INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

HONDURAS PRÓSPERA INC.

ST. JOHN'S BAY DEVELOPMENT COMPANY LLC

PRÓSPERA ARBITRATION CENTER LLC

Claimants

v.

THE REPUBLIC OF HONDURAS

Respondent

ICSID CASE NO. ARB/23/2

CLAIMANTS' OBSERVATIONS ON RESPONDENT'S PRELIMINARY OBJECTION

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26 September 2024

WHITE & CASE
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I. INTRODUCTION

1. In its Preliminary Objection under Article 10.20.5 of the Dominican Republic-Central America-United States Free Trade Agreement ("**CAFTA-DR**") dated 30 August 2024 ("**Preliminary Objection**"), Respondent invokes Article 10.20.5 of CAFTA-DR seeking on an expedited basis that the Tribunal declare that it lacks jurisdiction on the grounds that Claimants have not exhausted local remedies as purportedly required by a Declaration ("**Declaration**") in Decree No. 41-88 dated 25 March 1988 and published on 4 August 1988 ("**Decree 41-88**").

2. Although Respondent seeks to misdirect the Tribunal's attention to the Declaration in Decree 41-88, which is the act whereby the National Congress of Honduras approved the ratification of the ICSID Convention, the instruments by which Respondent gave its consent to arbitrate the present dispute are CAFTA-DR and the Agreement for Legal Stability and Investor Protection entered into between Honduras Próspera and the Republic of Honduras on 9 March 2021 ("**LSA**"). Neither of these instruments requires the exhaustion of local remedies or is even compatible with such a requirement.

3. Respondent's Preliminary Objection is fatally flawed. As Claimants detail below:

- Respondent's account of the legal framework of Article 10.20.5 of CAFTA-DR is incomplete and incorrect (Section II.A);

- Respondent has failed to make a valid objection. The exhaustion of local remedies is an issue of admissibility, not competence, and therefore cannot and should not be addressed as an objection to the Tribunal's competence under Article 10.20.5 of CAFTA-DR (Section II.B);

- Respondent's consent to arbitration of the present dispute under the ICSID Convention is not conditioned on the exhaustion of local remedies. The ICSID Convention deems arbitration to be the exclusive remedy except if a State specifies the opposite as a condition of its consent. Respondent did not do so, either through the Declaration in Decree 41-88 or in the applicable instruments of consent (Section II.C); and

- In any event, local remedies would be futile (Section II.D).

4. Therefore, the Preliminary Objection must fail as a matter of law. Period.

* * *

5. Respondent is no doubt aware of the myriad flaws in its position. It already has brought similar objections in two other arbitrations pursuant to ICSID Arbitration Rule 41(5). In both cases, the tribunal rejected Respondent's argument that the cases should be dismissed because of a manifest lack of legal merit. Respondent is not entitled to a different result under Article 10.20.5 of CAFTA-DR, and its insistence on making frivolous arguments in a misplaced attempt to derail the proceedings evidently is a product of the political motives underlying the Preliminary Objection and this case as a whole.

6. In particular, Respondent dedicates a greater part of its Preliminary Objection to an irrelevant recitation of factual allegations than it does to its actual objection.[1] Notably, Respondent concedes that this entire recitation "is not necessary for this Tribunal to enter into" for purposes of deciding the Preliminary Objection.[2] The evident reason for this is that Respondent is playing to a different audience than the Tribunal, using its submission in the arbitration to advance a political agenda and play to public opinion in Honduras (and/or that Respondent misguidedly believes that this Tribunal will resolve the Preliminary Objection and this case based on political beliefs similar to those of Respondent's present government).

7. For the avoidance of doubt, Respondent's factual recitation is replete with falsehoods and mischaracterizations (*e.g.*, about the history, legality, and nature of the ZEDE legal framework and Claimants' investments thereunder) and posturing about sovereignty (by which Respondent apparently means that the current government is entitled to do as it pleases without regard for the State's prior undertakings). Claimants fully reject Respondent's presentation of such issues, but refrain from addressing them at this time as they are irrelevant to the immediate issue, other than to briefly note the following to avoid misimpression:

    - ZEDEs are an innovative form of special economic zone instituted by Respondent pursuant to the ZEDE legal framework, consisting of provisions in Honduras's

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1 *Compare* Preliminary Objection § I ("Factual Background": 11+ pages) *with* § II ("Honduras' Preliminary Objections under Article 10.20.5 of the DR-CAFTA": 10 pages).

2 Preliminary Objection ¶ 16.

Constitution and the Organic Law of the ZEDEs ("**ZEDE Legal Framework**"), to promote investment and development. Special economic zones have a proven track record of catalyzing development (*e.g.*, Dubai's International Financial Centre and Shenzhen).

- Claimants were induced to invest in Honduras by Respondent and did so in reliance on the ZEDE Legal Framework and Respondent's guarantees of legal stability.

- Próspera ZEDE is a transformative platform that enables job creation and growth. It boasts a minimum wage higher than elsewhere in Honduras, a bill of rights that protects people of all income levels, low taxation, protections for the environment, and a regulatory system in accordance with international best practices.

- Despite Respondent's attacks, Claimants' innovative, rule-of-law business model has delivered by creating infrastructure and attracting investment (*e.g.*, in tourism, education, medical innovation, robotic manufacturing, Fintech innovation, etc.). Thousands of hard-needed jobs have been created in Honduras as a result of Próspera ZEDE, which has transformed the lives of many Hondurans for the better.[3]

- Far from being the assault on sovereignty that Respondent now pretends, Próspera ZEDE is exactly the type of special economic zone that Respondent wanted when it established and promoted the ZEDE Legal Framework. Far from being unanimously rejected by Honduran civil society, as Respondent asserts, one recent survey found that 50% of Hondurans believe ZEDEs have resulted in quality of life improvements and 72.1% support the ZEDEs.[4]

8. Claimants will fully address these matters further at the appropriate time. Insofar as the Tribunal members may be curious to read about Próspera ZEDE, we invite them to refer to the facts set out in Claimants' Request for Arbitration as well as the FAQs recently published by Próspera ZEDE to address the various misperceptions that Respondent is trying to create on a daily basis in Honduras.[5]

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[3] Mihalik, Peter, *Honduras' fight for prosperity: Honduran Zones for Economic Development and Employment being targeted*, WASHINGTON TIMES (9 Aug. 2022) (C-106); Reed, Jason, *Honduras Conducts Bold Experiment in Economic Freedom*, REAL CLEAR POLICY (24 Aug. 2024) (C-107).

[4] Image & Acceptance of Próspera ZEDE: Final Report, MACRODATO (2024) (C-120) pp. 9, 22.

[5] Request for Arbitration ¶¶ 23-83; *PRÓSPERA FAQs*, PRÓSPERA (3 Sept. 2024) (C-135).

9. It is further incumbent on Claimants to draw the Tribunal's attention to the grave situation currently developing in Honduras, which Respondent apparently already had anticipated at the time of filing its Preliminary Objection.[6]

10. On 20 September 2024, the Supreme Court of Honduras, by a vote of 8-7, ruled the ZEDE Constitutional Provisions and the ZEDE Organic Law to be unconstitutional with *ex tunc* effect.[7] The decision itself has not been made public, but the circumstances of this decision raise serious questions, including, without limitation, as to the adequacy and independence of the Honduran judiciary.

- On Tuesday, 17 September 2024, the Presiding Justice of the Supreme Court, Ms. Rebeca Raquel Obando, issued a summons for a plenary session of the Court to begin on Friday, 20 September 2024.[8] The two issues on the agenda were the constitutionality of the ZEDEs and the so-called Political Amnesty Law, which protects allies of former President "Mel" Zelaya, the leader of the ruling LIBRE party and husband of the current President of Honduras, Ms. Xiomara Castro.[9]

- The summons reportedly raised concerns that the plenary session was being engineered to ensure rulings while several sitting judges were unavailable, using substitute justices.[10] As explained in more detail below, the Honduran Constitution does not provide for substitute justices; the concept was created in 2023 upon the LIBRE party leveraging its congressional majorities to change the law and engineer a majority in the Supreme Court, and its use for purposes of ruling on the constitutionality of the ZEDE Legal Framework is widely seen as a power-grab by the LIBRE party, including by a U.S. Member of Congress and the former Vice-President of Honduras.[11]

- The likelihood that the ZEDE Legal Framework would be ruled unconstitutional with retroactive effect raised red flags with opposition lawmakers, who warned of

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6 Preliminary Objection ¶ 10 ("The plenary of the Supreme Court of Honduras will soon issue a final decision on the ruling issued on February 7, 2024 . . . by the Constitutional Chamber that declared the ZEDE regime unconstitutional.").

7 *See Press Release*, PODER JUDICIAL (20 Sept. 2024) (C-145).

8 *See* Judicial Branch of Honduras, Summons to Plenary Session dated 17 Sept. 2024 (C-137).

9 *See, e.g.*, Galo, Katerin, *Almost two years after its approval, pro-government deputies refuse to amend Amnesty Law*, CRITERIO (11 Dec. 2023) (C-117).

10 *Call for SC plenary session to address ZEDE and amnesty raises suspicion among the opposition*, EL HERALDO (18 Sept. 2024) (C-138).

11 *See Call for SC plenary session to address ZEDE and amnesty raises suspicion among the opposition*, EL HERALDO (18 Sept. 2024) (C-138); *Nasralla says magistrates are being sent to approve illegalities in the Honduran SC*, EL ESPECTADOR (19 Sept. 2024) (C-142).

an effort by the ruling LIBRE party to use such a ruling to disqualify the opposition from the next elections following the example of President Castro's political ally, Venezuelan President Nicolas Maduro.[12] Such concerns appear to be proving justified. On the day after the Supreme Court's decision was announced, President Castro celebrated by calling the ZEDE Legal Framework a "treason against the State."[13] The same day, the President of Congress, Mr. Luis Redondo (from President Castro's coalition), announced the existence of a list of officials that previously were in favor of the ZEDE, whom he called "treasonous criminals" and whom he demanded be "persecuted, tried, and condemned."[14] On Monday, 24 September, Mr. Jari Dixon, a member of Congress and of the LIBRE party filed a criminal complaint for treason against members of Congress that voted in favor of ZEDEs before the Office of the Public Prosecutor [*Ministerio Público*].[15]

- Notably, the Supreme Court's acts come at a time that the LIBRE party and President Castro's family are facing a number of scandals.

  - Ms. Obando, who was appointed to the Supreme Court in 2023 and immediately named its Presiding Justice, is a member of the LIBRE party and the aunt of President Castro's son-in-law.[16] Last month, Ms. Obando became embroiled in a corruption scandal when her husband, Mr. José Luis Melara Murillo, reportedly was implicated in a bribe-taking scheme by an anti-corruption judge who, upon being arrested, was recorded saying: "[t]ell the president of the [Supreme] Court that if I go down, I will talk."[17] At least one opposition congressman called for a political trial of Ms. Obando, citing instances of lost case files pertaining to money laundering by her relatives.[18] Ms. Obando has refused to resign from the Court and is being investigated.[19]

  - In August, President Castro's nephew and Minister of Defense, Mr. José Manuel Zelaya, met with an accused drug-trafficker in Venezuela, which

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[12] *See Libre is denounced for seeking to endorse political amnesty and disqualify opponents*, LA PRENSA (18 Sept. 2024) (C-139).

[13] *See* Xiomara Castro de Zelaya, X @XIOMARACASTROZ (21 Sept. 2024) (C-147).

[14] *See* Luis Redondo, X @LREDONDO (20 Sept. 2024) (C-143).

[15] *Dixon accuses deputies of treason for voting in favor of the ZEDEs*, EL HERALDO (23 Sept. 2024) (C-148).

[16] *See Rebeca Ráquel Obando elected as new president of the SC*, EL MUNDO (17 Feb. 2023) (C-113).

[17] *See José Luis Melara Murillo, husband of the president of the SC, at the center of corruption scandal*, CHOLUSAT SUR (C-150); Madrid, Yarely, *Arrest of Judge Marco Vallecillo rattles Supreme Court leadership in Honduras*, EXPEDIENTE PÚBLICO (21 Aug. 2024) (C-127); ICN.Digital, INSTAGRAM @ICN.DIGITAL, (19 Aug. 2024) (C-124).

[18] *Jorge Cálix calls for impeachment of SC president, Rebeca Ráquel*, HCH TELEVISIÓN DIGITAL - YOUTUBE (20 Aug. 2024) (C-126).

[19] *See Rebeca Obando refuses to resign from the SC: "They want to remove the people who work well,"* EL HERALDO (19 Aug. 2024) (C-125).

was remarked on by the U.S. Ambassador.[20] President Castro promptly ordered the termination of Honduras's extradition treaty with the United States.[21] Mr. Zelaya has since resigned.[22]

- In September, a video was released of President Castro's brother-in-law, Congressman Carlos Zelaya, meeting with a known drug-trafficker.[23] Mr. Zelaya (who is Mr. José Zelaya's father) has also resigned.[24]

11. Honduras is undergoing a complex and dangerous moment, and this is the real context of the Preliminary Objection. Claimants are carefully monitoring developments in Honduras and reserve the right to seek relief in this arbitration, including the right to request appropriate provisional measures to safeguard their rights (and safety).

II. RESPONDENT'S PRELIMINARY OBJECTION SHOULD BE REJECTED

A. RESPONDENT'S ACCOUNT OF THE LEGAL FRAMEWORK FOR AN OBJECTION UNDER ARTICLE 10.20.5 OF CAFTA-DR IS LACKING AND FAILS TO PROVIDE A CORRECT APPROACH FOR THE TRIBUNAL'S ASSESSMENT OF FACTS AT THIS STAGE

12. Article 10.20.5 of CAFTA-DR ("**Article 10.20.5**") 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

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20 Noticieros Hoy Mismo, X @HOYMISMOTSI, (28 Aug. 2024) (C-128).

21 *See, e.g.*, Wagner, James, *et al.*, *Honduras says it will end extradition treaty with U.S. in force since 1912*, THE NEW YORK TIMES (29 Aug. 2024) (C-130); *Uproar in Honduras over the annulment of the extradition treaty with the U.S.: who benefits?*, FRANCE 24 (30 Aug. 2024) (C-131); Sandoval, Elvin, *The Government of Honduras denounces its extradition treaty with the United States and accuses Washington of "interference,"* CNN ESPAÑOL (28 Aug. 2024) (C-129).

22 *Honduras: President's brother-in-law admits to meeting with drug-trafficker*, DEUTSCHE WELLE (1 Sept. 2024) (C-132); Torres, M., *Two weeks after narco video! National Congress accepted the resignation of Carlos Zelaya*, HCH TELEVISIÓN DIGITAL (18 Sept. 2024) (C-140).

23 Ernst, Jeff, *et al.*, *Narco Video Shows Traffickers Discussing Bribes With Honduras President's Brother-in-Law*, INSIGHT CRIME (3 Sept. 2024) (C-133); *Narco video of Carlos Zelaya, a "Devastating Blow" for LIBRE, says deputy Sabillón*, NOTICIAS 24/7 (20 Sept. 2024) (C-144); *The narco video is "devastating" for Libre, but even more serious is the removal of the extradition treaty*, HONDUDIARIO (20 Sept. 2024) (C-146); Vilar, José, *What is happening in Honduras? Alleged corruption or an attempted coup d'état*, LA ESTRELLA (6 Sept. 2024) (C-136).

