INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/23/2

In the arbitration proceeding between

Honduras Próspera Inc., St. John's Bay Development Company LLC, and Próspera Arbitration Center LLC

Claimants

and

Republic of Honduras

Respondent

DECISION ON PRELIMINARY OBJECTIONS UNDER ARTICLE 10.20.5 OF CAFTA-DR

Members of the Tribunal
Prof. Dr. Juan Fernández-Armesto, President of the Tribunal
Prof. Raúl E. Vinuesa, Arbitrator
Mr. David W. Rivkin, Arbitrator

Secretary of the Tribunal
Mr. Marco Tulio Montañés-Rumayor

Assistant to the Tribunal
Mr. Antonio Gordillo

Date of dispatch to the Parties: 26 February 2025

REPRESENTATION OF THE PARTIES

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GLOSSARY OF DEFINED TERMS AND ABBREVIATIONS

C Objection I	Claimants' observations on the Preliminary Objection, dated 26 September 2024
C Objection II	Claimants' Rejoinder on the Preliminary Objection, dated 25 November 2024
CAFTA-DR	Central America – United States – Dominican Republic Free Trade Agreement
CAMP	Committee for the Adoption of Best Practices
Claimants	Honduras Próspera Inc., St. John's Bay Development Company LLC, and Próspera Arbitration Center LLC
Convention or ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
***Decreto* 32**	*Decreto* 32-2022, seeking to remove the ZEDE Constitutional Provisions from the Constitution of Honduras, published on 21 April 2022
***Decreto* 33**	*Decreto* 33-2022, repealing the ZEDE Law, published on 26 April 2022
***Decreto* 41-88**	*Decreto* 41-88, dated 4 August 1988
ELSI	*Elettronica Sicula S.p.A.*, Judgment, I.C.J. Rep. 1989, dated 20 July 1989
English Tr. [page:line]	English transcript of the Hearing
Exhaustion Requirement	Requirement to exhaust local remedies before resorting to arbitration upon which Respondent's Preliminary Objection is based
Finnish Vessels	*Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland v. Great Britain)*, 3 UNRIIA 1481, Award, dated 9 May 1934
Hearing	The Hearing on Respondent's Preliminary Objection held on 16 December 2024
Honduras Próspera	Honduras Próspera Inc.

Honduras, the Republic, or Respondent	Republic of Honduras
ICSID or Centre	International Centre for Settlement of Investment Disputes
ICSID Rules	ICSID Arbitration Rules in force as of 1 July 2022
ILC	The International Law Commission
Interhandel	*Switzerland v. United States of America*, Judgment, I.C.J. Rep. 1959, dated 21 March 1959
Lion	*Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, dated 20 September 2021
LSA	Agreement for Legal Stability and Investor Protection concluded between Honduras Próspera Inc., and Honduras on 9 March 2021, and amended on 18 November 2021
MFN	Most Favored Nation clause
PAC	Próspera Arbitration Center LLC
Parties	Claimants and Respondent
PO1	Procedural Order No. 1, dated 9 September 2024
Preliminary Objection	Respondent's preliminary objection on the jurisdiction of ICSID and to the Tribunal's competence based on Claimants' alleged failure to exhaust local remedies
Preliminary Phase	The preliminary phase of the arbitration
R Objection I	Respondent's Preliminary Objection under Article 10.20.5 of CAFTA-DR, dated 30 August 2024
R Objection II	Respondent's Reply on the Preliminary Objection, dated 25 October 2024
RED	*Regiones Especiales de Desarrollo*
REDs Law	The law which created the *Regiones Especiales de Desarrollo*
Request for Arbitration	Claimants' Request for Arbitration, dated 20 December 2022
Spanish Tr. [page:line]	Spanish transcript of the Hearing

St. John's Bay	St. John's Bay Development Company LLC
Supreme Court	Honduran Supreme Court of Justice
Supreme Court's Decision	Decision of the Supreme Court of Honduras, dated 20 September 2024
ZEDE	*Zonas de Empleo y Desarrollo Económico* (Economic Development and Employment Zones)
ZEDE Constitutional Provisions	Articles 294, 303, and 329 of the Honduran Constitution
ZEDE Law	Organic Law of the Economic Development and Employment Zones
ZEDE Legal Framework	Legal framework for the creation of the *Zonas de Empleo y Desarrollo Económico* consisting of the ZEDE Constitutional Provisions together with the ZEDE Law

I. INTRODUCTION

1. THE PARTIES

1. Claimants are:

- Honduras Próspera Inc. (f/k/a Honduras Próspera LLC and Sociedad para el Desarrollo Socioeconómico de Honduras, LLC) ["**Honduras Próspera**"**]**, a corporation constituted under the laws of the State of Delaware;

- St. John's Bay Development Company LLC (f/k/a Próspera Land SPV 1 LLC) ["**St. John's Bay**"], a limited liability company organized under the laws of the State of Delaware; and

- Próspera Arbitration Center LLC ["**PAC**"], a limited liability company organized under the laws of Texas.

2. Claimants are referred collectively as the "**Claimants**".

3. Respondent is the Republic of Honduras ["**Honduras**", the "**Republic**" or "**Respondent**"].

4. Claimants and Respondent are jointly referred to as the "**Parties**". The Parties' representatives and their addresses are listed above on page (ii) *supra*.

2. THE DISPUTE

5. The present dispute concerns Respondent's preliminary objection to the jurisdiction of the International Centre for Settlement of Investment Disputes ["**ICSID**" or the "**Centre**"] and to this Tribunal's competence based on Claimants' alleged failure to exhaust local remedies before lodging these proceedings [the "**Preliminary Objection**"][1].

[1] *See* R Objection I, para. 24.

II. PROCEDURAL HISTORY

6. On 20 December 2022 Claimants submitted a Request for Arbitration [the "**Request for Arbitration**"] under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [the "**Convention**" or "**ICSID Convention**"], the Central America – United States – Dominican Republic Free Trade Agreement [the "**CAFTA-DR**"][2], and the Agreement for Legal Stability and Investor Protection between Honduras Próspera Inc., and Honduras [the "**LSA**"][3].

7. On 3 February 2023 the Secretary-General of ICSID registered the Request for Arbitration.

8. On 29 January 2024 the Tribunal was constituted pursuant to Article 10.19 of CAFTA-DR. The Tribunal is composed of Prof. Dr. Juan Fernández-Armesto, a national of the Kingdom of Spain, as President, appointed by the Secretary-General; Mr. David W. Rivkin, a national of the United States of America, appointed by Claimants; and Prof. Raúl E. Vinuesa, a national of Argentina and the Kingdom of Spain, appointed by the Secretary-General.

9. On 19 February 2024 Respondent filed a proposal for disqualification and the proceeding was suspended. Further to written submissions by the Parties, the proposal for disqualification was declined by the Chair of the Administrative Council and the proceeding was resumed on 7 August 2024.

10. On 30 August 2024 Respondent filed the Preliminary Objection under Article 10.20.5 of CAFTA-DR [also referred to as "**R Objection I**"].

11. On 4 September 2024 the Tribunal confirmed receipt of the Preliminary Objection and suspended the proceeding on the merits pursuant to Article 10.20.5 of CAFTA-DR.

12. On 9 September 2024 the Tribunal circulated a draft Procedural Order No. 1 ["**PO1**"] providing for the rules to govern the preliminary phase of the arbitration [the "**Preliminary Phase**"]. The Tribunal noted that if the case continued after the Preliminary Phase, a further procedural order would be issued for the remainder of the proceedings. Finally, the Tribunal invited the Parties to confer regarding the items contained in the draft order and to inform the Tribunal of their agreements and/or positions.

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[2] Doc. CL-2, Dominican Republic-Central America-United States Free Trade Agreement, signed on 5 August 2004. CAFTA-DR entered into force between the United States and Honduras on 1 April 2006.

[3] Doc. **CL-6**, Agreement for Legal Stability and Investor Protection entered into by and between Honduras Próspera and the Republic of Honduras, dated 9 March 2021. The LSA was amended on 18 November 2021. Doc. **CL-7**, Amendment to Agreement for Legal Stability and Investor Protection entered into by and between Honduras Próspera and Honduras, dated 18 November 2021.

13. On 19 September 2024 the Tribunal issued PO1, holding that the Preliminary Phase would be conducted in accordance with the ICSID Arbitration Rules in force as of 1 July 2022 [the "**ICSID Rules**"], except to the extent modified and/or supplemented by CAFTA-DR.

14. On 26 September 2024 Claimants filed observations on Respondent's Preliminary Objection ["**C Objection I"**].

15. On 25 October 2024 Respondent filed a reply on the Preliminary Objection ["**R Objection II**"].

16. On 25 November 2024 Claimants filed a rejoinder on the Preliminary Objection ["**C Objection II**"].

17. On 6 December 2024 the President of the Tribunal held a pre-hearing organizational meeting with the Parties by video conference to discuss any outstanding procedural, administrative, and logistical matters in preparation for the hearing on preliminary objections [the "**Hearing**"].

18. On 10 December 2024 the Tribunal issued Procedural Order No. 2 concerning the organization of the Hearing.

19. On 15 December 2024 the Tribunal issued Procedural Order No. 3 concerning applications to intervene by *amicus curiae* in accordance with Article 10.20.3 of CAFTA-DR and ICSID Rule 67.

