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' REJOINDER ON THE PRELIMINARY OBJECTION

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25 November 2024

WHITE & CASE
Counsel for Claimants

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I. INTRODUCTION

1. Claimants' Observations ("**Observations**") demonstrated that Respondent's preliminary objection under Article 10.20.5 of CAFTA-DR ("**Preliminary Objection**") is fatally flawed. Unable to rebut Claimants' arguments, Respondent's Reply ("**Reply**") once again relies on spurious attacks on Claimants and their investment entirely unrelated to the issue before the Tribunal, and on myriad misrepresentations and irrelevant arguments.

2. The question at issue in this Preliminary Phase is whether the Tribunal should declare that it lacks jurisdiction on the ground that Claimants have not exhausted local remedies as purportedly required by a Declaration ("**Declaration**") in Decree No. 41-88 ("**Decree 41-88**"). Clearly, the answer is no.

3. Respondent now admits that exhaustion of local remedies is not a prerequisite to ICSID arbitration unless a State has required such exhaustion as a condition of its consent in accordance with Article 26 of the ICSID Convention ("**Article 26**"). The simple and obvious truth is that Respondent did not require the exhaustion of local remedies in either of the relevant instruments of consent in this case. It did not do so in the Dominican Republic-Central America-United States Free Trade Agreement ("**CAFTA-DR**"). It did not do so in the Agreement for Legal Stability and Investor Protection entered into between Honduras Próspera and the Republic of Honduras on 9 March 2021 ("**LSA**"). Faced with this simple truth, Respondent argues that its ICSID arbitration agreements implicitly require exhaustion, but this argument is legally fundamentally flawed and it is apparent that this simply cannot be, particularly in the case of CAFTA-DR and the LSA, both of which are inconsistent with local remedies.

4. Respondent is unable to muster any authority for its argument that it "provided for the exhaustion of local remedies as a jurisdictional condition in its legislation approving the ICSID Convention," *i.e.*, Decree 41-88, and that this supposed jurisdictional condition "is applicable to all arbitration agreements referring to ICSID and involving the Republic of Honduras, whether or not the condition was expressly included in the instrument of

consent."[1] This is unsurprising, because Respondent's argument that its "express[ion] of its willingness to require exhaustion of local remedies" in future consents to ICSID arbitration in Decree 41-88 implies an exhaustion requirement in all its ICSID arbitration agreements is counter not only to Article 26 of the ICSID Convention itself, which mandates that any exhaustion requirement be included in the instrument of consent, but also to international law principles such as the fundamental rule that a State's consent to ICSID arbitration must be clear and unambiguous, that declarations are statements of intent that have no legally binding effect, and that domestic law does not prevail over subsequent incompatible treaty terms.

5. It is telling that Respondent has been unable to identify a single instance prior to this arbitration of its having understood that Decree 41-88 imposed such a condition on its consent, whereas the evidence shows myriad consents to ICSID arbitration by Respondent that cannot be reconciled with the existence of such a condition. It is obvious that Respondent developed its novel interpretation of Decree 41-88 to avoid accountability in this case (as well as the many other ICSID arbitrations that have been recently initiated against Respondent as a result of the anti-foreign investment policies of the current administration).

6. The Observations detailed many other reasons why Respondent's Preliminary Objection should fail, both procedural and substantive. Respondent is unable to rebut any of them in its Reply. The structure of the remainder of this submission is as follows:

- Section II.A shows that there does not appear to be significant disagreement as to the legal framework of Article 10.20.5 of CAFTA-DR ("**Article 10.20.5**"). Respondent agrees that this Preliminary Phase is not a mini-trial and that the only facts that need to be decided at this juncture are those that bear on the specific issue before the Tribunal. The only relevant fact remains that Claimants did not exhaust local remedies in Honduras before initiating the present arbitration, which is uncontested;

- Section II.B demonstrates that Respondent fails to rebut that it did not make a valid objection to the Tribunal's competence under Article 10.20.5 of CAFTA-DR. The Preliminary Objection raises an issue of admissibility, not competence, and

[1] Reply ¶ 82.

therefore is not a proper objection to the Tribunal's competence under Article 10.20.5 of CAFTA-DR;

- Claimants show in Section II.C that Respondent fails to rebut that it did not validly require the exhaustion of local remedies as a condition of its consents to arbitrate the present dispute. Respondent's mere "express[ion of] its willingness to require exhaustion of local remedies" as it itself characterizes the Declaration in its Reply is not a valid exercise of Article 26 of the ICSID Convention, nor does Decree 41-88 somehow imply an exhaustion requirement in all of Respondent's subsequent consents to ICSID arbitration. Indeed, the applicable instruments of consent in this case are inconsistent with any requirement to exhaust local remedies; and

- Section II.D shows that, in any event, Respondent fails to rebut that local remedies would be futile in this case.

7. For Respondent's Preliminary Objection to succeed, Respondent would have to prevail on every point in dispute, any one of which is fatal to the objection. Respondent flounders in the face of each point.

* * *

8. Unable to present a cogent case on the issue for decision, Respondent once again has chosen the path of sound and fury, seeking to use this Preliminary Phase as an excuse for wild allegations that are entirely irrelevant to the Preliminary Objection, all on the basis that "[w]hat is at stake is not a simple investment dispute," and "[w]hat is at stake is whether an international arbitral tribunal will endorse an unprecedented attempt to fragment the sovereignty."[2] Notably, Respondent fails to even mention the issue in dispute until page 5 of its Reply,[3] opting instead to first contest Claimants' Request for Arbitration and castigate its own ZEDE regime and Claimants' investments thereunder.[4]

9. Claimants reject Respondent's baseless and irrelevant accusations, which will be addressed at the appropriate time. Claimants look forward to the opportunity to rebut Respondent's efforts to demonize Claimants and their investment in its recent pleadings as well as in its ongoing public campaign against the ZEDEs. The evidence will show that the ZEDEs are

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[2] *Id.* ¶¶ 2, 16.

[3] *Id.* ¶ 14.

[4] *Id.* ¶¶ 2 *et seq.*

not the fiendish assault on sovereignty that Respondent alleges, but rather are innovative special economic zones created to attract investment, catalyze development, and create jobs in a country that continues to ache for all three. Worldwide, special economic zones have a proven record (for instance, the Dubai's International Financial Centre and Shenzhen) and the potential benefits of the ZEDEs for Honduras cannot be overstated. Próspera ZEDE shares many characteristics with other such zones, as summarized in Annex A hereto.

10. While Honduras's current administration may not like the ZEDEs, the evidence will show that it was Honduras, not Claimants, that created the legal framework for the ZEDEs (the "**ZEDE Legal Framework**") enshrined in its own Constitution and the Organic Law of the ZEDEs. Honduras promoted the ZEDEs for years and induced Claimants to invest. In this context, Claimants made significant investments in Próspera ZEDE which have already resulted in thousands of jobs being created, just as Honduras wanted. That investment would have grown by hundreds of millions of dollars had Honduras not done an about face on the ZEDEs shortly after the current administration assumed power.

11. For present purposes, Claimants merely observe that Respondent's assertion that ZEDEs "threaten[] the very existence of the Honduran State" is nothing but gross mischaracterization and hyperbole,[5] and that, contrary to what Respondent alleges, there is nothing nefarious about Próspera ZEDE:

- **Próspera ZEDE is a product of the ZEDE Legal Framework, which Honduras put in place to promote investment and development.** Autonomy and legal stability were critical elements of the regime deliberately established by Honduras.

- **Próspera ZEDE has a best practices justice system.** In accordance with the ZEDE Legal Framework, and consistent with the earlier 2011 Law for the Promotion and Protection of Investments (*Ley para la Promoción y Protección de Inversiones*), arbitration is the ZEDE's default dispute resolution mechanism for contractual disputes, and Honduras established a Special Jurisdiction of the ZEDEs. There is nothing nefarious about this.

[5] *Id.* ¶ 2.

- **Próspera ZEDE furnishes access control to private property and local law enforcement.** In accordance with the ZEDE Legal Framework, the ZEDE is entitled to establish a police department. There currently is a contract with a private security service which focuses on access control, which is entirely commonplace in endemically insecure Honduras. It is absurd to regard these as paramilitary.

- **Próspera ZEDE has a best practices monetary policy.** In accordance with the ZEDE Legal Framework and overseen by regulatory body headed by a former Honduran Central Banker, the former Deputy General Counsel of the U.S. Department of Homeland Security, and a founder of the Dubai International Financial Center,[6] the ZEDE recognizes the use of Bitcoin and Qualifying Cryptocurrencies, which are accepted by most businesses in the ZEDE in addition to fiat currencies.

- **Próspera ZEDE is an expression of State Sovereignty and is subject to national supervision.** In accordance with the ZEDE Legal Framework, the ZEDE is subject to supervision by the authorities created by Honduras, including by the Committee for the Adoption of Best Practices ("**CAMP**") and the Technical Secretary.

12. Respondent now seeks to distance itself from the ZEDE Legal Framework by calling it "the product of one of the darkest eras in Honduran history" and criticizing prior Supreme Court rulings that the ZEDE Legal Framework was constitutional.[7] These efforts ring hollow. Indeed, Respondent's effort to link the ZEDEs with former President Juan Orlando Hernández while emphasizing his conviction for drug trafficking is highly cynical given the many scandals that the current administration is itself facing for its own officials' ties to drug trafficking.[8]

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[6] *See Overview*, ROATAN FINANCIAL SERVICES AUTHORITY (last accessed 25 Nov. 2024) (C-180).

[7] Reply ¶¶ 2, 7.

[8] Observations ¶ 10. Both internal U.S. government sources and public reporting have addressed the alleged links between members of the Castro-Zelaya family to organized crime and drug trafficking for a long time. *See* Classified Memorandum by Ambassador Charles A. Ford, WIKILEAKS dated 6 Dec. 2005 (C-163) ("Zelaya's family tree raises eyebrows. . . . Carlos [Zelaya], who later became a congressman, was reportedly driving a car used in the kidnapping of Camilo Giron and Junior Kafati (the son of Salomon Kafati), who were later murdered (in the early 1980s). Although he claimed to be innocent, Carlos served 10 years in jail in connection with this incident."); Classified Memorandum by Ambassador Charles A. Ford, WIKILEAKS dated 15 May 2008 (C-164) ("Over [President Manuel Zelaya's] two and a half years in office, he has become increasingly surrounded by those involved in organized crime activities . . . There also exists a sinister Zelaya, surrounded by a few close advisors with ties to both Venezuela and Cuba and organized crime . . . Due to his close association with persons believed to be involved with international organized crime, the motivation behind many of his policy decisions can certainly be questioned. I am unable to brief Zelaya on sensitive law enforcement and counter-narcotics actions due my concern that this would put the lives of U.S. officials in jeopardy. . . His pursuit of immunity from the numerous activities of organized crime carried out in his Administration will cause him to threaten the rule of

13. Ultimately, the only thing that Respondent accomplishes by wasting ink on issues unrelated to the Preliminary Objection is to highlight the weakness of its position and its own insecurity in this regard. Ironically, Respondent makes an especially poorly disguised attempt at projection when it tries to blame Claimants for "try[ing] to divert the Tribunal's attention with political discussions."[9] To be clear, Claimants' position has been and remains that the Tribunal can safely, and should, ignore the entire irrelevant factual discussion.

* * *

14. More significant is Respondent's approach to the decision of the Supreme Court of Honduras that reportedly declares the ZEDE Legal Framework unconstitutional. As Claimants demonstrated, this – still not officially published – decision arose under highly questionable circumstances, including, *inter alia*, the capture and politicization of the Supreme Court and a series of scandals that have seen close family members of the Presiding Justice (who is a member of the ruling LIBRE party and the aunt of President Castro's son-in-law) and the President of Honduras herself implicated for bribe-taking and consorting with drug-traffickers.[10] Respondent calls Claimants' assertions "irresponsible," yet does not (and cannot) deny that the Presiding Justice is under investigation or that the President's nephew and brother-in-law have had to resign from their positions as Minister of Defense and congressional leader, respectively, as a result of these scandals.[11]

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law and institutional stability."); Ryan C. Berg, *From Bad to Worse: The Xiomara Castro Administration Begins to Weaponize the Honduran State*, CSIS (4 Nov. 2024) (C-173) ("Ironically, the Castro administration swept to power on an anti-corruption message. Castro juxtaposed her administration to the prosecution and eventual conviction of her predecessor, Juan Orlando Hernández. As the video in question well demonstrates, the rumors are likely true—the Castro-Zelaya family appears embedded in some of the same criminal networks as its predecessor.").

9 Reply ¶ 7.

10 Observations ¶¶ 10, 85.

11 *See id*. ¶ 10; Noticieros Hoy Mismo, X @HOYMISMOTSI, (28 Aug. 2024) (C-128); 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); 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); *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). It is unclear if any progress has been made since September to investigate these scandals. While the Attorney General Johel Zelaya has vowed to pursue

15. Instead, Respondent attempts to whitewash the Supreme Court's decision, insisting that it "was carried out in strict compliance with the powers conferred upon [the Presiding Justice] by law" and "without abnormalities and in strict compliance with the law"[12] (notwithstanding the fact that the applicable regulations were enacted following the recent takeover of the Court), and that it follows denunciations of the ZEDE Legal Framework "by different sectors of the Honduran society" and "the parliamentary session of April 20, 2022 . . . that sought to repeal the constitutional provisions of the ZEDE and repealed the Organic Law of the ZEDE, respectively"[13] (notwithstanding the fact that although the National Congress did repeal the ZEDE Organic Law, it ultimately refused to taken action to amend the Constitution of Honduras to remove the ZEDE Constitutional Provisions, which is why the government had to turn to the Supreme Court instead).

16. Respondent glosses over a particularly egregious aspect of the situation that exposes the lawlessness of the current regime. On 20 September 2024, the Supreme Court announced its decision through a press release.[14] More than two months later, the Court still has not formally published the decision, thus leaving its content and effects unclear. On 14 November 2024, the Honduran press published what reportedly is a copy of the decision, which was indeed dated 20 September 2024 but was only partially signed.[15] The Supreme Court's "X" account tweeted that the opinion was being notified to the National Congress on 21 November 2024, with the press reporting that magistrates had signed the decision

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investigations vigorously, he is also a member of the Zelaya dynasty, and was appointed in November 2023 by a pro-government commission that bypassed the traditional bipartisan consensus, angering opposition parties and raising further allegations of undue influence by the ruling party. Observers, including international commentators, warned that this appointment consolidated power and undermined public trust in the judiciary. C. Welch and A.M. Mendez Dardon, *Honduras Attorney General Election Breakdown 2023*, WOLA (30 Aug. 2023) (C-168). *See also Transparency International concerned over threats to civic space in Honduras*, TRANSPARENCY INTERNATIONAL (1 Feb. 2024) (C-170); *Honduras "does not advance" in transparency and combats corruption, while waiting for the CICIH*, HONDUDIARIO (2 Apr. 2024) (C-171); A. Woodmass, *Honduras protesters oppose president's appointment of top legal officials without congressional vote*, JURISTNEWS (12 Nov. 2023) (C-169).

[12] Reply ¶¶ 9-10.

[13] *Id.* ¶ 11.

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

[15] Unofficial Decision of the Supreme Court of Honduras, Case No. RI 0738-2021 ruling on the unconstitutionality of ZEDE Legal Framework dated 20 Sep. 2024, published by Honduran press on 14 Nov. 2024 ("***Unofficial Decision of the Supreme Court of Honduras on the unconstitutionality of ZEDE***") (C-172).

that same week.[16] As of the date of this submission, the official publication of the decision is still pending, and its content and the legal status of the ZEDEs remain unclear.

17. The relevance of these issues is further addressed in Section III.D below. For present purposes, it suffices to say that a justice system that operates through press releases and unpublished decisions and forces investors to rely on leaks to the media is beyond questionable and underscores the politicization and lack of legal certainty that Respondent so vehemently denies.

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18. Claimants trust that the Tribunal will not be distracted by Respondent's irrelevant allegations. Claimants agree with Respondent that Claimants' claims are very serious. But it is precisely because of the seriousness of what is at stake that the parties should be heard on these issues in the context of a proper and complete briefing of the merits, not during an expedited preliminary phase on the exhaustion of local remedies. As for the issue currently before the Tribunal for decision, for the reasons that Claimants have explained, Respondent's Preliminary Objection is baseless and should be dismissed.

II. RESPONDENT'S PRELIMINARY OBJECTION SHOULD BE REJECTED

A. There Ultimately Does Not Appear to Be a Significant Dispute as to the Correct Approach for the Tribunal's Assessment of Facts in Deciding the Preliminary Objection

19. Claimants explained in their Observations that while Respondent spent a significant portion of its Preliminary Objection dated 30 August 2024 ("**Preliminary Objection Application**") on factual allegations relating to the merits of the dispute, there was only one relevant background fact for deciding the Preliminary Objection and that fact is undisputed: Claimants did not exhaust local remedies prior to submitting their claims to arbitration.[17] Respondent's Preliminary Objection Application appeared to suggest, however, that the Tribunal should not assume Claimants' factual allegations in support of

[16] M. Torres, *Notificada la Sentencia que declara Inconstitucionalidad de las ZEDE; certificación va al CN*, HCH (21 Nov. 2024) (C-178).

[17] Observations ¶¶ 6, 16.

their claims in their Request for Arbitration as true for purposes of deciding the Preliminary Objection.[18] Claimants accordingly explained in their Observations how other tribunals have addressed the standard applicable to a tribunal's assessment of facts when deciding a preliminary objection to competence (including under Article 10.20.5 of CAFTA-DR) and clarified the appropriate standard, in case more facts turned out to be relevant from later pleadings.[19]

20. While it remains undisputed that Claimants did not exhaust local remedies prior to submitting their claims to arbitration, in its Reply, Respondent has, once again, alleged a series of facts that are irrelevant to the Preliminary Objection. In addition to allegations about Claimants and its investment,[20] which Respondent already conceded in its Preliminary Objection Application are irrelevant to the Preliminary Objection,[21] Respondent has raised other facts in relation to the nature and validity of the LSA as well as the nature and status of the Technical Secretary of the ZEDE Próspera.[22] As explained below, those facts are also not relevant for the Tribunal's decision on Respondent's Preliminary Objection, as they are only related to the merits of the dispute or other possible jurisdictional or admissibility objections that Respondent has not raised at this juncture.[23]

21. For the avoidance of doubt, Claimants' position on the standard applicable to Claimants' allegations of facts at this stage of the proceedings is as follows. As Claimants have explained in their Observations, the only facts that must be proven at this juncture are jurisdictional (or admissibility) facts that need to be determined for the Tribunal to decide on the Preliminary Objection. All other facts alleged by Claimants should at this stage of the proceedings be assumed to be true as pled by Claimants, including jurisdictional (or

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[18] Preliminary Objection Application ¶ 23.

[19] Observations § II.A.

[20] Reply ¶¶ 2-7.

[21] In the Preliminary Objection Application Respondent spent a significant portion of its submission addressing factual allegations related to the merits, which it conceded are irrelevant. *See* Preliminary Objection Application ¶¶ 1-16 (containing Respondent's alleged "Factual Background"), ¶ 16 ("Notwithstanding the foregoing and as detailed below, it is not necessary for this Tribunal to enter into the merits of this case.").

[22] Reply ¶¶ 100-106 (*citing* Agreement for Legal Stability and Investor Protection entered into by and between Honduras Próspera and the Republic of Honduras (9 Mar. 2021) (CLA-6)).

[23] *See infra* § II.C.3.b.

admissibility) facts that are not at issue in this preliminary phase, and facts that are relevant to the merits of the dispute.[24] This is the correct standard when deciding a preliminary objection to competence under Article 10.20.5 of CAFTA-DR even without applying the standard in Article 10.20.4(c) of CAFTA-DR. Tribunals deciding preliminary objections to competence under Article 10.20.5 of CAFTA-DR and analogous provisions have consistently presumed the truth of the claimants' factual allegations in support of their claims.[25]

22. This is consistent with the object and purpose of the expedited nature of an Article 10.20.5 proceeding which is intended to avoid the time and cost of a merits phase and permit a

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[24] *See* Observations ¶¶ 22-25 (*citing 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 (finding that where a competence objection raises issues of fact related to the merits, the tribunal should postpone the final determination of those issues to the merits hearing and make a *prima facie* decision on jurisdiction on the assumption that the facts pleaded by the claimant are correct.); *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) ¶¶ 112, 118-119, 286 (relying on the decision in *Bridgestone* and finding that only issues of fact that need to be determined in order to decide the jurisdictional question should be determined at the jurisdictional stage. All other factual issues should be decided on a *prima facie* basis and their final determination should be postponed to the merits hearing. The tribunal noted that the *prima facie* test still requires testing claimant's case on jurisdiction to a certain extent to determine whether respondent's jurisdictional challenge should succeed.); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL Partial Award on Jurisdiction (27 Feb. 2004) (CLA-61) ¶ 24 (finding that "at the jurisdictional stage the Tribunal should in principle take the Claimant's case as pleaded."), ¶ 26 (finding that if there are factual disputes relevant to issues of jurisdiction that cannot be definitely decided at the jurisdictional stage, a tribunal may join jurisdiction to the merits and determine jurisdiction on a *prima facie* basis); *Phoenix Action, Ltd. V. The Czech Republic*, ICSID Case No. ARB 06/5, Award (15 Apr. 2009) (CLA-69) ¶ 64 (finding that when deciding 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 only a fact which "constitutes a critical element for the establishment of the jurisdiction itself. . . must be proven, and the Tribunal must take a decision thereon when ruling on its jurisdiction."); *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 (finding that when deciding a jurisdictional objection, the facts alleged by claimant in the Notice of Arbitration should be assumed to be true, "excluding however a disputed fact uniquely relevant to the existence or exercise of the Tribunal's jurisdiction.")). In *Pac Rim Cayman v. El Salvador*, when deciding the respondent's abuse of process objection brought after the Article 10.20.5 expedited stage, the tribunal found that at the jurisdictional stage, a *prima facie* standard applies to testing the merits of a claimant's case, while a disputed fact upon which the tribunal's jurisdiction directly depends must be decided at that stage. The tribunal also acknowledged that factual issues which are common to both jurisdiction and merits can be joined to the merits. *See Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 Jun. 2012) (CLA-106) ¶¶ 2.5, 2.8).

[25] *See id*. *See also infra* nn. 29-30.

tribunal to decide on a preliminary objection without having to enter into the evidentiary phase of the proceedings.[26]

23. While Respondent does not say so, it appears largely to agree with this standard.

- Respondent agrees that the Tribunal should not have to engage in an intensive fact-finding exercise in this expedited procedure.[27]

- Respondent also recognizes that in the cases relied on by Claimants, tribunals have presumed the claimants' factual allegations to be true when deciding competence objections under procedures similar to Article 10.20.5, as those cases "presented factual allegations that were linked to an eventual merits phase of the dispute."[28] Respondent further cites to cases where tribunals have found that the claimant must

[26] *See* Observations ¶¶ 17, 21 (*quoting 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 and 112 (reasoning that Article 10.20.5's stringent deadlines are "clearly intended to avoid the time and cost of a trial and not to replicate it," and that the expedited procedure is "not intended to be a 'mini-trial', even without evidence." The tribunal also reasoned that concluding otherwise would attribute to CAFTA-DR Contracting Parties a "perverse intention" to make investor-state arbitration even more costly and procedurally burdensome, whereas in reality, Articles 10.20.4 and 10.20.5 "(read as a whole) [show] that the actual intention of the Contracting Parties was, manifestly, the exact opposite.")). Respondent alleges in response that the *Pac Rim* tribunal "delimited the scope of [the factual] presumption, which only applies to objections raised under Article 10.20.4 of the DR-CAFTA." Reply ¶ 20. As Claimants explained in their Observations, however, although the claimant in *Pac Rim* did not invoke the presumption in Article 10.20.4(c) when addressing the competence objection, the tribunal analyzed the meaning and effect of Article 10.20.4 and Article 10.20.5 in tandem and found that both articles are intended to avoid a mini trial. *See* Claimants' Observations ¶ 21 (*citing Pac Rim* (CLA-71) ¶¶ 106, 107, 112, 115, 239-243). *See also* Observations ¶ 22 (*citing Bridgestone* (CLA-83) ¶ 120 (finding that the tribunal's authority to make a *prima facie* decision on competence under Article 10.20.5 on the assumption that claimant's allegations of fact related to the merits are correct and to join the issue of competence to the merits of the dispute "is essential to prevent the hearing of the expedited objection turning into a mini, or even a maxi, trial.")).

[27] Reply ¶ 19 ("Claimants incorrectly infer that the Republic considers that the Tribunal would have to engage in an intensive fact-finding exercise on an expedited timetable such as that provided for by Article 10.20.5.").