24 *Honduras: President's brother-in-law admits to meeting with drug-trafficker*, DEUTSCHE WELLE (1 Sept. 2024) (C-132); *President of Honduras appoints new Defense minister amidst drug scandal*, MSN (3 Sept. 2024) (C-134).

> 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.

13. The Parties agree that CAFTA-DR must be interpreted in accordance with the rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties ("**VCLT**"), which reflects customary international law.[25] Article 31 of the VCLT (*General rule of interpretation*) sets forth the primary rule of treaty interpretation, *i.e.*, that a treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in light of its object and purpose.[26]

14. There is no dispute that Article 10.20.5 establishes an expedited mechanism for the Tribunal to decide certain preliminary objections.[27] Specifically, Article 10.20.5 requires the Tribunal to decide, on an expediated basis, (i) any objection under Article 10.20.4 of CAFTA-DR ("**Article 10.20.4**"), which provides for the possibility of an objection 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 under Article 10.26,"[28] and (ii) "any objection that the dispute is not within the tribunal's competence."[29] Like analogous expedited review provisions in other U.S.

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[25] Vienna Convention on the Law of Treaties, 1155 U.N. Treaty Series, p. 331, opened for signature in Vienna on 23 May 1969, entered into force on 27 Jan. 1980 (CLA-1). Respondent applied the VCLT to interpret CAFTA-DR in its Proposal to disqualify Mr. David W. Rivkin. Proposal ¶ 24 n. 24.

[26] VCLT (CLA-1) 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. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.").

[27] *See* Preliminary Objection ¶¶ 17-19.

[28] Dominican Republic-Central America-United States Free Trade Agreement dated 5 Aug. 2014 (CLA-2) Art. 10.20.4 ("Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent 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 under Article 10.26.").

[29] CAFTA-DR (CLA-2) Art. 10.20.5.

investment treaties, this provision modifies the ICSID Arbitration Rules by requiring an ICSID tribunal to decide any Article 10.20.4 objection as well as any objection to a tribunal's competence on an expedited basis, provided that the respondent make the request "within 45 days after the tribunal is constituted." The burden of persuading the Tribunal to grant the preliminary objection under Article 10.20.5 rests on Respondent, the party making the objection.[30]

15. Respondent's discussion of the legal framework governing objections under Article 10.20.5 is limited to (i) the timing requirements of such objections,[31] and (ii) the proposition that "[a]lthough objections filed under Article 10.20.4 of CAFTA-DR 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 CAFTA-DR Article 10.20.5."[32] There is no dispute as regards the timing requirements under Article 10.20.5.

16. With respect to the standard regarding a claimant's factual allegations, Claimants note that the key fact relevant to the Preliminary Objection is not in dispute: the Parties agree that Claimants did not exhaust local remedies prior to submitting their claims to arbitration. While Respondent spends a significant portion of its submission (11 pages) addressing background facts,[33] as noted, this is mere posturing by Respondent on the merits, and

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30 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5 (2 Aug. 2010) (CLA-71) ¶ 111 ("At all times during this exercise under CAFTA Articles 10.20.4 and 10.20.5, the burden of persuading the tribunal to grant the preliminary objection must rest on the party making that objection, namely the respondent."), ¶ 114 ("[A]s the party invoking these procedures it is of course for the Respondent to discharge the burden of satisfying the Tribunal that it should make a final decision dismissing the relevant claim or claims pleaded by the Claimant in these arbitration proceedings."); *Sea Search-Armada, LLC (USA) v. Republic of Colombia*, PCA Case No. 2023-37, Decision on Respondent's Preliminary Objections (16 Feb. 2024) (CLA-87) ¶ 116 (reasoning in connection with the US-Colombia Trade Protection Agreement, which contains analogous provisions to CAFTA-DR in Articles 10.20.4 and 10.20.5, that: "the burden of persuading the Tribunal to grant the jurisdictional objections at issue in this case lies with Respondent as the Party making those objections.").

31 Preliminary Objection ¶¶ 20-22.

32 *Id.* ¶¶ 20-23. Respondent assumes in the quoted language that an objection under Article 10.20.5 that the dispute is not within the tribunal's competence includes "admissibility objections." As shown below, that is wrong. Such an objection only encompasses jurisdictional objections.

33 *Id.* ¶¶ 1-16.

entirely irrelevant to the matter at hand, as Respondent itself concedes.[34] For the avoidance of doubt, however, Claimants will briefly address Respondent's deficient account of the standard relevant to the Tribunal's findings of fact at this phase of the proceedings.

17. *First*, Respondent does not state its position on the fact-finding standard applicable to competence objections brought under Article 10.20.5 beyond its contention that Article 10.20.4(c) (which states that "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)") does not apply. The unstated implication is that Respondent believes that a tribunal would have to undertake a more intensive fact-finding exercise within the expedited deadlines established by Article 10.20.5 than would be required for non-expedited objections under Article 10.20.4. This position is striking insofar as the objective of Article 10.20.5 is to avoid a "mini-trial," as the tribunal in *Pac Rim Cayman LLC v. Republic of El Salvador* ("***Pac Rim***") explained.[35] The tribunal found that concluding otherwise would attribute to CAFTA-DR Contracting Parties a "perverse intention" to make investor-state arbitration even more costly and procedurally burdensome for the parties, whereas in reality, "it would seem from these provisions [Articles 10.20.4 and 10.20.5] (read as a whole) that the actual intention of the Contracting Parties was, manifestly, the exact opposite."[36]

18. *Second*, Respondent's sole, unexplained citation is an inapposite reference to the Decision as to the Scope of the Respondent's Preliminary Objections Under Article 10.20.4 in *The Renco Group, Inc. v. Republic of Peru* ("***Renco I***").[37] Specifically, Respondent cites a paragraph of the decision in *Renco I* that merely reproduces Articles 10.20.4 and 10.20.5

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[34] Preliminary Objection ¶ 16 ("Notwithstanding the foregoing and as detailed below, it is not necessary for this Tribunal to enter into the merits of this case.").

[35] *See Pac Rim Cayman v. El Salvador*, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5 (2 Aug. 2010) ("***Pac Rim***") (CLA-71) ¶ 107 ("It is significant that the several deadlines under this expedited procedure [under Article 10.20.5] are stringent, both for the parties (and the parties' legal representatives) and also for the tribunal. It is not intended to be a 'mini-trial', even without evidence."), ¶ 112 ("Given the tight procedural timetable and deadlines under CAFTA Article 10.20.5 . . . it is clear that an expedited preliminary objection is not intended to lead to a 'mini-trial.'") (emphasis added).

[36] *Id.* ¶ 112.

[37] Preliminary Objection ¶ 23 n. 55 (*citing 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 (18 Dec. 2014) ("***Renco I***") (RLA-0017) ¶ 167(c)).

of the U.S.-Peru Trade Promotion Agreement which are analogous to Articles 10.20.4 and 10.20.5 of CAFTA-DR.[38] To be clear, the issue before the tribunal in *Renco I* was whether Article 10.20.4 "encompass[es] within its scope preliminary objections which may be characterized as relating to competence."[39] The tribunal ultimately decided this question in the negative.[40] Although the tribunal in *Renco I* considered the provisions applicable to fact-finding and to objections to competence under Article 10.20.5, it did so in the context of deciding whether Article 10.20.4 encompasses competence objections, and did not directly rule on the appropriate standard for factual determinations for competence objections under Article 10.20.5.

19. In any event, the distinction drawn by the *Renco I* tribunal between Articles 10.20.4 and 10.20.5 of the U.S.-Peru Trade Promotion Agreement differs from the treatment by other tribunals applying Articles 10.20.4 and 10.20.5 under CAFTA-DR. Rather than

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[38] Preliminary Objection ¶ 23 n. 55 (*citing Renco I* (RLA-0017) ¶ 167(c)); *Renco I* (RLA-0017) ¶ 167(c) ("The relevant Treaty provisions at issue are found in Article 10.20.4. Although not engaged on the facts here, Article 10.20.5 is also of relevance to the extent that it assists in the proper interpretation of Article 10.20.4. For convenience, these two provisions are set out in full as follows: Article 10.20.4: . . . (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) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.").

[39] *Renco I* (RLA-0017) ¶ 165 (the second question decided by the tribunal was "(2) [w]hich, if any, of the preliminary objections raised by the Respondent should be permitted to proceed to scheduling and full briefing for final decision in the Article 10.20.4 Phase of these proceedings?").

[40] *Id.* ¶ 213 ("In conclusion, having carefully considered all of the submissions of both Parties and the relevant Treaty texts, the Tribunal has determined that on a proper interpretation of the text of the Treaty provisions, objections as to a tribunal's competence are outside the scope of Article 10.20.4."), ¶¶ 254-255 ("[T]he Tribunal decides that on a proper interpretation of the Treaty provisions the Respondent's objections as to the Tribunal's competence fall outside the scope of Article 10.20. In view of the above, only one of the various preliminary objections noticed by the Respondent, namely, the Claimant's alleged failure to state a claim for breach of the investment agreement, will be considered and decided in the Article 10.20.4 Phase of these proceedings."). The tribunal in *Renco I* subsequently accepted Peru's objection under Article 23(3) of the UNCITRAL Arbitration Rules and dismissed the case on the grounds that claimant had failed to comply with the waiver requirements of the U.S.-Peru Trade Promotion Agreement.

differentiate the provisions, tribunals in cases such as *Pac Rim*[41] and *Commerce Group v. Republic of El Salvador*[42] have viewed these provisions as complementary.

20. *Third*, notably, Respondent alleges that Article 10.20.4(c) does not apply without setting forth any alternative standard applicable to findings of fact. Even assuming that Article 10.20.4(c) does not apply to a preliminary challenge to the Tribunal's competence under Article 10.20.5, it does not follow that the Tribunal is required to conduct the same level of fact-finding as would be required with respect to the merits. Indeed, doing so would be inconsistent with the expedited nature of an Article 10.20.5 proceeding, which, as noted above, is not intended to turn into a mini-trial.

21. Addressing the appropriate standard under Articles 10.20.4 and 10.20.5, the tribunal in *Pac Rim* took the position that the procedure "is clearly intended to avoid the time and cost of a trial and not to replicate it" and concluded that "there should be no evidence from the respondent contradicting the assumed facts alleged in the notice of arbitration."[43] Although the claimant in *Pac Rim* did not explicitly invoke the presumption in Article 10.20.4(c) when addressing the competence objection,[44] the tribunal articulated a general approach and standard for deciding preliminary objections, which included the factual standard in

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41 In *Pac Rim*, El Salvador submitted preliminary objections under both Article 10.20.4 and 10.20.5 of CAFTA-DR and the tribunal analyzed the provisions in tandem. The tribunal analyzed "the meaning and effect of CAFTA Article 10.20.4 (with Article 10.20.5)," to ascertain the "general approach to and standard of review under CAFTA Article 10.20.4," and found that "Article 10.20.4 mandates the tribunal to assume the relevant factual allegations made by the claimant to be 'true,'" and observed that the notice of arbitration – or any amendment thereof prior to the tribunal's decision – "benefits from the presumption of truthfulness." *See Pac Rim* (CLA-71) ¶¶ 58-65, 80, 86, 90.

42 In *Commerce Group et al. v. El Salvador*, El Salvador submitted a preliminary objection under Article 10.20.5 of CAFTA-DR arguing that "the Tribunal cannot accept jurisdiction under the Investment Law because Claimants have failed to assert any claims thereunder," and the tribunal considered both Article 10.20.4 and Article 10.20.5, indicating that these were "[t]he relevant provisions regarding the expedited procedures of CAFTA." The tribunal specifically relied on the Article 10.20.4 requirement to assume facts as true, and ultimately decided that the dispute was not within the tribunal's competence. *See Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award (14 Mar. 2011) (CLA-72) ¶¶ 34, 55, 140.

43 *Pac Rim* (CLA-71) ¶ 112.

44 *See, e.g., Pac Rim* (CLA-71) ¶¶ 239-243.

Article 10.20.4(c), without distinguishing between the approach for competence objections under Article 10.20.5 and Article 10.20.4 objections.[45]

22. In cases under treaties with provisions analogous to Article 10.20.5, tribunals have also presumed the truth of claimant's factual allegations in support of its claims, even without relying on the presumption of truthfulness in Article 10.20.4(c).[46] In *Sea Search-Armada v. The Republic of Colombia* ("***Sea Search-Armada***"), the tribunal decided competence objections under Article 10.20.5 of the U.S.-Colombia Trade Protection Agreement (analogous to Article 10.20.5 of CAFTA-DR) by assuming that the facts pled by the claimant were correct.[47] The approach in *Sea Search-Armada* followed the approach in *Bridgestone Licensing Services v. Republic of Panama* ("***Bridgestone***"), in which the tribunal decided on preliminary objections to competence under Article 10.20.5 of the

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[45] The tribunal referred to both articles when introducing and concluding its analysis on the general approach and standard of review under Art. 10.20.4, suggesting that the analysis applied to both provisions. This is consistent with the tribunal's approach of describing Art. 10.20.5 as "twinned with the procedure under Article 10.20.4." *See Pac Rim* (CLA-71) ¶ 80 ("The Tribunal's necessary starting-point in addressing the Respondent's Preliminary Objections (it being common ground between the Parties) is the meaning and effect of CAFTA Article 10.20.4 (with Article 10.20.5), interpreted and applied as part of CAFTA under international law."), ¶ 87 ("*The General Approach*: The procedure under CAFTA Article 10.20.4 mandates the tribunal to assume the relevant factual allegations made by the claimant to be 'true', without any express qualification.") (emphasis in original), ¶ 106 ("As regards the expedited procedure under Article 10.20.5, it is twinned with the procedure under Article 10.20.4 with an additional ground of objection as to competence."), ¶ 110 (regarding the standard of review), ¶ 115 (concluding the analysis mentioning both articles: "The Tribunal has reached this interpretation of CAFTA Articles 10.20.4 and 10.20.5 based upon the plain and unambiguous meaning of their respective wording and the principles of customary international law declared in Article 31 of the Vienna Convention on the Law of Treaties.").

[46] *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB 16/34, Decision on Expedited Objections (13 Dec. 2017) ("***Bridgestone***") (CLA-83) ¶ 119 ("Where an objection as to competence raises issues of fact that will fall for determination at the merits stage, the usual course is to postpone the final determination of those issues to the merits hearing. In those circumstances, it is usual for the tribunal to make a *prima facie* decision on jurisdiction on the assumption that the facts pleaded by the claimant are correct.").

