COURTESY TRANSLATION: *The Spanish version of Respondent's Preliminary Objection under Article 10.20.5 of the DR CAFTA dated August 30, 2024 is the original version. In the event of a discrepancy between the original text and the English translation, the original Spanish text prevails.*

**ARBITRATION BEFORE THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES**

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**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)*

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# Preliminary Objections of the Republic of Honduras under Article 10.20.5 of the DR-CAFTA

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August 30, 2024

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## TABLE OF CONTENTS

**I. FACTUAL BACKGROUND** .......... 1

**II. HONDURAS' PRELIMINARY OBJECTION UNDER ARTICLE 10.20.5 OF THE DR-CAFTA** .......... 12

**II.1. The Applicable Legal Framework under Article 10.20.5 of the DR-CAFTA** .......... 12

**II.2. ICSID Has No Jurisdiction Because The Republic Of Honduras Conditioned Its Consent To Arbitration On The Prior Exhaustion Of Local Remedies By Investors.** .......... 13

**III. THE PROCEDURE FOLLOWING SUBMISSION OF THE PRELIMINARY OBJECTION UNDERARTICLE 10.20.5OF THE DR-CAFTA.** .......... 21

**IV. RESERVATION OF RIGHTS** .......... 23

**V. PROPOSED PROCEDURAL CALENDAR** .......... 23

**VI. RELIEF REQUESTED** .......... 23

# I. FACTUAL BACKGROUND

1. This investment arbitration is unique and exceptional in the investor-State dispute settlement system. On one side, the Republic of Honduras seeks to safeguard its territorial integrity and right to self-determination; and, on the other side, Claimants seek compensation that would reach —according to them— the enormous sum of USD 10.8 billion dollars,[1] making this one of the largest investor-State arbitrations in history.

2. The alleged investment made by Claimants —for which they claim the above-referenced amount— consists of the intention to establish a "micro-state," composed of private capital and inserted within the territory of the Republic of Honduras. There is no ambiguity here is no mistake. What Claimants seek is autonomy and self-determination under the auspices of an alleged right to operate part of =Honduras' territory, as though they were a sovereign State, without interference, control, or effective supervision by the Republic of Honduras.

3. In practice, this has resulted in Próspera ZEDE acting in Honduran territory as if it were a sovereign state, for example, by:

    a. Enacting, on its own, all legislation in the Honduran territory in which Próspera ZEDE operates. Claimants have taken the position that practically all legislation established by the democratic institutions of the Republic of Honduras does not apply within its operational territory. Instead, the regulatory framework dictated by the controlling corporations of Próspera ZEDE —that is, Claimants themselves— is what [according to them] would govern t; as well as, whatever their investors and residents deem best, according to their own business models.[2]

[1] Claimants' Request for Arbitration (Dec. 19, 2022) ("**Request for Arbitration**"), ¶ 11.

[2] "A new kind of Government in Próspera," *CATO Daily Podcast* (March 9, 2022) (**R-0030**), 00:02:37-00:02:58 (Joel Bomgar: "You also have the ability to come up with your own regulations and put those forward for approval. So, if you want to do something really innovative in medical or finance or cryptocurrency or something like that, you have the ability to put forward a regulatory framework that is an upgrade or improvement from anything that exists in the world.").

b. Establishing their own judicial system, composed of judges proposed by [Claimants]. Claimants believe that the courts of the Republic of Honduras do not exercise jurisdiction over contractual or property matters related to activities carried out in the Honduran territory where Próspera ZEDE operates. Instead, they offer exclusively a private dispute settlement system, run by one of the Claimants, Próspera Arbitration Center LLC, devoid of any hierarchical control by the Honduran Judiciary.[3]

c. Exercising a monopoly on lawful force in the territory in which Próspera ZEDE operates. Claimants have taken the possition that the law enforcement and security forces of the Republic of Honduras cannot even enter the operational territory of Próspera ZEDE in order to monitor social order, prevent the commission of crimes, or carry out any kind of action. Instead, Claimants offer a private security service that operates as a paramilitary group, which controls its borders and guards its internal order and security.[4]

d. Exercising the regulatory powers of any modern State.[5] Claimants have taken the position that no administrative authority of the Republic of Honduras —Presidency, Ministers, Secretaries of State, etc.— of a national, regional, or municipal nature, have any powers within the territory in which Próspera ZEDE operates. Thus, Claimants not only wish to establish their own regulatory framework, but also wish police themselves, without any interference or supervision by the State. In this scenario, the existence of

[3] Próspera Arbitration Center, "About Us," *available at* https://pac.hn/about-us-2/ (last accessed Aug. 29, 2024) (**R-0045**) ("the PAC is authorized to decide all cases of a contractual nature arising in the Próspera ZEDE unless specifically stipulated otherwise").

[4] Próspera Arbitration Center, "PZ Law Enforcement," *available at* https://pzgps.hn/pz-law-enforcement (last accessed Aug. 29, 2024) (**R-0046**) ("The Law Enforcement Committee, a body established by the Próspera Council, oversees the operations of the Próspera Police Department. It consists of key officials including the Technical Secretary, Vice Technical Secretary, Council Secretary, and up to two additional appointees. This committee is responsible for approving the organizational structure of the Police Department, overseeing its activities, and ensuring adherence to best practices in law enforcement and human rights standards.").

[5] Próspera Arbitration Center, "Regulated Industries," *available at* https://pzgps.hn/regulated-industries/ (last accessed Aug. 29, 2024) (**R-0047**).

balance of powers or a system of checks and balances becomes simply fictitious.[6]

e. Establishing its own monetary policy and even its own currency, excluding the Central Bank of Honduras, the National Banking and Insurance Commission and any other State institution. Claimants have taken the position that the legal tender in Próspera ZEDE is not be the lempira —the official currency of the Honduran State—,[7] but rather whatever they themselves determine, such as Bitcoin.[8] This increases the risk of money laundering or other illicit activity; even more so, considering the absolute absence of control mechanisms besides Claimants themselves.[9]

f. Establishing its own public policies. Claimants have taken the position that, in Próspera ZEDE, the social, economic, educational and environmental policies and programs of the Republic of Honduras do not operate.[10] Thus, the power of the State to establish government policies over its citizens practically disappears.

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[6] This situation is aggravated when the companies that carry out activities in Próspera ZEDE are financed by, or directly belong to, financiers or controllers of Próspera ZEDE. This is the case of Minicircle, a company financed by Peter Thiel, also a Próspera ZEDE financier. *See* L. Clarke, "This biohacking company is using a crypto city to test controversial gene therapies," *MIT Technology Review* (Feb. 13, 2023) (**R-0033**).