[28] *Id*. ¶¶ 30-31 ("Claimants rely on a series of decisions of other tribunals that allegedly assumed as true the factual allegations of the Claimants in a procedure similar to that provided for under Article 10.20.5 of the DR-CAFTA . . . . In all the cases cited by Claimants, the preliminary objections raised by Respondents presented factual allegations that were linked to an eventual merits phase of the dispute. That is not the situation in the present case."). It is unclear what Respondent means by the last sentence in the quote, as Respondent does not identify any factual allegations that in its submission are not "linked to an eventual merits phase of the dispute." *See id.* Respondent follows on by saying "The Republic of Honduras submitted a sufficiently delimited jurisdictional objection whose factual analysis is not linked to the merits of the dispute." Reply ¶ 32. This is incorrect insofar as, as Claimants have pointed out, Respondent spent a significant portion of its Preliminary Objection Application and its Reply on background factual allegations going to the merits. Observations ¶¶ 6, 16; *supra* ¶ 20; *infra* § II.C.3.b. To the extent, however, that Respondent acknowledges that those factual allegations are irrelevant to the determination of its Preliminary Objection (as Respondent did in Preliminary Objection Application with respect to the facts alleged therein (*see* Preliminary Objection Application ¶ 16), Claimants agree, and such allegations should be disregarded by the Tribunal at this stage.

prove the jurisdiction of the tribunal, but not the substantive facts related to the merits.[29]

- Respondent also relies on *Kappes v. Guatemala* ("***Kappes***") where the tribunal decided an Article 10.20.5 CAFTA-DR objection that the claim was not brought within the three year time limit in Article 10.18.1 CAFTA-DR, and presumed for those purposes claimants' allegations and subsequent clarifications as to the facts claimants relied on for the breach alleged to be true (and deferred final resolution of the jurisdictional issue to the merits considering that the factual determinations involved could not be decided with the little evidence on the record).[30] Respondent avers that the Tribunal "like the tribunal in *Kappes v. Guatemala,* may conduct an analysis of the allegations according to the particularity of the preliminary objection raised by the Respondent."[31] Respondent then states that the "particularity of [its] objection" is that the Tribunal "must decide on the scope of the condition imposed by the Republic of Honduras for access to ICSID jurisdiction."[32] Claimants agree, and thus only facts alleged by Claimants relevant to determine that issue need to be proven, while other facts alleged by Claimants must be accepted as true at this stage. As Claimants have explained, however, there are no facts alleged by Claimants that are relevant to that issue and need to be decided by the Tribunal for purposes of deciding the Preliminary Objection, as both Parties agree on the one relevant fact (that Claimants did not pursue legal remedies prior to submitting claims to arbitration), and the Preliminary Objection otherwise only entails legal issues as to the legal implications of Decree 41-88, the Declaration, Respondent's

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[29] *See* Reply ¶ 26 (*citing Chevron I* (RLA-39) ¶¶ 105, 109, 110 (finding that to determine whether the claimed breach would be covered by the jurisdictional scope of the BIT, the tribunal should apply a *prima facie* standard and presume the claimant's factual allegations are true. The tribunal also reasoned that there is a limited exception if claimant's description of the facts is clearly false or insufficient to satisfy the *prima facie* test. In such circumstances, jurisdiction would have to be denied.)). Respondent omits that the *Chevron I* tribunal also found that "[t]he Claimants must prove the jurisdiction of the Tribunal at this stage, but they need not prove their substantive claims." *Chevron I* (RLA-39) ¶ 107. *See also*, *Seo Jin Hae v. Republic of Korea*, HKIAC Case No.18117, Submission of the United States of America (19 Jun. 2019) (RLA-51) ¶ 13 (stating that where "jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.").

[30] Reply ¶ 28 (*citing Daniel W. Kappes & Kappes, Cassiday & Associates v. Republic of Guatemala,* ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections (13 Mar. 2020) (RLA-53) ¶ 220 (finding that under the time-limitation provision in Article 10.18.1 "the relevant inquiry is whether 'more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of *the breach alleged* under Article 10.16.1 and knowledge that the claimant . . . . has incurred loss or damage' by reason of that breach. This determination cannot be made without a predicate determination of *what particular breach has been alleged.*") (emphasis in original)). *See also*, *Kappes* (RLA-53) ¶ 222-223 (relying on claimants' allegations that they were not claiming for facts that occurred prior to a certain date and noting that "The Tribunal takes Claimants at their word regarding what breach they in fact are alleging, and what breach they are not alleging."), ¶¶ 224-226 (reasoning that the factual questions for determining when claimants first acquired knowledge of the breach and the timeliness of the claim, could not be fully resolved at the preliminary stage without sufficient evidence on the record and without being fully briefed on the relevant factual issues, but that claimants' allegations and subsequent explanations on what they were actually claiming were sufficient "to clear the initial hurdle for the Preliminary Objections stage, which is focused on the Claimants' allegations.").

[31] Reply ¶ 28.

[32] *Id*. ¶ 29.

ratification of the ICSID Convention and other statements to ICSID, the ICSID Convention, CAFTA-DR, the LSA, other treaties of Respondent, and Respondent's actions in other investment treaty cases.

24. Despite these points of agreement, Respondent insists that the Tribunal is not required to presume Claimants' factual allegations to be true under Article 10.20.5 of the CAFTA-DR.[33] Claimants understand that Respondent must be referring to purely jurisdictional or admissibility facts relevant to the Preliminary Objection. A contrary conclusion would clearly be at odds with Respondent's own arguments summarized above. As noted above, Claimants agree that such facts (if there were any, which is not the case) would need to be proven, and thus, ultimately, there does not appear to be a significant dispute as to the correct approach for the Tribunal's assessment of facts in deciding the Preliminary Objection.

B. RESPONDENT'S PRELIMINARY OBJECTION MUST BE REJECTED BECAUSE IT IS AN ADMISSIBILITY OBJECTION AND NOT AN OBJECTION TO THE TRIBUNAL'S COMPETENCE AS REQUIRED BY ARTICLE 10.20.5 OF CAFTA-DR

25. As explained in Claimants' Observations, Claimants' alleged failure to comply with an alleged requirement to exhaust local remedies may have implications for the admissibility or ripeness of Claimants' claims, but it does not impact the Tribunal's competence to hear the claim. Accordingly, Respondent's Preliminary Objection must be rejected, as it is not an objection to the Tribunal's competence as required by Article 10.20.5 of the ICSID Convention.[34]

26. In its Reply, Respondent argues that its Preliminary Objection is an objection to the jurisdiction of the Tribunal because its consents to this ICSID arbitration were allegedly

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[33] *Id*. ¶¶ 20, 21, 33. With respect to *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-17), Respondent alleges that "Claimants fail to recognize the differences between the objections raised under Article 10.20.4 and Article 10.20.5 that are distinguished in the text of the Treaty and were identified by the tribunal in *Renco v. Peru (I)*." Reply ¶ 22. Claimants agree that there are textual differences between the two articles and have never stated otherwise. As explained in Claimants' Observations, the *Renco I* decision did not directly rule on the appropriate standard for factual determinations for competence objections under Article 10.20.5. The issue before the *Renco I* tribunal was whether Article 10.20.4 "encompass[es] within its scope preliminary objections which may be characterized as relating to competence." Observations ¶ 18 (*citing Renco I* (RLA-17) ¶¶ 165, 213, 254-255).

[34] Observations § II.B.

conditioned – either as an expression of will or implicitly – by the Declaration in Decree 41-88 as an exercise of the second sentence of Article 26 of the ICSID Convention.[35] Even assuming *arguendo* that the Declaration in Decree 41-88 is an exercise of Article 26, which as shown in Sections II.C below it is not, this is wrong.

27. *First*, Respondent's position is inconsistent with an interpretation of Article 26 in accordance with the ordinary meaning of its terms in their context and in light of the object and purpose of the treaty pursuant to Article 31 of the VCLT.[36]

28. On its face, Article 26 makes no reference to competence, jurisdiction, or admissibility. While the second sentence of Article 26 of the ICSID Convention provides that a "State may require the exhaustion of local . . . remedies as a condition of its consent to arbitration," not all conditions of consent go to jurisdiction, and a facile conflation of the two is a legal error.[37] Tribunals have found that certain conditions, although included in the dispute

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[35] Even Respondent appeared to consider in its Preliminary Objection Application that the Preliminary Objection pertained to the admissibility of Claimants' claims and not the Tribunal's jurisdiction, and its position there appeared to be that Article 10.20.5 of CAFTA-DR includes such objections. *See* Preliminary Objection Application ¶ 23 ("Although objections filed under Article 10.20.4 of the DR-CAFTA require the tribunal to 'assume to be true claimant's factual allegations in support of any claim in the notice of arbitration,' this requirement does not apply to jurisdictional <u>or admissibility objections under DR-CAFTA Article 10.20.5</u>.") (emphasis added). In its Reply, Respondent now appears to implicitly acknowledge that Article 10.20.5 does not encompass admissibility objections, as its argument in the Reply is entirely focused on an effort to show that its Preliminary Objection is an objection to competence (which, as shown herein, it is not).

[36] Respondent first relied on the VCLT to interpret the ICSID Convention in its Proposal to Disqualify Mr. Rivkin (*see id.* ¶ 24), following which Claimants relied on the VCLT for that same purpose in their Response to the Proposal to Disqualify Rivkin (*see id.* ¶ 15) and their Observations (*see id.* ¶ 13). Despite its earlier reliance on the VCLT to interpret the ICSID Convention, Respondent alleges in the Reply that "[t]echnically, the VCLT is not applicable to the ICSID Convention since, in accordance with Article 4 of the VCLT, the latter applies with respect to treaties entered into after its entry into force. The VCLT entered into force in 1980, while the ICSID Convention dates from 1966. However, many of the provisions of the VCLT are considered international custom." Reply n. 64. Respondent then applied Article 31 of the VCLT to interpret Article 26 of the ICSID Convention. *See* Reply ¶ 54. Respondent's point is of little significance as both Parties agree that the VCLT codifies customary international law and can be used to interpret the ICSID Convention.

[37] *See*, *e.g.*, *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order (16 Mar. 2006) (CLA-98) ¶¶ 3-7 ("Proper notice is an <u>important element of the State's consent to arbitration</u> . . . Proper notice of the present claim was not given. <u>This conclusion does not, in and of itself, affect the Tribunal's jurisdiction</u>. The Claimant should be given an opportunity to remedy the deficient notice. On the other hand, the proceedings should not be indefinitely suspended.") (emphasis added); *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award (6 Feb. 2008) (CLA-101) ¶¶ 124-125, 128 (considering that the question of whether a fork in the road clause precluded the initiation of ICSID proceedings after the investor had elected to proceed with Yemini arbitration "is more properly classified as one of admissibility rather than jurisdiction; its premise is that an ICSID tribunal having jurisdiction should nevertheless decline to exercise it due to circumstances which that ICSID tribunal has the authority to examine.").

settlement provision of investment treaties, will not deprive a tribunal of jurisdiction if not complied with, but instead may render the claim inadmissible.[38]

29. The object and purpose of Article 26 shows that an exhaustion of local remedies requirement should be interpreted as a precondition to the admissibility of a claim, in accordance with the classification of the exhaustion rule under international law, rather than as a stand-alone jurisdictional requirement.

30. Specifically, the Parties agree that the first sentence of Article 26 of the ICSID Convention displaces the traditional international law rule on the exhaustion of local remedies, by deeming consent to ICSID arbitration to exclude other remedies, unless otherwise stated.[39] The Parties also agree that the second sentence of Article 26 empowers States to revert back to the rule under international law by requiring the exhaustion of local remedies as a condition of their consent to arbitration.[40] Indeed, it is Respondent's expressly stated

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[38] *See*, *e.g.*, *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 Jul. 2008) ("***Biwater***") (CLA-68) ¶ 260 ("Under Article 8(3) of the BIT, the parties are required to pursue 'local remedies or otherwise' for a six-month period"), ¶ 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. . . . Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding."). A number of tribunals have upheld the application of an MFN provision to requirements in the dispute settlement clause, such as submitting the dispute to local courts, as the provisions relate to admissibility of the claim and not the tribunal's jurisdiction. *See*, *e.g.*, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 Oct. 2011) ("***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."); *Abaclat et al. v. Argentine Republic*, Decision on Jurisdiction and Admissibility (4 Aug. 2011) (CLA-73) ¶ 496 ("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."); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/01, Decision on Jurisdiction (21 Dec. 2012) (CLA-108) ¶¶ 169-170, 172 ("it is clear that Claimants' position falls within the 'admissibility' category of cases cited by UNCTAD, in which tribunals normally rule in favor of applying the MFN clause. Claimants are seeking to apply the Treaty's MFN clause in order to dispense with the requirements of Article X, namely, that the Parties attempt to amicably settle their dispute for 6 months, and that their dispute be subjected to the local courts of Argentina for 18 months.") (emphasis added).

[39] Reply ¶¶ 55-56; Observations ¶¶ 40-41.

[40] Preliminary Objection Application ¶ 27 ("This [*i.e.*, the possibility under Article 26 of the ICSID Convention to require investors to exhaust local remedies] is an uncontested power of any State party to the Convention to preserve the traditional rule of exhaustion of local remedies under customary international law . . . .") (emphasis

position that Decree 41-88 "preserved the traditional rule under customary international law."[41]

31. Under international law, the local remedies rule has traditionally applied in the context of the protection of foreign nationals – including foreign investors – who before the advent of investment protection treaties relied on their home State to espouse their claim through diplomatic protection and bring an international claim on their behalf against the host State.[42] Exhaustion of local remedies by foreign nationals is a condition to access diplomatic protection and a precondition to the admissibility of international claims brought by a State on behalf of its national, not a jurisdictional condition.[43] The International Court of Justice ("**ICJ**") has consistently held that for an international claim to be admissible, an injured person must exhaust local remedies, unless an exception applies, such as futility or waiver by the State. Failure to do so may render the claim inadmissible until local remedies are exhausted, but it will never impact the ICJ's jurisdiction over the claim.[44]

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added), ¶ 29 ("By means of [Decree 41-88] . . ., the Republic of Honduras expressly opted to preserve the traditional rule under customary international law and to condition its consent to ICSID arbitration to the prior exhaustion of local remedies.") (emphasis added). *See also* Christoph H. Schreuer, *et al., Chapter II: Jurisdiction of the Centre, in* The ICSID Convention – A Commentary (3d ed. 2022) (CLA-86) p. 544 ("The second sentence of Art. 26 deals with a traditional concept of international law, the exhaustion of local remedies before resort can be had to an international remedy."), p. 617 ("The exhaustion of local remedies is a concept of traditional international law, which requires that, before a claim for the violation of the rights of an individual or a corporation can be pursued against a State through international procedures, that individual or corporation must first have recourse to all means of redress available under the domestic law of the State concerned. Developed originally in the context of diplomatic protection . . . .").

[41] Preliminary Objection Application ¶¶ 27, 29.

[42] *See* International Law Commission Draft Articles on Diplomatic Protection with commentaries (2006) ("***ILC Articles on Diplomatic Protection***") (CLA-65), p. 2 ("Diplomatic protection belongs to the subject of 'Treatment of aliens'."), Art. 1 ("diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility."), p. 43 ("Diplomatic protection in respect of legal persons is mainly about the protection of foreign investment."). *See also* Paul Peters, *Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties*, *in* 44 Netherlands International Law Review 233 (1997) (CLA-93) p. 243 ("Traditionally, the local remedies rule has found its main field of application in the law of foreign investment.").

[43] B. Sabahi, *et al*. "Exhaustion of Local Remedies" *in Investor-State Arbitration* (2019) (RLA-21) p. 432 ("Exhaustion of local remedies . . . is a precondition of the admissibility of international claims.").

[44] *See*, *e.g.*, *Interhandel Case (Switzerland v. United States of America)*, Judgment, I.C.J. Rep. 1959 (21 Mar. 1959) (RLA-1) 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."); *ELSI. Elettronica Sicula S.p.A. (ELSI),* Judgment, I.C.J. Rep. 1989 (20 Jul. 1989) (RLA-4) ¶ 49 ("While the jurisdiction of the

32. Respondent's attempt in its Reply to distinguish the *Interhandel Case (Switzerland v. United States of America)*, on which Respondent itself relied in its Preliminary Objection Application,[45] on the basis that it relates to a claim brought in the context of diplomatic protection and the requirement to exhaust local remedies invoked as part of international law is unconvincing.[46] Respondent unequivocally stated in its Preliminary Objection Application that the exhaustion of local remedies rule, as understood within international law and the context of diplomatic protection, is exactly what the second sentence of Article 26 preserves.[47] This was also explicitly stated in the Report by the ICSID Executive Directors:

> In order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence [of Article 26] explicitly recognizes the right of a State to require the prior exhaustion of local remedies.[48]

33. The rationale behind the exhaustion rule in diplomatic protection does not change in the context of investment arbitration: the exhaustion of local remedies requirement allows a State's courts to remedy the wrong against an investor or an injured person before the matter proceeds to international adjudication, as Respondent accepts.[49] Neither do the

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Chamber is not in doubt, an objection to the admissibility of the present case was entered by Italy in its Counter-Memorial, on the ground of an alleged failure of the two United States corporations, . . . on whose behalf the United States claim is brought, to exhaust the local remedies available to them in Italy."). The 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 ("*Admissibility of claims*. 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."). *See also* ILC Articles on Diplomatic Protection (CLA-65) Art. 14 (establishing the general rule of exhaustion of local remedies), Art. 15 (establishing the exceptions to the local remedies rule, including waiver) (*see infra* n. 63).

[45] Preliminary Objection Application ¶ 27 *citing Interhandel Case (Switzerland v. United States of America)*, Judgment, I.C.J. Rep. 1959, p. 6 (21 Mar. 1959) (RLA-1) p. 27.

[46] Reply ¶ 44.

[47] Preliminary Objection Application ¶ 27 ("This [*i.e.*, the possibility under Article 26 of the ICSID Convention to require investors to exhaust local remedies] is an uncontested power of any State party to the Convention to preserve the traditional rule of exhaustion of local remedies under customary international law . . . ." (emphasis added)).

[48] 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-2) ¶ 32 (emphasis added).

[49] Preliminary Objection Application ¶ 27 ("This is an uncontested power of any State party to the Convention to preserve the traditional rule of exhaustion of local remedies under customary international law and to avoid being

workings of the exhaustion rule change in the context of investment arbitration: the rule remains subject to the same exception that an investor may access international dispute resolution if local remedies are futile. Respondent's alleged preservation of the international law rule of exhaustion of local remedies[50] could not change the rule from a precondition to the admissibility of a claim to a jurisdictional requirement that it never was under international law.

34. Finally, the context of Article 26 further confirms that exhaustion of local remedies is not a jurisdictional requirement. The drafters of the ICSID Convention knew how to specify if a State's requirements are jurisdictional in nature. For example, under Article 25(4) of the ICSID Convention, a State may notify the Centre that it does not consent to submit certain classes of disputes to the jurisdiction of the Centre.[51] Article 25(4) explicitly states that a notification under this subsection would be considered jurisdictional: "Any Contracting State may . . . notify the Centre of the class or classes of disputes which it would or would not consider <u>submitting to the jurisdiction of the Centre</u>." Article 26 does not contain any such language clarifying its jurisdictional nature, as Article 25(4) does. The drafters of the ICSID Convention could have included such terms in Article 26, but they chose not to.

35. *Second*, the requirement of exhaustion of local remedies, like requirements of compliance with a waiting period and pre-arbitration negotiations, relates to the manner in which an existing right to have recourse to arbitration should be exercised, and regulates the procedure for invoking a State's consent to arbitrate and therefore the admissibility of a claim against the State. Respondent agrees that the exhaustion requirement under Article

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dragged before an international tribunal before its own courts have had an opportunity to rule on the alleged claims.").

[50] *Id.* ¶ 29 ("Honduras expressly opted to preserve the traditional rule under customary international law and to condition its consent to ICSID arbitration to the prior exhaustion of local remedies.").

[51] ICSID Convention Art. 25(4) ("Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).").

26 is "a precondition for initiating arbitration against [the State]."[52] A State's consent to arbitrate disputes with foreign investors – whether in a treaty, a domestic law, or a contract – is binding and creates a right for the investor, who can invoke that consent by unilaterally initiating arbitration in accordance with the terms of the relevant instrument of consent, and by complying with any condition included therein.[53]

36. Just as exhaustion of local remedies is a condition to access diplomatic protection, the exhaustion requirement is a condition to invoke a State's consent to international arbitration under the treaty and therefore regulates the admissibility of a claim. The international law rule does not change when invoked under an investment treaty:

> In the *Elsi* case exhaustion of local remedies was a condition for diplomatic protection, in BITs it may be a condition for invoking international arbitration. However, there is no reason to assume that there is any difference in the rule itself in the one case as compared with the other. What the ICJ Chamber held with regard to the rule as applied to US diplomatic protection accorded to the owners of the *Elsi* company would also be true with regard to the right of an investor to submit a dispute to international arbitration under the terms of a BIT.[54]

37. The decision of the majority in *İçkale İnşaat Ltd. Şirketi v. Turkmenistan* ("***İçkale***") – which Claimants cited in their Observations[55] and Respondent ignored in its Reply – reasoned that a local litigation requirement in the relevant BIT was part of the procedure that the investor had to follow to invoke the State's consent, and was not a jurisdictional requirement limiting the State's consent to arbitrate. The majority concluded that the treaty's dispute resolution clause contains both the State's consent to arbitrate, which

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52 Preliminary Objection Application ¶ 26 ("According to Article 26 of the Convention, Contracting States may require investors to exhaust domestic remedies as a precondition for initiating arbitration against them.") (emphasis added).

53 *See 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."), ¶ 244 ("The State's consent has been given in Article VII, and it became effective, and as such unconditional, as soon as the Treaty entered into force; there is nothing conditional about it.").

54 Paul Peters, *Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties*, *in* 44 Netherlands International Law Review 233 (1997) (CLA-93) p. 239 (emphasis added).

55 Observations n. 79.

became unconditional when the Treaty entered into force,[56] and "the procedure that an investor must follow . . . before it can invoke the consent to arbitrate."[57] Addressing Article 26 of the ICSID Convention, the majority reasoned that the local litigation requirement "*regulates* the procedure for invoking consent; it does not *condition* the State's consent. If anything, it rather 'conditions' the investor's right to invoke the State's consent."[58] As the local litigation requirement only affects the investor's right to invoke the consent, it is "a matter of procedure and not . . . an element of the State parties' consent."[59] Therefore, the majority considered that "any objection [based on non-compliance with] procedural steps must be characterized as an objection to the admissibility of the claim" not to the tribunal's jurisdiction and if all the required

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[56] *İçkale* (CLA-82) ¶ 240 ("The consent of the two State parties to arbitrate, as set out in Article VII of the Treaty, 71 is unconditional; . . . Apart from the requirement of ratification, which applied to the Treaty as a whole, there were no further conditions precedent for the entry into force of the Treaty, including its Article VII(2), and accordingly the State parties' consent to arbitrate became effective, unconditionally, when the Treaty entered into force. It is another matter that the scope of their consent to arbitrate is not unlimited under the Treaty, but extends only so far as delimited by the Treaty, . . .".).

[57] *Id.* ¶ 241 ("[T]he proper way to characterize Article VII of the BIT is that it is a dispute resolution clause which, apart from establishing the consent of the State parties to arbitrate, sets out the procedure that an investor must follow, or the steps it must take, before it can invoke the consent to arbitrate given by a State party to the Treaty."), ¶ 242 ("it is plain that the [local litigation] clause does not constitute a jurisdictional requirement that delimits the scope of consent of the State parties to arbitrate; it sets out the procedure, or the step to be taken, in the event the dispute cannot be settled by way of negotiations between the parties, and thus constitutes a procedural rather than a jurisdictional requirement. The provision does not concern the issue of whether the State parties have given their consent to arbitrate – they have – but rather the issue of *how* that consent is to be invoked by a foreign investor; as an issue of 'how' rather than 'whether,' it must be considered a matter of procedure and not as an element of the State parties' consent.") (emphasis in original).

