

215. Accordingly, the Respondent's objection that the Claimants failed to exhaust local remedies is dismissed.

VI. THE REQUIREMENT OF PRIOR CONSULTATION AND NEGOTIATION

216. The Respondent has further raised the objection that, unlike Mr. Paiz, Mrs. Schloesser failed to comply with the requirement of prior consultation and negotiation, which conditions the Tribunal's jurisdiction under the CAFTA-DR, so that the Tribunal has no jurisdiction over her claim. The Tribunal dismisses this objection.

A. THE PARTIES' POSITIONS

217. The Parties' respective positions are, in substance, as follows.

(1) The Respondent's Position

218. In its Request for Bifurcation, the Respondent argued that Honduras has not consented to arbitration with Mrs. Schloesser because she failed to comply with the mandatory "Consultation and Negotiation" requirement in CAFTA-DR Article 10.15 before submitting her claims to arbitration.⁵⁸ The requirement to attempt to resolve a dispute through consultation or negotiation, the Respondent argues, is a "mandatory precondition for the submission of a claim to arbitration".⁵⁹ More specifically, the Respondent argues that Mrs. Schloesser failed to comply with this precondition because she was not mentioned in the notice of intent dated 10 October 2022 by Mr. Paiz on his own behalf and on behalf of Pacific Solar, and that, on 24 March 2023, the Claimants filed a new notice of intent only to add Mrs. Schloesser. However, unlike the October 2022 notice of intent, the March 2023 notice did not include a request for consultations and negotiations.⁶⁰ Mr. Paiz's negotiations do not extend to Mrs. Schloesser merely because they are allegedly co-owners of Pacific Solar. Consequently, the Respondent argues that the Request was submitted by both Claimants without Mrs. Schloesser having attempted to resolve her claim after she had submitted her notice of intent.⁶¹ In doing so, Mrs. Schloesser denied Honduras its right under the CAFTA-DR to have an opportunity to resolve the dispute amicably, which in the words of the *Burlington v. Ecuador* tribunal cited by the Respondent "suffices to defeat jurisdiction".⁶²

⁵⁸ Request for Bifurcation, ¶ 23.

⁵⁹ Request for Bifurcation, ¶¶ 23 ff.

⁶⁰ Request for Bifurcation, ¶ 27.

⁶¹ Request for Bifurcation, ¶ 27.

⁶² Request for Bifurcation, ¶ 29.

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219. The Respondent limited itself to mentioning this objection in a footnote in its Memorial on Jurisdiction, in the context of its objection on ownership and control,⁶³ and did not address it further in its Reply on Jurisdiction.

(2) The Claimants' Position

220. In its Observations on the Request for Bifurcation,⁶⁴ the Claimants argue that CAFTA-DR Article 10.15 does not require meetings to be held, that arbitral proceedings can be initiated if “a disputing party considers that the dispute cannot be settled”, which means that this is also open to the investor,⁶⁵ that the use of the conditional term in the phrase “should initially seek to resolve” shows that consultations or negotiations are not mandatory⁶⁶ and that, in any event, Mrs. Schloesser did invite Honduras to engage in consultations and negotiations through the notice of 24 March 2023.⁶⁷ The Claimants add that negotiations with Mrs. Schloesser would have been futile, as evidenced by the fact that Mr. Paiz did not manage to settle the dispute through consultations and negotiations.⁶⁸

221. In their Counter-Memorial on Jurisdiction, the Claimants argued that the Respondent abandoned this objection and invited the Tribunal to find that Honduras had withdrawn this objection, and should be precluded from subsequently raising it.⁶⁹

B. THE TRIBUNAL'S ANALYSIS

222. In this regard, the Tribunal finds as follows:

223. *First*, the Respondent's Memorial on Jurisdiction does not mention this objection under a separate heading as the other objections but limits itself to mentioning it in passing at footnote 188, in the context of its objection regarding ownership and control. The Respondent's Reply on Jurisdiction does not mention the objection at all. Therefore, the Respondent must be deemed to have withdrawn this objection.

⁶³ Memorial on Jurisdiction, footnote 188, in the context of the objection on ownership and control.

⁶⁴ Observations on the Request for Bifurcation, ¶¶ 36 ff

⁶⁵ Observations on the Request for Bifurcation, ¶ 40.

⁶⁶ Observations on the Request for Bifurcation, ¶ 41.

⁶⁷ Observations on the Request for Bifurcation, ¶ 43 referring to Notice of Intent, C-012.

⁶⁸ Observations on the Request for Bifurcation, ¶ 47.

⁶⁹ Counter-Memorial on Jurisdiction, ¶¶ 6 and 281(c). See also, Rejoinder on Jurisdiction, ¶ 311(c).

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224. *Second*, the objection is, in any event, unfounded. The objection is based on a misreading of the Claimants’ notice of intent of 24 March 2023. Contrary to what the Respondent stated in its Summary of Jurisdictional Objections and Request for Bifurcation, the Claimants’ counsel state in the March 2023 notice that they write “on behalf of (i) Mr. Fernando Paiz Andrade [...] and (ii) Ms. Anabella Schloesser de Paiz [...] (together with Mr. Paiz, the ‘Investors’)”, before stating that “the Investors invite Honduras to engage in good faith consultations and negotiations with the Honduran State to resolve the existing dispute”.⁷⁰ Mrs. Schloesser, therefore, also invited the Respondent to consult and negotiate, and she did so without success. There is indeed no reason why the Respondent would have reached an amicable settlement with Mrs. Schloesser and not with Mr. Paiz.

C. CONCLUSION

225. On these bases, the Tribunal finds that the Respondent’s objection regarding Mrs. Schloesser’s failure to comply with the requirement of prior consultation and negotiation in the CAFTA-DR has been withdrawn by the Respondent and is, in any event, dismissed as unfounded.

VII. THE OWNERSHIP AND CONTROL OF THE INVESTMENT

226. The Respondent further objects that the Claimants neither own nor control the alleged investment within the meaning of the CAFTA-DR. This objection is rejected. The Tribunal finds, in substance, that the Claimants indirectly owned Pacific Solar prior to the Trust Agreements entered into with [REDACTED] and that their beneficial ownership after the Trust Agreements gives them standing to claim compensation on behalf of Pacific Solar pursuant to CAFTA-DR Article 10.16.1(b).

A. THE PARTIES’ POSITIONS

227. The Parties’ respective positions are, in substance, as follows.

(1) The Respondent’s Position

228. In its Memorial and in its Reply on Jurisdiction, the Respondent argues that the Tribunal lacks jurisdiction *ratione materiae* because the Claimants had failed to prove that they own or control the alleged investment.⁷¹ According to the Respondent, the Claimants do not prove the relationship

⁷⁰ Notice of Intent, **C-012**, p. 1.

⁷¹ Memorial on Jurisdiction, Section III.C; Reply on Jurisdiction, Section III.B.

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between eight or more partnerships that allegedly exist between the Paizes and their alleged investment, the Honduran company Pacific Solar.⁷² More specifically, the Respondent observed in its Memorial on Jurisdiction that the Claimants submitted the shareholder ledger of Pacific Solar showing 99.99% ownership by [REDACTED] (a company incorporated in Bahamas), and Mr. Paiz's 0.01% ownership, but failed to provide any evidence of ownership of [REDACTED].⁷³ Furthermore, the Respondent argued that the certification of the corporate chart by a Guatemalan notary was manifestly insufficient.⁷⁴ The Tribunal already observes at this stage that the Respondent later declared at the Hearing on Jurisdiction that the additional evidence provided by the Claimants in the course of the written proceeding was sufficient to prove, for jurisdictional purposes, Mr. Paiz's⁷⁵ ownership in the corporate chain up to [REDACTED], which, as the Claimants assert and the Respondent admits, owns 99.99% of the shares in Pacific Solar, with Mr. Paiz owning the remaining 0.01%.⁷⁶

229. As to *ownership*, the Respondent further argues, however, that the Claimants (their indirect ownership in [REDACTED] notwithstanding) do not own Pacific Solar, because of the Trust Agreements entered into with [REDACTED].⁷⁷
230. Since the CAFTA-DR does not define the concept of “ownership,” the applicable standard for determining legal ownership of an asset is local law.⁷⁸ According to Article 1035 of the Honduran Code of Commerce, “[t]he trust implies the assignment of the rights or the transfer of the domain of the assets in favor of the trustee”. Further, Article 1036 of the same Code states that, “[f]rom third parties, the trustee shall be considered the owner of the rights or assets in trust”. According to the Trust Norms issued by the National Banking and Insurance Commission of Honduras, the trust constitutes “an autonomous and independent patrimony, distinct from the patrimony of the trust. [sic] of the settlor, the trustee, the trustee, as well as of any other assets administered by the trustee in trust

⁷² As shown in the Claimants' chart, Ownership Structure Pacific Solar Energy, S.A. de C.V., **C-027**. See also, Memorial on Jurisdiction, ¶ 140.

⁷³ Memorial on Jurisdiction, ¶ 147, referring to Libro de Accionistas de Pacific Solar Energy S.A. de C.V. of 22 August 2024, **C-073**.

⁷⁴ Memorial on Jurisdiction, ¶ 141; Reply on Jurisdiction, ¶¶ 116-138.

⁷⁵ As concerns Mrs. Schloesser, see below, ¶ 300.

⁷⁶ D3:P520:L22-P521:L4 (Solimano).

⁷⁷ Memorial on Jurisdiction, ¶¶ 149-151; Reply on Jurisdiction, ¶¶ 139 ff.

⁷⁸ Reply on Jurisdiction, ¶¶ 141-142.

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property [...]”,⁷⁹ and one of the effects of the constitution of the trust is the transfer of ownership of the assets from the settlor to the trustee.⁸⁰

231. In the present instance, a first trust agreement is the share trust agreement of 12 January 2018 between [REDACTED], [REDACTED], and two public development banks, namely the German Investment and Development Corporation (“**DEG**”) and the Dutch Entrepreneurial Development Bank (“**FMO**”) (the “**Share Trust Agreement**”).⁸¹ Through this Share Trust Agreement, [REDACTED], the majority shareholder of Pacific Solar, assigned and transferred all of its shares in Pacific Solar to [REDACTED], acting as trustee, with DEG and FMO as first ranking beneficiaries, and [REDACTED] itself as second ranking beneficiary.
232. The Respondent argues that the Claimants err in insisting that the Share Trust Agreement only places Pacific Solar’s shares as collateral to be administered by [REDACTED], by virtue of its debt obligations to DEG and FMO, and that this would not affect their ownership in the investment. The Claimants’ argument is contradicted by the terms of the Share Trust Agreement, which states that [REDACTED] assigns title and ownership of the Trust Shares to the trustee, [REDACTED]⁸²
233. A second trust agreement is the assets trust agreement of 12 January 2018 between Pacific Solar, [REDACTED], DEG and FMO (the “**Assets Trust Agreement**”).⁸³ Through this Assets Trust Agreement, “Pacific Solar assigned all of its assets and rights over the Nacaome I Plant in favour of [REDACTED] as trustee”. It sets DEG as first order beneficiary, FMO as second order beneficiary, and Pacific Solar as third ranking beneficiary.⁸⁴ Therefore, the Respondent argues, the true owner of the alleged investment, *i.e.*, the Nacaome Plant and the PPA, is the trustee, [REDACTED], and not Pacific Solar.⁸⁵

⁷⁹ Comisión Nacional de Bancos y Seguros, Normas para la Constitución, Administración y Supervisión de Fideicomisos, 27 February 2017, **R-033-EN**, Article 5.

⁸⁰ Memorial on Jurisdiction, ¶ 150.

⁸¹ Share Trust Agreement between [REDACTED], [REDACTED], DEG and FMO (“**Share Trust Agreement**”), **C-266-EN** and **C-266-EN (Respondent’s resubmission)**.

⁸² Share Trust Agreement, **C-266-EN (Respondent’s resubmission)**, p. 4; Reply on Jurisdiction, ¶¶ 144-145.

⁸³ Assets Trust Agreement between Pacific Solar, [REDACTED], DEG and FMO (“**Assets Trust Agreement**”), **C-267-EN (Respondent’s resubmission)**.

⁸⁴ Reply on Jurisdiction, ¶ 146.

⁸⁵ Memorial on Jurisdiction, ¶¶ 149-151; Reply on Jurisdiction, ¶¶ 139 ff.

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234. The Claimants also err in arguing that the Assets Trust Agreement only pledges Pacific Solar's assets as collateral in the event of default on Pacific Solar's debt obligations to DEG and FMO. This, the Respondent observes, does not affect the property transfer between the settlor and the trustee. In addition, as the Claimants admit, the Assets Trust Agreement also has administration functions. It expressly provides, among others, that "[Pacific Solar] [...] hereby assigns free and clear of all encumbrances to [REDACTED] in its capacity as Trustee, the ownership of the Trust Assets and Rights [...] (1) Real Property of the Project [...] (2) Movable Property of the Project [...] (3) The economic and other rights derived from the Material Documents of the Project [...]. It is specially emphasized that among the rights that are assigned, without this clarification being considered as any limitation, is the totality of the value corresponding to the invoices that are caused in favor of [Pacific Solar], for the provision of its electricity supply services, derived from the ENEE PPA contract [...]." ⁸⁶
235. According to the Respondent, the Claimants selectively cite extracts from the Trust Agreements and the Honduran Commercial Code to try to demonstrate that they retain ownership of Pacific Solar's shares, assets, and rights. This is incorrect:
236. *First*, the Claimants point out that [REDACTED]'s right of ownership is limited to performing those acts required for the fulfilment of the lawful and determined purpose for which they are intended and that [REDACTED]'s authority is limited to transferring the shares and assets to DEG and FMO in the event of Pacific Solar's default, so that it never has any ownership rights over Pacific Solar's shares and assets. This argument, the Respondent argues, is without merit given the explicit language of the Trust Agreements assigning and transferring Pacific Solar's shares, as well as its assets and rights. ⁸⁷
237. Furthermore, the Respondent asserts that the Share Trust Agreement and the Assets Trust Agreement state that [REDACTED] has the right to exercise "all administrative and judicial rights and actions required for the fulfilment and defence of the Trust". ⁸⁸ In other words, the transfer of ownership to

⁸⁶ Reply on Jurisdiction, ¶¶ 147-148.

⁸⁷ Reply on Jurisdiction, ¶ 150.

⁸⁸ Share Trust Agreement, C-266-EN (Respondent's resubmission), p. 13, Trustee's Rights, ¶ 1; Assets Trust Agreement, C-267-EN (Respondent's resubmission), p. 40, ¶ 8.10.1.

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██████████ “is for an indefinite period of time, until Pacific Solar complies with the obligations agreed in the Trust Agreements”.⁸⁹

238. *Second*, the Respondent further argues that the Claimants erroneously “state that the settlors may reserve rights over the trust assets and that they have the right to revoke the trust and obtain the return of the assets”. While this is true under the Honduran Commercial Code, the Trust Agreements provide otherwise. The Respondent emphasizes that “both trusts are irrevocable and the settlors waived any right of revocation, until the time they meet their debt obligations”.⁹⁰
239. *Third*, according to the Respondent, the Claimants wrongly contend that “██████████ continues to own the shares because the Share Trust provides that ██████████ must only ‘refrain from disposing of, selling, assigning, exchanging or otherwise disposing of the Trust Shares’”.⁹¹ The Respondent further argues that “[t]he idea that there are multiple owners of the trust property during the existence of the trust is incompatible with the very purpose of the trust”, that the law recognizes ██████████ as the owner of the shares *vis-à-vis* all third parties, including an eventual buyer, and that thus “██████████ cannot, as a matter of law, dispose of the shares through a transaction with third parties”.⁹²
240. *Fourth*, the Respondent further argues that the Claimants wrongly “allege that the title to Pacific Solar’s shares, assets and rights is demonstrated by the conduct between Pacific Solar and ENEE, and that all it has exercised is a right to encumber under the PPA”. *First*, ownership cannot “be determined by the conduct of a [S]tate entity, such as ENEE”. *Second*, although Clause 20.6 of the PPA is entitled “Right to Encumber”, it contains several possibilities, including assignment. While the assignment of the PPA does not imply an assignment of Pacific Solar’s obligations under the contract, it does imply the transfer of the revenues generated by the PPA to new beneficiaries. For the Respondent, Pacific Solar only retains the obligation to operate the Nacaome I Plant, which was also agreed in the Assets Trust Agreement. In the letter sent to ENEE on 12 January 2018, Pacific Solar itself indicated that “ENEE shall follow the written instructions issued by [██████████] on behalf of [DEG and FMO], in all matters relating to the deposit of any monies to which [Pacific

⁸⁹ Reply on Jurisdiction, ¶ 151.

⁹⁰ Reply on Jurisdiction, ¶ 152.

⁹¹ Reply on Jurisdiction, ¶ 153.

⁹² Reply on Jurisdiction, ¶ 153.

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Solar] is entitled under the PPA”.⁹³ Indeed, all payments made by ENEE since that time have been made to the account at [REDACTED].⁹⁴

241. *Finally*, the Respondent points out that both Trust Agreements contain defined terms that are to be found in in the Common Terms Agreement between Pacific Solar, DEG and FMO.⁹⁵ This includes the definitions of various terms such as “Secured Obligations,” “Event of Default,” “Financing Documents” and “Material Project Documents”. Although all of these terms are highly relevant to the proper interpretation of the Trust Agreements, the Claimants have overly redacted the definitions, notably of the listed concepts. The Respondent argues this warrants drawing adverse inferences.⁹⁶
242. As to *beneficial ownership*, the Respondent argues that, even adopting the beneficial owner doctrine under international law, the Claimants lack standing to bring the present arbitration since they are not the beneficiaries of the investment, the beneficiaries being DEG and FMO.⁹⁷
243. The Claimants invoke the decision of the Annulment Committee in *Occidental v. Ecuador* and point out that “the position as regards beneficial ownership is a reflection of a more general principle of international investment law: claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties not protected by the relevant treaty.”⁹⁸ Further, the decision in *Saba Fakes v. Turkey*, on which the Claimants rely, confirms that the use of trusts can create a split between legal owner and beneficiary. The Respondent also point out that Professor Stern similarly notes in her dissenting opinion to the award in *Occidental v. Ecuador* that, in those cases of imperfect dominion, “international law favours the beneficial owner”.⁹⁹ The Respondent further points out that doctrine invoked by the Claimants states that “[t]he fact that the nominal owner did not have a real interest in the subject property, or that the beneficial owner was not of a proper nationality, was occasionally the decisive ground for

⁹³ Carta de Pacific Solar Energy S.A. a J. A. Mejía Arita (ENEE), 12 January 2018, p. 3, **R-037-EN**.

⁹⁴ Reply on Jurisdiction, ¶¶ 154-155.

⁹⁵ Common Terms Agreement between Pacific Solar, DEG and FMO (“Loan Agreement”) (excerpt), 14 December 2017, **C-268**.

⁹⁶ Reply on Jurisdiction, ¶¶ 158-159.

⁹⁷ Reply on Jurisdiction, ¶ 161.

⁹⁸ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015 (“**Occidental Decision on Annulment**”), ¶ 262, **CL-273-EN**.

⁹⁹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Dissenting Opinion of Arbitrator Brigitte Stern, 20 September 2012 (“**Occidental Stern Dissent**”), ¶ 149, **RL-161**.

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dismissing a claim. The procedural time for proving beneficial ownership is at the time the arbitration claim is filed”.¹⁰⁰

244. In the present instance, “all income and economic benefits generated by the investment, namely the Nacaome I Plant, are received and administered by [REDACTED]” and “subsequently transferred to DEG and FMO, entities of the Federal Republic of Germany and the Kingdom of the Netherlands, respectively”. This was executed years before the institution of the present arbitration, and the assignment of the benefits of the Nacaome I Plant is irrevocable. The Respondent emphasizes that “[t]he mere possibility of Pacific Solar receiving benefits from the putative investment is conditional upon it having fulfilled its debt obligations to DEG and FMO”.¹⁰¹
245. More specifically, both the Share Trust Agreement and the Assets Trust Agreement designate DEG and FMO as creditors and beneficiaries. In the case of the Share Trust Agreement, the Respondent argues, “[REDACTED] is only a trustee for the purpose of repayment of the Pacific Solar shares, in the event that the debt obligations have been met”.¹⁰² Under the Assets Trust Agreement, “the administration of the income generated by the Nacaome I Plant is handled by [REDACTED]. [...] [REDACTED] allocates the funds that will be used to pay the operating costs of the Nacaome I Plant through the Operating Account”, and “all remaining funds in the Income Account are used to fund the Payment Account”, which services the debt repayment to DEG and FMO.¹⁰³
246. The Respondent argues that “[a]t no time are Pacific Solar or its shareholders expected to receive income from the Nacaome I Plant while the trustee holds the assets and shares.” Consequently, the Claimants “would not be beneficiaries of the investment except in the event that the Asset Trust is dissolved.”¹⁰⁴
247. In conclusion, the Claimants are not the beneficiaries of the alleged investment, “because at least since 2018 they assigned all revenues from the Nacaome I Plant in favour of their creditors, DEG and FMO.” Neither have the Claimants submitted evidence to show that they have regained title to

¹⁰⁰ Reply on Jurisdiction, ¶¶ 164-165.

¹⁰¹ Reply on Jurisdiction, ¶ 166.

¹⁰² Reply on Jurisdiction, ¶ 167.

¹⁰³ Reply on Jurisdiction, ¶ 168.

¹⁰⁴ Reply on Jurisdiction, ¶ 169.

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Pacific Solar's shares, assets, and right to the revenues of the Nacaome I Plant as of the date of the commencement of this arbitration.¹⁰⁵

248. As to *control*, the Claimants wrongly assert that they control Pacific Solar. However, they (i) have not yet shown that they own the investment and (ii) the control that Pacific Solar's shareholders might exercise is limited by the Share Trust Agreement.¹⁰⁶
249. For the Respondent, "[c]ontrol of an investment is reflected by the majority shareholding and the capacity to make decisions in the company." As put by the tribunal in *Aguas del Tunari v. Bolivia*, "'controlled directly or indirectly' means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity" and that "such legal capacity is to be ascertained with reference to the percentage of shares held".¹⁰⁷ For its part, the tribunal in *Brif Tres v. Serbia* stated that control "is generally ascertained through legal control founded on the percentage of ownership title of shares (direct or indirect), including an analysis of voting rights and shareholders' agreements, or through actual control, which requires establishing the capacity to control and direct a company's day-to-day management and activities."¹⁰⁸ Further, according to the tribunal in *Leshkasheli v. Azerbaijan*, "*de jure* control derives from majority ownership or other arrangements providing a minority shareholder the legal capacity to control a company" and "[t]ypically, *de jure* control involves the right to appoint a majority of the board of directors and the capacity to exercise significant influence over the company's decision-making process."¹⁰⁹
250. The Respondent argues that, in the present case, the Claimants did not provide reliable evidence that they are indirect owners of [REDACTED].¹¹⁰
251. The Claimants' position that, under the Assets Trust Agreement, they still have an obligation to operate Pacific Solar's Plant and generate electricity is irrelevant for determining control. *First*, the

¹⁰⁵ Reply on Jurisdiction, ¶ 170.

¹⁰⁶ Reply on Jurisdiction, ¶ 171.

¹⁰⁷ *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 264, **RL-137**.

¹⁰⁸ *BRIF TRES d.o.o. Beograd and BRIF-TC d.o.o. Beograd v. Republic of Serbia*, ICSID Case No. ARB/20/12, Award, 30 January 2023, ¶ 174, **RL-189**.

¹⁰⁹ Reply on Jurisdiction, ¶¶ 172-175; *Zaur Leshkasheli and Rosserlane Consultants Limited v. Republic of Azerbaijan*, ICSID Case No. ARB/20/20, ¶ 405, **RL-195**.

¹¹⁰ Reply on Jurisdiction, ¶ 175.

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Claimants have not shown – other than through Mr. Paiz’s testimony, which is insufficient – “that they operate and control the plant.” *Second*, “mere managerial control over the investment is insufficient to obtain treaty protection.”¹¹¹

252. Even assuming that the Paizes indirectly own [REDACTED] and thus control Pacific Solar (which the Respondent contests), the Claimants have not submitted evidence that they actually exercise such control. They merely assert that the Share Trust Agreement “allows [REDACTED] to exercise its rights as a shareholder.” However, they do not prove that they have exercised control over Pacific Solar.¹¹²
253. Under the Share Trust Agreement, [REDACTED] cannot hold meetings and vote in Pacific Solar’s shareholders meetings without a mandate or proxy from the trustee, [REDACTED]. Given that the “Claimants have failed to produce such a mandate or proxy in the present arbitration”, they have not proven that they exercise or have exercised control over Pacific Solar.¹¹³
254. As to the *restructuring of the loans* with the development banks, the Respondent recalls that the Claimants have indicated that, subsequent to the existence of the dispute, Honduras’s alleged actions have forced them to “restructure their debts”, but they have not produced any evidence other than the witness statements of Mr. Paiz, which are insufficient. In any event, the Respondent argues that “[i]t is undisputed that the effects of the Share Trust and the Asset Trust on Pacific Solar’s shares, assets and rights took place prior to the alleged” breaches of the Respondent’s obligations. The effect of the trusts on the Tribunal’s jurisdiction should, therefore, be analysed separately from the merits of the dispute.¹¹⁴

(2) The Claimants’ Position

255. The Claimants argue that the “standard for establishing the existence of an investment for jurisdictional purposes is the balance of probabilities.” Further, evidentiary issues are not governed by Honduran law but by international law, which grants the Tribunal full discretion to determine the admissibility and the probative value of the evidence presented.¹¹⁵

¹¹¹ Reply on Jurisdiction, ¶ 176.

¹¹² Reply on Jurisdiction, ¶¶ 177-178.

¹¹³ Reply on Jurisdiction, ¶¶ 179-180.

¹¹⁴ Reply on Jurisdiction, ¶¶ 183-186.

¹¹⁵ Rejoinder on Jurisdiction, ¶¶ 273-275.

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256. Pursuant to CAFTA-DR Article 10.28, an “investment” is “every asset that an investor owns or controls, directly or indirectly”. Consequently, the Claimants must show either ownership or control.¹¹⁶
257. According to the Claimants, “[t]he Respondent misrepresents the legal standard for ownership.” The Claimants’ maintain that “international law recognizes the division between ‘nominal’ or ‘record’ ownership and ‘beneficial’ ownership.” Where trusts divide ownership between nominal and beneficial interests, the case law and scholarly writings confirm that claims can be brought by the beneficial owner.¹¹⁷
258. Contrary to what the Respondent asserts, the qualification as a beneficial owner does not require being the direct recipient of the income and economic benefits of the investment. In *Blue Bank v. Venezuela*, for instance, “the tribunal rejected the claimant bank trustee’s claims for expropriation of trust assets, which [...] comprised shares in two companies in the host State” and, “while the local law applicable to the trust provided that title to the trust assets was to be held ‘in the name of the trustee’, the tribunal found that the claimant trustee could not ‘be considered an owner in any relevant sense of the word’, and that ownership rests with the trust’s beneficiary, who ‘enjoy[s] ultimate control over the trust assets and will ultimately enjoy or suffer, as the case may be, the fortunes of the trust assets’.”¹¹⁸
259. The Claimants also maintain that the Respondent “misrepresents the legal standard for control.” According to the Claimants, *de facto* control over an investment is sufficient even in the absence of formal ownership, to determine jurisdiction *ratione materiae*. Control includes the “ability to exercise substantial influence over the legal entity’s management, operation and the selection of members of its board of directors or any other managing body. In the context of a trust, [...] the ultimate investor and beneficial owner can maintain control even where nominal ownership is transferred to a third party.”¹¹⁹ The case law on which the Respondent relies to assert that management without property is insufficient to establish control is inapposite because it aims at preventing claimants from

¹¹⁶ Counter-Memorial on Jurisdiction, ¶ 169; Rejoinder on Jurisdiction, ¶ 276.

¹¹⁷ Counter-Memorial on Jurisdiction, ¶¶ 167 ff.; Rejoinder on Jurisdiction, ¶¶ 277-278.

¹¹⁸ Rejoinder on Jurisdiction, ¶¶ 279-280.

¹¹⁹ Counter-Memorial on Jurisdiction, ¶ 169; Rejoinder on Jurisdiction, ¶¶ 282-285.