[7] Constitution of the Republic of Honduras (1982) (**C-4_SPA**), art. 342 ("Monetary issuance is the exclusive power of the State, which shall exercise it through the Central Bank of Honduras."); Monetary Law, 1950 (Decree No. 51-1950) (**R-0001**), art. 1 ("The monetary unit of Honduras is the Lempira.").

[8] G. Gonzalez, "How does the bitcoin ban in Honduras affect the Próspera citadel?" *CryptoNews* (Feb. 22, 2024) (**R-0040**).

[9] United Nations, "Money Laundering through Cryptocurrencies" *available at* https://tinyurl.com/bxyrv587 (last accessed Aug. 30, 2024) (**R-0049**). The International Monetary Fund has highlighted these problems with respect to the regulation issued by El Salvador, which is similar in nature to Próspera ZEDE. *See* "El Salvador's Comeback Constrained by Increased Risks" *International Monetary Fund* (Feb. 16, 2022) (**R-0029**); "Bitcoin Could Increase Regulatory, AML Risks for El Salvador Banks," *Fitch Ratings* (June 25, 2021) (**R-0024**).

[10] Consejo Nacional Anticorrupción & Observatorio de Política Criminal Anticorrupción, *The Deadly Sins of ZEDEs* (June 2021) (**R-0020**), pp. 48-52. In their Request for Arbitration, Claimants candidly assert that ZEDEs are subject to the Honduran Constitution and sovereignty regulations. *See* Request for Arbitration, ¶ 5. However, a simple analysis of the emergence of the project, its evolution and the Claimants' actions demonstrates that this is an assertion without substance.

g. Maintaining full and absolute control of the territory in which Próspera ZEDE currently operates. Claimants seek to restrict the free transit of the citizens of the Republic of Honduras in its own territory.

4. The foregoing is not fiction, but the reality of what Claimants attempt to do on a daily basis on the island of Roatan. Claimants have sought to establish their own sovereign State there and, in the face of Honduras' attempt to re-establish its territorial integrity and self-determination, have claimed baseless damages with an obvious intent to intimidate. And yet, the unique and exceptional nature of this case does not end there.

5. Claimants fail to mention that the ZEDE legal regime is the product of one of the darkest and most corrupt periods in the history of Honduras. The ZEDEs's origin suffer from illegality linked to their promoters, Porfirio Lobo Sosa and Juan Orlando Hernández, whom for 12 years —in a period that many characterize as a true "narco-dictatorship"— exercised the highest positions of authority in the country.[11] Honduras does not make this assertion lightly. The powers of the State were co-opted by individuals who instrumentalized them for their own benefit and that of their political allies.[12] This has been recognized by the international community, including the U.S. government.[13] The recent history of Honduras attests to this:

[11] In particular, Mr. Lobo Sosa, who served as President of the Republic of Honduras between 2010 and 2014, and Mr. Juan Orlando Hernandez who served as President of the National Congress during Lobo's term and then as President of the Republic between 2014 and 2022. *See* U.S. Department of State, *Press Release: "Designations of Former Honduran President Porfirio 'Pepe' Lobo Sosa and Former First Lady Rosa Elena Bonilla Avila for Involvement in Significant Corruption* (July 20, 2021) (**R-0025**).

[12] H. Silva Ávalos, "How Chapo Guzmán Expanded in Honduras by the Hand of Former President Juan Orlando Hernández," *Infobae* (May 27, 2023) (**R-0035**) ("Mexican drug cartels had been working for years, since the late 1980s, with Honduran intermediaries to use the Central American country as a transit and resupply hub for cocaine coming from Colombia. But it was not until after the 2009 *coup d'état* that Sinaloa strengthened its dealings in Honduras, thanks in large part to the understandings it reached with politicians from the National Party, which brought Juan Orlando Hernandez to power, and which governed from 2010 to 2022. [...] The Justice Department has confirmed Sinaloa's delivery of bribes to former President Hernandez.").

[13] *See*, *U.S. Department of State, Press Release: "Designations of Former Honduran President Porfirio 'Pepe' Lobo Sosa and Former First Lady Rosa Elena Bonilla Avila for Involvement in Significant Corruption* (July 20, 2021) **(R-0025)**; United States of America v. Juan Orlando Hernandez, SDNY, Superseding Indictment (Jan. 27, 2022) **(R-0028)**; U.S. Department of Justice, *Press Release: Juan Orlando Hernandez, Former President of Honduras, Sentenced to 45 Years in Prison for Conspiring to Distribute More Than 400 Tons of Cocaine and Related Firearms Offenses* (June 26, 2024) (**R-0042**); J. Ernst & D.C. Adams, "Murder, Corruption, and Drugs: The Ledgers That Could Sink Honduras' Ex-President The Story Behind the Drug Ledgers That Could Sink Honduras' Ex-President," *InSightCrime* (Feb. 9, 2024) (**R-0039**); S. Kinosian, "U.S.

a. In 2010, in a first attempt to establish the ZEDE legal regime, Porfirio Lobo Sosa and Juan Orlando Hernández promoted in Honduras the creation of the so-called "model cities" or Special Development Regions ("RED", for its acronym in Spanish) with the aim of transforming large sections of uninhabited land into autonomous zones under the administration of multinationals or foreign governments.[14]

b. On October 17, 2012, the Constitutional Chamber of the Honduran Supreme Court of Justice declared the law which created the REDs unconstitutional because it was contrary to the fundamental principles of the Constitution, such as national sovereignty, equality before the law, and a democratic system of government - principles contained in the so-called immutable clauses ("*cláusulas pétreas e inmodificables*") of the Honduran magna carta.[15]

c. In response, on December 12, 2012, the National Congress, then headed by Juan Orlando Hernández, in the early hours of the morning and surrounded by members of the Armed Forces, arbitrarily and illegally dismissed the four justices of the Constitutional Chamber of the Supreme Court who voted in favor of declaring the REDs law unconstitutional.[16] In 2023, the Honduran State was condemned by the Inter-American Court of Human Rights for this arbitrary dismissal of the Constitutional Chamber justices.[17]

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prosecutors seek life for Honduran president's brother on drug trafficking conviction," *Reuters* (March 18, 2021) (**R-0019**).