[58] *Id.* ¶ 244 (responding to the findings of the majority in *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (2 Jul. 2013) ("***Kiliç***") (RLA-44), who referred to Article 26 of the ICSID Convention in support of their decision (*see id*. ¶ 243), and reasoning that "[w]hile it is possible to refer, loosely speaking, to each of these steps as a "condition" to the State parties' consent to arbitrate, this is conceptually misleading as compliance with these procedural steps is not a "condition precedent" to the State parties' consent to arbitrate. The State's consent has been given in Article VII, and it became effective, and as such unconditional, as soon as the Treaty entered into force; there is nothing conditional about it. It is another matter that, in order for the investor to be in a position to invoke the State's consent to arbitrate in Article VII, it must first take the procedural steps set out in that Article. An investor taking these steps in order to be able to invoke the State's consent does not affect the consent itself in any way; it only affects the investor's right to invoke it. In other words, Article VII *regulates* the procedure for invoking consent; it does not *condition* the State's consent. If anything, it rather "conditions" the investor's right to invoke the State's consent.") (emphasis in original)).

[59] *İçkale* (CLA-82) ¶ 242.

procedural steps have not yet been taken, a claim may be considered inadmissible and not yet ripe for such submission.[60]

38. In reaching this finding, the *İçkale* majority disagreed with the majority in the earlier decision in *Kiliç* that the local litigation requirement is a condition of the State's consent to arbitrate and an issue of jurisdiction.[61] Notably, Professor William W. Park disagreed with the *Kiliç* majority, taking the view that the BIT provision raised an issue of "ripeness, *recevabilité* or admissibility" rather than jurisdiction.[62]

39. *Third*, Respondent's position that an exhaustion requirement goes to jurisdiction is contrary to the nature of the requirement, which can be waived by a State or bypassed due to futility.[63] In an ICJ case, if a party fails to raise an objection based on non-compliance

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60 *İçkale* (CLA-82) ¶ 242. Professor Sands dissented from the majority's reasoning in ¶¶ 240-247. *See İçkale* (CLA-82) pp. 169-173.

61 *İçkale* (CLA-82) ¶ 243 (*citing Kiliç* (RLA-44) ¶¶ 6.2.1, 6.3.15 (finding that the domestic litigation requirement was a condition precedent to the State parties' consent to arbitrate, making it a jurisdictional issue and that the dispute resolution provisions contains the State parties' 'standing offer' to arbitrate, which had to be 'accepted' by the investor under its terms and conditions to come into existence). The *İçkale* majority also noted that the *Kılıç* majority referred to Article 26 of the ICSID Convention in support of their decision.). Professor Sands, appointed by the State in both *Kiliç* and *İçkale*, formed part of the majority in *Kiliç* and dissented in *İçkale*. *See supra* n. 60.

62 *See Kiliç* (RLA-44) ¶ 27 (finding that the treaty's local litigation and "no-judgment-within-a-year" requirements are not jurisdictional conditions precedent and go only to 'ripeness' and the admissibility of the claim: "Procedural flaws that may be cured during the arbitration are often characterized by reference to notions such as ripeness, *recevabilité* or admissibility. Such terms derive not from technical treaty definition, but from usage as convenient labels to describe steps to be taken either before or after constitution of a tribunal, even if they must be met prior to merits being addressed."). *See also Kiliç* (RLA-44) ¶ 6.5.1 ("In his Separate Opinion . . . Professor Park concludes . . . that Article VII.2's requirements for local litigation and "no-judgment-within-a-year" are not conditions precedent and go only to 'ripeness' and the admissibility of the claim, as opposed to the jurisdiction of the Tribunal."). *See also İçkale* (CLA-82) n. 81 (noting that the *Kılıç* annulment committee stated that "a determination of whether a particular objection constitutes an objection to jurisdiction or admissibility is not a basis for annulment: 'Faced with the same question, other tribunals have decided differently on questions of jurisdiction and admissibility; it is not for the Committee to favor one or the other of these positions.' (*Kılıç* Annulment Decision, para. 166.).").

63 *See*, *e.g.*, Draft ILC Articles on Diplomatic Protection (2006) (CLA-65) 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."); *BG Group Plc v. The Republic of Argentina*, UNCITRAL, Award (24 Dec. 2007) ("***BG Group***") (CLA-67) ¶ 144 ("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 . . . "); *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,

with the exhaustion of local remedies rule, the party will have waived the requirement and the ICJ will not raise the matter *proprio motu*.[64] This is because defects in admissibility can be waived or cured through acquiescence, whilst defects in jurisdiction cannot.[65] Indeed, this is a critical distinction between the two.

40. Respondent itself appears to acknowledge that its alleged requirement to exhaust local remedies could be waived.[66] And if the alleged requirement in fact existed, Respondent would have waived it in several instances. First, as explained in more detail below, if the Declaration contained an exhaustion requirement that applied automatically to all Respondent's consents to ICSID arbitration, as Respondent avers, Respondent waived the exhaustion requirement in several subsequent consents to ICSID arbitration that do not require the exhaustion of all remedies and are incompatible with such a requirement.[67]

41. Second, as explained in Claimants' Observations, based on public information, four ICSID arbitrations have previously been filed against Respondent,[68] and in none of these cases is

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603 (finding that it would be futile to submit the dispute to the local courts and 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.").

64 *Hochtief* (CLA-75) ¶ 95.

65 *Hochtief* (CLA-75) ¶ 90 ("The disputing parties are entitled to raise objections based upon questions of admissibility, but they are not bound to do so; and if they do not raise those objections, they will have acquiesced in any breach of the requirements of admissibility and that acquiescence will 'cure' the breach. The tribunal, if it has jurisdiction, will proceed to hear the case."). Respondent's own authority acknowledges this. *See* J. Sicard-Mirabal & Y. Derains, "Jurisdiction of the Arbitral Tribunal" in Introduction to Investor-State Arbitration (2018) (RLA-49) p. 59 ("While this section is entitled 'Preconditions to Arbitration', it is unclear whether the cooling-off and exhaustion of local remedies clauses constitute restrictions to the consent to jurisdiction, or whether they are merely procedural or admissibility requirements. If these preconditions were to be considered jurisdictional in nature, and the claimant did not comply with them, then the arbitration agreement would not be formed, and the tribunal would not have the jurisdiction to hear the claim. <u>The non-fulfilment of admissibility requirements, on the other hand, does not affect the existence of the agreement to arbitrate and, thus, the tribunal's jurisdiction</u>.") (emphasis added). Respondent tellingly omits this passage when referencing this authority. *See* Reply, n. 59 (*citing* J. Sicard-Mirabal & Y. Derains, "Jurisdiction of the Arbitral Tribunal" in Introduction to Investor-State Arbitration (2018) (RLA-49) p. 59).

66 Reply ¶ 79 ("Honduras has not engaged in any relevant and effective conduct that would allow Claimants, clearly and unambiguously, to be confident that the prior exhaustion of local remedies requirement for its consent to ICSID arbitration has been waived.").

67 *See infra* § II.C.2.

68 *See* Observations ¶ 49 (*citing 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).

there any indication that the claimants exhausted local remedies prior to submitting their claims to arbitration, that Respondent raised an objection to jurisdiction on the basis of the Declaration, or that the relevant tribunals raised it *sua sponte*. Respondent does not deny this in its Reply, and argues instead that it has claimed the need to exhaust local remedies "in all those cases in which, in its view, it was appropriate."[69] Respondent further contends that filing a preliminary objection on the basis of non-compliance with the alleged exhaustion requirement is not "imperative nor is it an obligation," and that it was within its procedural rights not to raise an objection in those cases.[70] These contentions only prove that the alleged exhaustion requirement is an admissibility requirement. Indeed, assuming *arguendo* that Decree 41-88 implied an exhaustion requirement in Respondent's consents to arbitration in those ICSID cases, as Respondent argues, Respondent waived the requirement or acquiesced in the investors' non-compliance in those cases. Further, if this requirement created a jurisdictional condition, the tribunals should have raised it *sua sponte*. The fact that the exhaustion requirement was not raised in any of those cases demonstrates that the Declaration did not create a jurisdictional condition; rather, it was at most an issue of admissibility, and was therefore waivable. As noted by the tribunal in *RosInvestCo 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."[71]

42. *Fourth*, while tribunals are rarely (if ever) called upon to analyze classic exhaustion of local remedies requirements as a condition of consent (as the vast majority of investment treaties do not require investors to exhaust local remedies as a condition of consent to

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[69] Reply ¶ 77.

[70] *Id.* ¶ 77 (stating that the filing of preliminary objections "constitutes a procedural power whose exercise is at the full disposal of the State. The fact that Honduras has not exercised this power in other cases in no way precludes it from exercising its right in the present case.").

[71] *RosInvestCo UK Ltd v. The Russian Federation, SCC Case No. V079/2005, Award on Jurisdiction* (1 Oct. 2007) ("***RosInvestCo***") (CLA-66) ¶ 152. Respondent argues that *RosInvestCo* is irrelevant as the ICSID Convention did not apply. *See* Reply ¶ 38. Claimants, however, relied on *RosInvestCo* for the reason that the tribunal reclassified a jurisdictional objection based on the failure to exhaust local remedies as an admissibility objection, because it found that the local remedies rule may be waived. This is relevant to the present case, as Article 26 makes clear that States are entitled to preserve the international law rule of exhaustion, including its exceptions such as waiver. *See* Observations ¶ 32 (*citing RosInvestCo* (CLA-66) ¶ 152).

ICSID arbitration),[72] ICSID tribunals analyzing the exhaustion of local remedies requirement as an element of a denial of justice claim have classified exhaustion of local remedies as addressed in Article 26 of the ICSID Convention as pertaining to the admissibility of the claims, and a procedural bar.[73] Tribunals discussing the exhaustion of local remedies rule whilst analyzing related admissibility objections have found the same.[74] Finally, as explained in Claimants' Observations, requirements to resort to local litigation for a certain period of time before proceedings can be instituted have also been classified as "procedural conditions to consent,"[75] or procedural requirements to invoke consent, and not as jurisdictional requirements.[76]

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[72] *See* Paul Peters, *Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties*, *in* 44 Netherlands International Law Review 233 (1997) (CLA-93) p. 233 (noting that although the principle of the exhaustion of local remedies is recognized as customary international law, "the overwhelming majority of countries in their recent treaties have avoided or circumvented this doctrine in relation to the treatment of foreign investors and foreign investments, which has always been the main application of this doctrine."), pp. 234-237 (analyzing 409 BITs in 1997 and finding that only 5 require exhaustion and "365 BITs (89% of the sample), . . . explicitly or implicitly, waive the local remedies rule *in toto* for all or some disputes, and the further 28 BITs (7%) . . . restrict the time available for local remedies.").

[73] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 Nov. 2008) (CLA-102) ¶ 255 ("the requirement addressed in Article 26 of the ICSID Convention . . . deals with the admissibility of the claims brought before an ICSID Tribunal."). The *Arif v. Moldova* tribunal also distinguished between the exhaustion of local remedies as an element of denial of justice claims and exhaustion of local remedies as a procedural bar. *See Mr. Franck Charles Arif v. Republic of Moldova,* ICSID Case No. ARB/11/23, Award (8 Apr. 2013) (CLA-109) ¶ 46 ("for claims for denial of justice, the exhaustion of local remedies is a question to be addressed with the merits of the dispute. It is a substantive standard, rather than a procedural bar.").

[74] *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) (CLA-60) ¶ 154 n. 84 (reasoning in *obiter dicta* that "[i]t 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."). Respondent disputes the relevance of *SGS v. Philippines* (*see* Reply ¶ 38). Although the tribunal considered the distinction between jurisdiction and admissibility in relation to a contract claim which provided exclusive jurisdiction to the courts, which the tribunal found affected the admissibility of the claim, the tribunal's general analysis on the classification of objections as admissibility or jurisdictional are relevant to the present case. *See* Observations ¶ 33.

[75] In the commentary to Article 25 of the ICSID Convention, in the section titled "Procedural Conditions to Consent" Schreuer explains that "[e]ven if a dispute is clearly covered by the parties' consent to ICSID's jurisdiction, access to the Centre may be subject to conditions," citing *inter alia* attempt at settlement in domestic courts. *See* Christoph H. Schreuer, *et al., Chapter II: Jurisdiction of the Centre, in* THE ICSID CONVENTION – A COMMENTARY (3d ed. 2022) (CLA-86) ¶¶ 981-997.

[76] *See supra* ¶ 37, n. 38. *See also* Observations ¶¶ 31-32. Respondent alleges that *Biwater* is irrelevant as the tribunal did not characterize the applicable BIT provision as a requirement to appear before domestic courts (*see* Reply ¶ 38). This is clearly incorrect. *See Biwater* (CLA-68) ¶ 260 ("Under Article 8(3) of the BIT, the parties are required to pursue 'local remedies or otherwise' for a six-month period: 'if any such dispute should arise and agreement cannot be reached within six months between the parties to this dispute through pursuit of local remedies or otherwise, then . . . either party may institute proceedings by addressing a request to that effect to the Secretary General of the Centre . . .'."). Respondent also alleges that the *BG Group* tribunal "did not make a

43. *Fifth*, Respondent's reliance on certain ICJ judgments to argue that a limitation of consent in an international treaty relates to jurisdiction is misplaced.[77] None of the cases referenced concern the exhaustion of local remedies, nor do they involve claims resulting from a State's treatment of a foreign national in the context of diplomatic protection (where the exhaustion of local remedies rule traditionally applies). The cases are pure State to State disputes, involving the ICJ's discussion of compromissory clauses in treaties between the States, and various dispute resolution mechanisms (such as arbitration) that the States must attempt before the ICJ can have jurisdiction over the dispute.[78] The "conditions"

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determination as to whether exhaustion of local remedies was a jurisdictional or admissibility issue in nature but rather decided that the treaty requirement was not applicable due to the particular circumstances of that case" (*see* Reply ¶ 38). This too is incorrect. The respondent "argued that failure by BG to bring its grievance to Argentine courts for 18 months renders its claims in this arbitration inadmissible." *See BG Group* (CLA-67) ¶ 141. The *BG Group* tribunal therefore did not have to consider whether the objection pertained to admissibility or jurisdiction, as it was only advanced as an admissibility objection. Respondent cites a number of cases that have found that local litigation requirements are of a jurisdictional nature. *See* Reply ¶¶ 40-43 (*citing Ömer Dede and Serdar Elhüseyni v. Romania,* ICSID Case No. ARB/10/22, Award (5 Sep. 2013) (RLA-45); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 Jun. 2011) (RLA-40), *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008) (RLA-10), *Emilio Aguntín Maffezini v. Kingdom of Spain,* ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 Jan. 2000) (RLA-32), *ICS Inspection and Control Services Limites v. Argentine Republic, PCA Case No. 2010-9*, Award on Jurisdiction (10 Feb. 2012) (RLA-15)). The cases cited by Respondent do not concern a traditional requirement to exhaust local remedies, which is always understood as pertaining to the admissibility of the claim. The cases predominantly concern the bypassing of a local litigation requirement in the treaty's dispute resolution clause through the use of the MFN clause, which is not the situation in the present case. In any case, it is undeniable that tribunals have diverged on whether local litigation requirements pertain to admissibility or jurisdiction, and there is an evident lack of consensus in this area (*see İçkale* (CLA-82) ¶ 245 ("The Tribunal is mindful of the fact that the distinction between jurisdiction and admissibility is often a fine one, and reasonable arbitrators may reasonably disagree on how it should be made and in particular, on how it should be applied in a particular case."). It is telling, however, that the analysis of some tribunals is framed in terms of an issue of admissibility rather than jurisdiction of the tribunal. *See*, *e.g*., *Emilio Aguntín Maffezini v. Kingdom of Spain,* ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 Jan. 2000) (RLA-32) ¶¶ 28 (noting that "even if Article X(3)(a) were considered to be a provision requiring exhaustion of local remedies, such a requirement would not have the effect unlike what Respondent argues-of preventing the subsequent submission of the case to international arbitration under the BIT. This is so because, where a treaty guarantees certain rights and provides for the exhaustion of local remedies before a dispute relating to those guarantees may be submitted to a domestic court, the parties to the dispute retain the right to submit the case to that court to the extent that they have exhausted available remedies, regardless of the outcome of the domestic proceedings. The parties retain this right of recourse because it is the international tribunal, and not the national tribunal, that ultimately decides on the meaning and scope of the international obligations-in this case the BIT-that are in dispute.") (emphasis added)).

[77] Reply ¶ 45 (*citing Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Judgment, I.C.J. Reports 2020, p. 455 (18 Dec. 2020) (RLA-54), *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* Judgment, I.C.J. Reports 2008, p. 177 (4 Jun. 2008) (RLA-38), *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda*), Judgment, I.C.J. Reports 2006, p. 6 (3 Feb. 2006) ("***Armed Activities***") (RLA-36)).

[78] *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Judgment, I.C.J. Reports 2020, p. 455 (18 Dec. 2020) (RLA-54) ¶¶ 32, 33, 89 101 (involving a boundary dispute between British Guiana (now Guyana) and Venezuela

mentioned by the ICJ are the States' consent to various dispute resolution mechanisms, and as a final option, dispute resolution before the ICJ. By contrast, in an investment treaty, a State generally provides its single consent, to arbitration, and may include a requirement to invoke that consent, the prior exhaustion of local remedies.[79]

44. *Finally*, tribunals that have considered whether preconditions to arbitration impact the admissibility of a claim or the jurisdiction of the tribunal have done so performing an analysis of the specific precondition provision in the relevant instrument of consent.[80] Tribunals' findings ultimately depend on the language of the condition of consent. As Respondent has not included a requirement to exhaust local remedies in the CAFTA-DR or the LSA, but rather claims that the alleged exhaustion requirement in the Declaration is implied in those instruments of consent, the only relevant language is contained in the Declaration, which says that exhaustion of local remedies would be "a prior condition to the implementation of the dispute settlement mechanisms."[81] This clearly presents the exhaustion of local remedies as a procedural condition to invoke arbitration, not as a jurisdictional condition of Respondent's consent to ICSID arbitration.

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and whether the Parties gave their consent to the judicial settlement of the dispute before the ICJ. The jurisdictional clause in dispute was Article IV, paragraph 2 of the Geneva Agreement, which provided methods for dispute resolution, and if these failed resolve the dispute, the United Nations Secretary-General was empowered to "choose another of the means stipulated in Article 33 of the Charter of the United Nations," which included judicial settlement before the ICJ); *Armed Activities* (RLA-36) ¶¶ 64, 87, 100, 125-126 (concerning Rwanda's alleged involvement in military aggression and violations of international law during the Second Congo War. The Democratic Republic of the Congo asserted that the ICJ had jurisdiction on the basis of seven compromissory clauses in international treaties and *jus cogens*. The ICJ found that it lacked jurisdiction as Rwanda had not consented to the treaties, or had made reservations, or because the Democratic Republic of Congo failed to fulfil dispute resolution preconditions in the compromissory clauses of certain treaties that were necessary for the ICJ to have jurisdiction); *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* Judgment, I.C.J. Reports 2008, p. 177 (4 Jun. 2008) (RLA-38) ¶¶ 45-49, 152 (finding that France breached its obligations under the Convention on Mutual Assistance in Criminal Matters for failing to provide reasons for not executing a letter rogatory in relation to an ongoing criminal investigation. France alleged that the ICJ lacked jurisdiction as the claims went beyond the subject of the dispute and France's consent to submit the dispute to the ICJ, or alternatively that the claims were inadmissible. The ICJ found that the objection was jurisdictional in nature and dismissed it.).

[79] *See supra* ¶¶ 35, 37.

[80] *See*, *e.g.*, *supra* ¶¶ 37-38, nn. 38, 56-58, 61-62, 76. *See also* Observations ¶¶ 31-32.

[81] Republic of Honduras, *Decree 41-88, Decree on the ICSID Convention* (25 Mar. 1988) (R-3) Art. 75 ("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.").

45. In sum, Respondent's Preliminary Objection must be dismissed because Respondent has failed to raise an objection to the Tribunal's competence under Article 10.20.5.

C. Respondent's consents to arbitrate the present dispute are not conditioned on the exhaustion of local remedies

46. Respondent's Preliminary Objection relies on the premise that Claimants were required to exhaust local remedies. Claimants showed in their Observations that this premise is fundamentally flawed. Arbitration is the exclusive remedy under the ICSID Convention unless a State has required the exhaustion of local remedies as a condition of its consent in accordance with Article 26. Respondent has not done so and, to the contrary, the instruments of consent in this case are incompatible with the exhaustion of local remedies.[82] Unable to deny that Decree 41-88 did not constitute Respondent's consent to ICSID arbitration, Respondent now argues that it could exercise Article 26 through a mere expression of "willingness" in the Declaration in Decree 41-88 to require exhaustion of local remedies in future consents to ICSID arbitration, that the alleged terms and conditions of Decree 41-88 apply implicitly in all future ICSID arbitration agreements, and that CAFTA-DR and the LSA are either compatible with the exhaustion of local remedies or irrelevant.[83] Such arguments have no basis whatsoever, and merely emphasize that Respondent did not require the exhaustion of local remedies as a condition of consent in accordance with Article 26. Accordingly, the Preliminary Objection must fail.

1. Article 26 of the ICSID Convention mandates that a State seeking to require the exhaustion of local remedies do so as a condition of its consent to arbitration, and a mere expression of "willingness" to require exhaustion of local remedies in future consents to ICSID arbitration is not a valid exercise of Article 26

47. Claimants explained in their Observations that Article 26 of the ICSID Convention requires Respondent's consent to ICSID arbitration to be deemed exclusive of local remedies unless Respondent has required the exhaustion of local remedies "as a condition of its consent to arbitration under the Convention."[84] As a threshold matter, Respondent's Preliminary

[82] Observations § II.C.

[83] Reply § IV.

[84] Observations ¶¶ 37 *et seq.*

Objection fails because Decree 41-88 did not constitute Respondent's consent to ICSID arbitration (as Respondent concedes) and, therefore, the Declaration in Decree 41-88 could not be a valid exercise of Respondent's prerogative under Article 26 to require exhaustion as a condition of its consent to arbitration.[85]

48. Respondent now concedes that Article 26 reverses the traditional international law rule requiring the exhaustion of local remedies.[86] In addition, Respondent concedes that Decree 41-88 does not constitute its consent to arbitration (albeit maintaining, incorrectly, that the terms of Decree 41-88 nonetheless apply to its actual instruments of consent, as further addressed in Section II.C.2 below).[87] Respondent's concession that Decree 41-88 does not constitute its consent to arbitration is by itself dispositive of its Preliminary Objection, as it confirms that the reference to the exhaustion of local remedies in Decree 41-88 was not made as a condition of Respondent's consent to arbitration in accordance with Article 26 of the ICSID Convention.

49. Respondent attempts to salvage its objection by giving Article 26 an unprecedented and overly broad interpretation. Specifically, Respondent now asserts that a State seeking to reverse the ICSID Convention's presumption that arbitration is the exclusive remedy may do so with a simple written declaration: "[a]t best, all that is required is for the host State to express its willingness to require exhaustion of local remedies in writing."[88] This is an unavailing effort to ignore the terms of Article 26.

50. On its face, Respondent's position is inconsistent with the plain meaning of Article 26. The second sentence of Article 26 expressly provides that "[a] Contracting State may require the exhaustion of local remedies as a condition of its consent to arbitration under the Convention." A mere expression of willingness to require exhaustion contains neither

[85] Observations ¶¶ 37-45.

[86] Reply ¶ 56 ("It goes without saying that the Republic of Honduras has never denied this point.").

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

[88] *Id.* ¶ 54.

a requirement nor a consent to ICSID arbitration; at most it reflects the State's intent to require exhaustion as a condition of a future consent to ICSID arbitration. This is insufficient under Article 26. To be effective, a State must condition a consent to ICSID arbitration on the exhaustion of local remedies.

51. Respondent attempts to bolster its position by hiding behind strawman arguments that seek to distort Claimants' positions, irrelevant assertions, and misrepresentations. For example, Respondent suggests that Claimants are arguing "that States must use a certain sacramental formula to express their will."[89] Claimants have never contended that Article 26 mandates any magic words. The only requirement is what Article 26 itself requires, *i.e.*, that any exhaustion requirement must be made as a condition of the State's consent to ICSID arbitration. A declaration that is not conditioning the State's consent is insufficient, no matter how formal or sacramental its words.

52. Respondent also suggests that Claimants have argued that an exhaustion requirement must be contained in "a single, indivisible instrument of consent,"[90] and argues that "parties may give their consent to ICSID arbitration by means of different or even unilateral instruments" and "a host State might express its consent to the Centre's jurisdiction through a provision in its national legislation."[91] This is a strawman argument. Claimants noted in their Observations that consent may be contained in separate instruments, as it is well-established that a State may give consent in a unilateral offer of ICSID arbitration (*e.g.*, in national legislation or an investment treaty) and the investor may give its consent by accepting the offer in writing (*e.g.*, in a Request for Arbitration).[92] But while a requirement to exhaust local remedies in such a unilateral offer of arbitration by the State would be an integral part of an instrument of consent and thus may be valid for the purposes of Article 26, it does not follow that such a requirement can be validly included in any declaration or

[89] *Id.* ¶¶ 54, 56.

