ARBITRATION BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/23/2

HONDURAS PRÓSPERA INC., ST. JOHN'S BAY DEVELOPMENT COMPANY LLC, AND PRÓSPERA ARBITRATION CENTER LLC

(Claimants)

v.

REPUBLIC OF HONDURAS

(Respondent)

Reply of the Republic of Honduras to the Preliminary Objection under DR-CAFTA Article 10.20.5

October 25, 2024

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I. INTRODUCTION

1. Pursuant to Procedural Order No. 1 of September 19, 2024, the Republic of Honduras (the "**Republic"**, the "**State"**, "**Honduras"**, or the "**Respondent**") submits its Reply on the Preliminary Objection under Article 10.20.5 of the DR-CAFTA on the date set forth in the Procedural Calendar in Annex B of Procedural Order No. 1, in response to the Observations on the Preliminary Objection submitted by Honduras Próspera Inc. (**"Honduras Próspera**") and its subsidiaries St. John's Bay Development Company LLC ("**SJBDC**") and Próspera Arbitration Center LLC ("**PAC**" and jointly with Honduras Próspera and SJBDC, the "**Próspera Group**" or "**Claimants**").

2. As we explained in the Background section of our Preliminary Objection, filed under Article 10.20.5 of the DR-CAFTA,[1] it is clear and evident that this arbitration is unique and exceptional in the investor-State dispute settlement system. What is at stake is not a simple investment dispute, but the very territorial integrity and right to self-determination of a sovereign State. Through a claim for USD 10.8 billion - equivalent to one third of Honduras' GDP - the Claimants seek to perpetuate a project that threatens the very existence of the Honduran State: the establishment of a private micro-state within the national territory, exempt from any effective supervision and control by the Honduran authorities.

3. The ZEDE regime that the Claimants seek to preserve is the product of one of the darkest eras in Honduran history. It was created during the governments of Porfirio Lobo Sosa and Juan Orlando Hernández - the latter now sentenced to 45 years in prison for drug trafficking in the United States - through the arbitrary dismissal of Supreme Court justices who had opposed its constitutionality and the erosion of State institutions. Even then, Próspera ZEDE failed to comply with the already questionable requirements that the regime itself established for its creation, as it was constituted without the approval of the National Congress.

[1] Preliminary Objections of the Republic of Honduras pursuant to Article 10.20.5 of DR-CAFTA ("**Preliminary Objections of the Republic**") (August 30, 2024).

4. In their Request for Arbitration, the Claimants attempt to present a sanitized image of their project as an innovative economic development zone. The reality is quite different. Próspera ZEDE intends, among others, to:

- Dictate its own legislation, outside of the Honduran legal system.
- Establish its own private justice system, free from control of the Honduran Judiciary.
- Exercise the monopoly of force through a paramilitary organization.
- Implement its own monetary policy and financial system.
- Control sovereign Honduran territory without effective State supervision.

5. The serious consequences of this experiment are already evident: controversial genetic experiments without oversight, infringement of the rights of local communities, and construction projects that violate environmental regulations, to name a few. All this, while Honduras remains internationally liable for what happens in its territory.

6. Faced with this reality, Claimants have adopted a strategy in this arbitration that is as predictable as it is unacceptable: they attempt to delegitimize all Honduran institutions through a distorted narrative that deliberately ignores the historical and legal context that gave rise to the ZEDE regime.

7. It is clear that Claimants knew the context of the enactment of the ZEDE Organic Law, the irregular modification of the Honduran Constitution, the fierce opposition of the population and all the dark circumstances of one of the most corrupt phases in the history of Honduras.[2] The Claimants, however, insist on ignoring the facts and try to divert the Tribunal's attention with political discussions. The Republic of Honduras must respond to these statements:

a) The ZEDE legal regime could only be created after the National Congress, then headed by Juan Orlando Hernández, arbitrarily and illegally dismissed the four justices of the Constitutional Chamber of the Honduran Supreme Court, who had

[2] Preliminary Objections of the Republic, ¶ 5.

already declared the Special Development Regions (RED) regime, the predecessor of the ZEDE regime to be unconstitutional.[3]

b) Claimants state that they would be a paradise for innovation, attraction of foreign investment and development of the local population. However, to date, the reality is that they have represented an unsupervised space for conducting controversial genetic experiments on humans, widely criticized by the scientific community[4] and the trampling of the rights of the inhabitants of Roatan Island, particularly the community of *Crawfish Rock*.[5]

c) Claimants allege that the ZEDE regime would be supported by the Honduran population. However, the reality is that there is a clear rejection at the political, business and citizen levels. The rejection of the sovereign prerogatives attributed to a private micro-state constituted outside the Republic is undisputed. There is full consensus in its rejection. The only evidence presented by the Claimants to prove alleged popular support is an alleged survey that appears to have been organized by the Claimants themselves.[6]

8. On the other hand, Claimants point out that the [recent] decision of the Honduran Supreme Court of Justice on the unconstitutionality of the ZEDE was made under questionable circumstances, suggesting a lack of independence and manipulation of the judiciary. This is a most serious and unacceptable accusation. The Republic of Honduras strongly reproaches this irresponsible assertion for the following reasons.

9. *First*, the convening of a plenary session on September 20, 2024 by the President of the Supreme Court, Rebeca Raquel Obando, was carried out in strict compliance with the powers conferred upon her by law.[7] The agenda of said session included two constitutional

[3] Preliminary Objections of the Republic Preliminary Objections of the Republic, ¶ 5(b)(c).

[4] L. Clarke, "This biohacking company is using a crypto city to test controversial gene therapies", *MIT Technology Review* (February 13, 2023) (**R-0033**).

[5] J. Ernst, "'Go home': Honduran islanders fight against crypto colonialists", *The Guardian* (July 5, 2022) (**R-0032**).

[6] "Image & Acceptance of Próspera ZEDE: Final Report", *MACRODATO* (2024) (**C-0120**).

[7] Supreme Court of Justice, *Agreement No. 04-02, Internal Regulations of the Supreme Court of Justice (*June 20, 2002) (**R-0052**), *art. 12* ("The Supreme Court *of Justice is the highest jurisdictional body; its jurisdiction comprises the entire territory of the State and its seat is in the capital.* Art. 12 ("The Supreme Court of Justice is the highest jurisdictional body; its jurisdiction comprises the entire territory of the State and its seat is in the capital, but it may temporarily change it, when it so determines, to any other part of the territory. The Supreme Court of Justice is composed of fifteen (15) Magistrates and its decisions shall be made by the majority of the totality of its members. The convocations for Plenary Sessions shall be made in writing sent by the Presidency to the Magistrates that make

challenges, one on the ZEDE regime and the other on the Political Amnesty Law, both of which are of utmost importance for the constitutional order of the country. The meeting was convened in accordance with the Court's Internal Rules of Procedure, within the established term and in accordance with the legal powers of the President.

10. *Second*, the Supreme Court's decision was made without abnormalities and in strict compliance with the law. As explained by the Supreme Court itself, ten regular judges of the Supreme Court participated in the plenary session (some in person and others by virtual means). Only the five justices of the Constitutional Chamber who issued the original decision that was now subject to plenary review, were substituted by non-titular [or alternate] permanent member judges. This was because by law, the five titular justices could not hear in the plenary session of the Supreme Court the same challenge that they had previously discussed and resolved in the Chamber. [8] As can be seen, the truth is the opposite of what the Claimants' story attempts to convey: the substitution mechanism seeks precisely to further safeguard due process by preventing the judges who had already issued an opinion on the matter from sitting in the plenary session.[9]

11. *Third*, Claimants have pointed out that the decision declaring the unconstitutionality of the ZEDE, the text of which is not yet public, was part of a strategy of the ruling political party to disqualify the opposition.[10] However, Claimants are well aware that the (un)constitutionality of the ZEDE regime was denounced, from the beginning, by the international community[11] and by different sectors of the Honduran society,[12] including the business

up the Court, at least forty-eight (48) hours in advance, except in cases of urgency qualified by the Presidency; a record of the receipt of said convocations and the documentation of the topics to be discussed, when applicable, shall be made.").

[8] Legislative Branch, *Decree No. 2-2023, Election of Justices of the Supreme Court of Justice (*February 17, 2023) (**R-0057**).

[9] Law of Organization and Powers of the Courts, 1906 (Decree No. 76 of 1906) (January 19, 1906) **(R-0050**), arts. 96, 101, 102, 103, 104, 105. The aforementioned articles refer to "substitute" or "integrating" magistrates, however, the manner of their election was not regulated.

[10] Claimants' Observations, ¶ 10.

[11] United Nations in Honduras, *Press Release: ZEDE could pose serious risks to the Honduran State's guarantee of human rights* (June 8, 2021) (**R-0022**).

[12] Numerous civil society organizations have spoken out over the years, including but not limited to the Honduran Bar Association, the Association of Mayors of Honduras, and the National Anti-Corruption Council. *See* J. Burgos, "Honduran Bar Association and Association of Mayors demand repeal of ZEDEs", Criterio (June 18, 2021) (**R-0023**);

community.[13] Moreover, Claimants say nothing about the parliamentary session of April 20, 2022, in which the National Congress, by unanimity of its 128 members -across all political parties- approved Decrees No. 32-2022[14] and 33-2022,[15] that sought to repeal the constitutional provisions of the ZEDE and repealed the Organic Law of the ZEDE, respectively. It is clear that it is Claimants themselves - not the Government of Honduras - who seek to politicize an issue where there is a clear republican consensus.

12. *And fourth,* the Claimants conveniently omit that they themselves participated in the judicial process under review by the Supreme Court represented by Jorge Colindres himself.[16]

13. Therefore, Claimants' allegations of a lack of independence of the judiciary and the manipulation of decisions relation to the ZEDE are not supported by Honduran law or the facts.

14. In this context, the Republic of Honduras filed its Preliminary Objection under Article 10.20.5 of the DR-CAFTA, which is supported by strong arguments based on the Treaty, the ICSID Convention and international law. The Claimants' position in defense of our Objection is unacceptable as it seeks to curtail Honduras' sovereign right to condition its consent to arbitration and to impose the continuation of a proceeding without the required domestic remedies having been exhausted. This attempt to circumvent the conditions validly imposed by a sovereign State for access to ICSID jurisdiction must be rejected by the Tribunal on the grounds that:

- Article 10.20.5 of the DR-CAFTA does not impose on Honduras, nor on the Tribunal, the obligation to presume as true the factual allegations of the Claimant.

National Anti-corruption Council & Observatory on Anti-corruption Criminal Policy, The deadly sins of the ZEDE (June 2021) (**R-0020**).

[13] Honduran Council of Private Enterprise. *Legal Analysis of the ZEDE in Honduras (*June 2, 2021) (**R-0021**).

[14] Republic of Honduras, *Decree No. 32-2022, decreeing the repeal of Constitutional Reform Decrees* (April 21, 2024) (**C-0057**).

[15] Republic of Honduras, *Decree No. 33-2022, decreeing the repeal of the Organic Law on ZEDE* (April 22, 2022) (**C-0060**).

[16] J. Constantino Colindres, *Legal Opinion as Amicus Curiae in connection with the appeal of unconstitutionality filed by the UNAH against Art. 34 of the Organic Law on ZEDE* (January 19, 2022) (**R-0054**).

- The preliminary objection filed by Honduras is an objection to the jurisdiction of the Tribunal.

- The Republic of Honduras conditioned its consent to ICSID arbitration on the exhaustion of local remedies. A good faith interpretation of the ICSID Convention and the DR-CAFTA confirms the Tribunal's lack of jurisdiction.

- The exhaustion of local remedies is not a sterile requirement as the Claimants intend to characterize it.

15. In sum, the conditions to the State's consent cannot be ignored.

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16. In short, according to the factual background of this arbitration, it is clear that this case transcends that of a mere investment dispute. What is at stake is whether an international arbitral tribunal will endorse an unprecedented attempt to fragment the sovereignty of a State through a project conceived in the darkness of a corrupt regime, and now defended through a strategy that seeks to delegitimize all democratic institutions in Honduras. The Republic defends here not only its sovereign right to condition its consent to ICSID arbitration, but also - and above all - its territorial integrity and its right to self-determination. The reality is undeniable: what Claimants seek is to perpetuate a project that threatens the very existence of the Honduran State, and this cannot be accepted. In the face of such a threat, the Republic of Honduras has not only the right but also the duty to defend itself, beginning by demanding that a basic and legitimate condition for access to this forum be respected: the prior exhaustion of domestic remedies. The reasons for this demand will be developed below.

II. THE APPLICABLE STANDARD UNDER THE DR-CAFTA ARTICLE 10.20.5

17. Article 10.20.5 of the DR-CAFTA provides:

> If the respondent so requests, the tribunal shall, within 45 days after the constitution of the tribunal, decide, in an expeditious manner, an objection under paragraph 4 and any other objection that the dispute is not within the tribunal's jurisdiction. The tribunal shall suspend any action on the merits of the dispute and shall, not later than 150 days after the date of the request, issue a decision or award on such objection, stating the basis therefor. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing has been requested, the tribunal may, upon a showing of extraordinary cause, delay issuing its decision or award for an additional brief period, which may not exceed 30 days.[17]

18. The Parties are in general agreement as to the procedure and legal standard required by Article 10.20.5 of the DR-CAFTA.[18] However, the Claimants dedicate nine pages of their observations to the standard applicable to the analysis of the Claimants' factual allegations, which in their view should be the same as that provided for objections under the DR-CAFTA Article 10.20.4.[19] Claimants' position has no legal support.