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artificially creating treaty jurisdiction by appointing a manager with the nationality required to bring action under a given treaty. This is inapplicable in the present instance.¹²⁰

260. Ownership must not be ascertained on the basis of Honduran domestic law, but by reference to international law.¹²¹

261. In accordance with all the above-mentioned rules, the Claimants *own* the investment:

262. As acknowledged by the Respondent, [REDACTED] directly holds 99.99% of the shares in Pacific Solar, while Mr. Paiz directly holds the other 0.01%.¹²²

263. [REDACTED] has “placed Pacific Solar’s shares and assets in trust as security for obtaining a project finance loan” from DEG and FMO as lenders. The Claimants point out that “Honduras signed off on this concept contemporaneously”. The Share Trust Agreement has the lenders as first order beneficiaries and [REDACTED] as the second order beneficiary. The Assets Trust Agreement, “in which Pacific Solar (acting as settlor) placed its assets under a guarantee trust that was administered by [REDACTED] as trustee”, has DEG as the first order beneficiary, FMO as the second order beneficiary, and Pacific Solar as the third order beneficiary.¹²³

264. The Claimants argue that the fact that [REDACTED] holds formal title for Pacific Solar’s shares and assets for purposes of the trusts does not prevent the Claimants from being their “ultimate beneficial owners.” The Trust Agreements and relevant provisions of Honduran law confirm that the Claimants retain beneficial ownership over the investment, which, the Claimants argue, is the relevant factor for establishing ownership under international law.¹²⁴

265. According to the Claimants, [REDACTED]’s role in the Share Trust Agreement is “limited to holding the shares as a custodian to use them as collateral if the Lenders notify an event of default on the loan”. It is only then that, as trustee, it would be allowed to sell the shares in a public auction or transfer them to the lenders. Before then, “[REDACTED] cannot exercise any ownership rights with respect to the shares”, “[a]mong other limitations, it cannot: (i) sell them to anyone; (ii)

¹²⁰ Rejoinder on Jurisdiction, ¶ 285.

¹²¹ Rejoinder on Jurisdiction, ¶ 288.

¹²² Rejoinder on Jurisdiction, ¶ 295.

¹²³ Counter-Memorial on Jurisdiction, ¶¶ 164 ff.; Rejoinder on Jurisdiction, ¶¶ 290-291.

¹²⁴ Counter-Memorial on Jurisdiction, ¶¶ 172 ff.; Rejoinder on Jurisdiction, ¶ 298.

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encumber them in any way; or (iii) exercise any political or economic rights inherent to them (such as voting in shareholders' meetings or collecting dividends). In addition, the trustee's 'fiduciary ownership' requires that the assets of the trust remain separate from the trustee's own estate." Once the purpose of the trust is fulfilled, [REDACTED] must return the shares to [REDACTED]. Accordingly, [REDACTED] has certified that the shares placed in trust "constitute an autonomous fiduciary estate, separate from the Trustee's estate, with the sole purpose of securing the Borrower's obligations towards [the lenders]" and that, "[o]nce payments are completed, the Shares in Trust shall be returned to the Settlor".¹²⁵ Therefore, Honduras's reference to the trustee's right to exercise "all administrative and judicial rights and actions required for the fulfilment and defence of the Trust" does not imply that the trustee has full ownership."¹²⁶

266. The Claimants point out that the Respondent recognizes that, under international law, [REDACTED] is a mere nominal owner, but wrongly asserts that the lenders and not the Claimants are the beneficial owners.¹²⁷
267. Pursuant to the Share Trust Agreement, DEG and FMO have not received and cannot receive Pacific Solar's shares or any other benefit of the trust unless and until they notify the trustee of an "event of default", which has not happened.¹²⁸
268. Similarly, under the Assets Trust Agreement, Pacific Solar is the ultimate beneficiary of the trust. The assets were placed as collateral of the loan and the lenders only have a contingent right to receive proceeds from their auction sale if they notify the trustee of an event of default. However, Pacific Solar as the settlor retains the ultimate right to recover all the assets once the loan is paid, prevent the sale of the assets by paying the balance of the loan, or receive all the proceeds that exceed the amount necessary to pay the loan once the auction sale concludes.¹²⁹
269. The Claimants point out that the financing documents define Mr. Paiz and Mrs. Schloesser as "Ultimate Beneficial Owners", provide that they are indirect shareholders of Pacific Solar, and further

¹²⁵ Rejoinder on Jurisdiction, ¶ 299.

¹²⁶ Counter-Memorial on Jurisdiction, ¶¶ 176 ff.; Rejoinder on Jurisdiction, ¶ 300.

¹²⁷ Rejoinder on Jurisdiction, ¶ 289.

¹²⁸ Rejoinder on Jurisdiction, ¶ 301.

¹²⁹ Rejoinder on Jurisdiction, ¶ 302.

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expressly provide that the lien in favor of the lenders is not considered a “transfer” of ownership to the lenders.¹³⁰

270. The only interest that the Respondent identifies as received directly by the lenders are the funds included in a “Requisition Payment Account” under the Assets Trust Agreement. However, this does not show that Pacific Solar never receives the proceeds of the sale of energy to ENEE. Pacific Solar receives ENEE’s payments in the “Collection Account”, which [REDACTED] administers under Pacific Solar’s instructions. Furthermore, the account receives only a portion of those proceeds, which are later transferred to an offshore account and used to pay the lenders. The Claimants add that “[t]his part of the transaction works as an assignment of accounts receivable to guarantee payment of the debt”. In Clause 20.6 of the PPA, the parties expressly agreed that this would not be considered a transfer of ownership, as the Respondent acknowledges.¹³¹
271. Finally, the Claimants argue that they also *control* the investment. [REDACTED] which is indirectly owned and controlled by the Claimants, holds a majority of Pacific Solar’s shares, as the Respondent seems to acknowledge, and the Claimants also exercise all governance, managerial and decision-making functions in the company.¹³²
272. The Share Trust Agreement confirms that [REDACTED] retains the right to participate, deliberate and vote in shareholders’ meetings and that it “will exercise the political and economic rights derived from the ownership of the shares”. Mr. Paiz has been president of the board of directors of Pacific Solar, since the purchase of Pacific Solar in December 2014. He also has had “a broad power of attorney to act on behalf of Pacific Solar, with full and sufficient powers including the execution of acts of disposition and transfer of assets and contracting, which has never been revoked. Mr. Paiz, and Mr. [REDACTED] under his instructions, run the day-to-day operations of Pacific Solar”, including instructing [REDACTED] to transfer funds as necessary both for operational purposes and for purpose of paying the lenders.¹³³
273. While the Respondent argues that Claimants lack control because [REDACTED] cannot exercise its voting rights without [REDACTED] granting it a power of attorney or proxy to appear

¹³⁰ Rejoinder on Jurisdiction, ¶ 303.

¹³¹ Counter-Memorial on Jurisdiction, ¶ 181; Rejoinder on Jurisdiction, ¶ 305.

¹³² Counter-Memorial on Jurisdiction, ¶¶ 183 ff.; Rejoinder on Jurisdiction, ¶ 306.

¹³³ Rejoinder on Jurisdiction, ¶ 306.

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in the shareholders' meetings, this ignores the reality that, under the Share Trust Agreement, [REDACTED] has the obligation to allow [REDACTED] to participate in those meetings. As the shareholders' minutes show, [REDACTED] and Mr. Paiz invariably have appeared as shareholders in all the meetings held after 12 January 2018 and have made substantial decisions regarding the company's operations. The minutes also show that Mr. Paiz plays a substantial role in the meeting discussions, acting as president of the meetings and being particularly active in making proposals that require a resolution.¹³⁴

274. Moreover, Pacific Solar retains control over the Plant under the Assets Trust Agreement.¹³⁵

275. If anything, the Trust Agreements illustrate the Respondent's breach. Project finance requires that lenders be confident in that "borrowers will generate a steady stream of revenue to repay [their] debt". In this instance, as a consequence of Honduras's repudiation of its obligations, Pacific Solar has been compelled to restructure its project finance loans to salvage the project. "Pacific Solar's breach of the loan commitments enables the Lenders to request the trustee to transfer the shares directly to them or sell them in a public auction and pay the Lenders with the proceeds of that sale, which would constitute a total loss of [the] Claimants' investments".¹³⁶

B. THE TRIBUNAL'S ANALYSIS

276. The Tribunal now turns to its analysis of the objection. As will appear hereinafter, the Tribunal's findings are unanimous in certain respects, based on a majority composed of President Angelet and Arbitrator Stern in other respects, and on a majority composed of President Angelet and Arbitrator Drymer in still other respects.

(1) General

277. CAFTA-DR Article 10.16 provides access to arbitration in the event of an "investment dispute" and the substantive provisions of Chapter Ten accord protection to "investments" and "investors". The existence of an investment and an investor thus determine the Tribunal's jurisdiction. Accordingly, the object and purpose of the present analysis is to determine whether the Claimants satisfy the "investment/investor" requirement to benefit from substantive protection and to have access to

¹³⁴ Rejoinder on Jurisdiction, ¶ 307.

¹³⁵ Counter-Memorial on Jurisdiction, ¶ 185; Rejoinder on Jurisdiction, ¶ 309.

¹³⁶ Counter-Memorial on Jurisdiction, ¶¶ 189 ff.

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arbitration under the CAFTA-DR. As the Claimants assert¹³⁷ and the Respondent acknowledges,¹³⁸ the issue of ownership or control presently discussed is an issue of standing. The question is whether the status of the Claimants' corporations establishes a sufficient connection between the Claimants and the claims brought before the Tribunal.

278. Pursuant to CAFTA-DR Article 10.28, an "investment" is "every asset that an investor owns or controls, directly or indirectly". As the Claimants correctly observe, it follows from the term "or" that they must show either ownership or control.¹³⁹ Further, the terms "owns" (or "ownership") and "controls" (or "control") must be interpreted in accordance with the principles of treaty interpretation and more specifically, in accordance with CAFTA-DR Article 1.2, which provides that the Treaty Parties must "interpret and apply the provisions of this Agreement in the light of its objectives [...] and in accordance with applicable rules of international law". This notwithstanding, domestic law and contractual arrangements will be core to determining who owns or controls the investment within the meaning of the Treaty. More specifically, the question before the Tribunal is whether the Claimants' rights and interests pursuant to applicable domestic law and contractual arrangements warrant a finding that the Claimants "own or control" a covered investment within the meaning of the CAFTA-DR.

279. In the present instance, the question of who owns or controls the investment requires consideration of the fact that Pacific Solar's shares and assets have been placed in trust with [REDACTED] as security for obtaining a project finance loan from German and Dutch public development banks, respectively DEG and FMO. One of the trust agreements, the Share Trust Agreement, has the DEG and FMO as first order beneficiaries and [REDACTED] as the second order beneficiary. The Assets Trust Agreement, in which Pacific Solar placed its assets under a guarantee trust administered by [REDACTED] as trustee, has DEG as the first order beneficiary, FMO as the second order beneficiary, and Pacific Solar as the third order beneficiary.¹⁴⁰

¹³⁷ Request, Section VI.B.

¹³⁸ Reply on Jurisdiction, ¶ 161.

¹³⁹ Counter-Memorial on Jurisdiction, ¶ 169; Rejoinder on Jurisdiction, ¶ 276.

¹⁴⁰ Counter-Memorial on Jurisdiction, ¶¶ 164 ff.; Rejoinder on Jurisdiction, ¶ 290.

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280. As the Claimants observe,¹⁴¹ the applicable standard of proof is not set by Honduran law, but by the ICSID Arbitration Rules, in particular Rule 36(1) according to which the Tribunal “shall determine the admissibility and probative value of the evidence adduced”.

281. The Tribunal will, in the first place, address ownership and, in second place, control.

(2) Ownership

282. The Claimants assert that they indirectly own their alleged covered investment, Pacific Solar and its Plant and the PPA, through a corporate chain consisting of several companies incorporated in various countries, with a Bahamas company, [REDACTED] owning 99.99% of Pacific Solar and the remaining 0.01% being owned by Mr. Paiz.¹⁴²

283. The Respondent does not dispute that, before the Trust Agreements were entered into, [REDACTED], a Bahamas company, and Mr. Paiz together owned Pacific Solar, a Honduran company, as evidenced by Pacific Solar’s shareholder ledger.¹⁴³

284. The subject-matter of the dispute between the Parties as to ownership is two-fold:

- *Upstream* [REDACTED]: the Respondent asserts that the Claimants have not proven that they indirectly own [REDACTED] through the corporate chain presented in their Memorial on the Merits.
- *Downstream* [REDACTED]: the Respondent asserts that the Trust Agreements have deprived the Claimants of any ownership they may have had in Pacific Solar, its Plant and the PPA.

a. Ownership in [REDACTED]

285. During the course of the written proceedings, the Respondent argued that the Claimants were extremely slow in adducing evidence showing that they owned [REDACTED] through the

¹⁴¹ Rejoinder on Jurisdiction, ¶¶ 273-275.

¹⁴² Rejoinder on Jurisdiction, ¶ 295.

¹⁴³ Memorial on Jurisdiction, ¶ 147; Libro de Accionistas de Pacific Solar Energy S.A. de C.V. of 22 August 2014, C-073-EN.

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corporate chain identified in the chart added to their Request for Arbitration and their Memorial on the Merits.¹⁴⁴

286. This caused the Claimants to further elaborate on the issue and adduce additional evidence with their Rejoinder on Jurisdiction.¹⁴⁵

287. This caused the Respondent to reconsider its position at the Hearing on Jurisdiction.

288. During its opening statement at the Hearing on Jurisdiction, the Respondent started by reiterating that it disputed that the Claimants had evidenced their control or ownership of Pacific Solar, irrespective of the trust issue:

As it has been clear from our written pleadings, this objection has two parts: Number one, the Claimants have failed to demonstrate control or ownership of Pacific Solar; the second part has to do with the transfer of their investment to a bank through two trusts.

*Any of these two variables can terminate this case completely. Let us now go on to the first part of this objection.*¹⁴⁶

289. The Respondent then addressed the way in which the Claimants had, in the course of the written proceeding, “presented the evidence by drops”:

*However, the Claimants, consistent with their policy of offering us the least information as possible, presented the evidence by drops.*¹⁴⁷

290. The Respondent then continued by stating that “[o]nly in the Rejoinder” had the Claimants adduced evidence and that the Respondent reserved its right to respond to this “abusive maneuver”:

Only in the Rejoinder, after having obligated this Party to go through two rounds of pleadings, arguing over incomplete and irrelevant documents, that is, only when Honduras had no ability to respond, then the Claimants presented the relevant documents, Exhibits C-310 to C-330. As the Tribunal will notice, some of these documents are prior to the start of this Arbitration, others were produced recently but at the request of the Claimants themselves. The Claimants could have presented these documents in their Request for Arbitration, but they decided not to do so

¹⁴⁴ Ownership Structure Pacific Solar Energy S.A. de C.V., **C-027**.

¹⁴⁵ Rejoinder on Jurisdiction, ¶¶ 294 ff. and **C-307-EN** to **C-330-EN**.

¹⁴⁶ D1:P50:L14-22 (Solimano).

¹⁴⁷ D1:P51:L15-18 (Solimano).

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and wait until their last pleading. The Republic of Honduras reserves its rights through – to respond to this abusive maneuver of the Claimants.

This Hearing is the first time that Honduras has a chance to pronounce itself on these documents.

In this sense, the Claimants have failed to prove some very basic points. All of the companies pertaining to the chain of the corporation exist, and they existed before the Request for Arbitration. However, despite this progress, the Claimants can fail to prove its ownership of Pacific Solar. In fact, the Owner seems to be a trust in the British Virgin Island.¹⁴⁸

291. The Respondent further clarified that, on the basis of the evidence tendered, Mr. Paiz indirectly controlled the entire corporate chain, but Mrs. Schloesser did not:



[...] On the contrary, Ms. Annabella Schloesser de Leon is a passive beneficiary -- she does not own the assets in [REDACTED], and she doesn't have control over them either, which is held by Mr. Paiz. Therefore, Mrs. Schloesser de Leon does not comply with the requirements under article 10-28 of the Treaty and cannot be considered a protected investor.¹⁴⁹

292. This caused Arbitrator Drymer to invite the Respondent to specify the nature of its reservation:

ARBITRATOR DRYMER: [...] I understand the point that Honduras reserves its right in respect of what you would say is the “tardy,” the late production of a series of documents going to ownership. [...] in my mind, it would seem to me that the Hearing is the time not to continue to reserve rights but to state the rights and your position in respect of them.¹⁵⁰

293. The Respondent then clarified:

MR. SOLIMANO: Thank you for your question.

¹⁴⁸ D1:P55:L9-P56:L10 (Solimano).

¹⁴⁹ D1:P:57:L4-9, 14-21 (Solimano).

¹⁵⁰ D1:P89:L13-22 (Drymer).

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Maybe my reservation of right wasn't clear enough.

I think we are reserving our right to a very distant possibility that the Tribunal rejects our jurisdictional objections, and then when we get to the Merits, we see even more information that might be contradictory what we see [sic], because we didn't have a full record to comment on, and the record can be even expanded later. [...]

*That's the only scope of the reservation.*¹⁵¹

294. In its closing statement, the Respondent again declared that “Honduras recognizes that between [Mr.] Paiz and [REDACTED] there is an ownership structure and there is ownership and control”.¹⁵²
295. This was again unequivocally confirmed on the Parties’ submissions on costs. Indeed, the Claimants’ assertion that the Respondent attempted to “walk back” on its previous concessions regarding ownership¹⁵³ led the Respondent to confirm that concession, while clarifying that it did not dispose of the entire question of ownership on the following terms:

*First, the fact that Respondent conceded that Mr. Fernando Paiz is an indirect owner of the corporate structure up to [REDACTED] is not “sufficient to dismiss Respondent’s ownership objection”. Honduras made it clear that its objection still stands, given that [REDACTED] ceded its shares over Pacific Solar Energy, S.A. de C.V., which is a core argument of Respondent’s *ratione materiae* objection.*¹⁵⁴

296. The Tribunal finds that the Claimants have indeed adduced conclusive evidence¹⁵⁵ of their ownership in Pacific Solar:

- *First*, the Claimants produce a chart of corporations provided by a Guatemalan notary public.¹⁵⁶ This document may, as the Respondent argues, not satisfy all the formal requirements for notary deeds (the use of the Spanish language and of the Spanish formula

¹⁵¹ D1:P90:L7-18 (Solimano).

¹⁵² D3:P521:L1-4 (Solimano).

¹⁵³ Claimants’ letter to the Tribunal of 10 December 2025, pp. 1-2.

¹⁵⁴ Respondent’s letter to the Tribunal dated 12 December 2025, p. 2.

¹⁵⁵ The Tribunal considers that, as stated by the Claimants (Rejoinder on Jurisdiction, ¶ 273), the applicable standard is that of the balance of probabilities.

¹⁵⁶ Ownership Structure Pacific Solar Energy, S.A. de C.V, C-027. A corrected version of the chart was included in the Claimants’ Rejoinder on Jurisdiction at ¶ 270.

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“por mí y ante mí”) to constitute final and binding proof under Guatemalan law.¹⁵⁷ This, however, does not deprive the document of any probatory value in these arbitral proceedings, in which the Tribunal can decide on issues of evidence in accordance with ICSID Arbitration Rule 36(1) without being bound by Guatemalan law. Since the chart was indeed provided by a Guatemalan notary public who certified it, the Tribunal finds that the chart constitutes admissible, though not conclusive, evidence.

- *Second*, the Claimants have produced corporate ledgers of the companies in the corporate chain identified in the just-mentioned chart.¹⁵⁸ These corporate ledgers are not authenticated, which means that they do not constitute conclusive evidence of ownership. Nevertheless, the detailed information contained therein as to the identity of the companies and their shareholding is in conformity with the evidence from the Guatemalan notary public, which it thus corroborates.¹⁵⁹
- *Third*, the Claimants have provided certificates of incumbency or certificates of ledger for all the companies in the corporate chain,¹⁶⁰ as well as certificates of incorporation,¹⁶¹

¹⁵⁷ Memorial on Jurisdiction, ¶ 142.

¹⁵⁸ Pacific Solar’s Corporate Documents, C-256-EN; [REDACTED]’s Corporate Documents, C-257-EN; [REDACTED]’s Corporate Documents, C-258-EN; [REDACTED]’s Corporate Documents, C-259-EN; [REDACTED]’s Corporate Documents, C-260-EN; [REDACTED]’s Corporate Documents, C-261-EN; [REDACTED]’s Corporate Documents, C-262-EN; The [REDACTED] Agreement dated 30 June 2015, C-263-EN. The relationship between the [REDACTED] Agreement and, through the trustee [REDACTED], Mr. Paiz and Mrs. Schloesser is further set out in C-310-EN.

¹⁵⁹ In its Reply on Jurisdiction at ¶ 134, the Respondent argued that, according to the corporate chart in C-027-EN, there was a 10% gap in [REDACTED]’s ownership. The Claimants reply in their Rejoinder on Jurisdiction at footnote 853 that this was a typographical error. C-260-EN at page 3 indeed shows that, as of 24 August 2023, [REDACTED] held 68.5003% of [REDACTED], not 58%, with the remaining shares held by [REDACTED], and [REDACTED]. The Tribunal also notes the Claimants’ explanation in their Rejoinder at footnote 853 that on 24 October 2024, after the case was filed, the Claimants sought to simplify the holding structure, and [REDACTED] transferred all its shares in [REDACTED] to its affiliate [REDACTED], so that as of that date, [REDACTED] holds 99.9997% of the shares of [REDACTED], and [REDACTED] holds the rest (0.0003%). This is without effect on the Tribunal’s analysis for present purposes.

¹⁶⁰ Certificate of Incumbency of [REDACTED] of 18 March 2025, C-307-EN; Certificate of Incumbency of [REDACTED] of 18 March 2025, C-308-EN; Certificate of Incumbency of [REDACTED] of 18 March 2025, C-309-EN; Certificate of Incumbency of [REDACTED] of 6 May 2025, C-310-EN; Certificate of Incumbency of [REDACTED] of 26 June 2025, C-311-EN; Notary Certification of Ledger of [REDACTED], of 26 June 2025 (unlike the English translation, the original Spanish version mentions the date of 26 June 2025), C-312-EN/SP.

¹⁶¹ Certificate of Incorporation of [REDACTED] of 27 January 201, C-316-EN; Certificate of Incorporation of [REDACTED] of 9 July 2014, C-315-EN; Certificate of Incorporation of [REDACTED] of 3 September 2004, C-314-EN; Certificate of Incorporation of [REDACTED] of 19 July 2000, C-313-EN; Certificate of Incorporation of [REDACTED] of 5 September 2017, C-317-EN. The Claimants do not list a certificate of incorporation of [REDACTED]. However, the Tribunal considers C-322-EN/SP, which is headed

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certificates of good standing,¹⁶² and share certificates,¹⁶³ confirming their existence and their place in the corporate chain presented in the chart certified by the Guatemalan notary public.

297. The Tribunal has thoroughly analysed these documents and finds that they are consistent as to their contents and validated by the various just-mentioned certificates. They therefore constitute conclusive evidence of the existence of the corporations and their shareholding.
298. As the Respondent declared in its closing statement, “[e]verything indicates that, between December 2014 to January 2018, Mr. Paiz was, in fact, the [o]wner of the investment. Honduras’s position is that it is the Honduran Trusts which deprived Mr. Paiz from the ownership of the investment”.¹⁶⁴
299. Accordingly, the Tribunal finds that the Respondent admits that the Claimants have given sufficient proof of Mr. Paiz’s indirect ownership of [REDACTED] and, without prejudice to the trust issue which is addressed below, through it, of Pacific Solar.
300. Finally, as concerns Mrs. Schloesser, the Respondent argued at the Hearing that Mrs. Schloesser does not satisfy the requirements of CAFTA-DR Article 10.28 because she “is a passive beneficiary -- she does not own the assets in [REDACTED], and she doesn’t have control over them either, which is held by Mr. Paiz”.¹⁶⁵ Yet, as the [REDACTED] Agreement of 30 June 2015¹⁶⁶ makes clear, Mrs. Schloesser is a primary beneficiary of the trust, together with Mr. Paiz. It follows

“certificate of good standing” in the English translation but “CERTIFICADO DE PERSONA JURÍDICA” in the Spanish authentic version, to be equivalent to a certificate of incorporation. Further, based on **C-262-EN**, **C-312-EN** and **C-329-EN**, together with the chart certified by the Guatemalan notary public, the Tribunal finds that [REDACTED] is the 100% shareholder of [REDACTED].

¹⁶² Certificate of Good Standing of Pacific Solar of 30 June 2025, **C-323-EN**; Certificate of Good Standing of [REDACTED] of 25 April 2024, **C-320-EN**; Certificate of Good Standing of [REDACTED] of 26 June 2025, **C-321-EN**; Certificate of Good Standing of [REDACTED] of 28 November 2024, **C-318-EN**; Certificate of Good Standing of [REDACTED] of 27 November 2024, **C-319-EN**; Certificate of Good Standing of [REDACTED] of 26 June 2025, **C-322-EN**. There is no certificate of good standing for [REDACTED]. However, based on **C-260-EN**, **C-311-EN** and **C-317-EN**, together with the chart certified by the Guatemalan notary public, the Tribunal is satisfied that the chart correctly presents the position of [REDACTED] in the corporate chain.

¹⁶³ Share Certificates Issued by Pacific Solar, **C-324-EN**; Share Certificates Issued by [REDACTED], **C-325-EN**; Share Certificates Issued by [REDACTED], **C-326-EN**; Share Certificates Issued by [REDACTED], **C-327-EN**; Share Certificates Issued by [REDACTED], **C-328-EN**; Share Certificates Issued by [REDACTED], **C-330-EN**; Share Certificates Issued by [REDACTED], **C-329-EN**.

¹⁶⁴ D3:P489:L2-7 (Solimano).

¹⁶⁵ D1:P:57:L4-9, 14-21 (Solimano).

¹⁶⁶ [REDACTED] Agreement of 30 June 2015, **C-263-EN**, Articles 1.17 and 11.1. In addition, the Tribunal does not see that this could be affected by C-310 to which the Respondent refers at D1:P56:L17 ff. (Solimano).

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that Mrs. Schloesser is a beneficial owner within the meaning discussed hereinafter. Accordingly, the Respondent has not established that Mrs. Schloesser should be excluded from the proceeding.¹⁶⁷ Even if that were the case, *quod non*, the consequence would be that ownership and control alleged to be with Mrs. Schloesser would in fact be with Mr. Paiz, which would leave the Claimants' overall claim unaffected.

b. The impact of the Trust Agreements

301. The Respondent however disputes that [REDACTED] and Mr. Paiz own Pacific Solar, because the shares in Pacific Solar (at least, [REDACTED]'s shares in Pacific Solar)¹⁶⁸ have been placed in a trust with [REDACTED] as trustee, and are used as collateral for loan agreements granted by German and Dutch public development banks. The Respondent accordingly argues that Pacific Solar is not owned by the Claimants but by [REDACTED],¹⁶⁹ and that beneficial ownership lies with the German and Dutch public development banks, not with the Claimants.¹⁷⁰ The Claimants, by contrast, argue that they qualify as beneficial owners and that this grants them standing in the present instance.¹⁷¹
302. Upon very careful analysis, there is partial truth in both the Respondent's and the Claimants' arguments.
303. The Tribunal will analyse, first, the relevant legal test; second, the rights of trustors and trustees under Honduran law and the ensuing application of the legal test; and third, the implications for the Claimants' standing in the present case.

(i) The relevant legal test: ownership under CAFTA-DR Article 10.28

304. As concerns the applicable legal test, it has been shown above that the term "owns" (or "ownership") in CAFTA-DR Article 10.28 must be interpreted in accordance with CAFTA-DR Article 1.2, according to which the Treaty Parties must "interpret and apply the provisions of this Agreement in the light of its objectives [...] and in accordance with applicable rules of international law". The

¹⁶⁷ D1:P:57:L21-22 and P:58:L1 (Solimano).

¹⁶⁸ The Tribunal observes that the Share Trust Agreement, **C-266-EN (Respondent's resubmission)**, is concerned with the 99.99% of the shares in Pacific Solar originally owned by [REDACTED] but does not pertain to the 0.01% of the shares in Pacific Solar owned by Mr. Paiz.

¹⁶⁹ Memorial on Jurisdiction, ¶¶ 149-151; Reply on Jurisdiction, ¶¶ 139 ff.

¹⁷⁰ Reply on Jurisdiction, ¶¶ 161 ff.

¹⁷¹ Counter-Memorial on Jurisdiction, ¶¶ 167 ff.; Rejoinder on Jurisdiction, ¶¶ 277 ff.

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question is whether the Claimants' rights pursuant to domestic law and contractual arrangements qualify as ownership of a covered investment within the meaning of CAFTA-DR Article 10.28.