[90] *Id.* § II.A. ("Article 26 of the ICSID Convention does not require that the condition of exhaustion of local remedies be contained in a single, indivisible instrument of consent."); *see also id.* n. 70 (*citing* S. Schill *et al.* in support of the statement that "[i]t is generally accepted that the parties may give their consent to ICSID arbitration by means of different or even unilateral instruments, as long as such consent is in writing.").

[91] Reply ¶ 54, n. 70.

[92] *See, e.g.,* Observations ¶ 44.

national legislation. That is because an exhaustion requirement must be a condition of a State's consent to ICSID arbitration, and not simply a separate expression of the State's willingness to require exhaustion of local remedies.

53. In this context, Respondent continues to seek to mischaracterize various legal authorities that note that a State may consent to ICSID arbitration in its national legislation (*i.e.*, through an investment law) and validly impose an exhaustion requirement in such instrument as a condition of its consent, as supporting Respondent's position that its unilateral declaration in Decree 41-88 of its wiliness to require exhaustion of local remedies as a condition of future consents to ICSID arbitration is a valid exercise of the second sentence of Article 26. This effort remains disingenuous and baseless.

- Contrary to what Respondent suggests, *Lanco International v. Argentine Republic* ("***Lanco***") does not support a view that there can be a valid exhaustion requirement in national legislation that does not contain the State's consent to ICSID arbitration. As Claimants have already explained,[93] the tribunal in *Lanco* confirmed that an exhaustion requirement must be "(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,"[94] *i.e.*, in one of the well-established forms that an instrument of consent to ICSID arbitration may take. The reference to domestic legislation does not refer to laws that do not also contain the State's consent to arbitration, and Respondent is unable to cite anything in the *Lanco* award that suggests the contrary. Notably, Respondent simply proclaims that Claimants' arguments are wrong, without attempting to provide any explanation or support.[95]

- Respondent seeks to diminish Claimants' reliance on the explanation of the tribunal in *Generation Ukraine v. Ukraine* ("***Generation Ukraine***") that an exhaustion requirement "must be contained in the instrument in which such consent is expressed"[96] by arguing that Ukraine sought to impose the exhaustion requirement solely on the basis of the provisions of Article 26.[97] Not only is this an

93 Observations ¶ 44.

94 *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal (8 Dec. 1998) (RLA-7) § 39.

95 Reply ¶ 63 (baldly stating "However, this in no way emerges from the tribunal's reasoning," without providing any further explanation or support).

96 *See* Observations ¶ 42 (*citing Generation Ukraine v. Ukraine*, Award (16 Sept. 2003) (CLA-59) ¶ 13.5).

97 Reply ¶¶ 57-58.

oversimplification of Ukraine's argument,[98] it also is irrelevant because the analysis in *Generation Ukraine* on the correct interpretation and application of Article 26 directly excludes the possibility that a requirement to exhaust local remedies can be validly made anywhere except in the instrument of consent.[99]

Further, contrary to what Respondent implies, nothing in *Generation Ukraine* supports an understanding of *Lanco* as standing for the proposition that an exhaustion requirement can be contained in domestic legislation other than an instrument of consent.[100] In fact, the tribunal in *Generation Ukraine* addressed *Lanco* and clearly understood that the reference to domestic legislation in that case meant legislation containing a State's consent to arbitration.[101] Nothing in the *Generation Ukraine* award suggests that an effective exhaustion requirement may be contained in domestic legislation (or any instrument) that does not contain the State's consent to arbitration.

- Contrary to Respondent's assertion, the *travaux preparatoires* of the ICSID Convention do not support the view that States may require exhaustion by "merely expressing such intention."[102] In particular, Respondent repeatedly underscores the reference by Mr. Broches to a State's inclusion of an exhaustion requirement in a "unilateral provision in its legislation," which Respondent interprets to mean that the drafters of the ICSID Convention "expressly provided for the possibility for States to express such intention in a unilateral provision of their domestic legislation."[103] Once again, Respondent is confusing the possibility of a domestic legislation comprising the State's unilateral consent to arbitration with other legislation. Mr. Broches was referring to the former, specifically to an investment law providing the State's offer of ICSID arbitration, as is evident from a reading of the entire sentence, including the part that Respondent chose not to underline:

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[98] *See Generation Ukraine* (CLA-59) ¶¶ 6.8(d), 13.1 ("[Ukraine] appears to maintain that it had the right to insist on the exhaustion of local remedies upon the first reference to ICSID arbitration following its accession to the ICSID Convention," and that "Article 26 of the ICSID Convention prevails over Article VI(4) of the BIT, which contains no reference to the local remedies rule, by reason of the lex specialis character of the ICSID.").

[99] *See id.* (CLA-59) ¶¶ 13.4-13.5 (explaining that the second sentence of Article 26 "allows Contracting States to reserve its [*sic*] right to insist upon the prior exhaustion of local remedies as a condition of its [*sic*] 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," and that once the investor has accepted the State's offer to arbitrate (whether in a BIT, national legislation, or direct agreement), "no further limitations or restrictions on the reference to arbitration can be imposed unilaterally.").

[100] Reply ¶ 58 (*citing Generation Ukraine* (CLA-59) ¶ 13.5).

[101] *Generation Ukraine* (CLA-59) ¶ 13.5 (quoting *Lanco* approvingly for the proposition that exhaustion of local remedies may be required as a condition of consent in a BIT, domestic legislation, or a direct investment agreement in support of the conclusion that exclusion of the exhaustion requirement must be contained in the instrument in which such consent is expressed).

[102] Reply ¶¶ 59-61.

[103] *Id.* ¶¶ 60-61, n. 80 (*citing* History of the ICSID Convention, Vol. II-1 (1968) (RLA-29) pp. 756-757).

> All the Convention said was that where there was consent to submit a dispute to the Centre, this would mean that the exhaustion of local remedies has been waived. It, e.g., clarified that where a State included a unilateral provision in the legislation for encouraging investments that investment agreements would be subject to international arbitration, such a provision would be taken to exclude local remedies, unless a contrary intention was expressed.[104]

Moreover, as Claimants also explained, Mr. Broches later confirmed 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."[105]

- Respondent also continues to rely on the short editorial by former ICSID Secretary-General Ibrahim F.I. Shihata promoting ICSID to States, which mentions that States may include exhaustion requirements directly into agreements with investors and in investment treaties, and, in addition, 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."[106] As Claimants have already explained, however, Respondent can hardly derive support from this editorial, which merely uses the tentative use of "might result" in the context of explaining that the approach had been attempted by a single State, and a better reading of Mr. Shihata's editorial is as recognition that States may make forward-looking declarations of intent, which is borne out by the phrases "that it intends" and "will require."[107] Respondent simply denies Claimants' arguments, without proffering a better alternative understanding of Mr. Shihata's editorial or explaining how if the position therein is as Respondent argues it can be reconciled with the terms of Article 26 and the weight of the authority.[108] In any event, as Claimants already noted and Respondent has no response to, this short editorial intended to promote ICSID arbitration is not a source of law or even persuasive evidence.[109]

54. Finally, the Reply does not address Professor Schreuer's explanation of how States may apply Article 26 of the ICSID Convention, which was cited in the Observations and

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[104] History of the ICSID Convention, Vol. II-1 (1968) (RLA-3) pp. 756-757.

[105] *Id.* pp. 973-974.

[106] I. Shihata, "Editorial, ICSID and Latin America," 1 NEWS FROM ICSID 2 (Summer 1984) (RLA-6) p. 2 (emphasis added).

[107] Observations ¶ 44.

[108] Reply ¶¶ 64-65.

[109] *Id.*

conclusively addresses all of Respondent's invalid arguments.[110] Professor Schreuer explains:

> 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 . . . . 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.[111]

55. Respondent's omission is noteworthy because Professor Schreuer confirms both (i) the disingenuousness of Respondent's attempt to argue that the references to domestic legislation in the various sources it cites refer to anything other than a law that contains a consent to ICSID arbitration, and (ii) that a State's advance notice that it will require the exhaustion of local remedies as a condition of its consent to ICSID arbitration, such as Respondent's "expression of willingness" in the Declaration (which, as discussed below, Respondent claims it notified to ICSID), is a statement for informational purposes only. Evidently, Respondent has no response to either point.

56. Based on the foregoing, it is clear that there is no basis for Respondent's attempt to distort the terms of Article 26 and the manner in which States may require the exhaustion of local remedies as a condition of their consent to ICSID arbitration. The fact that Decree 41-88 does not constitute Respondent's consent to ICSID arbitration is fatal to the Preliminary Objection because it means that the Declaration in Decree 41-88 could not constitute a condition of any consent to ICSID arbitration. That the Declaration in Decree 41-88 expressed a willingness by Respondent to eventually require exhaustion of local remedies in any consent to ICSID arbitration is plainly insufficient, particularly since there was not yet any consent to arbitration by Respondent, much less a condition thereto.

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[110] Observations n. 88.

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

2. Decree 41-88 did not constitute an exercise of Respondent's prerogative under the second sentence of Article 26 to require the exhaustion of local remedies as a condition of its consent to ICSID arbitration and did not imply such a requirement in all Respondent's subsequent consents to ICSID arbitration

57. Decree 41-88 does not require the exhaustion of local remedies in the present case. As Claimants explained in their Observations, the forward-looking Declaration in Decree 41-88 merely anticipated the possibility of future ICSID arbitration agreements of Respondent requiring the exhaustion of local remedies but did not itself require the exhaustion of local remedies as a condition of Respondent's future consents to ICSID arbitration.[112] It also did not somehow introduce an implied term requiring exhaustion of local remedies in all Honduras's subsequent consents to ICSID arbitration, as Respondent alleges.[113]

58. In its Reply, Respondent takes issue with Claimants' description of the Declaration in Decree 41-88 as a forward-looking declaration, stating that this "is nothing more than a crude attempt by Claimants to disregard . . . the sovereign will of Honduras."[114] Respondent, however, does not engage with several of Claimants' arguments and/or distorts them, as shown below. Respondent makes four arguments, none of which support its position.

59. *First*, Respondent concedes that Decree 41-88 was merely the legislative act pursuant to which the National Congress of Honduras approved Agreement No. 8-DTTL whereby the President of Honduras had approved the ICSID Convention, and that its ratification of the ICSID Convention does not constitute consent to ICSID arbitration.[115] It acknowledges that "a further manifestation of consent by the disputing parties is necessary."[116] Respondent, however, baldly asserts that "DL 41-88 being the legislation approving the ICSID Convention in Honduras, its terms and conditions are naturally applicable to all

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[112] Observations ¶¶ 46-58.

[113] *Id.* ¶ 57.

[114] Reply ¶ 69.

[115] Observations ¶ 52; Reply ¶ 70 ("[T]he Republic of Honduras has never said that the act of ratification of the ICSID Convention was in itself sufficient to constitute consent to arbitration before this forum. Of course, a further manifestation of consent by the disputing parties is necessary.").

[116] Reply ¶ 70.

arbitration agreements referring to ICSID and involving the Republic of Honduras, whatever the instrument of consent."[117] Notably, Respondent does not elaborate or explain its assertion, but its position appears to be that the purported exhaustion requirement in Decree 41-88 must be deemed to be an implied term in, that is, an implied condition of, all Respondent's subsequent consents to ICSID arbitration. This is plainly incorrect.

60. Critically, Respondent has not provided <u>any</u> support for its argument that the terms of its unilateral declaration in Decree 41-88 are implicitly incorporated into all of its subsequent ICSID arbitration agreements. Not a single source has been provided supporting the proposition that terms may be implied in consents to ICSID arbitration, including in such consents included in investment treaties such as CAFTA-DR. This is unsurprising, as Respondent's argument entails that the terms of an arbitration agreement need not be apparent on the face of the instrument, which runs counter to the well-established rule that a State's consent to arbitration must be explicit,[118] clear and unambiguous.[119]

61. Many investment tribunals have addressed the requirements for the incorporation of terms of consent from another instrument in the context of cases dealing with the use of most favored nations ("**MFN**") provisions and found that incorporation is inappropriate if the terms of consent are not clear and unambiguous. As the majority in *AsiaPhos v. China* recently explained, "a State's consent to arbitrate disputes with an investor must be expressed in clear and unambiguous terms," and "the expansion of an arbitration clause by virtue of an MFN clause requires the clear and unambiguous intention of both parties for the MFN clause to have this effect."[120] Starting from the premise that respect for consent

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[117] Reply ¶ 70. *See also* Reply ¶ 82 ("[T]he Republic of Honduras provided for the exhaustion of local remedies as a jurisdictional condition in its legislation approving the ICSID Convention. As will be explained in the following section, this is applicable to all arbitration agreements referring to ICSID and involving the Republic of Honduras, <u>whether or not the condition was expressly included in the instrument of consent</u>." (emphasis added)).

[118] *See, e.g., 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) ¶ 258 ("Consent must be given in writing and be explicit.").

[119] *See*, *e.g.*, *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."). *See also id.* ¶ 94 (noting that the terms of Venezuela's investment treaties were "clear and precise.").

[120] *AsiaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China*, ICSID Case No. ADM/21/1, Award (16 Feb. 2023) (CLA-112) ¶¶ 109, 211. Many other tribunals have likewise rejected claims that an MFN

is a fundamental principle of arbitration, the tribunal in *Daimler v. Argentina* explained that "[e]stablishing consent therefore requires affirmative evidence," and that "[w]hat is true of the very existence of consent to have recourse to a specific international dispute resolution mechanism is also true as far as the scope of this consent is concerned."[121]

62. The possibility of incorporating terms of consent into an arbitration agreement through an MFN provision was also analyzed by the tribunal in *Plama Consortium Limited v. Republic of Bulgaria* ("***Plama***"). This analysis is particularly instructive because the tribunal's concerns as to the alleged incorporation by reference of terms into the arbitration agreement are even more salient in the context of the more extreme and less express implicit incorporation that Respondent alleges was accomplished through the Declaration. Consistent with the cases cited above, the point of departure for the tribunal in *Plama* was the recognition that "[i]t is a well-established principle, both in domestic and international law, that [arbitration] agreement should be clear and unambiguous." With respect to the possibility of incorporation by reference, the tribunal explained that "[d]oubts as to the parties' clear and unambiguous intention can arise if the agreement to arbitrate is to be reached by incorporation by reference."[122] According to the tribunal in *Plama*, the sufficiency of incorporation by reference of particular jurisdictional terms depends on the parties making clear and unambiguous reference to such terms such that their intent to incorporate the referenced terms into the arbitration agreement cannot be in doubt:

clause can expand consent to jurisdiction on a similar basis. *See, e.g., Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award (21 Apr. 2006) (CLA-99) ¶ 206 ("[A]n MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the Contracting Parties."); *Telenor Mobile Communications A.S. v. The Republic of Hungary,* ICSID Case No. ARB/04/15, Award (13 Sep. 2006) (CLA-100) ¶¶ 91-100 ("There are at least four compelling reasons why an MFN clause in a BIT providing for most favoured nation treatment of investment should not be construed as extending the jurisdiction of the arbitral tribunal to categories of dispute beyond those set out in the BIT itself in the absence of clear language that this is the intention of the parties."); *Austrian Airlines v. Slovak Republic,* Final Award (9 Oct. 2009) (CLA-104) ¶ 135 ("Faced with a manifest, specific intent to restrict arbitration to disputes over the amount of compensation for expropriation to the exclusion of disputes over the principle of expropriation, it would be paradoxical to invalidate that specific intent by virtue of the general, unspecific intent expressed in the MFN clause.").

[121] *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 Aug. 2012) (CLA-107) ¶ 175 (emphasis in original).

[122] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005) (CLA-97) ¶¶ 198-199.

> [A] reference may in and of itself not be sufficient; the reference is required to be such as to make the arbitration clause part of the contract . . . . This is another way of saying that the reference must be such that the parties' intention to import the arbitration provision of the other agreement is clear and unambiguous . . . .
>
> As explained above, an arbitration clause must be clear and unambiguous and the reference to an arbitration clause must be such as to make the clause part of the contract (treaty).[123]

63. Based on the above, implicit incorporation of a condition of consent (which by definition is less express than incorporation by reference) would be inherently insufficient as the supposedly implicit terms of consent would necessarily not be clear and unambiguous on the face of the agreement. If Respondent wished the intent expressed in the Declaration to apply to any subsequent consent to ICSID arbitration, at minimum it was required to at least make reference to the Declaration as a condition of its consent so that it was clear that the terms and conditions of the Declaration were incorporated in the arbitration agreement as a condition of Respondent's consent. Respondent did not even do that, however, and its push for implicit incorporation in this case is nothing but an effort to change the terms of its consent after the fact.

64. In any event, it is apparent that Decree 41-88 was not intended to mandate terms and did not have the effect of doing so.

- The relevant part of Decree 41-88 is the Declaration (titled "Declaration of the Republic of Honduras"). The fact that the Declaration is styled as a declaration is significant as a matter of international law. As the UN Glossary of terms relating to Treaty actions explains, "declarations merely clarify the state's position and do not purport to exclude or modify the legal effect of a treaty," and, significantly, '[t]he term is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations."[124] In other words, a declaration is a means by which States may express their will, intention, or opinion, and does not create a legal obligation.[125] Notably,

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[123] *Id.* ¶¶ 200, 218.

[124] United Nations Treaty Collection, Glossary of terms relating to Treaty actions, "Declarations" (CLA-114).

[125] *See also* Oxford Public International Law, Max Planck Encyclopedia of Public International Law, "Declaration" (CLA-111) ("If subjects of international law refer to a document as a declaration, this might generally suggest that they do not want it to have legal effect. Therefore, most of the statements published as declarations only have a political character and, if at all, political consequences."); Royal Spanish Academia Española, Panhispanic

Respondent itself describes the Declaration as an expression of its sovereign will,[126] even as it studiously avoids referring to the Declaration as a declaration, opting instead for referring generally to Decree 41-88.

- The text of the Declaration likewise confirms that it was merely a forward-looking statement, with Respondent expressing its intent: (i) to consent to ICSID arbitration in the future (first sentence);[127] (ii) to make the exhaustion of local remedies a precondition in its future consents to ICSID arbitration (second sentence);[128] and, (iii) to make Honduran law the applicable law in any such arbitrations and limit arbitration to nationals of another Contracting State (third sentence).[129] Nothing in the Declaration requires that Respondent agree to ICSID arbitration or any particular terms, and Respondent clearly was left free to choose not to consent to ICSID arbitration or to structure its eventual agreements differently.

  In this regard, the Declaration's third sentence is particularly telling. As with a requirement to exhaust local remedies under Article 26,[130] Respondent could not require that Honduran law would be solely applicable to ICSID arbitration through a forward-looking declaration because Article 42 of the ICSID Convention requires that the Tribunal also apply "such rules of international law as may be applicable" barring an agreement of the parties to the contrary.[131] On the other hand, neither a declaration nor a subsequent agreement was necessary to limit ICSID arbitration to nationals of another Contracting State, this being already a requirement of Article 25 of the ICSID Convention.[132] Thus, this sentence further confirms that the Declaration was not itself mandating terms and conditions but rather was simply

Dictionary of Legal Spanish, "Declaration" (CLA-113) ("Declaration··· Int. pub. Manifestation of will by a subject of international law.").

[126] Reply ¶ 69.

[127] Republic of Honduras, *Decree 41-88, Decree on the ICSID Convention* (25 Mar. 1988) (R-3) p. 7 ("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.").

[128] *Id*. p. 7 ("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 Convention.").

[129] *Id*. p. 7 ("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 Convention may make use of the procedures provided for in the Agreement.").

[130] *See supra* § II.C.1.

[131] ICSID Convention, Art. 42(1) ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.").

[132] ICSID Convention, Art. 25(1) ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State…") (emphasis added).

expressing what Respondent expected to include and (as significantly) not to include in future ICSID arbitration agreements.

Respondent does not seriously parse the Declaration. Its sole analysis of the text is the conclusory observation in a footnote that "the expression 'shall exhaust' clearly reveals the imperative nature of the exhaustion condition."[133] The use of "shall" is hardly the smoking gun that Respondent suggests, however, as the Declaration uses the same word in the first sentence (". . . Honduras shall submit to arbitration . . .") and the third sentence (". . . the applicable laws shall be those of the Republic of Honduras . . ."), neither of which can be interpreted as a legal mandate independent of a subsequent agreement for the reasons detailed above. On the contrary, the use of "shall" is perfectly consistent with a simple declaration of Respondent's aspirations, which may have had significance from the political standpoint but did not create a legal obligation.

- The Declaration's context is also significant. Decree 41-88 is comprised of two operative articles:[134] Article 1 consists of the National Congress's approval of Agreement No. 8-DTTL, the text of which it reproduces between quotation marks. Agreement No. 8-DTTL includes a transcription of the ICSID Convention, with the Declaration tucked between Article 75 and the list of the ICSID Signatory States. Article 2 of Decree 41-88 provides that the decree will come into effect upon publication. Neither article is concerned with making law as to future arbitration agreements or the terms and conditions thereof, and it is apparent that the sole concern of Decree 41-88 was to approve Honduras's ratification of the ICSID Convention.

This is borne out by Respondent's own description of Decree 41-88 as "legislation approving the ICSID Convention in Honduras."[135] While it is unknown how Respondent described Decree 41-88 to ICSID at the time of its deposit of its ratification instrument with ICSID,[136] ICSID listed Decree 41-88 in Document ICSID/8-F, which is titled "Legislative or Other Measures Relating to the Convention (Art. 69 of the Convention)" and refers to those measures taken by States to make the ICSID Convention applicable in their country,[137] as opposed to

[133] Reply n. 100.

[134] Republic of Honduras, *Decree 41-88, Decree on the ICSID Convention* (25 Mar. 1988) (R-3).

[135] Reply ¶ 70.

[136] Respondent has not produced its instrument of ratification that it deposited with ICSID pursuant to Article 68 of the ICSID Convention. Claimants requested a copy from the ICSID Secretariat, which advised that it cannot provide copies of documents that have been deposited by individual Member States. *See* Email from the ICSID Secretariat to White & Case (13 Nov. 2024) (C-177).

[137] *See* ICSID/8, Contracting States and Measures Taken by Them for the Purpose of the Convention (28 Oct. 2022) (RLA-55) ICSID/8-F, Legislative or Other Measures Relating to the Convention (Art. 69 of the Convention) p. 24 ("Contracting States have communicated to the Centre the following legislative or other measures taken by them, pursuant to Article 69 of the Convention, to make its provisions effective in their territories."); ICSID

Document ICSID/8-D, in which ICSID recorded the notifications made by a few States regarding requirements to exhaust local remedies.[138]

Indeed, there is no evidence that Respondent considered that Decree 41-88 gave the Declaration a mandatory legal effect as a matter of Honduran law. The evidence rather demonstrates that Respondent considered the opposite, as near contemporaneous legislation shows that Respondent did for a short time elevate the terms of the Declaration into law pursuant to a 1989 investment law that was repealed less than three years later.[139]

65. Respondent further complicates matters by asserting that "it is not possible to separate the ICSID Convention from the instrument by which the Republic of Honduras approved and put it into force. Without Legislative Decree 41-88 and the exhaustion condition, there would simply be no consent by the Republic of Honduras to ICSID arbitration."[140] Again, Respondent does not elaborate, and it is not clear what precisely Respondent means,

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Convention, Art. 69 ("Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.").

[138] *Id.* ICSID/8-D pp. 12-13 (reporting notifications by Israel, Costa Rica, and Guatemala regarding the exhaustion of local remedies, but not Honduras). The Tribunal is not required to decide on the legal effect of such notifications as Respondent, notably, made no such notification. The ICSID Convention specifically provides for certain types of notifications (*e.g.*, with respect to consent by a constituent subdivision or agency of a Contracting State, the class or classes of disputes which a State would or would not consider submitting to the jurisdiction of the Centre, and the designation of the competent court or other authority for the purposes of recognition and enforcement in the territory of a Contracting State, as provided for in Articles 25 (3), 25(4), and 54(2), respectively, of the ICSID Convention), but not with respect to requirements for the exhaustion of local remedies pursuant to Article 26. As noted above, according to Professor Schreuer, even the specific notifications given by States regarding the requirement to exhaust local remedies are merely indicative. *See* 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 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. It is an announcement of the State's intentions much like the notifications under Art. 25(4) . . . . If a State subsequently consents to ICSID arbitration in terms inconsistent with the prior general notification, the consent will prevail over the notification.").