19. *First*, Claimants incorrectly infer that the Republic considers that the Tribunal would have to engage in an intensive fact-finding exercise on an expedited timetable such as that provided for by Article 10.20.5.[20]

20. Próspera's position is a desperate attempt to tie the Tribunal's hands and force it to take its unfounded allegations as true. In support of their position, Claimants turn to *Pac Rim v. El Salvador* to note that "an expedited preliminary objection is not intended to lead to a mini-trial."[21]

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[17] Free Trade Agreement between the Dominican Republic-Central America and the United States of America ("**DR-CAFTA**") (August 5, 2004) (**CLA-0002**), art. 10.20.5.

[18] Claimants' Observations, ¶ 13-14; Republic's Preliminary Objections, ¶¶ 17-19.

[19] Claimants' Observations, § II.A., pp. 6-15.

[20] Claimants' Observations, ¶ 17.

[21] Claimants' Observations, ¶ 17; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 (Aug. 2, 2010) (**CLA-0071**), ¶ 112.

However, the Claimants omit that the tribunal in *Pac Rim* delimited the scope of such presumption, which only applies to objections raised under Article 10.20.4 of the DR-CAFTA: "it is only the notice (or amended notice) of arbitration which benefits from a presumption of truthfulness: there is to be no assumption of truth as regards factual allegations made elsewhere, for example in other written or oral submissions made by a claimant to the tribunal under the procedure for addressing the respondent's preliminary objection."[22]

21. Honduras' position is supported by the text of the Treaty[23] and is widely recognized under the DR-CAFTA, as well as under similar provisions in other treaties concluded with the United States. The expedited procedure imposes no obligation on Honduras or the Tribunal to presume the Claimants' factual allegations to be true.[24]

22. *Second*, Claimants fail to recognize the differences between the objections raised under Article 10.20.4 and Article 10.20.5 that are distinguished in the text of the Treaty and were identified by the tribunal in *Renco v. Peru (I)*.[25]

23. In addition to *Renco v. Peru (I)*, the difference between the DR-CAFTA Articles 10.20.4 and 10.20.5 was addressed by the tribunals in *Chevron and TexPet v. Ecuador (I)*, when examining clauses with the same wording.

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[22] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5 (Aug. 2, 2010) (**CLA-0071**), ¶ 90.

[23] DR-CAFTA (**CLA-0002**). Unlike Article 10.20.4(c) which provides: "*(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof)* [...]," Article 10.20.5 has no such limitation.

[24] *Seo Jin Hae v. Republic of Korea*, HKIAC Case No.18117, Submission of the United States of America (June 19, 2019) (**RLA-0051**).¶ 12 ("[W]hen a respondent invokes paragraph 7 to address objections to competence, there is no requirement that a tribunal 'assume to be true claimant's factual allegations.' To the contrary, there is nothing in paragraph 7 that removes a tribunal's authority to hear evidence and resolve disputed facts."), ¶ 13 ("[N]othing in the text of paragraph 7 alters the normal rules of burden of proof. In the context of an objection to competence, the burden is on a claimant to prove the necessary and relevant facts to establish that a tribunal is competent to hear a claim. It is well-established that where "jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage." A tribunal may not assume facts in order to establish its jurisdiction when those facts are in dispute."); *Daniel W. Kappes & Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections (Mar. 13, 2020) (**RLA-0053**)¶ 220 ("Unlike objections under Article 10.20.4, jurisdictional objections do not require a tribunal to assume as true all facts alleged in the notice of arbitration.").

[25] *The Renco Group, Inc. v. Republic of Peru*, UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections Under Article 10.20.4 (Dec. 18, 2014) (**RLA-0017**)., ¶ 167; Claimants' Observations, ¶ 18.

24. In *Renco v. Peru (I)*, the Tribunal drew a distinction between an objection to jurisdiction raised under the applicable arbitration rules, and an objection authorized by Article 10.20.4, stating that:

> As the above exposition of Articles 10.20.4 and 10.20.5 demonstrates, the Treaty draws a clear distinction between three different categories of procedures for dealing with preliminary objections. Thus:
>
> (1) The principal ("shall address and decide") clause in Article 10.20.4 refers to objections alleging the insufficiency of a claim as a matter of law which a tribunal is mandated to decide as a preliminary issue based on assumed facts.
>
> (2) The subordinate ("without prejudice") clause in Article 10.20.4 preserves a tribunal's right to decide "other objections" (including competence objections) as preliminary questions pursuant to the applicable arbitration rules.
>
> (3) Article 10.20.5 provides for a special expedited procedure, at a respondent's option, for dealing with preliminary objections under both (1) and (2).[26]

25. In addition, the Tribunal concluded that:[27]

> In the Tribunal's view, the use of the words "other objections" in the subordinate clause of Article 10.20.4 must be seen to be a reference to objections that are *other than*, meaning *different from*, the objections referred to in the article's primary clause. If Article 10.20.4 objections included objections to competence, there would plainly be no need to describe competence objections as "*other* objections." **Therefore, in order to invest logic and meaning in the provision as a whole, the Tribunal considers that competence objections must be understood to fall outside the scope of Article 10.20.4 objections**.

[26] *The Renco Group, Inc. v. Republic of Peru*, UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections Under Article 10.20.4 (Dec. 18, 2014) (**RLA-0017**), ¶ 191.

[27] *The Renco Group, Inc. v. Republic of Peru*, UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections Under Article 10.20.4 (Dec. 18, 2014) (**RLA-0017**), ¶ 195 (emphasis added).

26. For its part, in *Chevron v. Ecuador (I)*, the tribunal stated that "[i]n defining the *prima facie* evidence, the Tribunal accepts that, in principle, the claimant's factual allegations must be presumed to be true."[28] The tribunal further concluded that "[t]his presumption, however, is not meant to allow a claimant to frustrate jurisdictional review by simply making enough frivolous allegations to bring its claim within the jurisdiction of the BIT."[29] Further, the tribunal determined that "[i]f, from this evidence, the Tribunal finds that facts alleged by the Claimants are shown to be false or insufficient to satisfy the prima facie test, **jurisdiction would have to be denied**."[30]

27. Consequently, the presumption of truthfulness in Article 10.20.4 **does not extend** to jurisdictional objections under the DR-CAFTA Article 10.20.5.

28. *Third*, the Claimants, confronted with [textual] differences under the Treaty, argue that the Tribunal is not required to conduct an analysis of the factual allegations similar to the merits stage because this situation would be inconsistent with Article 10.20.5.[31] The Republic of Honduras reiterates that the Tribunal is in no way constrained by the Treaty and like the tribunal in *Kappes v. Guatemala*, may conduct an analysis of the allegations according to the particularity of the preliminary objection raised by the Respondent.[32]

29. In the present case, far from being obliged to take Claimants' factual allegations as true, the Tribunal must focus on the particularity of the objection raised by the Republic of

[28] *Chevron Corporation & Texaco Petroleum Corporation v. Republic of Ecuador*, PCA Case CPA No. 2007-02/AA277, Interim Award (Dec. 1, 2008) (**RLA-0039**), ¶ 105.

[29] *Chevron Corporation & Texaco Petroleum Corporation v. Republic of Ecuador*, PCA Case CPA No. 2007-02/AA277, Interim Award (December 1, 2008) (**RLA-0039**), ¶ 109.

[30] *Chevron Corporation & Texaco Petroleum Corporation v. Republic of Ecuador*, PCA Case CPA No. 2007-02/AA277, Interim Award (Dec. 1, 2008) (**RLA-0039)**¶ 110 (emphasis added).

[31] Claimants' Observations, ¶¶ 20-21

[32] *Daniel W. Kappes & Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections (Mar. 13, 2020) (**RLA-0053**), ¶ 220 ("Unlike objections under Article 10.20.4, jurisdictional objections do not require a tribunal to assume as true all facts alleged in the notice of arbitration. Nonetheless, just as an Article 10.20.4 objection requires a threshold determination of what claim was actually submitted, in order to determine whether 'a claim submitted is not a claim for which an award in favor of the claimant made be made,' Respondent's particular Article 10.20.5 objection requires a similar threshold determination. That is because, under Article 10.18.1, the time-limitation provision that Respondent invokes as the basis for its jurisdictional objection, the relevant inquiry is whether "more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant [...] has incurred loss or damage" by reason of that breach. 281 This determination cannot be made without a predicate determination of what particular breach has been *alleged*.").

Honduras, *i.e.,* it must decide on the scope of the condition imposed by the Republic of Honduras for access to ICSID jurisdiction.

30. *Finally,* Claimants rely on a series of decisions of other tribunals that allegedly assumed as true the factual allegations of the Claimants in a procedure similar to that provided for under Article 10.20.5 of the DR-CAFTA.[33] Claimants' position does not withstand further analysis.

31. In all the cases cited by Claimants, the preliminary objections raised by Respondents presented factual allegations that were linked to an eventual merits phase of the dispute.[34] That is not the situation in the present case.

32. The Republic of Honduras submitted a sufficiently delimited preliminary objection whose factual analysis is not linked to the merits of the dispute.

33. In conclusion, it is clear that neither Respondent nor the Tribunal is required to rely on Claimants' factual allegations under the expedited procedure of the DR-CAFTA Article 10.20.5.

III. HONDURAS' PRELIMINARY OBJECTION IS NOT AN OBJECTION TO THE ADMISSIBILITY OF THE CLAIM

34. Claimants submit that the Preliminary Objection is not an objection to the tribunal's jurisdiction and competence under Article 10.20.5 of the DR-CAFTA, because - according to them - it is an admissibility objection.[35] This characterization is an additional attempt by Claimants to circumvent a jurisdictional requirement that they chose not to comply with.

35. Claimants spend most of their argument developing the distinction between an objection to jurisdiction and an admissibility objection, as well as the classification of the

[33] Claimants' Observations, ¶¶ 22-26.

[34] *See Sea Search-Armada, LLC v. Republic of Colombia*, CPA Case No. 2023-37, Decision on Respondent's Preliminary Objections to Article 10.20.5 of the TPA between Colombia and the United States of America (February 16, 2024) (**CLA-0087**); *Bridgestone Licensing Services, Inc. & Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB 16/34, Decision on Expedited Objections (Dec. 13, 2017) (**CLA-0083**); *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (April 15, 2009) (**CLA-0069**).

[35] Claimants' Observations, ¶ 27.

requirement of prior exhaustion of local remedies as an admissibility issue.[36] This argument is unsupported by the text of the ICSID Convention and the practice of investment arbitration tribunals.

36. Pursuant to Articles 25(1) and 41(b) of the ICSID Convention, the Arbitral Tribunal must examine whether the jurisdictional conditions of the Convention, as well as of the applicable treaty, to which the parties consented to international arbitration have been fulfilled.[37] In the present case, the consent to ICSID jurisdiction has not been perfected.

37. Claimants' arguments are limited to asserting that the Republic of Honduras erred in classifying the Preliminary Objection as a jurisdictional objection related to Honduras' consent to submit the present dispute to arbitration; and, consequently, the jurisdiction of the Arbitral Tribunal.[38] However, at no time do they refer to Article 26 of the ICSID Convention, which is the Respondent's basis for classifying the present Preliminary Objection as an objection to the jurisdiction of the Tribunal.

38. Claimants quote various sources to indicate that the exhaustion of local remedies requirement is a matter of admissibility.[39] However, as detailed below, Claimants fail to demonstrate to the Tribunal how these decisions relate to the present case:

- *Biwater Gauff v. Tanzania*. This decision is irrelevant to the present case since the arbitral tribunal characterized the applicable BIT provision as a waiting or

[36] Claimants' Observations, ¶¶ 28-36.

[37] A. Reinisch, "Jurisdiction and Admissibility in International Investment Law," 16 *The Law and Practice of International Courts and Tribunals* 1 (2017) (**RLA-0048**), p. 30 ("The above-discussed elements are those under Article 25 of the ICSID Convention which in cases brought under the ICSID Rules have to be fulfilled in addition to the jurisdictional requirements stemming from the applicable BIT or international investment agreements (IIAs) in which the consent of the parties to the jurisdiction is expressed.") *See also Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (Apr. 15, 2009) (**CLA-0069**), ¶ 74 ("It is common ground between the parties that the jurisdiction of the Tribunal is contingent upon the fulfillment of the jurisdictional requirements of both the ICSID Convention and the relevant BIT.").

[38] Claimants' Observations, ¶ 29.

[39] Claimants' Observations, ¶¶ 32, 33.

cooling-off period for consultations and negotiations, not as a requirement to appear before domestic courts.[40]

- *BG v. Argentina.* The arbitral tribunal did not make a determination as to whether exhaustion of local remedies was a jurisdictional or admissibility issue in nature but rather decided that the treaty requirement was not applicable due to the particular circumstances of that case.[41]

- SGS Société Générale de Surveillance S.A. v. Republic of the Philippines. In this case, the Republic of the Philippines did not raise an objection based on the exhaustion of domestic remedies. The excerpts cited by Claimants refer to the tribunal's discussion of its jurisdiction over contractual claims and the application of an exclusive forum clause in the contract.

- RosInvestCo UK Ltd v. Russian Federation. The decision of this tribunal is irrelevant. First, this arbitration was conducted under the Arbitration Rules of the Stockholm Chamber of Commerce, so the ICSID Convention, particularly Article 26 of the Convention, was not applicable. Second, the exhaustion of local remedies objection was made under the general rule of customary international law, not under any provision of the applicable treaties or approving legislation, therefore the respondent could never raise such an argument as a jurisdictional or admissibility objection, since the consent to arbitration -in that case- was express and without limitation, except for a waiting or *cooling-off* period.[42]

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[40] *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008) (**CLA-0068**), ¶ 342 ("The Arbitral Tribunal therefore proceeds from the premise that at the time the Request for Arbitration was filed in August 2005, the six-month prescribed settlement or "cooling off" period under Article 8(3) of the BIT had not yet elapsed.").

[41] *BG Group Plc v. Republic of Argentina*, UNCITRAL, Award (24 December 2007) (**CLA-0067**), ¶ 148 ("In this case, the regular operation of the courts in Argentina came under significant pressure [...] whose purpose was to bar recourse to the courts by those whose rights were felt to be violated [...].").