305. As the Parties imply when debating the Claimants' rights in the present instance,¹⁷² property under domestic law consists of a bundle of rights, which may be split between different right holders, and the nature and exercise of which may be subject to conditions.
306. International law takes account of this reality. It is generally – albeit not unanimously¹⁷³ – accepted that, in cases where nominal ownership does not coincide with beneficial ownership, it is the latter that enjoys protection under international law.¹⁷⁴ In the presence of a trust, therefore, claims under international law can (and must) as a general rule be brought by the beneficial owner rather than by the trustee.¹⁷⁵ More fundamentally, this evidences that the protection of ownership under international law must not focus solely on formal title, but must consider the nature and substance of rights that are part of the broader bundle of ownership rights to determine whether such rights attract protection under international law, and if so, which protection.
307. A majority of the Tribunal (President Angelet and Arbitrator Drymer) finds that this also applies to ownership within the meaning of CAFTA-DR Article 10.28, which governs here. Article 10.28 must indeed be interpreted in the light of general international law, with CAFTA-DR Article 1.2.2 placing

¹⁷² For the Respondent, see for instance D3:P496:L15-21 (Solimano) referring to various kinds of property and to limitations to property: “

” For

the Claimants, see for instance D3:P660 ff. (San Juan), discussing “

” (D3:P660:L20-21) and “” (D3:P662:L2-3 (San Juan)).

¹⁷³ See *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, ¶¶ 134-135, **CL-272-EN**: “The separation of legal title and beneficial ownership rights does not deprive such ownership of the characteristics of an investment within the meaning of the ICSID Convention or the Netherlands-Turkey BIT. Neither the ICSID Convention, nor the BIT make any distinction which could be interpreted as an exclusion of a bare legal title from the scope of the ICSID Convention or from the protection of the BIT. However, upon careful examination of the evidence before it, the Tribunal reached the conclusion that the Claimant does not hold legal title over the share certificates in Telsim”. It is observed that the *Saba Fakes* award does not deny that title in property can be split, and that the split is relevant to determining ownership under international law. Rather, it considers that it is formal title that must prevail.

¹⁷⁴ *I.a.*, Marjorie M. Whiteman, *Digest of International Law*, Vol. 8, 1967 (“*Digest of International Law*”), pp. 1261-1263, **RL-121**; David J. Bederman, *Beneficial Ownership of International Claims*, in 38 *I.C.L.Q.* 935 (1989), p. 936, **CL-275-EN**; Sir Robert Jennings a.o., eds., *Oppenheim’s International Law*, 9th ed. 2008, p. 514, **CL-276-EN**; James Crawford, *Brownlie’s Principles of International Law*, 8th ed., p. 704-705, **CL-277-EN**; *Occidental Decision on Annulment*, **CL-273-EN**, ¶¶ 259-264.

¹⁷⁵ To the same effect, *Digest of International Law*, **RL-121**, p. 1262; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017, ¶ 170, **CL-279-EN**.

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particular emphasis on the objectives of the Treaty,¹⁷⁶ which include increasing investment opportunities.¹⁷⁷ Moreover, as the Respondent observes, substance must generally prevail over form.¹⁷⁸ This warrants interpreting and applying the term “own” in a manner that does not focus solely on formal title but, as already mentioned, on the nature and substance of rights that are part of the broader bundle of property rights, to determine whether such rights attract protection under the Treaty.

308. This finds further confirmation in the definition of “investment” within the meaning of the CAFTA-DR. Article 10.28 defines “investment” as “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk”. Article 10.28 further provides that “[f]orms that an investment may take include: [...] h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges”.

309. It follows that specific rights that are part of a broader bundle of property rights, which together constitute an investment, may themselves, when considered in isolation, also qualify as an investment within the meaning of CAFTA-DR Article 10.28. They may qualify as an asset that an investor owns and that has the characteristics of the commitment of resources, the expectation of gain or profit, or the assumption of risk; and they may qualify as “intangible property” and “related property rights”. The question will be what protection such an investment attracts under the Treaty.

(ii) The rights of trustors and trustees under Honduran law

310. As concerns the rights of trustors and trustees under Honduran law, a majority of the Tribunal (President Angelet and Arbitrator Drymer) observes as follows.

311. *On the one hand*, the Respondent is correct in asserting that, in accordance with Honduran law and the Trust Agreements, [REDACTED] *holds title* – that is, formal ownership – in Pacific Solar and the Plant:

¹⁷⁶ CAFTA-DR, **CL-001-EN (Resubmitted)**, Article 1.2.2: “The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law”; Vienna Convention on the Law of Treaties (“VCLT”), **CL-133-EN**, Article 31.3.c.

¹⁷⁷ CAFTA-DR, **CL-001-EN (Resubmitted)**, Article 1.2(d).

¹⁷⁸ Reply on Jurisdiction, ¶ 507.

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- According to Article 1035 of the Honduran Code of Commerce, “[a] trust involves the transfer of rights or ownership of property to the trustee”. For its part, Article 1036 of the same Code states that, “[i]n front of third parties, the trustee will be considered the owner of the rights or assets” in trust.¹⁷⁹
- The Share Trust Agreement provides in part that [REDACTED] “hereby transfers to the Trustee, and the Trustee accepts, legal title to and ownership of the Trust Shares represented by the Share Certificates issued by [Pacific Solar]”.¹⁸⁰
- The Assets Trust Agreement also provides in part that Pacific Solar assigned all its assets and rights over the Nacaome I Plant in favour of [REDACTED] as trustee.¹⁸¹

312. *On the other hand*, however, Honduran law also confirms that the title of the trustee is functional (or conditional) in nature, that it is without prejudice to the trustor’s rights, and that *the trustee cannot hold any economic interest in the assets and rights given in trust*. Article 1037.1 of the Honduran Code of Commerce provides that “[t]he trustee shall exercise the ownership powers over the assets and rights given in trust, in accordance with the following conditions: 1-Such powers shall be exercised in accordance with the purpose to be achieved and *not in the interest of the trustee*”.¹⁸²

¹⁷⁹ Code of Commerce of the Republic of Honduras, **R-014-EN (Resubmitted)**.

¹⁸⁰ Share Trust Agreement, **C-266-EN**, Clause Two: “TWO: ESTABLISHMENT OF THE TRUST: [REDACTED] further stated that, on behalf of the Settlor, he hereby transfers to the Trustee, and the Trustee accepts, legal title to and ownership of the Trust Shares represented by the Share Certificates issued by the Borrower. ...The transfer is performed by: (i) the proper endorsement in ownership of the Share Certificates and delivery thereof to the Trustee; and (ii) the corresponding entry in the Borrower’s share register, listing the Trustee as the owner of the Trust Shares”. The Tribunal observes that the version of this exhibit resubmitted by the Respondent on 20 November 2025 slightly differs from the just quoted version, submitted by the Claimants. It notably states; “transfers to the Trustee, who hereby accepts, the title and ownership of the Trusted shares contained in the Share Certificates issued by the Borrower”. These variations are irrelevant to the present issue.

¹⁸¹ Pacific Solar Shareholder Record Book, 22 August 2014, **C-256-EN**. As the Respondent observes, the book reflects notations on each of [REDACTED]’s certificates indicating that they are placed in trust with [REDACTED]. More specifically, the English translation of the exhibit does not, unlike what the Respondent states in its Reply on Jurisdiction at footnote 168, use the terms “Endorsed in trust property”, but “placed in trust”. However, pursuant to the just-mentioned provisions from the Honduran Code of Commerce, it follows that the trustee, [REDACTED], is the owner of the shares.

¹⁸² Code of Commerce of the Republic of Honduras, **R-014-EN (Resubmitted)**. Emphasis added.

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313. Article 1037.2 further provides that “[t]he economic benefit of the trust will fall on the [fideicomisario]”,¹⁸³ that is, the beneficiary of the trust. Article 1038 further provides that “[t]he settlor may establish the trust in his or her own favor; but *the trustee may never be a beneficiary*”.¹⁸⁴
314. It follows from these provisions that [REDACTED], as trustee, holds nominal ownership (notably Articles 1035 and 1036 of the Honduran Code of Commerce) but *no economic interest whatsoever* in the assets and rights given in trust (notably Articles 1037 and 1038 of the Code). This is a typical situation as described above where international law and the CAFTA-DR grant protection to the effective economic beneficiary of the assets and rights, as opposed to the formal titleholder.¹⁸⁵
315. Accordingly, [REDACTED] is not the beneficial owner of the investment, which means, as set out above,¹⁸⁶ that it does not “own” the investment within the meaning of CAFTA-DR Article 10.28. Indeed, the Respondent itself considers that beneficial ownership does not necessarily coincide with ownership under Honduran law. It argues that, while [REDACTED] is the owner of the investment pursuant to Honduran law, the lenders, *i.e.*, DEG and FMO, are the beneficial owners.¹⁸⁷
316. The further question, then, is whether beneficial ownership lies with the Claimants (or one or more of their corporations), with the lenders, or indeed with each of them.
317. As already mentioned, Article 1037.2 of the Honduran Commercial Code provides that the economic benefit of the trust will fall on the beneficiary of the trust. This means that the beneficiary (or the beneficiaries) of the trust are the beneficial owners. As set out above,¹⁸⁸ it is the beneficial owners who enjoy protection pursuant to international law, and who enjoy protection pursuant to the CAFTA-DR as the “owners” of the investment within the meaning of CAFTA-DR Article 10.28.
318. In the present instance, the Trust Agreements have more than one beneficiary:

¹⁸³ The English translation in **R-014-EN (Resubmitted)** reads that “[t]he economic benefit of the trust will fall on the *trustee*”. However, the Spanish authentic version provides that “*El beneficio económico del fideicomiso recaerá sobre el fideicomisario*”, which is the beneficiary of the trust. The English translation on the record is therefore incorrect.

¹⁸⁴ Emphasis added.

¹⁸⁵ See above, ¶¶ 306 ff.

¹⁸⁶ See above, ¶¶ 307 ff.

¹⁸⁷ Reply on Jurisdiction, ¶¶ 161 ff.

¹⁸⁸ See above, ¶¶ 306 ff.

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- The Share Trust Agreement identifies the lenders as “FIRST-RANKING BENEFICIARIES”, whereas the settlor, [REDACTED], is identified as the “SECOND-RANKING BENEFICIARY”, which will recoup the shares upon reimbursement of the loans.¹⁸⁹
- The Assets Trust Agreement identifies DEG as the “FIRST-RANKING BENEFICIARY” and FMO the “SECOND-RANKING BENEFICIARY”, whereas the settlor, Pacific Solar, is the “THIRD-RANKING BENEFICIARY”, which will again recoup the Plant upon reimbursement of the loans.¹⁹⁰

319. In the present instance, therefore, beneficial ownership (and more importantly, ownership within the meaning of the CAFTA-DR) is a bundle of rights, divided between the lenders and the settlors. Both the lenders and the settlors (and through them, the Claimants who as admitted are indirect owners of [REDACTED]) have proprietary rights. Because of these proprietary rights, the settlors, and through them the Claimants, together with the lenders, “own” the shares, the Plant and the PPA within the meaning of the CAFTA-DR. As stated in the previous section, the term “own” in the CAFTA-DR must indeed be interpreted and applied in a manner that does not focus solely on formal title but on the nature and substance of rights that are part of the broader bundle of property rights, to determine whether such rights attract protection under the Treaty.¹⁹¹

320. The settlors’ rights (which indirectly determine the nature of the Claimants’ rights) are different from those of the lenders, but there is no basis to discard the former as inexistent, or so limited or uncertain that they should be treated as inexistent. While the exercise of the settlors’ right to recoupment is conditional on the full repayment of the loans, similarly, the lenders only have a conditional right to receive Pacific Solar’s shares, the Plant and the PPA upon the occurrence (and notice) of an “event of default”,¹⁹² which had not happened at the time of the Request for Arbitration.¹⁹³ And while the proceeds of the sale of electricity are essentially allocated to the repayment of the loans to the lenders, this is ultimately in the interest of the Claimants’ profit-seeking activity.

¹⁸⁹ Share Trust Agreement, **C-266-EN**, pp. 2 and 5.

¹⁹⁰ Assets Trust Agreement, **C-267-EN**, pp. 1 and 2.

¹⁹¹ See above, ¶¶ 304-309.

¹⁹² Share Trust Agreement, **C-266-EN**; Assets Trust Agreement, **C-267-EN**, Clauses 7 and 8.

¹⁹³ Cf. Minutes No. 21 of Pacific Solar’s Shareholders’ Meeting of 22 August 2023, **C-345-EN**, which is two days before the Request for Arbitration.

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321. It is these settlors' rights which qualify the Claimants' indirect ownership and thus, their standing or lack thereof in the present instance. Whether and, if so, to what extent the Claimants have standing is discussed hereinafter.

(iii) The Claimants' rights and the issue of standing

322. The question before the Tribunal is whether the Claimants' ownership gives them standing with respect to the claims brought before the Tribunal, that is, whether there is a sufficient connection between the nature of their rights, on the one hand, and the nature of their claims, on the other.

323. In this respect, President Angelet and Arbitrator Drymer agree in considering that the Claimants do have standing to bring a claim in the present instance, although they take different views on the scope of that standing. Whereas President Angelet considers that the Claimants *only* have standing to bring a claim for reparation on behalf of the local company Pacific Solar pursuant to CAFTA-DR Article 10.16.1(b), Arbitrator Drymer considers that the Claimants *also* have standing to bring a claim for reparation on their own behalf pursuant to CAFTA-DR Article 10.16.1(a). Subject to this specification, the analysis hereinafter reflects the position of President Angelet and Arbitrator Drymer, whereas Arbitrator Stern's position that the Claimants have no standing whatsoever is set out in a dissenting opinion.

324. *On the one hand*, one cannot unreservedly validate the Claimants' argument that what matters is that they will, in the terms of *Blue Bank v. Venezuela*, "ultimately enjoy or suffer, as the case may be, the fortunes of the trust assets".¹⁹⁴ *Blue Bank* was concerned with whether standing lay with the bank trustee or with the trust's beneficiary. Adopting this test in the present instance would allow for the conclusion that [REDACTED] does not have standing, but the *Blue Bank* tribunal did not refer to "ultimate enjoyment" with the present case's relationship between the lenders and the settlors in mind. Much will depend on the specific characteristics of the trust in any given case and, insofar as this is an issue of standing, on the connection between the claimant's rights and interests and the claim brought before the tribunal.

325. *On the other hand*, while the exercise of the settlors' right to recoupment is contingent upon the full repayment of the loans, as the Respondent observes,¹⁹⁵ it remains that the settlors have an actual and

¹⁹⁴ Rejoinder on Jurisdiction, ¶ 280, referring to *Blue Bank v. Venezuela*, CL-279-EN, ¶ 170.

¹⁹⁵ Notably D3:P512:L9-10 (Solimano): "[REDACTED]".

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non-contingent right,¹⁹⁶¹⁹⁷ at least *to protect the future exercise* of their right to recoup.¹⁹⁸ This is all the more evident in the light of the Trust Agreements' *raison d'être*. These are not trusts established for purposes of inheritance, where the trust may entirely pass to a third party at some point in time (*cf.* Article 1037.4 of the Honduran Commercial Code, which provides that, at the end of the trust, the assets and rights either return to the trustor, or pass definitely to the trustee or another specific person). In the present instance, the Trust Agreements are established in the interest of the settlors themselves, and ultimately in the interest of the Claimants. The settlors and, through them, the Claimants count on recoupment, which is the ultimate objective of the whole operation. The settlors' right to recoup upon full reimbursement of the loans is not a negligible element of the trust. Rather, it is its overarching objective.

326. In addition, contrary to what the Respondent suggests,¹⁹⁹ the question is not merely to whom damages awarded by the Tribunal would go in practice. The question of ownership under the CAFTA-DR is who, among the holders of part of the split ownership, has a *legally protected economic interest*.
327. As a consequence, what must be determined is whether the nature and scope of the settlors' rights and corresponding "ownership", provides a basis for the Claimants' various claims in the present instance. This depends on the specific object of each claim.

¹⁹⁶ It is not entirely correct, therefore, to state as the Respondent does, that "[REDACTED]". D3:P512:L8-10; 13 (Solimano).

¹⁹⁷ It is noted that the Share Trust Agreement (C-266-EN), Article 7.1, p. 8, provides that "Once all outstanding amounts payable to the Lenders have been satisfied ... ownership of the Trust Property and Rights assigned by the Settlor shall be returned in full to the Settlor, which to this end *shall become* the Third-Ranking Beneficiary" (emphasis added). The majority does not consider the terms "shall become" to affect the nature of the settlor's (and thereby the Claimants') rights as identified above. It is beyond doubt that the Share Trust Agreement confers the settlor rights as a "third-ranking beneficiary" on the conditions set out in the same. Other provisions of the Agreement do not use the future tense when referring to the third-ranking beneficiary. Article 8.1. provides: "8.1.1) The Settlor *shall be deemed to be the Third-Ranking Beneficiary, until such time as, by virtue of the provisions hereinafter, it becomes the Second-Ranking Beneficiary*, ...; 8.1.2) For the purposes of this Instrument, ... (ii) company FMO shall be the Second-Ranking Beneficiary until the transfer of ownership over the Project's Phase II land rights is registered ... Once the appropriate registration is made ... FMO shall become a First-Ranking Beneficiary ... Consequently, the Settlor shall be deemed Second-Ranking Beneficiary ..." (emphasis added).

¹⁹⁸ This is further confirmed by the fact that, as the Respondent admits, the settlors' right has a (limited) economic value and that they could sell that right. See D3:P513:L6-7 (Solimano).

¹⁹⁹ D3:P509:L19-P510:L5 (Solimano): "[REDACTED]".

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328. *First*, the Claimants’ actual *right to protect* their future right to recoup the shares, the Plant and the PPA²⁰⁰ gives them standing to request declarations of breach and orders not to aggravate the dispute. Such requests are essential to protect the future right to recoupment and are not contingent on the economic value of the rights concerned. The Claimants thus have standing to request an award, as stated in their Memorial:

(a) declaring that Honduras has breached its obligations under the Treaty [...]

(b) declaring that the Agreements are investment agreements as defined by the CAFTA-DR and that Honduras has violated its obligations under the Agreements;

(c) ordering the Republic of Honduras to [...] refrain from aggravating the dispute²⁰¹

329. *Second*, as concerns the compensation claimed for losses arising from any Treaty breaches including both interest and costs, a majority of the Tribunal (with Arbitrator Drymer dissenting) considers that the Claimants’ claim for compensation on their own behalf by reference to the damage allegedly suffered by Pacific Solar would be fragile indeed. This is because their corporations’ status as so-called second- or third-ranking beneficiaries, combined with the difficulties they are facing to reimburse the first-ranking beneficiaries, drastically reduces the present-day economic value of their rights.

330. Indeed, Mr. [REDACTED] declared at the hearing that [REDACTED] as of the date of the Hearing on Jurisdiction and that the loan [REDACTED],²⁰² meaning that the Claimants will normally not recoup their shares before that date. Mr. [REDACTED] added that [REDACTED]. As the PPA extends six years later, Mr. [REDACTED] indicated that “[REDACTED]”, adding that “[REDACTED]”.²⁰³ Against this background, the Claimants’

²⁰⁰ See above, ¶ 325.

²⁰¹ Claimants’ Memorial, ¶ 414.

²⁰² D2:P451 ff (Drymer and [REDACTED]).

²⁰³ D2:P452:L20-P453:L13 ([REDACTED]).

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effectively recouping their shares, the Plant and the PPA is too hypothetical in nature to found their standing now to request other than symbolic reparation *on their own behalf*.

331. This is true for the 99.99% shares in Pacific Solar that were originally held by [REDACTED], but also for the 0.01% of the shares in Pacific Solar held by Mr. Paiz. While Mr. Paiz's shares are not subject to the Share Trust Agreement,²⁰⁴ Mr. Paiz's respective ownership in the Plant and the PPA is affected by the Assets Trust Agreement.²⁰⁵ Recoupment for Mr. Paiz's 0.01% shares may thus be less hypothetical or remote than that of the 99.99% shares held by [REDACTED], but it remains too hypothetical or remote in the circumstances to allow for more than a claim for symbolic reparation.
332. In these circumstances, the Claimants cannot claim reparation on their own behalf as if their corporations were the first-ranking beneficiaries of the trusts, and neither can they claim reparation on their own behalf as if the loans were about to be entirely reimbursed so that their corporations would recoup their shares and assets in the immediate future. They could only claim a symbolic reparation. This does not, in any event, interfere with their standing to request, on their own behalf, the declarations and orders described at paragraph 328 above.
333. The Claimants, however, (also) claim reparation on behalf of their local enterprise, Pacific Solar.
334. CAFTA-DR Article 10.16.1 provides that claimants may bring a claim on their own behalf or "(b) on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly" alleging that the respondent has breached an obligation and "that the enterprise has incurred loss or damage by reason of, or arising out of, that breach".
335. In their Request for Arbitration, the Claimants argued that "[p]ursuant to CAFTA-DR, Claimants [h]ave [s]tanding to [b]ring [c]laims on their own [b]ehalf and on [b]ehalf of Pacific Solar, the [e]nterprise".²⁰⁶ The *petitum* as formulated in the Request for Arbitration then pursued with a request to order the Respondent to "compensate Claimants for the losses arising from Honduras's breaches of the Treaty in an amount of approximately US\$ 160 million (to be further quantified and updated

²⁰⁴ Share Trust Agreement, **C-266-EN (Respondent's resubmission)**, p. 1, identifying [REDACTED] as the settlor.

²⁰⁵ Assets Trust Agreement, **C-267-EN**, p. 1, identifying Pacific Solar as the settlor.

²⁰⁶ Request, Section VI.B.

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in these proceedings)” and to “grant any other relief that the Tribunal may deem just and proper”.²⁰⁷ The Claimants also reserved their rights to amend or modify their claims.²⁰⁸

336. In their Memorial on the Merits, the Claimants have specified their claim. They request the Tribunal to order the Respondent to “pay compensation for the losses arising from Honduras’s breaches of the Treaty and the Agreements in accordance with Section V above”.²⁰⁹ Section V of the Memorial only refers to the damages sustained by Pacific Solar.²¹⁰ It remains that the graph in that same paragraph refers to “damages to Claimants”,²¹¹ and the Respondent has pointed out at the Hearing on Jurisdiction that the Claimants’ Memorial contains further ambiguities or contradictions in this respect, in particular the statement that the “Claimants, *acting on their own behalf and on behalf of Pacific Solar*, seek an award that fully compensates such *Enterprise*”.²¹² Such ambiguities also appeared in Mr. Paiz’s testimony at the Hearing on Jurisdiction.²¹³
337. Some of these ambiguities may be due to the multifaceted nature of the Claimants’ claim, to terminological shortcuts or, in Mr. Paiz’s case, to a non-legal approach to the issue. In any event, however, it appears that the Claimants’ claim consists of, or at the least encompasses, a claim on behalf of Pacific Solar pursuant to CAFTA-DR Article 10.16.1(b) for the loss or damage allegedly caused to Pacific Solar by the Respondent’s alleged breaches of its obligations.
338. While pointing to the ambiguities in the Claimants’ position, the Respondent likewise acknowledges that the payment of compensation to Pacific Solar is a hypothesis before the Tribunal.²¹⁴

²⁰⁷ Request, ¶ 73 (ii) (a) and (iii).

²⁰⁸ Request, ¶ 74.

²⁰⁹ Claimants’ Memorial, ¶ 414 (c)(i).

²¹⁰ Claimants’ Memorial, ¶ 405.

²¹¹ Claimants’ Memorial, ¶ 405.

²¹² Claimants’ Memorial, ¶ 361. Emphasis added. See further, ¶ 380.

²¹³ D2:P351:L19-P352:L8 (Figueroa and Paiz): “Q [Mr. Figueroa for the Respondent] ...Mr. Paiz, as Claimant, what is – what would you wish the Tribunal to order, that compensation be paid to you and your wife, or that compensation be paid to Pacific Solar? A [Mr. Paiz] Mr. Figueroa, I don’t see the difference between the two. I am the owner of Pacific Solar. The monies are received by Pacific Solar. My wife and I, as ultimate beneficiaries would receive that money. If I’m paid directly, for me, it’s the same difference. I’m the owner of Pacific Solar. So I’m claiming on behalf of my company, and for the damages I have received personally as an investor.”

²¹⁴ E.g., D3:P509:L19-P510:L5 (Solimano): “

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339. The Claimants' ownership (through the status of their corporations as third-ranking beneficiaries) gives them standing to bring that claim on behalf of Pacific Solar pursuant to CAFTA-DR Article 10.16.1(b). The damage or loss allegedly sustained by Pacific Solar is, if established, direct and effective. This is a claim for reparation of damage or loss suffered by a local company within the meaning of Article 10.16.1(b), and the Claimants' ownership in the local company as explained above gives them standing to bring that claim. Reparation made to Pacific Solar, if any, will (and must) directly contribute to the reimbursement of the loan, and thereby enhance the Claimants' chance to recoup the shares, the Plant and the PPA. In other words, the Claimants' right to recoup the shares, the Plant and the PPA upon complete reimbursement of the loans, gives the Claimants' standing to claim reparation on behalf of Pacific Solar, with due respect for the lenders' rights.
340. The Claimants' bringing a claim on behalf of Pacific Solar precludes any undue enrichment on their part.²¹⁵ This issue was addressed at the Hearing on Jurisdiction during the witness examination of Mr. Paiz,²¹⁶ and subsequently in counsels' closing statement further to a question from Arbitrator Stern.²¹⁷ As Mr. Paiz conceded, the Claimants have no agreement with the banks (whether [REDACTED] or the lenders) to pay them in reimbursement of the settlors' debts in the event the Claimants would be awarded compensation on their own behalf.²¹⁸ By contrast, however, any damages owed pursuant to CAFTA-DR Article 10.16.1(b) would have to be paid, either directly or indirectly, to Pacific Solar. They would then have to be used in accordance with the terms of the Trust Agreements, which prioritize the repayment of the lenders and the financing of the operation of the Plant.²¹⁹ The Claimants would obtain no monies unless and insofar as the Trust Agreements allow.
341. It is not addressed at this stage whether damages owed pursuant to CAFTA-DR Article 10.16.1(b) might be received by Mr. Paiz on behalf of Pacific Solar. In any event, it appears to be inherent in the mechanism of Article 10.16.1(b), which concerns claims brought on behalf of a local enterprise for loss or damage incurred by that enterprise, that any damages accorded pursuant to said article must, whether directly or indirectly, be effectively paid to the local enterprise. How this might be achieved in the present instance would be a matter to be addressed at the merits phase.

²¹⁵ Cf. *Occidental Stern Dissent*, **RL-161**, in particular ¶¶ 160 ff.

²¹⁶ D2:P352 ff (Figuerola and Paiz).

²¹⁷ D3:P508-510 (Solimano).

²¹⁸ D2:P352-358 (Figuerola and Paiz).

²¹⁹ See, notably, Assets Trust Agreement, **C-267-SP**, p. 11-12, Clauses 1.21 and 1.22. More generally, the object and purpose of the Trust Agreements is to secure the repayment of the loans to the lenders.

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342. It should further be stressed that, as set out in detail hereabove, this is a fact-specific issue, and the Tribunal's finding is founded on the very specific characteristics of the Trust Agreements.
343. The above conclusion finds further confirmation in the fact that the settlors' right to recoupment, which is indirectly owned by the Claimants, also qualifies as an "investment" within the meaning of CAFTA-DR Article 10.28. The settlors' right to recoupment is an "asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk". More specifically, the right to recoupment qualifies as "intangible [...] property" within the meaning of the Treaty's definition of "investment".²²⁰ In other words, the rights that the Claimants presently own in the broader investment (consisting essentially of Pacific Solar), themselves also qualify as an investment within the meaning of the Treaty. The Claimants have standing to protect that investment. As set out above,²²¹ this does not give them standing to claim reparation *on their own behalf* for the *entire* damage allegedly suffered by the *broader investment*. But, in the light of the specific legal regime and *raison d'être* of the Trust Agreements, as set out in detail hereabove, it does give them standing to claim compensation on behalf of Pacific Solar, to be paid to Pacific Solar with due respect for the lenders' rights.
344. On these bases, a majority of the Tribunal composed of President Angelet and Arbitrator Drymer finds that the Claimants' beneficial ownership in the investment gives them standing to:
- request a finding and declaration that the Respondent has breached its obligations under the CAFTA-DR;
 - request a finding and declaration that the agreements are investment agreements as defined by the CAFTA-DR and that Honduras has violated its obligations under the agreements;
 - request an order not to aggravate the dispute;
 - claim reparation for damages or losses allegedly sustained by Pacific Solar pursuant to CAFTA-DR Article 10.16.1(b). The Claimants "own" the covered investment within the

²²⁰ In this respect, the Tribunal adopts the view advocated by the Claimants that the rights as second- or third-rank beneficiary could be sold. D3:P651 ff. (San Juan) for the Claimants' position and compare with D3: 513 ff (Solimano) for the Respondent's position, admitting that there might be a secondary market for contingent rights but first denying the qualification as investment, then reserving its position in that respect.