[139] Shortly after Respondent's internal ratification of the ICSID Convention in Decree 41-88, Respondent issued the Decree No. 266-89, approving Law to Promote National and Foreign Investment (*Ley de Fomento a la Inversión Privada Nacional y Extranjera*), dated 15 December 1989 ("**Decree 266-89**"). Unlike some other investment laws, Decree 266-89 did not include a unilateral arbitration offer. Article 29 of Decree 266-89 reproduced the Declaration nearly verbatim. *See* Decree No. 266-89, approving the Law to Promote National and Foreign Investment dated 15 Dec. 1989 (C-160) Art. 29. While its content remains a forward-looking, Article 29 of Decree 266-89 temporarily elevated the terms of the Declaration into law, which would not have been necessary if Decree 41-88 had already done so. Shortly thereafter, however, Respondent issued a new investment law, Decree No. 80-92 approving the Honduran Investment Law (*Ley Hondureña de Inversiones*), dated 29 May 1992 ("**Decree 80-92**"). Article 23 of Decree 80-92 repealed Decree 266-89 in its entirety. *See* Decree No. 80-92, approving the Honduran Investment Law (*Ley de Inversiones*) dated 12 Jun. 1992 (C-161) Art. 23 ("Repeal Decree No. 266-89 of 15 December 1989."). *See also id.* Art. 4(13) ("Foreign investors may agree to submit the settlement of their disputes in accordance with international agreements signed by Honduras.").

[140] Reply ¶ 71.

making it difficult for Claimants to respond. One possible interpretation of Respondent's assertion is as an argument that the Declaration has the effect of being a reservation to the ICSID Convention, but, as Claimants have previously pointed out, Respondent notably is no longer arguing – at least expressly – that the Declaration constitutes a reservation.[141] For the avoidance of doubt, the Declaration is not and cannot constitute a valid reservation to the ICSID Convention as it would be incompatible with the object and purpose of the Convention,[142] and, in any event, Respondent did not comply with the requirements for making a treaty reservation under international law.[143]

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[141] *See* Observations ¶ 50. Claimants explained there that Respondent initially referred to the Declaration as a reservation, but subsequently denied in the *JLL* and *Autopistas* cases that the Declaration constituted a reservation to the ICSID Convention. *Id.*; Respondent's Letter to ICSID dated 30 May 2023 p. 3 (referring to the Declaration as a "*cláusula de reserva*"); *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-22) ¶ 36; *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-23) ¶ 58. Claimants reserved the right to explain that the Declaration is not a reservation, should Respondent resuscitate that position in its Reply. Observations ¶ 50. There is no response in the Reply.

[142] *See* VCLT (CLA-1) Art. 19 ("A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty."). Setting aside their purely declarative nature, the terms of the Declaration would be incompatible with both Articles 26 and 42 of the ICSID Convention, which provide, respectively that arbitration is the exclusive remedy and that the tribunal will apply both the law of the host State and international law, and establish specific mechanisms by which a State can require the opposite (*i.e.*, as a condition of consent and by party agreement). For a State to simply sidestep these specific requirements through a reservation would be incompatible with the ICSID Convention. *See also* Christoph H. Schreuer, *et al.*, *Chapter II: Jurisdiction of the Centre, in* THE ICSID CONVENTION – A COMMENTARY (3rd ed. 2022) (excerpts) (CLA-86) p. 1696 (Writing well-after Decree 41-88, Professor Schreuer observed that "[n]o State party to the Convention has made a reservation" and "for a reservation to be permissible, it must not be incompatible with the object and purpose of the treaty," and "in the framework of the Convention, the admissibility of any reservation would presumably be judged by the Administrative Council as the 'competent organ of the organization' in which all State parties to the Convention are represented."); Christoph H. Schreuer, *et al.*, *Chapter II: Jurisdiction of the Centre, in* THE ICSID CONVENTION – A COMMENTARY (2nd ed. 2009) (excerpts) (CLA-105) p. 1270 ("Under customary international law, any reservation to the ICSID Convention would have to be compatible with the Convention's object and purpose. It is difficult to imagine any reservation that meets this criterion.").

[143] *See* VCLT (CLA-1) Art. 23(1) (providing that reservations "must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty."); *id.* Arts. 20(2), 20(4)(c) (addressing the requisite consent necessary for reservations to be effective and providing that "[w]hen a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization," *i.e.*, in this case, consent by ICSID, and that "an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation."). *See also id.* Arts. 21-22 (addressing the legal effects of reservations and objections to reservations). Respondent has not even attempted to show that such procedural steps were taken with respect to the Declaration, and there is no evidence that either ICSID or any other ICSID Contracting State ever consented to a reservation by Respondent.

66. Further, Respondent's argument is belied by the fact that Respondent clearly did not consider itself bound by the Declaration in Decree 41-88 when it actually came time to consent to ICSID arbitration. Respondent's consents to ICSID arbitration not only do not refer to or otherwise incorporate the purported terms of Decree 41-88, but moreover contain dispute resolution provisions that are inconsistent with these purported terms, further demonstrating that Respondent's newfound position is an – untenable – afterthought. (This is in addition to the dispute resolution provisions in CAFTA-DR and the LSA, which contain Respondent's consents to the present arbitration and are addressed in the next section). Claimants made this point in their Observations,[144] and it is completely ignored in the Reply. There are multiple examples.

- In 2011, Respondent issued the Law for the Promotion and Protection of Investments (*Ley para la Promoción y Protección de Inversiones*), Article 25 of which provides that investors may resort to one of three alternative dispute resolution mechanisms: (i) ICSID arbitration; (ii) national or international arbitration in Honduran arbitration centres; or (iii) "ordinary justice," *i.e.*, local courts.[145] Far from suggesting that "ordinary justice" is a prerequisite to ICSID arbitration, Article 25 makes clear that the investor may choose from either, but that once the choice has been made it is obligatory absent an agreement between the parties. This cannot be reconciled with the automatic application of an implicit, overarching requirement to exhaust local remedies before resorting to ICSID arbitration.

- Likewise, Respondent has entered into numerous treaties that give investors a choice between ICSID arbitration and local remedies, including, for example, with

[144] Observations ¶ 57.

[145] Decree No. 51-2011, approving Law for the Promotion and Protection of Investments *(Ley para la Promoción y Protección de Inversiones)* dated 15 Jul. 2011 (C-165) Art. 25.

the United States,[146] France,[147] Ecuador,[148] Spain,[149] the Netherlands,[150] and the other countries in Central America and the Dominican Republic.[151] Giving

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[146] *See* Treaty between the Government of the United States of America and the Government of the Republic of Honduras concerning the Encouragement and Reciprocal Protection of Investments entered into force 11 Jul. 2001 (CLA-92) Art. IX ("2. A national or company that is a party to an investment dispute may submit the dispute for resolution under one of the following alternatives: (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or (c) in accordance with the terms of paragraph 3." "3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b), and that three months have elapsed from the date on which the dispute arose, the national or company concerned may submit the dispute for settlement by binding arbitration: (i) to the Centre [ICSID], if the Centre is available; or (ii) to the Additional Facility of the Centre, if the Centre is not available; or (iii) in accordance with the UNCITRAL Arbitration Rules; or (iv) if agreed by both parties to the dispute, to any other arbitration institution or in accordance with any other arbitration rules."). *See also id.* Department of State's Letter of Submittal dated 1 May 2000 ("In the event that an investment dispute cannot be settled amicably, paragraph 2 gives an investor an exclusive choice among three options to settle the dispute. These three options are: (1) submitting the dispute to the courts or administrative tribunals of the Party that is a party to the dispute; (2) invoking dispute-resolution procedures previously agreed upon by the national or company and the host country government; or (3) invoking the dispute-resolution mechanisms identified in paragraph 3 of Article IX.") (emphasis added).

[147] Agreement between the Government of the French Republic and the Government of the Republic of Honduras on the Promotion and Reciprocal Protection of Investments entered into force 8 Mar. 2001 (CLA-94) Arts. 10.2 ("If such a dispute has not been settled within six months from the time it was raised by either party to the dispute, it shall be submitted at the request of the investor: (a) to the competent courts of the Contracting Party in which the investment is made; (b) to international arbitration under the conditions set out in paragraph 3."), 10.3 ("In the case of recourse to international arbitration, the dispute may be submitted, at the option of the investor: (a) to the International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on 18 March 1965, provided that the Contracting Parties are signatories to that Convention; (b) an ad hoc arbitration tribunal established in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).").

[148] Agreement between the Republic of Ecuador and the Republic of Honduras for the Promotion and Reciprocal Protection of Investments signed 26 Jun. 2000 terminated 18 Jan. 2008 (CLA-95) Art. 11.2 ("If the dispute has not been settled within a period of six months from the date on which it was raised by one or party or another, it may be submitted at the request of the investor: (a) to the competent courts of the Contracting Party in whose territory the investment was made. If this forum does not settle the dispute within six months from the date on which it was raised in its courts, the investor may discontinue this request and submit the dispute: (b) to the International Centre International Centre for Settlement of Investment Disputes between States and Nationals of Other States, under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington on 18 March 1965; or (c) to an ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).").

[149] Agreement for the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Honduras entered into force 23 May 1996 (CLA-91) Art. 11.2 ("If the dispute cannot be resolved in this way within six months from the date of written notification referred to in paragraph 1, it shall be submitted at the choice of the investor to: the competent courts of the Contracting Party in whose territory the investment was made; the ad hoc arbitral tribunal established by the Arbitration Rules of the United Nations Commission on International Commercial Law; the International Centre for Settlement of Relative and Investment Disputes (ICSID) established by the 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States', opened for signature at Washington 18 March 1965, when each State Party to this Agreement has acceded to it; the Court of Arbitration of the International Chamber of Commerce in Paris.") (emphasis added).

[150] Agreement on encouragement and reciprocal protection of investments between the Republic of Honduras and the Kingdom of the Netherlands entered into force 1 Sep. 2002 (CLA-96) Art. 9.2 ("If the dispute has not been

investors the choice between ICSID Arbitration and local courts cannot be reconciled with the application of an implicit, overarching requirement to exhaust local remedies before resorting to ICSID arbitration.

- In addition, Respondent has entered into agreements that do make resort to some local proceedings a precondition to arbitration, but without requiring exhaustion of all administrative and judicial channels, as would be the case if the terms of the Declaration were an implied term in these treaties, including, for example, with the other countries in Central America and Panama.[152] Claimants explained this in the Observations,[153] but it is ignored in the Reply. This treaty is particularly relevant in belying Respondent's argument that the terms of the Declaration are incorporated implicitly into subsequent agreements, as it shows Respondent explicitly agreeing to an investor submitting claims upon only partial recourse to local proceedings (*i.e.*, resort to administrative but not judicial remedies, and only for a limited period of time). This excludes the possibility of an implicit requirement of total exhaustion of all local administrative and judicial remedies.

- Finally, Respondent has entered into a number of treaties that address the applicable law for ICSID arbitrations and specifically provide for the application of

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settled within a period of six months from the date either party to the dispute requested amicable settlement, that Contracting Party consents the dispute be submitted at the request of the national concerned to: a) a competent domestic court of the Contracting Party in which territory the investment was made; b) the International Centre for Settlement of Investment Disputes (ICSID), for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965; c) an international ad hoc arbitral tribunal under the Arbitration Rules of the United Nations Commission on International Trade law (UNCITRAL).").

[151] Free Trade Agreement between Central America and the Dominican Republic entered into force 3 Oct. 2001 (CLA-54) Art. 9.20.2 ("If such consultations do not reach a settlement within five (5) months from the date of the application for settlement, the investor may refer the dispute (a) to the competent courts of the Party in whose territory the investment was made; (b) to the domestic arbitration of the Party in whose territory the investment was made; or (c) to international arbitration: (i) to ICSID, when both Parties are members thereof; or (ii) to the Rules of the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Procedures by the ICSID Secretariat, when one of the Parties is not a member of ICSID; or (iii) to arbitration in accordance with the Rules of the United Nations Commission on International Trade Law (UNCITRAL), in the event that neither Party is a member of ICSID. To this end, each party gives its advance and irrevocable consent that any dispute may be submitted to this arbitration.").

[152] Free Trade Agreement between Central America and Panama entered into force 4 Nov. 2002 (CLA-58) Art. 10.22 ("Each Party may require prior exhaustion of its administrative remedies as a condition of its consent to arbitration under this Chapter. However, if six (6) months after the administrative remedies were filed, the administrative authorities have not issued their final ruling, the investor may recourse directly to arbitration in accordance with this Section.").

[153] Observations ¶ 57.

international rules of law, including, for example, with France,[154] Ecuador,[155] Spain,[156] Chile,[157] and the other countries in Central America and the Dominican Republic,[158] as well as CAFTA-DR.[159] This further belies that the terms of the Declaration – which expressed the intent that only Honduran law be applicable – apply automatically, as such provisions cannot be reconciled with the third sentence of the Declaration being implicitly and generally applicable.

67. Even assuming *arguendo* that Honduran law required Respondent to condition future consents to ICSID arbitration on the exhaustion of local remedies, Respondent's failure to do so does not vitiate Respondent's consent to ICSID arbitration (under CAFTA-DR, the LSA, or any of the other instruments that would be inconsistent with the terms of the Declaration). Any such inconsistency would be Respondent's responsibility, not Claimants', and Honduran law expressly provides that, in the event of such inconsistency, Honduras's subsequent treaties prevail.[160] Likewise, on the international level, Respondent cannot demand the exhaustion of local remedies as a prerequisite to claims under CAFTA-DR on the grounds that such a requirement was mandated by Decree 41-88, as doing so is

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[154] Agreement between the Government of the French Republic and the Government of the Republic of Honduras on the Promotion and Reciprocal Protection of Investments entered into force 8 Mar. 2001 (CLA-94) Art. 10.4 ("The arbitration shall be based on the provisions of this Agreement, the provisions of any specific agreements on investment and the principles of international law in this field. The arbitration shall also take into consideration the provisions of the domestic law of the Contracting Party involved in the dispute.").

[155] Agreement between the Republic of Ecuador and the Republic of Honduras for the Promotion and Reciprocal Protection of Investments signed 26 Jun. 2000 terminated 18 Jan. 2008 (CLA-95) Art. 11.3 ("The arbitral tribunal shall decide on the basis of the provisions of this Agreement, the Law of the Contracting Party which is a party to the dispute including its rules on the Conflict of Laws, to the terms of any specific agreement concluded in relation to the investment as well as the principles of international law.").

[156] Agreement for the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Honduras entered into force 23 May 1996 (CLA-91) Art. 11.3 ("The arbitration shall be based on: the provisions of this Agreement and those of other agreements concluded between the Contracting Parties; generally accepted rules and principles of international law; the national law of the Contracting Party in whose territory the investment has been made, including conflict of law rules.").

[157] Private [*sic*] Agreement between the Republic of Chile and the Republic of Honduras for the reciprocal promotion and protection of investments entered into force on 11 Nov. 1996 (CLA-53) Art. X ("The Court shall decide on the basis of the provisions of this Agreement, the principles of international law in the matter and the general principles of law recognized by the Contracting Parties.").

[158] Free Trade Agreement between Central America and the Dominican Republic entered into force 3 Oct. 2001 (CLA-54) Art. 9.20.4 ("The arbitral tribunal shall decide on the basis of: a) the provisions of this Agreement and other related agreements concluded between the Parties; b) the national law of the Party in whose territory the investment has been made, including the terms of any particular agreements concluded with respect to the investment; and c) the universally recognized rules and principles of International Law.").

[159] CAFTA-DR (CLA-2) Art. 10.22.1 ("[T]he tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.").

[160] *See* Constitution of Honduras of 1982 with Amendments through 2013 ("***Constitution of Honduras***") (C-4) Art. 18 ("In the event of a conflict between the treaty or convention and the law, the first shall prevail.").

tantamount to invoking a provision of its internal law as justification for its failure to respect the dispute resolution mechanism in CAFTA-DR, contrary to the basic principle that a State cannot rely on its internal legislation to escape its international law obligations.[161] Moreover, even it were the case (*quod non*) that a requirement to exhaust local remedies was once required, the fact that such a requirement is not expressed in the subsequent ICSID arbitration agreement means that any prior requirement no longer applies, because the terms of a subsequent arbitration agreement can supersede prior conditions of consent previously set out by a State, as Claimants have explained.[162] Respondent provides no response, nor can it, as it is clear that subsequent ICSID arbitration agreements incompatible with any domestic exhaustion of local remedies requirement would prevail over the Declaration as opposed to incorporating it implicitly.

68. *Second,* Respondent argues that Decree 41-88 was public (and included in document ICSID/8-F) and "[i]t is therefore wholly inappropriate for Claimants to now claim that the Tribunal should disregard Honduras' conditional consent, just because they were (allegedly) unaware of its existence."[163] This is another strawman argument, as Claimants have not asserted that the Decree was unknown, but rather that the Declaration was unheard of in practice.[164] As Claimants explained in the Observations and explain herein, this shows that Respondent's position in this arbitration is new and disingenuous. Further, Respondent's reference to the ICSID/8-F Document is misleading. As noted, that document merely lists the legislative measures taken by Contracting States to give effect to the ICSID Convention in their territory, as they are required to do under Article 69 of

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[161] *See* VCLT (CLA-1) Art. 27 "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." *See also Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award (14 Oct. 2016) (CLA-110) ¶¶ 5.62, 5.71 ("It is well established that a State cannot justify the non-observance of its international obligations in an international arbitration by invoking provisions of its domestic law . . . Domestic law cannot automatically negate the Respondent's international obligation that has been established by its consent to ICSID arbitration under Article 15(a) of the Investment Law and the ICSID Convention.").

[162] Observations ¶ 58.

[163] Reply ¶¶ 72-73 (*citing* Observations ¶ 53).

[164] In support of its mischaracterization of Claimants' position, Respondent cites Observations ¶ 53, which, contrary to Respondent's assertion, does not state that Claimants were unaware of Decree 41-88 but rather that "[i]n practice, the Declaration was unheard of until Respondent first raised it in this case," which is completely true and uncontested in the Reply.

the Convention.[165] Honduras gave effect to the ICSID Convention in its territory by ratifying it in Decree 41-88. Document ICSID/8-F shows nothing more or less than that, as further demonstrated by the fact that it merely cites to Decree 41-88 and does not mention the Declaration or the exhaustion of local remedies at all.[166]

69. *Third*, Respondent argues that Claimants' interpretation of the Declaration as a declaration of future intent deprives both Decree 41-88 and Article 26 of meaning and is therefore contrary to the principle of effectiveness.[167] Claimants interpretation does nothing of the sort. Pursuant to the principle of *effet utile*, treaty provisions must be interpreted in a manner that does not deprive them of meaning.[168] As explained above, non-binding declarations have meaning, as they have the purpose of expressing a State's intent.[169] In any event, the Declaration is legally superfluous on its own terms, as it does not create a legal obligation, as explained above.[170] Furthermore, nothing in Claimants' reading deprives Article 26 of meaning. Respondent could have exercised its right under the second sentence of Article 26 to condition its consents to ICSID arbitration in this case on

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[165] *See supra* ¶ 64.

[166] ICSID/8, Contracting States and Measures Taken by Them for the Purpose of the Convention (28 Oct. 2022) (RLA-55) ICSID/8-F, Legislative or Other Measures Relating to the Convention (Art. 69 of the Convention) p. 24. Respondent's reliance on the ICSID/8-F list is reminiscent of efforts by the claimant in *Brandes*, which likewise asked the tribunal to verify terms of consent in a law on the basis that it was communicated to ICSID. This was rejected by the tribunal in *Brandes* because there was no evidence of the specific consent alleged. *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award (2 Aug. 2011) (CLA-74) ¶ 117 ("To refute one of Venezuela's arguments, Brandes refers in its Rejoinder to the notification about the LPPI made by the Respondent to ICSID in 2000, and to the fact that the enactment of that law was communicated to the World Trade Organization. The Tribunal does not find in those documents any statement by Venezuela to the effect that Article 22 provides for its consent to ICSID jurisdiction.").

[167] Reply ¶¶ 74-76. Respondent's argument as to the supposed "clear and manifest meaning" of Decree 41-88 (*see* Reply ¶ 74 and n. 100) is addressed in ¶ 64 above.

[168] *See* Richard K. Gardiner, 5 *The General Rule: (1) The Treaty, its Terms, and their Ordinary Meaning, in* Treaty Interpretation (2008) (CLA-103) p. 149 (explaining that it is a fundamental principle of treaty interpretation that all the terms included in the treaty should be given meaning and effect.). The International Law Commission considered the *effet utile* principle to be embodied in Article 31(1) of the VCLT. *See id.* p. 160.

[169] *See supra* ¶ 64.

[170] *See supra* ¶ 64. Following the Declaration, Respondent still would have had to require the exhaustion of local remedies as a condition of consent to ICSID arbitration and entered into an agreement that Honduran law be solely applicable. Both expressions of intent were superfluous as a legal matter because neither was possible without the subsequent acts, and either was possible without the prior Declaration. Moreover, the statement that only nationals of ICSID Member States would have resort to ICSID arbitration was already legally superfluous insofar as this is a basic jurisdictional requirement under the ICSID Convention and needed no further confirmation.

the exhaustion of local remedies. It did not do so, however. The fact that it now regrets not having done so does not mean that Article 26 has been made meaningless.

70. *Fourth,* Respondent attempts to address Claimants' showing in the Observations that Respondent's current position on Decree 41-88 is new.[171] Specifically, Claimants explained that Respondent historically does not appear to have held the view that it now espouses, and, on the contrary, never raised the Declaration to demand the exhaustion of local remedies in any of its prior ICSID cases or otherwise argued that Decree 41-88 establishes a jurisdictional condition until this very case.[172]

71. Respondent states in response that it raised an objection in the *JLL* and *Autopistas* matters under ICSID Arbitration Rule 41 that the claims were manifestly without legal merit on the basis of non-compliance with the alleged exhaustion requirement in Decree 41-88, and that it "recently asserted exhaustion of local remedies" in other arbitrations.[173] Respondent, however, fails to proffer any evidence that it ever raised an objection, or even considered that Decree 41-88 constituted an exercise of Article 26, prior to this case. Tellingly, Respondent filed its objections in *JLL* and *Autopistas* after having raised the issue in this case, and both tribunals dismissed Respondent's Rule 41 objection, finding that it failed to meet the Rule 41 threshold.[174] Respondent attempts to downplay its not having raised Decree 41-88 in prior ICSID cases by arguing that "[t]he filing of preliminary objections is neither an imperative nor does it represent an obligation, but rather constitutes a procedural power whose exercise is at the full disposal of the State."[175] But this is deliberately missing the point: the principal significance of Respondent not having asserted in previous ICSID cases that Decree 41-88 implied an exhaustion requirement in its consent to arbitration is that it is yet further evidence that Respondent did not previously consider that it had conditioned its consent to arbitration on the exhaustion of local remedies. Indeed, it is simply not credible that Respondent would not have objected on that basis in

171 Reply ¶¶ 77-81.

172 Observations ¶¶ 49-50.

173 Reply ¶ 77.

174 *JLL* (RLA-22); *Autopistas* (RLA-23).

175 Reply ¶ 77.

prior ICSID cases if it genuinely believed that the claimants in those cases had failed to comply with a condition of consent.[176]

72. Respondent focuses its argument on denying that it is estopped from raising the Preliminary Objection.[177] As Claimants have explained, estoppel derives from the international law principle of good faith which prohibits Respondent from raising arguments now that contradict its prior acts, including its consenting to ICSID arbitration in numerous instruments that do not include an exhaustion requirement and to the contrary contain provisions that are incompatible with such a requirement as well the lack of any evidence that it previously raised the exhaustion of local remedies in the ICSID cases brought against it.[178] Respondent argues that estoppel does not apply in this case because Claimants could not "be confident that the prior exhaustion of local remedies requirement for its consent to ICSID arbitration has been waived."[179] Notably, Respondent's position presupposes that Claimants should have assumed that there was an exhaustion requirement that Respondent was waiving, whereas in reality there was no such waiver because there was no such requirement, and Respondent has not identified a single piece of evidence that shows the opposite.

3. Neither instrument of consent in this case contains a requirement to exhaust local remedies; to the contrary, both instruments contain dispute resolution provisions that are incompatible with such a requirement

73. Respondent's consents to ICSID arbitration in this case are provided in Article 10.17 of CAFTA-DR and Section 2.2 of the LSA, not in Decree 41-88. As Claimants explained in their Observations, Respondent sought in its Preliminary Objection Application to misdirect the Tribunal's attention to the Declaration in Decree 41-88 instead of focusing on the actual instruments of consent in this case,[180] evidently because the consents in these

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[176] The fact that Respondent did not raise the exhaustion of local remedies in those cases further underscores that the objection is waivable, and therefore sounds in admissibility as opposed to jurisdiction. *See supra* § II.B.