20. The Hearing was held remotely on 16 December 2024, with the following participants:

Tribunal:

Prof. Prof. Juan Fernández-Armesto	President
Mr. David W. Rivkin	Arbitrator
Prof. Raúl E. Vinuesa	Arbitrator

Assistant to the Tribunal

Mr. Antonio Gordillo	Assistant of the Tribunal
Mr. Eduardo Rodríguez	Associate at Armesto & Asociados

ICSID Secretariat:

Mr. Marco Tulio Montañés-Rumayor	Secretary of the Tribunal
Mr. Federico Salon-Kajganich	Paralegal

For Claimants:

Ms. Ank Santens	White & Case LLP
Mr. Francisco X. Jijón	White & Case LLP
Ms. Bianca M. McDonnell	White & Case LLP
Mr. Eckhard Hellbeck	White & Case LLP
Ms. Marta González-Ruano	White & Case LLP
Mr. Abdullah Alshakrah	White & Case LLP

Mr. Erick A. Brimen	Honduras Próspera Representative
Mr. Nick Dranias	Honduras Próspera Representative

For Respondent:

Mr. Manuel Antonio Díaz Galeas	Procuraduría General de la República
Mr. Jacobo Domínguez Gudini	Procuraduría General de la República
Mr. Nelson Gerardo Molina Flores	Procuraduría General de la República
Mr. Marcio Ariel Canaca Curry	Procuraduría General de la República
Ms. María Daniella Rueda	Procuraduría General de la República
Mr. Kenneth Juan Figueroa	Foley Hoag LLP
Mr. Andrés Felipe Esteban Tovar	Foley Hoag LLP
Mr. Luis Brugal Bravo	Foley Hoag LLP
Mr. Rodrigo Gil	Jana & Gil Dispute Resolution
Mr. Francisco Grob	Jana & Gil Dispute Resolution
Mr. Mathias Lehmann	Jana & Gil Dispute Resolution
Mr. Alain Drouilly	Jana & Gil Dispute Resolution
Mr. Matías Toselli	Jana & Gil Dispute Resolution

Non-Disputing Parties:

Mr. David Bigge	Office of the Legal Adviser United States Department of State
Ms. Melinda E. Kuritzky	Office of the Legal Adviser United States Department of State
Ms. Ms. Jennifer Marcovitz	Office of the Legal Adviser United States Department of State
Ms. Natalia Polanco Abreu	*Dirección de Prevención y Solución de Controversias*, Dominican Republic
Ms. Gianna Rodríguez	*Dirección de Prevención y Solución de Controversias*, Dominican Republic
Ms. Nathalia Mercedes	*Dirección de Prevención y Solución de Controversias*, Dominican Republic
Mr. Julio Santiz	*Procuraduría General de la Nación*, Guatemala
Mr. Andrés Puente	*Procuraduría General de la Nación*, Guatemala
Ms. Paula Morales	*Procuraduría General de la Nación*, Guatemala
Ms. Victoria Meza	*Ministerio de Economía*, Guatemala
Mr. Jorge Luis Godínez	*Ministerio de Economía*, Guatemala
Ms. Luisa Fernanda Medina	*Ministerio de Economía*, Guatemala
Ms. Ivania Ponce	*Ministerio de Economía*, Guatemala
Ms. Tania Guzmán	*Ministerio de Economía*, Guatemala
Ms. Lesly Gabriela Pérez	*Ministerio de Economía*, Guatemala

Court Reporters:

Ms. Marta Rinaldi	Spanish Court Reporter
Ms. Eliana da Silva	Spanish Court Reporter
Ms. Dawn Larson	English Court Reporter

Interpreters:

Ms. Silvia Colla	English-Spanish Interpreter
Mr. Charles Roberts	English-Spanish Interpreter
Mr. Luis Eduardo Arango	English-Spanish Interpreter

Technical Support:

Mr. Dale Abbott	Sparq, Inc.

21. On 23 December 2024 the Parties sent to ICSID their agreed revisions to the Hearing transcripts, in both English and Spanish [“**English Tr**.” and “**Spanish Tr.**”, respectively].

22. On 10 January 2025 the Tribunal received three applications to intervene as *amici curiae* in the proceeding.

23. On 17 January 2025 the Parties submitted their comments on the *amicus curiae* applications.

24. On 24 January 2025 the Tribunal issued Procedural Order No. 4, denying *pro tem* the *amicus curiae* applications.

25. On 21 February 2025 the Parties filed their cost submissions.

III. BACKGROUND

26. Given that the present dispute concerns exhaustion of local remedies, the Tribunal will begin by presenting this requirement under international law (**1.**). Subsequently, it will summarize Honduras' conduct regarding exhaustion of local remedies over the past three decades (**2.**). Then, the Tribunal will review Honduras' approval and ratification of CAFTA-DR in the mid-2000s (**3.**), before addressing Claimants' alleged investments under the ZEDE Legal Framework starting in late 2010s (**4.**) and the parliamentary and judicial actions taken in Honduras against such framework since 2022 (**5.**). Finally, the Tribunal will describe the steps taken by Claimants to initiate these proceedings (**6.**).

1. EXHAUSTION OF LOCAL REMEDIES AS A REQUIREMENT UNDER INTERNATIONAL LAW

1.1 ORIGINS AND IMPLEMENTATION OF THE EXHAUSTION OF LOCAL REMEDIES REQUIREMENT

27. The exhaustion of local remedies requirement stems from the customary international law principle that, prior to bringing an international claim, foreign nationals must have first resorted to the host State's legal remedies to obtain redress[4].

28. This principle of customary international law was developed in the context of diplomatic protection in the *Interhandel*[5] and *ELSI*[6] cases. In *Interhandel*, the International Court of Justice stated that

> "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law […] Before resort may be had to an international court […] it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system"[7].

29. However, the ICSID Convention reverses the traditional customary international law requirement of exhaustion of local remedies by enacting Article 26, which provides that

> "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may

[4] Doc. **CL-84**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, dated 20 September 2021 ["***Lion***"], para. 543.
[5] Doc. **RL-1,** *Switzerland v. United States of America*, Judgment, I.C.J. Rep. 1959, dated 21 March 1959. ["***Interhandel***"].
[6] Doc. **RL-4**, *Elettronica Sicula S.p.A*., Judgment, I.C.J. Rep. 1989, dated 20 July 1989 ["***ELSI***"].
[7] Doc. **RL-1**, *Interhandel,* p. 27.

> require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention"[8].

30. Thus, under Article 26 of the Convention, the Contracting States waive the requirement of exhaustion of local remedies, "unless otherwise stated"[9].

31. According to Professor Schreuer, there are various alternatives for a State which wishes to reinstate the requirement to exhaust local remedies:

    - it may do so by inserting a condition in a treaty offering consent to ICSID arbitration;

    - alternatively, it may do so in national legislation providing for ICSID arbitration; or finally

    - in a contract with an ICSID arbitration clause[10].

32. Despite the foregoing, ICSID Contracting States have generally shied away from requiring exhaustion of local remedies. ICSID reports that only Israel, Costa Rica and Guatemala (but not Honduras) have notified the Centre that their consent to its jurisdiction is conditioned on the exhaustion of local remedies by the claimant[11].

33. Similarly, States have been traditionally reluctant to incorporate a requirement to exhaust local remedies in BITs. Pursuant to a study from 1997, out of the 220 BITs concluded in the 1980s, only three required the exhaustion of local remedies. Likewise, out of the 409 BITs executed between 1990 and 1997, only five required such exhaustion[12].

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[8] Doc. **RL-9**, ICSID Convention, Art. 26.

[9] Doc. **RL-9**, ICSID Convention, Art. 26; Doc. **RL-56**, S. Schill et al., "Article 26" in *Schreuer's Commentary on the ICSID Convention* (2022), para. 298.

[10] Doc. **RL-56**, S. Schill et al., "Article 26" in *Schreuer's Commentary on the ICSID Convention* (2022), para. 302. This was also the tribunal's view in *Lanco v. Argentina*: "A State may require the exhaustion of domestic remedies as a prior condition for its consent to ICSID arbitration. This demand may be made (i) in a bilateral investment treaty that offers submission to ICSID arbitration, (ii) in domestic legislation, or (iii) in a direct investment agreement that contains an ICSID clause"; *see also* Doc. **RL-7**, *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal, 8 December 1998, para. 39.

[11] Doc. **R-55**, ICSID/8-D, p. 10. Israel withdrew its notification (which dated from 1983) by a communication to the Centre in 1991; Costa Rica notified the Centre in 1993 that "[t]here may only be recourse to arbitration pursuant to [the Convention] where all existing administrative or judicial remedies have been exhausted"; Guatemala notified the Centre in 1993 that "the Republic of Guatemala will require the exhaustion of local administrative remedies as a condition of its consent to arbitration under the Convention". As discussed below, Honduras does not appear to have sent any notification to ICSID in this regard.

[12] Doc. **CL-93**, Paul Peters, Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties, in 44 Netherlands International Law Review 233 (1997), pp. 233-234. In a more recent paper, the International Institute for Sustainable Development noted that "very few agreements in the universe of over 3,000 bilateral investment treaties (BITs) and treaties with investment provisions (TIPs) expressly require ELR. It only appears in some first-generation BITs and in more recent BITs concluded by Argentina, Romania, Turkey, the United Arab Emirates and Uruguay, among others" (IISD Best Practices Series:

34. In a number of cases, State parties to ICSID proceedings have raised the principle of exhaustion of local remedies as a jurisdictional requirement. Professor Schreuer, however, highlights that, up to 2022, these challenges have "never" been successful[13].

1.2 CONTENT OF THE EXHAUSTION OF LOCAL REMEDIES REQUIREMENT

35. The exhaustion of local remedies principle 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"[14].

36. The remedies available to an alien that must be exhausted before resorting to arbitration will inevitably vary from State to State. It is clear, however, that the foreign national must exhaust all judicial remedies available under the domestic law of the host State, including recourse to the highest municipal court, if the circumstances of the case authorize such recourse[15]. Similarly, an alien is required to exhaust all administrative remedies that may lead to a binding decision[16].

1.3 EXCEPTION OF OBVIOUS FUTILITY

37. Tribunals have recognized an exception to this requirement: "an alien cannot be required to take a measure or lodge an appeal which will not remedy the international wrong"[17].

38. Professor Amerasinghe describes this exception as follows:

> "The test of obvious futility clearly requires more than the probability of failure or the improbability of success, but perhaps less than the absolute certainty of failure. The test may be said to require evidence from which it could reasonably be concluded that the remedy would be ineffective"[18].

Exhaustion of Local Remedies in International Investment Law, 2017, Section 3.1, https://www.iisd.org/system/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf).

[13] Doc. **RL-56**, S. Schill et al., "Article 26" in *Schreuer's Commentary on the ICSID Convention* (2022), para. 329.