²²¹ *Supra*, ¶¶ 329-332.

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meaning of the Treaty for the purpose of bringing a claim on behalf of Pacific Solar, for reparation, if any, to be paid directly or indirectly to Pacific Solar with due respect for the Lenders' rights.

345. To this extent, the Respondent's objection to jurisdiction fails.
346. By contrast, a majority of the Tribunal composed of President Angelet and Arbitrator Stern finds that the Respondent's objection to jurisdiction is upheld insofar as it relates to the Claimants' claim for reparation brought on their own behalf pursuant to CAFTA-DR Article 10.16.1(a).
347. Arbitrator Stern considers, for the reasons set out in her dissenting opinion, that the Claimants' claim should be entirely dismissed based on their lack of ownership as well as their lack of control, as concerns both claims brought by the Claimants on their own behalf and claims brought on behalf of Pacific Solar.

(3) Control

348. Pursuant to CAFTA-DR Article 10.28, an "investment" is "every asset that an investor owns or controls, directly or indirectly". Control therefore constitutes an alternative criterion to bring a claim under the Treaty.
349. Since the Tribunal has found hereabove that the Claimants' ownership gives them standing to bring a claim on behalf of Pacific Solar pursuant to Article 10.16.1(b), but not a claim for reparation on their own behalf pursuant to Article 10.16.1(a), the question to be addressed here is whether the criterion of control gives the Claimants standing to bring also a claim for reparation on their own behalf pursuant to Article 10.16.1(a); that is, whether the criterion of control broadens the Claimants' standing as compared to the criterion of ownership.
350. For the reasons set out hereafter, control cannot, in any event, give the Claimants standing to bring a claim for reparation on their own behalf. As a consequence, control cannot give the Claimants a broader or different standing than what they already have based on the criterion of ownership. The Tribunal will therefore limit itself to set out the reasons why the criterion of control does not add to what the Tribunal has already found based on the criterion of ownership.
351. *First*, the Share Trust Agreement provides that [REDACTED] retains the right to participate, deliberate and vote in shareholders' meetings and that [REDACTED] "will exercise the

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political and economic rights derived from the ownership of the shares, for which purpose it shall hold a Power of Attorney granted by the TRUSTEE, as the legitimate holder of the shares. However, it may not exercise voting rights in the case of any resolution to be adopted at a General and/or Special Shareholders' Meeting that may cause detriment to the conditions established in this Trust Agreement".²²² Clause 4 of the Share Trust Agreement, under the sub-heading "Settlor Rights", provides:

*The Settlor shall have the following rights: [...] 5) Participate in the ordinary and extraordinary shareholders' meetings of the Borrower and deliberate and consequently exercise the corresponding vote in the manner and terms deemed appropriate, provided such voting does not limit, restrict, diminish, or modify in any way the rights of the First Order Beneficiaries in relation to, or arising from, the Trust Shares. For this purpose, the Trustee shall grant the SETTLOR the required authority or power of attorney, provided no Event of Default exists under the Financing Documents*²²³

352. This is further confirmed by Clause 6 of the Share Trust Agreement, headed "Exercise of Shareholder Rights":

*Inasmuch as the Borrower [i.e., Pacific Solar] shares constitute the instruments necessary to exercise and prove shareholder rights, [REDACTED] will exercise the political and economic rights derived from the ownership of the shares, for which purpose it shall hold a Power of Attorney granted by the TRUSTEE, as the legitimate holder of the shares. However, it may not exercise voting rights in the case of any resolution to be adopted at a General and/or Special Shareholders' Meeting that may cause detriment to the conditions established in this Trust Agreement.*²²⁴

353. It follows from these provisions that, whatever control the Claimants' may have, such control does not in any event allow them (via [REDACTED]) to take decisions at the shareholders meeting of Pacific Solar that would "limit, restrict, diminish, or modify in any way the rights of the First Order Beneficiaries in relation to, or arising from, the Trust Shares" or "that may cause detriment to the conditions established in this Trust Agreement".²²⁵ Put simply, the Share Trust Agreement denies the

²²² Share Trust Agreement, C-266-EN, p. 6, Clause 6.

²²³ Share Trust Agreement, C-266-EN, p. 5.

²²⁴ Share Trust Agreement, C-266-EN, p. 6. Emphasis added.

²²⁵ Share Trust Agreement, C-266-EN, Clauses 4 and 6, pp. 5 and 6.

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settlers (and therefore indirectly, the Claimants) the right to exercise control in a way that could negatively affect the rights and interests of the lenders.

354. This is of direct relevance to whether the criterion of control could provide a basis for the Claimants' bringing a reparation claim on behalf of Pacific Solar or on their own behalf. By bringing a claim for reparation on behalf of Pacific Solar, the Claimants do not in any way affect the lenders' rights and interests. To the contrary, such a claim could increase the lenders' chances of obtaining the reimbursement of their loans, in case of success. By contrast, a claim for reparation on the Claimants' own behalf would affect the rights and interests of the lenders, because if such reparation were paid to them, the Claimants could lose their incentive to pursue the repayment of the loans to the lenders in order to get a return on their investment. This is therefore an instance where the Claimants are denied the right to exercise control over the alleged investment.
355. Accordingly, the "control" criterion of CAFTA-DR Article 10.28 does not give the Claimants standing to bring a claim for reparation on their own behalf, in addition to the claim they can bring on behalf of Pacific Solar based on their beneficial ownership. As set out in her dissenting opinion, Arbitrator Stern considers that the Claimants lack control within the meaning of CAFTA-DR Article 10.28.

C. CONCLUSION

356. On these bases, a majority of the Tribunal composed of President Angelet and Arbitrator Drymer finds that the Claimants' ownership in the investment gives them standing to:
- request a finding that the Respondent has breached its obligations under the CAFTA-DR;
 - request a finding that the agreements are investment agreements as defined by the CAFTA-DR and that Honduras has violated its obligations under the agreements;
 - request an order not to aggravate the dispute;
 - claim reparation for damages or losses allegedly sustained by Pacific Solar pursuant to CAFTA-DR Article 10.16.1(b).
357. To this extent, the Respondent's objection to the Tribunal's jurisdiction fails.

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358. A majority of the Tribunal composed of President Angelet and Arbitrator Stern finds that the Respondent's objection to jurisdiction is upheld insofar as it relates to the Claimants' claim for reparation brought on their own behalf pursuant to CAFTA-DR Article 10.16.1(a).

VIII. THE IMPORT OF AN UMBRELLA CLAUSE THROUGH MFN

359. The Respondent's objection concerns whether the Claimants' claims on alleged breaches of contractual obligations fall outside the Tribunal's jurisdiction *ratione voluntatis* or whether the Claimants are entitled to rely on the most-favoured-nation ("MFN") clause in CAFTA-DR Article 10.4 to import substantive provisions from treaties between Honduras and third States, which the Claimants argue are more favourable to them. It concerns the nature of MFN clauses in general and the CAFTA-DR MFN clause in particular, as well as whether reliance on the MFN clause in the present instance is precluded by CAFTA-DR Article 10.13.5(a), according to which Article 10.4 does not apply to "procurement". As set out hereinafter, this objection is upheld because CAFTA-DR Article 10.4, interpreted pursuant to the rules on treaty interpretation, does not allow for the import of abstract substantive protection standards from investment treaties between a CAFTA-DR State Party and third States.

A. THE PARTIES' POSITIONS

360. The Parties' respective positions are, in substance, as follows.

(1) The Respondent's Position

361. The Respondent objects to the purported jurisdiction *ratione voluntatis* of the Tribunal to hear Claimants' claim of alleged breach of contractual obligations, which is based on the umbrella clause contained in the bilateral investment treaties between Honduras, on the one hand, and Germany, Switzerland and The Netherlands, on the other hand, which the Claimants seek to import into the CAFTA-DR through the MFN clause in CAFTA-DR Article 10.4. The Respondent argues, in substance, that:

362. *First*, "[t]he procurement exclusion in the Treaty prevents Claimants from applying the MFN clause to the present case".²²⁶ CAFTA-DR Article 10.13.5 provides that "Articles 10.3, 10.4 and 10.10 do not apply to: (a) 'procurement'". The term "procurement" in Article 10.13.5(a) must be interpreted

²²⁶ Memorial on Jurisdiction, ¶¶ 160 ff.; Reply on Jurisdiction, ¶¶ 192 ff.

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based on the rules of interpretation of the law of treaties. The definition of “procurement” in Article 2.1 is part of the context of the term “procurement” in Article 10.13.5. The ordinary definition of procurement refers to any act by which a State entity receives or acquires goods or services for a purpose of public interest. It does not “refer to ‘procurement’ as a legal procedure for the structuring of the legal instrument enabling the acquisition of goods or services, but to the instrument itself by which the acquisition of goods or services by the State for governmental purposes is consolidated.”²²⁷ For the Respondent, “this clearly includes the PPA as the instrument through which ENEE’s purchase of energy from Pacific Solar is consolidated.”²²⁸ The purpose of the exception is to preserve the sovereign control of the CAFTA-DR State Parties in critical areas of economic and social policy, such as public procurement. It must allow States greater flexibility in relation to the expenditure of public funds when procuring goods or services from foreign or domestic investors. Accordingly, “the exception in [CAFTA-DR] Article 10.13.5 [...] applies to any dispute arising out of procurement, understood as the acquisition of goods or services by the State, and not to the mere formal procedure for the consolidation of a government procurement, as argued by Claimants.”²²⁹ In this case, the Claimants’ claim “arises out of [...] [the PPA] between Pacific Solar and ENEE”, which “provides that ENEE will purchase the power generated by the Nacaome Plant that is allegedly owned by the Claimants.” In other words, the supply of energy, which “leaves no room for doubt that the business underlying this arbitration is a public procurement.”²³⁰

363. *Second*, “[i]n any event, if the Tribunal were to consider that the procurement [carve-out] does not prevent the application of the MFN clause to the present dispute [...], the MFN clause [in the CAFTA-DR] does not permit the import of substantive standards” from other treaties.²³¹ In this case, the MFN clause “cannot be used to import an umbrella clause into a treaty that does not have one.”²³² The objective of an MFN clause is to avoid discrimination between investors in like circumstances, not to create substantive rights that are not expressly enshrined in the base treaty. This is specifically the case of the CAFTA-DR MFN clause which accords MFN treatment “in like circumstances” and “with respect to the establishment, acquisition, expansion, management, conduct, operation and sale

²²⁷ Reply on Jurisdiction, ¶ 232.

²²⁸ Memorial on Jurisdiction, ¶¶ 169 ff.; Reply on Jurisdiction, ¶ 232.

²²⁹ Reply on Jurisdiction, ¶ 237.

²³⁰ Memorial on Jurisdiction, ¶ 169.

²³¹ Memorial on Jurisdiction, ¶¶ 180 ff.; Reply on Jurisdiction, ¶¶ 239 ff.

²³² Memorial on Jurisdiction, ¶ 181.

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or other disposition of investments in its territory”.²³³ The purpose of this clause is to protect an investor of a State Party by comparing the treatment it received with the treatment accorded to an actual investor of another nationality. As also stated in the US NDP Submission, “for the MFN clause to apply, the claimant investor has the burden of demonstrating that it or its investments (i) received treatment; (ii) were in like circumstances with investors or investments of another Contracting Party or a third State; and (iii) received treatment less favourable than that accorded to investors or investments of another Contracting Party or a third State.”²³⁴ The existence of provisions in other international investment treaties does not amount to “treatment” within the meaning of the MFN clause.

364. The Respondent argues that its interpretation is further confirmed by the circumstance that the US NDP Submission together with the position of Honduras on this issue constitute both a subsequent agreement and practice, within the meaning of the rules on treaty interpretation, for the purpose of interpreting the CAFTA-DR MFN clause.²³⁵

(2) The Claimants’ Position

365. The Claimants argue, in substance, that the CAFTA-DR MFN clause allows importing an umbrella clause from another treaty on which the Claimants may rely in the present instance.
366. *First*, the MFN treatment guaranteed by CAFTA-DR Article 10.4 is broad and applies to all “treatment”, which encompasses substantive treaty protections, “including the umbrella clause in third-party BITs”.²³⁶ The phrase “in like circumstances” does not require showing an actual investor or investment in similar circumstances as the Claimants or their investment. “The absence of specific limitations in the MFN clause supports including substantive protections from third-party treaties”.²³⁷ The Respondent’s interpretation would allow States to defeat their MFN obligations by failing in fact to accord to third-State nationals the treatment to which they are legally entitled.²³⁸ The US NDP

²³³ CAFTA-DR, **CL-001-EN (Resubmitted)**, Article 10.4.

²³⁴ Reply on Jurisdiction, ¶ 280 *citing* the United States of America’s Non-Disputing Party Submission of 20 March 2025 (“**US NDP Submission**”), ¶ 3.

²³⁵ Reply on Jurisdiction, ¶¶ 285 ff.

²³⁶ Claimants’ Memorial, Section IV.C.1; Counter-Memorial on Jurisdiction, ¶¶ 64 ff.; Rejoinder on Jurisdiction, ¶¶ 86 ff.

²³⁷ Counter-Memorial on Jurisdiction, p. 48, title 3.

²³⁸ Rejoinder on Jurisdiction, ¶¶ 88 ff.

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Submission does not constitute a subsequent agreement or subsequent practice for the purpose of treaty interpretation.²³⁹

367. Further, “for purposes of the MFN clause, a treaty need not contain the same obligation that the claimant seeks to import in order for the ‘in like circumstances’ standard to be met.”²⁴⁰ In any case, CAFTA-DR Article 10.16.1(a)(i)(C) provides investors with the right, as the Claimants say, to enforce the provisions of investment agreements, which is a standard of protection akin to that provided by the umbrella clauses sought to be imported through the MFN clause.²⁴¹
368. According to the Claimants, “[t]he object and purpose of the CAFTA-DR and the MFN clause undermines the Respondent’s restrictive reading”. The MFN obligation must be “interpreted in the manner most conducive to fulfil[ing] the objective of the BIT to protect investments and create conditions favorable to investments”. In CAFTA-DR “Article 10.13, the [State] Parties deliberately chose to carve out certain matters like ‘non-conforming measures,’ but did not exclude the importation of substantive protections.” The Treaty’s drafting history confirms that the State Parties wanted to exclude the application of MFN to dispute settlement mechanisms but did, by contrast, accept its application to substantive protection provisions.²⁴²
369. *Second*, the CAFTA-DR’s procurement carve-out in Article 10.13.5 does not apply. Article 2.1 defines “‘procurement’ narrowly, limiting it to the formal ‘process’ of acquiring goods or services”. It “does not extend the term’s coverage to subsequent stages after a contract is awarded and executed.” The Claimants argue that “[t]he purpose of the procurement carve-out is to permit discrimination during the selection process for government contracts” “as opposed to the imposition of Government regulations after the State awards such agreements”, which “would undermine legal certainty and expose foreign investors to arbitrary treatment throughout the life of their investment.” Finally, the procurement carve-out “acts as an exception to the Treaty’s general rule” and “should be interpreted narrowly”.²⁴³

²³⁹ Rejoinder on Jurisdiction, ¶¶ 91-92.

²⁴⁰ Counter-Memorial on Jurisdiction, ¶¶ 82 ff.; Rejoinder on Jurisdiction, ¶ 93.

²⁴¹ Counter-Memorial on Jurisdiction, ¶ 88.

²⁴² Rejoinder on Jurisdiction, ¶¶ 86, 97 ff.

²⁴³ Rejoinder on Jurisdiction, ¶¶ 104 ff.

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B. US NDP SUBMISSION

370. Also before the Tribunal is the US NDP Submission. As concerns CAFTA-DR Article 10.4, the United States of America submit in substance as follows:

371. To establish a breach of the provision, “a claimant has the burden of proving that it or its investments: (1) were accorded ‘treatment’; (2) were in ‘like circumstances’ with investors or investments of any other Party or of any non-Party; and (3) received treatment ‘less favorable’ than that accorded to investors or investments of any other Party or of any non-Party”.²⁴⁴ The United States submits that “[d]etermining whether an investor or investment identified by a claimant is in like circumstances with the claimant or its investment is a fact-specific inquiry”.²⁴⁵

372. Identifying appropriate comparators for purposes of the “like circumstances” analysis “requires consideration of more than just the business or economic sector”. Regulatory framework and policy objectives, among other possible relevant characteristics, should also be considered. Whether two investors are in like circumstances will notably depend on “whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives”.²⁴⁶

373. The United States further submits that, to establish a violation of the provision, a claimant must identify a measure adopted or maintained by a State Party through which that State Party accorded more favourable treatment, “as opposed to speculation as to how a hypothetical measure might have applied to investors of a non-Party or another Party”.²⁴⁷ Additionally, it submits that “a Party does not accord ‘treatment’ through the mere existence of provisions in its other international agreements such as conditions to consent, procedural provisions, umbrella clauses, or clauses that impose autonomous fair and equitable treatment standards”. The treatment accorded by a State Party could include measures adopted or maintained by a Party in connection with carrying out its obligations under such provisions.²⁴⁸

²⁴⁴ US NDP Submission, ¶ 3.

²⁴⁵ US NDP Submission, ¶ 4.

²⁴⁶ US NDP Submission, ¶ 4.

²⁴⁷ US NDP Submission, ¶ 5.

²⁴⁸ US NDP Submission, ¶ 5.

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C. THE TRIBUNAL'S ANALYSIS

374. As appears from the above, the Parties have taken different approaches to the order in which the two main limbs of their arguments should be addressed. The Respondent suggests that logic commands that the Tribunal should first determine whether the MFN clause applies to the present instance given the procurement carve-out, then determine, if need be, whether the clause allows for importing standards from other treaties.²⁴⁹ In the Tribunal's view, each limb relates to different aspects of the scope of application of the MFN clause. Consequently, they can be addressed in the order most conducive to procedural efficiency. This impels the Tribunal to start with the question whether the CAFTA-DR MFN clause allows for importing substantive protection standards from other treaties. For the reasons set out below, the Tribunal finds that this is not the case.

(1) The import of substantive standards from third-State treaties

a. General

375. Numerous arbitral decisions and awards have addressed the question of whether a given MFN clause in a treaty allowed for importing substantive standards or dispute settlement mechanisms from other treaties and, if so, whether that was subject to conditions such as the existence of a similar provision in the "importing" treaty which is less advantageous to the investor than the one in the other treaty.
376. It is common ground between the Parties that this depends on the specific wording of any given MFN clause, and other factors of relevance pursuant to the rules of treaty interpretation.²⁵⁰
377. Along the same lines, there is no general interpretive presumption either in favour or against allowing for the import of protections from other treaties by means of an MFN clause.
378. *On the one hand*, the interpretation of MFN clauses in favour of the import of "abstract" protections from other treaties has a certain pedigree. The ILC's 1978 Draft Articles on MFN clauses with commentaries addressed "whether the operation of a most favoured-nation clause is contingent upon a third State merely becoming entitled to claim certain treatment, or whether it operates only when

²⁴⁹ Reply on Jurisdiction, ¶ 190.

²⁵⁰ See, for instance, Rejoinder on Jurisdiction, ¶ 86 referring to the term "treatment" in its ordinary meaning; Reply on Jurisdiction, ¶ 244 referring to an interpretation of the MFN clause "aligned with the elements of Article 31 of the VCLT".

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the third State actually claims and begins to enjoy the treatment”.²⁵¹ The ILC quoted from the position of the United Kingdom as set out by Lord McNair, stating:

In answer to this question two views are possible. The first is that Great Britain has no locus standi to claim the treatment until she can point to its actual exercise and enjoyment by B or B's nationals. This view places Great Britain at the mercy of the degree of vigilance exerted by B or the degree of importance of the matter to B; for instance, B might have no nationals residing in the territory of A and earning a taxable income. The second view is that the most favoured-nation clause in the treaty with Great Britain, automatically and absolutely, invests her and her nationals with all rights in pari materia which may be possessed at any time when the treaty is in force by B and its nationals, irrespective of the question whether those rights are in fact being exercised and enjoyed or not, that is, irrespective of the question whether B has claimed them or neglected to claim them or had no occasion to claim them. The United Kingdom Government has been advised by its law officers that the second view is the right one, that is to say, that while the question 'must depend upon the true construction of the most-favoured-nation clause upon which it may arise, ... speaking generally[²⁵²] ... the right extends to the treatment which the most-favoured-nation is entitled to, whether actually claimed or exercised or not'. The United Kingdom has asserted, and succeeded in maintaining, this second view.²⁵³

379. While this statement was not specifically concerned with investment treaties and the import of treaty standards through MFN, it shows that the interpretation of MFN clauses as allowing the import of “abstract” advantages from other treaties is not a mere creation of investment tribunals.
380. *On the other hand*, States have the sovereign right to limit the operation of an MFN clause to the situation where two actual investors are treated differently, if they so wish. As also emphasised by Lord McNair in the just-quoted passage, the question “must depend upon the true construction of the most-favoured-nation clause upon which it may arise”.²⁵⁴

²⁵¹ International Law Commission, Draft Articles on most-favoured-nation clauses with commentaries, 1978 (“**ILC Draft Articles**”), p. 54, point 6, **CL-233-EN**.

²⁵² The Tribunal does not consider that there is, at least in international investment law, room for “speaking generally”. Rather, the Tribunal adheres to Lord McNair’s accompanying statement that the question depends on the “true construction of the most-favoured-nation clause upon which it may arise”, while noting that such construction does not depend on the terms of the clause alone but on an application of the rules of treaty interpretation.

²⁵³ ILC Draft Articles, **CL-233-EN**, p. 54, point 6.

²⁵⁴ ILC Draft Articles, **CL-233-EN**, p. 54, point 6.

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381. Further, MFN treatment is not a rule of customary international law. In its Draft articles on MFN clauses, the ILC thus referred to:

*[...] the obvious rule that no State is entitled to most-favoured-nation treatment by another State unless that State has undertaken an international obligation to accord such treatment.*²⁵⁵

382. This means that, when it comes to interpreting a given treaty clause, there is no “general international law” MFN regime against which that clause can be interpreted. This confirms that all depends on the interpretation of any given MFN clause.

383. The Tribunal thus proceeds with analysing the CAFTA-DR MFN clause, contained in Article 10.4, in accordance with the rules of interpretation of the law of treaties, rather than primarily by reference to the numerous but case- and clause-sensitive arbitral decisions on the matter. This is also in line with CAFTA-DR Article 1.2.2, according to which the Parties “shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 [to which the Tribunal will revert] and in accordance with applicable rules of international law”.

b. The terms in their ordinary meaning

384. CAFTA-DR Article 10.4 reads as follows:

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

*2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*²⁵⁶

385. As far as the terms of this provision are concerned, the following observations can be made.

²⁵⁵ ILC Draft Articles, CL-233-EN, p. 24, Article 7.1.

²⁵⁶ CAFTA-DR, CL-001-EN (Resubmitted).

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386. *First*, as concerns “treatment”, the Claimants argue that the term, “in its ordinary meaning, encompasses access to more favorable substantive protections available under third-party treaties”.²⁵⁷ On this view, “treatment” appears to be considered in the abstract as the benefit from a legal rule or regime. It has been observed, however, that this interpretation confuses the terms “treatment” and “standard of treatment”.²⁵⁸ The juxtaposition of both these notions indicates that “standard of treatment” refers to the abstract rule contained in the investment treaties, whereas “treatment” refers to a host State’s action or inaction that does or does not conform to the “standard of treatment”. At the same time, the term “treatment” can also be used in a more abstract sense, as evidenced by the abovementioned analysis of Lord McNair quoted by the ILC.²⁵⁹ The Tribunal therefore considers the term “treatment” to be neutral as concerns the capacity of Article 10.4 to import treaty standards.
387. *Second*, Article 10.4 provides that MFN treatment must be accorded to investors or investments “in like circumstances”. The terms “in like circumstances” are inherently fact-sensitive. They therefore support the interpretation of the MFN clause as requiring a comparison *in concreto* of actual foreign investors. In this respect, the Tribunal notes that whereas the *İçkale İnşaat* tribunal, referred to by the Respondent, considered that the terms “in like circumstances” precluded the abstract import of treaty provisions,²⁶⁰ the *Güris İnşaat* tribunal, on which the Claimants rely, disagreed.²⁶¹ This Tribunal considers that the reasoning of the *Güris İnşaat* tribunal is either unconvincing or inapplicable.
388. *Firstly*, the *Güris İnşaat* tribunal considered that the “similar situations” test “requires a showing of likeness [...]. It calls for an assessment of similarities and dissimilarities between investors or investments, in order to identify whether differential treatment would be warranted as a matter of international law. It is an altogether different matter to say that there is a further requirement of identifying an actual investment by an actual investor that has received more-favourable treatment in actual fact”.²⁶² As a matter of fact, however, the question whether differential treatment is warranted

²⁵⁷ Rejoinder on Jurisdiction, ¶ 86.

²⁵⁸ See, notably, Canada’s position in *Chemtura Corp. v. Government of Canada*, PCA Case No. 2008-01, as set out in Simon Batifort and J. Benton Heath, “The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization”, *A.J.I.L.*, 2017, Vol. 111/4, p. 902-903, **RL-099**.

²⁵⁹ *Supra*, ¶ 378. See also *Güris İnşaat ve Mühendislik Anonim Şirketi et al. v. Syrian Arab Republic*, ICC Case No. 21845/ZF/AYZ, Final Award, 31 August 2020 (“*Güris İnşaat v. Syria*”), ¶ 252, **CL-333-EN**.

²⁶⁰ *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016, ¶¶ 328-329, **RL-91**.

²⁶¹ *Güris İnşaat v. Syria*, **CL-333-EN**, ¶ 255.

²⁶² *Güris İnşaat v. Syria*, **CL-333-EN**, ¶ 255.

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will generally depend on all the circumstances of a given case. The abstract import of a provision from another treaty hardly allows for that appreciation.

389. *Secondly*, the *Güris İnşaat* tribunal considered that “it is difficult to endorse a reading that would allow the States Parties altogether to defeat their [...] MFN obligations by failing in fact to accord to third State nationals the treatment to which they are legally entitled”.²⁶³ This assumes that a host State would violate the rights of third State nationals for the purpose of avoiding MFN treatment in favour of another investor. This reasoning is based on a presumption of bad faith on the part of host States, which is both unrealistic and contrary to general principles of law.²⁶⁴
390. In light of the above, the Tribunal does not agree with the Claimants that “[t]he absence of specific limitations in the MFN Clause supports including substantive protections from third-party treaties”.²⁶⁵ In first instance, this reasoning implicitly relies on a presumption in favour of the interpretation of MFN clauses as allowing the import of treaty standards. As already stated, there is no such presumption under general international law.²⁶⁶ In second instance, the terms of CAFTA-DR Article 10.4 are not neutral. Rather, the terms “in like circumstances” are an indication against the clause’s capacity to import treaty standards.

c. The context

391. According to the rules on treaty interpretation, and as the Claimants rightly argue,²⁶⁷ the abovementioned terms of the treaty must be placed in their context. Both the immediate and the broader context of CAFTA-DR Article 10.4 are of major relevance.
392. As to the *immediate context*, Article 10.4 is preceded by the provision on “National Treatment”. CAFTA-DR Article 10.3 is formulated in the same way as Article 10.4 and notably provides that:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors

²⁶³ *Güris İnşaat v. Syria*, CL-333-EN, ¶ 255.

²⁶⁴ For the sake of completeness, it is noted that the *Güris İnşaat* tribunal further considered that “it is difficult to see why [...] the States Parties would have agreed that Article III(2) is to have ‘no effect in relation to ... customs unions, regional economic organization or similar international agreements’ if the latter Article only covered *de facto* discrimination” (*Güris İnşaat v. Syria*, CL-333-EN, ¶ 255). In this respect, it is sufficient to observe that the CAFTA-DR does not contain a similar exception to MFN.

²⁶⁵ Counter-Memorial on Jurisdiction, p. 48, title 3, and ¶ 92.

²⁶⁶ See above, ¶ 377.

²⁶⁷ Counter-Memorial on Jurisdiction, ¶¶ 89 ff.