[14] M. Yepe, "Disaster capitalism for Honduras," *Cubadebate* (Feb. 1, 2011) (**R-0004**); Republic of Honduras, *Decree No. 123-2011*, *Constitutional Statute of the Special Development Regions (RED)* (Aug. 11, 2011) (**R-0005**).

[15] Office of the President of the Judiciary, *Official Communication PCSJ No. 0203-2025* (Apr. 18, 2024) (**R-0041**).

[16] "Congress of Honduras delivers technical blow to the CSJ," *El Heraldo* (Apr. 7, 2014) (**R-0012**); Inter-American Commission on Human Rights, *José Antonio Gutiérrez et al. v. Honduras*, *Initial Petition* (Feb. 5, 2013) (**R-0010**); "Honduran Congress removes magistrates overruling against Government," *Deutsche Welle* (Dec. 12, 2012) (**R-0007**).

[17] Inter-American Court of Human Rights, *Case of Gutiérrez Nava et al. v. Honduras*, Judgment (Nov. 29, 2023) (**R-0037**). The IACHR found that the actions led by Juan Orlando Hernández constituted a violation of several articles of the American Convention on Human Rights, including the right to personal integrity, judicial

d. Once the opposing justices were removed and new justices loyal to the regime were installed,[18] the Lobo-Hernández duo resumed their idea of dismembering the State of Honduras, by reviving the RED project, but with cosmetic changes and a flashier name. On January 24, 2013, the National Congress of Honduras approved Legislative Decree No. 236-2012, which amended Articles 294, 303 and 329 of the Constitution to allow for the creation of the Employment and Economic Development Zones ("ZEDE", for its acronym in Spanish)[19]; subsequently on September 5, 2013, Congress also approved the ZEDE Organic Law, which detailed the legal framework for their operation.[20] As could be expected, the "new" Constitutional Chamber, in a decision criticized for its superficial arguments, lack of logical coherence and simplistic reasoning, rejected a constitutional challenge against the ZEDE.[21] Only months later, Juan Orlando Hernández would assume the presidency of Honduras.[22]

e. After four years of government marked by accusations of corruption, Juan Orlando Hernández sought reelection in 2017, even though the Constitution expressly prohibited it.[23] In December of that year, Juan Orlando Hernández

guarantees, the principle of legality, political rights and the right to judicial protection. Specifically, the court pointed to the following conduct as violating the Inter-American Convention on Human Rights: the failure to investigate threats and harassment of the dismissed judges (¶ 151); dismissal in the absence of a previously established procedure is in itself contrary to Article 8.1 of the American Convention (¶ 120); the removal of the victims constituted an act of deviation of power that was carried out without respect for judicial guarantees, with the purpose of exerting external pressure on the Judiciary in violation of judicial independence (¶ 127); and, the removal of the victims by the National Congress violated the principles of judicial independence and legality, and also violated their judicial guarantees and political rights (¶ 133).

[18] *See* Republic of Honduras, *Decree No. 191-2012, Decreeing the substitution of Justices of the Supreme Court of Justice.* (Dec. 18, 2012) (**R-0009**); National Congress, *Official Communication No. 482-2012, Informing separation of magistrates of the Supreme Court of Justice* (Dec. 12, 2012) (**R-0008**).

[19] Republic of Honduras, *Decree 236-2012, Decree Reforming the Constitution of the Republic* (Jan. 25, 2013) (**C-2_SPA**).

[20] Republic of Honduras, *Decree No. 120-2011, Organic Law on Employment and Economic Development Zones (ZEDE) (*Sept. 5, 2013) (**C-6_SPA**).

[21] Supreme Court of Justice, *Appeal of Unconstitutionality SCO-0030-2014, Judgment* (May 26, 2014) (**R-0013**).

[22] J. García, "Juan Orlando is sworn in as president of half of Honduras," *El País* (Jan. 27, 2018) (**R-0018**).

[23] Constitution of the Republic of Honduras (1982) (**C-4_SPA**), art. 239.

—assisted by the justices he himself installed— proclaimed himself the winner of the elections.[24] The electoral process was plagued with irregularities, as denounced by the Honduran people[25] and by the Organization of American States, which called for new elections.[26]

f. The corrupt regime of Juan Orlando Hernández came to an end with the general elections of November 28, 2021, which had the highest voter turnout in more than a decade, and in which Iris Xiomara Castro Sarmiento of the Libertad y Refundación ("LIBRE") Party, won the presidency of the Republic of Honduras.[27]

g. In February 2022, just days after leaving office, Juan Orlando Hernández was arrested in Tegucigalpa and extradited to the United States on charges of drug trafficking and other crimes.[28] Subsequently, on March 8, 2024, Juan Orlando Hernández was sentenced to 45 years in prison by U.S. courts. He was convicted on multiple crimes, including conspiring with drug traffickers to import cocaine into the United States, and using weapons and violence to facilitate that conspiracy.[29]

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[24] "Who is Juan Orlando Hernández, the first president re-elected in Honduras since the return of democracy (and in the most controversial election in recent history)," *BBC News Mundo* (Dec. 18, 2017) (**R-0016**).

[25] J. García, "Honduras protests against fraud," *El País* (Dec. 16, 2017) (**R-0014**).

[26] J. García, "OAS calls for new elections in Honduras as electoral body makes Juan Orlando president," *El País* (Dec. 18, 2017) (**R-0017**); OAS General Secretariat, *Press Release: OAS General Secretariat Communiqué on Elections in Honduras* (Dec. 17, 2017) (**R-0015**).

[27] *See* National Electoral Council of Honduras, "General Election 2021 – General Results" *available at* https://resultadosgenerales2021.cne.hn:8080/#resultados/PRE/HN (last updated Dec. 30, 2021) (**R-0027**). In February 2022, just days after leaving power, JOH [Juan Orlando Hernández] was arrested in Tegucigalpa and extradited to the United States to answer charges of drug and arms trafficking beforethe Court for the [Southern] District of New York. As noted above, on March 8, 2024, JOH was sentenced to 45 years in prison and fined $8 million for various crimes, including conspiring with drug traffickers to import cocaine into the United States and using weapons and violence to facilitate such conspiracy. *See United States of America v. Juan Orlando Hernandez*, SDNY, Superseding Indictment (Jan. 27, 2022) (**R-0028**); M. Santana & J. Guy, "New York court sentences Juan Orlando Hernandez, former president of Honduras, to 45 years in prison," *CNN* (June 26, 2024) (**R-0043**).

[28] *United States of America v. Juan Orlando Hernandez*, SDNY, Superseding Indictment (Jan. 27, 2022) (**R-0028**).