[47] *Sea Search-Armada v. Colombia*, Decision on Respondent's Preliminary Objections (16 Feb. 2024) ("***Sea Search-Armada***") (CLA-87) ¶ 115 ("[T]he Tribunal's findings are made on a *prima facie* basis."), ¶ 119 ("[T]he Tribunal considers that the factual issues that require determination at this stage, even if limited in number and scope, could potentially impact the merits of the dispute and, therefore, out of an abundance of caution, the Tribunal will only decide those issues on a *prima facie* basis, as per paragraph 119 of *Bridgestone*. However, reaching such *prima facie* conclusions still requires the Tribunal to test the strength of Respondent's objections, and so to a certain extent Claimant's affirmative case on jurisdiction, to determine whether Respondent's jurisdictional challenge should succeed – a substantive exercise requiring a commensurate degree of analysis, particularly in view of the number and complexity of the issues that lie for determination before the Tribunal at this early stage of the proceedings.").

U.S.-Panama Trade Protection Agreement (analogous to Article 10.20.5 of CAFTA).[48] Both tribunals found that if a competence objection raises issues of fact "that will not fall for determination at the hearing of the merits," the tribunal should determine those issues on the evidence and provide a final decision on jurisdiction.[49] However, for competence objections that involve "issues of fact that will fall for determination at the merits stage," the tribunal should "make a *prima facie* decision on jurisdiction on the assumption that the facts pleaded by the claimant are correct," and defer determination of those issues to the merits hearing.[50] According to the *Bridgestone* tribunal, "such authority is essential if the Tribunal is to be in a position to prevent the hearing of the expedited objection turning into a mini, or even a maxi, trial."[51]

23. Other tribunals deciding preliminary objections to the tribunal's competence in advance of the merits in cases brought under treaties without provisions analogous to Article 10.20.4

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[48] *Sea Search-Armada* (CLA-87) ¶ 286 ("[T]he Parties have acknowledged the Tribunal's discretion under Arts. 10.20.5 of the TPA and 21 of the UNCITRAL Rules, and in line with the *Bridgestone* approach according to which '[w]here an objection as to competence raises issues of fact that will fall for determination at the merits stage, the usual course is to postpone the final determination of those issues to the merits hearing' and 'it is usual […] to make a *prima facie* decision on jurisdiction on the assumption that the facts pleaded by the claimant are correct.'"); *Bridgestone* (CLA-83) ¶ 119 ("Where an objection as to competence raises issues of fact that will fall for determination at the merits stage, the usual course is to postpone the final determination of those issues to the merits hearing. In those circumstances, it is usual for the tribunal to make a *prima facie* decision on jurisdiction on the assumption that the facts pleaded by the claimant are correct.").

[49] *Bridgestone* (CLA-83) ¶ 118 ("Where an objection as to competence raises issues of fact that will not fall for determination at the hearing of the merits, the Tribunal must definitively determine those issues on the evidence and give a final decision on jurisdiction."); *Sea Search-Armada* (CLA-87) ¶ 112 ("The Tribunal agrees that it is only issues of fact 'that will not fall for determination at the hearing of the merits' that might properly be determined at the jurisdictional stage. However, not every issue of fact that is independent of the merits requires determination when deciding the question of jurisdiction, but *only those factual issues that need to be determined in order to decide the question*.") (emphasis in original), ¶ 118 ("[T]he Tribunal understands that it may make a final determination of the facts if it is able to do so.").

[50] *Bridgestone* (CLA-83) ¶ 119 ("Where an objection as to competence raises issues of fact that will fall for determination at the merits stage, the usual course is to postpone the final determination of those issues to the merits hearing. In those circumstances, it is usual for the tribunal to make a *prima facie* decision on jurisdiction on the assumption that the facts pleaded by the claimant are correct."); *Sea Search-Armada* (CLA-87) ¶ 118 ("[I]f there is a risk that in deciding a factual issue the Tribunal may prejudge questions going beyond the question of its jurisdiction, the Tribunal may postpone that determination to the merits stage."), ¶ 119 ("[T]he Tribunal considers that the factual issues that require determination at this stage, even if limited in number and scope, could potentially impact the merits of the dispute and, therefore, out of an abundance of caution, the Tribunal will only decide those issues on a *prima facie* basis, as per paragraph 119 of *Bridgestone*."), ¶ 286 ("[T]he Parties have acknowledged the Tribunal's discretion under Arts. 10.20.5 of the TPA and 21 of the UNCITRAL Rules, and in line with the *Bridgestone* . . . 'to make a *prima facie* decision on jurisdiction on the assumption that the facts pleaded by the claimant are correct.'").

[51] *Bridgestone* (CLA-83) ¶ 120.

and Article 10.20.5 have also recognized that the tribunal should in principle take the claimant's factual case as pleaded.[52]

24. Similarly, other tribunals have distinguished between jurisdictional facts and facts relevant to the merits of the claims. For example, the tribunal in *Phoenix Action v. The Czech Republic* ("***Phoenix Action***"), which applied the Israel-Czech Republic Bilateral Investment Treaty, found that when deciding on a jurisdictional objection, the tribunal must accept claimant's allegations as to facts that, if proven, would constitute a violation of the relevant BIT, and needs only look into jurisdictional facts.[53]

25. While the formulations in various cases have differed, the consistent theme underlying the case law is that tribunals presume to be true the factual allegations related to the merits of the claim when deciding preliminary objections.

26. Even if the standard set out in *Bridgestone* or *Phoenix Action* were to apply, as Respondent's Preliminary Objection is an objection as to the admissibility or ripeness of the claim and not the Tribunal's competence, as shown in Section II.B below, any facts relevant to the Tribunal's assessment of the Preliminary Objection do not pertain to the

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[52] *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL Partial Award on Jurisdiction (27 Feb. 2004) (CLA-61) ¶ 24 ("[A]t the jurisdictional stage the Tribunal should in principle take the Claimant's case as pleaded, although it is entitled to take into account other facts not in dispute which bear on any question of characterisation of the dispute."). The tribunal also reasoned that it may join jurisdiction to the merits if there are factual disputes relevant to issues of jurisdiction. *Id.* ¶ 26 ("[T]he tribunal should definitively resolve jurisdictional issues if it is possible to do so at the preliminary stage . . . Reasons for joining jurisdiction to the merits may include the existence of factual disputes relevant to issues of legal characterisation and thus to jurisdiction. But a respondent should only be required to go to the cost and expense of defending the merits of a claim (in a case where jurisdiction has not yet been established) if there is a reasonable prospect that jurisdiction will be held to exist.").

[53] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB 06/5, Award (15 Apr. 2009) ("***Phoenix Action***") (CLA-69) ¶ 64 ("In sum, the Tribunal considers that as a general approach, it is correct that factual matters should provisionally be accepted at face value, since the proper time to prove or disprove such facts is during the merits phase. But when a particular circumstance constitutes a critical element for the establishment of the jurisdiction itself, such fact must be proven, and the Tribunal must take a decision thereon when ruling on its jurisdiction. In our case, this means that the Tribunal must ascertain that the prerequisites for its jurisdiction are fulfilled, and that the facts on which its jurisdiction can be based are proven."). *See also*, *Sea Search-Armada* (CLA-87) ¶ 116; *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 Feb. 2012) (CLA-76) ¶ 4.11 ("[T]he Tribunal's general approach in deciding the Respondent's jurisdictional objections under the *prima facie* standard here requires an assumption of the truth of the relevant facts alleged by the Claimants in the Notice of Arbitration (subject to the qualifications described above), excluding however a disputed fact uniquely relevant to the existence or exercise of the Tribunal's jurisdiction.").

Tribunal's competence and should not be characterized as jurisdictional facts (but rather as facts related to the merits given that admissibility is an issue related to the merits).[54] In any case, as noted, there is no dispute among the parties as to the one potentially relevant fact – that Claimants did not seek to resolve the dispute through local proceedings. As detailed below, however, even this 'fact' is irrelevant, as it not a fact that pertains to the existence of the Tribunal's competence.

B. RESPONDENT'S OBJECTION UNDER ARTICLE 10.20.5 OF CAFTA-DR THAT THE DISPUTE IS NOT WITHIN THE TRIBUNAL'S COMPETENCE MUST BE REJECTED BECAUSE RESPONDENT'S OBJECTION IS NOT ACTUALLY AN OBJECTION TO THE TRIBUNAL'S COMPETENCE

27. Respondent is clear that its Preliminary Objection is an "objection that the dispute is not within the tribunal's competence" under Article 10.20.5.[55] Notwithstanding Respondent's characterization, however, the Preliminary Objection is an objection to the admissibility of Claimants' claims and accordingly must be dismissed on the basis that Respondent has failed to raise an objection to the Tribunal's competence under Article 10.20.5.

28. A tribunal's competence (*i.e.*, jurisdiction under the ICSID Convention) and the admissibility of a claim are two distinct concepts that should not be conflated.[56] Competence (which is often linked to the tribunal) and jurisdiction (which is often linked

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[54] *Bridgestone* (CLA-83) ¶ 119; *Phoenix Action* (CLA-69) ¶ 64. *See also*, *Sea Search-Armada* (CLA-87) ¶ 116; *Chevron Corporation et al. v. Ecuador (II)*, Third Interim Award on Jurisdiction and Admissibility (27 Feb. 2012) (CLA-76) ¶ 4.11.

[55] *See, e.g.*, Preliminary Objection ¶¶ 16, 20, 22, 24.

[56] The *Abaclat et al. v. Argentine Republic* tribunal deemed it "not only appropriate but also necessary to distinguish issues relating to ICSID's jurisdiction *stricto sensu* and admissibility issues," highlighting the serious implications related to the distinction. *See Abaclat and Others (formerly Giovanna A. Beccara and others). v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) (CLA-73) ¶¶ 247-248 ("Although a lack of jurisdiction or admissibility may both lead to the same result of a tribunal having to refuse to hear the case, such refusal is of a fundamentally different nature . . . : (i) While lack of jurisdiction *stricto sensu* means that the claim cannot at all be brought in front of the body called upon, a lack of admissibility means that the claim was neither fit nor mature for judicial treatment; (ii) Whereby a decision refusing a case based on a lack or arbitral jurisdiction is usually subject to review by another body, a decision refusing a case based on a lack of admissibility can usually not be subject to review by another body; (iii) Whereby a final refusal based on a lack of jurisdiction will prevent the parties from successful re-submitting the same claim to the same body, a refusal based on admissibility will, in principle, not prevent the claimant from resubmitting its claim, provided it cures the previous flaw causing the inadmissibility."). *See also Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award (16 May 2012) (CLA-77) ¶ 293 ("[O]bjections on the ground of admissibility are different in nature from objections to jurisdiction.").

to the Centre itself) both pertain to the power to decide a case,[57] and are often used interchangeably in cases under the ICSID Convention.[58] In contrast, admissibility pertains to the claims advanced in the proceedings.[59] As the tribunal in *Hochtief v. Argentina* explains, "[j]urisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal."[60] The tribunal reasoned that the difference between "a new, independent, right to arbitrate and what is simply a manner in which an existing right to arbitrate must be exercised reflects the distinction between questions of jurisdiction and questions of admissibility."[61]

29. Respondent repeatedly characterizes its Preliminary Objection as a jurisdictional objection[62] because, Respondent avers, Claimants' failure to exhaust local remedies would affect the State's consent to arbitrate this dispute and the Tribunal's jurisdiction. This is wrong.

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57 Christoph H. Schreuer, *et al., Chapter II: Jurisdiction of the Centre, in* THE ICSID CONVENTION – A COMMENTARY (3d ed. 2022) (CLA-86) p. 105 ("[T]he concept of 'jurisdiction' may be defined generally as 'the power of a court or judge to entertain an action, petition or other proceeding.'").

58 *See, e.g., Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999) (CLA-55) ¶ 68 (using the term 'competence' to describe the elements required to establish the tribunal's jurisdiction under the ICSID Convention: "A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT.") (emphasis added); *Pac Rim* (CLA-71) ¶ 253 (addressing the exercise of jurisdiction by tribunals as an issue of competence). Notably, while the English and Spanish versions of the ICSID Convention and ICSID Arbitration Rules distinguish between the "jurisdiction of the Centre" and the "competence of the Tribunal" ("*jurisdicción*" and "*competencia*" in the Spanish versions), the French versions use the term "*competence*" for both the Centre and the tribunal, suggesting that "jurisdiction" and "competence" can be used interchangeably.

59 *See, e.g., Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Objections to Jurisdiction (29 May 2009) (CLA-70) ¶ 132 ("The issues that divide the parties . . . relate to two issues: the issue of jurisdiction, namely whether the Tribunal has jurisdiction over [Claimant's] claims under [the BIT]; and the issue of admissibility, namely whether in the event that the Tribunal does have jurisdiction, the claim is admissible.").

60 *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 Oct. 2011) ("***Hochtief***") (CLA-75) ¶ 90.

61 *Id.*

62 *See, e.g.*, Preliminary Objection ¶¶ 16, 20, 22, 24.

30. Contrary to Respondent's position, the exhaustion of local remedies requirement relates to the admissibility or ripeness of Claimants' claims, not the Tribunal's competence, as evidenced by multiple authorities and commentators.[63]

31. In the context of investor-State disputes, arbitral tribunals have generally refused to regard non-compliance with the exhaustion of local remedies rule as an obstacle to their jurisdiction and instead have considered any such objection as a question of admissibility. For example, in *Abaclat v. Argentina*, the majority of the tribunal found that compliance with the local remedy requirement in the Italy-Argentina BIT was a question of admissibility, not jurisdiction. As the tribunal explained:

> The Tribunal is of the opinion that the negotiation and 18 months litigation requirements relate to the conditions for implementation of Argentina's consent to ICSID jurisdiction and arbitration, and not the fundamental question of whether Argentina consented to ICSID jurisdiction and arbitration. Thus, any non-compliance with such requirements may not lead to a lack of ICSID jurisdiction, and only -if at all- to a lack of admissibility of the claim.[64]

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[63] *See, e.g., SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 Jan. 2004) ("***SGS v. Philippines***") (CLA-60) ¶ 154 n. 84 ("It may be noted that the analogous rule of exhaustion of local remedies is normally a matter concerning admissibility rather than jurisdiction in the strict sense."); *RosInvestCo UK Ltd v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction (1 Oct. 2007) ("***RosInvestCo UK***") (CLA-66) ¶ 152 ("The Respondents advance their case about exhaustion of local remedies on a jurisdictional basis or on the basis of the lack of admissibility of the claim. The jurisdictional argument must be rejected. The very fact that the local remedies rule may be waived, as is undoubtedly the case, demonstrates that one is not dealing with a jurisdictional issue."); B. Sabahi, *et al.* "Exhaustion of Local Remedies" *in Investor-State Arbitration* (2019) (RLA-0021) p. 432 ("Exhaustion of local remedies . . . is a precondition of the admissibility of international claims."). The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) ("**ILC Articles on State Responsibility**") address the rule of exhaustion of local remedies under the title "Admissibility of claims." *See* ILC Articles on State Responsibility (CLA-57) Art. 44(b) ("The responsibility of a State may not be invoked if: . . . (b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.").

[64] *Abaclat et al. v. Argentine Republic*, Decision on Jurisdiction and Admissibility (4 Aug. 2011) (CLA-73) ¶ 496.