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with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

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

393. The CAFTA-DR's presentation of national treatment and MFN treatment as "twin sisters" is an indication that they must be interpreted in essentially the same manner. More specifically, it is an indication that both provide for essentially the same rule with respect to the differentiation between foreigners and nationals, on the one hand, and foreigners of different countries, on the other hand.
394. Yet national treatment does not (and cannot) call for the import of provisions from other treaties. It only calls for a comparison between the treatment accorded by a host State's regulations and practice to that State's own nationals, on the one hand, and foreign nationals, on the other hand. This is again an indication that Article 10.4 is not meant either to allow for the import of provisions from other treaties.
395. Further with respect to the immediate context, the Claimants argue that Article 10.4 must be interpreted in the context of the carve-out provision in Article 10.13, entitled "non-conforming measures". This provision does not exclude the possibility of using the MFN clause to import treaty standards. According to the interpretative maxim *expressio unius (est) exclusio alterius*, the Claimants argue, this means that the Treaty drafters "chose not to exclude the possibility for investors to rely on treatment accorded to investors of third-party treaties".²⁶⁸
396. This interpretation is, however, contradicted by the object and purpose of Article 10.13. The provision *dispenses* State Parties from applying some treaty provisions, including Article 10.4, in some circumstances. By contrast, the question whether Article 10.4 allows importing other treaty standards is not about dispensing State Parties from applying a treaty provision but about determining its scope. In truth, in providing that "Article[] [...] 10.4 ... do[es] not apply" in the circumstances enumerated,

²⁶⁸ Counter-Memorial on Jurisdiction, ¶ 90.

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Article 10.13 implies that the scope of Article 10.4 is defined elsewhere. The Claimants' argument is therefore unfounded.²⁶⁹

397. As to the *broader context*, the CAFTA-DR is a very elaborate treaty with many nuances, annexes specifying the meaning of treaty provisions, carve-outs, etc. This creates a strong presumption that the MFN clause cannot be used to import broad standards from other treaties. Treaty negotiators may of course carefully and painstakingly negotiate the details of a regional multilateral agreement, then accept to put all these details at the mercy of any existing or future²⁷⁰ agreement that any of the Contracting States may enter into with a third country, however that is not obviously a rational or coherent thing to do. The detailed and balanced nature of the CAFTA-DR therefore is a very strong indication that Article 10.4 does not allow for importing standards from third-party treaties. In the Tribunal's view, this is one of the main elements why the abundant case law on MNF clauses in less detailed investment treaties cannot be transplanted to a treaty such as the CAFTA-DR.

398. The context of Article 10.4 thus provides strong indications that the provision does not allow for the import of provisions from other treaties.

d. The object and purpose

399. Turning now to the object and purpose of Article 10.4 and of the CAFTA-DR as a whole, the following observations can be made.

400. *On the one hand*, the application of MFN to import treaty standards has advantages in line with the object and purpose of investment law. The import of treaty standards is more straight-forward and effective than a comparison between two actual investors as advocated by the Respondent. The latter approach raises evidentiary issues similar to those identified by Lord McNair in the passage quoted

²⁶⁹ Also, the Claimants' argument is difficult to reconcile with their argument based on the *travaux* of the CAFTA-DR, which reportedly ruled out the application of the MFN clause to dispute settlement provisions but not to substantive provisions (Counter-Memorial on Jurisdiction, ¶ 91 and footnote 227). If that were the case, the Parties would, according to the Claimants' *exclusio unius* reasoning, have carved that out in Article 10.13.

²⁷⁰ The Tribunal is not convinced that, as the Respondent asserts, importing standards from treaties concluded after the treaty containing the MFN clause raises issues of non-retroactivity of treaties (Memorial on Jurisdiction, ¶ 196), but this must not be addressed here. The point here is that treaty negotiators cannot be *presumed* to put the fate of a detailed treaty text at the mercy of another treaty, and this is even more true where future treaties are concerned.

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above:²⁷¹ investors may be incapable of determining whether the other operators in their business are foreign owned.

401. *On the other hand*, the nature of the CAFTA-DR as a regional agreement promoting fair competition in the free trade area argues against importing standards from third States. Where *bilateral* treaties are concerned, interpreting MFN clauses as allowing for the import of treaty standards can contribute to a “multilateralization” of international investment law, thereby creating a level playing field. Where *regional* treaties such as the CAFTA-DR are concerned, by contrast, allowing the import of standards from treaties with third States risks undermining the creation of a level playing field at the regional level.²⁷²
402. Further, as the United States of America have emphasised in their NDP submission, their proposed interpretation allows for considering “whether the relevant treatment distinguishes between investors or investments *based on legitimate public welfare objectives*.”²⁷³ The nuanced provisions in the CAFTA-DR indeed allow for protecting host States’ regulatory freedom and the pursuit of non-economic legitimate objectives such as the protection of health and the environment.²⁷⁴ This balanced regime could be undermined if Article 10.4 allowed investors to import treaty standards that do not allow for the same protection of legitimate public welfare objectives in the same way as the CAFTA-DR.
403. It follows from the above that interpreting CAFTA-DR Article 10.4 as precluding the import of protection standards from other treaties is in line with the object and purpose of the Treaty as a whole and of the MFN clause in particular. While the alternative interpretation may also contribute to the

²⁷¹ *Supra*, ¶ 378: “This view places Great Britain at the mercy of the degree of vigilance exerted by B or the degree of importance of the matter to B; for instance, B might have no nationals residing in the territory of A and earning a taxable income.”

²⁷² The Respondent has also argued that allowing for importing treaty standards has the disadvantage of favouring treaty shopping and undermining confidence in the system (Memorial on Jurisdiction, ¶ 183). The Tribunal is not convinced that using an MFN clause to import standards from other treaties can qualify as illegitimate “shopping” in the same way as a last-minute restructuring of an investment to try and obtain treaty protection.

²⁷³ US NDP Submission, ¶ 4.

²⁷⁴ The protection of host States’ regulatory freedom and the protection of public welfare objectives is not mentioned among the objectives in CAFTA-DR, **CL-001-EN (Resubmitted)**, Article 1.2, but they are mentioned in several preambular paragraphs, and also find expression in specific provisions of the Treaty’s investment chapter, such as Article 10.11 on “Investment and Environment”, Annex 10-A on “Public Debt” and Annex 10-C.4.b, which provides that, “[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations”. Safeguarding the effectiveness of these provisions is not less important than pursuing the objectives set out in Article 1.2.

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object and purpose of the Treaty and the clause, that contribution is more debatable. It would *at most* be equivalent, and unable to alter the conclusion reached on the basis of the other interpretative elements.

404. On all these bases, the Tribunal concludes that the MFN clause contained in CAFTA-DR Article 10.4 does not allow for importing protection standards from other treaties entered into by the host State.

e. The CAFTA-DR travaux

405. The Claimants further refer to the CAFTA-DR's drafting history as reported in *ICS v. Argentina* to assert that, "[i]n the CAFTA-DR's drafting history, the Contracting Parties reportedly affirmed their understanding that the MFN provision applies to 'substantive treatment matters,' but was not intended to 'encompass international dispute resolution mechanisms'".²⁷⁵ Irrespective of the fact that this is an indirect source which the Tribunal should handle with great caution, this argument is unconvincing for the following reasons.
406. *First*, according to the rules of treaty interpretation codified in the VCLT, preparatory works are only a supplementary means of interpretation. According to the rule codified in VCLT Article 32, preparatory works may be resorted to in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable. Yet, the Tribunal has found that the application of the rules of treaty interpretation codified in VCLT Article 31 does not leave the meaning of the CAFTA-DR clause ambiguous or unclear, nor does it lead to a manifestly absurd or unreasonable result.
407. *Second*, even if recourse to the drafting history were required, the reported *travaux* are not quite as clear as the Claimants assert. The footnote in the negotiating history of the CAFTA-DR discussed by the *ICS* tribunal discarded the application of *Maffezini* to CAFTA-DR Article 10.4 by referring to the terms "with respect to the establishment [...] [etc.]".²⁷⁶ Yet, as discussed above, these terms are also

²⁷⁵ Counter-Memorial on Jurisdiction, ¶ 91 and footnote 227, quoting from *ICS Inspection and Control Services Limited v. The Argentine Republic (I)*, PCA Case No. 2010-09, Award on Jurisdiction, 10 February 2012 ("*ICS Inspection v. Argentina*"), ¶ 302, **CL-253-EN**.

²⁷⁶ As quoted in *ICS Inspection v. Argentina*, ¶ 302, **CL-253-EN**: "The Parties [to the CAFTA-DR] agree that the following footnote is to be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Treatment Article and the *Maffezini* case. This footnote would be deleted in the final text of the Agreement. The Parties note the recent decision of the arbitral tribunal in *Maffezini (Arg.) v. Kingdom of Spain*, which found an unusually broad most-favored-nation clause in an Argentina-Spain agreement to encompass

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to be found in the national tTreatment clause of Article 10.3, which manifestly does not allow for importing abstract standards from other treaties. This is not, therefore, an instance where an interpretation according to VCLT Article 31 leaves a treaty provision ambiguous or obscure, and the *travaux* bring the light. On the contrary, CAFTA-DR Article 10.4 is, when interpreted in accordance with VCLT Article 31, unambiguous and clear, while the *travaux* are not.

408. In conclusion, the report of the CAFTA-DR *travaux* relied upon by the Claimants leaves the Tribunal's conclusion unaffected.

f. Conclusion

409. The Tribunal finds that CAFTA-DR Article 10.4 does not allow the Claimants to import the umbrella clauses contained in the bilateral investment treaties entered into by Honduras with Germany, Switzerland, and The Netherlands. Accordingly, the Tribunal lacks jurisdiction to hear the Claimants' claim of alleged breach of contractual obligations, which is based on the alleged violation of any of these umbrella clauses.

(2) The procurement carve-out

410. In light of the above, it is not necessary for the Tribunal to address the question of whether the Claimants are deprived of the benefit of CAFTA-DR Article 10.4 by reason of Article 10.13.5(a), which provides that Article 10.4, among others, does not apply to "procurement".

D. GENERAL CONCLUSION

411. In conclusion, the Respondent's objection is upheld. The Tribunal lacks jurisdiction to hear the Claimants' claim of alleged breach of contractual obligations, which they base on the alleged violation of an umbrella clause imported into the CAFTA-DR by means of the MFN clause in CAFTA-DR Article 10.4.

international dispute resolution procedures". Further, "[b]y contrast, the Most-Favored-Nation Treatment Article of this Agreement is expressly limited in its scope to matters 'with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.' The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case. Other recent investment treaties have similarly included provisions explicitly indicating that this language intends to specifically limit the MFN clause to substantive treatment matters".

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412. Arbitrator Stern agrees with the conclusion that the Claimants have no right to claim for alleged contractual breaches, without necessarily agreeing with the developments concerning the way the MFN clause has been interpreted, which she had difficulties to follow.

IX. THE INVESTMENT AGREEMENT CLAIM

413. The Respondent's objection is concerned with whether the PPA, the State Guarantee and the Operations Agreement qualify as an "investment agreement" within the meaning of CAFTA-DR Article 10.28. This qualification would give the Claimants access to arbitration under the CAFTA-DR irrespective of whether the Respondent breached the Treaty's substantive investment protection standards set out in Chapter Ten, since CAFTA-DR Article 10.16 provides that ICSID arbitration is available where the claim is based on a respondent's alleged breach of either "[i)] an obligation under Section A [of CAFTA-DR Chapter Ten], [(ii)] an investment authorization, or [(iii)] an investment agreement," and such breach has resulted in loss or damage to the claimant. In addition to CAFTA-DR Article 10.28 which defines an "investment agreement", of further relevance are Footnote 12 to CAFTA-DR Chapter Ten which defines a "written agreement", and Footnote 13 to Chapter Ten which defines the notion of "national authority". As set out hereinafter, this objection is dismissed because the PPA, the State Guarantee and the Operations Agreement taken together qualify as an "investment agreement" within the meaning of CAFTA-DR Article 10.28.

A. THE PARTIES' POSITIONS

414. The Parties' respective positions are, in substance, as follows.

(1) The Respondent's Position

415. The Respondent argues that, in the present case, there exists no "investment agreement" under CAFTA-DR Article 10.28.²⁷⁷
416. *First*, while "Honduras does not dispute that the PPA, the State Guarantee and the Operations Agreement are in writing and [...] entered into force after the date of entry into force of CAFTA-

²⁷⁷ Memorial on Jurisdiction, ¶¶ 204 ff.; Reply on Jurisdiction, ¶¶ 305 ff.

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DR”,²⁷⁸ the Claimants fail to identify “a written agreement” as required by Article 10.28 for the following reasons:

- The PPA, the State Guarantee and the Operations Agreement “do not constitute agreements of the same rank”. Rather, the the State Guarantee and the Operations Agreement are “derivative and supplementary to the PPA[, which] represents the agreement establishing the contractual relationship for the purchase and sale of electricity, while the State Guarantee merely acts as a guarantee of payment in case of ENEE’s default”, as provided in Annex X of the PPA. The Operations Agreement is only a technical document that authorizes the construction and operation of the Plant, without creating new substantive rights.²⁷⁹ Thus, “the only written agreement that the Tribunal must analyse to determine whether an investment agreement under CAFTA-DR Article 10.28 is in place is the PPA”.²⁸⁰
- The PPA is not a written agreement within the meaning of Footnote 12 to CAFTA-DR Chapter Ten. It “was not executed between a national authority of one [State] Party and a covered investment or investor of another [State] Party”.²⁸¹ ENEE is not a national authority because it is not part of the central level of government.²⁸² Footnote 13 defines “national authority” under CAFTA-DR Article 10.28 as an “authority at the central level of government”. “The membership of the central level of government must be analyzed in light of Honduran legislation [and, under] Honduran law, ENEE is not part of the central level of government.” It is a State-owned enterprise, not an authority.²⁸³
- Neither were the PPA, the State Guarantee or the Operations Agreement entered into with a covered investment or investor of another State Party.²⁸⁴ This condition is required by CAFTA-DR Article 10.28 and must be satisfied at the time of the original execution of the agreement, as was for example decided in *Duke Energy v. Ecuador*.²⁸⁵ In this case, Pacific

²⁷⁸ Memorial on Jurisdiction, ¶ 208.

²⁷⁹ Memorial on Jurisdiction, ¶ 212; Reply on Jurisdiction, ¶ 308.

²⁸⁰ Memorial on Jurisdiction, ¶ 214; Reply on Jurisdiction, ¶¶ 314-321, 340-341.

²⁸¹ Memorial on Jurisdiction, ¶ 217; Reply on Jurisdiction, ¶¶ 354-372.

²⁸² Memorial on Jurisdiction, ¶ 220.

²⁸³ Memorial on Jurisdiction, ¶¶ 218-223.

²⁸⁴ Memorial on Jurisdiction, ¶ 227; Reply on Jurisdiction, ¶¶ 373-386.

²⁸⁵ Memorial on Jurisdiction, ¶ 228.

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Solar, a company incorporated in Honduras, was owned and controlled at the time of the execution of the PPA (and its derivative instruments) by Honduran nationals.²⁸⁶

- “Additionally, it is well established in doctrine and jurisprudence that ‘such an agreement must be entered into by the host State and the foreign investor, and not by a State-owned entity or a local company established by the investor’”.²⁸⁷

417. *Second*, the Claimants have not proven that the alleged agreement would confer rights with respect to natural resources or other assets controlled by the national authorities. The PPA or the so-called agreements do not grant Pacific Solar rights with respect to natural resources. In any event, the solar resource is not a “natural resource[] that a national authority controls” within the meaning of CAFTA-DR Article 10.28.²⁸⁸

418. *Third*, the PPA or so-called agreements cannot simultaneously be the basis of the investment and the covered investment.²⁸⁹

(2) The Claimants’ Position

419. The Claimants disagree.²⁹⁰

420. *First*, all three agreements constitute an “investment agreement” within the meaning of CAFTA-DR Article 10.28. They are part of the same economic transaction, and a holistic analysis must be undertaken to determine the existence of an investment agreement.

421. Pursuant to the 2007 Renewables Energy Law, “generators who enter into a PPA ‘shall be entitled’ to a State guarantee” and “[u]nder the State Guarantee, the Government accepted joint and several liability to Pacific Solar for ENEE’s obligations under the PPA”, of which it is a part.²⁹¹

422. “Through the Operations Agreement, SERNA – the Honduran Ministry of Natural Resources – expressly granted Pacific Solar the exclusive right to ‘use and usufruct’ solar resources for the Plant to operate. This was done in accordance with the 2013 Renewables Law, which provides that power

²⁸⁶ Memorial on Jurisdiction, ¶ 227.

²⁸⁷ Memorial on Jurisdiction, ¶ 231.

²⁸⁸ Memorial on Jurisdiction, ¶¶ 236-244; Reply on Jurisdiction, ¶¶ 387-407.

²⁸⁹ Memorial on Jurisdiction, ¶¶ 245-246; Reply on Jurisdiction, ¶¶ 408-414.

²⁹⁰ Counter-Memorial on Jurisdiction, ¶¶ 110 ff.; Rejoinder on Jurisdiction, ¶¶ 123 ff.

²⁹¹ Counter-Memorial on Jurisdiction, ¶ 116.

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generators that use natural resources for their production will receive a ‘concession for the use of the natural resource’”. “The Operations Agreement further provides that the National Dispatch Center (“**CND**” [in Spanish]), Honduras’s authority in charge of administering the national grid—must receive and dispatch all electricity generated at the agreed delivery point in the PPA, and [...] allows Pacific Solar to be connected to the grid in exchange for a fee, without which it could not deliver the power it generates. These rights and obligations—among others—are closely intertwined with the PPA. One could not function without the other.”²⁹²

423. *Second*, the agreements were executed by a Honduran national authority and by a covered investment of the Claimants.
424. There is no dispute between the parties that the State Guarantee and Operations Agreement were executed by “national authorit[ies]”: the State Guarantee was executed by the Attorney General’s Office and the Secretariat of Finance, both “in representation of the State”, and the Operations Agreement was executed by SERNA, the Ministry in charge of natural resources. The Respondent’s argument that ENEE, which executed the PPA, is not a Honduran national authority is therefore irrelevant.
425. In any event, ENEE also is a “national authority” within the meaning of the Treaty. This meaning is not to be determined in accordance with the choice of law clause in CAFTA-DR Article 10.22 but in accordance with the rules of treaty interpretation and in particular the plain wording of the Treaty itself, notably Footnote 13 to Chapter Ten. According to the Claimants, Footnote 13 defines “central level of government” for purposes of Honduras as “the national level of government”. Contrary to what the Respondent asserts, this does not exclude entities that are “autonomous” of the executive branch. The definition focuses on whether authority extends throughout the country’s territory (*i.e.*, nationwide), as opposed to only certain portions of that territory (*i.e.*, regional or local). This meaning is confirmed by CAFTA-DR Article 10.13 on non-conforming measures, which divides each Party’s Government into central, regional and local government.
426. CAFTA-DR Article 10.13 also provides that each State defines the central level of Government covered by each non-conforming measure in Annex I to the Treaty. In its Schedule to Annex I, Honduras expressly included a non-conforming measure related to market access (under CAFTA-DR Chapter Eleven) at the “Central” level of Government, providing that “[o]nly the Honduran

²⁹² Counter-Memorial on Jurisdiction, ¶¶ 119-120.

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Government, through the Empresa Nacional de Energía Eléctrica [ENEE], may transmit electricity or operate the electricity transmission system and dispatch center.” Honduras, therefore, “acknowledged in the Treaty that ENEE operates at the central level of Government and, in fact, exercises the central Government’s authority in the area of electricity for the State.”²⁹³

427. Further, the agreements were executed by a covered investment of the Claimants. The Claimants assert that the Respondent errs in arguing that the agreements cannot constitute an investment agreement under Article 10.28, because they were executed by an entity (Pacific Solar) that has the same nationality (Honduran) as the Respondent. The definition of investment agreement under Article 10.28 provides that “investment agreement means a written agreement [...] between a national authority of a Party and a covered investment or an investor of another Party that grants the covered investment or investor rights”. It is undisputed that “an enterprise” may qualify as a covered investment, and that a “covered investment” must be “an investment [...] in [the host State’s] territory”.
428. The CAFTA-DR does not require that the “covered investment” party to an investment agreement must be owned or controlled by an investor at the time the agreement is executed. ICSID tribunals addressing this issue confirm that a “covered investment” does not need be owned by the claimants before an investment agreement is executed.
429. *Third*, the agreements confer rights over natural resources or other assets that Honduras controls. The concept of control within the meaning of the Treaty does not refer to physical control, but to legal control.
430. Consistent with the 2013 Renewables Law, the Operations Agreement executed with SERNA confirms that Honduras granted Pacific Solar the “exclusive right to use and usufruct over the solar resource required for the Plant’s operation”. That, as Honduras argues, those “exclusive rights” would be granted “only in relation to the Nacaome Plant [that Pacific Solar] built and owns, and the electricity used by that plant” and that “[t]he fact that a natural resource is used in the production of electricity is insufficient to elevate these ‘Agreements’ to the status of investment agreements”, fails to engage with the issue.

²⁹³ Counter-Memorial on Jurisdiction, ¶¶ 129-130.

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431. In any event, “the Treaty provides that for an ‘investment agreement’ to exist, the State must grant rights with respect to either natural resources *or* ‘other assets’ it controls.” The Respondent also granted the Claimants “the right to use ‘other assets’ that [the Respondent] controls that are needed for power generation and sale, such as the national grid.”²⁹⁴
432. Finally, contrary to the Respondent’s assertions, the PPA is not a mere commercial contract. According to the Claimants, “[c] PPA arising out of a direct statutory mandate can hardly be classified as a ‘mere commercial’ agreement.”²⁹⁵
433. *Fourth*, “[t]he agreements qualify as both an investment agreement and a protected investment under the Treaty”.²⁹⁶ An “investment agreement” under CAFTA-DR Article 10.28 must be an agreement that confers rights to the covered investor or a covered investment “upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself”. The Claimants relied on the agreements to invest in Pacific Solar (*i.e.*, acquire shares of Pacific Solar). “[W]hether (i) a claimant has made a protected investment under the Treaty, and (ii) an agreement qualifies as an investment agreement, are distinct inquiries under the Treaty, and nothing in the Treaty renders them mutually exclusive.”²⁹⁷

B. THE TRIBUNAL’S ANALYSIS

(1) General

434. CAFTA-DR Article 10.28 defines an “investment agreement” as:

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

²⁹⁴ Counter-Memorial on Jurisdiction, ¶ 148.

²⁹⁵ Counter-Memorial on Jurisdiction, ¶ 149-150.

²⁹⁶ Counter-Memorial on Jurisdiction, Section II.C.5.

²⁹⁷ Counter-Memorial on Jurisdiction, ¶ 154.

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435. Accordingly, the Tribunal will determine in the following sections whether the Claimants have demonstrated the existence of:

- (i) a written agreement (which is further defined in Footnote 12 to Chapter Ten as “an agreement in writing, executed by both parties, that creates an exchange of rights and obligations, and which is binding upon the parties under the law applicable under Article 10.22.2”);
- (ii) that takes effect on or after the date of entry into force of the CAFTA-DR;
- (iii) between a “national authority” of a State Party (which is further defined in Footnote 13 to Chapter Ten) and a covered investment or an investor of another State Party;
- (iv) that grants the covered investment or investor rights with respect to natural resources or other assets that a national authority controls; and
- (v) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself.

436. The Tribunal observes from the outset that, since the notion of “investment agreement” is specifically defined in the CAFTA-DR, including by means of additional definitions of “written agreement” and “national authority”, the general understanding of what an “investment agreement” typically is will be of limited relevance. It can potentially contribute to the interpretation of the notion as defined in the Treaty, but it cannot displace it.

(2) A written agreement

437. The first question is whether the Claimants can rely on a “written agreement” within the meaning of CAFTA-DR Article 10.28. The accompanying Footnote 12 defines “written agreement” as follows:

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

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438. Accordingly, what is required is “an agreement in writing”, which is “executed by both parties”, that “creates an exchange of rights and obligations”, and which is “binding upon both parties under the law applicable under Article 10.22.2”.

a. General

439. This question stems from the fact that the Claimants’ alleged investment is governed by the PPA, the State Guarantee, and the Operations Agreement. The Claimants argue that the three agreements are part of the same economic transaction and constitute a single “investment agreement” for the purpose of Article 10.28. This is particularly true, the Claimants argue, by virtue of the State Guarantee and its incorporation into the interpretative provisions of the PPA. The 2007 Renewables Energy Law provides that generators which enter into a PPA “shall be entitled” to a State guarantee. Under the State Guarantee, the Honduran Government accepted joint and several liability to Pacific Solar for ENEE’s obligations under the PPA. The State Guarantee expressly provides that the Attorney General’s Office, which “holds the legal representation of the State of Honduras”, and the Secretary of Finance, who has ‘the express power for the subscription of the guarantee,’ confirm the State’s joint liability for ENEE’s obligations under the PPA. This State Guarantee is an integral part of the PPA. The State Guarantee is included as an Annex to the PPA, which means – as the PPA itself stipulates – that it “form[s] a single body that must be interpreted as a whole” with the PPA.²⁹⁸ Accordingly, the Claimants say, whether the various conditions in Article 10.28 are satisfied must be appreciated by reference to the PPA, the State Guarantee and the Operations Agreement combined.

440. The Respondent asserts that the instruments cannot be considered together to determine whether the conditions in Article 10.28 are satisfied. It argues that this can only be determined by reference to the PPA on its own, because the State Guarantee and the Operations Agreement are derivative and supplementary to the PPA.²⁹⁹

441. The Tribunal will first address whether a written agreement within the meaning of Article 10.28 can in principle consist of several instruments. It will subsequently determine the relevance, if any, of the alleged derivative and supplementary nature of the State Guarantee and the Operations Agreement.

²⁹⁸ Counter-Memorial on Jurisdiction, ¶¶ 115 ff.; Rejoinder on Jurisdiction, ¶¶ 126 ff.

²⁹⁹ Memorial on Jurisdiction, ¶¶ 209 ff.; Reply on Jurisdiction, ¶¶ 307 ff.

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b. A written agreement consisting of several instruments

442. The term “a written agreement” in Article 10.28 is defined in Footnote 12 as “an agreement in writing [...]”. These terms are not further defined, and must accordingly be interpreted pursuant to the rules of treaty interpretation. This primarily means that regard must be had to the terms in their ordinary meaning, in their context and in the light of the object and purpose of the Treaty, and more specifically of CAFTA-DR Article 10.28.
443. It is undisputed that the PPA, the State Guarantee and the Operations Agreement are written instruments. It is also undisputed that the three instruments are binding upon both parties under the law applicable under Article 10.22.2, which is Honduran law. The question is whether they constitute a single agreement (“an agreement”) within the meaning of Article 10.28 and Footnote 12.
444. The Tribunal considers that several instruments can, together, constitute a single agreement and therefore, “an agreement” within the meaning of the just mentioned provisions. This is illustrated by the definition of the term “treaty” in VCLT Article 2(1)(a), to which the Claimants have referred.³⁰⁰ VCLT Article 2(1)(a) defines a treaty as “an international agreement concluded between States [...] whether embodied in a single instrument or in two or more related instruments [...]”.³⁰¹ As the Claimants observe, the 2004 United States Model BIT and some other investment treaties contain specific wording to the same effect.³⁰² The juxtaposition of this investment treaty practice with the just-mentioned VCLT definition evidences that the investment treaty practice is declaratory, not constitutive, of the understanding that a written agreement can consist of several related instruments.
445. Accordingly, the fact that the PPA, the State Guarantee and the Operations Agreement constitute separate instruments does not prevent them from constituting a single “investment agreement” within the meaning of CAFTA-DR Article 10.28.
446. This remains unaffected by the definition of “written agreement” in Footnote 12 to Chapter Ten, which provides that a “written agreement” in Article 10.28:

refers to an agreement in writing, executed by both parties, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2. For greater certainty, (a) a

³⁰⁰ Rejoinder on Jurisdiction, ¶ 130.

³⁰¹ VCLT, **CL-133-EN**, Article 2(1)(a).

³⁰² Counter-Memorial on Jurisdiction, ¶ 124; Rejoinder on Jurisdiction, ¶ 134; US Model BIT (2004), **CL-258-EN**, Article 1, n. 4; Treaty between the United States and Uruguay, **CL-264-EN**, Article 1, n. 5.

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unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity or a decree, order, or judgment; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

447. The question here is whether the terms “executed by both parties, that creates an exchange of rights and obligations” mean that the agreement must be contained in a single instrument containing that exchange of rights and obligations such that the parties’ respective signatures appear together in one and the same document. This is not the case. When an agreement is contained in several instruments, what is required is that each party expresses its intent to be bound, not that such expression be laid down in a single document. The second sentence of Footnote 12 (“For greater certainty [...]”) confirms that the terms “executed by both parties, that creates an exchange of rights and obligations” is not meant to require a single instrument, but to distinguish written agreements within the meaning of the definition from unilateral regulatory or judiciary acts.
448. This finds further support in the object and purpose of the CAFTA-DR and its relevant provisions. Interpreting the notion of “a written agreement” as encompassing various interrelated instruments is in conformity with the economic and legal practice of foreign investment which Article 10.28 seeks to regulate. In that respect, the case law according to which an “investment” can consist of various related operations is of relevance. True, the Respondent asserts that most of this case law (other than *Chevron v. Ecuador*) relates to the notion of “investment” rather than that of “investment agreement”.³⁰³ It remains that such related operations are likely to give rise to related legal instruments, which together will constitute the overall legal framework of the investment. Given the object and purpose of the CAFTA-DR and of Article 10.28, which is to regulate (foreign) investment, there are solid reasons for aligning the definition of “investment agreement” with the economic and legal reality of (foreign) investment.
449. By contrast, always from the viewpoint of the Treaty’s object and purpose, the Tribunal sees no reason why an “investment agreement” should be interpreted as strictly limited to one single instrument. In particular, there is no basis for arguing that the investment agreement must be contained in a single instrument for reasons of legal security, because the agreement can serve as a basis for an arbitration claim pursuant to Article 10.16. Investments can also serve as a basis for an

³⁰³ Reply on Jurisdiction, ¶¶ 330-333.