[29] M. Santana & J. Guy, "New York court sentences Juan Orlando Hernandez, former president of Honduras, to 45 years in prison," *CNN* (June 26, 2024) (**R-0043**).

6. The ZEDE were born in this corrupt context. Subsequently, persisting in a state of illegality, Próspera, when incorporating itself under the ZEDE Organic Law, failed to comply with the requirements established in the ZEDE regime. It is an undisputed fact that Próspera never obtained approval for its incorporation from the National Congress; rather, it was authorized by the Committee for the Adoption of Best Practices ("CAMP", for its acronym in Spanish).[30] This body, consisting of a committee of members from the private sector and foreign investors hand-selected by Lobo and Hernández, did not have the authority to approve the incorporation of Próspera ZEDE, making this act null and void for manifest violation of Article 321 of the Honduran Constitution.[31]

7. Despite its uncurable defects, Próspera ZEDE has decided to continue with its project. It has sought to proclaim itself a sort of autonomous State by means of the so-called "Charter and Bylaws of Próspera ZEDE" — erroneously described by Claimants as an investment authorization—;[32] and, furthermore, has attempted to secure legal stability for a term of 50 years through an alleged Legal Stability Agreement —erroneously described by the Claimants as an investment agreement—,[33] signed by an individual acting as a legal representative of Próspera ZEDE, not a State authority, and whose will they have sought to impose on the State.[34]

8. Against this backdrop, the Republic of Honduras has recently embarked on the path of reclaiming its territorial integrity and self-determination. The unanimity regarding the repeal of the ZEDE regulatory framework is absolute. Proof of this is the parliamentary session of April 20, 2022, in which each and every one of the 128 representatives that make up the National Congress —regardless of their political

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[30] Request for Arbitration, ¶ 39. *See* Republic of Honduras, *Decree 368-2013, Decree Appointing the CAMP* (Jan. 24, 2014) (**R-0011**), art. 1.

[31] Constitution of the Republic of Honduras (1982) (**C-4_SPA**), art. 321 ("State servants have no powers other than those expressly conferred by law. Any act that they execute outside the law is null and void and implies responsibility.").

[32] Request for Arbitration, ¶ 47.

[33] *Id.*

[34] Republic of Honduras, *Decree No. 120-2011, Organic Law on Employment and Economic Development Zones (ZEDE)* (Sept. 5, 2013) (**C-6_SPA**), art. 12.

association— approved Decrees No. 32-2022[35] and 33-2022[36] which sought to repeal the ZEDE constitutional provisions and repealed the ZEDE Organic Law, respectively.[37]

9. Likewise, Honduran civil society —also unanimously— has spoken out against the ZEDE regime. Various trade associations, linked to the private and business sector, such as the Honduran Council of Private Enterprise[38] and the Honduran Bar Association[39]; and those associated with the public sector, such as the Association of Mayors of Honduras,[40] and the National Anti-Corruption Council,[41] among several others, have opposed the ZEDE in defense of the sovereignty and rule of law of the Republic of Honduras.

10. In parallel, a renewed Constitutional Chamber of the Supreme Court of Justice has reviewed two constitutional challenges against Legislative Decrees 236-2012 and 09-2013[42] and the ZEDE Organic Law for infringement of the immutable provisions of the Constitution and other guarantees.[43] The plenary of the Supreme Court of Honduras will soon issue a final decision on the ruling issued on February 7, 2024by the Constitutional Chamber that declared the ZEDE regime unconstitutional..[44]

[35] Republic of Honduras, *Decree No. 32-2022, decreeing the repeal of the Constitutional Reform Decrees* (Apr. 21, 2024) (**C-57_SPA**).

[36] Republic of Honduras, *Decree No. 33-2022, decreeing the repeal of the Organic Law on ZEDE* (Apr. 22, 2022) (**C-60_SPA**).

[37] "Honduran Parliament repeals controversial Zede as it deems it violates country's sovereignty," *BBC* (Apr. 21, 2022) (**R-0031**).

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

[39] J. Burgos, "Honduran Bar Association and Association of Mayors demand repeal of ZEDEs," *Criterio* (June 18, 2021) (**R-0023**).

[40] J. Burgos, "Honduran Bar Association and Association of Mayors demand repeal of ZEDEs," *Criterio* (June 18, 2021) (**R-0023**).

[41] Consejo Nacional Anticorrupción & Observatorio de Política Criminal Anticorrupción, *The Deadly Sins of ZEDEs* (June 2021) (**R-0020**).

[42] M. Amador, "Commissioner files constitutional challenge against ZEDE," *Tiempo* (Nov. 22, 2023) (**R-0036**).

[43] E. Rodríguez, "Supreme Court of Justice decides in favor of unconstitutionality appeal filed by the UNAH against the ZEDEs" *Blogs UNAH* (Aug. 9, 2024) (**R-0044**).

[44] Supreme Court of Justice, *Constitutional challenge 0738-2021, Decision* (Feb. 7, 2024) (**R-0038**).

11. As the democratic institutions of the Republic of Honduras continue toward the reclamation of the territorial integrity of the State, Próspera ZEDE's defiant exercise of sovereign powers continues to produce risks on an international level. Claimants purport that the Republic of Honduras does not have the power to monitor activities such as drug trafficking —in an area commonly used for its transportation to the United States—,[45] acts of corruption, human rights violations, genetic experimentation, and environmental damage, among other dangers. In spite of this, because Próspera operates within Honduran territory, the Republic of Honduras continues to be responsible at the international level for what happens in Próspera ZEDE, exposing itself to sanctions derived from non-compliance with international treaties ratified by the State.

12. The international community has shared the Republic of Honduras' concern, publicly and spontaneously declaring its rejection of what Próspera ZEDE has attempted to develop in the country. Specifically, the Office of the United Nations High Commissioner for Human Rights in Honduras stated that it "respectfully calls on the State of Honduras to review the compatibility of the constitutional and legal framework of ZEDEs with its international obligations to respect and guarantee the exercise of human rights, including the right to free, prior and informed consultation of indigenous and Afro-descendant peoples and the right to equitable and sustainable development."[46]

13. Unfortunately, the risks associated with Próspera ZEDE have already begun to materialize. For example, the press has reported controversial human genetic experiments widely criticized by the scientific community;[47] construction has begun under the cover of building permits and licenses that contradict applicable

[45] United Nations Office on Drugs and Crime, "Cocaine from South America to the United States" (n.d.) (**R-0006**). ("Crossing from Colombia to Honduras by fast boat is a six-hour journey, and the brevity of this route allows for the use of submarines. At least four submarines were detected near Honduras last year, and seizures from just two of them amounted to about 14 tons of cocaine.").