[177] Reply ¶¶ 78-81.

[178] Observations ¶ 68.

[179] Reply ¶¶ 79, 81.

[180] Observations ¶ 59.

instruments are not conditioned on any requirement to exhaust local remedies, and in fact are fundamentally incompatible with any such requirement, further demonstrating the incorrectness of Respondent's implicit term argument.

74. In the Reply, Respondent asserts (a) that the terms of the CAFTA-DR are "perfectly reconcilable" with the alleged exhaustion requirement,[181] and (b) that the LSA is "simply irrelevant" on the grounds of a new allegation that Respondent is not a party thereto.[182] Both arguments are misguided.

(a) CAFTA-DR's dispute resolution provisions do not include a requirement to exhaust local remedies and, to the contrary, are incompatible with such a requirement

75. The parties agree that CAFTA-DR does not contain any express requirement that claimants exhaust local remedies. Respondent maintains that a requirement to exhaust local remedies is nonetheless implicit in CAFTA-DR and denies that the treaties provisions are incompatible with such a requirement. Respondent's position is not only inconsistent with the requirements of Article 26 of the ICSID Convention, but also devoid of any basis in CAFTA-DR itself. As explained below, (i) the existence of an implicit condition of consent is simply not credible given the carefully crafted and comprehensive nature of the disputes resolution provisions in CAFTA-DR, (ii) the exhaustion requirement alleged by Respondent is inconsistent with the plain language of multiple CAFTA-DR provisions, and (iii) the principle of good faith precludes accepting Respondent's position.

(i) CAFTA-DR contains carefully crafted detailed dispute resolution provisions that do not include a requirement to exhaust local remedies

76. At the outset, Claimants note that Respondent's effort to read an implicit exhaustion requirement into CAFTA-DR is simply not credible given that CAFTA-DR includes a detailed and carefully crafted dispute resolution mechanism, including various detailed conditions on consent.

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[181] Reply ¶¶ 84, 86-98.

[182] *Id*. ¶¶ 84, 99-106.

- Article 10.18 ("Conditions and Limitations on Consent of Each Party") provides that "[n]o claim may be submitted to arbitration" if (i) the treaty's prescription period has elapsed, (ii) if claimant has not consented to arbitration, (iii) if claimant has not accompanied the notice of arbitration with the requisite waiver, or (iv) if the claimant 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.[183]

- Annex 10-E of CAFTA-DR includes additional limitations as to the submission of claims by U.S. investors.

- Honduras and the United States also exchanged letters dated 5 August 2004 regarding the implications of the investment chapter in CAFTA-DR for the US-Honduras BIT.[184]

77. A treaty's level of precision and nature are key elements in construing the existence of absent or implicit terms,[185] and in this case it is apparent that CAFTA-DR is extremely precise as regards the terms of consent (and generally) and that such elements should not be implied. Had Honduras wanted to include exhaustion as yet another condition of consent, it could, would, and should have done so in the specific conditions of consent article, an annex, or even a side letter. It did not do so. As Professor Gardiner explains, "[s]ometimes the absence of something means simply that it is not there."[186]

(ii) To the contrary, CAFTA-DR's carefully crafted dispute resolution provisions are incompatible with a requirement to exhaust local remedies

78. In reality, CAFTA-DR's dispute resolution provisions are fundamentally incompatible with an exhaustion requirement as they expressly restrict the pursuit and/or exhaustion of local remedies. As Claimants have explained, finding that claimants are required to exhaust local remedies would deprive these provisions of *effet utile*.[187]

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[183] CAFTA-DR (CLA-2) Art. 10.18.

[184] Exchange of Letters Regarding the U.S.-Honduras Bilateral Investment Treaty dated 5 Aug. 2004 (C-162).

[185] *See* Richard K. Gardiner, *5 The General Rule: (1) The Treaty, its Terms, and their Ordinary Meaning, in Treaty* Interpretation (2008) (CLA-103) pp. 165-167 (explaining how treaty interpretation has coped with silence or absent terms).

[186] *Id.* p. 165.

[187] Observations ¶¶ 61, 65-67.

79. Respondent denies that there is any incompatibility between CAFTA-DR and the purported exhaustion requirement but is unable to respond to a number of Claimants' arguments. Rather than engage seriously with Claimants' arguments and the treaty provisions, Respondent relies on a series of mischaracterizations and irrelevant arguments, all easily rebutted.

1. CAFTA-DR's waiver requirement is incompatible with the exhaustion of local remedies

80. As Claimants have explained, CAFTA-DR requires that investors waive any right to initiate or continue local remedies upon submitting claims as a condition for bringing claims. This requirement necessarily implies that local remedies have not been exhausted – otherwise, there would be no local remedies to "initiate or continue."[188] Respondent has no real response to this point.

81. *First,* Respondent argues that the waiver requirement in CAFTA-DR is not incompatible with the exhaustion of local remedies because the requirement "has been deliberately established for the benefit of the Contracting States to protect them against potential parallel proceedings" and "in no case exempts investors from exhausting domestic remedies," and that to interpret the provision in that way "would go against its meaning and purpose, contrary to the basic canons of interpretation of the VCLT."[189] This argument is a red herring. Whether the waiver requirement was established to benefit States is irrelevant to the issue of incompatibility with the exhaustion of local remedies. Whether the objective of the waiver is to avoid multiple proceedings is likewise irrelevant (though, notably, requiring the exhaustion of local remedies entails multiple proceedings).

82. Respondent chooses not to address the real issue, which is that the waiver requirement is incompatible with the exhaustion of local remedies requirement that Respondent alleges should be implied into CAFTA-DR. Starting with an ordinary meaning interpretation of

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[188] CAFTA-DR (CLA-2) Art. 10.18.2 (requiring a waiver "of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.").

[189] Reply ¶¶ 87-88.

Article 10.18.2, which is what the VCLT requires, the plain text of the provision requires a claimant waive to "any right to initiate or continue" any local proceedings with respect to any measure alleged to constitute a treaty breach.[190] While this provision does not exclude the possibility of already commenced or concluded local proceedings, it necessarily assumes that claimants have not already exhausted local proceedings – otherwise, by definition, there would be no further local proceedings to initiate or continue that could be waived. Therefore, implying an exhaustion requirement into the treaty, as Respondent seeks to do, would leave the waiver requirement without object and purpose and render it superfluous, *i.e.*, deprive it of *effet utile*, contrary to the principles of treaty interpretation that Respondent itself espouses in its Reply.[191]

83. *Second*, Respondent denies that *Metalclad Corporation v. The United Mexican States* ("***Metalclad***") supports Claimants' position that the waiver requirement is incompatible with the exhaustion of local remedies.[192] According to Respondent, *Metalclad* can be distinguished from the instant case on the grounds that "unlike the Republic of Honduras, Mexico had nowhere required investors to exhaust domestic remedies prior to resorting to arbitration."[193] This is an irrelevant distinction that fails to disprove the incompatibility between the waiver requirement and the exhaustion of local remedies confirmed by the tribunal in *Metalclad*. The relevant point of *Metalclad* for present purposes is the tribunal's conclusion that Mexico's decision not to insist on the need for exhaustion of local remedies was correct in light of the waiver provision of NAFTA, which is very similar to Article 10.18.2 of CAFTA-DR and likewise conditioned the submission of arbitration claims upon waiver of the right to initiate or continue local proceedings.[194]

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[190] CAFTA-DR (CLA-2) Art. 10.18.2.

[191] Reply ¶ 75.

[192] *Id.* ¶ 90.

[193] *Id.* ¶ 89.

[194] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 Aug. 2000) (CLA-56) n. 4 ("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.").

84. *Third*, Respondent misrepresents the analysis of Article 10.18.2 of CAFTA-DR in *Corona Materials, LLC v. Dominican Republic* ("***Corona Materials***") and falsely asserts that the tribunal in that case concluded that the waiver requirement "did not preclude the claimants in that case from exhausting domestic remedies, because 'this [*i.e.*, the waiver] requirement is immediately conditioned by subsection 3 of this Article.'"[195] Respondent's gloss is a blatant mischaracterization. The tribunal in *Corona Materials* did not address exhaustion at all, much less its compatibility with the waiver provision. Rather the tribunal in *Corona Materials* was addressing the limited exception to the waiver requirement in Article 10.18.3 of CAFTA-DR, which allows claimants to initiate proceedings to obtain interim measures.[196] Seeking interim injunctive relief that does not involve the payment of monetary damages for the sole purpose of preserving the claimant's or its local enterprise's rights and interest during the pendency of the arbitration, which is all that Article 10.18.3 of CAFTA-DR allows,[197] is entirely different from, and has nothing to do with, seeking a local remedy for the alleged wrongful conduct. *Corona Materials* in no way suggests that the waiver in Article 10.18 and an exhaustion requirement are compatible.

2. CAFTA-DR's fork-in-the-road provisions are incompatible with the exhaustion of local remedies

85. As Claimants have explained, CAFTA-DR prohibits investors from submitting to arbitration claims for breach of an investment authorization or an investment agreement

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[195] Reply ¶ 90.

[196] *Corona Materials LLC v. Dominican Republic,* ICSID Case No. ARB(AF)/14/3, Award on Respondent's Expedited Preliminary Objections Pursuant to DR-CAFTA Article 10.20.5 (31 May 2016) (RLA-19) ¶ 268 ("In the Tribunal's view, the waiver required to submit a claim to international arbitration pursuant to DR-CAFTA Chapter 10 is clear in its terms. Article 10.18.2 first requires the claimant (whether claiming on its own behalf or on behalf of an enterprise) to waive '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', this requirement is immediately qualified by the article's subparagraph 3 . . . Thus, an action seeking interim injunctive relief not involving the payment of damages is available to a DR-CAFTA claimant (or its enterprise) while it pursues its DR-CAFTA claim for damages.").

[197] CAFTA-DR (CLA-2) Art. 10.18.3 ("Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue <u>an action that seeks interim injunctive relief and does not involve the payment of monetary damages</u> before a judicial or administrative tribunal of the respondent, <u>provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration</u>." (emphasis added)).

previously brought in local proceedings, and it prohibits U.S. investors from submitting to arbitration certain claims previously brought in local proceedings or for breaches previously alleged in local proceedings.[198] Again, Respondent's arguments to the contrary are misplaced.

86. Respondent argues that "the *fork-in-the-road* clauses of the DR-CAFTA operate on a different plane than the requirement of exhaustion of local remedies," on the basis that such clauses are merely intended to bar arbitration where the investor "previously claimed an alleged breach of *international law obligations* before domestic courts."[199] Respondent's argument is premised on the supposition that the type of proceedings that an investor allegedly would be required to exhaust are categorically different from those that trigger CAFTA-DR's fork-in-the-road provisions. This is not the case.

87. Assuming *arguendo* that the second sentence of the Declaration is implicitly incorporated into CAFTA-DR, as Respondent alleges, the investor would be required to "exhaust the administrative and judicial channels of the Republic of Honduras."[200] This would not necessarily be limited to claims solely arising out of Honduran law. On the contrary, Annex 10-E of CAFTA-DR expressly presupposes the possibility that an investor may "elect to submit a claim" for breach of the treaty to local courts.[201] Likewise the fact that

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[198] Observations ¶ 62; CAFTA-DR (CLA-2) Art. 10.18.4 ("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."); CAFTA-DR, Annex 10-E ("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 . . . 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.").

[199] Reply ¶ 92.

[200] Republic of Honduras, *Decree 41-88, Decree on the ICSID Convention* (25 Mar. 1988) (R-3) p. 7 ("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 Convention.").

[201] CAFTA-DR (CLA-2) Annex 10-E (2) ("For greater certainty, if an investor of the United States elects to submit a claim of the type described in paragraph 1 [i.e., a claim that a Central American Party or the Dominican Republic has breached an obligation under Section A] 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

various other treaties of Honduras give investors the choice of pursuing claims for breach of the treaty in local courts presuppose that such mechanisms exist or could exist.[202]

88. Moreover, the fork-in-the-road provisions in CAFTA-DR do not only bar arbitration where the investor "previously claimed an alleged breach of *international law obligations* before domestic courts," as Respondent asserts.[203] In fact, the plain language of CAFTA-DR makes clear that arbitration can also be barred if an investor has pursued Honduran law causes of action in local proceedings. Specifically, Annex 10-E prevents U.S. investors from submitting claims to arbitration if they have ever "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."[204] *i.e.*, even if such allegations are made in a local proceeding for relief under Honduran law regardless of the cause of action. Similarly, Article 10.18.4 prevents investors from submitting claims to arbitration after bringing any local claim "for breach of an investment authorization" or "for breach of an investment agreement,"[205] *i.e.,* even if they asserted purely contractual or administrative claims under Honduran law.

89. Accordingly, the plain terms of CAFTA-DR demonstrate that there is overlap between the proceedings that would be required under the Declaration as interpreted by Respondent, and the allegations and claims that trigger the fork-in-the-road prohibitions. Because Respondent's interpretation of the Declaration would require investors to first exhaust all possible remedies in Honduras, this overlap inevitably could result in their being barred from international arbitration.

90. Respondent is not availed by *Corona Materials* (or the sources it cites addressing the interpretation of fork-in-the-road provisions outside of the CAFTA-DR context) to support

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arbitration under Section B."). Notably, the passage from *Corona Materials* cited by Respondent itself states that Annex 10-E "is clearly intended to address the situation in certain civil law countries where international treaties have direct effect and, therefore, the alleged breach of an international treaty may form a case under the domestic law of these States." *See* Reply ¶ 94 (citing *Corona Materials* (RLA-19) ¶ 269).

202 *See supra* § II.C.2.

203 Reply ¶ 92.

204 CAFTA-DR (CLA-2) Annex 10-E (1) (emphasis added).

205 *Id*. Art. 10.18.4.

its argument that the scope of procedures effectively prohibited by CAFTA-DR's fork-in-the road provisions is limited only to claims of an alleged breach of an obligation under Section A of Chapter X.[206] The issue before the tribunal in *Corona Materials* was whether claimants could validly claim a denial of justice without having exhausted specific administrative remedies that respondent maintained were necessary prerequisites to the denial of justice claim as part of its defense on the merits.[207] In that context, the parties appear to have addressed whether local remedies would have been prohibited by Annex 10-E of CAFTA-DR in their post-hearing briefs,[208] and the tribunal concluded that if the investor "had submitted an administrative contentious proceeding in which did not invoke DR-CAFTA's Chapter 10, it would not have run afoul of Article 10.18.4."[209] This tribunal's short analysis is superficial and conclusory, and its conclusion does not apply to the broader question of whether the exhaustion of local remedies is always consistent with CAFTA-DR's fork-in-the-road provisions. As indicated, the conclusion is belied by the plain language of the fork-in-the-road provisions.

91. Similarly, Respondent is mischaracterizing *Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain* ("***Bank Melli***") as supporting its position that fork-in-the-road provisions only bar arbitration in cases where investors previously claimed an alleged breach of "*international law obligations*" before domestic courts.[210] As Claimants have explained, the relevance of the decision in *Bank Melli* lies in the tribunal's conclusion that requiring the exhaustion of local remedies was inconsistent with the applicable fork-in-the-road clause.[211] Contrary to what Respondent suggests,[212] the tribunal in *Bank Melli* was not referring to treaty violations when it concluded that "had the Claimants sought redress of the violations impugned here before Bahraini courts, the Tribunal would have been

[206] Reply ¶ 93.

[207] *Corona Materials* (RLA-19) ¶¶ 248 *et seq.*

[208] *Id.* nn. 258, 259.

[209] *Id.* ¶ 269.

[210] Reply ¶ 93, n. 128.

[211] Observations ¶ 62.

[212] Reply n. 128.

barred from ruling on such claims,"[213] but rather to the "violations of due process in the issue of administrative decisions" which Bahrain contended should have been referred to local courts.[214] Indeed, the tribunal in *Bank Melli* never stated that the fork-in-the-road provision would only be triggered by claims that the treaty has been breached; on the contrary, the tribunal found that the provision bars arbitration "when the investor has 'primarily referred' <u>the dispute</u> to the courts of the host State."[215]

3. CAFTA-DR is incompatible with the exhaustion of local remedies as a practical matter

92. Claimants further explained in the Observations that CAFTA-DR also contains provisions that are incompatible with an exhaustion requirement as a practical matter, including the prohibition on filing claims after a three-year prescription period has elapsed.[216] Respondent does not address this incompatibility in its Reply, presumably because it has no response. As the evidence clearly shows, the Honduran legal system is plagued by delays, with recent reports finding tens of thousands of cases to be in a state of judicial default [*mora judicial*], with over 20,000 cases being over ten years old, and 4 dating back to 1975-1980.[217] It is obvious that any exhaustion requirement that is not timebound, as Respondent alleges the Declaration imposes, would render the timely filing of claims impossible.

93. Rather, Respondent attempts to bypass the entire incompatibility argument by asserting that "DR-CAFTA allows a claimant to initiate international arbitration under the UNCITRAL Rules, without having to exhaust domestic remedies, and does not present any alleged inconsistency with the provisions of the DR-CAFTA."[218] Respondent may not

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213 *Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain*, PCA Case No. 2017-25, Award (9 Nov. 2021) (CLA-85) ¶ 528.

214 *Id.* ¶ 509.

215 *Id.* ¶ 528 (emphasis added).

216 Observations ¶ 63; CAFTA-DR (CLA-2) Article 10.16.1 ("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.").

217 *See* Observations ¶¶ 63, 165; *National Plan to Eradicate Judicial Delay*, PODER JUDICIAL (Jan. 2019) (C-101).

218 Reply ¶¶ 97-98.

have fully considered this argument, which proves too much. While it is certainly true that CAFTA-DR provides for UNCITRAL as an alternative to ICSID arbitration, Respondent's argument is tantamount to admitting that the reference to ICSID in CAFTA-DR would be superfluous as to investors in Honduras insofar as they would not have a real option to submit claims to ICSID. In any event, having UNCITRAL as an alternative does not change the fact that requiring the exhaustion of local remedies is belied by CAFTA-DR itself, as it would be incompatible with Respondent's consent to ICSID arbitration in CAFTA-DR and its carefully-negotiated and detailed dispute resolution provisions.

(iii) The principle of good faith precludes Respondent's interpretation of CAFTA-DR

94. In addition to the foregoing, Claimants have shown that the Tribunal should be loath to adopt Respondent's position that the Declaration in Decree 41-88 somehow implies an exhaustion requirement into CAFTA-DR for any investor wishing to bring a claim against Honduras because doing so would require the Tribunal to find that Respondent acted in contravention of the principle of good faith in entering into CAFTA-DR.[219] Specifically, it is well-established as a matter of international law that good faith "must prevail in international relations," that "inconsistency of conduct or opinion on the part of the State to prejudice another is incompatible with good faith,"[220] and that a State "shall not be allowed to blow hot and cold—to affirm at one time and deny at another."[221] Had Respondent believed that the Declaration in Decree 41-88 constituted an exercise of Article 26 of the ICSID Convention and that its terms and conditions would somehow implicitly be incorporated into CAFTA-DR and other consents to ICSID arbitration (and, to reiterate, there is no evidence that it did), and had Respondent then agreed to terms patently

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[219] Observations ¶¶ 65-67.

[220] *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 ("[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).*"); *Argentina-Chile Frontier Case* (Argentina v. Chile) 16 UNRIAA 109, Award (9 Dec. 1966) (CLA-49) p. 164 (endorsing Judge Alfaro's opinion).

[221] *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.'").

incompatible with that exhaustion requirement in CAFTA-DR (and other treaties that are likewise incompatible), this would demonstrate significant bad faith by Respondent vis-à-vis its treaty partners.[222]

95. Respondent does not engage seriously with this argument, attempting to skirt the implications of its new position in a footnote, merely asserting that Decree 41-88 "is an instrument to which the entire public had free access while Honduras was still a member of ICSID," and that "[i]n no way can the Claimants allege ignorance of that instrument without proving their own negligence."[223] These are strawmen arguments that do not respond to the issue of good faith. As detailed above, Claimants' argument is in no way based on alleged ignorance of Decree 41-88,[224] but rather on the lack of coherence between Respondent's current invocation of an exhaustion requirement and its erstwhile incompatible positions, including its agreement to incompatible dispute resolution provisions in CAFTA-DR and other treaties. Decree 41-88 being public does not change the fact that any belief that Respondent may have had that the Declaration contained a condition of its consent to ICSID arbitration was so carefully guarded that Respondent has not been able to identify a single piece of evidence corroborating its position. If, however, the Tribunal is at all minded to give Respondent's position any credence, the fact that the purported requirement to exhaust local remedies is not mentioned in CAFTA-DR and would be incompatible with the express terms of CAFTA-DR (as well as several other treaties into which Respondent entered with treaty partners) should give the Tribunal pause insofar as it means that Respondent acted in bad faith vis-à-vis its treaty partners at the time of entering these treaties, which is comparatively more serious than Respondent

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[222] Observations ¶¶ 65-67.

[223] Reply n. 133. Respondent asserts incorrectly that "Claimants allege that Honduras acted in bad faith by agreeing to a dispute resolution mechanism in the DR-CAFTA that was inconsistent with the 'undisclosed' requirement of exhaustion of local remedies," arguing that "the entire public had free access [to Decree 41-88] while Honduras was still a member of ICSID." Reply n. 133. This is a strawman argument. First, Claimants have not asserted that Respondent acted in bad faith when it entered into its arbitration agreements; on the contrary, Claimants have argued that the tribunal should be loath to find such bad faith, which would be necessary if it accepts Respondent's interpretation of Decree 41-88. Second, it is irrelevant that the public had access to Decree 41-88, for all the reasons that have been explained, and, in any event, it is notable that the public does not have access to Respondent's instrument of ratification under Article 68 of the ICSID Convention, which Respondent has not produced and which the ICSID Secretariat has advised it cannot provide. *See* Email from the ICSID Secretariat to White & Case (20 Nov. 2024) (C-177).

[224] *See supra* ¶ 64.

simply making frivolous allegations in the context of this arbitration. Respondent has no response to this.

(b) Respondent does not contest that the LSA does not contain a requirement to exhaust local remedies and is incompatible with such a requirement, and Respondent's argument that it is not bound by the LSA is untimely and wrong

96. As Claimants explained in the Observations, even though Claimants identified the LSA as a second instrument of consent to the present arbitration along with CAFTA-DR in their Request for Arbitration,[225] Respondent simply ignored the LSA in its Preliminary Objection Application.[226] As Claimants further explained, the LSA, like CAFTA-DR, is also incompatible with an exhaustion requirement,[227] as ICSID arbitration is the exclusive remedy for monetary claims thereunder.[228]

97. In its Reply, Respondent argues that the LSA is "inapplicable," because, Respondent now newly alleges, it is not a party to the LSA and "[s]ince the provisions of the LSA do not bind the Republic of Honduras as it is not a party to the agreement, it is therefore irrelevant whether or not the agreement provides for the requirement of prior exhaustion of local remedies to enable ICSID jurisdiction."[229]

98. Respondent's argument is improper:

- The applicability of the LSA is not at issue in this preliminary phase, which is limited to whether the exhaustion of local remedies was required. In Respondent's own words, the objection before the tribunal is a "preliminary objection of non exhaustion of local remedies."[230] Had Respondent truly considered that it was not bound by the consent to arbitration in the LSA, it should have raised a different

[225] Request for Arbitration ¶¶ 96-98.

[226] Observations ¶ 64.

[227] *Id*. ¶ 64.

[228] LSA (CLA-6) Art. 2.2 ("Claims 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.").

[229] Reply ¶¶ 99-103.

[230] *See* Preliminary Objection Application ¶ 49; Reply ¶ 132.

preliminary objection and requested that the Tribunal declare that it lacks competence under the LSA or otherwise rule on its validity. It did not do so.

- Having limited the scope of the preliminary phase under Article 10.20.5 of CAFTA-DR to the issue of exhaustion, Respondent cannot now expand its scope to incorporate additional objections related to the LSA. Any attempt to do so at this juncture would be improper because Article 10.20.5 requires that preliminary objections thereunder be filed within 45 days of the constitution of the Tribunal, *i.e.*, no later than August 2024.

- Nor can Respondent put the facts of the LSA's validity at issue at this juncture because these are not jurisdictional or admissibility facts relevant to Respondent's objection of non-exhaustion of local remedies. As detailed above, only those facts bearing on the jurisdictional or admissibility issue currently before the Tribunal need be decided at this juncture, and the Tribunal should assume to be true the facts pled by Claimants as to other issues (including the validity of the LSA).[231] To consider the facts of the LSA additional jurisdictional or admissibility facts that need to be proven at this stage would be tantamount to allowing a new preliminary objection.