[42] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments (April 6, 1989) (**RLA-0030**), art. 8.

39. In support of their argument, Claimants also cite *Abaclat v. Argentina* and *Hochtief v. Argentina* to classify the requirement of prior exhaustion of domestic remedies as a question of admissibility.[43] However, this Arbitral Tribunal should also take into account the dissenting opinions of Professor Georges Abi-Saab and J. Christopher Thomas KC, respectively, who stated the following:

> But the fatal blow to the majority opinion's distinction comes from much closer quarters. For the non-adepts at legal analysis, it suffices to read the second sentence of Article 26 of the ICSID Convention ("A contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention"), to discover that such a stipulated requirement conditions the consent to arbitrate and not merely "the effective implementation of such consent", whatever that means. As such, it is a limit to jurisdiction, and the plea based on it is a plea to jurisdiction and not to admissibility.[44]
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> The majority does not believe that Hochtief's failure to comply with Article 10 relates to the jurisdiction of the Tribunal, but rather to the admissibility of the claim. I do not share that view, and prefer the view expressed by other tribunals, that the provision establishing the requirement of prior recourse to local courts is mandatory and jurisdictional in nature.
>
> With respect to this approach, as held in the Impregilo, Maffezini and Wintershall cases, failure to comply with the mandatory terms of subsection 3(a) affects jurisdiction, rather than admissibility, and Respondent's insistence on Claimant's compliance with the condition expressed in Respondent's offer is properly characterized as an exception concerning jurisdiction; not admissibility.[45]

40. Likewise, another arbitral tribunal constituted under the Argentina-Italy BIT – similarly to *Abaclat v. Argentina* - determined that the requirement to bring an action before local

[43] Claimants' Observations, ¶ 31.

[44] *Abaclat and Others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Dissenting Opinion of Prof. Georges Abi-Saab) (October 28, 2011) (**RLA-0042**)¶ 24 (emphasis in original).

[45] *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (Separate and Dissenting Opinion of J. Christopher Thomas, Q.C.) (Oct. 7, 2011) **(RLA-0041**), ¶¶ 31, 42.

courts is "**a jurisdictional requirement** that must be observed before an ICSID tribunal can declare itself competent [...] such clause obliges the investor to litigate [...] before the local forum, before the right to submit the dispute to ICSID can even be realized. Since [Claimant] has not complied with this requirement, **the Tribunal cannot find that jurisdiction exists** [...]."[46]

41. The tribunal in *Wintershall v. Argentina,* which was constituted under the Argentina-Germany BIT —like *Hochtief v. Argentina*—, also contained a clause requiring the exhaustion of local remedies prior to arbitration, and determined that it represented an element of *ratione fori* and that the requirement to litigate before local courts is a jurisdictional requirement.[47]

42. The same conclusion has been reached by several investment tribunals such as *Maffezini v. Spain,*[48] *ICS v. Argentina,*[49] *Dede v. Romania*,[50] and *Kiliç v. Turkmenistan.*[51]

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[46] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (June 21, 2011) (**RLA-0040**), ¶ 94 (emphasis added).

[47] *Wintershall Aktiengesellschaft v. Argentina, ICSID Case No. ARB/04/14, Award (December 8, 2008) (RLA-0010). Republic of Argentina*, ICSID Case No. ARB/04/14, Award (Dec. 8, 2008) (**RLA-0010**), ¶ 145 ("The obligation under Article 10(2) has two aspects, since it is composed of both a *ratione fori* and a *ratione temporis* element. In the present case, the fact that some decisions find that 'waiting periods' do not constitute a jurisdictional requirement, but a 'procedural' one, does not preclude **the requirement to litigate before local courts for 18 months from being considered as a requirement of a jurisdictional nature**.") (emphasis added). *See also Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (June 21, 2011) (**RLA-0040**), ¶¶ 90-91.

[48] *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (Jan. 25, 2000) (**RLA-0032**), ¶¶ 22, 23 ("*The wording of Article 26 makes it clear that if a Contracting State has not conditioned its consent to ICSID arbitration on the prior exhaustion of local remedies, such a requirement does not apply. […] In determining whether Spain conditioned its acceptance of the jurisdiction of the Centre and the jurisdiction of the Tribunal on the prior exhaustion of local remedies, the Tribunal notes that in ratifying the ICSID Convention, Spain did not include any such condition in relation to Article 26..")* (emphasis added).

[49] *ICS Inspection and Control Services Limites v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction (Feb. 10, 2012) (**RLA-0015**).¶ 262 ("*As a result, the* ***failure to respect the pre-condition to the Respondent's consent to arbitrate cannot but lead to the conclusion that the Tribunal lacks jurisdiction*** *over the present dispute..*") (emphasis added).

[50] *Ömer Dede and Serdar Elhüseyni v. Romania*, ICSID Case No. ARB/10/22, Award (Sept. 5, 2013) (**RLA-0045**), ¶¶ 224, 262, 263 ("As discussed in greater detail below, Claimants have failed to satisfy the requirement either (i) **to exhaust local remedies** or (ii) to litigate for at least one year before local courts without a final decision. [...] **Claimants have failed to comply with the jurisdictional preconditions that must be satisfied prior to submission of their claims to arbitration**, as provided by Article 6(4) of the BIT. [...] **Accordingly, this Tribunal lacks jurisdiction to hear the present claims.**") (emphasis added).

[51] *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (July 2, 2013) (**RLA-0044**), ¶ 6.3.15 ("For these reasons, and on the basis of the factual record, **the Tribunal concludes that the requirements set forth in Article VII.2 are to be treated as conditions, and that the failure**

43. In *Kiliç v. Turkmenistan*, the tribunal addressed the claimant's argument, which invoked *Abaclat v. Argentina*, to qualify the respondent's objection as a question of admissibility rather than jurisdiction. In that case, the tribunal found that the majority of the tribunal in *Abaclat* committed a legal error since Article 26 of the ICSID Convention clearly states that a State may impose conditions on its consent to ICSID arbitration, such that it may determine the conditions under which jurisdiction exists and may be exercised.[52]

44. Claimants also cite the *Interhandel* case of the International Court of Justice for the purpose of determining that the obligation to exhaust domestic courts is a question of admissibility.[53] It is important to note that, as Claimants themselves point out, this determination was made by the Court in the context of a claim for diplomatic protection.[54] Thus, the requirement to exhaust domestic remedies was invoked as part of customary international law, and not as a mandatory condition to the consent of the States involved in the dispute.[55]

45. The International Court of Justice has said that its jurisdiction is the product of the consent of the parties and is limited to the extent to which the parties have agreed.[56] Where such consent has been expressed in an international agreement, any condition to which such consent is subject must be considered as a limitation thereof; therefore, the Court must consider that the

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to meet those conditions goes to the existence of the Tribunal's jurisdiction and are not to be treated as issues of admissibility.") (emphasis added).

[52] *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (July 2, 2013) (**RLA-0044**).¶ 6.3.4 ("The Tribunal considers that, to the extent that it was seeking to make a general proposition that went beyond the terms of the BIT at issue in that case, the majority in Abaclat fell into legal error. This is because Article 26 of the ICSID Convention explicitly recognises that a Contracting State may impose conditions on its consent to arbitration under the ICSID Convention, **in a manner that determines the conditions in which jurisdiction may be said to exist and be capable of being exercised** [...]") (emphasis added).

[53] Claimants' Observations, ¶ 34.

[54] Claimants' Observations, ¶ 34.

[55] *Interhandel Case (Switzerland v. United States of America)*, Judgment, I.C.J. Rep. 1959, p. 6 (21 March 1959) (**RLA-0001**), p. 27 ("The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law.").

[56] *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 2020, p. 455 (Dec. 18, 2020) (**RLA-0054**), ¶ 89 ("The Court observes that, in treaties by which parties consent to the judicial settlement of a dispute, it is not unusual for them to subject such consent to conditions which must be regarded as constituting the limits thereon."). *See* also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177 (June 4, 2008) (**RLA-0038**), ¶ 48 ("The Court confirmed, [...] that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them.").

examination of such a condition relates to its jurisdiction and not to the admissibility of the claim.[57] This is the situation in the present case.

46. In conclusion, Honduras' Preliminary Objection is directed to the jurisdiction and competence of the present Arbitral Tribunal pursuant to Article 10.20.5 of the DR-CAFTA. As we have already explained in this section, the condition of Honduras' consent to ICSID arbitration under Article 26 of the ICSID Convention is jurisdictional in nature,[58] therefore, if the Claimants have not complied with it, the consent to arbitration under ICSID cannot be formed, and the tribunal does not have jurisdiction to hear the claim.[59]

IV. THE REPUBLIC OF HONDURAS CONDITIONED ITS CONSENT TO ICSID ARBITRATION ON THE EXHAUSTION OF LOCAL REMEDIES

47. As explained by the Republic of Honduras in its Preliminary Objection, ICSID lacks jurisdiction in the present case because the Republic of Honduras conditioned its consent to arbitration on the prior exhaustion of local remedies by the investors, and the Claimants did not comply with this jurisdictional condition.

48. In their response, the Claimants deny that the Republic of Honduras has conditioned its consent to arbitration on the exhaustion of local remedies. They argue in this regard that (i) Article 26 of the Convention would peremptorily require that such condition be included in the same instrument by which the State consents to ICSID arbitration; (ii) Legislative Decree 41-88 would not constitute - nor could it constitute - a condition to the consent of the Republic of Honduras to ICSID arbitration, since it would be a purely unilateral declaration; and (iii) none of

[57] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6 (Feb. 3, 2006) (**RLA-0036**), ¶ 88 ("The Court recalls in this regard that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them. When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application.").

[58] *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (July 2, 2013) (**RLA-0044**)., ¶ 6.3.4.

[59] J. Sicard-Mirabal & Y. Derains, "Jurisdiction of the Arbitral Tribunal" in *Introduction to Investor-State Arbitration* (2018) (**RLA-0049**), p. 59 ("If these preconditions were to be considered jurisdictional in nature, and the claimant did not comply with them, then the arbitration agreement would not be formed, and the tribunal would not have the jurisdiction to hear the claim.").

the instruments by which Honduras would have given its consent in this case (*i.e.*, the DR-CAFTA and the so-called "Agreement for Legal Stability" ("**LSA**")) would even be compatible with the exhaustion of local remedies as a condition of consent.

49. As we shall see below, Claimants' position defies the clear and precise terms of Article 26 of the Convention, Legislative Decree 41-88 ("**DL 41-88**") and the DR-CAFTA. *First*, Article 26 of the ICSID Convention does not require that the condition of prior exhaustion of local administrative or judicial remedies be necessarily and explicitly stated in the same instrument in which consent to arbitration is given (**Section IV.A**). *Second*, such prerogative was duly exercised by the Republic of Honduras by means of DL 41-88, the instrument by which it approved and ratified the ICSID Convention and whose terms the Claimants accepted when instituting the present arbitration (**Section IV.B**). *Third*, the provisions of the DR-CAFTA (and even of the alleged investment agreement) are not inconsistent with the local remedies exhaustion requirement (**Section IV.C**). *Finally*, any consequences that acceptance [by the Tribunal] of the present Preliminary Objection may have, are solely the responsibility of the Claimants and their decision to bring their claims before a clearly incompetent forum (**Section IV.D**). The Republic of Honduras elaborates on each of these arguments below.

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

50. As Honduras demonstrated in its Preliminary Objection,[60] Article 26 of the ICSID Convention allows Contracting States to require investors to exhaust local remedies as a condition precedent to initiating arbitration against them. In exercise of this prerogative, Honduras conditioned its consent to ICSID arbitration through DL 41-88, through which Honduras approved and enacted the ICSID Convention.[61]

51. The Claimants seek to controvert this fact, arguing that Honduras should have exercised the prerogative of Article 26 by incorporating the requirement of exhaustion of local

[60] Preliminary Objections of the Republic, ¶¶ 26-27.

[61] Republic of Honduras, *Decree 41-88, Decree on the ICSID Convention* (March 22, 1988) (**R-0003**), art. 75.

remedies in the instrument of consent.[62] In their view, Article 26 would not admit such a requirement by means of -what they characterize in reference to DL 41-88- as a merely unilateral declaration,[63] which would not have been accepted by them nor would it form part of the terms of the arbitral consent.

52. However, as we shall see, neither the literal wording of Article 26, interpreted in accordance with the rules set forth in the Vienna Convention on the Law of Treaties ("VCLT"),[64] nor the doctrine, jurisprudence and precedents referred to by Claimants in their Observations on the Preliminary Objection support their position.

53. *First*, Claimants argue that the Republic of Honduras has distorted the object and purpose of Article 26 (and partially cited it in its Preliminary Objections),[65] by justifying in that provision [Article 26], as well as in DL 41-88, the need for foreign investors in Honduras to exhaust local remedies in order to resort to ICSID.[66] According to Claimants, the main purpose of Article 26 would have been - specifically - to restrict the application of the traditional requirement of international law of exhaustion of local remedies, by way of requiring that such condition be necessarily stated in the same instrument in which the State expresses its consent to arbitration, without being able to resort to any other source.[67]

54. Claimants' position openly defies the general rule of interpretation provided for in Article 31 of the VCLT.[68] A reading of the terms of Article 26, interpreted in good faith and in

[62] Claimants' Observations¶ 42 ("[I]f a Contracting State wishes to require the exhaustion of local remedies, it must strictly comport with the narrow limits of Article 26, which requires that such requirement be an integral part of the parties' consent.").

[63] Claimants' Observations¶ 43 ("[I]t is clear that Article 26 does not allow Contracting States to unilaterally require the exhaustion of local remedies independently of their consent to arbitration that forms part of their arbitration agreement with the claimant investor.").