[46] 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**).

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

ordinances;[48] the local environment has been adversely impacted;[49] and multiple abuses have been reported against the Afro-descendant tribal peoples of *Crawfish Rock*.[50]

14. Although its supposed investment is incipient and its promises of value are entirely speculative, all of the above makes it clear that the Próspera ZEDE project goes against the very concept of the modern democratic state and the most elementary considerations of morality, common sense and law in the civilized world. This model, which curtails the State and allows private companies to install a micro-state in its territory, threatens the very existence of the Republic of Honduras and puts the international community at risk.

15. In this scenario, the Request for Arbitration filed by the Claimants shows itself for what it is: a desperate attempt to forestall a State action that [Claimants] deem detrimental to their interests, by means of an absurd claim[51] —equivalent to one third of Honduras' GDP —, which deliberately seeks to hobble the democratic will of the institutions of the Republic of Honduras. Fortunately, the international community has expressed its solidarity in the face of such a reckless measure. Proof of this is the letter sent on May 2, 2023, by a group of Democratic members of the United States Congress expressly denouncing this case as an instrumentalization of the investor-state arbitration system.[52]

16. Notwithstanding the foregoing and as detailed below, it is not necessary for this Tribunal to enter into the merits of this case, since the consent of the Republic of Honduras to submit to ICSID arbitration was never perfected. Having clarified the

[48] Próspera Global, "Construction of Duna Residences begins in Roatan Próspera" *available at* https://tinyurl.com/bdzjae78 (Oct. 19, 2021) (**R-0026**); Duna Residences, "About" *available at* https://www.dunaresidences.com/why-choose-us (last access: Aug. 30, 2024) (**R-0048**) ("with a targeted completion date in mid-2023").

[49] *Id*.

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

[51] Request for Arbitration, ¶ 11 ("the total losses to the Próspera Group's investment over the course of the remaining period of the guaranteed legal stability will be at least several billion US dollars.").

[52] Letter from Members of the U.S. Congress to Amb. K. Tai (U.S. Rep. of Commerce) and Sec. A. Blinken (U.S. Sec. of State) (May 2, 2023) (**R-0034**).

factual context involved in this unique case — which Claimants had misrepresented — the Republic of Honduras proceeds to state its jurisdictional objection.

# II. HONDURAS' PRELIMINARY OBJECTION UNDER ARTICLE 10.20.5 OF THE DR-CAFTA

## II.1. THE APPLICABLE LEGAL FRAMEWORK UNDER ARTICLE 10.20.5 OF THE DR-CAFTA

17. The DR-CAFTA establishes a mechanism that allows the arbitral tribunal to resolve, in a prompt and expeditious manner, certain objections of the respondent that can put an end to an arbitration or claim that has no chance of success.

18. Pursuant to Article 10.20.5 of the DR-CAFTA, the respondent may request the tribunal to decide "on an expedited basis" two types of preliminary objections: (i) that "as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made" as provided in Article 10.20.4 of the DR-CAFTA; and, (ii) that "the dispute is not within the tribunal's jurisdiction," as provided in Article 10.20.5 of the DR-CAFTA.

19. Article 10.20.5 of the DR-CAFTA provides:

> In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. 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 is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.[53]

[53] Free Trade Agreement between the Dominican Republic-Central America and the United States of America ("**DR-CAFTA**") (Aug. 5, 2004) (**CL-2_SPA**), art. 10.20.5.

20. Under the DR-CAFTA, the application of Article 10.20.5 is subject to a single condition: that the Respondent file its objection that the dispute is not within the jurisdiction of the Tribunal "within 45 days after the tribunal is constituted."[54]

21. It is undisputed that the Tribunal was constituted on January 29, 2024. On February 19, 2024, the Respondent submitted a proposal to challenge the arbitrator appointed by Claimants, whereupon the proceedings were suspended pursuant to ICSID Arbitration Rule 22(2). Then, on August 7, 2024, the Chairman of the ICSID Administrative Council decided on the proposed challenge and the suspension was lifted. Therefore, this objection under Article 10.20.5 is filed on August 30, 2024; i.e., within 45 days of the constitution of the Tribunal.

22. In this regard, Honduras is entitled to invoke Article 10.20.5 and requests: (1) an expedited decision on its objection to the Tribunal's jurisdiction; (2) the suspension of any proceedings on the merits; and, (3) the issuance of an award no later than 150 days after the date of this request, with the option of an additional 30 days upon a request by one of the disputing parties for a hearing, or by decision of the Tribunal on the occasion of an extraordinary ground.

23. Although objections filed under Article 10.20.4 of the DR-CAFTA require the tribunal to "assume to be true claimant's factual allegations in support of any claim in the notice of arbitration," this requirement does not apply to jurisdictional or admissibility objections under DR-CAFTA Article 10.20.5.[55]

### II.2. ICSID HAS NO JURISDICTION BECAUSE THE REPUBLIC OF HONDURAS CONDITIONED ITS CONSENT TO ARBITRATION ON THE PRIOR EXHAUSTION OF LOCAL REMEDIES BY INVESTORS.

24. The Arbitral Tribunal lacks jurisdiction to hear this case because the Republic of Honduras conditioned its consent to ICSID arbitration on the prior exhaustion of local remedies, a condition which Claimants have failed to fulfill.

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[54] DR-CAFTA (**CL-2_SPA**), art. 10.20.5.

[55] *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(c).

25. Claimants chose to submit their claim to ICSID under Article 10.16.3 of the DR-CAFTA.[56] This decision by Claimants implies that Honduras would have consented to the submission of the present dispute under the ICSID Convention. The following background information, however, clearly shows that Honduras did not consent to the submission of this dispute to ICSID:

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

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

27. This is an uncontested power of any State party to the Convention to preserve the traditional rule of exhaustion of local remedies under customary international law and to avoid being dragged before an international tribunal before its own courts have had an opportunity to rule on the alleged claims.[57] As the International Court of Justice held in the *Interhandel* case, "[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law."[58]

28. It was precisely in exercise of this prerogative that the Republic of Honduras conditioned its consent to ICSID arbitration at the time of approving and ratifying the ICSID Convention, through Legislative Decree No. 41-88 dated August 4, 1988 (the "Legislative Decree 41-88"). The aforementioned approving decree clearly

[56] Request for Arbitration, ¶¶ 99-100.