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arbitration claim under Article 10.16. Yet, it is undisputed that an investment can consist of various interrelated operations performed over time.

450. The Tribunal therefore concludes that an “investment agreement” within the meaning of CAFTA-DR Article 10.28 and the accompanying Footnote 12 can consist of several instruments. In the present instance, the PPA, the State Guarantee, and the Operations Agreement are part of the legal framework of one and the same economic operation. Accordingly, the three instruments together constitute a written agreement within the meaning of Article 10.28.

451. As set out hereinafter, this is unaffected by the Respondent’s argument that the State Guarantee and the Operations Agreement are, in its view, of derivative and supplementary nature to the PPA.

c. The alleged derivative and supplementary nature of an instrument

452. The Respondent’s main argument is that, in the present instance, the State Guarantee and the Operations Agreement are derivative and supplementary to the PPA, so that the conditions of Article 10.28 must be verified by reference to the PPA alone.³⁰⁴

453. The question is thus whether a condition to qualify as an investment agreement within the meaning of Article 10.28 (such as, for instance, execution by a national authority), that is satisfied only with respect to some of the so-called derivative instruments, is thereby deemed also satisfied for the entire agreement including the PPA. This is of relevance because the Respondent considers that the PPA has not been executed by a Honduran national authority.

454. In this respect, the Tribunal considers, first, that this does not so much depend on the rather abstract legal question of whether one of the instruments is derivative and supplementary to the other. It rather requires an examination *in concreto*, focusing on the condition in Article 10.28 to be satisfied. Two examples illustrate this point:

- If one of the instruments sets forth one party’s obligations, and another instrument the obligations of the other party, the alleged derivative and supplementary nature of the second instrument can hardly stand in the way of the finding that there is an exchange of rights and obligations between the parties – unless perhaps one party’s obligations qualify as manifestly *de minimis* as compared to the other’s obligations.

³⁰⁴ Memorial on Jurisdiction, ¶ 214.

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- If one of the instruments is not executed by the competent authority, but another instrument is executed by the competent authority, qualifying the second instrument as derivative and supplementary will not in itself allow for concluding that the agreement as a whole was not approved by the competent authority. The question will rather be whether the competent authority, in executing the second instrument, implicitly but certainly validated the first one. The derivative and supplementary nature of the second instrument may then turn out to be an argument in favour, not against, the validation of the first instrument by the competent authority. The authority executing the derivative and supplementary instrument should indeed be presumed to validate the principal instrument.

455. Accordingly, the Respondent’s argument based on the so-called derivative and supplementary nature of the State Guarantee and the Operations Agreement is irrelevant. Whether a feature of one of these instruments irradiates the others, so that a requirement of Article 10.28 can be deemed satisfied for the investment agreement composed of the three instruments, requires a more complex and nuanced analysis *in concreto*.

456. Further and in any event, the State Guarantee is not just derivative of or supplementary to the PPA. It is an integral part thereof:

- The 2007 Renewables Energy Law provides that generators who enter into a PPA “shall be entitled” to a State guarantee.³⁰⁵ In other words, Pacific Solar’s rights under the PPA already include the right to a State guarantee.
- In terms of form, the State Guarantee is included as an annex to the PPA, which stipulates that it “form[s] a single body that must be interpreted as a whole” with the PPA.³⁰⁶
- In terms of substance, under the State Guarantee, the Government accepts joint and several liability toward Pacific Solar for ENEE’s obligations under the PPA.³⁰⁷

³⁰⁵ Law Promoting the Generation of Electricity with Renewable Resources (Decree No. 70-2007 dated 29 June 2007), Official Gazette of 2 October 2007, Article 4, **C-004-EN (Resubmitted)**.

³⁰⁶ Contract No. 002-2014, Power Purchase Agreement between Empresa Nacional de Energía Eléctrica and Pacific Solar Energy, S.A. de C.V. (“PPA”), **C-001-EN (Resubmitted)**, ¶ 1(A).

³⁰⁷ Support Agreement and Guarantee of Solidarity of the State of Honduras for the fulfilment of the Contract of Supply, between Empresa Nacional de Energía Eléctrica and Pacific Solar Energy Contract No. 002-2014 (Decree No. 113-2014 dated 19 Nov. 2014 and published in the Official Gazette on 28 Nov. 2014) (“**State Guarantee**”), **C-002-EN (Resubmitted)**, Article 2; PPA, **C-001-EN (Resubmitted)**, Annex X, Article 4.2.

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457. In other words, the PPA and the State Guarantee are one, both in terms of form and substance. It follows that, when a condition under Article 10.28 is satisfied by the State Guarantee, it is also satisfied by the PPA.
458. The Tribunal will address the relevance of the above with respect to the other requirements of Article 10.28 as appropriate in the following sections. It is already noted here that applying the test identified hereabove does not lead to discarding any feature of any instrument as insufficient to conclude that the investment agreement consisting of the three instruments satisfies the requirements of Article 10.28. In particular:
- As concerns the execution by a national authority, the execution of the State Guarantee by two national authorities manifestly validated the PPA.
 - As concerns the exchange of rights and obligations, the State’s obligations under the State Guarantee must be considered together with the rights of the Claimants under the other instruments, and the obligations under the Guarantee are not *de minimis* – they equal by nature the rights of the Claimants.
 - As concerns the conferral of rights over natural resources or other assets which a national authority controls, this should be appreciated by reference to the three instruments combined, including the Operations Agreement.

(3) Executed by a Honduran National Authority and by a Covered Investment of the Claimants

459. The next question is by whom or by what entity(ies) the “investment agreement” consisting of the PPA, the State Guarantee and the Operations Agreement has been executed and whether this satisfies the requirement of execution “between a national authority of a Party and a covered investment”.

a. By a National Authority

460. According to the Respondent, ENEE, which signed the PPA, is not a “national authority” because it is not part of the central level of Government. National authority under CAFTA-DR Article 10.28 is defined in Footnote 13 as an “authority at the central level of Government”. That notion must be analysed in the light of Honduran legislation. In Honduran law, the Respondent says, ENEE is not part of the central level of Government, because it is an autonomous decentralized agency.³⁰⁸ The

³⁰⁸ Memorial on Jurisdiction, ¶¶ 219-222.

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Claimants argue that the Respondent's argument is irrelevant since it is accepted that two out of the three instruments constituting the "investment agreement", namely the State Guarantee and the Operations Agreement, were executed by "national authorit[ies]".³⁰⁹

461. That two out of the three agreements were executed by national authorities is correct, but does not fully address the question. The real question is whether the fact that two out of the three instruments have been signed by a national authority suffices to conclude that the "agreement" as a whole satisfies this requirement.
462. The Tribunal finds that the State Guarantee's execution by a national authority warrants the conclusion that the PPA also satisfies the condition of execution by a national authority. This is because under the State Guarantee, the Government accepts joint and several liability for ENEE's obligations under the PPA.³¹⁰ The Government thus recognizes and validates the PPA for the purposes of CAFTA-DR Article 10.28. In addition, the State Guarantee is included as an annex to the PPA,³¹¹ and the PPA expressly states that the Contractual Agreement, the General Conditions, and their Annexes "form a single body that must be interpreted as a whole".³¹²
463. As concerns the Operations Agreement, it was executed by the Honduran Ministry of Natural Resources,³¹³ which means that it was in and of itself executed by a national authority of Honduras. It was also approved by Legislative Decree.³¹⁴ The PPA and the Operations Agreement are also intrinsically linked, as illustrated by Article 4.5(h) of the PPA which gives ENEE a right of early termination of the PPA if the Operations Agreement is terminated, and Article 4.6(d) according to which Pacific Solar is entitled to early termination of the PPA if no Operations Agreement is executed within 12 months after the PPA.³¹⁵

³⁰⁹ Counter-Memorial on Jurisdiction, ¶ 127.

³¹⁰ State Guarantee, **C-002-EN (Resubmitted)**, Article 2; PPA, **C-001-EN (Resubmitted)**, Annex X, Article 4.2.

³¹¹ PPA, **C-001-EN (Resubmitted)**, Annex X, pp. 85 ff.

³¹² PPA, **C-001-EN (Resubmitted)**, ¶ 1(A).

³¹³ Operations Contract between Pacific Solar and the Ministry of Natural Resources and Environment of Honduras (Decree No. 109-2015 dated 26 Oct. 2015 and published in the Official Gazette on 27 Nov. 2015) ("**Operations Agreement**"), **C-003-EN (Resubmitted)**. This execution, which is not disputed by the Respondent, does not appear on the English translation of **C-003-EN (Resubmitted)** but does appear on the original Spanish version as published in the Honduran Official Gazette, filed as **C-003-SP** with the Request for Arbitration, pp.1-2 and at the bottom of p. 11: "(F. Y. S) Ing. José Antonio Galdames Fuentes, Secretario de Estado en los Despachos de Energía, Recursos Naturales, Ambiente y Minas".

³¹⁴ Operations Agreement, **C-003-EN (Resubmitted)**, p. 1.

³¹⁵ PPA, **C-001-SP**, official Spanish version, pp. 20 and 22 (pp. 28 and 31 of the PDF).

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464. In conclusion, the Respondent's argument that the PPA was not executed by a national authority fails. On the contrary, the agreement consisting of the PPA, the State Guarantee and the Operations Agreement has in its entirety been executed by Honduran national authorities.

b. By a Covered Investment

465. The Respondent further disputes that the agreements were entered into by "a covered investment or an investor of another Party" within the meaning of Article 10.28. It notably observes that in *Duke Energy v. Ecuador*, the tribunal noted that, at the time the PPAs were entered into, the non-State party to the agreement (a company incorporated in the respondent State) was not owned by foreign investors and, as such, the PPAs could not be considered investment agreements.³¹⁶

466. This objection does not find support in the text of CAFTA-DR Article 10.28 and the accompanying Footnote 12. Article 10.28 refers to an agreement "between a national authority of a Party and a covered investment or an investor of another Party", without requiring that the quality of the parties to the agreement be established at the date of its original execution. Footnote 12 requires that the agreement be "executed by both parties", which, as already mentioned, is meant to distinguish agreements from unilateral acts.³¹⁷ The definitions are therefore *capable* of encompassing agreements that were not originally entered into by a covered investment or an investor of another State Party, but which were subsequently transferred to such an investment or investor.

467. In order to determine whether these provisions do or do not encompass such agreements, one must therefore look beyond their terms, and consider their context as well as the object and purpose of the Treaty and of the relevant provisions in particular.

468. Applying CAFTA-DR Article 10.28 to agreements that were not initially entered into by a covered investment or an investor of another State Party is in line with the object and purpose of the Treaty, and of Chapter Ten in particular, to promote and protect foreign investment. Foreign investment can indeed take the form of a transfer of existing contracts to a foreign investor.

469. In addition, as a matter of both context as well as object and purpose, where the agreement is entered into by a foreign investor from the start, the parties have the possibility to include an ICSID arbitration clause in the agreement itself, which makes access to ICSID arbitration for alleged breaches of the

³¹⁶ Memorial on Jurisdiction, ¶¶ 224 ff.; Reply on Jurisdiction, ¶¶ 380 ff.

³¹⁷ *Supra*, ¶ 447.

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agreement pursuant to CAFTA-DR Article 10.16 superfluous. Article 10.16 is precisely of particular use for agreements that were not initially entered into with a foreign investor but which are transferred to a foreign investor subsequently.

470. Accordingly, CAFTA-DR Article 10.28 encompasses agreements that were not initially entered into with a foreign investor, but which are subsequently transferred to a foreign investor.
471. What the definition of Article 10.28 does require is that the agreement take effect on or after the date of entry into force of the Treaty. This condition is satisfied in the present instance. The Treaty entered into force between Honduras and Guatemala in 2006.³¹⁸ The PPA, the State Guarantee and the Operations Agreement were all entered into after the entry into force of CAFTA-DR,³¹⁹ and *a fortiori* transferred to the Claimants' "covered investment" after the entry into force of the Treaty.
472. Additionally, the Respondent argues that it is established in doctrine and jurisprudence that such an agreement must be entered into by the host State and the foreign investor, and not by a State-owned entity or a local company established by the investor. This is contradicted by the express terms of CAFTA-DR Article 10.28, whereby an investment agreement must be with either "a covered investment" or "an investor of another Party". It follows from these two alternatives that the agreement must not necessarily be with a foreign investor; it can also be with a covered investment. A company established in the territory of one Party by a national of another Party can qualify as a "covered investment", given that, according to the definition of "investment" in CAFTA-DR Article 10.28(a), forms that an investment may take include "an enterprise".
473. In conclusion on this point, the agreements are executed by a covered investment of the Claimants within the meaning of CAFTA-DR Article 10.28.

³¹⁸ Letter of 31 March 2006 from the Secretary of Industry and Commerce of Honduras to the Secretary General of the Organization of American States declaring the entry into force of CAFTA-DR for Honduras on 1 April 2006, **C-196-EN**: "In accordance with Article 22.5 of the Agreement, the Government of Honduras is pleased to notify that it has completed the applicable legal procedures and has agreed with the Government of the United States of America that the Agreement will become effective as to the Republic of Honduras on April 1, 2006."; Office of the United States Trade Representative, Statement of USTR Susan C. Schwab Regarding Entry Into Force of the CAFTA-DR for Guatemala, 30 June 2006, **C-214-EN**, announcing that the President of the United States of America "has issued a proclamation to implement the CAFTA-DR agreement for Guatemala as of July 1, 2006".

³¹⁹ PPA, **C-001-EN (Resubmitted)**; State Guarantee, **C-002-EN (Resubmitted)**, p. 19; Operations Agreement, **C-003-EN (Resubmitted)**.

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(4) That creates an exchange of rights and obligations

474. It is further beyond doubt that the investment agreement, as defined above, creates an exchange of rights and obligations.
475. While the State Guarantee sets out obligations for the State and not for Pacific Solar, the Guarantee must be read in combination with the PPA which provides for rights and obligations for both parties. Since the PPA and the State Guarantee form “a single body”, as discussed above, the argument that the State Guarantee, in isolation, does not set out obligations on the part of Pacific Solar, must fail. The State’s obligations under the Guarantee cannot qualify as *de minimis* since they are determined by reference to the PPA, which itself provides for a substantial exchange of rights and obligations.
476. Likewise, the Operations Agreement sets out detailed rights and obligations for both parties, none of which can qualify as *de minimis*. For example, the Operations Agreement gives Pacific Solar the “exclusive right to use and usufruct over the solar resource required for the Plant’s operation”,³²⁰ and obliges Pacific Solar to “operate the Plant observing the Operation Rules of the National Interconnected Grid (SIN)” and to provide “the Grid Operator all the available electric generation capacity of the Plant, including any capacity not reserved under physical contracts with third or private parties”.³²¹ This is a typical exchange of rights and obligations.
477. Accordingly, the agreement as a whole, consisting of these three instruments, creates an exchange of rights and obligations within the meaning of CAFTA-DR Article 10.28.

(5) Conferring rights over natural resources or other assets that Honduras controls

478. The Respondent further argues that the agreements do not grant Pacific Solar rights with respect to natural resources, first, because they do not grant “rights” with respect to the solar resource and, second, because the solar resource is not a natural resource that a national authority controls.³²²
479. As the Claimants observe, this argument is contradicted by the Operations Agreement with the Ministry of Natural Resources, which expressly grants Pacific Solar the “exclusive right to use and usufruct over the solar resource required for the Plant’s operation”.³²³ These terms have two

³²⁰ Operations Agreement, C-003-EN (Resubmitted), ¶ 1.4.8.

³²¹ Operations Agreement, C-003-EN (Resubmitted), ¶ 1.4.4.

³²² Reply on Jurisdiction, ¶¶ 387 ff.

³²³ Operations Agreement, C-003-EN (Resubmitted), ¶ 1.4.8.

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necessary implications. *First*, they mean that, under Honduran law, the solar energy that is required for the Plant's operation is considered a "resource" – and necessarily, a "natural" resource. *Second*, the fact that the Ministry of Natural Resources grants Pacific Solar the "exclusive right to use and usufruct" over the solar resource required for the Plant's operation means that it is a natural resource "that a national authority controls". These conclusions stemming from the Operations Agreement are binding on the Respondent in the present proceeding.

480. This interpretation is entirely compatible with the specific nature of solar energy and its use to generate electricity. While there may be many differences between solar energy and other natural resources such as hydrocarbons, it does not follow that a fundamental difference exists when it comes to the control of such resources and their use for the production of energy. While States can refuse access to the hydrocarbons available in their territory, States can likewise refuse access to solar energy by prohibiting the use of solar panels on their territory. They can control and regulate the use of such resources in their territory, and that is precisely what is relevant here regarding the use of solar energy *for the Plant's operation*. Accordingly, there is no fundamental difference between solar energy and hydrocarbons that would warrant a finding that only the latter can qualify as "a natural resource that a national authority controls" and in respect of which it can grant rights.
481. It follows that the solar resource is a natural resource that a national authority controls and with respect to which that authority grants exclusive rights to investors. Accordingly, the Respondent errs in arguing that "exclusive rights" were granted "only in relation to the Nacaome Plant [that Pacific Solar] built and owns, and the electricity used by that plant". Also, the Respondent errs in arguing that "[t]he fact that a natural resource is used in the production of electricity is insufficient to elevate these 'Agreements' to the status of investment agreements".
482. In addition, the Claimants correctly observe that for an "investment agreement" to exist, the State must grant rights with respect to either natural resources *or* "other assets" it controls, and that Honduras also granted Claimants the right to use "other assets" that Honduras controls, such as the national grid.³²⁴
483. In conclusion on this point, the Tribunal finds that the agreements confer rights over the use of natural resources or other assets that the Respondent controls.

³²⁴ Operations Agreement, C-003-EN (Resubmitted), ¶ 1.4.4.

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(6) Upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself

484. The last requirement for an “investment agreement” to exist under CAFTA-DR is that the covered investment or the investor must rely on the agreement in establishing or acquiring a covered investment other than the written agreement itself. In this respect, the Respondent argues in substance that the PPA, the State Guarantee and the Operations Agreement cannot be the basis of the investment and also the covered investment simultaneously.³²⁵ The Claimants respond that they relied on the agreements to acquire shares in Pacific Solar, among others, and that whether (i) a claimant has made a protected investment under the Treaty, and (ii) an agreement qualifies as an investment agreement are not mutually exclusive inquiries.
485. As the Respondent correctly argues, it follows from the definition in CAFTA-DR Article 10.28 that a claimant cannot act in protection of an investment agreement absent evidence that this agreement was relied upon to establish or acquire a covered investment other than the agreement itself. However, this condition is satisfied in the present instance.
486. *First*, the Claimants made a covered investment other than the agreement itself. It is established that the Claimants acquired shares in Pacific Solar,³²⁶ which is an investment different from the investment agreement.
487. *Second*, the Claimants “relied” on the agreement to make the covered investment. The PPA and the Operations Agreement and the State Guarantee were individually and collectively, by reason of their subject-matter, highly relevant for the Claimants’ decision to invest as they did, whereas the State Guarantee’s very object and purpose was specifically to attract investors by reassuring them as to the viability of their investment. These objective factors are in line with the witness statement by Mr. [REDACTED], stating that “[t]he PPA was particularly important [in the decision to invest in Pacific Solar] because it included certain key commitments by ENEE, for which the Honduran State was also responsible, which assured a steady and predictable revenue stream for [Pacific Solar]”,³²⁷ and

³²⁵ Reply on Jurisdiction, ¶¶ 308, 350.

³²⁶ More specifically, as discussed in Section VII above on ownership and control, the Respondent clarified at the Hearing that, on the basis of the evidence tendered, it accepted that Mr. Paiz indirectly controlled the entire corporate chain up to [REDACTED], but that Mrs. Schloesser did not (with the consequence that only Mr. Paiz had control). Further, it is not disputed that [REDACTED] acquired shares in Pacific Solar; what is debated is the impact of the Trust Agreements with [REDACTED] on [REDACTED]’s ownership in Pacific Solar.

³²⁷ Witness Statement of [REDACTED], dated 20 September 2024 (“[REDACTED] WS”), ¶ 11; Claimants’ Memorial, ¶ 306.

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with Mr. Paiz’s witness statement that, “based on the Government’s guarantees, and the Project’s rights and potential, my wife and I invested in Pacific Solar”.³²⁸ These statements were repeated in substance at the Hearing on Jurisdiction³²⁹ and are not specifically contradicted by the Respondent.³³⁰ The Tribunal therefore finds that it is established that the agreement was “particularly important” in the Claimants’ decision to invest and that the decision was made “based on” it, and that the Claimants “relied” on the investment agreement to make a covered investment.

488. In conclusion on this point, the Tribunal finds that the Claimants relied on the investment agreement in establishing or acquiring a covered investment other than the written agreement itself.

C. CONCLUSION

489. For the foregoing reasons, the Tribunal finds that the PPA, the State Guarantee and the Operations Agreement together constitute an “investment agreement” within the meaning of CAFTA-DR Article 10.28, the alleged breach of which can give rise to an arbitration claim pursuant to CAFTA-DR Article 10.16.

490. The Tribunal, therefore, dismisses the Respondent’s objection claiming the inexistence of an investment agreement.

X. COSTS

A. THE PARTIES’ SUBMISSIONS ON COSTS

(1) The Claimants’ Submissions on Costs

491. In their Rejoinder on Jurisdiction, the Claimants request the Tribunal to order the Respondent “pursuant to ICSID Arbitration Rule 52 to pay all the costs associated with the bifurcated phase, including without limitation, Claimants’ legal costs, expert fees, and in-house costs, the fees and expenses of the Tribunal, and ICSID’s costs, with interest running as of the date of the decision at a

³²⁸ Witness Statement of Fernando Paiz, dated 20 September 2024 (“**Paiz WS**”), ¶ 17; Claimants’ Memorial, ¶ 308.

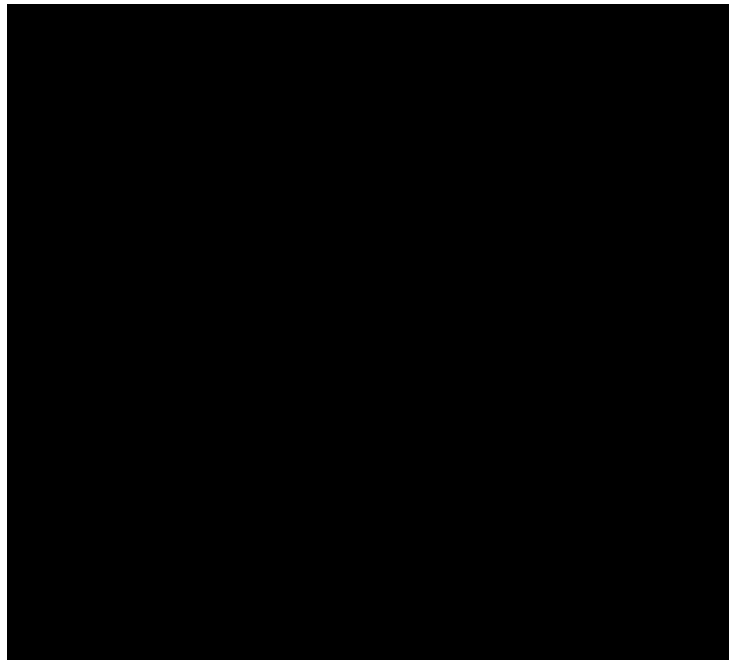
³²⁹ D2:P395-396 (██████).

³³⁰ The Respondent does argue that the “Claimants also fail to demonstrate that the PPA, as the purported investment agreement at issue in this case, is the basis upon which Claimants formed or acquired another investment” (Reply on Jurisdiction, ¶ 414). However, this argument is based on the Respondent’s position that the Claimants do not prove that they acquired a covered investment different from the PPA (Reply on Jurisdiction, ¶¶ 411 ff.), which the Tribunal finds to be without merit as the Claimants acquired shares in Pacific Solar (*supra*, ¶ 486).

Decision on the Bifurcated Jurisdictional Objections

rate to be established in due course.”³³¹ In their Statement of Costs, the Claimants request the Tribunal to order that Respondent bear all the costs of the arbitration incurred to date.³³²

492. The Claimants submit that an award of costs in their favour is warranted in the bifurcated phase of the proceedings because the Respondent has advanced “an ever-growing list of jurisdictional objections that have required extensive and costly briefing” and that “[n]otably, Respondent significantly expanded the scope of the bifurcated phase by submitting eight jurisdictional objections” and “changed the arguments it relied upon to make its jurisdictional objections at every stage of this proceeding [...], including some that were later abandoned”.³³³
493. The Claimants submit that, as of 20 November 2025, they have incurred USD [REDACTED] in costs, as broken down in Annex A to their Statement of Costs below:³³⁴



³³¹ Rejoinder on Jurisdiction, ¶ 311(d).

³³² Claimants’ Statement of Costs, p. 3. See also, Claimants’ letter to the Tribunal of 10 December 2025, p. 6.

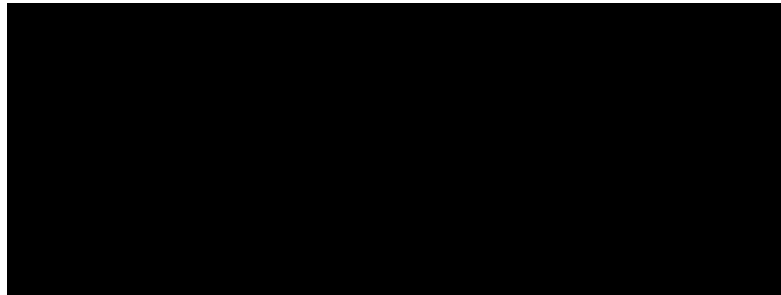
³³³ Claimants’ Statement of Costs, p. 2.

³³⁴ Claimants’ Statement of Costs, p. 3, and Annex A.

Decision on the Bifurcated Jurisdictional Objections

(2) The Respondent's Submissions on Costs

494. In its Reply on Jurisdiction, the Respondent requests the Tribunal to order the Claimants “to pay all costs associated with this arbitration, including costs and professional fees incurred by the Republic of Honduras, the Tribunal, and ICSID, with interest”.³³⁵
495. In its Submission on Costs, the Respondent argues that ICSID Arbitration Rule 52(1) “sets forth the circumstances that the tribunal ‘*must consider [...] in making any allocation*’, which are the following: (a) the outcome of the proceeding or any part of it; (b) the conduct of the parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner and complied with these Rules and the orders and decisions of the Tribunal; (c) the complexity of the issues; and (d) the reasonableness of the costs claimed”.³³⁶ The Respondent further argues that costs should be awarded to the prevailing party,³³⁷ that “[t]he Claimants withheld information relevant to the determination of the Tribunal’s jurisdiction”,³³⁸ and that “during the conduct of the proceedings, the Claimants have engaged in bad-faith conduct, forcing the Republic to incur unnecessary and elevated costs for adequate representation”.³³⁹
496. The Respondent submits that it has incurred USD [REDACTED] in costs, as broken down in its Submission on Costs:³⁴⁰



³³⁵ Reply on Jurisdiction, ¶ 622.

³³⁶ Respondent’s Submission on Costs, p. 2, emphasis in the original.

³³⁷ Respondent’s Submission on Costs, pp. 1 ff.

³³⁸ Respondent’s Submission on Costs, ¶¶ 19 ff.

³³⁹ Respondent’s Submission on Costs, ¶ 30.

³⁴⁰ Respondent’s Submission on Costs, ¶ 35.