99. While this is not the appropriate juncture to discuss the nature of the LSA, and as noted, the Tribunal must assume the facts pled by Claimants in this respect as true, Claimants wish to briefly state for the record, and for future purposes in this arbitration, that Respondent is incorrect in alleging that the LSA "is nothing more than a unilateral agreement entered into by the president of Honduras Próspera Inc. and his employee, the Technical Secretary of ZEDE Próspera,"[232] and that "[t]he Technical Secretaries of the ZEDE are not public officials of the Republic of Honduras and, consequently, cannot act on its behalf."[233] Respondent provides no support whatsoever in support of its allegation. Moreover, its assertions are belied by the evidence in the record.

- Contrary to what Respondent now alleges, the parties to the LSA are Honduras Próspera and the Republic of Honduras. The LSA was executed by the Technical

[231] *See supra* § II.A.

[232] Reply ¶ 101.

[233] *Id.* ¶ 102.

Secretary of Próspera ZEDE on behalf of Honduras in accordance with the Organic Law of the Economic Development and Employment Zones (the "**ZEDE Law**").[234]

- Contrary to what Respondent now alleges, the Technical Secretary is a national authority, not an employee of Honduras Próspera. The Technical Secretary position and its role within the ZEDE governance structure is set forth in the ZEDE Law, which provides that the Technical Secretary is appointed by the CAMP and serves as the "the highest executive officer [of the ZEDE] and its legal representative."[235]

- Contrary to what Respondent now alleges, the Technical Secretary is expressly empowered to conclude binding legal stability agreements by the ZEDE Law. Article 12(2) of the ZEDE Law provides that the Technical Secretary's functions include "suscrib[ing] to legal stability agreements for matters deemed necessary," and Article 45 of the ZEDE Law expressly recognizes the binding nature of such agreements on the State, providing that "[s]hould this Organic Law be repealed, it shall remain in effect for the term indicated in the legal stability clause or contract signed with individuals or corporations residing or investing in the [ZEDE]."[236]

100. Respondent also makes a brief attempt to show that the LSA is compatible with the exhaustion of local remedies, which is the only issue regarding the LSA that is to be decided for purposes of deciding the Preliminary Objection. Specifically, Respondent simply asserts that "the dispute resolution clause in the LSA operates on a different plane from the local remedies that had to be exhausted by the Claimants to trigger ICSID jurisdiction," and that "the local administrative and judicial remedies that should have been exhausted by Claimants are not based on or related to alleged breaches of the provisions of the LSA."[237] Respondent's argument is reminiscent of its argument that the fork-in-the-road provisions in CAFTA-DR are not incompatible with the exhaustion of local remedies because they also allegedly operate on a different plane. Such arguments are even less valid in the context of a claim under Section 2.2 of the LSA.

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234 Request for Arbitration ¶ 132. *See also* Agreement for Legal Stability and Investor Protection entered into by and between Honduras Próspera and the Republic of Honduras, effective on 9 Mar. 2021 (CLA-6) (stating that the Technical Secretary acts "as agent and authorized representative for the Republic of Honduras").

235 Request for Arbitration ¶¶ 30, 97. *See also* Decree No. 120-2013, published on 6 Sept. 2013 ("***ZEDE Law***") (C-6), Art. 12.

236 Request for Arbitration ¶ 31; ZEDE Law (C-6), Arts. 12(2), 45.

237 Reply ¶¶ 104-105.

101. Section 2.2 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."[238] As Claimants have explained, this makes ICSID arbitration the exclusive remedy for claims by Honduras Próspera that Respondent has breached its obligations under the LSA, including its legal stability guarantees.[239] On its face, this means that LSA claims are contractual claims, independent of Claimants' claims that Respondent has breached its obligations under Chapter 10 Section A of CAFTA-DR or claims under Honduran law, and do not operate on some abstract different plane. If Respondent has breached obligations under the LSA, Honduras Próspera is entitled to bring claims for breach of contract thereunder directly and is not required to first "challenge[] in the local venue the particular administrative acts that they allege caused them harm."[240] At the same time, the possibility of recourse to local administrative and judicial remedies for such contractual claims has been expressly foreclosed.

4. Respondent professes that it does not seek to deny Claimants a forum to resolve the dispute, but implies in the same breath that the consequence of its positions would and should be exactly that

102. Claimants have elected to submit their claims to ICSID arbitration, as is their right under CAFTA-DR and the LSA. Granting the Preliminary Objection would deprive Claimants of the forum of their choice and, at minimum, could give Respondent new opportunities to seek to obstruct Claimants' right to be heard on their claims.[241] Respondent calls this "mere hypothetical conjecture," and asserts that "[i]n no way does Honduras seek to deny Claimants a forum to resolve their disputes under the DR-CAFTA Simply, Honduras requires that the investors comply with the requirements that it validly imposed as a condition to their consent to ICSID jurisdiction -i.e., the exhaustion of local remedies-."[242] Respondent's professed concern for the alleged terms of Decree 41-88 is disingenuous.

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[238] LSA (CLA-6) Art. 2.2.

[239] Observations ¶ 64.

[240] Reply ¶ 105.

[241] Observations ¶¶ 71 *et seq.*

[242] Reply ¶¶ 111-112.

103. As Claimants have noted, Respondent never bothered with the exhaustion of local remedies until its recent anti-investment measures resulted in a wave of ICSID cases against it, from which point onward Respondent has simply grasped at frivolous arguments in an effort to escape international accountability at ICSID.[243] Likewise Respondent's assertion that Claimants could still submit their claims under the UNCITRAL Rules,[244] as to which the Declaration does not apply, confirms that Respondent's insistence on the exhaustion of local remedies is motivated less by a concern with being able to effect a local remedy than with merely delaying arbitration claims.

104. In any event, Respondent's assertion that Claimants could still submit claims under the UNCITRAL Rules should be viewed with skepticism because Respondent will doubtlessly try to block a UNCITRAL arbitration, as Claimants noted.[245] Notably, Respondent appears to be retreating from its prior assertion, pointedly refusing to make any undertaking that it will not seek to preclude claims under the UNCITRAL Rules, and on the contrary, asserting that "any consequences that the granting of the Preliminary Objection may have to the detriment of the Claimants is solely and exclusively the responsibility of their own acts."[246] If Respondent is already trying to shift the blame onto Claimants, it is clearly because it is seeking to preserve the ability to make future objections.[247] Respondent has revealed itself to be an opportunistic litigator, and there is no reason to doubt that it is willing to assert everything and anything, in every forum, no matter how frivolous, seeking to avoid accountability.

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[243] *See*, *e.g.*, Observations ¶¶ 49-50.

[244] Preliminary Objection Application ¶ 42.

[245] Observations ¶ 73.

[246] Reply ¶¶ 112-113.

[247] This is also Respondent's strategy in addressing how it would deal with the implications of the prescription period under Article 10.18.1: Respondent asserts that the prescription period is irrelevant, but does not undertake to not raise an argument in this regard to bar Claimants' claims in the event that the instant case is dismissed. *See* Reply ¶¶ 109-110. In this context, Respondent cites *Philip Morris v. Uruguay* for the proposition that requirements to resort to local proceedings are not meaningless even if the local courts cannot grant a decision within the time period prescribed by the applicable treaty because the purpose of such requirements is to provide the State with an opportunity to redress alleged violations of the investor's rights before the investor resorts to international arbitration. *Id.* This assertion is irrelevant because the prescription period that Respondent would presumably attempt to invoke would be premised on the passage of time during the instant arbitration, not local proceedings.

D. LOCAL REMEDIES ARE FUTILE IN THIS CASE

105. Even assuming for the sake of argument that Respondent required the exhaustion of local remedies as a condition of its consents to arbitrate this dispute (which, as shown above, it clearly did not), Claimants do not have to exhaust local remedies because they are futile.

106. Claimants explained in their Observations that any requirement to exhaust local remedies is not absolute and that local remedies need not be exhausted when there is no reasonable possibility of effective redress.[248] Claimants also explained that this standard is amply met in this case, including because (i) the Honduran judiciary is plagued by serious problems; (ii) the current administration has taken steps to control the judiciary; (iii) there is no local proceeding through which Claimants would have any reasonable possibility of relief for Respondent's repeal of the ZEDE Legal Framework and refusal to honor its legal stability undertakings; and (iv) Respondent's anti-ZEDE posture confirms the futility of local remedies.[249]

107. Respondent has no real answer to these points. Critically, since the Reply, the Honduran media published what is reported to be a copy of the decision by the Supreme Court of Honduras declaring the ZEDE Legal Framework unconstitutional.[250] If this document is authentic, as appears to be the case, it confirms that there is no reasonable possibility of effective redress in Respondent's courts, as the Supreme Court – the highest judicial authority in Honduras – has already declared the ZEDE Legal Framework unconstitutional with retroactive and general effects, as a result of which in the context of any administrative

[248] Observations § II.D. *See*, *e.g.*, *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 Sep. 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, *i.e.* the measure or appeal has a reasonable prospect of correcting the judicial wrong committed by the lower courts (ii).").

[249] Observations § II.D.

[250] *See* Unofficial Decision of the Supreme Court of Honduras on the unconstitutionality of ZEDE (C-172).

or judicial proceeding before Honduran courts the ZEDE Legal Framework will have been excised from Honduran legislation as though it never existed. Any attempt to seek legal remedies against this ruling or based on the ZEDE Legal Framework – which is deemed to be no more in effect *ex tunc* – would be futile.[251]

108. As regards the legal standard for a showing of futility, Claimants showed in their Observations that the exhaustion of local remedies under international law is not required if there are no reasonably available local remedies to provide effective redress or the local remedies provide no reasonable possibility of such redress.[252] Honduras recognizes in its Reply that the exhaustion of local remedies under international law is not required if there is no "reasonable option of an effective remedy."[253] But Respondent is merely paying lip service to this standard, and actually appears to be demanding a higher standard of proof.[254] Respondent's effort to heighten the standard misses the mark. The sources it invokes are either inapposite or confirm the standard articulated by Claimants:

- Respondent cites *Louis Dreyfus Armateurs SAS v. Republic of India* ("***Louis Dreyfus***") for the proposition that Claimants must show "a manifest waste of effort towards a self-evident, even pre-ordained, lack of success" to prove futility.[255] Respondent is taking this quote out of context. The issue in *Louis Dreyfus* concerned whether the claimant had an obligation to undertake amicable settlement efforts, not the exhaustion of local remedies, and the tribunal specifically found that the applicable standard was higher in that specific context: "[i]n the context of an express waiting period during which the parties are required to undertake amicable

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[251] Press Release, PODER JUDICIAL (20 Sep. 2024) (C-145); Observations ¶ 86. In addition, one of the Supreme Court Justices stated there is no legal recourse against the decision. *See* Flores, Javier, *No legal recourse can overturn ruling against ZEDEs, experts say,* EL HERALDO (23 Sep. 2024) (C-149) (quoting Mario Díaz, a Justice of the Supreme Court, as stating "against a sentence issued by the Supreme Court of Justice there is no appeal; this happens in other instances, but at the level of a Supreme Court sentence there is no appeal.").

[252] Observations ¶¶ 79–81; ILC Articles on Diplomatic Protection (CLA-65) Art. 15.

[253] Reply ¶ 117.

[254] *Id.* ¶ 117 ("the standard for proving the futility or uselessness of exhausting local remedies under international law is admittedly high"), n. 150 (citing various sources).

[255] *Id.* n. 150.

settlement efforts, the doctrine of futility faces a particular high threshold of proof."[256] This case is therefore inapposite.[257]

- Nor does Respondent derive any support from *ICS Inspection and Control Services Limited v. República Argentina*.[258] That case actually confirms that "[t]he test is not whether a successful outcome is likely or possible, but whether the municipal system of the respondent State is reasonably capable of providing effective relief."[259] This is what Claimants have proven.

- Likewise, Respondent derives no support from *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*.[260] As that tribunal explained, the burden on a party alleging futility is to show that "recourse to the Contracting State's courts would be futile or ineffective."[261] Claimants have met this standard of proof.

109. Further, Respondent seems to suggest that the Tribunal should assess whether Claimants' claims are meritorious as a necessary step to rule on the futility of local remedies.[262] This is manifestly not the test, and the Tribunal does not need to analyze the merits of Claimants' claim. As Claimants have explained, the Tribunal merely needs to consider whether Respondent offers an adequate system of judicial protection and whether Claimants would

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[256] *Louis Dreyfus Armateurs SAS v. Republic of India,* PCA Case No. 2014-26, Decision on Jurisdiction (22 Dec. 2015) (RLA-46) ¶ 98.

[257] In any event, Claimants would meet the elevated standard as well, given that, as shown below, resort to local proceedings would constitute "a manifest waste of effort towards a self-evident, even pre-ordained, lack of success."

[258] Reply n. 150.

[259] *ICS Inspection and Control Services Limited v. República Argentina*, CPA Case No. 2010-9, Decision on Jurisdiction (10 Feb. 2012) (RLA-15) n. 296 (quoting ILC Draft Articles on Diplomatic Protection with Commentaries (2006), Art. 15, comment (4)). *See also* Observations ¶ 80.

[260] Reply n. 150.

[261] *Kiliç* (RLA-44) ¶ 8.1.10.

[262] *See* Reply n. 150. Respondent seeks to mischaracterize the standard set forth in the ILC Draft Articles on Diplomatic Protection as requiring a showing that claimants' claims would be meritorious, in support of which Respondent relies on an exposition of the standard by Mr. Fitzmaurice that has been taken out of context. In fact, the cited authority confirms that the meritoriousness of the underlying claims is not relevant to the determination of whether a remedy is reasonably possible. *See* B. Sabahi, *et al.* "Exhaustion of Local Remedies" *in Investor-State Arbitration* (2019) (RLA-21) p. 436 (*citing* the exposition of the standard by G. Fitzmaurice: "Lauterpacht propounded the criterion of there being a 'reasonable possibility' that a remedy would be afforded, as being the test of effectiveness—or in other words he suggested that no means of recourse can be regarded as futile from the effectiveness standpoint unless there does not appear to be even a reasonable possibility that it will afford an effective remedy. This test is acceptable provided it is borne in mind that what there must be a reasonable possibility of is the existence of a possibly effective remedy, and that the mere fact that there is no reasonable possibility of the claimant obtaining that remedy, because his case is legally unmeritorious, does not constitute the type of absence of reasonable possibility which will displace the local remedies rule." (emphasis added)).

have a reasonable possibility of redress by pursuing local remedies. The merits of Claimants' claims are irrelevant to this question; these are issues for the upcoming merits phase. For the purposes of the futility analysis in this Preliminary Phase, it is sufficient that Claimants have proven that Respondent's judicial system is plagued by serious problems, that there are no appropriate local remedies – *i.e.*, that the remedies that Respondent suggests are not suitable for entertaining Claimants' claims as submitted in this case – and, moreover, that the Supreme Court has already declared the unconstitutionality of the ZEDE Legal Framework *ex tunc* – and *erga omnes* – without Claimants' participation.

110. With respect to the factual basis for futility, Claimants have submitted ample evidence in the Observations that proves the futility of resorting to local proceedings, which Respondent has failed to rebut in the Reply. Respondent makes general unsupported allegations, and remains silent on the facts that prove the futility of local remedies.

111. *First*, Honduras fails to rebut that its judicial system is plagued by serious problems, lack of independence, and delays. Respondent adopts the ostrich-like strategy of burying its head in the sand and baldly denying all the evidence produced by Claimants that it finds inconvenient. Respondent's feeble effort to challenge these facts merely confirms the critically deficient state of the Honduran judiciary.[263]

- Honduras seeks to discredit the conclusions of the Special Rapporteur of the U.N. High Commissioner for Human Rights by alleging that the "Preliminary Observations on the Official Visit to Honduras" (i) were only "based . . . on a one-week stay" in the country, and (ii) would highlight "discernible improvements in the judicial system."[264] This is incorrect.

  The report was issued by well-known Special Rapporteur, Diego García-Sayán, who has extensive experience and served two mandates as Chief Justice of the Interamerican Human Rights Court.[265] During his tenure as Special Rapporteur, he conducted assessments on the independence of judges in several countries – including Poland, Honduras, Uzbekistan, and Bolivia – and also issued general

[263] Reply ¶ 118.

[264] *Id.* ¶ 118 (*citing* Preliminary Observations on the Official Visit to Honduras, OHCHR (22 Aug. 2019) (C-102).).

[265] *See Mr. Diego García-Sayán, former Special Rapporteur (2016-2022),* UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (last accessed 14 Nov. 2024) (C-174).

reports on this subject, submitted to the U.N. Human Rights Council.[266] In the case of Honduras, he made an in-depth analysis, around three main topics: separation of powers; impact of corruption and organized crime on judicial independence; and citizen insecurity (including the effects on justice operators).[267] The Special Rapporteur took into account "not only the laws, policies and regulations specifically related to the administration of justice and the free exercise of the legal profession, but also the broader institutional aspects and public policies that may affect the independence of the judiciary and the separation of powers."[268] The mission resulted in (i) the Preliminary Observations on the Official Visit to Honduras in August 2019[269] and (ii) a final Report of the Special Rapporteur on the independence of judges and lawyers on his visit to Honduras, published in June 2020 (the "**Final Report**").[270]

The Final Report explains that the Special Rapporteur met with senior government officials from various ministries, members of the National Congress, the Honduran Commissioner for Human Rights, the President of the Supreme Court of Justice, judges and magistrates of various courts and tribunals, members of the Office of the Prosecutor-General (including the Prosecutor-General and prosecutors from specialized prosecution services, such as the Special Prosecution Unit to Fight Corruption-related Impunity), a wide range of civil society representatives (including nongovernmental organizations and associations of judges, prosecutors and lawyers, academics and members of the donor community), and representatives of international and regional organizations.[271]

Contrary to Respondent's position, the reports are conclusive on the lack of independence, serious delays, and corruption of the judiciary, and show no significant improvement. For instance, the Final Report concludes:

> The efforts made to strengthen the independence and effectiveness of the justice system have not yet had a significant result in strengthening access to justice and fighting impunity. Underfunding, poorly trained staff and ineffectiveness result in lengthy judicial proceedings and a backlog of cases, while political influence and other forms of interference and pressure from non-State actors, along with low salaries, are at the root of the high level

[266] *See Annual Thematic Reports*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (last accessed 14 Nov. 2024) (C-175).

[267] Preliminary Observations on the Official Visit to Honduras, OHCHR (22 Aug. 2019) (C-102).

[268] *Id.*

[269] *Id.*

[270] Report of the Special Rapporteur on the independence of judges and lawyers on his visit to Honduras, OHCHR (2 Jun. 2020) (C-166).

[271] *Id.* ¶ 2.

> of judicial corruption, with bribes and irregular payments often being exchanged for favourable court decisions. . . .
>
> The legal and institutional framework on the judiciary presents serious gaps and is not sufficient, as it stands, to protect and promote the independence of the judiciary from other branches of Government and the independence of individual judges to adjudicate the cases before them impartially and autonomously. . . .
>
> Honduran judges continue to be exposed to various forms of interference or pressure from other sources, including not only other State institutions, such as the legislative and executive branches of power, but also the judicial hierarchy. . . .[272]

- Respondent seeks to discredit the report by the Interamerican Commission on Human Rights on the grounds that "the visit was limited to observing the human rights situation in Honduras."[273] It is unclear why Respondent considers that a report assessing the Honduran judiciary in the context of an analysis on human rights is any less relevant or should be given less weight as evidence. As the report itself states "[a]n efficient and effective administration of justice is a *sine qua non* requirement to guarantee not only the right to due process and judicial guarantees, but also all human rights."[274]

- Respondent further seeks to discredit this report and the report issued by Honduras's current Secretary of Defense (Rixi Moncada) in December 2022 by alleging that their conclusions on the state of the Honduran judiciary reflect the lack of independence that existed previously, but not the current status of the judiciary.[275] Respondent's position defies understanding: a failing judicial system found to be "in rags, on the floor, which is why no one trusts it"[276] does not transform overnight, even if Respondent had taken any measures in this regard. In any event, Respondent does not provide any evidence that it has sought to address (much less fixed) the gross systemic deficiencies. Indeed, the fact that, as detailed in the Observations and further below,[277] Honduras's current Administration has

[272] Report of the Special Rapporteur on the independence of judges and lawyers on his visit to Honduras, OHCHR (2 Jun. 2020) (C-166) ¶¶ 84-86.

[273] Reply ¶ 118 (*citing Situation of Human Rights in Honduras*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (27 Aug. 2019) (C-103)).

[274] *Situation of Human Rights in Honduras*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS (27 Aug. 2019) (C-103) ¶ 74.

[275] Reply ¶ 118 (*citing The justice system is in "rags," but CICIH memorandum generates hope*, PROCESO DIGITAL (19 Dec. 2022) (C-108)).

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

[277] Observations ¶ 85; *see infra* ¶ 114.

taken steps to control the judiciary (*e.g.*, through its efforts to stack the Supreme Court, the appointment of a LIBRE party loyalist and aunt of President Castro's son in law as Presiding Justice of the Supreme Court, and the self-serving changes in procedure) confirms the continued politicization of the judiciary.

- Respondent likewise tries to discredit the 2024 Investment Climate Statements of the U.S. Department of State on Honduras by alleging that they are "based on subjective considerations" and "partial interests."[278] These bald and unsupported assertions get Honduras nowhere. Notably, Respondent fails to provide a single piece of evidence that casts doubt on the U.S. State Department's report and/or any objective reason to discredit its content. The U.S. State Department's "Investment Climate Statements" are drafted on a yearly basis to help U.S. companies make informed business decisions by providing up-to-date information on the investment climates of more than 165 countries and economies. They are prepared by economic officers stationed in posts around the world and analyze a variety of economies that are currently or potential markets of all sizes. The reports are based on objective data, key metrics, and serious analysis of the legal framework, and not on subjective opinions or partial interests.[279]

- Honduras seeks to discredit the 2024 Freedom House Report on Honduras stating that Claimants "conveniently select[ed] those paragraphs that mention obstacles in the Honduran justice system" and that the report mentions relevant progress made by the current government to improve the country's institutions.[280] Again, Respondent is attempting to mislead the Tribunal with baseless assertions and fails to identify any findings in the report as to relevant progress in Honduras. To the contrary, the report shows that the alleged measures that Honduras tried to implement failed, and the situation worsened.[281]

- Respondent attempts to discredit the significance of its own "National Plan to Eradicate Judicial Delay" on the grounds that it does not reflect the current state of

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[278] Reply ¶ 118 (*citing 2024 Investment Climate Statements: Honduras*, U.S. DEPARTMENT OF STATE (2024) (C-118)).

[279] *2024 Investment Climate Statements: Honduras*, U.S. DEPARTMENT OF STATE (2024) (C-118).

[280] Reply ¶ 118 (*citing Freedom in the World 2024: Honduras*, FREEDOM HOUSE (2024) (C-119)).

[281] *Freedom in the World 2024: Honduras*, FREEDOM HOUSE (2024) (C-119) pp. 6, 8, 11-12 (highlighting that: (i) "[l]egislators selected a 15-member bench . . . on a <u>partisan basis</u>; six came from Libre, five from the PN, and four from the PL;" (ii) "in 2022, legislators passed a law to improve transparency in the nomination of Supreme Court justices, although <u>it was criticized for favoring the interests of political parties</u>;" (iii) "concerns persist over the political influence that President Castro's husband, former president José Manuel Zelaya Rosales, and other members of the Zelaya family wield. In a May 2023 report, the National Anticorruption Council (CNA) said that relatives of President Castro had received posts within the cabinet, National Congress, and Supreme Court;" (iv) "the lack of due process is a serious issue in Honduras;" (v) "[t]he Castro administration has taken some steps to address due process and law enforcement problems. <u>However</u>, the government's announcement of a "war against extortion" in 2022 and the resulting state of exception led to a suspension of constitutionally protected rights.") (emphasis added).

the Honduran judiciary.[282] This is absurd. This is an official plan published recently in 2024, well-into the current Administration's term, which expressly acknowledges that judicial delay "undermines the basis of the *tutela judicial efectiva*, constitutes a barrier to guarantee that right[,] and may lead to denial of justice."[283]

- As recently as August 2024, the President of the Supreme Court herself acknowledged that corruption networks and connections with organized crime and drug dealers exist in the judiciary.[284] Respondent seeks to downplay this evidence by qualifying it as "tabloid allegations."[285] This is incorrect. The press article is quoting public statements made by the Chief Justice of Honduras. Respondent does not deny that these statements are accurately reported, and its criticism of the use of press articles rings particularly hollow given its own ample reliance on press articles in its Preliminary Objection and throughout its Reply.[286] Respondent cannot have it both ways and apply a different standard for Claimants.