[57] I. Shihata, "Towards A Greater Depoliticization of Investment Disputes: Public Disclosure Authorized The Roles of ICSID and MIGA" (1992) (**RLA-0005**), 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").

[58] *Interhandel Case (Switzerland v. United States of America)*, Judgment, I.C.J. Rep. 1959, p. 6 (Mar. 21, 1959) (**RLA-0001**), p. 27 ("[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law."). The same Court reiterated this idea in *ELSI*. *See Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Rep. 1989, (July 20, 1989) (**RLA-0004**), p. 15.

establishes, as a *sine qua non* condition of the consent of the Republic of Honduras, that:

> DECLARATION OF THE REPUBLIC OF HONDURAS. The State of Honduras shall submit to the arbitration and conciliation procedures provided for in the Convention, only when it has previously expressed its consent in writing. **The investor shall exhaust the administrative and judicial channels of the Republic of Honduras, as a prior condition to the implementation of the dispute settlement mechanisms provided for in this Agreement.** In any case, once submitted to the Tribunal to which the State of Honduras is a Party, the applicable laws shall be those of the Republic of Honduras, and only the natural and legal parties of the States Parties to the Agreement may make use of the procedures provided for in the Agreement.[59]

29. By means of this Legislative Decree, which the Claimants *did not* disclose to this Tribunal and which they omitted in their Request for Arbitration, the Republic of Honduras expressly opted to preserve the traditional rule under customary international law and to condition its consent to ICSID arbitration to the prior exhaustion of local remedies.[60] Thus, it excluded direct access -without prior exhaustion of local remedies- to such dispute resolution mechanism. As other tribunals have pointed out, "it is a general principle of international law that international courts and tribunals can exercise jurisdiction over a State only with its consent. [...] Presumed consent is not regarded as sufficient, because any restriction upon the independence of a State (not agreed to) cannot be presumed by courts."[61]

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[59] Republic of Honduras, *Decree 41-88, Decree on the ICSID Convention* (Mar. 25, 1988) (**R-0003**), art. 75 (emphasis added).

[60] B. Sabahi, *et al*. "Exhaustion of Local Remedies," *in Investor-State Arbitration* (2019) (**RLA-0021**), p. 432-433 ("The requirement of exhaustion of local remedies (or local remedies rule) is a longstanding rule of customary international law that was developed in the context of diplomatic protection. Under this rule, where a state commits an act that injures a foreign person, the victim traditionally must exhaust all the effective domestic legal remedies before its home government can espouse its claim in the exercise of diplomatic protection. Exhaustion of local remedies in this sense is a precondition of the admissibility of international claims. The exhaustion of certain local remedies may also be required as a substantive element of some international wrongs, such as denial of justice.").

[61] *Wintershall Aktiengesellschaft v. Argentina,* ICSID Case No. ARB/04/14, Award (Dec. 8, 2008) (**RLA-0010**), ¶ 160(3). In the same vein: *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v.*

30. As is well known, this requirement is a reflection of respect for the sovereignty of States to allow them, precisely, to address through their own courts any alleged illegality of their organs' actions.[62] It would therefore be completely unacceptable for the Republic of Honduras, having explicitly limited and subordinated its consent to this jurisdictional condition, as authorized by Article 26 of the ICSID Convention, to be dragged into this arbitration when that condition has not been fulfilled. In this regard, the Tribunal cannot rely on the ICSID Convention to assume jurisdiction and at the same time ignore the condition established by the Republic of Honduras for access to its dispute resolution mechanism.

31. The *travaux préparatoires* of the ICSID Convention also confirm that the intention of the drafters was never to prevent States from enforcing the exhaustion of local remedies rule within the ICSID system. On the contrary, the *travaux* make it clear that States would retain the sovereign power to require the exhaustion of local remedies.[63] The second part of Article 26 leaves no doubt in this regard. As stated in the discussions that preceded the adoption of the Convention:

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

*Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Award (Dec. 22, 2017) (**RLA-0020**), ¶ 148 ("consent cannot be presumed; it must be established by an express manifestation of intent or implicitly by conduct that demonstrates consent. Further, the burden of proving the existence of consent is on the Claimants, as they are the ones asserting jurisdiction.").

[62] I. Shihata, "Towards A Greater Depoliticization of Investment Disputes: Public Disclosure Authorized The Roles of ICSID and MIGA" (1992) (**RLA-0005**), 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.").

[63] 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" (Mar. 18, 1965) (**RLA-0002**), p. 38. History of the ICSID Convention, Vol. II-1 (1968) (**RLA-0003**), p. 162 ("Similarly, Section 16 leaves it open to a State to stipulate that its undertaking to have recourse to arbitration is subject to the condition that the foreign investor first exhaust his remedies in the State's national courts or administrative agencies.").

> the right of a State to require the prior exhaustion of local remedies.[64]

32. The *travaux préparatoires* also indicate that the drafters assumed that Contracting States could express their willingness to give priority to the exhaustion of local remedies in various ways.[65] Under Article 26, and as the tribunal in *Lanco International Inc. v. Argentine Republic* held, "[a] State may require the exhaustion of domestic remedies as a prior condition for its consent to ICSID arbitration. This requirement may be made (i) in a bilateral investment treaty that offers submission to ICSID arbitration, (ii) in domestic legislation, or (iii) in a direct investment agreement that contains an ICSID clause."[66]

33. It is crucial to understand the historical context that led Honduras to include the requirement to exhaust local remedies when it ratified the ICSID Convention. In 1964, all Latin American countries voted against the ICSID Convention, due to the strong influence of the Calvo Doctrine, which promoted the resolution of disputes with foreign investors under the law of the host State and through domestic remedies, rejecting foreign diplomatic intervention in these conflicts.[67] This doctrine, deeply rooted in sovereignty and domestic law, led the region to initially reject the idea of international arbitration administered by an entity such as ICSID.

34. However, in 1984, the then Secretary-General of ICSID, Mr. Ibrahim F.I. Shihata, wrote an editorial stating that the dispute resolution mechanism provided for in the ICSID Convention was compatible with the Calvo Doctrine.[68] He referred to Article

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[64] History of the ICSID Convention, Vol. II-1 (1968) (**RLA-0003**), p. 441 (The drafters also recorded that "The second sentence of Article 26(1) has been added by the Legal Committee merely to make clear that the first sentence was not intended to cast any doubt on the right of States to require exhaustion of local remedies.").