32. The same result was reached in other cases, such as *BG v. Argentina*,[65] *Biwater Gauff v. Tanzania*,[66] *Hochtief v. Argentina*,[67] and *RosInvestCo UK Ltd v. The Russian Federation*.[68]

33. Similarly, in *SGS v. Philippines* the tribunal examined the distinction between jurisdiction and admissibility in relation to a contract claim which provided exclusive jurisdiction to the courts, brought on the basis of an investment treaty.[69] The majority of the tribunal found that whilst it had jurisdiction under the treaty to decide contract claims, the parties' choice of forum to determine their contract claims impacted the admissibility of the claim, as a decision under the treaty would be premature.[70] The majority of the tribunal decided

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[65] *BG Group Plc v. The Republic of Argentina*, UNCITRAL, Award (24 Dec. 2007) (CLA-67) ¶ 144 (analyzing exhaustion of local remedies as a matter of admissibility: "Exhaustion of local remedies . . . is not an absolute bar to international adjudication. Article 15 of the International Law Commission's Draft Articles on Diplomatic Protection attempts to codify exceptions: Local remedies do not need to be exhausted where: (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress . . . ").

[66] *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 Jul. 2008) (CLA-68) ¶ 343 ("The Republic's objection depends upon the characterisation of the six-month period in Article 8(3) of the BIT as a condition precedent to the Arbitral Tribunal's jurisdiction, or the admissibility of BGT's claims. In the Arbitral Tribunal's view, however, properly construed, this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding.").

[67] In *Hochtief*, the tribunal classified an 18-month domestic litigation period as a matter of admissibility, not jurisdiction, and allowed the claimant to rely on a dispute resolution provision from a different treaty without the requirement. *Hochtief* (CLA-75) ¶ 86 ("[T]he avoidance of the 18-month period in the Argentina-Germany BIT by reliance on the MFN clause would have no impact upon the scope of the jurisdiction of the Tribunal."), ¶ 96 ("The Tribunal . . . regards the 18-month period as a condition relating to the manner in which the right to have recourse to arbitration must be exercised – as a provision going to the admissibility of the claim rather than the jurisdiction of the Tribunal.").

[68] *RosInvestCo UK* (CLA-66) ¶ 152 ("The Respondents advance their case about exhaustion of local remedies on a jurisdictional basis or on the basis of the lack of admissibility of the claim. The jurisdictional argument must be rejected. The very fact that the local remedies rule may be waived, as is undoubtedly the case, demonstrates that one is not dealing with a jurisdictional issue."), ¶ 156 ("Therefore, no exhaustion of local remedies is required in the present context and the claims are admissible.").

[69] *SGS v. Philippines* (CLA-60) ¶ 149 ("[T]he Tribunal is faced with a valid and applicable exclusive jurisdiction clause, affecting the substance of SGS's claim. The question is whether this affects the Tribunal's jurisdiction or the admissibility of the claim.").

[70] *SGS v. Philippines* (CLA-60) ¶ 154 ("In the Tribunal's view, this principle is one concerning the admissibility of the claim, not jurisdiction in the strict sense. The jurisdiction of the Tribunal is determined by the combination of the BIT and the ICSID Convention. . . . Thus the question is not whether the Tribunal has jurisdiction: unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract. The question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum . . . This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction.") (emphasis added), ¶ 170 ("The effect of these findings is that SGS is bound by the terms of the

to give effect to the choice of forum in the contract, and stayed the proceedings pending determination in the competent forum.[71] The tribunal in *Bureau Veritas v. Paraguay* followed a similar approach.[72]

34. Likewise, the International Court of Justice does not treat a party's failure to exhaust local remedies as capable of rendering the court without jurisdiction over a claim.[73] Indeed, Respondent itself cites an authority recognizing that under international law exhaustion of local remedies is treated as a precondition to the admissibility of international claims.[74] Even in *Interhandel* – also cited by Respondent in its Preliminary Objection –[75] the International Court of Justice found that an objection related to the lack of exhaustion of

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exclusive jurisdiction clause, Article 12 of the CISS Agreement, in order to establish the quantum or content of the obligation which, under Article X(2) of the BIT, the Philippines is required to observe. This is a matter of admissibility rather than jurisdiction, and there is a degree of flexibility in the way it is applied."), ¶ 170 n. 95 ("An analogy may be drawn with the practice of national courts faced with claims such as *lis alibi pendens* and *forum non conveniens*, which are likewise not jurisdictional.").

71 *SGS v. Philippines* (CLA-60) ¶ 173 ("Implicit in the discussion in *SGS v. Pakistan* is the view that an ICSID Tribunal has the power to stay proceedings pending the determination, by some other competent forum, of an issue relevant to its own decision."), ¶ 171 ("Normally a claim which is within jurisdiction but inadmissible (e.g., on grounds of failure to exhaust local remedies) will be dismissed, although this will usually be without prejudice to the right of the claimant to start new proceedings if the obstacle to admissibility has been removed (e.g., through exhaustion of local remedies). However, international tribunals have a certain flexibility in dealing with questions of competing forums."), ¶ 175 ("[J]ustice would be best served if the Tribunal were to stay the present proceedings pending determination of the amount payable, either by agreement between the parties or by the Philippine courts in accordance with Article 12 of the CISS Agreement.").

72 *Bureau Veritas v. Paraguay*, Decision of the Tribunal on Objections to Jurisdiction (29 May 2009) (CLA-70) ¶¶ 152-154, 159-161.

73 *See, e.g.*, *Hochtief* (CLA-75) ¶ 95 ("In the ICJ, for example, rules on admissibility include such matters as the rules on the nationality of claims and the exhaustion of local remedies. The ICJ may have jurisdiction to decide whether State A had injured corporation B in violation of international law; but it may be that the claim actually filed is inadmissible because it has been brought by the wrong State, or because local remedies have not yet been exhausted. But if no objection is raised on such grounds, the Court will not raise the matter *proprio motu*. If, on the other hand, the objection based upon admissibility is raised and upheld, the very same claim (*mutatis mutandis*) could be brought by another State or brought after the exhaustion of local remedies (to pursue the examples used above), because the Court has jurisdiction in respect of the claim. Defects in admissibility can be waived or cured by acquiescence: defects in jurisdiction cannot.") (emphasis added).

74 Preliminary Objection n. 60 (*quoting* B. Sabahi, *et al*. "Exhaustion of Local Remedies" *in Investor-State Arbitration* (2019) (RLA-0021) pp. 432-433 ("The requirement of exhaustion of local remedies (or local remedies rule) is a long-standing rule of customs 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.") (emphasis added).

75 Preliminary Objection ¶ 27.

local remedies (in the context of diplomatic protection) was an issue of admissibility, and not jurisdiction.[76]

35. The authorities are clear that an exhaustion of local remedies requirement, similar to an obligation to comply with a waiting period or engage in pre-arbitration negotiations, does not need to be complied with in certain circumstances, such as futility or waiver by the state.[77] Thus, such requirements all relate to the admissibility of a claim – the manner in which an existing right to have recourse to arbitration should be exercised – not the competence of the tribunal or the jurisdiction of the Centre. As noted by the tribunal in *RosInvestCo UK Ltd v. The Russian Federation*, "[t]he very fact that the local remedies rule may be waived, as is undoubtedly the case, demonstrates that one is not dealing with a jurisdictional issue."[78]

36. As a result, Respondent's objection goes to the alleged admissibility of Claimants' claims, not to competence or jurisdiction. Respondent's characterization of its Preliminary Objection as a jurisdictional objection does not make it so,[79] and the Tribunal must find that the Preliminary Objection is not an objection that the dispute is not within the tribunal's

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[76] *Interhandel Case (Switzerland v. United States of America)*, Judgment, I.C.J. Rep. 1959, p. 6 (21 Mar. 1959) (RLA-0001) pp. 6, 26 ("Although framed as an objection to the jurisdiction of the Court, this Objection must be regarded as directed against the admissibility of the Application of the Swiss Government.").

[77] International law recognizes that the exhaustion of local remedies rule can be waived by a State. *See, e.g.*, International Law Commission Draft Articles on Diplomatic Protection with commentaries (2006) ("**ILC Articles on Diplomatic Protection**") (CLA-65) Art. 14 (which establishes the general rule of exhaustion of local remedies), Art. 15 ("Exceptions to the local remedies rule[.] Local remedies do not need to be exhausted where: (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; (b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible; . . . or (e) the State alleged to be responsible has waived the requirement that local remedies be exhausted.") (emphasis added); *Hochtief* (CLA-75) ¶ 95.

[78] *RosInvestCo UK* (CLA-66) ¶ 152 ("The Respondents advance their case about exhaustion of local remedies on a jurisdictional basis or on the basis of the lack of admissibility of the claim. The jurisdictional argument must be rejected. The very fact that the local remedies rule may be waived, as is undoubtedly the case, demonstrates that one is not dealing with a jurisdictional issue."), ¶ 156 ("Therefore, no exhaustion of local remedies is required in the present context and the claims are admissible.").

[79] *See, e.g.*, *İçkale İnşaat Ltd. Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 Mar. 2016) (CLA-82) ¶¶ 239-247 (finding that an objection based on a domestic litigation requirement, which both parties characterized as a jurisdictional objection, was really an admissibility objection, and that compliance with the local remedies requirement was not required because it would be futile.). *See also*, *RosInvestCo UK* (CLA-66) ¶ 152 ("The Respondents advance their case about exhaustion of local remedies on a jurisdictional basis or on the basis of the lack of admissibility of the claim. The jurisdictional argument must be rejected. The very fact that the local remedies rule may be waived, as is undoubtedly the case, demonstrates that one is not dealing with a jurisdictional issue.").

competence pursuant to Article 10.20.5. As a result, Respondent's Preliminary Objection fails and must be dismissed.

C. RESPONDENT'S CONSENTS TO ARBITRATE THE PRESENT DISPUTE ARE NOT CONDITIONED ON THE EXHAUSTION OF LOCAL REMEDIES

1. In accordance with the ICSID Convention, Respondent's consent to arbitration must be deemed to be to the exclusion of local remedies absent an express statement that it is conditioned on the exhaustion of local remedies in the applicable instruments of consent

37. The Preliminary Objection is premised on a flawed understanding of the ICSID Convention and the nature of consent to arbitration thereunder. Contrary to what Respondent posits, the ICSID Convention requires that the Tribunal deem Respondent's consent to arbitration to be to the exclusion of local remedies unless Respondent demonstrates that it stated that its consent to arbitration was conditioned on the exhaustion of local remedies.

38. Article 26 of the ICSID Convention provides as follows:

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

39. The plain meaning of these two sentences is that (i) the ICSID Convention's default presumption is that the exhaustion of local remedies is not required as a prerequisite to arbitration, and (ii) the Convention authorizes a limited exception to the presumption only if and when a Contracting State states that its consent to arbitration is conditioned on an exhaustion requirement. [80]

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[80] *See, e.g.*, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 Sept. 2003) (CLA-59) ¶¶ 13.4-13.5 ("The first sentence of Article 26 secures the exclusivity of a reference to ICSID arbitration vis-à-vis any other remedy. A logical consequence of this exclusivity is the waiver by Contracting States to the ICSID Convention of the local remedies rule, so that the investor is not compelled to pursue remedies in the respondent State's domestic courts or tribunals before the institution of ICSID proceedings. This waiver is implicit in the second sentence of Article 26, which nevertheless allows Contracting States to reserve its right to insist upon the prior exhaustion of local remedies as a condition of its consent. Any such reservation to the Ukraine's consent to ICSID arbitration must be contained in the instrument in which such consent is expressed, *i.e.* the BIT itself.").

40. Respondent notably omits to mention the first sentence of Article 26 in the Preliminary Objection.[81] Not only does Respondent inappropriately decontextualize the second sentence of Article 26, it misrepresents the object and purpose of the entire provision in an apparent effort to portray the Convention as being in line with the archaic and provincial Calvo Doctrine.[82] Contrary to Respondent's suggestion, however, the purpose of Article 26 was precisely to circumscribe the application of the traditional international law requirement of exhaustion of local remedies on which Respondent relies.[83] This was explicitly stated in the Report by the ICSID Executive Directors under the heading "Arbitration as Exclusive Remedy:"

> It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26. 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 explicitly recognizes the right of a State to require the prior exhaustion of local remedies.[84]

41. Likewise, Professor Schreuer has explained that "Article 26 reverses the situation under traditional international law: the Contracting States waive the requirement of exhaustion of local remedies unless otherwise stated."[85] Thus, Respondent's repeated references to the traditional international law rule (*e.g.*, by citing the *Interhandel Case*) are wholly irrelevant insofar as the rule simply does not apply in the context of a proceeding under the ICSID Convention.[86]

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81 *See* Preliminary Objection ¶ 26 and generally.

82 *See Id*. ¶¶ 33-34.

83 *Id*. ¶¶ 29-30.

84 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" (18 Mar. 1965) (RLA-0002) ¶ 32.

85 Christoph H. Schreuer, *et al., Chapter II: Jurisdiction of the Centre, in* THE ICSID CONVENTION – A COMMENTARY (3d ed. 2022) (CLA-86) p. 617. *See also, id.* p. 544 ("The exclusive remedy rule of the first sentence implies that there is no need to exhaust local remedies before initiating ICSID arbitration 'unless otherwise stated.'").

86 Preliminary Objection ¶ 27.

42. In this context, if 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. Specifically, the phrase "unless otherwise stated" in the first sentence of Article 26 refers to the "[c]onsent of the parties to arbitration under this Convention," and the second sentence of Article 26 goes on to specify that an exhaustion requirement must be made "as a condition of its consent to arbitration under this Convention." As the tribunal in *Generation Ukraine* explained, an exhaustion requirement further to the second sentence of Article 26 "must be contained in the instrument in which such consent is expressed."[87] Any purported exhaustion requirement that does not comply with Article 26 is ineffective, and the default presumption that arbitration is the exclusive remedy will prevail.[88]

43. Contrary to Respondent's position, it 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.[89] The above-cited explanation of Article 26 in the Report by the ICSID Executive Directors specifically refers to consent "when a State and an investor agree to have recourse to arbitration."[90] Likewise, during the negotiation of the ICSID Convention, ICSID's first

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87 *Generation Ukraine v. Ukraine*, Award (16 Sept. 2003) (CLA-59) ¶ 13.5.

88 Christoph H. Schreuer, *et al., Chapter II: Jurisdiction of the Centre, in* THE ICSID CONVENTION – A COMMENTARY (3d ed. 2022) (CLA-86) p. 619 ("A State may make the exhaustion of local remedies a condition of its consent to arbitration. The condition may be expressed in a bilateral investment treaty offering consent to ICSID arbitration . . . in national legislation providing for ICSID arbitration . . . or in a contract with the investor containing an ICSID arbitration clause . . . The condition that local remedies must be exhausted before ICSID arbitration can be instituted may be expressed by a State party to the Convention only up to the time consent to arbitration is perfected but not later . . . A State may also give advance notice that it will require the exhaustion of local remedies as a condition for its consent to ICSID arbitration by way of a general notification to the Centre. But a general notification of this kind is a statement for information purposes only.").

89 *Id*. p. 544 ("The exclusive remedies rule applies regardless of whether consent is based on a direct agreement between the host State and the investor or an offer of consent contained in a treaty or legislation. However, Art. 26 operates only once the offer of consent in the treaty or legislation has been perfected through acceptance by the investor.").