[64] Technically, the VCLT is not applicable to the ICSID Convention since, in accordance with Article 4 of the VCLT, the latter applies with respect to treaties entered into after its entry into force. The VCLT entered into force in 1980, while the ICSID Convention dates from 1966. However, many of the provisions of the VCLT are considered international custom. Furthermore, the Claimants acknowledge the applicability of the VCLT in their submission. *See* Claimants' Observations, ¶ 13.

[65] Claimants' Observations, ¶ 40.

[66] Preliminary Objections of the Republic, ¶ 26.

[67] Claimants' Observations, ¶ 40.

[68] U.N. General Assembly, *Vienna Convention on the Law of Treaties*, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 331 ("**VCLT**") (May 23, 1969) (**CLA-0001**), art. 31.

their context, and taking into account its object and purpose, suffices to show that the Convention does not provide for any formality for States to exercise the prerogative recognized in that provision.[69] At best, all that is required is for the host State to express its willingness to require exhaustion of local remedies in writing, as might be concluded from the provisions of Article 25(1) of the Convention.[70] It is clear that this requirement is fully met in this case.

55. *Second*, Claimants contend - with reference to the Report of the Executive Directors on the ICSID Convention - that Article 26 of the Convention would reverse the traditional rule of international law, in the sense that local remedies do not need to be exhausted unless otherwise expressed.[71]

56. It goes without saying that the Republic of Honduras has never denied this point.[72] But from this it does not follow - in any way - that States must use a certain sacramental formula to express their will in order to preserve, as the same Report of the Executive Directors acknowledges, the traditional rule of international law and "[require] the prior exhaustion of other avenues."[73]

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[69] On the contrary, Article 26 of the ICSID Convention is clear in stating that: "Unless otherwise stipulated, the consent of the parties to arbitration under this Convention shall be deemed to be consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the prior exhaustion of its administrative or judicial remedies as a condition of its consent to arbitration under this Convention".

[70] It is generally accepted that the parties may give their consent to ICSID arbitration by means of different or even unilateral instruments, as long as such consent is in writing. *See* S. Schill *et al.*, "Article 25" in *Schreuer's Commentary on the ICSID Convention* (2022) (**RLA-0055**), pp. 348, 353 ("The Convention's only formal requirement for consent is that it must be in writing. [The possibility that a host State might express its consent to the Centre's jurisdiction through a provision in its national legislation, or through some other form of unilateral declaration, was discussed repeatedly during the Convention's preparation. In response to several questions, Mr. Broches pointed out that unilateral acceptance of the Centre's jurisdiction constituted an offer that could be accepted by a foreign investor and so become binding on both parties (History, Vol. II, pp. 274-275)."). *See also*, International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (*March 18, 1965) (**CLA-008**), ¶¶ 23-24 ("Consent to jurisdiction must be given in writing and once given cannot be revoked unilaterally (Article 25(1)). (...) Nor does the Convention require that the consent of both parties be recorded in the same instrument. Thus, a host State may offer in its investment promotion legislation that disputes arising out of certain types of investments will be submitted to the jurisdiction of the Centre, and the investor may give its consent by accepting the offer in writing").

[71] Claimants' Observations, ¶ 40.

[72] Preliminary Objections of the Republic, ¶ 31.

[73] International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (March 18, 1965) (**CLA-008**), ¶ 32 ("It may be presumed that when a State and an investor agree to arbitration and do not reserve the right to pursue

57. *Third*, the Claimants cite *Generation Ukraine* to argue that Article 26 of the Convention would not allow States to unilaterally require the exhaustion of local remedies regardless of their consent to arbitration contained in the arbitration agreement with the investor.[74] But the discussion in that case was completely different, so the tribunal's conclusions are in no way applicable here.

58. In the *Generation Ukraine* case, Ukraine did not limit its consent to ICSID by its domestic legislation or anything similar, but sought to impose the requirement of exhaustion of local remedies solely on the basis of the provisions of Article 26.[75] That is, as if the same article established such a requirement of exhaustion without the States needing to express any prior will to that end. Obviously, such a position does not stand up to analysis. In this case, on the contrary, Honduras expressly conditioned its consent to ICSID arbitration by means of Legislative Decree 41-88, using the prerogative provided by Article 26 of the Convention -and does not intend to limit its consent only on the basis of the provisions of the Convention. In addition, the tribunal also made reference -citing *Lanco v. Argentina*- to the possibility that the condition of prior exhaustion of local remedies may be included in domestic legislation.[76]

59. *Fourth*, Claimants refer to statements made by Mr. Broches, the first Secretary-General of ICSID, during the negotiation and formulation of the Convention. According to Claimants, Mr. Broches confirmed that any exhaustion requirement under Article 26 had to be expressed in the applicable arbitration agreement.[77] This is also not true.

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other avenues, or to require the prior exhaustion of other avenues, the intention of the parties is to arbitrate to the exclusion of any other proceeding. This rule of interpretation is contained in the first sentence of Article 26") (emphasis added). The same paragraph cited by Claimants makes it clear that the second sentence of Article 26 "explicitly recognizes the right of the State to require prior exhaustion of its administrative or judicial remedies, in order to make it clear that no attempt is made to modify the rules of international law on the subject." (emphasis added).

[74] Claimants' Observations, ¶ 42.

[75] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003) (**CLA-0059**), ¶¶ 13.1-13.5.

[76] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (September 16, 2003) (**CLA-0059**), ¶ 13.5.

[77] Claimants' Observations, ¶ 43.

60. Contrary to Claimants' position, Mr. Broches not only made it clear that the Convention expressed no view on the desirability or undesirability of States requiring the exhaustion of local remedies, but also expressly mentions the possibility that the intention to require such exhaustion could be included in a unilateral provision of their domestic law. Mr. Broches stated:

> Mr. Broches (Chairman) reiterated that the Convention did not express any view with regard to the desirability or undesirability of exhausting local remedies. All the Convention said was that where there was consent to submit a dispute to the Centre, this would mean that the exhaustion of local remedies has been waived. It, e.g. clarified that where a State included a unilateral provision in the legislation for encouraging investments that investment agreements would be subject to international arbitration, such a provision would be taken to exclude local remedies unless a contrary intention was expressed.[78]

61. *Fifth*, Claimants allege that the *travaux préparatoires* of the ICSID Convention do not evidence the intention of its drafters to allow Contracting States to require exhaustion of local remedies by "merely expressing such intention."[79] Claimants thus seek to create the impression that the Republic of Honduras would be attempting to impose this requirement simply because that would be its will, without any additional support or manifestation. This, however, is not at all consistent with the reality of the facts.

62. In this case, the Republic of Honduras established the referred requirement in DL 41-88, which is -no more and no less than- the legislation that approved and put into force the ICSID Convention in Honduras. Moreover, the preparatory work itself expressly provided for the possibility for States to express such intention in a unilateral provision of their domestic legislation,[80] which - naturally - will be integrated into any consent that such State may subsequently grant.

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[78] History of the ICSID Convention, Vol. II-2 (1968) (**RLA-0029**), pp. 756-757 (emphasis added).

[79] Claimants ' Reply, ¶ 44.

[80] History of the ICSID Convention, Vol. II-2 (1968) (**RLA-0029**), pp. 756-757 ("Mr. Broches (Chairman) reiterated that the Convention did not express any view with regard to the desirability or undesirability of exhausting local remedies. All the Convention said was that where there was consent to submit a dispute to the Centre, this would mean

63. *Sixth*, Claimants also attempt (unsuccessfully) to discredit the *Lanco v. Argentina* precedent, in which the tribunal recognized that, under Article 26 of the Convention, Contracting States may require the exhaustion of local remedies as a condition precedent to their consent to ICSID arbitration through bilateral investment agreements, domestic legislation, or investment agreements with ICSID arbitration clauses.[81] According to Claimants, the reference to domestic legislation in *Lanco v. Argentina* refers only to domestic laws containing the State's consent to submit future disputes to ICSID arbitration and, therefore, Legislative Decree 41-88 would be excluded from that category.[82] However, this in no way emerges from the tribunal's reasoning.

64. *Finally*, Claimants unsuccessfully attempt to refute the statements of the then ICSID Secretary-General, Mr. Shihata, who held that one of the ways to require exhaustion of local remedies under Article 26 is through a declaration made by the State at the time of signing or ratifying the ICSID Convention, as Honduras did.[83] Claimants argue in this regard that Mr. Shihata's use of the tentative phrase "*might result*" and his clarification that this approach was only undertaken by a single State demonstrate that Mr. Shihata did not have a strong position on this issue.[84] Acknowledging the weakness of their position, Claimants then argue that, in any event, the former ICSID Secretary's editorial is neither a source of law nor persuasive evidence.[85]

65. The inappropriateness of these arguments is evident.[86] Mr. Shihata, Secretary General of ICSID, argued rather the opposite on that occasion. The simple reading of the editorial cited by Claimants makes it clear that Mr. Shihata recognizes the possibility for Contracting States to establish the condition of exhaustion of local remedies in the instrument of ratification of the

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that the exhaustion of local remedies has been waived. It, e.g. clarified that where a State included a unilateral provision in the legislation for encouraging investments that investment agreements would be subject to international arbitration, such a provision would be taken to exclude local remedies unless a contrary intention was expressed.") (emphasis added).

[81] Claimants' Observations, ¶ 44.

[82] Claimants' Observations, ¶ 44.

[83] Claimants' Observations, ¶ 44.

[84] Claimants' Observations, ¶ 44.

[85] Claimants' Observations, ¶ 44.

[86] Claimants' Observations, ¶ 44.

Convention. The fact that - at the time - only one signatory State had opted for this option in no way renders this possibility inoperative. According to the former Secretary General of ICSID:

> Another way to accomplish the same objective might result from a declaration made by a Contracting State at the time of signature or ratification of the Convention that it intends to avail itself of the provision of Article 26 and will require, as a condition of its consent to ICSID arbitration, the exhaustion of local remedies. It should be added, however, that among 97 Contracting States, only one [...] has made such a declaration and moreover has subsequently withdrawn it [...].[87]

66. By virtue of the foregoing, Claimants' interpretation of Article 26 of the Convention as requiring that the condition of exhaustion of local remedies must necessarily be included in the same instrument in which the State expresses its consent to arbitration is contrary to the ordinary meaning of the terms of the treaty and seeks to introduce a requirement that does not arise from the text of the rule or from its context, object and purpose.

B. The Republic of Honduras validly conditioned its consent to ICSID arbitration through Legislative Decree 41-88.

67. As demonstrated in the Statement of Preliminary Objections, the Republic of Honduras validly conditioned its consent to ICSID arbitration at the time of approving and promulgating the Convention through Legislative Decree 41-88, thus exercising its prerogative under Article 26 of the Convention.[88]

68. Claimants' central defense in their Observations to the Preliminary Objection is that Legislative Decree 41-88 does not form part of the arbitral consent and, therefore, cannot represent the means of exercising the prerogative provided for in Article 26 of the Convention.[89]

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[87] I. Shihata, "Towards A Greater Depoliticization of Investment Disputes: Public Disclosure Authorized The Roles of ICSID and MIGA" (1992) (**RLA-0005**), p. 14. *See* also C. F. Amerasinghe, "Basis of the Rule" in *Local Remedies in International Law* (2004) (**RLA-0034**), p. 58 ("[...] the rule results mainly from recognition of the respondent state's sovereignty in what is basically an international dispute."); M.C. Porterfield, "Exhaustion of Local Remedies in Investor-State Dispute Settlement: an idea whose time has come?" 41 *The Yale Journal of International Law Online* (Fall 2015) (**RLA-0018**), p. 5 ("The central function of the local remedies rule is to protect the sphere of sovereignty that States are entitled to under international law").

[88] Preliminary Objections of the Republic, ¶¶ 27-28.

[89] Claimants' Observations, ¶ 52.

According to the Claimants, Legislative Decree 41-88 would be nothing more than a declaration whose sole purpose is to announce or anticipate the possibility that, in the future, Honduras would require the exhaustion of local remedies as a prerequisite to ICSID arbitration.[90] In addition, [Claimants] argue that, by filing this preliminary objection, Honduras would be contradicting its own conduct in previous arbitrations in which the objection would not have been exercised.[91] [Claimants] even go so far as to suggest that the very existence of Legislative Decree 41-88 comes as a surprise to them and that they were not aware of it until the filing of the Republic of Honduras' brief.[92]

69. As we shall see, the foregoing is nothing more than a crude attempt by Claimants to disregard, on the basis of tendentious and ill-conceived arguments, the sovereign will of Honduras clearly expressed in Legislative Decree 41-88. Nothing raised by the Claimants controverts the fundamental importance of Legislative Decree 41-88. This can be seen as follows:

70. *First*, the Republic of Honduras has never said that the act of ratification of the ICSID Convention was in itself sufficient to constitute consent to arbitration before this forum. Of course, a further manifestation of consent by the disputing parties is necessary.[93] The point is, that DL 41-88 being the legislation approving the ICSID Convention in Honduras, its terms and conditions are naturally applicable to all arbitration agreements referring to ICSID and involving the Republic of Honduras, whatever the instrument of consent, including -of course- the DR-CAFTA.[94]

71. Thus, however much Claimants may try to deny it,[95] it is not possible to separate the ICSID Convention from the instrument by which the Republic of Honduras approved and put

[90] Claimants' Observations, ¶¶ 52-53.

[91] Claimants' Observations, ¶ 57.

[92] Claimants' Observations¶ 53 ("*In practice, the Declaration was unheard of until Respondent first raised it in this case*.").

[93] *See* ICSID Convention, Rules and Regulations (July 2022) (**RLA-0009 bis**), Convention, art. 25.Convention, art. 25.

[94] Preliminary Objections of the Republic, ¶ 35.