[65] History of the ICSID Convention, Vol. II-1 (1968) (**RLA-0003**), p. 241: ("When parties consented to arbitration, they would be free to stipulate either that local remedies might be pursued in lieu of arbitration, or that local remedies must first be exhausted before the dispute could be submitted for arbitration under the Convention.").

[66] *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal (Dec. 8, 1998) (**RLA-0007**), ¶ 39.

[67] I. Shihata, "Towards A Greater Depoliticization of Investment Disputes: Public Disclosure Authorized The Roles of ICSID and MIGA" (1992) (**RLA-0005**), p. 15.

[68] I. Shihata, "Editorial, ICSID and Latin America," 1 News from ICSID 2 (Summer 1994) (**RLA-0006**), p. 2.

26 of the ICSID Convention[69] and [noted] that the ICSID Secretariat had prepared model clauses providing for the exhaustion of domestic remedies before proceeding to international arbitration.[70] The Secretary General specifically noted that one of the ways to establish the requirement to exhaust local remedies was through a declaration made by the State at the time of signature or ratification of the ICSID Convention.[71] This is exactly what Honduras did.

35. The Republic of Honduras included this jurisdictional condition —as mentioned above— in its legislation approving the ICSID Convention. The exhaustion of local remedies is therefore 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.

36. The failure to comply with this kind of precondition as a matter affecting the consent of the host State and, therefore, the jurisdiction of the Arbitral Tribunal, has been highlighted by numerous tribunals.[72] Thus, by way of example, the tribunal in *ICS v. Argentina,* in the context of a case under an investment protection treaty, stated that:

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[69] ICSID Convention, Rules and Regulations (Apr. 2006) (**RLA-0009**), Convention, art. 26.("A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.").

[70] I. Shihata, "Editorial, ICSID and Latin America," 1 News from ICSID 2 (Summer 1994) (**RLA-0006**), p. 2.

[71] I. Shihata, "Editorial, ICSID and Latin America," 1 News from ICSID 2 (Summer 1994) (**RLA-0006**), p. 2. ("Another way to accomplish the same objective might result from a declaration made by a Contracting State at the time of signature or ratification of the Convention that it intends to avail itself of the provision of Article 26 and will require, as a condition of its consent to ICSID arbitration, the exhaustion of local remedies.").

[72] *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**), ¶ 34 ("The history of the BIT's negotiation and ratification shows that Uruguay deemed domestic litigation requirement to be a critical element of the BIT and an important limitation on the consent to international arbitration."); *Wintershall Aktiengesellschaft v. Argentina Argentine Republic*, ICSID Case No. ARB/04/14, Award (Dec. 8, 2008) (**RLA-0010**), ¶145: ("The circumstance that 'waiting periods' are held in some decisions to be 'procedural' rather than imposing a jurisdictional requirement has no bearing in the present case on the characterization of the eighteen-month requirement before the local Courts as a jurisdictional requirement."); P.M. Dupuy, "Preconditions to Arbitration and Consent of States to ICSID Jurisdiction," in *Building International Investment Law: The 50 years of ICSID* (2016) (**RLA-0008**), p. 227 ("The *Wintershall v. Argentina* Award appears as a warning addressed to the community of investor-State arbitrators to remind them of the limits of their powers in the face of consent to arbitration by sovereign States."); *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case ARB/08/4, Award on Jurisdiction (Dec. 15, 2010) (**RLA-0014**), ¶ 149 ("This Tribunal finds the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, 'a procedural rule' or a 'directory and procedural' rule which can or cannot be satisfied by the concerned party.

> As a result, the failure to respect the precondition to the Respondent's consent to arbitrate cannot but lead to the conclusion that the Tribunal lacks jurisdiction over the present dispute. Not only has the Respondent specifically conditioned its consent to arbitration on a requirement not yet fulfilled, but the Contracting Parties to the Treaty have expressly required the prior submission of a dispute to the Argentine courts for at least 18 months, before a recourse to international arbitration is initiated.[73]

37. Although tribunals in two previous ICSID cases chose to defer their decision on this issue, rejecting the Republic of Honduras' objections that the claimants' respective claims were manifestly without legal merit because of Decree 41-88,[74] such decisions were rendered in proceedings under instruments other than the DR-CAFTA and pursuant to Rules 41(5) and 41 of the ICSID Arbitration Rules 2006 and 2022, respectively. As is well known, those objections were subject to the high standard of "manifest" lack of legal merit. The present objection is not brought under the aforementioned Rule 41 of the ICSID Arbitration Rules, but rather under the expedited procedure provided by Article 10.20.5 of the DR-CAFTA, which is not subject to this standard.[75]

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To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules."); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (June 2, 2010) (**RLA-0013**), ¶ 315: ("...by imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an *opportunity* to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction.").

[73] *ICS Inspection and Control Services Limites v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction (Feb. 10, 2012) (**RLA-0015**), ¶ 262.

[74] *JLL Capital S.A.P.I. de C.V. v. Republic of Honduras*, ICSID Case No. ARB/23/3, Decision on Preliminary Objection (Dec. 21, 2023) (**RLA-0022**); *Autopistas del Atlántico, S.A. de C.V. et al. v. Republic of Honduras*, ICSID Case No. ARB/23/10, Decision on Respondent's Preliminary Objection under Rule 41(5) of the ICSID Arbitration Rules (Apr. 3, 2024) (**RLA-0023**).

[75] DR-CAFTA (**CL-2_SPA**), art. 10.16.5 ("The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement."); *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**), ¶ 237 ("In the Tribunal's judgment, ICSID Rule 41.5 contains language that is very different from that found in Articles 10.20.4 and 10.20.5 of the Treaty. Nor does ICSID Rule 41.5 share precisely the same object and purpose as Articles 10.20.4 and 10.20.5 of the Treaty.").

38. In this case, the failure to exhaust local remedies is evident and undeniable. Claimants have failed to pursue any local administrative and judicial remedies prior to submitting their dispute to international arbitration. It is not that they have done so unsuccessfully, but rather that they have not even tried.