[14] Doc. **RL-56**, S. Schill et al., "Article 26" in *Schreuer's Commentary on the ICSID Convention* (2022), para. 297.

[15] Doc. **RL-31**, United Nations General Assembly, Commentary on the Draft Articles on Diplomatic Protection, U.N. Doc. A/61/10, p. 48.

[16] Doc. **RL-31**, United Nations General Assembly, Commentary on the Draft Articles on Diplomatic Protection, U.N. Doc. A/61/10, p. 48.

[17] Doc. **CL-84**, *Lion*, para. 554; *see also* Doc. **CL-47**, *Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland v. Great Britain)*, 3 UNRIIA 1481, Award, dated 9 May 1934 ["***Finnish Vessels***"], p. 1494.

[18] Doc. **CL-84**, *Lion*, para. 554 (*citing* C. F. Amerasinghe, "Local Remedies in International Law", Cambridge, 2004, p. 206).

39. The International Law Commission [the "**ILC**"] has recorded this exception in its Draft Articles on Diplomatic Protection:

> "Article 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"[19].

40. The tribunal in *Lion* interpreted Article 15 of the ILC Draft Articles on Diplomatic Protection and found that the exhaustion rule is subject to two prongs:

> "[…] an aggrieved alien is only required to pursue remedies
>
> - Which are reasonably available, and
>
> - Which have an expectation that they will be effective, *i.e.* the measure or appeal has a reasonable prospect of [redressing claimant's injuries]"[20].

Reasonable availability

41. The tribunal in *Lion* defined the "reasonable availability" prong of the obvious futility test as follows:

> "The first facet of the exhaustion rule is that the aggrieved alien must launch all remedies, which are not extravagant, and take them to the highest judicial instance in the land"[21].

42. The burden on the claimant is not to pursue all possible remedies, but only those which are reasonably available[22]. In the words of Professor Amerasinghe:

> "An aggrieved alien is bound only to exhaust those remedies that are available to him. The requirement thus postulated has been described in terms of accessibility"[23].

43. In its Commentary to the ILC Draft Articles on Diplomatic Protection, the ILC recalls that the "reasonable availability" test is supported by judicial decisions that considered that remedies need not be exhausted when:

> "the domestic court does not have jurisdiction to hear the dispute in question, when the domestic legislation justifying the acts challenged by the alien are not subject to judicial review by the domestic courts, when the domestic courts are notoriously lacking

[19] Doc. **CL-65**, ILC Articles on Diplomatic Protection, Art. 15.
[20] Doc. **CL-84**, *Lion*, para. 562.
[21] Doc. **CL-84**, *Lion*, para. 563.
[22] Doc. **CL-84**, *Lion*, para. 564.
[23] Doc. **CL-84**, *Lion*, para. 565 (*citing* C. F. Amerasinghe, "Local Remedies in International Law", Cambridge, 2004, p. 206).

> in independence, when consistent and well-established case law is contrary to the alien, when the domestic courts do not offer the alien an avenue appropriate and sufficient remedy or when the respondent State does not have an adequate system of judicial protection"[24].

Effectiveness

44. The tribunal in *Lion* found that the "effectiveness" prong of the obvious futility test provides that "[t]he aggrieved alien is not under an obligation to resort to an appeal which, although available, was obviously futile"[25].

45. The seminal case establishing this exception was the 1934 *Finnish Vessels* decision, which held that a claimant is not obliged to resort to an appeal, provided that such remedy was "obviously futile"[26]. In the specific case the arbitrator found that where the finding of fact by a lower instance court was final, and the success of the claimant's case depended on a different finding of fact, an appeal to a higher Court was obviously futile[27].

46. Judge Lauterpacht defined the criterion as there being a "reasonable possibility" that a remedy would be afforded. As stated by Judge Fitzmaurice,

> "[…] 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 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"[28].

2. HONDURAS' TRACK RECORD IN RELATION TO EXHAUSTION OF LOCAL REMEDIES UNDER THE ICSID CONVENTION

2.1 HONDURAS' REFERENCE TO THE EXHAUSTION OF LOCAL REMEDIES IN THE *DECRETO* RATIFYING THE CONVENTION

47. Honduras signed the Convention on 28 May 1986[29]. The Tribunal understands that Honduras did not make any reservations at that time.

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[24] Doc. **RL-31**, United Nations General Assembly, Commentary on the Draft Articles on Diplomatic Protection, U.N. Doc. A/61/10, pp. 51-52.
[25] Doc. **CL-84**, *Lion*, para. 567.
[26] Doc. **CL-47,** *Finnish Vessels*, p. 1504.
[27] Doc. **CL-47,** *Finnish Vessels*, p. 1543.
[28] Doc. **RL-21**, B. Sabahi, et al. "Exhaustion of Local Remedies" in Investor State Arbitration (2019), p. 436 (*citing* the exposition of the standard by G. Fitzmaurice).
[29] List of Contracting States and Other Signatories of the Convention, https://icsid.worldbank.org/sites/default/files/ICSID%203/2024%20-%20Aug%2025%20-%20ICSID%203%20-%20ENG.pdf (as of 25 August 2024).

48. About two years thereafter, Honduras approved and ratified the Convention through *Decreto* 41-88 dated 4 August 1988 [the "***Decreto* 41-88**"][30]. *Decreto* 41-88 contains only two provisions:

- Article 1, which approves an "*Acuerdo Original Nº 8-DTTL de fecha 25 de julio de 1986, referente al* '[Convention]'", and transcribes *ad pedem litterae* the text of the Convention in Spanish[31]; and

- Article 2, which provides that "[e]l *presente Decreto entrará en vigencia a partir de la fecha de su publicación, en el Diario Oficial 'La Gaceta*'"[32].

49. In the transcription of the Convention, between Article 75 (the final provision of the Convention) and the list of signatory parties, Honduras inserted the text on which it now bases its Preliminary Objection [the "**Exhaustion Requirement**"]:

> "*DECLARACIÓN DE LA REPÚBLICA DE HONDURAS. El Estado de Honduras se someterá a los procedimientos de arbitraje y conciliación previstos en el Convenio, únicamente cuando haya expresado previamente su consentimiento por escrito. El inversionista deberá agotar las vías administrativas y judiciales de la República de Honduras, como condición previa a la puesta en marcha de los mecanismos de solución de diferencias previstos en este Convenio. En cualquier caso sometido al Tribunal en que el Estado de Honduras sea Parte, las leyes aplicables serán las de la República de Honduras y, únicamente podrán hacer uso de los procedimientos previstos en el Convenio, las Partes naturales y jurídicas de los Estados parte del mismo*"[33].

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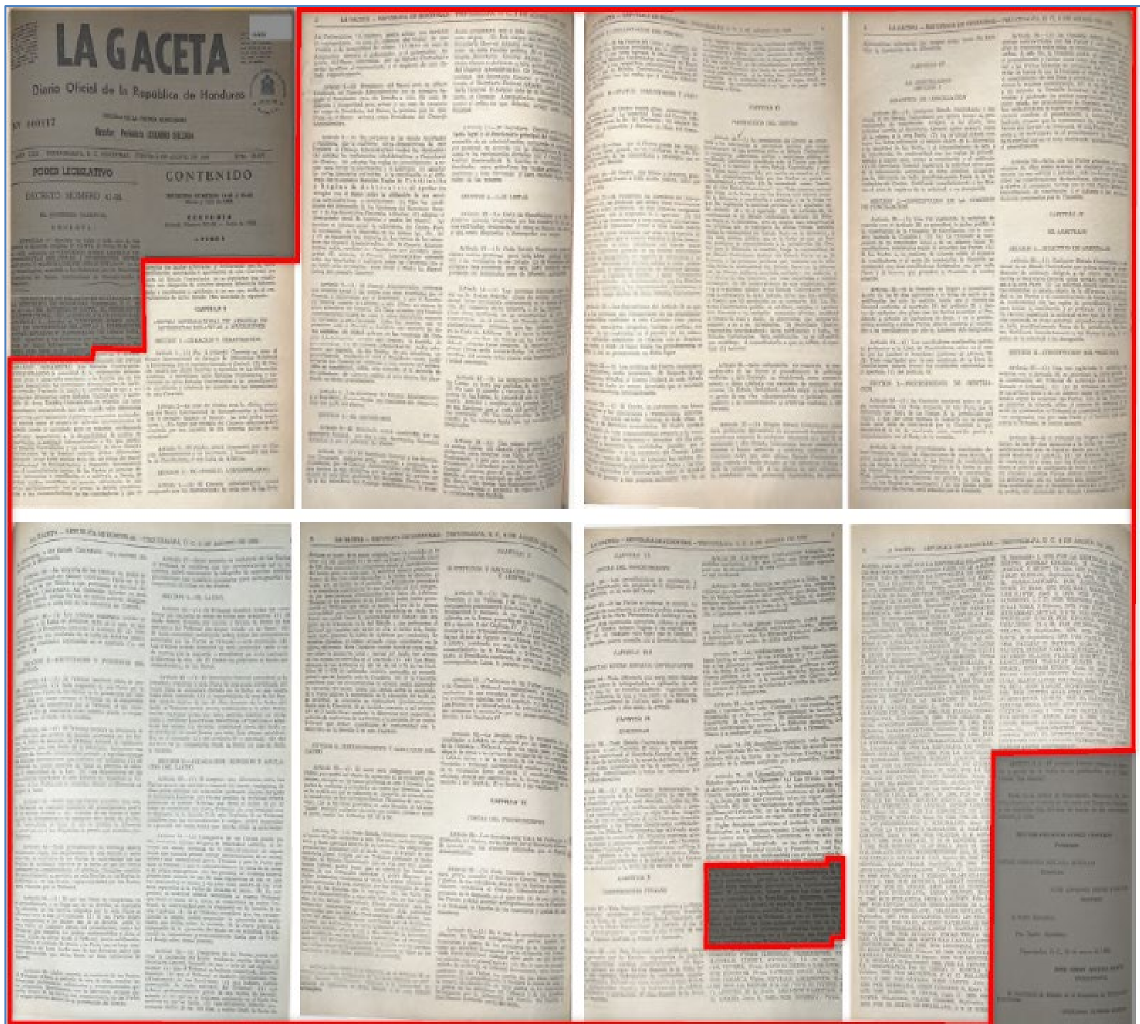
[30] R Objection I, para. 28; C Objection I, para. 2.