[95] Claimants' Observations¶ 53 ("Decree 41-88 is unnecessary to establish that Respondent was an ICSID Member State and irrelevant to establish the jurisdiction of this Tribunal.").

it into force.[96] Without Legislative Decree 41-88 and the exhaustion condition, there would simply be no consent by the Republic of Honduras to ICSID arbitration.

72. *Second*, Claimants have no way to justify their disregard of Legislative Decree 41-88 and the condition to Honduras' consent that it includes. This is because the instrument of ratification of the ICSID Convention was public information and freely accessible while the Republic of Honduras was a party to ICSID.[97] In addition, ICSID took note and informed the public of the measures adopted by the Contracting States in relation to the Convention. This is stated in the document issued by ICSID entitled "Contracting States and Measures Adopted by them for the purposes of the Convention", making express reference -again- to Legislative Decree 41-88.[98]

	Décret No. 409/PRG du 28 sept. 1968 promulgant une loi de l'Assemblée Nationale portant ratification par la République de Guinée de la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats.
Honduras	Decreto No. 41-88. (Off. Gaz. August 4, 1988)

73. It is therefore wholly inappropriate for Claimants to now claim that the Tribunal should disregard Honduras' conditional consent, just because they were (allegedly) unaware of its existence.[99]

74. *Third*, Claimants' interpretation of Legislative Decree 41-88 -that is-, to consider it merely as a prospective statement that only anticipates an eventual conditioning of Honduras' consent not only contradicts the clear and manifest meaning of the Decree,[100] , but is also contrary

[96] The Claimants dispute that Legislative Decree 41-88 reproduces Agreement No. 8-DTTL and the ICSID Convention, and that the exhaustion condition has been included among Article 75 and the list of ICSID signatory States. As can be seen, Claimants resort to purely aesthetic arguments to disregard the relevance of Legislative Decree 41-88. *See* Claimants' Observations, ¶ 52.

[97] It was sufficient to review the ICSID web page to note that, in the window relating to the member States of the Convention, express reference was made to Legislative Decree 41-88. *See* Contracting States and Measures taken by them for the purpose of the Convention (ICSID/8) (October 28, 2022) (**R-0055**)..

[98] List of Contracting States and other Signatories of the ICSID Convention (September 3, 2021) (**CLA-45**)p. 24.

[99] Claimants' Observations, ¶ 53.

[100] Contrary to the Claimants' assertion, the letter of Legislative Decree 41-88 leaves no room for doubt. The inclusion of the expression "shall exhaust" clearly reveals the imperative nature of the exhaustion condition. No exercise of

to the principle of effectiveness or principle of *effet utile* in international law, since it would deprive that provision and the second part of Article 26 of the ICSID Convention of all practical effect.

75. As is well known, the principle of effectiveness is intended to interpret international acts in a useful and not illusory manner, with a view to giving practical effect to the original intention of the States.[101] In matters of treaty interpretation, this principle is reflected in Article 31(1) of the Vienna Convention on the Law of Treaties by referring to "ordinary meaning" and "object and purpose" as basic elements of interpretation,[102] according to the annual reports of the United Nations International Law Commission ("**ILC**").[103][104] Likewise, the principle of

linguistic dissection -such as the one attempted by Claimants- can change the letter and meaning of Legislative Decree 41-88. *See* Claimants' Observations, ¶ 55.

[101] A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008) (**RLA-0037**), p**.** 394 ("The principle of effectiveness is aimed at construing the original consent and agreement of States-parties effectively and not as unreal and illusory").

[102] VCLT (**CLA-0001**)Art. 31.1 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").

[103] During the codification work of the Commission, it was proposed to regulate as the principle of effectiveness or *effet utile* as an independent criterion of interpretation whereby each provision "is to be so interpreted as to give them all the force and effect consistent with the ordinary meaning of the words and with other parts of the text [...]." United Nations General Assembly, *Yearbook of the International Law Commission Vol. II,* A/CN.4/SERA/W64/ABD.1 (1964) (**RLA-0028**)*, p*. 54. Subsequently, the Commission determined that it was not necessary to insert a separate provision on this question and then noted that "*[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted*." [United Nations General Assembly, *Yearbook of the International Law Commission Vol. II,* A/CN.4/SERA/W64/ABD.1 (1964) (**RLA-0028**), p. 201.

[104] The principle of effectiveness ("*effet utile*") has, in turn, been recognized and applied by the International Court of Justice and by international arbitral tribunals. In the *US Nationals in Morroco case*, the International Court of Justice referred to the principle of "*economic liberty without any inequiality*" recognized in various treaties and observed that "*this principle was intended to be a binding character and not merely an empty phrase*". In the *Peace Treaties* case, the Court stated that "The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit." *See Case concerning rights of nationals of the United States of America in Morocco,* Judgment, I.C. J. Reports 1952, p. 176 (Aug. 27, 1952) (**RLA-0027**), ¶¶ 184, 191; *Interpretation of Peace Treaties (second phase),* Advisory Opinion, I.C.J. Reports 1950, p. 221 (July 18, 1950) (**RLA-0026**), p. 226.p. 226. *See also Daniel W. Kappes & Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections (March 13, 2020) (**RLA-0053**),, ¶¶ 145-149 ("the Tribunal takes seriously Respondents arguments about *effet utile*, namely that whatever the strict textual interpretation of Articles 10.16.1(a) and (b) might be, the intent of the Contracting State Parties could not have been to make the first path so broad as to render the second path effectively meaningless. *(…)* Rather, the point is that for a treaty interpretation to rest on an *effet utile* conclusion, beyond simply construing the ordinary meaning of treaty terms in their context, a tribunal must be convinced that the alternative interpretation would leave a treaty provision with no effective meaning at all. ."); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013) (**RLA-0016**), ¶ 111 ("The words "in all their aspects" must have a meaning in keeping with the principle that all treaty provisions must have an "*effet utile*"); *İçkale İnşaat Şirketi Ltd. v. Turkmenistan,*

effectiveness has been used to interpret the scope of unilateral acts and/or declarations of States, since "like any other act or transaction, unilateral acts are performed for a reason and with calculation, and hence they do have an object and purpose".[105] Examples of this can be found in the jurisprudence of the Permanent Court of International Justice.[106]

76. In this case it is clear that the interpretation sought by the Claimants is contrary to the principle of effectiveness, inasmuch as it seeks to strip Legislative Decree 41-88 of any practical effect and, consequently, to nullify the power conferred by Article 26 of the ICSID Convention to condition consent to ICSID arbitration. As has been explained, both the letter of Article 26 and the preparatory works of the Convention leave no room for doubt as to the object and purpose of the referred provision. To claim otherwise, as Claimants do, is simply improper.

77. *Fourth*, the idea that the Republic of Honduras would be precluded under the doctrine of *estoppel* from requiring exhaustion of local remedies as a condition to ICSID consent, since it acted in alleged contradiction with its conduct in other arbitrations, is as incorrect as it is irrelevant. As Claimants themselves acknowledge,[107] Honduras has claimed the need to exhaust local remedies as a preliminary objection in all those cases in which, in its view, it was appropriate. Thus, and as explained,[108] in *JLL Capital* and *Autopistas del Atlántico*, what was discussed were objections of manifest lack of legal merit under Rule 41(5) of the ICSID Arbitration Rules, which

ICSID Case No. ARB/10/24, Award (C**L**A-0082), ¶ 329 ("Such a reading would not be consistent with the generally accepted rules of treaty interpretation, including the principle of effectiveness, or *effet utile*, which requires that each term of a treaty provision should be given a meaning and effect.").

[105] A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008) (**RLA-0037**)p. 467.

[106] In the *Eastern Greenland* case, the Permanent Court of International Justice refused to interpret the statement made by the Norwegian Foreign Minister as a recognition of Denmark's sovereignty over Greenland. The Minister had promised Denmark that Norway would not raise any problems about its own efforts to obtain sovereignty over that part of Greenland. Thus, after "a careful examination of the words used," the Court determined that such a declaration could not be interpreted as a definitive recognition of Danish sovereignty. Similarly, in the *Minority Schools in Albania* case, the Permanent Court interpreted the 1921 Albanian Declaration addressed to the Council of the League of Nations, in which Albania undertook to guarantee equality to de jure and de facto minorities. In this regard, the Court stated that it would interpret this Declaration on the basis of its text and in consideration of the fact that it was intended to apply the general principles of the treaties on minorities ("As the Declaration of October 2nd, 1921, was designed to apply to Albania the general principles of the treaties concerning the protection of minorities, this is the point of view which, in the Court's opinion, must be adopted [...]"). *See Legal Status of Eastern Greenland*, Judgment, P.C.I.J. Series A/B, No. 53 (Apr. 5, 1933) (**RLA-0024**)p. 69; *Minority Schools in Albania*, Advisory Opinion, P.C.I.J. Series A/B, No. 64 (Apr. 6, 1935) (**RLA-0025**)pp. 16-17.

[107] Claimants' Observations, ¶ 47.

[108] Preliminary Objections of the Republic, ¶ 47.

-as is well known- are subject to a high standard that has nothing to do with the objection raised in this case under Article 10.20.5 of the DR-CAFTA.[109] Likewise, the Republic of Honduras recently asserted exhaustion of local remedies as part of its request for bifurcation in the *Palmerola International*,[110] *Inversiones y Desarrollos Energéticos*,[111] and *Fernando Paiz* cases.[112] Moreover, the Claimants' position is irrelevant since the filing of preliminary objections is neither an imperative nor does it represent an obligation, but rather constitutes a procedural power whose exercise is at the full disposal of the State. The fact that Honduras has not exercised this power in other cases in no way precludes it from exercising its right in the present case.

[109] In *ADASA v. Honduras*, the Republic of Honduras raised a plea of manifest lack of legal merit under Rule 41(5) of the ICSID Arbitration Rules. This resulted in an expedited proceeding, with two rounds of written pleadings and a virtual hearing. After the conclusion of these proceedings, the tribunal decided to deny the objection as such, finding that it involved a complex interpretative exercise that exceeded the bounds of obviousness, and postponed its decision on the merits of the objections raised by the Republic of Honduras to a later date, joining them to the merits. It was in this context that the tribunal decided not to bifurcate the proceedings, considering that it was inadvisable for the efficiency of the proceedings after an entire phase devoted to the analysis of the objection for manifest lack of legal merit; a phase that did not take place in the present arbitration. *See* L. Bohmer, "ICSID tribunal rejects Honduras' argument that claims manifestly lack legal merit due to investor's failure to exhaust local remedies," *IAReporter* (April 5, 2024) (**R-0058**). In *JLL Capital v. Honduras*, as in the previous case, the tribunal considered that the high standard of Rule 41(5) had not been met and denied the preliminary objection for manifest lack of legal merit. However, the tribunal subsequently bifurcated the proceedings to hear at a preliminary stage, among others, the Republic of Honduras' objection that the claimant had failed to exhaust domestic remedies, as it was required to do. *See* L. Bohmer, "ICSID tribunal dismisses Rule 41 in objection financial services with Honduras," *IAReporter* (December 29, 2013) (**R-0053**).

[110] *Palmerola International Airport, S.A. de C.V. v. Republic of Honduras*, ICSID Case No. ARB/23/42, The Respondent files a request to address the objection to jurisdiction as preliminary question (October 16, 2024) (**R-0062**).

[111] *Inversiones y Desarrollos Energéticos, S.A. v. Republic of Honduras*, ICSID Case No. ARB/23/40, The Claimant files observations on the request to address the objections to jurisdiction as a preliminary question (October 18, 2024) (**R-0063**)..

[112] *Fernando Paiz Andrade and Anabella Schloesser de León de Paiz v. Republic of Honduras*, ICSID Case No. ARB/23/43, The Respondent files a request to address the objections to jurisdiction as a preliminary question pursuant to ICSID Convention Article 41(2) and ICSID Arbitration Rule 44 (October 22, 2024) (**R-0064**).

78. In any event, and as is well known, the standard for accepting an *estoppel* claim is high,[113] which is reflected in its low success rate.[114] In this case, the requirements for applying this doctrine[115] are not met at all for the following reasons.

79. First, Honduras has not engaged in any relevant and effective conduct that would allow Claimants, clearly and unambiguously, to be confident that the prior exhaustion of local remedies requirement for its consent to ICSID arbitration has been waived. Neither the terms of the treaties entered into with third parties by the Republic of Honduras nor the defenses it does or does not raise in other arbitrations would allow Claimants to rely, in good faith, that the Republic of Honduras would not require such a precondition.

80. Second, the parties involved in the other cases brought against the Republic of Honduras are not the same as in this arbitration. Indeed, the defenses raised by Honduras in the earlier arbitrations were not directed at the Claimants, who therefore could not have relied on such alleged statements.

81. Claimants cannot allege an alleged breach of the confidence created or contradictory conduct simply because the Republic of Honduras has not engaged in legally relevant conduct directed at Claimants. The central point of the [estoppel] theory is the reliance placed on a party on the basis of prior conduct directed to it, and that the *same* party cannot have

[113] *Chevron Corporation & Texaco Petroleum Corporation v. Republic of Ecuador*, PCA Case CPA No. 2007-02/AA277, Interim Award (Dec. 1, 2008) (**RLA-0039**), ¶143, (**"[...] it has further been noted that in all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold.** ¶143, ("[...] it has further to be noted that in all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold.").

[114] A. Kulick, "About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals," in 27 *The European Journal of International Law* 1 (2016) (**RLA-0047**).at 113 ("With respect to the outcome of the decisions, the tribunal/dissenting arbitrator rejected the estoppel argument in 33 instances, while only nine decisions came out in favor. In the remaining 11 decisions, the matter remained undecided. It is thus fair to say that arbitrators are rather hesitant to endorse an estoppel claim or argument.").

[115] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award (June 26, 2000) (**RLA-0033**)¶ 111 ("In international law it has been stated that the essentials of estoppel are (1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary. unconditional. and authorised; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.").

that reliance defrauded by subsequent contradictory conduct.[116] In conclusion, the *estoppel* theory invoked by Claimants is clearly inapposite.