90 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" (18 Mar. 1965) (RLA-0002) ¶ 32.

Secretary-General Aron Broches confirmed that any exhaustion requirement under Article 26 would have to be embodied in the applicable arbitration agreement.[91]

44. Consequently, Respondent errs in maintaining that it was authorized by Article 26 to require the exhaustion of local remedies in all future ICSID arbitrations merely based on a declaration tucked away in Decree 41-88, its internal legislative act ratifying the ICSID Convention that was subsequently deposited with ICSID.[92] As detailed below, Decree 41-88 did not contain any consent to ICSID arbitration but only laid the groundwork for Respondent to consent to ICSID arbitration on future occasions.[93] Respondent's misguided position that a statement in a State's internal legislation ratifying the ICSID Convention that its future consents to ICSID arbitration shall be conditioned on the exhaustion of legal remedies subjects such future consents *ipso facto* to an exhaustion requirement is not supported by any of the authorities on which it relies:

- Respondent wrongly suggests that the ICSID Convention's *travaux préparatoires* show that its drafters intended to allow Contracting States to exercise their right under the second sentence of Article 26 by simply "express[ing] their willingness to give priority to the exhaustion of local remedies."[94] But the very same passage of the ICSID Convention's *travaux préparatoires* clarifies that it is only "[w]hen parties consented to arbitration" that "they would be free to stipulate. . . that local remedies must first be exhausted."[95]

- Respondent mischaracterizes the decision in *Lanco International v. Argentine Republic* by suggesting that it supports the proposition that a Contracting State may require the exhaustion of local remedies in domestic legislation ratifying the ICSID Convention independent of the arbitration agreement.[96] In fact, the tribunal in

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91 History of the ICSID Convention, Vol. II-1 (1968) (RLA-0003) pp. 973-974 ("Mr. Rajan said that while Article 26(1) as it stood was acceptable to his Government, he would like Mr. Broches to clarify whether a State's right to require exhaustion of local remedies was one which must have been embodied in an agreement between the State and the investor. Mr. Broches said that when a State had entered into an agreement with an investor containing an arbitration clause unqualified by any reservation regarding prior exhaustion of local remedies, the State could not thereafter demand that the dispute be first submitted to the local courts.").

92 *See* Preliminary Objection ¶¶ 28, 30, 35; Republic of Honduras, *Decree 41-88, Decree on the ICSID Convention* (25 Mar. 1988) (R-0003) Art. 1.

93 *See infra* § II.C.2.

94 Preliminary Objection ¶ 32.

95 *Id*. n. 65.

96 *Id*. ¶ 32 (*quoting Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal (8 Dec. 1998) ("***Lanco***") (RLA-0007) § 39).

Lanco confirmed that an exhaustion requirement must be in the instrument that contains the consent to arbitration, namely "(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."[97] It is clear that the reference to "domestic legislation" refers to a domestic law containing a State's consent to submit future disputes to arbitration under the ICSID Convention, as the tribunal cites the Report on the ICSID Convention by the ICSID Executive Directors, which explains that "a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing."[98] As explained below, Decree 41-88 is Honduras's legislative act ratifying the ICSID Convention; it is not an investment promotion law or any other type of instrument consenting to arbitration under the ICSID Convention and indeed explicitly states as much.[99]

- Respondent's reliance on the editorial by former ICSID Secretary-General Ibrahim F.I. Shihata addressing Article 26 and the Calvo Doctrine is similarly misplaced.[100] In fact, Mr. Shihata takes the uncontroversial position that States may include exhaustion requirements directly into agreements with investors, and to this end he refers to the model arbitration clause prepared by ICSID that conditions the State's consent to arbitration on the exhaustion of other remedies,[101] and recognizes that States may likewise make the exhaustion of local remedies a condition of their consent to arbitration in investment treaties.[102] Far from endorsing Respondent's position, Mr. Shihata merely states that "[a]nother 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 provisions 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 90 Signatory States, only one has made such a declaration."[103] This is

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97 *Lanco* (RLA-0007) § 39.

98 *Id*. § 43. *See also, Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Award (16 Nov. 2012) (CLA-78) ¶ 229 (referring to open offers by States to use ICSID arbitration in future disputes, which may be expressed through "the voluntary consent by the State that hosts the investment to ICSID jurisdiction, including that protection in its national legislation for a certain class of investors."); *Generation Ukraine v. Ukraine*, Award (16 Sept. 2003) (CLA-59) ¶ 13.5 (addressing *Lanco* and concluding that a requirement further to the second sentence of Article 26 "must be contained in the instrument in which such consent is expressed, *i.e.* the BIT itself."); Christoph H. Schreuer, *et al., Chapter II: Jurisdiction of the Centre, in* THE ICSID CONVENTION – A COMMENTARY (3d ed. 2022) (CLA-86) p. 619 ("[a] State may make the exhaustion of local remedies a condition of its consent to arbitration. The condition may be expressed in a treaty offering consent to ICSID arbitration . . . in national legislation providing for ICSID arbitration . . . or in a contract with the investor containing an ICSID arbitration clause.").

99 *See infra* § II.C.2.

100 Preliminary Objection ¶ 34.

101 I. Shihata, "Editorial, ICSID and Latin America," 1 News from ICSID 2 (Summer 1984) (RLA-0006) p. 2.

102 *Id*.

103 *Id*.

> hardly the endorsement that Respondent purports it to be. Mr. Shihata's use of the tentative phrase "might result" and his clarification that this approach had only been attempted by a single State demonstrate that Mr. Shihata was far from taking a strong position in favor of the effectiveness of using a declaration at the time of signature or ratification of the ICSID Convention to impose an exhaustion requirement. In fact, his use of the terms "intends" and "will require" suggests that Mr. Shihata saw any such declaration as forward-looking, and that a State making such a declaration would still need to include any such condition to its consent in a future instrument of consent. In any event, a short editorial intended to promote ICSID arbitration is not a source of law or even persuasive evidence.

45. Respondent has not conditioned its consent to arbitration in this case on the exhaustion of local remedies. As detailed below, the only purported exhaustion requirement identified by Respondent is the declaration in Decree 41-88, which merely approves the ratification of the ICSID Convention, explicitly states that it is not Respondent's consent to arbitration under the ICSID Convention, and clearly does not constitute a condition on Respondent's consent to arbitration in accordance with Article 26 of the ICSID Convention. Accordingly, the default presumption in Article 26 continues to apply and the Tribunal must deem Respondent's consent to arbitration under the ICSID Convention to be to the exclusion of local remedies.

2. Respondent's Declaration in Decree 41-88 does not constitute a condition of its consents to ICSID arbitration in the present case

46. The Preliminary Objection is premised on Respondent's interpretation of the Declaration in Decree 41-88, which states:

> 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.

47. Respondent previously raised the Declaration in *JLL Capital, S.A.P.I. de C.V. v. Republic of Honduras* ("***JLL***") and in *Autopistas del Atlántico, S.A. de C.V. and others v. Republic*

of Honduras ("***Autopistas***") as a basis for its objection that the claims therein were manifestly without legal merit under ICSID Rule of Arbitration 41. The tribunals in both cases declined to dismiss the claims, finding that Respondent's objection failed to meet the Rule 41 threshold.[104] Respondent may seek to raise similar objections again, in *JLL*, *Autopistas*, or one of the many other ICSID cases that it is now facing. Claimants note that at least two of the recent wave of cases against Respondent are now at the merits phase, including one case under CAFTA-DR, without Respondent having filed a preliminary objection on the basis of the Declaration in Decree 41-88 as of this date.[105]

48. In its Preliminary Objection, Respondent incorrectly contends that the Declaration constitutes an exercise of its prerogative under Article 26 of the ICSID Convention,[106] and repeatedly mischaracterizes Decree 41-88 as a "jurisdictional condition."[107] It is nothing of the sort.

49. *First*, it is telling that Respondent historically does not appear to have held the view of the Declaration (and its corresponding legal implications) that it puts forward in the instant case, and that its views of the Declaration appear to have varied over time. Based on public information, four ICSID arbitrations have previously been filed against Respondent.[108] There is no indication in the public domain that Respondent raised the Declaration to demand the exhaustion of local remedies in any of these cases or otherwise argued that Decree 41-88 establishes a jurisdictional condition. If that were the case, Respondent presumably would have said so in the Preliminary Objection, in particular if the objection

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[104] *JLL Capital S.A.P.I. de C.V. v. Republic of Honduras*, ICSID Case No. ARB/23/3, Decision on Preliminary Objection (21 Dec. 2023) ("***JLL***") (RLA-0022); *Autopistas Atlántico, S.A. de C.V. and others. v. Honduras*, ICSID Case No. ARB/23/10 Decision on the Preliminary Objection under Rule 41(5) (3 Apr. 2024) ("***Autopistas***") (RLA-0023).

[105] *See Palmerola International Airport, S.A. de C.V. v. Republic of Honduras*, ICSID Case No. ARB/23/42, International Centre for Settlement of Investment Disputes, Case Details (C-152); *Fernando Paiz Andrade and Anabella Schloesser de León de Paiz v. Republic of Honduras*, ICSID Case No. ARB/23/43, International Centre for Settlement of Investment Disputes, Case Details (C-151).

[106] Preliminary Objection ¶¶ 28 *et seq.*

[107] *Id*. ¶¶ 30, 35.

[108] *Astaldi S.p.A. & Columbus Latinoamericana de Construcciones S.A. v. Republic of Honduras*, ICSID Case No. ARB/99/8; (ii) *Astaldi S.p.A. v. Republic of Honduras*, ICSID Case No. ARB/07/32; (iii) *Elsamex, S.A. v. Honduras*, ICSID Case No. ARB/09/4; and (iv) *Inversiones Continental (Panamá), S.A. v. Republic of Honduras*, ICSID Case No. ARB/18/40.

was successful. Nor is there any indication that the claimants in any of these arbitrations exhausted local remedies prior to submitting their claims to arbitration.

50. Respondent first referred to the Declaration last year, when it asked ICSID to dismiss Claimants' claims on the basis that the Declaration constituted a reservation (as opposed to an exercise of Article 26 of the ICSID Convention).[109] Subsequently, however, Respondent denied in the *JLL* and *Autopistas* cases that the Declaration constituted a reservation to the ICSID Convention (apparently in response to arguments from the claimants in those cases that such a reservation would be invalid as a matter of international law).[110] While Respondent no longer asserts in the Preliminary Objection that the Declaration constitutes a reservation, Claimants reserve their right to address Respondent's erstwhile position or any other new arguments if Respondent changes its views once again. In any event, Respondent's shifting stance should give the Tribunal pause insofar as it appears that Respondent is adopting arguments out of convenience (employing an everything-but-the-kitchen-sink defense) as opposed to advancing a long-held sincere position.

51. *Second*, the Declaration in Decree 41-88 does not and cannot constitute an application of the second sentence in Article 26 of the ICSID Convention because Decree 41-88 does not constitute (and does not purport to constitute) Respondent's consent to arbitration under the ICSID Convention in this case.

52. Decree 41-88 is the legislative act pursuant to which the National Congress of Honduras approved Agreement No. 8-DTTL dated 25 July 1986 whereby the President of Honduras had approved the ICSID Convention.[111] Decree 41-88 then reproduces Agreement No. 8-DTTL and the Convention in its entirety, with the Declaration oddly tucked between Article 75 of the ICSID Convention and the list of the ICSID Signatory States (almost

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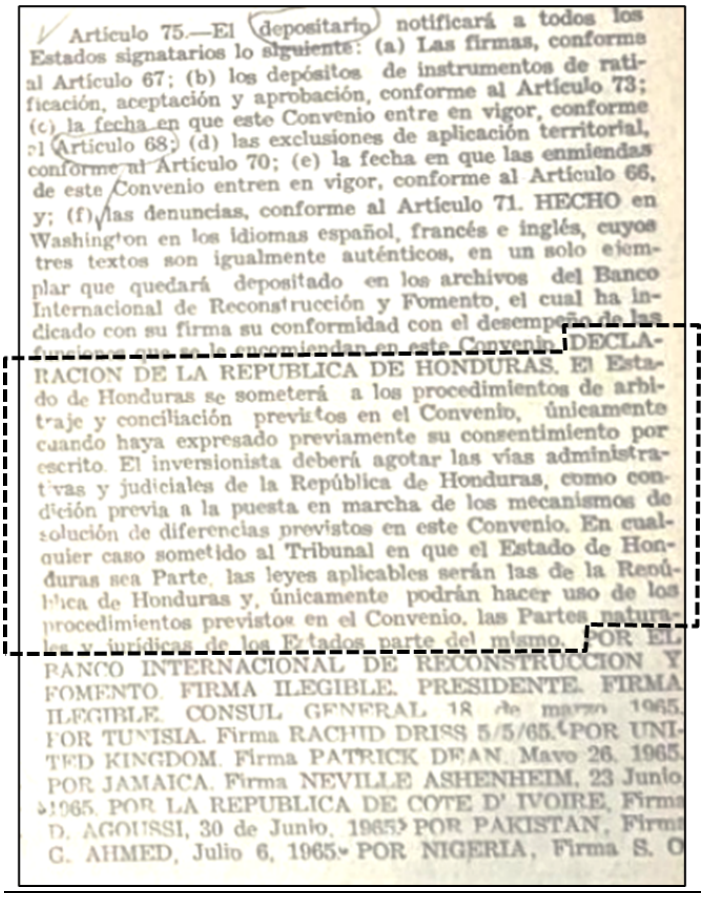
[109] *See* Respondent's Letter to ICSID, dated 30 May 2023 p. 3 (referring to the Declaration as a "*cláusula de reserva*").

[110] *JLL* (RLA-0022) ¶ 36; *Autopistas* (RLA-0023) ¶ 58.