[31] Doc. **R-3**, Republic of Honduras, Decree 41-88, Art. 1: "Original Agreement No. 8-DTTL dated 25 July 1986, referring the [Convention]".

[32] Doc. **R-3**, Republic of Honduras, Decree 41-88, Art. 2: "The present Decree shall be effective as of the date it is published in the Official Journal 'La Gaceta'".

[33] Doc. **R-3**, Republic of Honduras, Decree 41-88, Decree on the ICSID Convention dated 25 March 1988, Art. 75 (emphasis added) ("DECLARATION OF THE REPUBLIC OF HONDURAS. The State of Honduras shall submit itself to the arbitration and conciliation procedures provided for in the Convention, only when it has previously expressed its consent in writing. The investor shall exhaust the administrative and judicial channels of the Republic of Honduras as a precondition for the implementation of the dispute settlement mechanisms provided for in this Convention. In any case, submitted to the Tribunal to which the State of Honduras is a Party, the applicable laws shall be those of the Republic of Honduras and, only natural and juridical persons from Contracting Parties to the Convention may avail themselves of the procedures provided for in the Convention.").

50. The following images show the exact location of the Exhaustion Requirement within the transcription of the Convention in Article 1 of *Decreto* 41-88[34]:



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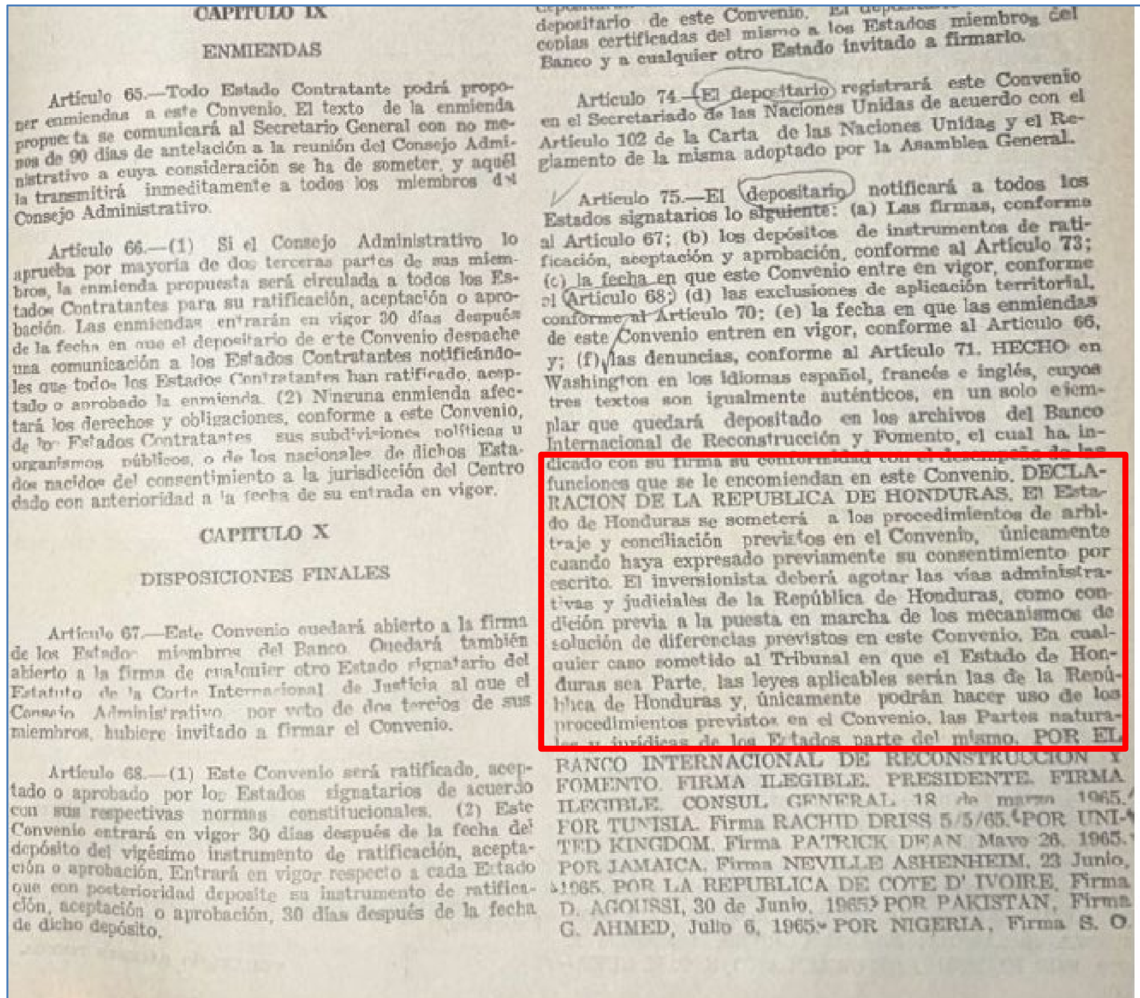
[34] Doc. **R-3**, Republic of Honduras, Decree 41-88, p. 7. The Exhaustion Requirement is located in the area highlighted in grey and found between the text of the Convention and its signatures.



CAPITULO IX

ENMIENDAS

Artículo 65.—Todo Estado Contratante podrá propo- ner enmiendas a este Convenio. El texto de la enmienda propuesta se comunicará al Secretario General con no me- nos de 90 días de antelación a la reunión del Consejo Admi- nistrativo a cuya consideración se ha de someter, y aquél la transmitirá inmeditamente a todos los miembros del Consejo Administrativo.

Artículo 66.—(1) Si el Consejo Administrativo lo aprueba por mayoría de dos terceras partes de sus miem- bros, la enmienda propuesta será circulada a todos los Es- tados Contratantes para su ratificación, aceptación o apro- bación. Las enmiendas entrarán en vigor 30 días después de la fecha en que el depositario de este Convenio despache una comunicación a los Estados Contratantes notificándo- les que todos los Estados Contratantes han ratificado, acep- tado o aprobado la enmienda. (2) Ninguna enmienda afec- tará los derechos y obligaciones, conforme a este Convenio, de los Estados Contratantes sus subdivisiones políticas u organismos públicos, o de los nacionales de dichos Esta- dos nacidos del consentimiento a la jurisdicción del Centro dado con anterioridad a la fecha de su entrada en vigor.

CAPITULO X

DISPOSICIONES FINALES

Artículo 67.—Este Convenio quedará abierto a la firma de los Estados miembros del Banco. Quedará también abierto a la firma de cualquier otro Estado signatario del Estatuto de la Corte Internacional de Justicia al que el Consejo Administrativo por voto de dos tercios de sus miembros, hubiere invitado a firmar el Convenio.

Artículo 68.—(1) Este Convenio será ratificado, acep- tado o aprobado por los Estados signatarios de acuerdo con sus respectivas normas constitucionales. (2) Este Convenio entrará en vigor 30 días después de la fecha del depósito del vigésimo instrumento de ratificación, acepta- ción o aprobación. Entrará en vigor respecto a cada Estado que con posterioridad deposite su instrumento de ratifica- ción, aceptación o aprobación, 30 días después de la fecha de dicho depósito.

depositario de este Convenio. El depositario ... a los Estados miembros del copias certificadas del mismo a los Estados miembros del Banco y a cualquier otro Estado invitado a firmarlo.

Artículo 74.—El depositario registrará este Convenio en el Secretariado de las Naciones Unidas de acuerdo con el Artículo 102 de la Carta de las Naciones Unidas y el Re- glamento de la misma adoptado por la Asamblea General.

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

51. Honduras claims that it incorporated the Exhaustion Requirement in *Decreto* 41-88 as an exercise of its right under Article 26 of the Convention, which provides as follows:

> "[…] A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention"[35].

52. While Honduras was certainly entitled to require the exhaustion of local remedies under Article 26 of the Convention, the approach it decided to adopt is uncommon:

- *First*, exercising the right to require the exhaustion of local remedies under Article 26 of the Convention is, in itself, exceptional; as noted above, the Tribunal is aware of only three other countries having exercised this right (Israel, Costa Rica and Guatemala).

[35] Doc. **RL-9**, ICSID Convention, Art. 26.

- *Second*, the requirement to exhaust local remedies, which remains an exception to the rule under the Convention, would seem to require greater clarity in both its wording and its placement:

    - In its wording, because the language can be interpreted in two ways: either as imposing a requirement to exhaust local remedies before accessing ICSID arbitration, as Honduras asserts, or as a directive to Honduras' future negotiators of treaties and other instruments providing for ICSID arbitration, inciting them to incorporate such a requirement, as Claimants allege; and

    - In its placement, because a paragraph buried within the transcription of the Convention in the *Decreto* – inserted between the final article and the signatures – does not seem to be the most transparent way to communicate to the international community that Honduras is exercising its right under Article 26; furthermore, there is no evidence in the record that Honduras notified this requirement to ICSID; in fact, ICSID registered *Decreto* 41-88 in Document ICSID/8-F, titled "Legislative or Other Measures Relating to the Convention (Article 69 of the Convention)" rather than in Document ICSID 8-D, which is used by ICSID to, *inter alia*, register notifications about requirements to exhaust local remedies, such as those made by Israel, Costa Rica and Guatemala[36].

2.2 HONDURAS' SCARCE REFERENCES TO EXHAUSTION OF LOCAL REMEDIES IN INSTRUMENTS PROVIDING FOR ICSID ARBITRATION, INCLUDING CAFTA-DR

53. Since the publication of *Decreto* 41-88, Honduras has enacted various domestic laws that provide, either directly or indirectly, for ICSID arbitration. References in these laws to the Exhaustion Requirement are scarce:

- In 1989 Honduras approved the *Ley de Fomento a la Inversión Privada Nacional y Extranjera*; in Article 29, this *Ley* transcribed almost verbatim the text of the Exhaustion Requirement from *Decreto* 41-88[37]; this is the only domestic regulation issued after *Decreto* 41-88 that expressly mentioned the Exhaustion Requirement;

[36] Doc. **R-55**, ICSID/8-D, pp. 10, 21-30.