- Respondent does not rebut the fact that it failed to appoint the judges to the special jurisdiction of the ZEDE and made it impossible to resort to that jurisdiction to get any relief. Unable to defend that failure to comply with its own law (which predates the coming into power of the current Administration and its anti-ZEDE stance), Respondent resorts to vacuous assertions on national integrity and self-determination,[287] which prove nothing but its (already well-known) contempt for the ZEDEs.

112. Respondent's inability to rebut the fact that the Honduran judiciary is plagued by delay is particularly telling given the three-year prescription period set forth in Article 10.18.1. of

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282 Reply ¶ 118 (*citing National Plan to Eradicate Judicial Delay*, PODER JUDICIAL (11 Mar. 2024) (C-121)).

283 *National Plan to Eradicate Judicial Delay*, PODER JUDICIAL (11 Mar. 2024) (C-121) p. 12.

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

285 Reply ¶ 118.

286 *See, e.g.* Preliminary Objections Application n. 14 (*citing* M. Yepe, "Disaster capitalism for Honduras," *Cubadebate* (1 Feb. 2011) (R-4)), n. 16 (*citing* "Honduran Congress removes magistrates overruling against Government," *Deutsche Welle* (12 Dec. 2012) (R-7) and "Congress of Honduras delivers technical blow to the CSJ," *El Heraldo* (7 Apr. 2014) (R-12)), n. 25 (*citing* J. García, "Honduras protests against fraud," *El País* (16 Dec. 2017) (R-14)), n. 27 (*citing* M. Santana & J. Guy, "New York court sentences Juan Orlando Hernandez, former president of Honduras, to 45 years in prison," CNN (26 Jun. 2024) (R-43)); Reply n. 167 (*citing* "Elección de la nueva Corte Suprema de Justicia y la reconstrucción del Estado de Derecho en Honduras," *Agenda Estado de Derecho* (31 Jan. 2023) (R-56)), n. 180 (*citing* "'No vamos a correr y será una decisión jurídica,' garantiza presidenta de CSJ en torno a recurso sobre las ZEDEs," *Proceso Digital* (14 Aug. 2024) (R-61)).

287 Reply ¶ 118 ("[T]he lack of composition of the Special ZEDE Jurisdiction only demonstrates the path of the Republic of Honduras' vindication of its national integrity and self-determination.").

CAFTA-DR.[288] Respondent is simply unable to credibly demonstrate that the local courts would render a final decision in time for Claimants to submit their claims to arbitration within the time limits established in CAFTA-DR. This would effectively preclude arbitration. As shown above, in the treaties in which Respondent required investors to resort to local remedies (as opposed to CAFTA-DR, which does not include such a requirement), Respondent notably allowed arbitration in the absence of a final decision within a limited time period, evidently in order to protect foreign investors from the well-known undue delays and denial of justice in the Honduran judicial system.[289]

113. *Second*, the current administration has taken steps to control de judiciary. Respondent seeks to overlook that reality by stating that (i) the enactment of Decree 74-2022 was part of a plan to "strengthen institutions and bring greater independence and transparency to the judiciary";[290] (ii) the appointment of the justices of the Court was made by decision of the National Congress preceded by negotiations and deliberations "all in strict compliance with the Constitution";[291] (iii) the amendments introduced by the Supreme Court justices to the Internal Regulations of the Judiciary, among which is the incorporation of the alternate justices, are "irrelevant";[292] and (iv) Mr. Zelaya's statements (*i.e.*, that he had been a protagonist in shaping the Court, and that he called for the Court to rule the ZEDE Legal Framework unconstitutional) do not illustrate the alleged flaws in the Honduran justice system.[293]

114. It was predictable that Respondent would seek to recharacterize the current administration's efforts to capture the judiciary, but its attempt is unavailing. The facts are unrebutted and speak for themselves:

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[288] CAFTA-DR (CLA-2) Art. 10.18.1 ("[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.") (emphasis added).

[289] *See supra* § II.C.2.

[290] Reply ¶ 120.

[291] *Id.* ¶ 121.

[292] *Id.* ¶ 122.

[293] *Id.* ¶ 123.

- Honduras replaced all the members to the Supreme Court on a partisan basis, rather than a meritocratic one, departing from the judicial independence allegedly sought through Decree 74-2022.[294] Respondent invokes abstract notions such as "transparency," "democratization," and "independence,"[295] and relies on formal regulations, but ignores what actually happened: (i) all the seats on the Court were allotted among three political parties;[296] (ii) 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;[297] and (iii) the aunt of President Castro's son in law and member of the LIBRE party was appointed Presiding Justice of the Supreme Court, raising obvious and vocal concerns over the Supreme Court's independence.[298]

- On the same date of the appointment of the new Presiding Justice, the Supreme Court modified its regulations to create six "substitute justices" to participate in the Plenary Sessions of the Court, which were to be elected by the Court itself.[299] This procedure is not established in the Constitution, which provides that Supreme Court

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[294] *Honduras elected the 15 new justices of the Supreme Court*, EXPEDIENTE PÚBLICO (16 Feb. 2023) (C-110) (abstract stating that "[t]he Supreme Court is subject to political control," and article further elaborating that "[t]he Supreme Court of Justice of Honduras is moving away from the political independence that was sought in this process, since 5 magistrates respond to the interests of the National Party, 4 to the Liberal Party and 6 to those of Libre, which thus adds the control of the Judicial Power to that already held by the Government and Congress."). It should be recalled that, among other things, the reform introduced by Decree 74-2022 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).

[295] Reply ¶ 120.

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

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

[298] *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).

[299] *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) ("The Supreme Court of Justice shall have the following powers: . . . Approve by three quarters (3/4) of its members, a list of not less than six (6) magistrates for the Plenary Sessions of the Supreme Court of Justice, who shall be chosen from the last list of candidates proposed to the National Congress by the Nominating Board, who shall be called to integrate in successive and rotating order to the Plenary Sessions, but exceptionally to the different Chambers of the Supreme Court of Justice.").

Justices shall be elected by Congress.[300] Faced with this challenge, in its Reply, Honduras simply asserts that the matter is "irrelevant," and provides no further explanation.[301]

- Immediately after the capture of the Supreme Court, Mr. Zelaya, former President of Honduras and husband and advisor to President Castro, called for the Court to rule the ZEDE Legal Framework unconstitutional.[302] The Supreme Court followed suit, and has now reportedly declared the ZEDE legal framework unconstitutional *ex tunc*.[303]

115. *Third*, Claimants have no avenue to present the claims submitted before this Tribunal in Honduras's courts. Respondent also fails to rebut this issue. Claimants' claims arise from Respondent's repeal of the ZEDE Legal Framework and its refusal to honor its legal stability undertakings, acts which constitute a breach of Respondent's obligations under CAFTA-DR, the Charter of Próspera ZEDE, and the LSA. ICSID arbitration is the exclusive remedy for these claims, without even the possibility of recourse to local proceedings.[304]

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[300] Pursuant to Section 311 of the Honduran Constitution, the Justices of the Supreme Court of Justice shall be elected by the National Congress. Constitution of Honduras (C-4) Art. 311. In addition, Section 314 of the Constitution provides that "[i]n the case of death, disability that impedes the exercise of office, substitution for legal reasons or resignation, the Justice that fills the vacancy shall occupy the office for the rest of the term and <u>shall be elected by the National Congress</u> through the favorable vote of two thirds of the total membership. <u>The substitute shall be elected from the remaining candidates proposed by the Nominating Board at the beginning of the term</u>." *Id.* (emphasis added).

[301] Reply ¶ 122.

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

[303] Press Release, PODER JUDICIAL (20 Sep. 2024) (C-145).

[304] Observations ¶ 3 ("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"); § II.C.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"); ¶ 60 ("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."); ¶ 64 ("The LSA also does not require the exhaustion of local remedies . . . 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. On its face, this provision mandates ICSID arbitration, without even the possibility of recourse to other types of arbitration, much less local proceedings" (CLA-6)); ¶ 86 ("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.").

116. Respondent alleges that Claimants could and should have commenced piecemeal proceedings with respect to each separate measure within the anti-ZEDE campaign by Honduras,[305] but this again misses the point: Respondent cannot identify a single local proceeding through which Claimants could have gotten relief against Respondent's repeal of the ZEDE Legal Framework and refusal to honor its legal stability obligations. Forcing Claimants to respond haphazardly to each and every new affront by Respondent, across sectors and at any level of government, merely reinforces the prejudice caused by Respondent reneging on its stability undertakings. In any event, as further addressed below, even piecemeal proceedings would be futile given that Respondent's now-official position is that the ZEDE Legal Framework is unconstitutional *ex tunc* and the ZEDE Legal Framework accordingly has been fully removed from the Honduran legal system.

117. *Fourth*, Respondent's anti-ZEDE posture confirms the futility of local proceedings in the instant case. While Respondent characterizes Claimants' argument as a "desperate attempt" that lacks "support and seriousness," it notably is unable to deny the facts before the Tribunal.[306]

118. Indeed, Respondent's own vehemence in addressing the facts of the case proves that Respondent's official stance is so rabidly anti-ZEDE that Claimants could never be able to hope for reasonable and effective justice in local proceedings given the political and juridical context of Honduras, including the lack of independence of the judiciary as demonstrated above. Without agreeing with the content of Respondent's allegations, Claimants consider it useful to call the Tribunal's attention to various statements by Respondent that evidence its having prejudged the legality of the ZEDE:

- "[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 unconstitutional;" and "the democratic institutions of the Republic

[305] Preliminary Objection Application ¶ 39; Reply ¶¶ 125-126.

[306] Reply ¶ 129.

of Honduras continued toward the reclamation of the territorial integrity of the State;"[307]

- "the (un)constitutionality of the ZEDE regime was denounced, from the beginning, by the international community and by different sectors of Honduran society, including the business community."[308]

- "the National Congress, by unanimity . . . approved Decrees . . . that sought to repeal the constitutional provisions of the ZEDE and repealed the Organic Law of the ZEDE . . . ." This would be a matter in which "there is a clear republican consensus."[309]

119. That Respondent felt compelled to make these baseless allegations despite their complete irrelevance to any issue in this Preliminary Phase merely underscores that Respondent is uninterested in an impartial adjudication and that its effort to steer claims to local proceedings is meant to deny Claimants relief.

120. In addition, even assuming for the sake of argument that there could be impartial forum in Honduras (which, as shown in the Observations and above, there is not), any judge (and counsel) would be under intense pressure to stick to Respondent's official anti-ZEDE narrative. In this context, it is particularly noteworthy that President Castro and her allies (i) denounced the ZEDE Legal Framework as a "treason against the State," and (ii) accused officials that were previously in favor of the ZEDE of being "treasonous criminals" that should be "persecuted, tried, and condemned."[310] On Monday 24 September 2024, Mr. Jari Dixon, a member of Congress and of the LIBRE party, followed suit and filed a criminal complaint for treason before the office of the Public Prosecutor [*Ministerio Público*] against members of Congress that voted in favor of ZEDEs.[311] Unable to deny these facts, which are a matter of public record, Respondent feebly argues that the Honduran Constitution mandates the treason charges and presents its dystopian view of "the duty of

[307] Preliminary Objection Application ¶¶ 8-11.
[308] Reply ¶ 11.
[309] *Id.* ¶ 11.
[310] *See* Xiomara Castro de Zelaya, X @XIOMARACASTROZ (21 Sep. 2024) (C-147).
[311] Observations ¶ 86.

every citizen" to report crimes,[312] as a vague excuse. This is a red herring to hide what actually happened: members of the LIBRE party seized on the rumors that the Supreme Court would be declaring the ZEDE Legal Framework unconstitutional (which, in itself, shows the seriously deficient state of affairs as regards the administration of justice in Honduras) and, before the Court's judgment was even published, were exploiting it to persecute and intimidate political opponents. This highlights the politicization of the ZEDE question and shows how Respondent can intimidate anyone supportive of Claimants or their position (as another example, Respondent can punish any Honduran citizen who aids in an international claim against the State with loss of nationality[313]). In the face of this, the very idea of Claimants being able to seek an effective remedy in Honduras is absurd.

121. Therefore, even if Respondent's narrative was accepted at face value, Respondent's own case would only confirm the futility of local remedies.

122. All of the above circumstances are aggravated by a critical fact: the Supreme Court's decision of 20 September 2024, which declared the ZEDE Legal Framework unconstitutional *ex tunc*. As noted above, the circumstances of the decision's issuance are highly dubious, as is the fact that the decision was announced by press release but not officially published, despite which it was used by the administration and its allies to threaten political opponents.

123. On 14 November 2024, what appears to be a copy of the decision was published by the Honduran press.[314] The document is dated 20 September 2024 and only bears two signatures. There is no indication of who leaked this to the media or why. The fact that this is how the public was able to discover the content of the Supreme Court's decision is astounding and yet more evidence of the serious institutional problems that have already been adverted.

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312 Reply ¶ 128.

313 Constitution of Honduras (C-4) Art. 42.

314 Unofficial Decision of the Supreme Court of Honduras on the unconstitutionality of ZEDE (C-172).

124. Assuming that the published document is an accurate copy of the Supreme Court's decision, it confirms that the Supreme Court has declared the entire legal framework that created and regulated ZEDEs unconstitutional, with retroactive effects, for allegedly violating "entrenched" clauses (*contenidos pétreos*) of the Constitution.[315] As a result, the Court found that the ZEDEs – and all associated acts, laws and contracts – are null and void from their inception,[316] and that any and all internal or international provisions on the ZEDE Legal Framework are "expelled" from the Honduran legal system.[317] The Court itself recognizes that its decision is unprecedented, indicating that it is the first and only decision in the history of Honduras to have *ex tunc* effects.[318]

125. While investors will require time to properly analyze this long (86 pages) and much delayed decision and its effects, it is already apparent that Claimants would be completely unable to pursue any reasonable remedy in Honduras. In this context, Claimants note the following indicative statements by the Court:

- The Court characterized the ZEDE regime as "the most evident and gross facts against Honduras's and the sovereign, violating its will as established in the Constitution." [319]

- "For this high court of Justice, the matter at hand . . . encompasses an entire system currently in force in the Constitution, which is illegitimate because it originated from acts that supplanted the sovereign will residing in the original Constituent."[320]

- "Article 34 [of the ZEDE Organic Law] originates from constitutional provisions whose amendment is strictly prohibited by our Constitution, as they violate unamendable articles, commonly referred to as 'entrenched' clauses."[321]

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[315] Unofficial Decision of the Supreme Court of Honduras on the unconstitutionality of ZEDE (C-172) p. 25.

[316] *Id*. p. 36.

[317] *Id*. p. 84.

[318] *Id*. p. 28.

[319] *Id*. p. 42.

[320] *Id*. p. 4.

[321] *Id*. p. 25.

- "The unconstitutionality that arises against the creation and establishment of the [ZEDEs] produces retroactive or *ex tunc* effects, as an exceptional case and, until now, unique in the judicial history of Honduras."[322]

- "[T]he mere repeal of regulations is not sufficient; rather, their retroactive nullification must be declared, as they pertain to the integrity of the national territory."[323]

- "Any domestic or international provision that aimed to create . . . 'model cities,' and [ZEDEs], is hereby expelled from the Honduran legal system."[324]

126. Casting further doubt on the Supreme Court's motivations is the fact that this decision arose out of a targeted case brought by the Dean of the Autonomous National University of Honduras questioning the constitutionality of Article 34 in the ZEDE Organic Law, which provides for ZEDEs to establish educational and curricular policies.[325] Even though the ZEDE Organic Law has been repealed,[326] the Supreme Court converted the case into an opportunity to declare the ZEDE Legal Framework as a whole unconstitutional *ex officio*.[327] In effect, the Court converted the case into the vehicle to do away with the entire ZEDE Legal Framework as the current administration had so long desired.[328]

127. This decision confirms that Claimants would not have any reasonable possibility of an effective remedy, as Claimants already adverted. As Claimants have explained, there is no

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[322] *Id.* p. 28.

[323] *Id*. p. 34.

[324] *Id*. p. 84.

[325] *Id*. p. 1 ("On July twenty-first, two thousand twenty-one, Mr. **FRANCISCO JOSÉ HERRERA ALVARADO**, appeared before the Constitutional Chamber, acting in his capacity as dean of the **NATIONAL AUTONOMOUS UNIVERSITY OF HONDURAS**, filing a guarantee of unconstitutionality by way of action and by reason of content, against **Article 34 of Legislative Decree No. 120-2013, which contains the ORGANIC LAW OF THE ZONES OF EMPLOYMENT AND ECONOMIC DEVELOPMENT (ZEDE)**, . . ." (emphasis in original)); ZEDE Law (C-6) Art. 34.

[326] *See* Request for Arbitration ¶ 61.

[327] *Id*. p. 4 ("for this high court of Justice the matter at hand is not only the contravention of Rule 34 of Legislative Decree No. 120-2013, as the petitioner has referred to, but it encompasses an entire system currently in effect in the Constitution, and which is spurious because it was born from acts that supplanted the sovereign will that resides in the original Constituent."); *Id.* p. 23 ("this high court of justice considers it appropriate to broaden the challenged subject matter and to hear the issue of said zones in a complete manner.").

[328] Pursuant to the Honduran Constitution, it appears that the Supreme Court's ruling on the unconstitutionality of the ZEDE Legal Framework would have general effect (*i.e.*, *erga omnes*), not limited to the actual parties to the proceedings. *See* Constitution of Honduras (C-4) Art. 316.2 ("The decisions in which unconstitutionality of a law is declared are of immediate execution and have general effect, and abrogate the unconstitutional law. . . .").

recourse in Honduras against the decision, and the decision has general effects and the ZEDE Legal Framework is deemed abrogated *ex tunc*. This confirms that no local court would grant Claimants any relief and defeats any reasonable possibility of Claimants obtaining effective redress in Honduras. In short, local remedies would be futile.

128. Respondent acknowledges that Claimants were not a party to these proceedings, but at the same time tries to mislead the Tribunal by asserting that the Supreme Court heard the legal opinion of an alleged legal representative of Próspera ZEDE – Mr. Colindres – through an *amicus curiae* brief submitted to the Supreme Court.[329] This is yet another egregious mischaracterization. Mr. Colindres did not act on behalf of either Próspera ZEDE or Claimants before the Supreme Court.

- First, Mr. Colindres signed a legal opinion requested by UOMAC (*Universidad Olga y Manuel Ayau Cordón*), not Próspera ZEDE (or Claimants). This is clear on the face of the *amicus* submission cited by Respondent.[330] That opinion appears to have been subsequently submitted into the Court proceeding on behalf of UOMAC by a Mr. Marlon Osmín Donaire Coello.[331]

- Second, contrary to what Respondent suggests, Mr. Colindres was not even the legal representative of Próspera ZEDE at the time of his legal opinion. The legal opinion is dated 19 January 2022.[332] Mr. Colindres was only subsequently appointed as the Technical Secretary of Próspera ZEDE by CAMP on 28 January 2022.[333]

- Third, in any event, Respondent is once again improperly conflating Claimants with the Technical Secretary of Próspera ZEDE. As detailed above, the Technical Secretary of Próspera ZEDE is an official of Honduras, not Claimants' employee.[334]

- Fourth, even if, by way of hypothesis, Mr. Colindres represented Próspera ZEDE at that time or Claimants (which, as shown above, he did not), Honduras's position

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329 Reply ¶ 128.

330 J. Constantino Colindres, Legal Opinion as Amicus Curiae in connection with the appeal of unconstitutionality filed by the UNAH against Art. 34 of the Organic Law on ZEDE (19 Jan. 2022) (R-54).

331 Unofficial Decision of the Supreme Court of Honduras on the unconstitutionality of ZEDE (C-172) pp. 11-12.

332 J. Constantino Colindres, Legal Opinion as Amicus Curiae in connection with the appeal of unconstitutionality filed by the UNAH against Art. 34 of the Organic Law on ZEDE (19 Jan. 2022) (R-54).

333 Ratification of Promulgations of Próspera ZEDE dated 28 Apr. 2022 (C-167).

334 *See supra* § II.C.3; *see also* ZEDE Law (C-6) Art. 12.

that Claimants had a proper opportunity to defend their legal position before the Supreme Court is untenable. Submitting an *amicus curiae* brief is an entirely different proposition from participating in a case as a proper party). Thus, even if this Honduras's position were taken at face value, it would confirm the absence of any basic guarantees within Honduras's judicial system.

129. As Claimants have indicated, the Preliminary Objection Application (dated 30 August 2024) shows that Respondent was aware that a decision by the Supreme Court was imminent, stating that "the Plenary of the Supreme Court of Honduras will promptly issue a final decision."[335] In its Reply, Respondent tries to deny any advance knowledge and asserts that what it wrote was merely reproducing statements in the press releases and statements from the Court itself.[336] In fact, the documents on which Respondent relies belie its attempt to forswear its own words, as those sources plainly do not suggest that the Court was about to issue a decision. On the contrary, the Chief Justice of the Supreme Court expressly stated: "we are not going to rush."[337]

130. Respondent's certainty as to the decision in this case is all the more striking given the public uncertainty that exists in Honduras. More than two months have passed since the Supreme Court announced its decision to declare the ZEDE Legal Framework unconstitutional. As of the date of this submission, Respondent has acted by press release[338] and social network "X,"[339] even as an apparently leaked version of the decision dated 20 September 2024 – signed by only two Justices – was published by the Honduran press.[340] As of today, there has been no official publication of the decision. Through it all, the President of Honduras and her allies have not hesitated to use the Court's decision to accuse opponents of treason.[341] This is a Kafkaesque situation, which generates

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335 Preliminary Objection Application ¶ 10.

336 Reply ¶ 128 ("What the Republic of Honduras said in its Preliminary Objection about a prompt decision of the plenary on the (un)constitutionality of the ZEDE simply responds to the statements and declarations that the Supreme Court itself made in this regard.").

337 "No vamos a correr y será una decisión jurídica," garantiza presidenta de CSJ en torno a recurso sobre las ZEDEs," PROCESO DIGITAL (14 Aug. 2024) (R-61).

338 Press Release, PODER JUDICIAL (20 Sep. 2024) (C-145).

339 Poder Judicial HN, X @PJDEHONDURAS (20 Nov. 2024) (C-176).

340 Unofficial Decision of the Supreme Court of Honduras on the unconstitutionality of ZEDE (C-172).

341 *See supra* ¶ 120.

uncertainty and confirms the lack of legal security and judicial independence that exists in Honduras.

131. In conclusion, even assuming *arguendo* that Respondent required the exhaustion of local remedies as a condition of its consent to arbitration in this case, which it has not, local remedies would be futile, and therefore, Claimants are not required to exhaust them. Claimants have made a convincing showing that there is no effective means of redress in Honduras, amply meeting the applicable standard, and Respondent's bald and misleading responses in the Reply as well as the Supreme Court decision only further underscore Claimants' showing.

III. REQUEST FOR RELIEF

132. 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.

Respectfully submitted,

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25 November 2024

Annex A

COMPARISON OF PRÓSPERA ZEDE AND OTHER SPECIAL ECONOMIC ZONES[1]

Common Elements in Autonomous Cities

PRÓSPERA ZEDE

Hong Kong SAR, China	Dubai, UAE	Abu Dhabi, UAE	Próspera ZEDE, Honduras	Astana, Kazakhstan
Constitutional reform	Constitutional reform	Constitutional reform	Constitutional reform	Constitutional reform
Normative autonomy	Normative autonomy	Normative autonomy	Normative autonomy	Normative autonomy
Local Public Administration	Local Public Administration	Local Public Administration	Local Public Administration	Local Public Administration
Common Law	Common Law	Common Law	Common Law	Common Law
Exclusive financial regulator (HKMA)	Exclusive financial regulator (DFSA)	Exclusive financial regulator (FSRA)	Exclusive financial regulator (RFSA)	Exclusive financial regulator (AFSA)
Special judicial system (JHKSAR)	Sistema judicial especial (DIFC Courts)	Special judicial system (ADGM Courts)	Special judicial system (ZEDE Jurisdiction)	Special judicial system (AIFC Court)
English language	English language	English language	English language	English language
Mercantile and Property Registry	Mercantile and Property Registry	Mercantile and Property Registry	Mercantile and Property Registry	Mercantile Registry
Fiscal competence	Fiscal competence	Fiscal competence	Fiscal competence	Fiscal competence

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1 Jorge Colindres, X @GEORGECOLINDRES (24 Nov. 2024) (C-179) (comparing Próspera ZEDEs with Special Economic Zone regimes located in the People's Republic of China, the United Arab Emirates, and Kazakhstan).