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497. On these bases, the Respondent requests the Tribunal to:

i. Order the Claimants to pay all costs and expenses of these arbitration proceedings, including fees and expenses of the Tribunal and the cost of the Respondent's legal and administrative fees, plus pre-award and post-award interest thereon, in an amount no less than USD [REDACTED] or;

ii. Alternatively, order the Claimants to pay an appropriate portion of the abovereferenced costs and expenses of these arbitration proceedings incurred by the Republic, plus pre-award and post-award interest.

iii. To the extent necessary, defer the decision on costs allocation to the end of the merits proceedings.³⁴¹

B. THE TRIBUNAL'S DECISION ON COSTS

498. The Tribunal considers that the criteria set out in ICSID Arbitration Rule 52(1) to determine how to allocate costs are also relevant to determine whether to do so in its decision on bifurcated jurisdictional objections. It is also of relevance that decisions on costs at an interlocutory stage of arbitral proceedings can only be enforced with the award, but they can, awaiting enforcement, be used to send the parties, or one of the parties, a signal as to the financial implications of their course of action, past and future.

499. In the present instance, both Parties have partially prevailed in their arguments on the Tribunal's jurisdiction. The Claimants have prevailed on three objections, the Respondent has prevailed on one objection, and both Parties have partially prevailed over one further objection – that regarding ownership and control. All the objections raised intricate questions of law and fact and have been thoroughly and skilfully debated by the Parties.

500. While the bifurcated proceeding on jurisdiction has proved complex, the Tribunal considers that the Claimants and the Respondent have always acted in good faith and complied with the Rules and the orders of the Tribunal.

³⁴¹ Respondent's Submission on Costs, ¶ 37.

Decision on the Bifurcated Jurisdictional Objections

501. Relatedly, the preliminary objections addressed in this Decision were identified following a rather complex process. In PO3, the Tribunal granted bifurcation for four objections raised by the Respondent and denied it with respect to one other objection. Following the Claimants' observations,³⁴² the Tribunal also requested the Respondent to address any additional jurisdictional objections in its memorial in the bifurcated proceeding.³⁴³ This caused the Respondent to raise three additional objections, one of which – on ownership and control of the investment – was bifurcated in PO6,³⁴⁴ and partially upheld in this Decision. This means that the Tribunal is here dealing with five jurisdictional objections.
502. This is not, therefore, an instance where the Tribunal might consider appropriate to send any of the Parties a signal as to the financial implications of their respective behaviour in the bifurcated proceeding on jurisdiction.
503. The Tribunal further observes that while the Claimants, in their Rejoinder on Jurisdiction, request the Tribunal to order the Respondent to pay “all the costs associated with the bifurcated phase”,³⁴⁵ the USD [REDACTED] in fees mentioned in Annex A to their Statement of Costs, which is not otherwise detailed, may well comprise work performed for the drafting of the Request for Arbitration and the Memorial on the Merits.
504. In these circumstances, a majority of the Tribunal finds that there is no basis to allocate costs at the present stage of the proceedings and reserves its decision on costs for a later decision. Arbitrator Drymer disagrees with certain of the statements above and considers that it is both feasible and meet that the costs associated with the bifurcated proceedings be allocated at this stage.

XI. DECISION

505. For the reasons set forth above, the Tribunal decides as follows, with Arbitrator Drymer dissenting on the findings identified hereinafter, and Arbitrator Stern dissenting on the findings identified hereinafter and concurring, *i.e.*, reserving her position regarding the reasons stated, on all the other findings:

³⁴² Observations on the Request for Bifurcation, ¶ 20.

³⁴³ PO3, ¶¶ 67-70 and 73.

³⁴⁴ PO6, ¶ 46.

³⁴⁵ Rejoinder on Jurisdiction, ¶ 311.

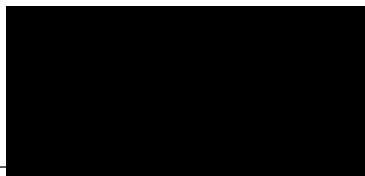
Decision on the Bifurcated Jurisdictional Objections

- (1) The Respondent's objection to jurisdiction *ratione voluntatis* based on the Claimants' alleged failure to exhaust local remedies is dismissed;
- (2) The Respondent's objection to jurisdiction *ratione personae* based on Mrs. Schloesser's alleged failure to comply with the requirement of prior consultation and negotiation in CAFTA-DR has been withdrawn by the Respondent and is, in any event, dismissed as unfounded;
- (3) The Respondent's objection to jurisdiction *ratione materiae* based on the Claimants' alleged lack of ownership in or control over the alleged investment is:
 - a. upheld, by majority (Arbitrator Drymer dissenting), regarding the Claimants' claim for reparation brought on their own behalf pursuant to CAFTA-DR Article 10.16.1(a);
 - b. dismissed, by majority (Arbitrator Stern dissenting), as it concerns the Claimants' standing to request (i) a finding and declaration that the Respondent has breached its obligations under the CAFTA-DR; (ii) a finding and declaration that the agreements are investment agreements as defined by the CAFTA-DR and that Honduras has violated its obligations under the agreements; and (iii) an order not to aggravate the dispute;
 - c. dismissed, by majority (Arbitrator Stern dissenting), regarding the Claimants' claim for reparation brought on behalf of Pacific Solar pursuant to CAFTA-DR Article 10.16.1(b);
- (4) The Respondent's objection to jurisdiction *ratione voluntatis* over the Claimants' claim based on the alleged violation of an umbrella clause imported into the CAFTA-DR by means of the MFN clause in CAFTA-DR Article 10.4 is upheld;
- (5) The Respondent's objection to jurisdiction *ratione materiae* that the PPA, the State Guarantee Agreement and the Operations Agreement do not constitute an "investment agreement" within the meaning of CAFTA-DR Article 10.28, the alleged breach of which can give rise to an arbitration claim pursuant to CAFTA-DR Article 10.16 is dismissed;

Decision on the Bifurcated Jurisdictional Objections

(6) By majority (Arbitrator Drymer dissenting), the issue of costs is reserved for a subsequent phase of the proceedings;

(7) The proceeding shall continue.



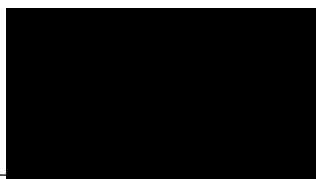
Stephen Drymer
Arbitrator

Date: 20 July 2026



Brigitte Stern
Arbitrator
Subject to the attached dissenting opinion

Date: 20 July 2026



Nicolas Angelet
President of the Tribunal

Date: 20 July 2026

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

FERNANDO PAIZ ANDRADE AND ANABELLA SCHLOESSER DE LEÓN DE PAIZ

and

REPUBLIC OF HONDURAS

ICSID Case No. ARB/23/43

DISSENTING OPINION
PROFESSOR BRIGITTE STERN

1. Although the majority of the Tribunal is composed of highly distinguished colleagues, I am compelled to disagree with their analysis of the Tribunal's assertion of jurisdiction. This is a complex case and although the three members of the Tribunal had lengthy and challenging exchanges of views, they could not at the end of the day arrive at unanimous analyses. I find myself obliged to explain my understanding of the facts of the case and develop what I consider to be the correct legal approach to the situation. Although I have many reservations on other parts of the Decision on Bifurcated Jurisdictional Objections (the "Decision"), I will concentrate my analysis on the jurisdictional objection *ratione materiae* presented by the Respondent on the basis that the Claimants do not own or control their alleged investment, a question which the Tribunal has accepted unanimously to bifurcate in Procedural Order No. 6 dated 31 July 2025.
2. In order to set the stage, it can be indicated at the outset that the Claimants, nationals of Guatemala, alleged to own directly (through 0,01% of the shares) and indirectly through the Bahamas company [REDACTED] (through 99,99% of the shares) the local Honduran company Pacific Solar, considered to be their investment, before these two companies entered into two Trust Agreements, both dated 12 January 2018, with a Honduran Bank, [REDACTED]. I agree with the majority that, although this might not have been clear at the beginning of the proceeding, this initial situation of ownership has been proven to the satisfaction of the Tribunal and can be taken as a point of departure of the analysis.
3. The issue that remains to be decided is whether any entitlement of the Claimants to their investment continues to exist after the signature of the two Trust Agreements. As Pacific Solar needed funds, it entered into a project finance, based on loans from DEG, a German public development bank and FMO, a Dutch public development bank, referred to as "the Lenders." As security for obtaining the loans, [REDACTED] placed its shares in Pacific Solar and Pacific Solar placed its assets – being mainly the Nacaome Plant and the PPA – in trust with [REDACTED]. The Share Trust Agreement identifies the two Lenders as "first-ranking beneficiaries", whereas the Settlor, [REDACTED], is identified as the "second-ranking beneficiary"; the Assets Trust Agreement identifies DEG as the "first-ranking beneficiary" and FMO as the "second-ranking beneficiary", whereas the Settlor, Pacific Solar, is identified as the "third-ranking beneficiary."

4. The core issue is to know whether, in this complex legal construction, the Claimants have protected rights under international law that give them standing to bring claims under the CAFTA-DR. According to me, the answer is negative, while the majority considered that the Claimants have no standing to bring claims on their own behalf, but that they have standing to bring claims on behalf of the Honduran company, Pacific Solar, which I find two incompatible conclusions, as will be further explained.
5. Before entering into the analysis of the proprietary status of the Claimants, it should be recalled that in the CAFTA-DR there is a possibility for an investor to bring a claim on its own behalf and/or on behalf of an enterprise of the host State, which it owns or controls directly or indirectly, as stated in Article 10.16:

Submission of a Claim to Arbitration:

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, **on its own behalf**, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

(b) the claimant, **on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly**, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.¹

6. Indeed, the Claimants have used this possibility to act both on their own behalf and on behalf of Pacific Solar, as is apparent in their Notice of Arbitration:

Mr. Fernando Paiz Andrade (“**Mr. Paiz**”) and Ms. Anabella Schloesser de Leon de Paiz (“**Ms. Schloesser de Paiz**”) (together, the “**Paizes**,” the “**Investors**,” or “**Claimants**”), nationals of Guatemala, **on their own behalf and on behalf of**

¹ CAFTA-DR, Central America - Dominican Republic - United States Free Trade Agreement, **CL-001-EN (Resubmitted)**. Emphasis added.

Pacific Solar Energy, S.A. de C.V. (“**Pacific Solar**” or the “**Enterprise**”), hereby submit this Notice of Arbitration [...].²

7. It is important to keep this in mind when analysing the claims presented by the Claimants on their own behalf and the claims presented on behalf of Pacific Solar. The investment of the Claimants consists of their shares in Pacific Solar, the investment of Pacific Solar consists of its assets, *i.e.*, the PPA and the Nacaome Plant.
8. As mentioned above, it appears that the majority concludes that the Claimants have no standing to present claims on their own behalf as these claims are based on rights which are “too hypothetical”, while they have standing to bring claims on behalf of Pacific Solar, for reasons that remain completely unexplained. More precisely, I find that, in the presentation of my colleagues relating to this objection, there is absolutely no link between point A – their analysis of the law and the facts of the case – and point B – their conclusions: on the one hand, that “[t]he Respondent’s objection to jurisdiction is upheld insofar as it relates to the Claimants’ claim for reparation brought **on their own behalf** pursuant to CAFTA-DR Article 10.16.1(a)”³, because “the Claimants’ effectively recouping their shares, the Plant and the PPA is **too hypothetical** in nature to found their standing now to request other than symbolic reparation *on their own behalf*.”⁴; on the other hand, that the Claimants can bring a claim **on behalf of Pacific Solar** which, according to the majority, they own indirectly but don’t control. These conclusions appear to be contradictory: if it were true, as stated by the majority, that “**the Claimants’ effectively recouping their shares, the Plant and the PPA is too hypothetical** in nature to found their standing”, it is difficult to understand that the claim of the Claimants on their own behalf and the claim of the Claimants on behalf of Pacific Solar have been treated differently, although both the recoupment of the shares of Pacific Solar by [REDACTED] and the recoupment of the Plant and the PPA by Pacific Solar have been considered by the majority to be too hypothetical.
9. Without trying to understand why these two situations have not been analysed as “too hypothetical” in a similar way, I will present here what I consider as the correct and

² Notice of Arbitration, 24 August 2023, ¶ 1. Emphasis in bold in the original, emphasis in bold and underlined added.

³ Decision, ¶ 346. Emphasis added.

⁴ Decision, ¶ 330. Italics in the Decision, emphasis in bold added.

rigorous reasoning that should have been followed, without too many references to the Decision, as far as possible.

I. THE APPLICABLE LAW

A. The law applicable to the existence of the investors' rights: Honduran Law

10. The first thing to be ascertained is the law under which the proprietary status of the Claimants has to be defined. The Parties have contradictory approaches on this question, the Respondent referring to domestic law, the Claimants referring to international law.

11. According to the Respondent:

Since the FTA does not define the concept of “ownership,” the applicable standard for determining legal ownership of an asset is **local law**.⁵

12. According to the Claimants:

According to Respondent, because the Treaty does not define “ownership,” the Tribunal should resort to Honduran municipal law to define it. This is wrong. As Respondent’s authority observes, while the CAFTA-DR does not define “ownership,” it refers to it repeatedly, and Article 1.2 of the CAFTA-DR makes clear that the Treaty Parties must “interpret and apply the provisions of this Agreement in the light of its objectives . . . and in accordance with applicable **rules of international law**.” This provision makes no reference to the domestic law of the State Parties.⁶

13. Concerning the position of the majority on the issue of the applicable law, I find it difficult or even impossible to follow the path which goes back and forth from local law to international law as embodied in the CAFTA-DR, with several references to “ownership within the meaning of the CAFTA-DR” and renders the analysis ambiguous and incoherent. I will therefore avoid discussing this position and go forward with my own analysis based on overwhelming jurisprudence.

14. It is common ground that, when international law has not developed its own rules, the existence of investors’ rights depends on domestic law, as was clearly explained by the International Court of Justice in the seminal and well-known case of the *Barcelona Traction*:

⁵ Reply on Jurisdiction, ¶ 141. Emphasis added.

⁶ Rejoinder on Jurisdiction, ¶ 288. Emphasis in the original.

In this field **international law is called upon to recognize institutions of municipal law** that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is **that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction.** This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of **companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.** Consequently, in view of the relevance to the present case of **the rights of the corporate entity and its shareholders under municipal law,** the Court must devote attention to the nature and interrelation of those rights.⁷

15. This approach has been generally accepted by international investment tribunals, as well as by doctrinal work.
16. Some jurisprudential examples can be given here, like the decision in *Encana v. Ecuador*:

The second preliminary question concerns the applicable law. The relevant clause, Article XIII(7) of the BIT, provides only [that] a tribunal exercising jurisdiction under the BIT “shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law”. Unlike many BITs there is no express reference to the law of the host State. However for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the **rights affected must exist under the law which creates them, in this case, the law of Ecuador.**⁸

17. Another example is the decision in *Perenco v. Ecuador*:

Given the absence of detailed general or conventional rules of international law governing the organisation, operation, management and control of an enterprise, **a tribunal should in principle be guided by the more detailed prescriptions of the applicable municipal law.**⁹

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

General international law contains no substantive rules of property law. Nor do investment treaties purport to lay down rules for acquiring rights in *rem* over

⁷ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Judgment of 5 February 1970, ¶ 38. Emphasis added.

⁸ *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, 3 February 2006, **RL-139**, ¶ 184. Emphasis added.

⁹ *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, **CL-067-EN**, ¶ 522. See also *Mason Capital L.P. & Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Final Award, 11 April 2024, **RL-194**, ¶ 969: “As the Tribunal explained in its Decision on Respondent’s Preliminary Objections, the ownership of assets can only be determined by reference to the applicable domestic law.”

tangibles and intangibles. **Whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property.**¹⁰

B. The law applicable to the protection of the investors' rights: international law

19. While reiterating that the existence of rights has to be ascertained in domestic law, the decision in the case of *Nagel*, in which the following was stated, indicates that the standards of protection of those rights have to be found in public international law:

The principal source of governing law in this case is the 1990 Investment Treaty. **The protection** given to Mr Nagel must be measured by the Treaty's provisions, interpreted in light of the purposes the Treaty was intended to achieve. The Treaty's terms show that it guarantees a high level of **investment protection**.

...

The Arbitral Tribunal has already noted that the basis of Mr Nagel's claims in this case is the Investment Treaty and that that Treaty should be interpreted **in accordance with the rules of public international law**. However, Czech domestic law will be of some relevance, since **the terms "investment" and "asset" in Article 1 of the Investment Treaty cannot be understood independently of the rights that may exist under Czech law**. It is therefore necessary to determine what is the legal significance of that Cooperation Agreement under Czech law.¹¹

20. A similar analysis can be found in *Emmis v. Hungary*:

In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.¹²

21. **In conclusion**, in the general case where international law has not developed a position relating to the substance of the rights that are protected by international law, they are created and defined by national law. But, if generally **defined** by domestic law, the investors' rights are always **protected** by international law.

II. THE RELEVANT LAW APPLIED TO THE FACTS

¹⁰ Z. Douglas, *The International Law of Investment Claims*, 2009, **RL-149**, ¶¶ 101-102. Emphasis added.

¹¹ *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 3 September 2003, ¶¶ 77 and 316. Emphasis added.

¹² *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, **CL-315-EN**, ¶ 162.

22. It is necessary to turn to Honduran law and the contractual arrangements under Honduran law entered into by [REDACTED] and Pacific Solar, in order to determine what is the substance of the rights that can be invoked by the Claimants, either on their own behalf or on behalf of Pacific Solar. It can be noted here that the Claimants are not signatories of the two Trust Agreements. The only rights they invoke refer to their alleged position as shareholders of Pacific Solar through [REDACTED] and as alleged owners and controllers of Pacific Solar.

A. What are the rights of the Claimants under Honduran law and contracts under Honduran law?

1. Honduran law

23. It is not contested that under Honduran law a trust implies **a transfer of ownership** to the Trustee, as indicated in Article 1035 of the Honduran Code of Commerce:¹³

A trust involves the transfer of rights or ownership of property to the trustee.

2. Share Trust Agreement with [REDACTED]¹⁴

24. This agreement defines the respective rights of the Settlor, *i.e.*, [REDACTED] and the Trustee, *i.e.*, [REDACTED], as well as the rights of the Lenders – the Dutch FMO and the German DEG – to the benefit of which the Trust was instituted:
25. [REDACTED] has the legal title and the ownership of the shares of Pacific Solar, which belonged to the Claimants before the signature of the Share Trust Agreement:

BACKGROUND INFORMATION ... [REDACTED]
further stated ... that ... the entity he represents intends to transfer in trust the entirety of the **Trust Shares** to [REDACTED] so that the bank, in its capacity as **TRUSTEE**, may assume legal title thereto, subject to the purposes of this Trust Agreement as described hereinafter.

[...] ESTABLISHMENT OF THE TRUST: [REDACTED]
[REDACTED] further stated that, on behalf of the **Settlor**, he hereby transfers to the **Trustee**, and the Trustee accepts, legal title to and ownership of the **Trust**

¹³ Code of Commerce of the Republic of Honduras, **R-014-EN (Resubmitted)**. This has been admitted by the Decision in ¶ 311.

¹⁴ Share Trust Agreement between [REDACTED], [REDACTED], DEG and FMO (“**Share Trust Agreement**”), **C-266-EN**. I am referring in my Dissenting Opinion to the version submitted by the Claimant, but I am aware of the fact that the Respondent has submitted its own translation of the Claimant exhibit – **C-266-EN (Respondent’s resubmission)**, after the Hearing, on 20 November 2025. I have compared the two texts and, in my view, there are only distinctions without a difference.

Shares represented by the **Share Certificates** issued by the **Borrower** [Pacific Solar].¹⁵

26. The two Lenders ARE **first-ranking beneficiaries**.

27. It is stated in the Share Trust Agreement that the Lenders, FMO and DEG, shall “be collectively referred to as the “**FIRST-RANKING BENEFICIARIES**”. The Trust has been precisely instituted in order to guarantee the repayment of the loans granted to Pacific Solar by the Lenders:

BACKGROUND INFORMATION ... [REDACTED]
further stated ... that, ... **for the purpose of ensuring the fulfillment of the Secured Obligations of the Borrower to the First-Ranking Beneficiaries** under the Loan Agreements, including, without limitation, the payment of interest, fees, commissions, expenses, charges, and any other payment obligations arising from and/or associated with the Common Terms Agreement, promissory notes issued by the Borrower in connection with or arising from the Loan Agreements, all of which are owed to the First-Ranking Beneficiaries as creditors under the Loan Agreements – and for the definitive commissioning of the Project – the entity he represents intends to transfer in trust the entirety of the Trust Shares to [REDACTED] so that the bank, in its capacity as TRUSTEE, may assume legal title thereto, subject to the purposes of this Trust Agreement as described hereinafter.¹⁶

28. The Settlor, [REDACTED], MIGHT BE the second-ranking beneficiary in the future, only if and when the loans have been fully reimbursed:

DESIGNATION OF THE SECOND-RANKING BENEFICIARY: For the purposes of this agreement and the benefits derived herefrom, the Settlor shall serve as **SECOND-RANKING BENEFICIARY, solely and exclusively in connection with the return of the Trust Shares**, insofar as the **Secured Obligations** have been paid in full.¹⁷

29. Moreover, if the loan is not repaid and there is an Event of Default, the rights of the second-ranking beneficiary will never materialize:

[...] the Trustee, upon receiving written notification from the Agent Bank informing that an event of default has occurred under the Financing Documents, shall either: (i) execute the transfer in payment of the Trust Shares in favor of the First Beneficiaries, to serve as an instrument of partial or total payment of the Secured Obligations, or (ii) alternatively proceed to sell the shares in a public

¹⁵ Share Trust Agreement, **C-266-EN**, p. 4. Emphasis in bold in the original, emphasis in bold and underlined added.

¹⁶ Share Trust Agreement, **C-266-EN**, p. 4. Emphasis in bold in the original, emphasis in bold and underlined added.

¹⁷ Share Trust Agreement, **C-266-EN**, p. 5. Emphasis in bold in the original, emphasis in bold and underlined added.

auction, using the proceeds from such auction to pay, partially or totally, the Secured Obligations as provided in clause seven of this Instrument.¹⁸

30. This means that the second-ranking beneficial ownership has **no substance at the present time**, when the Tribunal has to decide the case, as it will only **possibly materialize in the future** when the first-ranking beneficiary have been fully satisfied, *i.e.*, when the loans have been entirely repaid, **or never materialize** if there is an Event of Default. The Claimants through [REDACTED] have no right to any benefit as long as the Trust is in place and might only obtain the return of their shares if and when the loan has been fully reimbursed and no Event of Default has occurred.

3. Assets Trust Agreement with Pacific Solar¹⁹

31. [REDACTED] has the ownership of the assets of Pacific Solar transmitted to it by the Assets Trust Agreement and the profits generated by these assets:

For the purposes of the Trust, the Trustee was **irrevocably assigned ownership** over real property, personal property and rights deriving from material contracts to which **PACIFIC SOLAR ENERGY, S.A. DE C.V.** was a party ...

...

CREATION OF TRUST. The Settlor continues to express that, with the abovementioned background, it hereby assigns to [REDACTED], in its capacity as Trustee, free from any and all encumbrances, **ownership** over the following Trust Property and Rights, so that [REDACTED], through its trust office, manage this assignment in strict and full compliance with the purpose of the Trust, and thus administer them pursuant to the rules established in this Trust Agreement and the other Financing Documents: (1) The Project Land Rights [...]; (2) The Project Personal Property [...]; (3) The economic and other rights deriving from the Project Material Documents and any guarantees issued [...] It is especially highlighted that **among the rights assigned** (without this clarification being considered as a limitation) **is the Settlor's total turnover** for the provision of electric power supply services derived from the ENEE PPA contract [...].²⁰

32. The two Lenders ARE respectively **first-ranking beneficiary and second-ranking beneficiary**:

¹⁸ Share Trust Agreement, C-266-EN, pp. 4-5.

¹⁹ Assets Trust Agreement between Pacific Solar, [REDACTED], DEG and FMO ("Assets Trust Agreement"), C-267-EN and C-267-EN (Respondent's resubmission). The same remark as the one made in footnote 14 applies here concerning the translation presented by the Respondent.

²⁰ Assets Trust Agreement C-267-EN, p. 3 and p. 6. Emphasis in bold in the original, emphasis in bold and underlined added.

First-Ranking Beneficiary means DEG-Deutsche Investitions-und Entwicklungsgesellschaft mbH. [...] Second-Ranking Beneficiary means Nederlandse Financierings-Maatschappij Voor Ontwikkelingslanden N.V.

...

PURPOSE OF THE TRUST: The Settlor continues to state that ownership over the Trust Property and Rights is assigned for the following irrevocable, inalterable and unmodifiable purposes: **7.1) Guarantee Purpose:** The primary purpose of this Trust is to ensure that all Trust Assets and Rights are, at all times, maintained and constituted as an autonomous estate **in order to serve as a payment guarantee** for the Secured Obligations that the Settlor assumes before the Creditors in their capacity as Secured Beneficiaries in this Trust [...].²¹

33. The Settlor, Pacific Solar, MIGHT BECOME the **third-ranking beneficiary** in the future, only if and when the loans have been fully reimbursed:

Once all outstanding amounts payable to the Lenders have been satisfied, as evidenced by the proof of payment issued by the Agent Bank and addressed to the Trustee by the latter, as well as the outstanding obligations to any other First-Ranking or Second-Ranking Beneficiary that subsequently acquires such status, ownership of the Trust Property and Rights assigned by the Settlor shall be returned in full to the Settlor, which to this end **shall become the Third-Ranking Beneficiary**.²²

34. Moreover, if the loan is not repaid and there is an Event of Default, the rights of the third-ranking beneficiary will never materialize, as the Trustee will take possession of the assets and sell them for the benefit of the Lenders:

[...] upon receipt of the notice issued by the Agent Bank regarding an Event of Default and an instruction to foreclose on the Trust Property and Rights, the Trustee shall take any necessary steps to conduct **the sale and disposal of the Trust Property and Rights through a Public Auction**, with immediate effect, and as a result, deem the Loan for Use Agreement terminated for such reason, take possession of all the Trust Property and Rights for the benefit of the Lenders (assuming their custody and conservation), and initiate the process to liquidate or dispose of the Trust Property and Rights as provided for in this Trust [...].²³

35. This means that the third-ranking beneficial ownership has **no substance at the present time**, when the Tribunal has to decide the case, as it will only **possibly materialize in the future** when the first-ranking beneficiary and the second-ranking beneficiary have been fully satisfied, *i.e.*, when the loans have been entirely repaid, **or never materialize** if there is an Event of Default. Pacific Solar has no right to any benefit as long as the

²¹ Assets Trust Agreement, C-267-EN, p. 5 and p. 7. Emphasis in bold in the original, emphasis in bold and underlined added.

²² Assets Trust Agreement, C-267-EN, p. 8. Emphasis in bold and underlined added.

²³ Assets Trust Agreement, C-267-EN, pp. 8-9. Emphasis in bold and underlined added.

Trust is in place and might only obtain the return of its assets if and when the loan has been fully reimbursed and no Event of Default has occurred.

36. It must be noted that it is clearly stated that **the rights of the third-ranking beneficiary might only come into existence in the future** and have no effect and no substance at present, as mentioned in the Assets Trust Agreement, indicating that Pacific Solar will only “become” the third-ranking beneficiary at a time in the future, if and when the loans have been fully reimbursed and no Event of Default has occurred.

B. What rights of investors are protected under international law?

1. International law does not protect uncertain rights

37. There is a well-established line of jurisprudence holding that international law does not protect rights that are merely contingent, speculative or uncertain. A potential property right or one that is conditional in that it may or may not materialize depending on a future event is not protected by international law.
38. Some case law can be cited here, to the effect that it is only acquired rights existing at the time when they are invoked and not future contingent rights that can be protected under international law.
39. The tribunal in *Apotex v. United States* has clearly made reference to the principle that rights which have not materialized at the time when a claim is based upon them, cannot be protected under international law and that the tribunal therefore lacks jurisdiction over such a claim:

Whether or not each of Apotex’s ANDAs [Abbreviated New Drug Application] would have been granted final approval **is by no means certain** on the evidence. But in any event, **the critical enquiry must be as to the nature of the alleged “property” as at the date of the alleged breach – not at some future point.**

The jurisdictional issue here turns upon the inherent nature of the relevant ANDAs, not the nature of Apotex’s rights over them. As set out above, even assuming that the ANDAs were Apotex’s exclusive “property”, they remained no more than applications for permission to (in this case) export, and as such neither fell within NAFTA Article 1139(g), nor constituted “investments” as contemplated more generally by NAFTA Chapter Eleven.