[37] Doc. **C-160**, Decree No. 266-89, approving the Law to Promote National and Foreign Investment dated 15 December 1989, Art. 29: "*El Estado de Honduras se someterá a los procedimientos de arbitraje y conciliación previstos en el [Convention] únicamente cuando haya expresado previamente consentimiento por escrito. El inversionista deberá agotar las vías administrativas y judiciales de la República de Honduras, como condición previa a la puesta en marcha de los mecanismos de solución de diferencias previstas en el Convenio*". ("The State of Honduras shall submit to the arbitration and conciliation procedures provided for in the [Convention] only when it has previously expressed consent in writing. The investor must exhaust the administrative and judicial avenues of the Republic of Honduras, as a precondition to the implementation of the dispute resolution mechanisms provided for in the Convention").

- In 1992 Honduras replaced the 1989 *Ley* with the *Ley Hondureña de Inversiones*[38]; Article 4.13 of the new *Ley* provided that "*los inversionistas extranjeros podrán acordar someter la solución de sus diferencias de acuerdo a convenios internacionales suscritos por Honduras*", but it made no reference to the Exhaustion Requirement[39];

- In 2011 Honduras replaced the 1992 *Ley* with the new *Ley para la Promoción y Protección de Inversiones*[40]; Article 25 of the new *Ley* allows investors to resort to ICSID arbitration, national or international arbitration in Honduran arbitration centres, or "*Justicia Ordinaria*"[41]; however, this *Ley* also lacks any reference to the Exhaustion Requirement.

54. At the international level:

- The record contains only one treaty signed by Honduras that provides for ICSID arbitration and allows the treaty parties to condition their consent to arbitration on the exhaustion of local remedies; however, this requirement is limited to administrative remedies and permits investors to initiate ICSID arbitral proceedings if a final administrative resolution is not obtained within six months[42];

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[38] Doc. **C-161**, Decree No. 80-92, approving Honduran Investment Law dated 29 May 1992. In Article 23, this *Ley* repealed the *Decreto* approving the 1989 *Ley*.

[39] Doc. **C-161**, Decree No. 80-92, approving Honduran Investment Law dated 29 May 1992, Art. 4.13 ("Foreign investors may agree to submit the solution of their differences in accordance with international agreements signed by Honduras").

[40] Doc. **C-165**, Decree No. 51-2011, approving Law for the Promotion and Protection of Investments dated 15 July 2011. In Article 60, this *Ley* repealed the *Decreto* approving the 1992 *Ley*.

[41] Doc. **C-165**, Decree No. 51-2011, approving Law for the Promotion and Protection of Investments dated 15 July 2011, Art. 25: "*Cuando no se logre un acuerdo a través de los medios de negociación y conciliación, los inversionistas extranjeros cuya nacionalidad corresponda a un Estado que hubiere suscrito y ratificado el Convenio Constitutivo del [ICSID] o que se hubiere adherido al mismo con posterioridad, podrán recurrir a uno de los siguientes mecanismos de solución de conflictos:*

> *1) Arbitraje Internacional ante el [ICSID] de conformidad con su Convenio Constitutivo y sus reglas internas;*
>
> *2) Arbitraje nacional o internacional ante uno de los Centros de Conciliación y Arbitraje Nacional; y,*
>
> *3) La Justicia Ordinaria".*

("When an agreement is not reached through negotiation and conciliation, foreign investors whose nationality corresponds to a State that has signed and ratified the [Convention] or that has subsequently acceded to it, may resort to one of the following conflict resolution mechanisms:

> 1) International Arbitration before [ICSID] in accordance with its [Convention] and its internal rules;
>
> 2) National or international arbitration before one of the National Conciliation and Arbitration Centers; and,
>
> 3) Ordinary Justice.").

[42] Doc. **CL-58**, Central America-Panama Free Trade Agreement, dated 6 March 2022:
"1. El consentimiento de las partes contendientes al procedimiento de arbitraje conforme a este Capítulo se considerará como consentimiento a ese arbitraje con exclusión de cualquier otro mecanismo.
2. Cada Parte podrá exigir el agotamiento previo de sus recursos administrativos como condición a su consentimiento al arbitraje conforme a este Capítulo. Sin embargo, si transcurridos seis (6) meses a partir del momento en que se interpusieron los recursos administrativos correspondientes, las autoridades

- Claimants have identified several treaties signed by Honduras (with the United States[43], France[44], Ecuador[45], Spain[46], the Netherlands[47], and other Central American countries and the Dominican Republic[48]) that provide for ICSID arbitration but do not expressly require the exhaustion of local remedies; this is also the case of CAFTA-DR, as will be discussed *infra*.

2.3 HONDURAS' FAILURE TO INVOKE THE EXHAUSTION REQUIREMENT IN PREVIOUS ICSID PROCEEDINGS

55. Claimants have identified four ICSID cases concluded before this arbitration in which there is no indication that Honduras raised the Exhaustion Requirement as a defense[49]. Honduras does not dispute this.

56. It appears that Honduras invoked the Exhaustion Requirement in ICSID proceedings for the first time in a letter to the Centre dated 30 May 2023, in which it requested ICSID to dismiss Claimants' claims in these proceedings on the grounds that the Exhaustion Requirement constituted a "*Cláusula de Reserva*"[50].

57. Subsequently, in addition to filing the Preliminary Objection in this arbitration, Honduras has invoked the Exhaustion Requirement in objections for manifest lack of legal merit raised under Rule 41(5) of the ICSID (2006) Arbitration Rules in two other pending ICSID cases. The Tribunal understands that:

- in one of these cases (*ADASA v. Honduras*), the tribunal rejected the objection, finding that it involved a complex interpretative exercise that went beyond the

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administrativas no han emitido su resolución final, el inversionista podrá recurrir directamente al arbitraje, de conformidad con lo establecido en esta Sección".
("1. The consent of the disputing parties to arbitration under this Chapter shall be deemed to constitute consent to such arbitration to the exclusion of any other mechanism.
2. Each Party may require the prior exhaustion of its administrative remedies as a condition of its consent to arbitration under this Chapter. However, if six (6) months have elapsed from the time the corresponding administrative remedies were filed and the administrative authorities have not issued their final decision, the investor may resort directly to arbitration, in accordance with the provisions of this Section".)

[43] Doc. **CL-92**, 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 Investment, dated 11 July 2001, Art. IX.

[44] Doc. **CL-94**, Agreement between the Government of the French Republic and the Government of the Republic of Honduras on the Promotion and Reciprocal Protection of Investments dated 8 March 2001, Arts. 10.2, 10.3.

[45] Doc. **CL-95**, Agreement between the Republic of Ecuador and the Republic of Honduras for the Promotion and Reciprocal Protection of Investments dated 26 June 2000, terminated 18 January 2008, Art. 11.2.

[46] Doc. **CL-91**, Agreement for the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Honduras dated 23 May 1996, Art. 11.2.

[47] Doc. **CL-96**, Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Honduras and the Kingdom of the Netherlands dated 1 September 2002, Art. 9.2.

[48] Doc. **CL-54**, Free Trade Agreement between Central America and the Dominican Republic, dated 3 October 2001, Art. 9.20.2.

[49] *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.

[50] Respondent's Letter to ICSID, dated 30 May 2023, para. 5.

threshold of obviousness, and deferred its decision on the merits of Honduras' objection to a later stage of the proceedings[51]; and

- in the other case (*JLL Capital v. Honduras*), the tribunal also denied the preliminary objection, ruling that it did not meet the high standard of Rule 41(5)[52]; however, according to Respondent, the tribunal later bifurcated the proceedings to hear, *inter alia*, Honduras' objection based on the claimant's failure to exhaust local remedies[53].

58. Honduras also claims to have "recently asserted exhaustion of local remedies as part of its request for bifurcation in the *Palmerola International*, *Inversiones y Desarrollos Energéticos*, and *Fernando Paiz* cases"[54].

59. Meanwhile, on 24 February 2024 Honduras has decided to denounce the ICSID Convention. Pursuant to Article 71 of the Convention, the denunciation took effect on 25 August 2024, six months after ICSID received Honduras' notice[55].

3. HONDURAS' APPROVAL AND RATIFICATION OF CAFTA-DR WITH NO REFERENCE TO THE EXHAUSTION REQUIREMENT

60. Honduras signed CAFTA-DR in August 2004 and approved it through *Decreto* No. 10-2005 in July 2005[56].

61. Chapter Ten of CAFTA-DR, titled "Investment", spans 20 pages and contains detailed provisions on investment protection, including Section B on "Investor-State Dispute Settlement", which allows investors to submit claims to ICSID arbitration.

62. Like other treaties signed by Honduras that provide for ICSID arbitration, CAFTA-DR does not reference the Exhaustion Requirement nor contain any exhaustion requirement at all. Similarly, none of the four articles in the *Decreto* approving CAFTA-DR mentions such a requirement.

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[51] Doc. **R-58**, L. Bohmer, "ICSID tribunal rejects Honduras' argument that claims manifestly lack legal merit due to investor's failure to exhaust local remedies," IAReporter, dated 5 April 2024.

[52] Doc. **R-53**, L. Bohmer, "ICSID tribunal dismisses Rule 41 in objection financial services with Honduras," IAReporter, dated 29 December 2023.

[53] R Objection II, fn. 109.

[54] R Objection II, para. 77: "*recientemente la República de Honduras hizo valer el agotamiento de recursos locales como parte de su solicitud de bifurcación en los casos Palmerola International, Inversiones y Desarrollos Energéticos, y Fernando Paiz*".

[55] List of Contracting States and Other Signatories of the Convention, available on https://icsid.worldbank.org/sites/default/files/ICSID%203/2024%20-%20Aug%2025%20-%20ICSID%203%20-%20ENG.pdf (as of 25 August 2024).