82. However, it is clear that the Republic of Honduras provided for the exhaustion of local remedies as a jurisdictional condition in its legislation approving the ICSID Convention. As will be explained in the following section, this is applicable to all arbitration agreements referring to ICSID and involving the Republic of Honduras, whether or not the condition was expressly included in the instrument of consent.

C. The requirement to exhaust local remedies applies to the DR-CAFTA as well as to any other international treaty or instrument of consent.

83. Claimants also argue that the dispute resolution clauses of the DR-CAFTA and the alleged investment agreement (or "**LSA**") would - in any event - be incompatible with the requirement of exhaustion of local remedies for access to ICSID arbitration.[117]

84. As we shall see, the Claimants are wrong once again. There is no such incompatibility. The terms of the DR-CAFTA are perfectly reconcilable with the condition that the Republic of Honduras has established through DL 41-88 to submit any dispute to ICSID. On the other hand, and as stated in the Preliminary Objections, the LSA is simply irrelevant in this case because Honduras is not a party to such agreement: it is a self-contract illegally entered into between the same executives/shareholders of Próspera.

85. Claimants' allegations regarding the DR-CAFTA, on the one hand, and the LSA, on the other, are addressed separately below.

[116] L. Díez-Picazo, *The Doctrine of Specific Acts* (1962) (**R-0051**) p. 206 ("The binding conduct, that is to say, that which sets in motion the rule under study, must have been observed with respect to those interested in the legal situation in question in each case. Conduct observed with respect to persons other than those interested in the specific legal situation or conduct that has been observed in different circles of interests may not be considered as binding acts of their own, which cannot be contradicted.").

[117] Claimants' Observations, ¶ 59.

1. The DR-CAFTA provisions are not inconsistent with the local resource exhaustion requirement.

86. Claimants allege that the dispute resolution mechanism established in the DR-CAFTA would be inconsistent with the requirement of exhaustion of local remedies established by Legislative Decree 41-88.[118]

87. *First*, the Claimants refer to the *no-u-turn* clause set forth in Article 10.18.2 of the DR-CAFTA. According to Claimants, such a clause-which requires investors to refrain from initiating or continuing any action in respect of measures that they allege to be in breach of the Treaty-would be inconsistent with the requirement of exhaustion of local remedies. For the Claimants, "Article 10.18.2 necessarily presumes that local remedies have not been exhausted."[119]

88. The truth is that the referred waiver, which has been deliberately established for the benefit of the Contracting States to protect them against potential parallel proceedings,[120] in no case exempts investors from exhausting domestic remedies when so required by the legislation of the respective State, as in the case of Honduras. To interpret such provision otherwise would go against its meaning and purpose, contrary to the basic canons of interpretation of the VCLT.[121]

89. Nor is it true that the tribunal in *Metalclad Corporation v. Mexico* endorsed the Claimants' argument.[122] The tribunal there merely found that, unlike the Republic of Honduras, Mexico had nowhere required investors to exhaust domestic remedies prior to resorting to

[118] Claimants' Observations, ¶ 60.

[119] Claimants' Observations, ¶ 61.

[120] M. Kinnear & C. Mavromati, "Consolidation of Cases at ICSID," in *Jurisdiction, Admissibility and Choice of Law in International Arbitration* (2018) (**RLA-0050**).at 244 ("numerous treaties have adopted provisions that reduce the potential for cases arising out of the same measure to proceed in multiple fora. For example [...], to waive their right to pursue a single claim in parallel fora simultaneously, or to elect one dispute resolution forum to the exclusion of others (e.g.: fork in the road or no U-turn clauses)."); G. Kaufmann-Kohler and M. Potestà, "The Interplay Between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework," in *European Yearbook of International Economic Law* (2020) (**RLA-0052**).¶ 81 ("In broad terms, fork-in-the-road and waiver clauses pursue the same objectives: avoiding parallel proceedings, which entail duplication of costs, risks of double recovery and of inconsistent outcomes.").

[121] VCLT (**CLA-0001**) Article 31 ("*General rule of interpretation. I. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*.").

[122] Claimants' Observations, ¶ 61; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000) (**CLA-0056**).

arbitration.[123] Obviously, in that case there was no basis for imposing such a requirement on the investors. In this case, on the other hand, the Republic of Honduras has clearly and peremptorily established such a requirement through Legislative Decree 41-88. This makes all the difference.

90. In addition, and as the tribunal in *Corona Materials LLC v. Dominican Republic* held, in concluding -in this same sense- that the "waiver required to submit a claim to international arbitration under Chapter 10 of the DR-CAFTA is clear in its terms"[124] and did not preclude the claimants in that case from exhausting domestic remedies, because "this requirement is immediately conditioned by subsection 3 of this Article"[125] which leaves safe and "available to the claimant (or its enterprise) under the DR-CAFTA an action seeking interim injunctive relief, not involving the payment of damages while the claimant pursues its claim for damages under the DR-CAFTA."[126]

91. *Second*, the Claimants point to the *fork-in-the-road* clause in Annex 10-E of the DR-CAFTA. According to them, such a clause would be irreconcilable with Legislative Decree 41-88, because had [Claimants] gone to the Honduran courts to exhaust local remedies, they would have automatically lost the possibility of initiating the present arbitration. But this is not true either.

92. As is clear from the very sources cited by the Claimants, the *fork-in-the-road* clauses of the DR-CAFTA operate on a different plane than the requirement of exhaustion of local remedies.[127] Such clauses prevent investors from initiating arbitration in cases where they have previously claimed an alleged breach of *international law obligations* before domestic courts. This

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[123] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000) (**CLA-0056**), note 4 ("The question of turning to NAFTA before exhausting local remedies was examined by the parties. However, Mexico does not insist that local remedies must be exhausted. Mexico's position is correct in light of NAFTA Article 1121(2)(b) which provides that a disputing investor may submit a claim under NAFTA Article 1117 if both the investor and the enterprise waive their rights to initiate or continue before any administrative tribunal or court under the law of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in NAFTA Article 1117.").

[124] *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on Respondent's Expedited Preliminary Objections Pursuant to DR-CAFTA Article 10.20.5 (May 31, 2016) **(RLA-0019)**, ¶ 268.

[125] *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on Respondent's Expedited Preliminary Objections Pursuant to DR-CAFTA Article 10.20.5 (May 31, 2016) **(RLA-0019)**, ¶ 268.

[126] *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on Respondent's Expedited Preliminary Objections Pursuant to DR-CAFTA Article 10.20.5 (May 31, 2016) **(RLA-0019)**, ¶ 268.

[127] Claimants' Observations, ¶ 62.

was expressly held by the tribunal in *Bank Melli Iran v. Bahrain* which Claimants cite, curiously, in purported support of their position.[128]

93. The purpose of the *fork in the road* clauses is to avoid duplication of proceedings involving the same parties, object and cause of action; that is to say, where there is a triple identity, as has been shown by abundant international doctrine and jurisprudence.[129] But these clauses do not prevent-- nor could they prevent-- investors from asserting the rights they may have under the domestic legal system of the host State of the investment, and which are the ones that-- in this case --the Claimants should have exhausted.

94. This was also held – expressly - by the tribunal in *Corona Materials LLC v. Dominican Republic* when analyzing these same the DR-CAFTA provisions. The tribunal held in this regard that:

> Article 10.18.4 of DR-CAFTA establishes the 'choice of remedies' clause. But this is applicable only to claims of an alleged breach under Section A of Chapter 10 in proceedings before a judicial or administrative tribunal of a Central American State Party or the Dominican Republic. Annex 10-E is only applicable to claims by

[128] *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Award (**CLA-0085**), ¶¶ 526-528. There, the tribunal held that the exhaustion of local remedies requirement was not applicable as there was no rule establishing such a requirement ("the Tribunal finds no basis in the BIT or in international law to impose a general requirement to pursue local remedies for an investor to bring a treaty claim"), which is an obvious difference with the present case. The tribunal further recognized that the *fork-in-the-road* clause included in the applicable treaty would only have been triggered if the claimants had sought redress before local courts for the *treaty breaches* challenged in the ICSID arbitration ("This conclusion is reinforced by the presence of a fork-in-the-road clause in Article 11(3) of the BIT [....] by virtue of Article 11(3), the Contracting Parties have chosen to bar recourse to arbitration when the investor has 'primarily referred' the dispute to the courts of the host State and local proceedings are pending or a final judgment has been rendered. Thus, had the Claimants sought redress of the violations impugned here before Bahraini courts, the Tribunal would have been barred from ruling on such claims."). Here, the local remedies that the Claimants should have exhausted before turning to ICSID were not claims for violations of DR-CAFTA, but challenges to the administrative acts that they allege violated their rights. Accordingly, the tribunal's findings in *Bank Melli v. Bahrain* only confirm Honduras' position.

[129] S. Schill et al., "Article 26" in *Schreuer's Commentary on the ICSID Convention* (2022) (**RLA-0056**), ¶ 86 ("[t]ribunals have consistently held that a fork-in-the-road clause will prevent access to international arbitration, only if the same dispute involving the same parties and cause of action had been submitted to the courts of the host State. The jurisdiction of an ICSID tribunal is not affected by the submission of a related, but not identical dispute to domestic courts"); *Khan Resources Inc, Khan Resources B.V., and Cauc Holding Company Ltd. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction (July 25, 2012) (**RLA-0043**)., ¶ 390 ("[t]here is ample authority for [the application of the triple identity test]"; *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467, Award (July 1, 2004) (**RLA-0035**)¶ 52 ("To the extent that a dispute could involve the same parties, the same subject matter and the same cause of action, it could be considered as the same dispute and the 'fork in the road' mechanism would preclude its submission to concurrent tribunals.").

> U.S. investors. This 'choice of avenues' is clearly intended to address the situation in certain civil law countries where international treaties have direct effect and, therefore, the alleged breach of an international treaty may form a case under the domestic law of these States. Claimant would have violated this provision if Walvis (or Corona) had brought a claim in domestic courts for the "same alleged violation" (i.e., a violation of Section A of Chapter 10 of DR-CAFTA) as in the present proceedings. If Walvis had brought an administrative litigation proceeding that did not invoke DRCAFTA Chapter 10, it would not have violated Article 10.18.4.[130]

95. As Honduras demonstrated in its Preliminary Objections, and Claimants acknowledge, the Próspera Group failed to exhaust the administrative remedies or claims available to them by law to challenge Decrees Nos. 32-2022 and 33-2022 and the measures they identified in their Request for Arbitration that allegedly violated their rights.[131] Before resorting to ICSID arbitration, Claimants should have exhausted these remedies before the institutions that issued these measures pursuant to the procedures set forth in the Administrative Procedure Law.[132] These remedies would not have been claims based on violations of the DR-CAFTA, such as those that the Claimants are submitting to this Arbitral Tribunal, and thus the *fork-in-the-road* clause provided therein would not have been triggered.[133]

96. By virtue of the foregoing, the provisions of the DR-CAFTA are in no way inconsistent with the requirement of exhaustion of local remedies established by Legislative Decree 41-88, to which Honduras conditioned its consent to ICSID arbitration.

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[130] *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on Respondent's Expedited Preliminary Objections Pursuant to the DR-CAFTA Article 10.20.5 (May 31, 2016) **(RLA-0019**), ¶ 269 (emphasis added).

[131] Request for **Arbitration** (December 19, 2022), ¶ 65.

[132] Preliminary Objections of the Republic, ¶ 39.

[133] In addition, Claimants allege that Honduras acted in bad faith by agreeing to a dispute resolution mechanism in the DR-CAFTA that was inconsistent with the "undisclosed" requirement of exhaustion of local remedies, which Claimants allege was "hidden" in its domestic law. This allegation is patently unfounded. As explained in detail in section IV.B, the disregard of Legislative Decree 41-88 invoked by the Claimants is unjustified, since it is an instrument to which the entire public had free access while Honduras was still a member of ICSID; and of which ICSID took note and circulated to the public. In no way can the Claimants allege ignorance of that instrument without proving their own negligence. Furthermore, Claimants argue that the Tribunal should conclude that Honduras incurred in bad faith given the alleged inconsistency between the provisions of DR-CAFTA and an exhaustion requirement. But this is a circular argument because, as explained *above* in section IV.B, the alleged inconsistency does not exist.

97. In any event, the DR-CAFTA allows a claimant to initiate international arbitration under the UNCITRAL Rules, without having to exhaust domestic remedies, and does not present any alleged inconsistency with the provisions of the DR-CAFTA.

98. As Honduras explained in its Preliminary Objection, Honduras is not denying the alleged investor a forum to resolve disputes under the DR-CAFTA. Simply, the investor must comply with the conditions imposed by the State in order to bring a claim under the Treaty and the ICSID Convention. The DR-CAFTA itself provides options other than ICSID, in case the investor does not comply with the requirements under the Convention and decides to submit its claim to arbitration, for example, under the UNCITRAL Arbitration Rules.[134]

2. Honduras is not a party to the LSA, so its provisions are inapplicable.

99. Claimants also argue that the LSA would not require the investor to exhaust local remedies in order to resort to ICSID arbitration, so this requirement would not be applicable to arbitrations based on such an "agreement."[135] The Claimants' position arises from an incorrect premise.

100. *First*, Claimants rely on the LSA as if it were an investment agreement entered into between Próspera and the Republic of Honduras.[136] But this is ostensibly false.

101. The LSA, as much as it is recurrently cited by Claimants, is nothing more than a unilateral agreement entered into by the president of Honduras Próspera Inc. and his employee, the Technical Secretary of ZEDE Próspera. This is clear from the instrument itself, which states that it was signed "BY AND BETWEEN: Tristán M. Monterroso, as Technical Secretary, acting under the authority of Articles 11(3), 11(5), 12(2), 12(4), 12(7) and 45 of the Organic Law of the Employment and Economic Development Zones (ZEDE) [...], and on behalf of Próspera ZEDE

[134] DR-CAFTA (**CLA-0002**), art. 10.16.3; Preliminary Objections of the Republic, ¶ 42.