[111] Republic of Honduras, *Decree 41-88, Decree on the ICSID Convention* (25 Mar. 1988) (R-0003) Art. 1.

giving the false impression that the Declaration was part of the treaty being ratified), on the penultimate page:[112]



Artículo 75.—El depositario notificará a todos los Estados signatarios lo siguiente: (a) Las firmas, conforme al Artículo 67; (b) los depósitos de instrumentos de ratificación, aceptación y aprobación, conforme al Artículo 73; (c) la fecha en que este Convenio entre en vigor, conforme al Artículo 68; (d) las exclusiones de aplicación territorial, conforme al Artículo 70; (e) la fecha en que las enmiendas de este Convenio entren en vigor, conforme al Artículo 66, y; (f) las denuncias, conforme al Artículo 71. HECHO en Washington en los idiomas español, francés e inglés, cuyos tres textos son igualmente auténticos, en un solo ejemplar que quedará depositado en los archivos del Banco Internacional de Reconstrucción y Fomento, el cual ha indicado con su firma su conformidad con el desempeño de las funciones que se le encomiendan en este Convenio. DECLARACION DE LA REPUBLICA DE HONDURAS. El Estado de Honduras se someterá a los procedimientos de arbitraje y conciliación previstos en el Convenio, únicamente cuando haya expresado previamente su consentimiento por escrito. El inversionista deberá agotar las vías administrativas y judiciales de la República de Honduras, como condición previa a la puesta en marcha de los mecanismos de solución de diferencias previstos en este Convenio. En cualquier caso sometido al Tribunal en que el Estado de Honduras sea Parte, las leyes aplicables serán las de la República de Honduras y, únicamente podrán hacer uso de los procedimientos previstos en el Convenio, las Partes naturales y jurídicas de los Estados parte del mismo. POR EL BANCO INTERNACIONAL DE RECONSTRUCCION Y FOMENTO. FIRMA ILEGIBLE. PRESIDENTE. FIRMA ILEGIBLE. CONSUL GENERAL 18 de marzo 1965. POR TUNISIA. Firma RACHID DRISS 5/5/65. POR UNITED KINGDOM. Firma PATRICK DEAN. Mayo 26, 1965. POR JAMAICA. Firma NEVILLE ASHENHEIM, 23 Junio 1965. POR LA REPUBLICA DE COTE D' IVOIRE, Firma D. AGOUSSI, 30 de Junio, 1965. POR PAKISTAN, Firma G. AHMED, Julio 6, 1965. POR NIGERIA, Firma S. O

53. Respondent has since denounced the ICSID Convention[113] in response to the avalanche of claims that have been filed against it as a result of the policies of the current government that also has taken the ideological anti-ZEDE stance that is at the root of the present arbitration, but there is no dispute that it was a party thereto when Claimants submitted their claims (which Claimants properly demonstrated with reference to ICSID's Database of Member States).[114] Respondent's emphatic suggestion that Claimants should have disclosed Decree 41-88 when filing their Request for Arbitration[115] is misguided: Decree

[112] Republic of Honduras, *Decree 41-88, Decree on the ICSID Convention* (25 Mar. 1988) (R-0003) pp. 1-8.

[113] *Honduras Denounces the ICSID Convention,* ICSID Press Release (29 Feb. 2024) (C-92).

[114] *See* Request for Arbitration ¶ 101.

[115] Preliminary Objection ¶ 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

41-88 is unnecessary to establish that Respondent was an ICSID Member State and irrelevant to establish the jurisdiction of this Tribunal. In practice, the Declaration was unheard of until Respondent first raised it in this case, and in any event, it is irrelevant because it obviously does not condition Respondent's consent, as explained herein.

54. It is uncontroversial that a State's ratification of the ICSID Convention does not constitute consent to arbitration thereunder.[116] Rather, after a State has become an ICSID member State, it may then choose to consent to arbitrate disputes before ICSID. The plain text of Article 25(1) of the ICSID Convention requires separate "consent in writing to submit [a dispute] to the Centre" as a prerequisite to jurisdiction.[117] As Professor Schreuer explains "[c]onsent by both or all parties is an indispensable condition for the jurisdiction of the Centre. The fact that the host State and the investor's State of nationality have ratified the Convention will not suffice."[118] Likewise, diverse tribunals in numerous proceedings have recognized that ratification of the ICSID Convention is insufficient and that a separate

preserve the traditional rule under customary international law and to condition its consent to ICSID arbitration to the prior exhaustion of local remedies." (emphasis in original)).

[116] ICSID Convention Preamble ("The Contracting States: . . . Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.").

[117] Similarly, Article 25(3) ICSID Convention also conveys that consent to arbitration is separate and subsequent to becoming a member of ICSID ("[c]onsent . . . shall require.").

[118] Christoph H. Schreuer, *et al., Chapter II: Jurisdiction of the Centre, in* THE ICSID CONVENTION – A COMMENTARY (3d ed. 2022) (CLA-86) p. 346.

written consent is required.[119] As the tribunal in *Brandes v. Venezuela* explained, "it is self-evident that such consent should be expressed in a manner that leaves no doubts."[120]

55. The Declaration demonstrates that Respondent itself understood that Decree 41-88 did not constitute its consent to arbitration under the ICSID Convention, which the first sentence of the Declaration makes explicit: "[t]he 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."[121] Indeed, the entirety of the Declaration is forward looking and anticipates future steps (*e.g.*, "shall submit" and "only when it has previously expressed its consent in writing," in the first sentence; "shall exhaust," in the second sentence; and "once submitted," in the third sentence) for Respondent to consent to the arbitration of any particular dispute(s).[122] This is only logical as interpreting Decree 41-88 itself as Respondent's consent to arbitration would mean that by virtue of the Declaration Respondent consented to ICSID arbitration of any and all disputes.

56. Thus, pursuant to the Declaration in Decree 41-88, Respondent merely anticipated the possibility of a future arbitration agreement with its consent to arbitration under the ICSID Convention, and, correspondingly, Respondent anticipated making the exhaustion of local remedies a condition of such future consent. The Declaration in Decree 41-88 is therefore

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[119] *See, e.g.*, *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award (5 May 2015) (CLA-81) ¶ 244 ("It is well-established that this requirement is not satisfied merely by a State's ratification of the ICSID Convention or by a notification under Article 25(4) of the ICSID Convention that the Contracting States may choose to make."); *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction (11 May 2005) (CLA-64) ¶ 139 ("The Tribunal agrees with the Argentine Republic that the consent expressed in ratifying the Convention is not the consent required by the Convention for bringing a claim before ICSID; this indeed requires a separate declaration by means of a treaty or other acts making such consent unequivocally clear."); *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction (8 Feb. 2013) (CLA-80) ¶ 131 ("As earlier stated, a fundamental tenet of the ICSID Convention is that 'no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.'").

[120] *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award (2 Aug. 2011) (CLA-74) ¶ 113 ("Even if there is no requirement that consent to ICSID arbitration should have any characteristic other than to be expressed in writing in accordance with Article 25 of the Convention, it is self-evident that such consent should be expressed in a manner that leaves no doubts.").

[121] Republic of Honduras, *Decree 41-88, Decree on the ICSID Convention* (25 Mar. 1988) (R-0003) p. 7 (emphasis added).

[122] *Id*.

insufficient to constitute an exercise of the second sentence of Article 26 and fails to reverse the ICSID Convention's default presumption that consent thereunder is to the exclusion of other remedies.

57. *Third*, contrary to Respondent's assertion,[123] nothing in the Declaration makes the exhaustion of local remedies an automatic condition of all future ICSID arbitration agreements in which Respondent might enter. As detailed above, the Declaration is forward-looking on its face and merely anticipated the possibility of future agreements and the terms that it anticipated including therein. In fact, Respondent subsequently consented to ICSID arbitration in treaties with fork-in-the-road clauses, which are incompatible with exhausting local remedies.[124] Respondent also consented to at least one arbitration clause that allows it to demand the exhaustion of *administrative* remedies only and only for a limited period of time.[125] In the same vein, as detailed in the next section, the specific instruments of consent applicable in the instant proceeding are antithetical to an exhaustion requirement.

58. *Fourth*, even assuming *arguendo* that the Declaration did constitute an exercise of Respondent's prerogative under Article 26 of the ICSID Convention (which it did not), it does not follow that such a requirement of exhausting local remedies set forth in the Declaration applies to Respondent's consents to arbitrate the present dispute. On the contrary, the terms of a subsequent arbitration agreement can supersede conditions of

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123 Preliminary Objection ¶ 35.

124 *See, e.g.*, Private [*sic*] Agreement between the Republic of Chile and the Republic of Honduras for the reciprocal promotion and protection of investments entered into on 11 Nov. 1996 (CLA-53) Art. VIII (providing that Chilean investors must choose between submitting investment disputes against Honduras to local courts or ICSID arbitration, and that once the investor submits the dispute to local courts or to arbitration, that election shall be definitive); Free Trade Agreement between Central America and the Dominican Republic entered into on 16 Apr. 1998 (CLA-54) Art. 9.20 (providing that foreign investors must choose between submitting investment disputes against Honduras to local courts, domestic arbitration, or international arbitration, and that once the investor submits the dispute to one of those options, the election shall be definitive).

125 Central America-Panama Free Trade Agreement entered into on 6 Mar. 2002 (CLA-58) Part IV Art. 10.22 (1)-(2) (providing that arbitration is to the exclusion of other mechanisms, and that a contracting parties may require the exhaustion of local *administrative* remedies, provided that if such a remedy does not conclude within six months the investor may submit claims directly to arbitration). The Central America-Panama Free Trade Agreement demonstrates that Respondent knew how to include an exhaustion remedy in the instrument of consent, and also that the requirement that was agreed therein was much narrower than Respondent suggests is required in this case.

consent previously set out by a State (in a declaration, notification, or otherwise). For example, in *PSEG v. Republic of Turkey*, the tribunal refused to dismiss claims on the basis of a declaration by Respondent that qualified its consent to arbitration pursuant to Article 25(4) of the ICSID Convention. According to the tribunal, such unilateral declarations "always have to be embodied in the consent that the Contracting Party will later give in its agreements or treaties. . . [o]therwise the consent given in the Treaty stands unqualified by the notification."[126] Professor Schreuer is of the view that general declarations by States stating that they will require exhaustion of local remedies resemble notifications under Article 25(4) and, accordingly, "[i]f a State subsequently consents to ICSID arbitration in terms inconsistent with the prior general notification, the consent will prevail over the notification."[127] As detailed in the next section, neither of the instruments of consent applicable in this case embodies a requirement to exhaust local remedies; on the contrary, the dispute resolution proceedings established thereunder are inimical to any such requirement.

3. Neither of the two instruments in which Respondent gave its consent to submit the present dispute to arbitration requires the exhaustion of local remedies

59. Although Respondent seeks to misdirect the Tribunal's attention to the Declaration in Decree 41-88, the real question before the Tribunal is whether Respondent has required the exhaustion of local remedies as a condition of its consents to arbitrate the present dispute, which were provided in Article 10.17 of CAFTA-DR and Section 2.2 of the Agreement for Legal Stability and Investor Protection entered into by and between Honduras Próspera and the Republic of Honduras.[128] Respondent omits any discussion of the relevant provisions of either CAFTA-DR or the LSA and accordingly fails to identify an exhaustion requirement in either. Its singular reliance on the Declaration to the exclusion of the two

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[126] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction (4 Jun. 2004) (CLA-62) ¶ 145.

[127] Christoph H. Schreuer, *et al., Chapter II: Jurisdiction of the Centre, in* THE ICSID CONVENTION – A COMMENTARY (3d ed. 2022) (CLA-86) p. 619.

[128] Request for Arbitration ¶¶ 92, 98. Respondent incorrectly refers to the section of the Request for Arbitration addressing Claimants' acceptance of Respondent's offer to arbitrate investment disputes under CAFTA-DR and omits the LSA entirely. Preliminary Objection ¶ 25.

instruments that contain its consents to the present arbitration underscores that no such conditions exist.

60. *First*, CAFTA-DR does not require the exhaustion of local remedies; on the contrary the dispute resolution mechanism established in the Treaty is fundamentally inconsistent with any such requirement, as shown below.

- Article 10.18.2 of CAFTA-DR explicitly requires investors to waive any right to initiate or continue local remedies upon submitting claims, as a condition and limitation of consent:

> 2. No claim may be submitted to arbitration under this Section unless:
>
> . . . .
>
> (b) the notice of arbitration is accompanied,
>
> (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and
>
> (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers
>
> of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

- Article 10.18.4 of CAFTA-DR explicitly prohibits investors from submitting to arbitration claims for breach of an investment authorization or an investment agreement previously brought in local proceedings:

> 4. No claim may be submitted to arbitration:
>
> (a) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or

(b) for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C),

if the claimant (for claims brought under Article 10.16.1(a)) or the claimant or the enterprise (for claims brought under Article 10.16.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for adjudication or resolution.

- Annex 10-E expressly prohibits U.S. investors from submitting to arbitration any claims previously brought in local proceedings:

1. An investor of the United States may not submit to arbitration under Section B a claim that a Central American Party or the Dominican Republic has breached an obligation under Section A either:

(a) on its own behalf under Article 10.16.1(a), or

(b) on behalf of an enterprise of a Central American Party or the Dominican Republic that is a juridical person that the investor owns or controls directly or indirectly under Article 10.16.1(b),

if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section A in proceedings before a court or administrative tribunal of a Central American Party or the Dominican Republic.

2. For greater certainty, if an investor of the United States elects to submit a claim of the type described in paragraph 1 to a court or administrative tribunal of a Central American Party or the Dominican Republic, that election shall be definitive, and the investor may not thereafter submit the claim to arbitration under Section B.

61. The above cited provisions cannot be reconciled with a requirement of exhausting local remedies, and artificially grafting such a requirement onto the Treaty through the Declaration would deprive these provisions of their *effet utile*. Article 10.18.2 necessarily presumes that local remedies have not been exhausted; otherwise, the requirement of waiving any right to "initiate or continue" local proceedings makes no sense. Interpreting

the analogous waiver provision in the North America Free Trade Agreement ("**NAFTA**"), the tribunal in *Metalclad Corporation v. The United Mexican States* concluded that the waiver requirement, by itself, meant that the claimants were not required to exhaust local remedies as a precondition to arbitration.[129]

62. Similarly, Article 10.18.4 and Annex 10-E constitute fork-in-the-road provisions that preclude arbitration if there has been a resort to local remedies. This case includes claims that Respondent has breached its obligations under the Treaty as well as claims that it has breached an investment agreement (the LSA) and an investment authorization (the Charter of Próspera ZEDE).[130] Thus, Claimants were forced to choose definitively between local proceedings or international arbitration and, had they resorted to a local proceeding, they would be precluded from bringing claims at ICSID. [131] As Professor Schreuer explains, fork-in-the-road clauses and the local remedies rule are hard to reconcile because under a fork-in-the-road provision "the claimant has an irreversible choice between domestic courts and international arbitration," and thus "any step by the claimant to take the dispute to the national courts would rule out subsequent access to the international forum."[132] Likewise, the tribunal in *Bank Melli Iran v. The Kingdom of Bahrain* concluded that Bahrain could not demand the exhaustion of local remedies, among other reasons, because

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129 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 Aug. 2000) (CLA-56) n. 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.").

130 Request for Arbitration ¶ 93.

131 Respondent appears to have argued in another case that the Treaty's fork-in-the-road provisions are supposedly compatible with an exhaustion requirement because local remedies do not necessarily meet the triple identity test when compared to ICSID arbitration claims. *See JLL* (RL-0022) ¶ 47. While Claimants have not seen Respondent's arguments in that case, any such arguments would be significantly flawed insofar as they are plainly at odds with the plain meaning and the object and purpose of CAFTA-DR's dispute resolution provisions. Moreover, even if an investor did not allege the breach of the Treaty and rather relied on some local cause of action to address the underlying State conduct, it could still run afoul of the waiver requirement in 10.18.2 (which refers to "proceedings with respect to any measure alleged to constitute a breach") and the fork-in-the-road provision in 10.18.4 (which extends to claims for breach of an investment agreement or investment authorization). Claimants reserve the right to address any such arguments that Respondent may be saving and choose to deploy later in this case.