[56] Doc. **R-65**, Republic of Honduras, *Decreto* 10-2005 approving CAFTA-DR, dated 3 March 2005.

4. <u>CLAIMANTS' ALLEGED INVESTMENTS</u>

4.1 HONDURAS' ESTABLISHMENT OF THE ZEDE LEGAL FRAMEWORK

A. <u>The first attempt to create special economic zones in Honduras</u>

63. In 2011 the Congress of Honduras made a first attempt to create certain special economic zones called *Regiones Especiales de Desarrollo* ["**RED**", an acronym for the Spanish term], with the purpose of attracting national and foreign investments[57].

64. However, about a year after these REDs were created, in October 2012, the Constitutional Chamber of the Honduran Supreme Court of Justice [the "**Supreme Court**"] declared the law which created them [the "**REDs Law**"] unconstitutional[58].

B. <u>The establishment of the ZEDE Legal Framework</u>

65. One year later, in 2013 Honduras established the legal framework for the creation of *Zonas de Empleo y Desarrollo Económico* ["**ZEDE**", an acronym for the Spanish term]. This framework ["**ZEDE Legal Framework**"] consisted of Articles 294, 303, and 329 of the Constitution[59] ["**ZEDE Constitutional Provisions**"], as well as the Organic Law of the Economic Development and Employment Zones[60] ["**ZEDE Law**"].

66. Pursuant to the ZEDE Constitutional Provisions, ZEDEs enjoyed functional and administrative autonomy, but were subject to the national legislation in all matters related to sovereignty, application of justice, national defense, foreign relations, electoral matters, and issuance of identification documents and passports[61].

67. Additionally, in accordance with the ZEDE Law, ZEDEs were to be governed by two national authorities: the Committee for the Adoption of Best Practices [the "**CAMP**"], and the Technical Secretariat[62].

<u>Relevant provisions of the ZEDE Law with regard to investments</u>

68. The ZEDE Law provided that:

- The Technical Secretary could enter into legal stability agreements with residents and investors of the ZEDEs[63]; and,

[57] Doc. **R-5**, Republic of Honduras, Decree No. 123-2011, Constitutional Statute of the Special Development Regions of 11 August 2011.
[58] Request for Arbitration, para. 25; R Objection I, para. 5(b).
[59] Doc. **C-4**, Constitution of Honduras of 1982 with Amendments through 2013; Doc. **C-2**, Decree No. 236-2012, published on 24 Jan. 2013; Doc. **C-3**, Decree No. 9-2013, published on 20 March 2013.
[60] Doc. **C-6**, Decree No. 120-2013, published on 6 September 2013.
[61] Doc. **C-4**, Constitution of Honduras of 1982 with Amendments through 2013, Art. 329.
[62] Doc. **C-6**, ZEDE Law, Arts. 11, 12.
[63] Doc. **C-6**, ZEDE Law, Art. 12.

- Should the ZEDE Law be repealed, it would remain in effect for the term agreed in the legal stability agreement, which should not be shorter than 10 years[64].

69. Additionally, the ZEDE Law included a most-favored-nation ["**MFN**"] clause, which provided as follows:

> "*Las personas naturales y jurídicas que operen dentro de las Zonas de Empleo y Desarrollo Económico (ZEDE) recibirán trato en base al principio de Nación Más Favorecida (NMF), para lo cual obtendrán la extensión automática de cualquier mejor tratamiento que se conceda o se haya concedido a las demás partes en un acuerdo de comercio internacional suscrito por el Estado de Honduras*"[65].

70. In January 2014 a lawyer identified as "M.A.Á.S", "acting on her own behalf", challenged the ZEDE Legal Framework before the Supreme Court, which upheld its constitutionality[66].

4.2 CLAIMANTS' CREATION OF PRÓSPERA ZEDE

Incorporation of Próspera ZEDE and its operating entities

71. In August 2017 Mr. Erick Brimen, a United States national, together with his business partners, incorporated Honduras Próspera, a Delaware limited liability company[67], the first step towards establishing a ZEDE in Honduras. On 29 December 2017 Honduras Próspera submitted to CAMP (one of the two authorities in charge of governing the ZEDEs) a formal application to incorporate a ZEDE under the ZEDE Legal Framework[68].

72. In its formal application, Honduras Próspera represented that:

- It had already secured rights to acquire 188 acres of land between the communities of Pristine Bay and Crawfish Rock in the island of Roatán, including about one kilometer of waterfront beach[69]; and

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[64] Doc. **C-6**, ZEDE Law, Art. 45.
[65] Doc. **C-6**, ZEDE Law, Art. 32 ("Natural and legal persons operating within the Zones of Economic Development and Employment (ZEDE) shall be treated on the basis of the Most Favored Nation (MFN) principle, for which they shall obtain the automatic extension of any better treatment that is granted or has been granted to the other parties to an international trade agreement signed by the State of Honduras").
[66] Doc. **C-8**, Decision of the Supreme Court of Honduras, Case No. RI 0030-13, 26 May 2014, p. 42.
[67] Doc. **C-14**, Certificate of Formation of Sociedad para el Desarrollo Socioeconómico de Honduras, LLC, State of Delaware, Secretary of State, Division of Corporations, dated 28 August 2017; Doc. **C-23**, Resolution of Sociedad para el Desarrollo Socioeconómico de Honduras, LLC, Written Consent of Board of Directors, dated 31 December 2018; Doc. **C-29**, Certificate of Amendment of the Name of Sociedad para el Desarrollo Socioeconómico de Honduras, LLC, State of Delaware, Secretary of State, Division of Corporations, dated 17 July 2019.
[68] Doc. **C-17**, ZEDE Application, dated 29 December 2017.
[69] Doc. **C-17**, ZEDE Application, dated 29 December 2017, p. 9.

- It was in the early stages of negotiations to secure an additional 350 acres in the immediately surrounding areas[70].

73. Pursuant to its Charter, the purpose of Próspera ZEDE was to:

> "[P]romote shared prosperity and human flourishing by protecting the individual rights of life, liberty, and property; furthermore, attracting domestic and foreign investment, creating economic opportunities, increasing safety and security, and building resilient, transparent, and effective governance institution"[71].

74. For this purpose, the Charter provided:

- a number of tax incentives to Próspera ZEDE's residents[72];
- the establishment of a default arbitration provider to adjudicate all causes of action involving Próspera ZEDE, its officers, agents and instrumentalities, or otherwise arising within Próspera ZEDE[73];
- the creation of Próspera ZEDE's own security entities, including police, criminal investigation bodies, intelligence services, criminal prosecution, and penitentiary system under Próspera ZEDE's exclusive control[74];
- both English and Spanish as Prospera ZEDE's official languages[75];
- a waiver of sovereign immunity in certain cases[76]; and
- a Bill of Rights to be guaranteed to all residents of Próspera ZEDE[77].

75. On the same day, CAMP certified the incorporation of this ZEDE, known at the time as ZEDE Village of North Bay, later renamed Próspera ZEDE[78].

76. On 21 August 2018 CAMP appointed a Technical Secretary for the ZEDE Village of North Bay[79]. Two days later, the Technical Secretary promulgated the ZEDE's Charter and Bylaws[80].

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[70] Doc. **C-17**, ZEDE Application, dated 29 December 2017, p. 9.
[71] Doc. **CL-5**, Charter of Próspera ZEDE, dated 12 September 2019, Art. 2.03.
[72] Doc. **CL-5**, Charter of Próspera ZEDE, dated 12 September 2019, Art. 8.
[73] Doc. **CL-5**, Charter of Próspera ZEDE, dated 12 September 2019, Art. 9.02.
[74] Doc. **CL-5**, Charter of Próspera ZEDE, dated 12 September 2019, Art. 10.
[75] Doc. **CL-5**, Charter of Próspera ZEDE, dated 12 September 2019, Art. 11.04.
[76] Doc. **CL-5**, Charter of Próspera ZEDE, dated 12 September 2019, Art. 11.11.
[77] Doc. **CL-5**, Charter of Próspera ZEDE, dated 12 September 2019, Art. 12.
[78] Doc. **C-16**, Certificate of Registration and Incorporation of Land as ZEDE Village of North Bay, dated 29 December 2017; Doc. **C-31**, Letter from CAMP to the Technical Secretary of Próspera ZEDE, dated 12 September 2019; Doc. **CL-5**, Charter of Próspera ZEDE, dated 12 September 2019.
[79] Doc. **C-21**, Appointment of Technical Secretary of ZEDE Village of North Bay, dated 21 August 2018.
[80] Doc. **CL-4**, Charter and Bylaws of ZEDE Village of North Bay, dated 23 August 2018.

77. In summer 2019 Honduras Próspera incorporated Claimant St. John's Bay (known at the time as "Próspera Land SPV 1 LLC") in Delaware, to develop and manage Honduras Próspera's properties in Próspera ZEDE, and to be responsible for all construction projects[81].

78. Similarly, a few months after the incorporation of St. John's Bay, Honduras Próspera, together with several United States judges and legal scholars, incorporated Claimant PAC in Texas, to serve as the default arbitration provider of Próspera ZEDE[82].

The Legal Stability Agreement

79. On 9 March 2021 Honduras Próspera and the Technical Secretary for Próspera ZEDE entered into the LSA[83], which was later amended on 18 November 2021[84].

80. Pursuant to the LSA, the Republic allegedly[85] agreed to provide Honduras Próspera and its affiliates, until the earliest of 15 January 2064 or 10 years after the ZEDE Law were repealed[86], protections such as:

- "Stabilization of Non-discrimination Rights"[87];
- "Stabilization of Treaty Rights" "for purposes of applying, enforcing and interpreting the CAFTA-DR and the US-Honduras BIT, including the guarantees of Article 16(4) of the Kuwait-Honduras BIT incorporated pursuant to the most favored nation clauses of Article 10.4 of the CAFTA-DR and Article 2(1) of the US-Honduras BIT"[88]; and
- "General Stabilization of Law and Policy"[89].