[135] Claimants' Observations, ¶ 64.

[136] Request for Arbitration, ¶¶ 1, 11, 47.

[...] in accordance with Sections 1.02(c), 2.04(3), 3.09(2), 3.09(d), 4.01(2)(b), 4.02(2) and 11.02 of the Próspera ZEDE Charter; AND: Honduras Próspera Inc."[137]

102. The Claimants allege that the LSA would bind Honduras through the Technical Secretariat of the ZEDE Próspera,[138] which would act as the representative of the Republic of Honduras. This is not true. The Technical Secretaries of the ZEDE are not public officials of the Republic of Honduras and, consequently, cannot act on its behalf. The Technical Secretaries are at the service of the ZEDEs themselves, and exclusively look after their interests.

103. Since the provisions of the LSA do not bind the Republic of Honduras as it is not a party to the agreement, it is therefore irrelevant whether or not the agreement provides for the requirement of prior exhaustion of local remedies to enable ICSID jurisdiction.

104. *Second*, and in any event, as with the DR-CAFTA provisions discussed in section IV.C.1, the dispute resolution clause in the LSA operates on a different plane from the local remedies that had to be exhausted by the Claimants to trigger ICSID jurisdiction.

105. Section 2.2 of the LSA provides for ICSID jurisdiction for "[c]laims for monetary damages of the Parties arising under or relating in any way to this Agreement." As explained above, the local administrative and judicial remedies that should have been exhausted by Claimants are not based on or related to alleged breaches of the provisions of the LSA-which is even governed by the alleged laws of the Prosperous ZEDE-[139] . The Claimants should have simply challenged in the local venue the particular administrative acts that they allege caused them harm.

[137] Agreement for Legal Stability and Investor Protection between the Republic of Honduras and Honduras Próspera Inc. ("**Legal Stability Agreement**") (March 9, 2021) (**CLA-0006**), p. 1.

[138] Request for Arbitration, ¶ 47 ("Honduras Próspera and Honduras (through the Technical Secretary for Próspera ZEDE at the time) entered into the Agreement for Legal Stability and Investor Protection, effective on 9 March 2021 and amended on 18 November 2021 (together, the "LSA").").

[139] Agreement on Legal Stability (**CLA-0006**), §3.7 ("*Choice of Law. This Agreement shall be governed by and construed in accordance with the Roatan Common Law Code, §§2-3-4-0-1-0-1001, et seq., of Próspera ZEDE, […] without regard to conflict of laws principles.")*

106. By virtue of the foregoing, the provisions of the LSA do not bind the Republic of Honduras as it is not a party to the agreement. Consequently, it is irrelevant that the requirement of exhaustion of local remedies was not provided therein as a condition for ICSID jurisdiction.

D. The implications that the granting of the Preliminary Objection may have, are the sole consequence of the Claimants

107. As a last resort, Claimants argue that the Tribunal's granting of the Preliminary Objection would have serious practical and policy implications in that it would deprive Claimants of a forum in which to present their claims.[140] Claimants' position is misplaced.

108. *First*, Claimants allege that in the event that the Preliminary Objection is granted, and they proceed to exhaust local remedies in Honduras, they would not then be able to bring their claims before ICSID.[141] This is not true. As developed in Section IV.C.1, the subject matter of local administrative and judicial remedies for non-compliance with Honduran law should not be the same as that of the present arbitration, which is based on violations of the DR-CAFTA. Therefore, the *fork-in-the-road* clause would not be triggered, allowing Claimants to then bring a claim for breaches of DR-CAFTA in arbitration.

109. *Second*, Claimants argue that they could not bring and exhaust local remedies in Honduras within the three-year limitation period set forth in Article 10.18.1 of the DR-CAFTA.[142] This argument is also irrelevant. In fact, this position was analyzed and rejected in similar circumstances by the tribunal in *Philip Morris v. Uruguay*, which held:

> The Tribunal disagrees with the position advanced by certain tribunals and cited by Claimants, which consider that the requirement of due process before domestic courts is "meaningless" given that domestic courts are allegedly not in a position to render a decision within the time period prescribed by the applicable treaty. [...] the requirement of due process before domestic courts cannot be ignored or set aside as futile by virtue of its overriding importance to the host State. Its purpose is to provide the State with an opportunity to redress alleged violations of the investor's rights

[140] Claimants' Observations, ¶¶ 70-71.

[141] Claimants' Observations, ¶ 72.

[142] Claimants' Observations, ¶ 72.

> under the applicable treaty before the dispute is submitted to international arbitration.[143]

110. Notwithstanding the foregoing, the passage of time and the delay in presenting their claims would be solely attributable to the Claimants' failure to comply with the requirement of exhaustion of local remedies [in the first place].

111. *Third,* according to the Claimants, it is "far from clear" that the Claimants can submit their claims under the UNCITRAL Arbitration Rules as permitted under the DR-CAFTA,[144] while it is to be expected that Honduras will continue to assert every conceivable argument to prevent the Claimants from being heard. Claimants base their position on mere hypothetical conjecture.

112. In no way does Honduras seek to deny Claimants a forum to resolve their disputes under the DR-CAFTA. Simply, Honduras requires that the investors comply with the requirements that it validly imposed as a condition to their consent to ICSID jurisdiction -*i.e.*, the exhaustion of local remedies-. Thus, having the possibility of submitting their claims under the UNCITRAL Arbitration Rules, the Claimants freely chose to bring their claims before ICSID when the conditions for Honduras' consent to such forum were not available.

113. In conclusion, any consequences that the granting of the Preliminary Objection may have to the detriment of the Claimants is solely and exclusively the responsibility of their own acts, inasmuch as they chose to bring their claims before ICSID even though the requirements for Honduras' consent to such forum were not met.

V. EXHAUSTION OF LOCAL REMEDIES IS NOT A STERILE REQUIREMENT AS ALLEGED BY THE CLAIMANTS

[143] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Eastern Republic of Uruguay,* ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013) (**RLA-0016**), ¶ 137.

[144] DR-CAFTA (**CLA-0002**), art. 10.16.3.

114. The Claimants argue that resorting to the local courts of the Republic of Honduras would, in any event, be a futile exercise as local remedies would not provide a reasonable possibility of redress.[145]

115. According to Claimants, the alleged absence of a reasonable possibility of redress would be demonstrated on the basis of four reasons: (i) the "serious" problems of the Honduran judicial system, stemming from its alleged lack of impartiality and delays[146] ; (ii) the alleged measures adopted by the current administration to "control" the judiciary[147] ; (iii) the non-existence of local procedures available for the Claimants' claims[148] ; and (iv) the current anti-ZEDE stance of the Republic of Honduras would confirm the alleged futility.[149]

116. At this point, Claimants' strategy comes to light. On the basis of a fallacious and distorted account of the facts, the Claimants intend to draw a highly caricatured picture of the Republic of Honduras and its democratic institutionality with the intention of circumventing the exhaustion of local remedies. That they have opted for such an inconceivable strategy is, however, no surprise. After all, contempt for the Honduran State, its sovereignty and democratic integrity is inherent to the Próspera ZEDE regime. As will be seen, Claimants' entire futility narrative revolves around that corrupt axis.

117. Notwithstanding this, it is well known that the standard for proving the futility or uselessness of exhausting local remedies under international law is admittedly high. As the Claimants themselves admit, for this to occur, local remedies must not be capable of providing even a reasonable option of an effective remedy.[150] This is not at all apparent from the Claimants' tendentious statements, much less from the documents they cite in support.

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[145] Claimants' Observations, ¶ 77.

[146] Claimants' Observations, ¶¶ 83-84.

[147] Claimants' Observations, ¶ 85.

[148] Claimants' Observations, ¶ 86.

[149] Claimants' Observations, ¶ 87.

[150] United Nations General Assembly, *Commentary on the Draft Articles on Diplomatic Protection,* U.N. Doc. A/61/10 (**RLA-0031**), p. 51. This standard emphasizes the reasonableness of the existence of a local remedy. According to GERALD FITZMAURICE, this standard is the correct one to apply, provided that it is taken into consideration that what must be reasonably likely to exist is the existence of a possible effective remedy, and that the

118. *First*, Claimants allege that the Honduran judiciary is "plagued" with serious problems such as lack of independence and inexcusable delays. In doing so, they cite the following documents, none of which - as we shall see - actually prove their unfounded allegations:

- Claimants refer to the Report of the United Nations High Commissioner. In this regard, suffice it to say that this report is based, as it indicates, on a one-week stay in the Republic of Honduras in which, in any case, its author highlights discernible improvements in the judicial system, such as the creation of specialized courts for crimes of corruption and extortion.[151]

- Claimants cite the report prepared by the Inter-American Commission on Human Rights in 2019.[152] But the truth is that the visit carried out by the Commission and the report produced as a result of the visit was limited to observing the human rights situation in Honduras. Regarding the administration of justice, the Commission highlights a lack of independence of the judiciary at the time, due to the excessive control by former President Juan Orlando Hernández of the Supreme Court, for his interference in the appointment and removal of judges. This is precisely what Honduras denounced in its

mere possibility that there is no reasonable likelihood of success in the remedy because of the lack of merit of the claim, fails to meet the standard; B. Sabahi, *et al*. "Exhaustion of Local Remedies" *in Investor-State Arbitration* (2019) (**RLA-0021**), p. 436, ("This test is acceptable provided it is borne in mind that there must be a reasonable possibility of is the existence of a possibly effective remedy, and that the mere fact there is no reasonable possibility of the claimant obtaining that remedy, because his case is legally unmeritorious, does not constitute the type absence of reasonable possibility which will displace the local remedies rule."). Also, regarding the standard and that general assertions about the local judicial system are not sufficient to prove futility, see *ICS Inspection and Control Services Limites v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction (Feb. 10, 2012) (**RLA-0015**), ¶ 269; *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction (Dec. 22, 2015) (**RLA-0046**), ¶ 97, ("Nonetheless, the doctrine [futility] imposes a considerable burden of proof on a claimant wishing to invoke it to excuse non-compliance with preconditions to arbitrate. A mere showing that the steps a treaty requires to be taken prior to arbitration are unlikely to result in a satisfactory outcome for the investor would not satisfy a requirement of demonstrating that it was futile for the investor even to try. Futility connotes a manifest waste of effort towards a self-evident, even pre-ordained, lack of success."); *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (July 2, 2013) (**RLA-0044**), ¶ 8.1.10.

[151] United Nations High Commissioner for Human Rights, *Preliminary Observations on the Official Visit to Honduras* (August 22, 2019) (**C-0102**)., pp. 2; 7.

[152] Inter-American Commission on Human Rights, *Situation of Human Rights in Honduras* (Aug. 27, 2019) (**C-0103**), pp. 29, 43.

Preliminary Objection, which allowed the establishment of the ZEDE Regime.[153]

- Claimants cite the report of Ms. Moncada, Secretary of Defense of Honduras.[154] However, the 2022 report describes the state of the judiciary over the past 21 years and focuses on the projects and measures that the new government has in mind to strengthen the Honduran judiciary. This in no way demonstrates that the judiciary does not currently provide Claimants with a reasonable possibility of redress.

- Claimants refer to the unilateral report of the United States Department of State on the investment climate in Honduras.[155] Suffice it to say that the government of Honduras duly rejected and condemned this report, for having been issued unilaterally by another State based on subjective considerations, partial interests and without the participation of the State of Honduras.[156] In no way does this report reflect the reality of the current Honduran justice system.

- Claimants mention the report prepared by Freedom House in Honduras in the year 2024, conveniently selecting those paragraphs that mention obstacles in the Honduran justice system.[157] Indeed, in this report, the institution recognizes important advances made by the current government to improve Honduran institutions. It mentions, for example, measures adopted by the National

[153] Preliminary Objections of the Republic, ¶ 5.

[154] "The justice system is in tatters, there is no trust and CICIH generates hope: Rixi Moncada," *Proceso Digital (*December 19, 2022) (**C-0108**).

[155] U.S. Department of State, *2024 Investment Climate Statements: Honduras* (**C-0118**).

[156] Publication of the Secretary of Foreign Affairs and International Cooperation of Honduras, Mr. Enrique Reina, on social network X (April 24, 2024) (**R-0059**). ("We reject and do not recognize the human rights report issued by the U.S. State Department on Honduras 2023. Out of respect for a fundamental and basic principle, since we do not recognize reports or measures of a unilateral nature carried out by a State on another Sovereign State. Without discussing its content and since most of the problems we face as a country are structural and were caused by the narco-dictatorship, the report, being partial and unilateral, does not reflect the important advances, the great efforts and the political will of the Government of President @XiomaraCastroZ, to establish the rule of law in Honduras, reestablish institutions, respect and promote human rights, and at the same time develop policies of inclusion and protection. Likewise, it does not mention all the actions carried out to comply with Honduras' commitments under international human rights treaties, agreements and judgments.").

[157] Freedom House, *Freedom in the World 2024: Honduras* (2024) (**C-0119**).

Congress to increase the powers of the prosecutor's office in accordance with the recommendations of the Inter-American Commission on Human Rights[158] ; the approval of a law with new guidelines for the Nominating Board of the Supreme Court, which limited its discretionary power.[159] The report even acknowledges that the current administration of President Castro took steps to address problems related to due process and law enforcement.[160]

- Claimants refer to the National Plan for the Eradication of Judicial Delay launched by the current government in the year 2024, in which a 2019 report is mentioned analyzing the serious delays that the Honduran justice system suffered at that time.[161] This report is not proof of the reality of the current Honduran justice system. On the contrary, the fact that the current government has issued the National Plan referred to by the Claimants only demonstrates that Honduran institutions continue to be strengthened to provide an adequate service of justice.