132 Christoph H. Schreuer, *Calvo's grandchildren: the return of local remedies in investment arbitration*, *in* 1 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 4, 1 (2005) (CLA-63) p. 16.

the applicable treaty contained a fork-in-the-road clause, pursuant to which seeking redress in Bahraini courts would have barred the claimants' international claims.[133]

63. In addition, CAFTA-DR's dispute resolution mechanism includes other provisions that, while not explicitly referring to local proceedings, are inconsistent with a requirement of exhausting local remedies as a practical matter. For example, Article 10.18.1 provides that "[n]o claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage." Because of the time necessary to exhaust local remedies would almost certainly be greater than the three-year prescription period, this requirement effectively would preclude arbitration if exhaustion of local remedies were required. Respondent's judiciary is notorious for having a significant backlog of cases, for not ruling within legal deadlines, and for taking an unreasonable amount of time to settle disputes. Notably, in March 2024, the Honduran judiciary launched a "National Plan to Eradicate Judicial Delay," noting that there are instances where disputes have been resolved after the parties had died or the dispute had ceased to be relevant for them.[134] A report authored by Respondent's judiciary in support of this new plan highlighted that some of the factors that cause judicial delay are: (i) failure by the Government to assign the judiciary constitutionally required funds; (ii) a historical backlog of cases; (iii) excessive demand; and (iv) inadequate and contradictory proceedings, among others.[135]

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[133] *Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain*, PCA Case No. 2017-25, Award (9 Nov. 2021) (CLA-85) ¶¶ 526-528 ("Consequently, 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 (with the exception of a denial of justice claims, which is not at issue here). 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.").

[134] *Press Release: National Plan to Eradicate Judicial Delay*, PODER JUDICIAL (11 Mar. 2024) (C-122).

[135] *National Plan to Eradicate Judicial Delay*, PODER JUDICIAL (11 Mar. 2024) (C-121) pp. 9-10.

64. *Second*, the LSA also does not require the exhaustion of local remedies; on the contrary, ICSID arbitration is the exclusive remedy for monetary claims thereunder. Specifically, Section 2.2 of the LSA provides that "[c]laims for monetary damages by the Parties arising under or in any way related to [the LSA] shall be arbitrated pursuant to the rules and procedures set forth by the International Centre for the Settlement of Investment Disputes (ICSID) as stated under the CAFTA-DR."[136] On its face, this provision mandates ICISD arbitration, without even the possibility of recourse to other types of arbitration, much less local proceedings. Indeed, if a dispute under the LSA were referred to the Honduran judiciary, basic arbitration law principles would require the judge to decline jurisdiction and refer the Parties to the exclusive arbitration mechanism to which they agreed.[137]

65. *Third*, in interpreting the scope of Respondent's consent in CAFTA-DR, the Tribunal should be loath to find that Respondent failed to act in good faith vis-à-vis its treaty partners by agreeing to a dispute resolution mechanism in the Treaty that is incompatible with an undisclosed exhaustion requirement tucked away in its domestic legislation ratifying the ICSID Convention. Indeed, absent any evidence suggesting otherwise, the Tribunal should assume that Respondent negotiated and entered into the Treaty in good faith, and not that it misled the U.S., Nicaragua, El Salvador, Costa Rica, Guatemala, and the Dominican Republic – its counterparties to CAFTA-DR – and their nationals, by offering a consent to ICSID arbitration that it believed could not be acted upon by foreign investors.

66. As stated by the International Court of Justice in the *Nuclear Test Case*, "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential."[138] As Bin Cheng explains, this is a well-established principle of

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[136] Agreement for Legal Stability and Investor Protection entered into by and between Honduras Próspera and the Republic of Honduras, dated 9 Mar. 2021 ("**LSA**") (CLA-6) Art. 2.2.

[137] Decree No. 211-2006, Code of Civil Procedure of Honduras (updated in May 2016) (C-100) Art. 24 ("Extension and limits of civil jurisdiction . . . 2. Organs with civil jurisdiction shall abstain from matters referred to them when any of the following circumstances exists: . . . d) Existence of a valid contract or clause subjecting the dispute to arbitration.").

[138] *Nuclear Tests* (Australia v. France), Judgment, ICJ Reports 1974 (CLA-50) p. 268.

international law: a State "shall not be allowed to blow hot and cold—to affirm at one time and deny at another."[139] Addressing the principle of good faith and its implications as a matter of international law in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Vice-President Alfaro likewise explained that good faith "must prevail in international relations," and that "inconsistency of conduct or opinion on the part of the State to prejudice another is incompatible with good faith."[140]

67. Given the patent incompatibility between the provisions of CAFTA-DR and an exhaustion requirement, for the Tribunal to accept Respondent's position that the Declaration in Decree 41-88 somehow imposes an exhaustion requirement, it would be necessary to conclude that Respondent incurred in precisely the type of bad faith inconsistency that Bin Cheng and Vice-President Alfaro warned against when it entered into CAFTA-DR, especially insofar as it did not alert its co-parties of any exhaustion requirement contradictory to the Treaty. Because, as a matter of international law, a State's bad faith should not be presumed, but must rather be proven,[141] Respondent will be in the odd

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[139] *See* Bin Cheng, *Chapter 5 – Other Applications of the Principle*, *in* GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1987) (CLA-52) pp. 141-142 (*quoting Cave v. Mills* (1862) 7 Hurlstone & Norman 913, 927) ("It is a principle of good faith that 'a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another . . . Such a principle has its basis in common sense and common justice and whether it is called 'estoppel,' or by any other name, it is one which courts have in modern times most usefully adopted.' In the international sphere, this principle has been applied in a number of cases.").

[140] *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Judgment on the Merits, Separate Opinion of Vice-President Alfaro, ICJ Reports 1962 (CLA-48) p. 42; *see also, id.* pp. 39-40 ("Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible *(allegans contraria non audiendus est).* Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State *(nemo potest mutare consilium suum in alterius injuriam). A fortiori*, the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it. *(Nullus commodum capere de sua injuria propria.)* Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right *(venire contra factum proprium non ilalet).*"); *Argentina-Chile Frontier Case* (Argentina v. Chile) 16 UNRIAA 109, Award (9 Dec. 1966) (CLA-49) p. 164 (endorsing Judge Alfaro's opinion).

[141] *See, e.g., Case concerning certain German Interests in Polish Upper Silesia (Germany v Poland) (Merits)* PCIJ Series A, No. 7 (CLA-46) ("such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement.").

position of having to prove that it acted in bad faith in entering into CAFTA-DR or invent some other explanation for blowing hot and cold.

68. *Fourth*, similarly and in any event, another implication of the principle of good faith is that Respondent is estopped from now arguing that Claimants' claims are inadmissible on the basis of a supposed exhaustion requirement that Respondent itself has contradicted through subsequent conduct and that it never raised prior to Claimants' initiation of this arbitration, and the existence of which its own acts belie. For example, following Decree 41-88, Respondent consented to ICSID arbitration on numerous occasions pursuant to a variety of agreements without conditioning its consent to the previous exhaustion of local remedies, including in a number of treaties with fork-in-the-road provisions and other terms incompatible with exhausting local remedies.[142] Moreover, as noted, based on public information, Respondent has never challenged, or at least never successfully challenged, another ICSID tribunal's jurisdiction on the basis that the claimant failed to exhaust local remedies before initiating ICSID arbitration.[143]

69. *Fifth*, insofar as Respondent's consent to arbitration under the ICSID Convention in the LSA is not conditioned on the exhaustion of local remedies, any subsequent attempt to impose such a condition on Claimants and seeking to have Claimants' claims dismissed on the basis of non-compliance with such a condition is tantamount to an impermissible withdrawal of Respondent's written consent to arbitration in the LSA. Article 25 of the ICSID Convention provides that "[w]hen the parties have given their consent [to ICSID arbitration], no party may withdraw its consent unilaterally."[144] In this case, Article 25 precludes Respondent from unilaterally adding new conditions on the basis of its latest interpretation of the Declaration in Decree 41-88 or any other instrument to which Claimants have not consented.

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142 *See supra* n. 124.

143 *See supra* ¶ 49.

144 *İçkale İnşaat Limited Şirketi v. Turkmenistan*, Award (8 Mar. 2016) (CLA-82) ¶ 244 ("[A] State's consent [in an investment treaty], which is addressed to an anonymous class of foreign investors meeting the relevant nationality requirements . . . is expressed in a binding manner even before any dispute has arisen . . . [the investment treaty] contains the State parties' 'consent' to arbitrate, which is binding on the State as such, without any further 'perfecting,' as a unilateral undertaking *vis-à-vis* a class of foreign investors.").

4. Accepting Respondent's Preliminary Objection would have grave implications

70. For all the reasons detailed above, the Preliminary Objection has no legal basis whatsoever and must be rejected. In addition, Claimants consider it pertinent to underscore that accepting the Preliminary Objection would have serious practical and policy implications that should make the Tribunal even more skeptical of Respondent's position.

71. Accepting the Preliminary Objection could effectively deprive Claimants of a forum or chance to be heard on their claims.

72. If the Tribunal were to grant the Preliminary Objection, Claimants would be unable to pursue local proceedings in Honduras and refile their claims before ICSID. As detailed above, both CAFTA-DR and the LSA make arbitration the exclusive remedy, meaning that Claimants would be unable to pursue local remedies without violating the express conditions of Respondent's consent and thus thereby blocking their access to ICSID arbitration.[145] Further, Claimants would not be able to file and exhaust local proceedings in Honduras within the three-year prescription period established in Article 10.18.1 of CAFTA-DR.[146] Respondent surely would rely on both obstacles if Claimants were forced to pursue local remedies and then seek to pursue their claims at ICSID (notably, it has not stated otherwise in the Preliminary Objection).

73. Further, the Tribunal should be skeptical of Respondent's assertion that Claimants could submit their claims to arbitration under the UNCITRAL Rules.[147] While CAFTA-DR does in theory provide for arbitration under the UNCITRAL Rules as an alternative to arbitration under the ICSID Convention (which would not be subject to Respondent's Declaration in Decree 41-88 approving the ratification of the ICSID Convention even under Respondent's

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145 *See supra* ¶¶ 60-64.

146 *See supra* ¶ 63; CAFTA-DR (CLA-2) Art. 10.18.1 ("No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.").

147 Preliminary Objection ¶ 42.

interpretation),[148] it is far from clear that Claimants would be able to avail themselves of such an option. Given Respondent's conduct in the instant proceedings, it is to be expected that Respondent will continue to assert every conceivable argument, misplaced though it may be, and seek to bar Claimants from being heard regardless of the applicable rules.

74. For example, notwithstanding its assertion that arbitration under the UNCITRAL Rules is an option, Respondent has not stated that the three-year prescription period in Article 10.18.1 of CAFTA-DR has been tolled during the pendency of the instant proceedings. This is significant because the Tribunal might not even rule on the Preliminary Objection until the end of March 2025, and Claimants could face the difficult and uncertain prospect of having to immediately file claims as to Respondent's repeal of the ZEDE Legal Framework in April 2022 in order to avoid arguments by Respondent that the claims are untimely. This would be a particularly unjust result considering that Claimants commenced arbitration in December 2022, and that the delay in the proceedings is directly attributable to Respondent's failure to participate in the constitution of the Tribunal and its failed challenge of Mr. Rivkin.

75. Similarly, Claimants relied on the terms of Respondent's consent to arbitration in CAFTA-DR, and complied with the waiver requirement in Article 10.18.2 by submitting a waiver of "any right to initiate or continue … other dispute settlement procedures" in their Request for Arbitration.[149] Notwithstanding its assertion that arbitration under the UNCITRAL Rules is an option, Respondent has not indicated that it would not seek to bar Claimants from refiling claims by invoking the waiver.

76. In any event, as detailed above, ICSID arbitration is the exclusive remedy for monetary claims under the LSA. If the Tribunal were to dismiss those claims, it is far from clear that Claimants have any other options. Indeed, as noted, as regards those claims, there are no local remedies to be exhausted: in view of the arbitration clause in the LSA, any Honduran

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[148] *See, e.g.*, CAFTA-DR (CLA-2) Art. 10.16.3.

[149] Request for Arbitration ¶ 105; Honduras Próspera's Waiver Pursuant to Article 10.18 of the CAFTA-DR, dated 19 Dec. 2022 (C-84); SJBDC's Waiver Pursuant to Article 10.18 of the CAFTA-DR, dated 19 Dec. 2022 (C-85); PAC's Waiver Pursuant to Article 10.18 of the CAFTA-DR, dated 15 Dec. 2022 (C-76).

court seized of claims under the LSA should decline to hear the matter and refer the parties to arbitration under basic arbitration law principles.[150]

D. IN ANY EVENT, LOCAL REMEDIES WOULD BE FUTILE IN THIS CASE

77. Even assuming *arguendo* that Respondent has required the exhaustion of local remedies as a condition of its consents to arbitration in this case, which it has not, Claimants are not required to exhaust local remedies because local remedies do not provide a reasonable possibility of redress.

78. Respondent alleges that Decree 41-88 serves to "preserve the traditional rule under customary international law."[151] Even if this were the case, the traditional rule that Respondent now purports to preserve is not absolute. According to the International Law Commission ("**ILC**"), the traditional rule only applies if a local remedy is available,[152] offers a real prospect of relief,[153] and would result in a binding decision.[154] The crucial question, explains the ILC, is "whether [the local remedy] gives the possibility of an effective and sufficient means of redress,"[155] and local remedies need not be exhausted

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150 *See supra* ¶ 64.

151 Preliminary Objection ¶¶ 27, 29.

152 Report of the International Law Commission on the work of its twenty-ninth session, Yearbook of the International Law Commission (1977), Vol. II-2 (CLA-51) p. 47 ("Needless to say, the requirement of the exhaustion of local remedies by the individuals concerned presupposes that there are remedies open to those individuals under the internal legal system of the State in question. If the measure initially taken by a State organ, whether it be a legislative, administrative, judicial or other measure, does not admit of any remedy, the possibility of using other means to redress the situation created by that measure is ruled out.").

153 *Id*. pp. 47-48 ("It is generally recognized in principle that the mere existence of remedies does not automatically impose a mandatory requirement that the individuals concerned make use of them . . . From the standpoint of the person with whom that initiative lies, it seems plain that the action to be taken relates to all avenues which offer a real prospect of still arriving at the result originally aimed at by the international obligation or, if that has really become impossible, an equivalent result . . . ").

154 ILC Articles on Diplomatic Protection (CLA-65) p. 45 ("The injured alien is, however, only required to exhaust such remedies which may result in a biding decision. He is not required to approach the executive for relief in the exercise of its discretionary powers.").

155 *Id*. p. 45 ("Courts in this connection include both ordinary and special courts since 'the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress.'").

where "the course of justice is unduly slow or unduly expensive in relation to the prospective compensation."[156]

79. The principle that local remedies need not be exhausted if they would be futile has been recognized for almost a century, since at least the *Finnish Shipowners* case, in which the Arbitrator explained:

> It is […] common ground that [it] is not sufficient to bring in the local remedies rule; the remedy must be effective and adequate.[157] […] the local remedies rule does not apply where there is no effective remedy. […] this is the case where a recourse is obviously futile.[158]

80. As the futility principle has become more established, the "obviously futile" standard has been replaced by the reasonableness standard set out in Article 15 of the ILC's Draft Articles on Diplomatic Protection:

> Local remedies do not need to be exhausted where:
>
> (a) There are no reasonably available local remedies to provide effective redress or the local remedies provide no reasonable possibility of such redress.[159]

81. The reasonableness standard also applies in investor-State arbitration cases.[160]

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[156] Report of the International Law Commission on the work of its twenty-ninth session, Yearbook of the International Law Commission (1977), Vol. II-2 (CLA-51) p. 49, n. 204.