In the light of the above considerations the Tribunal hereby unanimously Orders and Awards as follows:

(a) Apotex does not qualify as an “investor”, who has made an “investment” in the U.S., for the purposes of NAFTA Articles 1116 and 1139, and accordingly both the Sertraline and Pravastatin Claims are hereby dismissed in their entirety, on the basis that **the Tribunal lacks jurisdiction** in relation thereto.²⁴

40. The case of *Eureko v. Poland* was also dealing with a contingent right and the crystallization of such right. The tribunal in that case stated both that a contingent right cannot be protected under international law “as long as the contingency has not been realized”,²⁵ and that it can be protected when it has “**crystallized**.”²⁶

41. I take the liberty to mention that a similar approach can be found in my thesis, “*Le préjudice dans la théorie de la responsabilité internationale*”:²⁷

*Toujours est-il que le simple espoir d’acquérir un droit doit être distingué du droit d’acquérir un droit, seul ce dernier étant protégé. C’est vraisemblablement un droit de ce genre que M. Ago qualifie d’expectative ...*²⁸

Nevertheless, the mere hope of acquiring a right must be distinguished from the right to acquire a right, only the latter being protected. It is likely this kind of right that Mr. Ago refers to as an expectation.

42. Numerous investment tribunals have also concluded that they have no jurisdiction *ratione materiae* to entertain a claim of expropriation²⁹ when the Claimant did not have **an existing vested right** under the relevant domestic law.³⁰

²⁴ *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, **RL-162**, ¶ 215, ¶ 224 and ¶ 358 (a). Emphasis added.

²⁵ *Eureko B.V. v. Republic of Poland*, UNCITRAL Partial Award, 19 August 2005, **CL-085-EN** [hereinafter, “*Eureko v. Poland*”], ¶ 151.

²⁶ *Eureko v. Poland*, ¶ 152. Emphasis added.

²⁷ Brigitte Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale*, Paris, Pedone, 1973, 382 p. (Préface de Paul Reuter), p. 148.

²⁸ In his pleading in the *Barcelona Traction* case, C.R. 144, p. 57.

²⁹ It can be noted here that in their Memorial on the Merits, ¶ 414, the Claimants present a claim of expropriation: For the foregoing reasons, Claimants respectfully request an award:

(a) declaring that Honduras has breached its obligations under the Treaty, including its obligations:

(i) under Article 10.7 not to expropriate Claimants’ investment except if made for a public purpose, in no case discriminatory, on payment of prompt, adequate and effective compensation, and in accordance with due process.

³⁰ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, **CL-179**, ¶ 20.26: “A plea of creeping expropriation must proceed on the basis that the investment existed at a particular point in time.”; *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award, 26 January 2006, **CL-038**, ¶ 208: “compensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited.”; *Merrill & Ring Forestry L. P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, **CL-110**, ¶ 142: “The right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument. [...] Expropriation cannot affect potential interests.”, ¶ 215: “The Tribunal has also concluded in respect of expropriation that a potential and eventual benefit relating to export

2. International law protects existing beneficial owners

i. The legal principle dealing with beneficial ownership

43. The majority recognizes that it “is generally – albeit not unanimously – accepted that, in cases where nominal ownership does not coincide with beneficial ownership, it is the latter that enjoys protection under international law”.³¹ This jurisprudence has been referred to in my Dissenting Opinion in *Occidental*, as has been mentioned by the Respondent, as cited in the Decision:

Professor Stern similarly notes in her dissenting opinion to the award in *Occidental v. Ecuador* that, in those cases of imperfect dominion, “international law favours the beneficial owner.”³²

44. I stand by this position, which I can cite in full here, with references to case law and doctrine:³³

As far as the position of international law towards beneficial owners, in cases where the legal title and the beneficial ownership are split, is concerned, it is quite uncontroversial, after a thorough review of the existing doctrine and case-law, that international law grants relief to the owner of the economic interest.

The fact that international law favours the beneficial owner has been recognized by the doctrine³⁴; the case-law of the Iran-US Claims Tribunal³⁵ which has always considered the beneficial owner of the legal interest rather than the legal owner when there was a split of title, as well as ICSID tribunals’ decisions.³⁶

ii. The application of the legal principle to situations of existing beneficial ownership

45. It is indeed important to examine different factual situations in order to understand the contours of the protection granted by international law to beneficial owners.

prices cannot be affected by an alleged act of taking because it has not materialized in an existing contract and there is thus no actual contractual right that can be protected as an intangible interest.”

³¹ Decision, ¶ 306.

³² Decision, ¶ 243.

³³ Dissenting Opinion of Arbitrator Brigitte Stern in *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, **RL-161**, ¶¶ 148-149.

³⁴ See for example, Margaret Whiteman’s *Digest of International Law*, vol. 8, **RL-121**, pp. 1261-1262, in particular: “Where the beneficial owner of property, with respect to which claim was made before ... the Commission ... was a *national* of the United States, and where the legal owner or nominee was a non-national of the United States, the Commission allowed claims, if otherwise eligible. But where the legal owner or trustee was a national of the United States, and the beneficiary or *cestui que trust* was a non-national, in claims before that Commission, the claims were denied.”

³⁵ *James M. Saghi, Michael R. Saghi and Allan J. Saghi, Claimants, v. The Islamic Republic of Iran*, Case No. 298, 29-Iran.U.S.C.T.R. p. 20, with references to many other cases.

³⁶ See, for example, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, **CL-022-EN**, ¶¶ 87-90.

46. The case of *Occidental*, mentioned in the Decision, did not imply a Trust, but a Farmout Agreement. This concerned an oil concession in Block 15 exploited by OEPC, which kept the legal title but transferred a 40% beneficial ownership in Block 15 to AEC, in exchange for certain capital contributions by AEC. AEC's **beneficial ownership consisted of 40% of OEPC's share in the crude produced** from Block 15.
47. In other words, **the beneficial ownership existed** as soon as the Farmout Agreement was signed and **granted immediately profits to its holder**, derived from the oil received.
48. Another example of a more classical trust than the two Trusts mentioned and analysed so far, where the beneficial owner was the primary beneficiary (and not a second- or third-ranking beneficiary) who enjoyed immediate and exclusive benefits, is the Family Trust, between Mr. Paiz and Mrs. Paiz on the one hand and [REDACTED] on the other hand, which was a contractual arrangement dated 10 June 2015 in the chain of ownership between the Claimants and Pacific Solar:³⁷

1.17 "**Primary Beneficiary**" means Mr. Fernando Paiz Andrade, resident and citizen of the Republic of Guatemala; and Mrs. Anabella Schloesser de Paiz, resident and citizen of the Republic of Guatemala;

...

CLASS OF BENEFICIARIES

The Beneficiaries of this Settlement are:

11.1 the Primary Beneficiaries: Mr. Fernando Paiz Andrade and Mrs. Anabella Schloesser de Paiz.

11.2 Such other persons as are added to the class of Beneficiaries [...].

...

TRUST INCOME

4.1 The Trustees may during the Trust Period pay transfer or **apply the income of the Trust Fund to or for the benefit of any Beneficiaries.**

4.2 The Trustees shall accumulate the remainder of the income of the Trust Fund during the Trust Period and may add such income to the capital of the Trust Fund [...].³⁸

49. In other words, as was the case for the Farmout Agreement, **the beneficial owners were the exclusive beneficiaries and could receive immediately the benefits** of their beneficial ownership, as soon as the Family Trust was executed.

³⁷ The [REDACTED] (as amended and restated) BETWEEN FERNANDO PAIZ ANDRADE (as Settlor) AND [REDACTED] (as Trustees), C-263-EN.

³⁸ Emphasis in bold and underlined added.

50. The same can be said as far as the Lenders are concerned, as they have an **existing and immediate right to receive funds** for the purpose of the reimbursement of their loans, and not as asserted by the majority “only [...] a contingent right to receive proceeds from their auction sale if they notify the trustee of an event of default.”³⁹
51. In **sum**, it can be stated that **existing** beneficial owners are protected by international law.

C. Are the alleged rights of the Claimants protected by international law?

52. The question here is to determine whether the Tribunal can assert jurisdiction over the claims of the Claimants through the second-ranking beneficiary, [REDACTED], in the Share Trust Agreement and on behalf of Pacific Solar as the third-ranking beneficiary in the Assets Trust Agreement, by application of the rules and principles of international law, as exposed in the preceding points.
53. The majority has considered the beneficial ownership of the Lenders and the beneficial ownership of the Settlers, [REDACTED] and Pacific Solar to be on the same level. I consider that one of the key errors of the majority is to have ignored the difference between the priority ranking beneficial ownership of the Lenders with the subsidiary beneficial ownership of the Settlers, considering that each of them had a partial beneficial ownership, whereas, in fact and law, the Settlers had only a conditional beneficial ownership:

In the present instance, the Trust Agreements have more than one beneficiary
...

In the present instance, therefore, beneficial ownership (and more importantly, ownership within the meaning of the CAFTA-DR) is **a bundle of rights, divided** between the lenders and the settlers. Both the lenders and the settlers (and through them, the Claimants who as admitted are indirect owners of [REDACTED] have proprietary rights. Because of these proprietary rights, the settlers, and through them **the Claimants, together with the lenders, “own” the shares, the Plant and the PPA** within the meaning of the CAFTA-DR.⁴⁰

54. What the majority disregarded is that, in fact and law, the Settlers had only a conditional beneficial ownership. Indeed, there are three stakeholders, which have each different entitlements: the Trustee, which is the legal owner, the two Banks, which are the

³⁹ Decision, ¶ 268.

⁴⁰ Decision, ¶¶ 318, 319.

current beneficial owners and the Settlers which are conditional direct and indirect beneficial owners **in the future**, as will be developed below. And, precisely, another serious error of the majority is to have disregarded the difference between an existing right and a contingent right.

55. I will try to bring some order in the reasoning, first, in distinguishing the claims of the Claimants on their own behalf and their claims on behalf of Pacific Solar, second, in showing that the beneficial ownership of the Lenders and of the Settlers are in what could be called a hierarchical or temporal relationship, the beneficial ownership of the Settlers either coming into existence in a very far future, when the loans are fully reimbursed, or never coming into existence if there is an Event of Default.

a. Can the Claimants claim on behalf of [REDACTED]?

56. The answer is undoubtedly no, as the Claimants can only act on behalf of a company of the host State, while [REDACTED] is a company registered in the Bahamas.

b. Can the Claimants claim on their own behalf?

57. I quote here the conclusions of the majority relating to the rights of the Claimants that can be protected under international law, after the signature of the Trust Agreements:

First, the Claimants' **actual right to protect their future right** to recoup the shares, the Plant and the PPA gives them standing to request declarations of breach and orders not to aggravate the dispute. Such requests are essential to protect the future right to recoupment and are not contingent on the economic value of the rights concerned. The Claimants thus have standing to request an award, as stated in their Memorial:

(a) declaring that Honduras has breached its obligations under the Treaty [...]

(b) declaring that the Agreements are investment agreements as defined by the CAFTA-DR and that Honduras has violated its obligations under the Agreements;

(c) ordering the Republic of Honduras to [...] refrain from aggravating the dispute

Second, as concerns the compensation claimed for losses arising from any Treaty breaches including both interest and costs, a majority of the Tribunal (with Arbitrator Drymer dissenting) considers that the Claimants' claim for compensation on their own behalf by reference to the damage allegedly suffered by Pacific Solar would be fragile indeed. This is because their corporations' status

as so-called second- or third-ranking beneficiaries,[⁴¹] combined with the difficulties they are facing to reimburse the first-ranking beneficiaries, drastically reduces the present-day economic value of their rights.

... the Claimants' effectively recouping their shares, the Plant and the PPA is **too hypothetical** in nature to found their standing now to request other than symbolic reparation on their own behalf.⁴²

58. If I understand correctly the position of the members of the majority, they consider, on the one hand, that after the signature of the Trusts Agreements, the right of the Claimants to claim on their own behalf is too hypothetical to be protected by international law, in other words that this right is presently inexistent, while, on the other hand, they affirm the existence of a right to protect an inexistent right, which is the basis for what they call a symbolic reparation. I must confess that I find this illogical, contradictory and at odds with the usual concepts of international law relating to State responsibility.
59. But what is more, I find this conclusion also in stark contradiction with the position adopted by the majority in relation to the claim presented by the Claimants on behalf of Pacific Solar, as will be explained now.

c. Can the Claimants claim on behalf of Pacific Solar?

60. The majority rejects the preliminary objection relating to the claim of the Claimants on behalf of Pacific Solar:

The Claimants' ownership (through the status of their corporations as third-ranking beneficiaries) gives them standing to bring that claim on behalf of Pacific Solar pursuant to CAFTA-DR Article 10.16.1(b). The damage or loss allegedly sustained by Pacific Solar is, if established, direct and effective.⁴³

61. In other words, a claim of the Claimants for "compensation on their own behalf by reference to the damage allegedly suffered by Pacific Solar would be fragile" and "too hypothetical",⁴⁴ but a claim of the Claimants on behalf of Pacific Solar, for compensation by reference to the damage allegedly suffered by Pacific Solar has to be entertained as the damage, "if established, would be direct and effective."
62. I find no justification for this distinction. The position of the majority seems to me contradictory, at best. A door has to be open or closed. A claim has to be able to be

⁴¹ To be noted, the Claimants are not themselves beneficiaries.

⁴² Decision, ¶¶ 328-330. Emphasis added.

⁴³ Decision, ¶ 339.

⁴⁴ Decision, ¶¶ 329, 330.

presented or not. A right does exist or does not exist. A damage is too hypothetical or is not too hypothetical.

63. Naturally, this conclusion also implies that the Claimants own or control directly or indirectly Pacific Solar. This is another issue on which I strongly disagree with the majority, which considered that the Claimants own but do not control Pacific Solar, as will be developed further.
64. It is not contested that the Claimants can only present a claim on behalf of Pacific Solar, if it is “an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly.”
65. It is not contested that Pacific Solar is a Honduran company. The issue that remains to be analysed is whether Pacific Solar is owned or controlled directly or indirectly by the Claimants.
66. The majority concludes that Pacific Solar is indeed owned by the Claimants, while considering that it is not controlled, which on its face appears contradictory. A shareholder who “owns” a company also controls it, while it is of course possible to control a company without owning it by majority or in full.

i. Do the Claimants own directly or indirectly Pacific Solar?

67. Today, the Claimants do not own Pacific Solar. The legal title to ownership of the shares of Pacific Solar belonging to [REDACTED] have been transferred to the Trustee, [REDACTED]. This is not contested. The Claimants have a direct ownership of 0,01% of the shares of Pacific Solar and an indirect beneficial ownership in 99,90% the shares of Pacific Solar, **which might or might not crystallise in the far future**, depending on whether or not a pre-condition is fulfilled. This legal situation clearly cannot be equated with ownership of Pacific Solar. In other words, the claim on behalf of Pacific Solar is only, in my view, a **potential future claim of indirect ownership**.
68. This has been underlined by the Respondent, in the Reply:

The mere possibility of Pacific Solar receiving benefits from the **putative** investment is **conditional** upon it having fulfilled its debt obligations to DEG and FMO.

At no time is Pacific Solar or its shareholders expected to receive income from the Nacaome I Plant while the trustee holds the assets and shares.

In conclusion, Claimants cannot claim that they are the beneficiaries of the alleged investment, because at least since 2018 they assigned all revenues from the Nacaome I Plant in favour of their creditors, DEG and FMO. Furthermore, they have not submitted evidence to show that they have regained title to Pacific Solar's shares, assets, and right to the revenues of the Nacaome I Plant as of the date of the commencement of this arbitration.⁴⁵

69. The same analysis was presented again to the Tribunal by the Respondent during the Hearing:⁴⁶

[REDACTED]

PRESIDENT ANGELET:

[REDACTED]

MR. SOLIMANO:

[REDACTED]

70. In fact, there is an extremely high risk that the rights linked with the status of the Claimants as beneficial owners will either materialize in a very far future or will not materialize at all. The situation of the Claimants is indeed based on multiple extreme contingencies and uncertainties.
71. First uncertainty: the full reimbursement of the debt in the very far future.

⁴⁵ Reply on Jurisdiction, ¶¶ 166, 169 and 170. Emphasis added.

⁴⁶ D3:PP490-491:L16-22 & 1-15 (Solimano). Emphasis added.

72. In order for the second-ranking right to materialize, there is an important condition. [REDACTED] has only a contingent right to have its shares in Pacific Solar recouped, if there is a full reimbursement of the debts of Pacific Solar. In order to try to justify the similar treatment of the beneficial ownership of the Settlers and the beneficial ownership of the Lenders, the majority stated the following:

While the exercise of the settlers' right to recoupment is conditional on the full repayment of the loans, similarly, the lenders only have a conditional right to receive Pacific Solar's shares, the Plant and the PPA unless upon the occurrence (and notice) of an "event of default", which had not happened at the time of the Request for Arbitration.⁴⁷

73. What the majority overlooks is that **the Lenders have also an actual existing right to receive funds** in order to repay their loans and interests.
74. It appears from the file and the witness statement of Mr. [REDACTED] during the Hearing that the full reimbursement of the debt might only occur in a very far future. Mr. [REDACTED], questioned by Arbitrator Stephen Drymer⁴⁸ has recognized that [REDACTED] as of the date of the Hearing and indicated that the loan [REDACTED], with the consequence that Mr. Paiz might only recover its status as shareholder on which his claims are based on this far away date. And as Arbitrator Drymer commented: "[REDACTED]." Mr. [REDACTED] also added spontaneously that "[REDACTED]". As the PPA extends 6 years later, Mr. [REDACTED] indicated that "[REDACTED]". [REDACTED]. I do not see how we could now satisfy a claim that might not even be based on a right possibly coming into existence in [REDACTED].

75. Second uncertainty: the existence of an Event of Default.

76. In case an Event of Default occurs, both Trust Agreements provide that the Trustee can either transmit respectively the shares or the assets to the Lenders, or proceed to an

⁴⁷ Decision, ¶ 320.

⁴⁸ D2:P452.

auction whose benefits should then be delivered to the Lenders. In this case, the beneficial ownership of the Claimants will never come into existence.

77. In fact, if we look at the whole picture, the Claimants will only be **very hypothetical future and indirect shareholders of Pacific Solar**, if and when they recover their position of shareholders in a company being a third-ranking beneficiary of the Assets Trust Agreement. This means that they cannot be considered today as the indirect owners of Pacific Solar.
78. **In conclusion**, I consider that Claimants' beneficial rights of ownership of the shares of the local company, Pacific Solar, cannot be a basis for an international protection claim on behalf of this company.

ii. Do the Claimants control directly or indirectly Pacific Solar?

79. Control is the ability to make the major corporate decisions for a company. In my understanding, today the Claimants do not control Pacific Solar, as there is neither *de jure* control nor *de facto* control.
80. There is no *de jure* control.
81. Control *de jure* lies with majority shareholders – in other words, any individual or group holding at least a 51% stake, or with some other contractual arrangement granting the power to control to some entity or some group of shareholders.
82. As I have demonstrated that at present, there is no indirect ownership by the Claimants of 99,9% of the shares of Pacific Solar, as the ownership belongs to [REDACTED], there is neither a basis to find that there exists a control of the Claimants resulting from this majority ownership.
83. To make an exhaustive analysis, it can be noted that, by virtue of the Share Trust Agreement, [REDACTED] has some rights, as a former shareholder of Pacific Solar, stemming from its beneficial ownership of the shares:

EXERCISE OF SHAREHOLDER RIGHTS: Inasmuch as the **Borrower** shares constitute the instruments necessary to exercise and prove shareholder rights, [REDACTED] will exercise the political and economic rights derived from the ownership of the shares, for which purpose it shall hold a Power of Attorney granted by the TRUSTEE, as the legitimate holder of the shares. However, it may not exercise voting rights in the

case of any resolution to be adopted at a General and/or Special Shareholders' Meeting that may cause detriment to the conditions established in this Trust Agreement.⁴⁹

84. This could appear, in a superficial approach, to give [REDACTED], and through it to the Claimants, a control of Pacific Solar.

85. However, the alleged power of control of the Claimants through their indirect beneficial ownership of the shares of Pacific Solar – the Borrower – has a double limitation: first, it depends on a procedural requirement, the granting of a power of attorney by [REDACTED]; and second it has limitations as to the substance of the decisions that can be adopted. As indicated by the Respondent, no power of attorney has been produced and there is therefore no legal basis for the Claimants to exercise control over Pacific Solar:

It follows from the foregoing that [REDACTED] cannot hold meetings and vote without a mandate or proxy from [REDACTED], as trustee. Claimants have failed to produce such a mandate or proxy in the present arbitration. Therefore, they have not shown that they exercise or have exercised control over Pacific Solar.⁵⁰

86. The majority in fact follows the analysis presented by the Respondent, to conclude that there is no control:

Under the Share Trust Agreement, [REDACTED] cannot hold meetings and vote in Pacific Solar's shareholders meetings without a mandate or proxy from the trustee, [REDACTED]. Given that the "Claimants have failed to produce such a mandate or proxy in the present arbitration", they have not proven that they exercise or have exercised control over Pacific Solar.⁵¹

87. If the fact that there is no *de jure* control is a correct conclusion, it is however in sharp contradiction with the earlier conclusion of the majority finding that there is ownership.

88. For my part, there is simply no *de jure* control, as there is no indirect ownership by the Claimants of 99,9% of the shares of Pacific Solar.

89. There is no *de facto* control.

⁴⁹ Share Trust Agreement, C-266, p. 6.

⁵⁰ Reply on Jurisdiction, ¶ 180.

⁵¹ Decision, ¶ 253.

90. The Claimants invoke a certain number of elements in order to try to prove that they exercise *de facto* control: day-to-day management of the company⁵², position of Mr. Paiz as the President of the Board of Directors⁵³ of Pacific Solar, some instructions given by Pacific Solar to make payments to their contractors.

Managerial Control

91. On the one hand, the Claimants rely on their day-to-day management of Pacific Solar in order to argue that there is *de facto* control by the Claimants:

Claimants make all important decisions related to Pacific Solar, including day-to-day operations [...].⁵⁴

92. First, investment tribunals have established that mere managerial control over the investment is insufficient to obtain treaty protection.

93. For example, the tribunal in *Gramercy* indicated the following:

The tribunal made a clear distinction between “de facto” control derived from agreements between minority shareholders and a distinct “de facto” control exerted by the managers of the company. This latter control, without ownership is not sufficient to grant protection under the treaty [...]. B-Mex supports this Tribunal’s conclusion that **managerial control is not sufficient for an investor to acquire standing** under the FTA.⁵⁵

94. Second and even more importantly, all the acts performed in order to manage Pacific Solar performed by Mr. [REDACTED] and Mr. Paiz **are authorised by a Loan for use agreement given by [REDACTED]**, which can revoke this Loan for use at any time:

TWELVE: LOAN FOR USE AGREEMENT: [REDACTED]
[REDACTED] continues to represent, in her aforementioned capacity, that her representative, as Provider [REDACTED], owns and is in legitimate possession of the Trust Property and Rights described in Section Five of this Instrument through the related Trust, and that having so instructed and agreed with the Settlor, in its capacity as Recipient [Pacific Solar], in compliance with the conditions agreed in this Instrument and in the Financing Documents, she

⁵² See for example Rejoinder on Jurisdiction, ¶ 8, ¶ 178, ¶ 271 and ¶ 306.

⁵³ See for example Claimants’ Rejoinder on Jurisdiction, ¶ 271: “Moreover, since the purchase of Pacific Solar in December 2014, Mr. Paiz has continuously held the position of president of the board of directors of Pacific Solar.” And ¶ 306: “Since the purchase of Pacific Solar in December 2014, Mr. Paiz has held the position of president of the board of directors of Pacific Solar without interruption. In addition, Mr. Paiz’s close collaborator, Mr. [REDACTED], has also been a director since that time.”

⁵⁴ Rejoinder on Jurisdiction, ¶ 8.

⁵⁵ See *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, **CL-290-EN**, ¶¶ 646-647; *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, **CL-189-EN**, ¶ 246. Emphasis added.

hereby **grants a revocable loan for use over the operational assets assigned in Trust** in accordance with this Instrument, which are received by the Recipient in accordance with the following conditions [...].

12.3) Term and Termination of the Loan for Use Agreement: It is understood that for and in consideration of the currently existing debts of the Recipient related to the Project, which were assumed through the Financing Documents under the conditions listed therein, this Loan for Use Agreement shall remain in effect for as long as full payment of the Secured Obligations is outstanding. This Loan for Use Agreement may be terminated before the established term by mutual, express and written agreement of the parties. However, and considering its legal nature as a gratuitous and mere use contract, **this Loan for Use is essentially revocable at any time, at the sole and exclusive discretion of the Provider**, in accordance with the terms set forth in the Trust Agreement.⁵⁶

95. Third, it can be added that in case of the occurrence of an Event of Default, the Trustee will terminate all alleged control over the Plant:

[...] if the Trustee receives notice of an Event of Default from the Agent Bank in the manner provided for in the Trust Agreement, then the Provider shall, without further notice, **terminate this Loan for Use Agreement** without any liability if so instructed by the Agent Bank (acting upon the instructions of the Lenders), and the Recipient shall, without objection or opposition, immediately allow the Provider [the Trustee], through a duly authorized officer, to take full material and administrative possession of the Project.⁵⁷

96. In other words, all the elements of the record indicate that there is ***no de facto control over the operations of Pacific Solar***, which are performed by virtue of a revocable loan for use agreement granted by [REDACTED], which is a kind of subcontracting agreement or lease contract.

Role of Mr. Paiz as President of the Board of Directors

97. First, it is worth noting that Mr. Paiz is neither a signatory of the Trusts, nor is he even mentioned in these documents. The custodian for the functioning of the loan for use provided for in the Assets Trust Agreement is Mr. [REDACTED], Project Manager at Pacific Solar:

12.7) Designation of the Custodian: Without this designation meaning in any way reduction in or exemption of liability on the part of the Settlor towards the Provider, [REDACTED] is hereby designated for the purpose of assuming before the Provider, in a personal and *ad honorem* capacity – that is, without any fee, remuneration or compensation – responsibility for the

⁵⁶ Asset Trust Agreement, C-267-EN, p. 14. Emphasis in bold and underlined added.

⁵⁷ Asset Trust Agreement, C-267-EN, p. 14. Emphasis in bold and underlined added.

safekeeping, custody, management, maintenance and operation of the property subject to the loan for use, without any distinction. [REDACTED]

[REDACTED] **shall be jointly and severally liable for the obligations derived from this Loan for Use Agreement**, specifically for the purposes of the civil or criminal liability that may arise in the event of loss, theft, relocation without authorization, undue retention in the event of revocation of the Loan for Use Agreement and any other act that may affect the assets subject to the loan for use, before the Provider.⁵⁸

98. Second, the president of a board of director does not control the company. While a board of directors might sometimes look like it holds the ability to control, it ultimately lies with majority shareholders – in other words, any individual or group holding at least a 51% stake or having some contractual arrangement giving the control to some of the shareholders.

Decisions relating to the use of the funds received by Pacific Solar

99. Contrary to what the Claimants argue in their submissions, the Claimants have **no control over the use of the money** generated by the activities of Solar Energy. [REDACTED] and not the Claimants decide on how the money is to be distributed between the Lenders on the one hand and Pacific Solar for their management of the Plant, on the other hand, as was indicated to ENEE (Empresa Nacional de Energía Eléctrica) in a letter of 12 January 2018:⁵⁹

As part of the Financing Documents, the Company will enter into an amending agreement to the guarantee trust agreement in favor of [REDACTED] (the “Trustee”), constituted on December 7, 2016

[...]

In consideration of the aforementioned background, the Company hereby notifies ENEE of the following:

1. That the Company will enter into the Financing Documents in accordance with the right granted by Section 20.6 of the Twentieth Clause of the PPA.
2. The Company will proceed with the encumbrance and assignment in guarantee of all the rights granted by the PPA in favor of the Trustee, for the benefit of the Financial Institutions, by means of the execution of the Trust Agreement.
3. **That ENEE shall follow the written instructions issued by the Trustee on behalf of the Financial Institutions** or by the Agent Bank on behalf of the Financial Institutions, **in all matters relating to the deposit of any sum of money** to which the Company is entitled under the PPA, including, without

⁵⁸ Asset Trust Agreement, C-267-EN, p. 16. Emphasis added.

⁵⁹ Carta de Pacific Solar Energy S.A. a J. A. Mejía Arita (ENEE), 12 January 2018, R-037-EN, pp. 2-3. Emphasis added.

limitation, payment for energy and capacity, and any other amounts pursuant to the provisions of the PPA.

100. No element of the file indicates the existence of a control by the Claimants over Pacific Solar.
101. **In conclusion**, the Claimants have no standing to claim for themselves, they have no standing to claim for [REDACTED], which is a company of the Bahamas, and they have no standing to claim for Pacific Solar, because, at present, they neither own nor control directly or indirectly that company. I consider therefore that **the Tribunal has no jurisdiction *ratione materiae* and that the objection of the Respondent should have been accepted.**

[REDACTED]
Brigitte Stern
Arbitrator

Date: 20 July 2026