- Claimants refer to the questioning of the current President of the Supreme Court of Honduras, in order to detract credibility from her claims that her main challenge is to dismantle the networks of corruption, organized crime and drug

[158] Freedom House, *Freedom in the World 2024: Honduras* (2024) (**C-0119**), p. 11 ("While legislators limited prosecutorial access to financial information in cases of corruption in 2021.p. 11 ("While legislators limited prosecutorial access to financial information in cases of corruption in 2021, the National Congress has since legislated to increase prosecutorial powers in line with a 2022 memorandum of understanding on the creation of the CICIH. Legislators annulled three laws that had limited prosecutors' access to documents and restricted their ability to pursue cases involving financial impropriety in 2023.") (emphasis added).

[159] Freedom House, *Freedom in the World 2024: Honduras* (2024) (**C-0119**), pp. 11-12 ("A law establishing new guidelines for the Nominating Board for the Supreme Court (JNCS) and limiting its discretionary power was passed in 2022. In January 2023, the JNCS produced a list of candidates based on merit. Legislators selected a 15-member bench from that list in February but selected them on a partisan basis; six came from Libre, five from the PN, and four from the PL. The new justices' terms will end in 2030.").

[160] Freedom House, *Freedom in the World 2024: Honduras* (2024) (**C-0119**), p.12 ("The Castro administration has taken some steps to address due process and law enforcement problems [...]").p.12 ("The Castro administration has taken some steps to address due process and law enforcement problems [...].").

[161] Judicial Branch of the Republic of Honduras, *National Plan for the Eradication of Judicial Delinquency* (March 11, 2024) (**C-0121**); Judicial Branch of the Republic of Honduras, Follow-up Report on the National Plan for the Eradication of Judicial Delinquency (January 2019) (**C-0101**).

trafficking.[162] In no way do these tabloid allegations demonstrate that there is no reasonable likelihood of redress for the Claimants.

- Finally, Claimants cite as an example of the alleged disfunction of the Honduran Judiciary, the failure to appoint judges to the Special ZEDE Jurisdiction.[163] On the contrary, the lack of composition of the Special ZEDE Jurisdiction only demonstrates the path of the Republic of Honduras' vindication of its national integrity and self-determination, following the absolute unanimity to repeal the ZEDE Regime.

119. *Second*, Claimants allude to alleged measures adopted by the current government to control the Honduran Judiciary, in connection with the appointment of the current composition of the Supreme Court.[164] In particular, they refer to the enactment of Decree 74-2022 that modified the nomination process for Supreme Court justices, a legislative measure that they intend to illustrate as a political "move" in favor of the current Government.[165] As will be seen, Claimants' claim is totally unfounded.

120. The enactment of Decree 74-2022 was precisely part of the new government's plan to strengthen institutions and bring greater independence and transparency to the judiciary. Contrary to the Claimants' suggestion, Decree 74-2022 does not modify the manner of selection of judges -which is defined by the Constitution-[166] but only modifies the process for the nomination of candidates before the Nominating Board. Decree 74-2022, in this sense, allowed those professionals who met the constitutionally established requirements to be judges of the Court to

[162] Claimants' Observations, ¶¶ 83, 10.

[163] Claimants' Observations, ¶ 84.

[164] Claimants' Observations, ¶ 85.

[165] Claimants' Observations¶ 85 ("In 2022 [...] Respondent passed Decree 74-2022 modifying the nomination process, which was seen at that time as an effort by President Castro to stack the Court in her favor.").

[166] Constitution of the Republic of Honduras (1982) (**C-0004**), art. 311 ("The Justices of the Supreme Court of Justice shall be elected by the National Congress, with the favorable vote of two thirds of its total membership…").

self-nominate, avoiding the need to go through a filtering process by each sector that makes up the Nominating Board, thus democratizing the nomination process.[167]

121. Claimants suggest that the President of the National Congress unilaterally modified the manner of appointment of the magistrates or, even, that the ruling party directly decided on the selected judges.[168] This is absolutely false. As established by the Constitution of the Republic of Honduras, the appointment of the justices of the Court was made by decision of two thirds of the totality of the members of the National Congress, based on the list of candidates presented by the Nominating Board.[169] Certainly, the selection of the judges was preceded by negotiations and deliberations in Congress, which is quite natural and desirable in a democratic system; all in strict compliance with the Constitution.[170] The Claimants' allegations in this regard are devoid of any evidentiary and legal support, are fanciful and highly offensive to the Republic of Honduras.

122. Claimants also refer to the amendments that the Supreme Court justices introduced in 2023 to the Internal Regulations of the Judiciary, among which is the incorporation of the figure of alternate justices. According to the Claimants, the legality of such measure would be questionable since it is not provided for by the Constitution.[171] This argument is irrelevant for the purposes of what is at issue here. Evidently, the Claimants attempt to shift the focus of the discussion away from their inability to prove that they lack a reasonable possibility of obtaining a remedy to their claims before the Honduran courts.

123. Finally, in order to delegitimize the Supreme Court's decision, the Claimants refer to Mr. Zelaya's statements as an alleged further demonstration of the "politicization" of the

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[167] "Election of the New Supreme Court of Justice and the Reconstruction of the Rule of Law in Honduras", *Agenda Estado de Derecho* (January 31, 2023) (**R-0056**). ("*As an example, on October 31, 2022, the Nominating Board closed the deadline for applications for candidates aspiring to the magistracies, with a total of 185 lawyers and notaries who personally decided to apply and submit the documents required by the Nominating Board; unlike previous processes, when the previous Law of the Nominating Board, in its article 18 specifically, required that each organization part of the Board propose the candidates that its sector considered suitable to be included in the list of the 45.*").

[168] Claimants' Observations, ¶ 85.

[169] Constitution of the Republic of Honduras (1982) (**C-0004**), art. 311.

[170] Moreover, it was thanks to that democratic conversation that the National Congress was able to reach a consensus on a single slate in which no political party obtained an absolute majority, a situation that opens the possibility for the country to have a Court with a greater degree of independence and suitability.

[171] Claimants' Observations, ¶ 85.

Court.[172] This argument borders on the absurd, since such an event in no way illustrates the alleged flaws in the Honduran justice system.[173]

124. *Third*, the Claimants go a step further and assert that in Honduras, there would be no procedure that would guarantee them at least a reasonable likelihood of obtaining the relief they claim.[174] Thus, Claimants, true to form, construct a distorted narrative with the intention of showing the Tribunal an alleged disadvantageous position in the dispute. All of this must be dismissed.

125. On the one hand, Claimants dispute the Republic of Honduras' statement in its Preliminary Objections that Claimants should have resorted to the Honduran courts to claim for those acts of the State that qualify as indirect interference with Próspera ZEDE's operations.[175] In their view, the need to initiate separate legal proceedings for each of Honduras' alleged interferences with the ZEDE would in itself confirm the futility of domestic remedies.[176] Claimants' position is fallacious and, once again, based on mere conjecture.

126. Claimants intend to use their procedural inactivity to their own advantage by arguing the futility of unexercised local remedies. Claimants cannot seriously expect the Tribunal to give any merit to such circular and contradictory behavior.

127. On the other hand, Claimants question the viability of resorting to the Honduran courts after the recent decision of the Supreme Court that ruled in favor of the unconstitutionality of the ZEDE regime, since no remedies are available against it.[177] They point out that such proceeding was of a political nature and even suggest that the Republic of Honduras would have

[172] Claimants' Observations, ¶ 85.

[173] Moreover, and as the Republic of Honduras explained in its Preliminary Objections Brief, both the National Congress and Honduran society as a whole have expressed their opposition to the constitutionality of the ZEDE. Preliminary Objections of the Republic, ¶¶ 9, 12.

[174] Claimants' Observations¶ 86 ("In any event, there is no local proceeding through which Claimants would have any reasonable possibility of redress in Honduras.").

[175] Claimants' Observations, ¶ 86 (referring to the Preliminary Objections of the Republic, ¶ 39).

[176] Claimants' Observations¶ 86 ("Respondent's suggestion appears to be that Claimants should commence separate proceedings for each and every consequence of Respondent's upending of the ZEDE Legal Framework, which merely confirms that no one remedy will address the root cause of Claimant's claims.").

[177] Claimants' Observations, ¶ 86.

known in advance the outcome by having indicated in its Preliminary Objections that "[t]he plenary of the Supreme Court of Honduras will rule promptly."[178]

128. The foregoing is yet another piece of the Claimants' tendentious narrative. As we can see, their strategy is based on discrediting (without any evidence whatsoever) the acts and decisions of the most varied Honduran institutions for the purpose of demonizing the Republic of Honduras and its democracy. Without prejudice to the fact that this is sufficient to dismiss their argument, the following should be noted:

- Of course, the Government of Honduras was not aware -nor had any way of knowing- of the Supreme Court's decision prior to its pronouncement on September 20, 2024.[179] What the Republic of Honduras said in its Preliminary Objection about a prompt decision of the plenary on the (un)constitutionality of the ZEDE simply responds to the statements and declarations that the Supreme Court itself made in this regard.[180] Any allegation by Claimants to the contrary is unfounded and must be substantiated by the Claimants themselves.

- Although Claimants - formally - were not a party to the proceedings in question, the Supreme Court did hear the legal opinion of Jorge Colindres, the legal representative of Próspera ZEDE.[181] None of this was reported by Claimants in their brief.

- With respect to the charges of treason, Claimants avoid explaining that it is the Constitution of Honduras itself that permits such charges against those who

[178] Claimants' Observations, ¶ 86 (referring to the Preliminary Objections of the Republic, ¶ 10).

[179] Judicial Branch of the Republic of Honduras, *Press Release: Supreme Court of Justice, by majority vote, declares unconstitutional the Organic Law of ZEDEs* (September 20, 2024) (**C-0145**).

[180] Judiciary of the Republic of Honduras, *News Release* (August 12, 2024) (**R-0060**) ("That to date there is no definitive ruling on [the ZEDE], since a non-unanimous resolution has been issued, and it will be the Plenary of the 15 Justices of the Supreme Court of Justice that must pronounce on the project presented, therefore its discussion and analysis is still in progress and there is still no official legal publication by the competent body […]") (emphasis added). *See* "We are not going to rush and it will be a legal decision", says the president of the SCJ regarding the appeal on the ZEDE*" Proceso Digital (*August 14, 2024) (**R-0061**).

[181] J. Constantino Colindres, *Legal Opinion as Amicus Curiae in connection with the appeal of unconstitutionality filed by the UNAH against Art. 34 of the Organic Law on ZEDE* (January 19, 2022) (**R-0054**).

> infringe the sovereignty of the people,[182] democracy as a form of government,[183] and/or damage the territorial integrity and independence of the Republic.[184] To denounce these facts is the duty of every citizen invested or not with authority.[185]

129. *Finally*, Claimants, in a desperate attempt to bolster their argument, contend that the account of the facts contained in the Preliminary Objection of the Republic of Honduras would, in itself, confirm the futility of the local remedies.[186] The latter is utterly inconceivable and deserves to be rejected out of hand by this Tribunal for its evident lack of support and seriousness.

130. In sum, it is clear that Claimants' allegations aimed at demonstrating the alleged (and non-existent) futility of exhausting local remedies are entirely frivolous, have been conveniently fabricated in response to the Republic of Honduras' Preliminary Objection and deserve no credence whatsoever.

VI. RESERVATION OF RIGHTS

131. The Republic of Honduras reiterates in all its terms the reservation of any and all rights to present additional objections in defense of the claims, at any future stage of this arbitration, made in its submission dated August 30, 2024.

VII. REQUEST FOR RELIEF

[182] Constitution of the Republic of Honduras (1982) (**C-0004**), art. 2 ("*Sovereignty originates in the People, from which stem all the powers of the State, which are exercised through representation. The Sovereignty of the People may also be exercised directly, through Plebiscite and the Referendum. The supplanting of Popular Sovereignty and the usurping of the constituted powers shall be considered crimes of treason against the Nation. Responsibility in these cases is imprescriptible and an action may be initiated by the competent organ in its own motion or by petition of any citizen*.").

[183] Constitution of the Republic of Honduras (1982) (**C-0004**), art. 4 ("*The form of government is republican, democratic and representative. It is exercised by three branches: Legislative, Executive and Judicial, which are complementary, independent, and not subordinate to one another. Alternation in the exercise of the Presidency of the Republic is obligatory. A violation of this rule constitutes a crime of treason against the nation*.").

[184] Constitution of the Republic of Honduras (1982) (**C-0004**), art. 19 ("*No authority may enter into or ratify treaties or grant concessions that damage the territorial integrity, the sovereignty or the independence of the Republic. Anyone who does so shall be tried for the crime of treason to the country. Responsibility in such a case is imprescriptible*.").

[185] Constitution of the Republic of Honduras (1982) (**C-0004**), art. 375.

[186] Claimants' Observations, ¶ 87.

132. For the foregoing reasons, the Republic of Honduras respectfully requests that the Arbitral Tribunal:

a) Pursuant to Article 10.20.5 of the DR-CAFTA, accept in full the preliminary objection of non-exhaustion of local remedies to which the Republic of Honduras conditioned its consent to ICSID arbitration, declaring in consequence that it lacks jurisdiction.

b) Order the Claimants to pay all costs of this arbitration, including professional fees and expenses incurred by the Republic of Honduras, the Tribunal, and ICSID, with interest.

* * *

133. The Republic of Honduras reiterates its reservation of its rights to supplement or modify the foregoing as necessary, to request such procedural measures as it deems appropriate for the protection of its rights, and, in accordance with Article 10.20.5 of DR-CAFTA, refers this memorial to the Tribunal for it to determine the need for a hearing.

Respectfully submitted on October 25, 2024,

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