[157] *Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland v. Great Britain)*, 3 UNRIIA 1481, Award (9 May 1934) (CLA-47) p. 1494.

[158] *Id.* p. 1503.

[159] ILC Articles on Diplomatic Protection (CLA-65) Art. 15.

[160] *Ambiente Ufficio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 Feb. 2013) (CLA-79) ¶¶ 620, 603 ("Given the jurisprudence of the Supreme Court in Argentina and in light of the circumstances prevailing in the present case the Tribunal concludes that having recourse to the Argentine domestic courts and eventually to the Supreme Court would not have offered Claimants a reasonable possibility to obtain effective redress from the local courts and would have accordingly been futile."). In order to reach this conclusion, the tribunal considered that "the futility exception to the exhaustion of local remedies rule in the field of diplomatic protection is, in the light of Art. 31(3)(c) of the VCLT, also applicable to clauses requiring recourse to domestic courts in international investment law."; *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award (20 Sept. 2021) (CLA-84) ¶ 562 ("In the Tribunal's opinion, the exhaustion rule is subject to two categories of exceptions: an aggrieved alien is only required to pursue remedies - which are reasonably available (i), and - which have an expectation that they will be effective,

82. In the instant case, Respondent does not offer an adequate system of judicial protection, and Claimants would have no reasonable possibility of redress by pursuing local remedies.

83. *First*, as a general matter, the Honduran judicial system is plagued by serious problems, with international observers and Respondent's own officials recognizing its lack of independence and serious delays.

- In 2019, a Special Rapporteur of the U.N. High Commissioner for Human Rights concluded that Respondent's judiciary exhibited serious problems, among others, in terms of judicial independence, separation of powers, interference by the legislative and executive branches of government, and corruption.[161]

- Also in 2019, a report by the Interamerican Commission on Human Rights found that Honduras's judicial system suffers from "structural problems that weaken the guarantees of independence and impartiality" of the judiciary.[162]

- In 2022, Respondent's then Minister of Finance (and current Secretary of Defense), Ms. Rixi Moncada, described the country's justice system as being "in rags" and stated that "no one trusts" local courts because the judiciary is "penetrated by criminal networks and corruption."[163]

- The 2024 Investment Climate Report Statements of U.S. Department of State on Honduras highlights that "[t]he Honduran judicial system can be inefficient, lacks transparency, and is subject to political influence and/or corruption," and that for that reasons numerous investors strongly prefer alternative dispute resolution mechanisms.[164]

- According to the 2024 Freedom House Report on Honduras, "[p]olitical and business elites exert excessive influence over the judiciary, including the Supreme Court. Judicial appointments are made with little transparency, judges have been removed from their posts for political motivations, and several lawyers have been

i.e. the measure or appeal has a reasonable prospect of correcting the judicial wrong committed by the lower courts (ii).").

161 *Preliminary Observations on the Official Visit to Honduras*, OHCHR (22 Aug. 2019) (C-102).

162 *Situation of Human Rights in Honduras*, INTER-AMERICAN COURT OF HUMAN RIGHTS (27 Aug. 2019) (C-103) pp. 29, 43.

163 *The justice system is in "rags," but CICIH memorandum generates hope*, PROCESO DIGITAL (19 Dec. 2022) (C-108).

164 *2024 Investment Climate Statements: Honduras*, U.S. DEPARTMENT OF STATE (2024) (C-118).

killed in recent years," and "[t]he lack of due process is a serious issue in Honduras."[165]

- In 2024, Respondent's own judiciary launched a "National Plan to Eradicate Judicial Delay."[166] A 2019 report cited in support of the Plan, found that Honduras had 100,507 case files in its Judicial Default Control System [*sistema de control de mora judicial*], of which 71,037 were found to be in a state of judicial default [*mora judicial*]. Strikingly, the report found that over 20,000 cases were over ten years old, with 4 dating back to 1975-1980.[167]

- In August 2024, the President of Respondent's Supreme Court commented on the U.S. Department of State's Investment Climate report, acknowledging that since day one her main challenge has been dismantling the corruption networks and connections with organized crime and drug dealers that exist in the Judiciary.[168] The allegations of misconduct by individuals closely tied to Ms. Obando should give pause to question her sincerity.[169]

84. A telling example of the disfunction within the Honduran judiciary is Respondent's failure to appoint judges to the Special Jurisdiction of the ZEDEs. Respondent established the Special Jurisdiction of the ZEDEs in 2021, giving it exclusive jurisdiction over disputes in the ZEDEs relating to criminal matters, child and adolescent matters, and certain contractual issues as to which arbitration has been waived.[170] Despite the existence of the jurisdiction on paper, no judges were ever appointed making recourse there impossible.

85. *Second*, the current administration has taken steps to control the judiciary, including, without limitation, through the appointment of 15 justices to the Supreme Court in 2023, reportedly through a process in which "political quotas replaced meritocracy."[171]

- Under the Constitution of Honduras, Supreme Court justices are supposed to be elected by the National Congress from a list prepared by an official Nominating Board made up of representatives from the Supreme Court, the Honduran Bar

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165 *Freedom in the World 2024: Honduras*, FREEDOM HOUSE (2024) (C-119).

166 *National Plan to Eradicate Judicial Delay*, PODER JUDICIAL (11 Mar. 2024) (C-121).

167 *National Plan to Eradicate Judicial Delay*, PODER JUDICIAL (Jan. 2019) (C-101).

168 Maldonado, Fernando, *Corruption, favoritism and bribes tarnish Honduras's judicial system*, EL HERALDO (18 Jul. 2024) (C-123).

169 *See supra* ¶ 10.

170 *See* Supreme Court of Honduras, Agreement No. CSJ-01-2021, dated 15 Jun. 2021 (C-37).

171 *Honduras elected the 15 new justices of the Supreme Court*, EXPEDIENTE PÚBLICO (16 Feb. 2023) (C-110).

Association, the National Commissioner of Human Rights, the Honduran Council of Private Enterprise, faculty from the National Autonomous University of Honduras, civil society organizations, and Labor Confederations.[172] In 2022, however, 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.[173]

- In 2023, the Nominating Board submitted a list of 45 candidates that it ranked according to their qualifications. The President of the National Congress, Mr. Luis Redondo, a member of President Castro's coalition, stated that the Nominating Board's ranking was irrelevant, and that Congress would choose the 15 justices.[174] Ultimately, the ruling LIBRE party reached an agreement with the Liberal and National parties to divide the 15 seats on the Court amongst themselves, with the LIBRE party being allotted six (6) justices, while the National and Liberal parties were allotted five (5) and four (4), respectively.[175]

- On 17 February 2023, Ms. Rebeca Lizette Raquel Obando of the LIBRE party – the aunt of President Castro's son-in-law – was appointed Presiding Justice of the Supreme Court.[176] That same day, the Court justices modified the Court's regulations to create six "substitute justices," to be designated by the Court and appointed to plenary sessions by the Presiding Justice.[177] The justices agreed that each of the three parties represented in the plenary would select two substitute

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[172] Constitution of Honduras of 1982 with Amendments through 2013 (C-3) Art. 311.

[173] Among other things, the reform changed who could be nominated (*e.g.*, eliminating requirements that precluded members of political parties, former members of the Nominating Board, relatives of members of the Nominating Board or members of Congress, and individuals with rulings against them for serious crimes, domestic violence, and failure to pay child support) and changed the scoring criteria to be taken into account (*e.g.*, reducing the points that had to be awarded to for personal and professional integrity and professional ethics). *See* Decree No. 74-2022, published on 20 Jul. 2022 (C-104); *Honduras: The Government of Xiomara Castro prepares a tailored Supreme Court*, EXPEDIENTE PÚBLICO (22 Jul. 2022) (C-105).

[174] *The Castro-Zelayas seek to control the Supreme Court of Honduras*, EXPEDIENTE PÚBLICO (25 Jan. 2023) (C-109).

[175] *Corruption and nepotism. Learn of the history of the justices of the new Supreme Court of Honduras*, EXPEDIENTE PÚBLICO (17 Feb. 2023) (C-112).

[176] *The Castro-Zelayas in Honduras are copying the authoritarian manual from Daniel Ortega*, EXPEDIENTE PÚBLICO (29 Mar. 2023) (C-116) ("The last key nomination for the Libre Party was to the Supreme Court of Justice (CSJ in Spanish). Amid irregularities in the early hours of February 17, Rebecca Lizette was named president of the CSJ. In addition to being a supporter of the governing party, Lizette has a history of money laundering and her daughter has been linked to Juan Matta-Ballesteros, a former Honduran drug lord with ties to the Medellín Cartel who is currently detained in the United States."); *Honduras elected the 15 new justices of the Supreme Court*, EXPEDIENTE PÚBLICO (16 Feb. 2023) (C-110).

[177] Agreement of the Supreme Court of Honduras published in Gazette No. 36,158, Section B amending the Supreme Court's Internal Regulations, dated 17 Feb. 2023 (C-111).

justices.[178] The legality of the move was questioned because the Constitution of Honduras makes no provision for substitute justices.[179]

- The politicization of the Court appointment process was apparent on its face. Immediately after the selection of the justices, Mr. Manuel "Mel" Zelaya, former President of Honduras and husband and advisor to President Castro, stated that he had been a protagonist in shaping the Court, and specifically called for it to rule the ZEDE Legal Framework unconstitutional.[180]

86. *Third*, Claimants' claims arise from Respondent's repeal of the ZEDE Legal Framework and refusal to honor its legal stability undertakings. These acts constitute breaches of Respondent's obligations under CAFTA-DR, the Charter of Próspera ZEDE, and the LSA, for which Claimants seek redress.[181] While local courts may sometimes have jurisdiction over causes of action with respect to measures alleged to constitute a treaty or contract breach, that is not the case where the treaty or contract specify that arbitration is the exclusive remedy. In any event, there is no local proceeding through which Claimants would have any reasonable possibility of redress in Honduras.

- In its Preliminary Objection, Respondent asserts that Claimants could pursue local proceedings for various measures that Claimants identified in their Request for Arbitration as examples of acts by Respondent interfering with the operation Próspera ZEDE in the wake of its repeal of the ZEDE Legal Framework.[182] 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 Claimants' claims. Respondent has not identified a single proceeding that could have given Claimants relief for Respondent's repeal of the ZEDE Legal Framework and failure to address the consequences for existing ZEDE.

- On the contrary, it is evident that no local court would grant Claimants relief, particularly in light of the Supreme Court's decision of 20 September 2024, which reportedly declared the ZEDE Legal Framework unconstitutional *ex tunc*.[183]

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178 *SC modified its internal regulations to create deputy judges*, HONDUDIARIO (18 Feb. 2023) (C-114).

179 *Id.*

180 *"Mel" Zelaya thinks that new Supreme Court should reverse re-election and ZEDEs*, HONDUDIARIO (21 Feb. 2023) (C-115).

181 Request for Arbitration ¶ 93.

182 Preliminary Objection ¶ 39.

183 *See Press Release*, PODER JUDICIAL (20 Sept. 2024) (C-145).

According to one of the Supreme Court justices, there is no legal recourse against this decision.[184] Respondent appears to have expected the decision, as it stated in the Preliminary Objection that the Court would rule soon.[185] As detailed above, the decision has not yet been made public, but is already highly controversial, including because of its use of substitute justices and the politicized circumstances of its issuance.[186] Even putting aside such concerns, however, the nature of the Supreme Court process underscores Claimants' lack of options in Honduras. In particular, the Supreme Court procedure, to which Claimants were not parties, was political from the start, arising from a petition to declare the ZEDE Legal Framework unconstitutional filed by Respondent's Anti-ZEDE Commissioner, Mr. Fernando Garcia, who recently explained that this was motivated by the National Congress's failure to repeal the ZEDE Constitutional Provisions in 2023.[187]

- President Castro's and her allies' accusations of treason and calls for prosecution are particularly troubling.[188] Claimants' decision to submit claims to international arbitration was not taken lightly. Claimants invested in Honduras to develop a project that would promote development and create opportunities benefiting both the people of Honduras and Claimants, and they would much rather have found an amicable solution, had one been possible (which they tried tirelessly to achieve). Moreover, Respondent has numerous ways of punishing and pressuring Claimants and anyone who chooses to help them. Aside from the already mentioned accusations of treason, it is notable that Respondent can punish any Honduran citizen who aids in an international claim against the State with loss of nationality.[189] Respondent clearly wishes to avoid accountability, but what it cannot do is simply declare that Claimants are not entitled to bring their claims before ICSID.

87. *Fourth*, Respondent's vehement anti-ZEDE posture in this proceeding confirm the futility of local proceedings. Though irrelevant to its actual objection, Respondent's own factual allegations underscore the futility of Claimants seeking redress in Honduras. According to Respondent, "[t]he unanimity regarding the repeal of the ZEDE regulatory framework is absolute," "Honduran civil society —also unanimously— has spoken out against the ZEDE regime," "the Constitutional Chamber [of the Supreme Court] declared the ZEDE regime

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184 Flores, Javier, *No legal recourse can overturn ruling against ZEDEs, experts say*, EL HERALDO (23 Sept. 2024) (C-149).

185 Preliminary Objection ¶ 10.

186 *See supra* ¶ 10.

187 *See* HCH Television Digital, X @HCHTELEVDIGITAL (19 Sept. 2024) (C-141).

188 *See supra* ¶ 10.

189 Constitution of Honduras of 1982 with Amendments through 2013 (C-3) Art. 42.

unconstitutional," and "the democratic institutions of the Republic of Honduras continue toward the reclamation of the territorial integrity of the State."[190] While Claimants disagree that "Honduran civil society —also unanimously— has spoken out against the ZEDE regime,"[191] on Respondent's own case seeking relief in Honduras would be futile.

III. REQUEST FOR RELIEF

88. For the above reasons, Claimants respectfully request that the Arbitral Tribunal:

a) Reject Respondent's Preliminary Objection;

b) Order Respondent pursuant to ICSID Arbitration Rule 52 to pay forthwith all costs associated with its Preliminary Objection, including the costs incurred by Claimants for purposes of legal representation and the costs incurred by the Tribunal and ICSID, with interest running as of the date of the order at a rate determined by the Tribunal.

[190] Preliminary Objection ¶¶ 8-11.

[191] *See supra* ¶ 7; Request for Arbitration ¶ 41; Letter from the Mayor of La Ceiba to Erick Brimen, dated 14 Aug. 2018 (C-20); Letter from the Mayor of Roatán to Erick Brimen, dated 22 Mar. 2019 (C-24); Letter from the Governor of the Bay Islands to Erick Brimen, dated 1 Apr. 2019 (C-25); Letter from Congressman Bader Dip to Erick Brimen, dated 10 Oct. 2018 (C-22); Crawfish Rock Community Resolution, dated 29 Jun. 2019 (C-27); Image & Acceptance of Próspera ZEDE: Final Report, MACRODATO (2024) (C-120) pp. 9, 22.

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