[81] Doc. **C-12**, Certificate of Formation of Próspera Land SPV 1 LLC, State of Delaware, Department of State, Division of Corporation; Doc. **C-40**, Amended and Restated Operating Agreement for St. John's Bay Development Company LLC, dated 10 Sept. 2021.

[82] Doc. **C-32**, Certificate of Filing of PAC, Office of the Secretary of State, State of Texas, dated 4 November 2019; Doc. **C-33**, Limited Liability Company Operating Agreement of Próspera Arbitration Center LLC, dated 31 December 2019.

[83] Doc. **CL-6**, Agreement for Legal Stability and Investor Protection entered into by and between Honduras Próspera and the Republic of Honduras, dated 9 March 2021.

[84] Doc. **CL-7**, Amendment to Agreement for Legal Stability and Investor Protection entered into by and between Honduras Próspera and Honduras, dated 18 November 2021.

[85] Honduras argues that the LSA is not binding on the Republic (R Objection I, para. 7; C Objection II, paras. 101-103).

[86] Doc. **CL-6**, Agreement for Legal Stability and Investor Protection entered into by and between Honduras Prospera and the Republic of Honduras, dated 9 March 2021, Art. 1.1.

[87] Doc. **CL-6**, Agreement for Legal Stability and Investor Protection entered into by and between Honduras Prospera and the Republic of Honduras, dated 9 March 2021, Art. 1.2.

[88] Doc. **CL-6**, Agreement for Legal Stability and Investor Protection entered into by and between Honduras Prospera and the Republic of Honduras, dated 9 March 2021, Art. 1.3.

[89] Doc. **CL-6**, Agreement for Legal Stability and Investor Protection entered into by and between Honduras Prospera and the Republic of Honduras, dated 9 March 2021, Art. 1.4.

81. Additionally, the Republic and Honduras Próspera allegedly agreed to arbitrate

> "[c]laims for monetary damages […] arising under or in any way related to [the LSA] pursuant to the rules and procedures set forth by the [ICSID] as stated under the CAFTA-DR"[90].

5. PARLIAMENTARY AND JUDICIAL ACTION AGAINST THE ZEDE LEGAL FRAMEWORK

5.1 PARLIAMENTARY ACTION TO REMOVE THE ZEDE LEGAL FRAMEWORK

82. Claimants' impugned measures include two *Decretos* passed by the Honduras National Congress in April 2022 (*i.e.,* six months after the general elections held in November 2021 which had resulted in a change of government and an administration presided by Ms. Xiomara Castro)[91]:

- *Decreto* 32-2022, seeking to remove the ZEDE Constitutional Provisions from the Constitution of Honduras[92] ["***Decreto* 32**"]; and

- *Decreto* 33-2022, repealing the ZEDE Law and all its progeny with immediate effect[93] ["***Decreto* 33**"].

83. *Decreto* 32 was a constitutional amendment, which required that it be passed by a two-thirds majority of Parliament and be ratified by the same quorum in the following legislative session[94]; at the Hearing, Honduras stated that *Decreto* 32 never came into effect[95].

84. *Decreto* 33 was signed into law by President Castro on 26 April 2022[96].

85. Claimants never took any action against these *Decretos* (or against any other measure) before local courts[97].

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[90] Doc. **CL-6**, Agreement for Legal Stability and Investor Protection entered into by and between Honduras Prospera and the Republic of Honduras, dated 9 March 2021, Art. 2.2.
[91] Doc. **R-27**, National Electoral Council of Honduras, "General Election 2021 – General Results" available at https://resultadosgenerales2021.cne.hn:8080/#resultados/PRE/HN (last updated 30 December 2021).
[92] Doc. **C-57**, Decree No. 32-2022, published on 21 April 2022.
[93] Doc. **C-60**, Decree No. 33-2022, published on 26 April 2022.
[94] Doc. **C- 4**, Constitution of Honduras of 1982 with Amendments through 2013, Art. 373.
[95] English Tr., p. 183:9-11 (Gil). At the Hearing, Honduras' counsel stated that, "[w]ith respect to Decrees 32 and 33, 33 never came into force so the only Measure really at issue is really 32". However, the Tribunal understands that counsel was referring to Decree No. 32-2022, given that Decree 33-2022 did come into effect, as recognized by the Supreme Court of Justice in its judgment dated 20 September 2024. *See* Doc. **R-66**, Supreme Court of Justice, Constitutional Challenge SCO-0738-2021, Judgment, dated 20 September 2024, p. 16. In the same judgment, the Supreme Court did not make any reference to Decree No. 32-2022.]
[96] Doc. **C-60**, Decree No. 33-2022, published on 26 April 2022.
[97] C Objection I, para. 26; R Objection I, para. 24.

5.2 JUDICIAL ACTION AGAINST THE ZEDE LAW

86. Claimants have also included within the impugned measures[98] a September 2024 decision by the Supreme Court's Plenary Chamber declaring the "total and original or *ex tunc* unconstitutionality of" the Zede Legal Framework[99].

87. This decision concluded a procedure initiated against the ZEDE Law, originally filed by the rector of the *Universidad Nacional Autónoma* de Honduras in July 2021[100]. In February 2024, a majority of the Constitutional Chamber of the Supreme Court found the entire ZEDE Legal Framework unconstitutional and declared it null and void *ex tunc*. However, given the lack of unanimity, the Constitutional Chamber remanded the matter to the Supreme Court's Plenary Chamber for a final decision[101].

88. On 25 November 2024, *La Gaceta* (Honduras' official gazette) published the decision by the Supreme Court dated 20 September 2024 [the "**Supreme Court's Decision**"][102]. In this decision, in addition to declaring the *ex tunc* unconstitutionality of the Zede Legal Framework, the Supreme Court confirmed that the ZEDE Law had already been repealed by *Decreto* 33[103] and explicitly stated that,

> "*luego de analizar la parte considerativa* […] *del* [*Decreto* 33]*, este alto tribunal de justicia declara que hace suyos los conceptos allí establecidos, en virtud de que acompañan y complementan las argumentaciones que sustentan la presente sentencia*"[104].

6. CLAIMANTS' INITIATION OF THIS ARBITRATION

89. On 3 June 2022 Claimants delivered a formal Request for Consultations and Negotiations under Article 10.15 of CAFTA-DR to Honduras[105].

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[98] English Tr., p. 162:3-6 (Santens).
[99] Doc. **R-66,** Supreme Court of Justice, Constitutional Challenge SCO-0738-2021, Judgment, dated 20 September 2024, p. 58.
[100] Doc. **R-38**, Supreme Court of Justice, Constitutional challenge 0738-2021, Decision, dated 7 February 2024, p.1, para. 1.
[101] Doc. **R-38**, Supreme Court of Justice, Constitutional challenge 0738-2021, Decision, dated 7 February 2024, p. 50, para. 2.
[102] Doc. **R-66,** Supreme Court of Justice, Constitutional Challenge SCO-0738-2021, Judgment, dated 20 September 2024, p. 1.
[103] Doc. **R-66**, Supreme Court of Justice, Constitutional Challenge SCO-0738-2021, Judgment, dated 20 September 2024, p. 3, fn. 2.
[104] Doc. **R-66**, Supreme Court of Justice, Constitutional Challenge SCO-0738-2021, Judgment, dated 20 September 2024, p. 51: "after analyzing the above-transcribed recitative part of Legislative Decree No. 33-2022, this high court of justice declares that it adopts all the concepts set forth therein, by virtue of that they accompany and complement the arguments that support this judgment".
[105] Doc. **C-64**, Letter from Claimants to Honduras's Dirección General de Integración Económica y Política Comercial, dated 3 June 2022.

90. On 16 September 2022 Claimants delivered to Honduras a Notice of Intent to Submit Claims to Arbitration pursuant to Article 10.16 of CAFTA-DR[106].

91. Both of these letters appear to have been left unanswered.

92. On 19 December 2022 Claimants filed their Request for Arbitration[107] and submitted written waivers under Article 10.18.2(b)(i) of CAFTA-DR[108].

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[106] Doc. **C-67**, Letter from Claimants to Honduras's Dirección General de Integración Económica y Política Comercial, dated 16 September 2022.

[107] Request for Arbitration, p. 1.

[108] Article 10.18.2(b)(i) provides that "[n]o claim may be submitted to arbitration under this Section unless […] the notice of arbitration is accompanied […] by the claimants' written waiver […] of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measures alleged to constitute a breach referred to in Article 10.16". Doc. **C-76**, PAC's Waiver Pursuant to Article 10.18 of CAFTA-DR, dated 15 December 2022; Doc. **C-84**, Honduras Próspera's Waiver Pursuant to Article 10.18 of CAFTA-DR, dated 19 December 2022; Doc. **C-85**, St. John's Bay's Waiver Pursuant to Article 10.18 of CAFTA-DR, dated 19 December 2022.

IV. DISCUSSION

93. In essence, Respondent submits that Claimants have committed a procedural mistake: they decided to submit the dispute to arbitration under the ICSID Convention and the ICSID Rules, notwithstanding the – undisputed – fact that they had not exhausted the local administrative and judicial remedies. ICSID arbitration is – in the Republic's submission – not available in this case, because of the Exhaustion Requirement inserted by Honduras in *Decreto* 41-88, in which the Republic approved the Convention. This Exhaustion Requirement – through which, according to Honduras, it exercised its prerogative under Article 26 of the Convention[109] – is worded as follows:

> "*El inversionista deberá agotar las vías administrativas y judiciales de la República de Honduras, como condición previa a la puesta en marcha de los mecanismos de solución de diferencias previstos en el Convenio*"[110].

94. The Republic says that, due to Claimants' failure to comply with this condition, the Tribunal is not competent, and the Centre lacks jurisdiction, to adjudicate Claimants' claims.

95. The Republic acknowledges that if Claimants had opted for UNCITRAL arbitration (a possibility envisaged by Article 10.16(3)(c) of CAFTA-DR), the Exhaustion Requirement would not have been applicable, and the Tribunal's competence could not have been challenged for failure to exhaust local remedies[111].