39. Thus, if Claimants believed that the Republic of Honduras violated their rights by simply promulgating Decrees Nos. 32-2022 and 33-2022, they should have had recourse -- and may still have recourse -- to the judicial courts of Honduras. Similarly, if Claimants believed that their rights have been violated because: (i) the Honduran Customs Administration Agency adopted inconsistent positions and "intermittently" refused to recognize the alleged independent customs authority of Próspera ZEDE[76]; (ii) the Honduran National Banking and Insurance Commission interfered with Claimants' ability to transfer and receive funds[77]; (iii) the Regional Departmental Directorate of the Ministry of Governance, Justice and Decentralization (*Secretaría de Estado en los Despachos de Gobernación, Justicia y Descentralización*) issued an opinion subjecting persons seeking to hold a public event in a ZEDE to the same permit requirements that apply in the rest of Honduras[78]; or, finally, that (iv) the Honduras' Tax Authority (*Superintendencia de Administración de Rentas de Honduras*) has not processed requests for tax identification numbers from entities incorporated in Próspera ZEDE,[79] Claimants could —and should— have appealed or filed an administrative claim before the respective public institutions and following the procedures established in the Administrative Procedure Law.[80] <u>These aforementioned action are incidentally, the only State measures that Claimants identify in their Request for Arbitration</u>.

40. Only after exhausting the local procedures described above, and in the event that Claimants had not obtained the protection they expected of their alleged rights, could

[76] Request for Arbitration, ¶ 64.

[77] Request for Arbitration, ¶ 64.

[78] Request for Arbitration, ¶ 64.

[79] Request for Arbitration, ¶ 64.

[80] Administrative Procedure Act, 1987 (Decree No. 152-87) (**R-0002**), art. 139.

they have turned to ICSID to initiate the present international arbitration. However, Claimants did nothing of the sort, —on the contrary—Claimants rushed to ICSID to file an opportunistic multibillion-dollar, claim.

41. Finally, the decision on jurisdiction in *Nova Scotia v. Venezuela (I)* is illustrative of the tribunal's power to declare itself without jurisdiction to hear a claim when the claimant has not complied with the requirements necessary to accede to the consent offered by the respondent.[81]

42. As in *Nova Scotia (I)*, Honduras is not denying the alleged investor a forum to resolve disputes under the DR-CAFTA. Rather, the investor must simply 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 preconditions under the Convention and decides to submit its claim to arbitration, for example, under the UNCITRAL Arbitration Rules.[82]

43. By virtue of the foregoing, Claimants' claim must be rejected *in limine* as it is evident they have not complied with the requirement of exhaustion of local remedies as a condition to enable ICSID jurisdiction.

## III. THE PROCEDURE FOLLOWING SUBMISSION OF THE PRELIMINARY OBJECTION UNDERARTICLE 10.20.5OF THE DR-CAFTA.

44. Due to the valid invocation by Honduras of Article 10.20.5 of the DR-CAFTA, and unlike a request for bifurcation which is generally left to the discretion of arbitral tribunals, in this case the Tribunal is obligated to proceed in accordance with the provisions of that Article.[83] Therefore, once an application is filed pursuant to Article 10.20.5 within 45 days of the constitution of the tribunal:

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[81] DR-CAFTA (**CL-2_SPA**), art. 10.16.3; *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (I)*, UNCITRAL, Award on Jurisdiction (Apr. 22, 2010) (**RLA-0012**), ¶ 88 ("A protected investor under the Treaty enjoys a right to file international arbitration proceedings. The question is —which procedure?").

[82] DR-CAFTA (**CL-2_SPA**), art. 10.16.3.

[83] DR-CAFTA (**CL-2_SPA**), art. 10.22.1, Applicable Law ("[...] when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with

a. The Tribunal is obligated to "decide on an expedited basis, [...] any objection that the dispute is not within the tribunal's competence."

b. The Tribunal is obligated to "suspend any proceedings on the merits."

c. The Tribunal is obligated to "issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request." In any event, the Tribunal may take an additional 30 days, should either party request a hearing, or the Tribunal so decides on the occasion of an extraordinary ground.

45. The historical drafting process of the U.S. Model BIT, and particularly its Article 28.5, which is a clause identical to Article 10.20.5 of the DR-CAFTA, confirms this. According to authoritative comments on U.S. Model Investment Agreements:

> Article 28(5) provides for expedited treatment of a preliminary objection raised under Article 28(4) or any objection to the tribunal's jurisdiction. If the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide the objection on an expedited basis. Specifically, the tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection no later than 150 days after the date of the request. The decision or award shall state the grounds upon which it is based. If a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Further, regardless of whether a hearing is re quested, on a showing of extraordinary cause, a tribunal may delay its decision or award by an additional brief period of time not to exceed 30 days.[84]

46. In accordance with the foregoing, the Republic of Honduras respectfully requests the following from this Tribunal:

i) That it order the suspension of any proceedings on the merits of the dispute.

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this Agreement and applicable rules of international law."); *see also 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**), ¶ 185.

[84] K.J. Vandevelde, *U.S. International Investment Agreements* (2009) (**RLA-0011**), pp. 608-609.

ii) That it open a jurisdictional phase in accordance with Article 10.20.5 of the DR-CAFTA.

iii) That it E=establish a procedural timetable that permits it to decide the jurisdictional objection in an expeditious manner.

## IV. RESERVATION OF RIGHTS

47. Nothing herein is intended as a waiver of any right or objection, the Republic expressly reserves any and all rights to raise objections in defense of the claims, at any future stage of this arbitration; including, but not limited to objections to the jurisdiction of the Tribunal or the admissibility of the claims, and preliminary objections under Article 10.20.4 of DR-CAFTA and under Rule 41 of the ICSID Arbitration Rules.

## V. PROPOSED PROCEDURAL CALENDAR

48. In order to expedite the proceedings, the Republic of Honduras submits for the consideration of the Tribunal the following proposed procedural timetable for the filing of pleadings for the expedited procedure of the preliminary objection hereby filed:

| | |
|---|---|
| Claimants' Response | September 20, 2024 |
| Reply from the Republic of Honduras | October 4, 2024 |
| Claimants' Rejoinder | October 18, 2024 |
| Hearing by videoconference | Date to be determined |

## VI. RELIEF REQUESTED

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

a) To consider the present preliminary objection as filed in due time and form; to suspend the proceedings on the merits of the case; and to resolve the objection

in an expeditious manner, all in accordance with Article 10.20.5 of the DR-CAFTA.

b) Pursuant to Article 10.20.5 of the DR-CAFTA, to accept in all its parts 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.

c) To order 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.[85]

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50. The Republic of Honduras expressly reserves 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 the DR-CAFTA, refers this memorial to the Tribunal to determine the need for a hearing.

Respectfully submitted and dated August 30, 2024,

/s/ Manuel Antonio Díaz Galeas
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[85] DR-CAFTA (**CL-2_SPA**), art. 10.20.6 ("When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.").