96. Claimants concede that they did not exhaust local remedies[112] but disagree with Honduras mainly for three reasons:

- Respondent has submitted an admissibility objection instead of an objection to the Tribunal's competence, as allegedly required by Article 10.20.5 of CAFTA-DR;

- The Exhaustion Requirement in *Decreto* 41-88 does not suffice to condition Honduras' consent to this arbitration on the exhaustion of local remedies; and

- In any event, the exhaustion of existing local remedies would be futile.

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[109] Doc. **RL-9**, ICSID Convention, Art. 26: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention".

[110] Doc. **R-3**, Republic of Honduras, Decree 41-88, Decree on the ICSID Convention dated 25 March 1988, 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").

[111] R Objection I, para. 42; R Objection II, paras. 97-98.

[112] C Objection I, para. 26.

Claimants' first argument

97. The Tribunal rejects Claimants' first argument. From a theoretical point of view, the Tribunal tends to prefer the position that the exhaustion of local remedies is a question of admissibility, which does not impinge the competence of the Tribunal nor the jurisdiction of ICSID. That said, the Tribunal is not persuaded that the distinction between admissibility or jurisdictional objections is relevant for the purposes of this decision. Respondent's Preliminary Objection, whether labelled as admissibility or jurisdictional objection, falls within the scope of Article 10.20.5 of CAFTA-DR. Claimants' reading is too restrictive.

98. The relevant part of such provision reads as follows:

> "In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request"[113].

99. In the Tribunal's view, this paragraph is drafted broadly. The purpose of Article 10.20.5 of CAFTA-DR – including the reference to "any objection that the dispute is not within the tribunal's competence" – seems to be to allow respondents to submit any kind of objections, whether related to admissibility or jurisdiction, which, if granted, could promptly end the dispute[114]. The Tribunal sees no reason why the question of the exhaustion of local remedies (which, if decided in favor of Respondent, would put an end to the proceedings) should be excluded from this.

100. This leaves the Tribunal with two questions:

- Whether the Exhaustion Requirement in *Decreto* 41-88 is a valid condition to ICSID arbitration under Article 26 of the Convention and, if so, whether it has been waived (**1.**);

- Whether, regardless of the validity of the condition, it would make sense to require Claimants to exhaust local remedies given the legal and factual circumstances of this case (**2.**).

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[113] Doc. **CL-2**, CAFTA-DR, Art. 10.20.5.

[114] In the same vein, the tribunal in *Pac Rim* – quoted by Claimants – stressed that the procedure in Articles 10.20.4 and 10.20.5 CAFTA-DR "is clearly intended to avoid the time and cost of a trial". Doc. **CL-71**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, dated 2 August 2010, para. 112.

1. THE APPLICABILITY OF THE EXHAUSTION REQUIREMENT IN THE PRESENT CASE

1.1 VALIDITY OF THE EXHAUSTION REQUIREMENT IN *DECRETO* 41-88 UNDER ARTICLE 26 OF THE CONVENTION

101. Honduras asserts that it validly required exhaustion of local remedies under Article 26 of the Convention by incorporating the Exhaustion Requirement into the law that approved the Convention (*i.e.*, in *Decreto* 41-88). Claimants disagree.

102. The Tribunal is inclined to concur with Honduras. Article 26 of the Convention provides that "[a] Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention", without specifying the method of implementation.

103. Professor Schreuer is of the view that States may express this condition through various means, including "in national legislation providing for ICSID arbitration"[115]. *Decreto* 41-88 serves as legislation that provides for ICSID arbitration – in fact, it integrates ICSID arbitration into the Honduran legal framework. However, it could be argued – as Claimants do – that by "national legislation" Professor Schreuer means laws containing the State's explicit consent to ICSID arbitration for certain disputes (such as an investment law) rather than the law approving the Convention.

104. The answer to this discussion appears to lie in the terms used by then-ICSID Secretary General, Mr. Shihata, in a 1984 editorial titled "ICSID and Latin America":

> "The condition regarding exhaustion of local remedies might also be set forth in a bilateral treaty between the Latin American country concerned and the countries of foreign investors. Another way to accomplish the same objective might result from a declaration made by a Contracting State at the time of signature or ratification of the Convention that it intends to avail itself of the provisions of Article 26 and will require, as a condition of its consent to ICSID arbitration, the exhaustion of its local remedies. It should be added, however, that among 90 Signatory States, only one has made such a declaration"[116].

105. This 1984 commentary, specifically focused on Latin American States, holds relevance as it reflects ICSID's position at that time. It is reasonable to infer that Honduras signed the Convention in 1986 and, two years later, inserted the

[115] Doc. **RL-56**, S. Schill et al., "Article 26" in *Schreuer's Commentary on the ICSID Convention* (2022), para. 302. Likewise, the tribunal in *Lanco v. Argentina* stated that "[a] State may require the exhaustion of domestic remedies as a prior condition for its consent to ICSID arbitration. This demand may be made […] (ii) in domestic legislation"; *see also* Doc. **RL-7**, *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal, dated 8 December 1998, para. 39.

[116] **Doc. RL-6**, I. Shihata, "Editorial, ICSID and Latin America," 1 News from ICSID 2 (Summer 1994), p. 2. The Tribunal understands that the one country referred to by Mr. Shihata was Israel, as in 1984 it was the only country that had notified ICSID that its consent was conditioned on the exhaustion of local remedies.

Exhaustion Requirement in *Decreto* 41-88 based on the assurances provided by Mr. Shihata and ICSID, whether through this editorial or by other means. At that time, Honduras had no reason to believe that additional steps were necessary to condition its consent to ICSID arbitration under Article 26 of the Convention.

106. In the Tribunal's view, this is corroborated by the similarity between the language used in Article 26 and in the Exhaustion Requirement:

Article 26 of the Convention	*Decreto* 41-88
"Un Estado Contratante podrá exigir el agotamiento previo de sus vías administrativas o judiciales, como condición a su consentimiento al arbitraje conforme a este Convenio"[117].	*"El inversionista deberá agotar las vías administrativas y judiciales de la República de Honduras, como condición previa a la puesta en marcha de los mecanismos de solución de diferencias previstos en este Convenio"*[118].

107. While the inclusion and placement of the Exhaustion Requirement in the *Decreto* 41-88 may be unconventional, as noted above, the Tribunal is unconvinced by Claimants' assertion that it is a forward-looking declaration, instructing future Honduran governments and legislators to insert the exhaustion of local remedies in the State's subsequent consents to ICSID arbitration[119]. Rather, the terms used and the context in which they were employed seem to reflect Honduras' intention to establish a "*condición previa*" as permitted by the Convention.

108. Be that as it may, this does not mean that the Exhaustion Requirement is applicable to the present case, as will be explained below.

1.2 WHETHER THE CONDITION IN *DECRETO* 41-88 HAS BEEN WAIVED IN CAFTA-DR

109. Given the factual background outlined above, Claimants could hardly be faulted for directly bringing their claims against Honduras to ICSID. *Pro memoria*,

- Honduras unconventionally inserted the Exhaustion Requirement in *Decreto* 41-88, back in 1988;

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[117] Doc. **RL-9**, ICSID Convention, Art. 26 ("Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention").

[118] Doc. **R-3**, Republic of Honduras, Decree 41-88, Decree on the ICSID Convention dated 25 March 1988, 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").

[119] C Objection I, paras. 55-57; C Objection II, 57-65; English Tr., p. 103:19-104:3 (Jijón).

- ICSID never registered or listed Honduras' Exhaustion Requirement in its official documents for such a purpose;

- Honduras never mentioned the Exhaustion Requirement in its international treaties providing for ICSID arbitration (including CAFTA-DR), even though in at least one occasion it entered into a treaty that required exhaustion of local remedies; and

- Honduras never brought the Exhaustion Requirement as a defense in any ICSID arbitration prior to this case.

110. However, these circumstances – including the absence of any reference to the Exhaustion Requirement in CAFTA-DR – do not *per se* lead the Tribunal to conclude that Honduras has waived the Exhaustion Requirement vis-à-vis Claimants. The primary reason leading the Tribunal to conclude that Honduras has waived the Exhaustion Requirement is its incompatibility with the *no-U-turn* clause in CAFTA-DR.

The Exhaustion Requirement and Article 10.18.2 of CAFTA-DR are incompatible

111. *In limine*, as Claimants assert, States may waive their right to require exhaustion of local remedies under international law[120]. Honduras does not dispute this assertion; in fact, it acknowledges that waiving the Exhaustion Requirement is a possibility[121].

112. Claimants argue that Honduras has waived the Exhaustion Requirement not only by failing to include a requirement to exhaust local remedies in CAFTA-DR (which contains Honduras' consent to ICSID arbitration), but also by agreeing to certain clauses that are incompatible with such a requirement. The Tribunal agrees that this is the case for Article 10.18.2 of CAFTA-DR[122].

113. Article 10.18.2 of CAFTA-DR reads, in its relevant part, as follows:

> "No claim may be submitted to arbitration under this Section unless:
>
> […]

[120] C Objection I, para. 35 and fn. 77. Claimants quoted the International Law Commission Draft Articles on Diplomatic Protection, which provide in Article 15 that "Local remedies do not need to be exhausted where […] the state alleged to be responsible has waived the requirement that local remedies be exhausted"; Doc. **CL-65**, ILC Articles on Diplomatic Protection, Art. 15.
[121] R Objection II, para. 79.
[122] Claimants allege that the Exhaustion Requirement is also incompatible with the fork-in-the-road provisions contained in Article 10.18.4 and in Annex 10-E of CAFTA-DR. In the Tribunal's view, such alleged incompatibility is not evident given that, as Honduras argues, these provisions only refer to the investor's duty to choose a forum (either local or international) for its claims of alleged violations of the State's international obligations (R Objection II, para. 92). Therefore, it could be argued that there is no inconsistency in requiring an investor to, first, exhaust local remedies in the host State for claims *under domestic law* and, subsequently, to choose whether it brings its related claims *under the Treaty* before local courts or before an international tribunal.

> (b) the notice of arbitration is accompanied,
>
> > (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver[123], and
> >
> > (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers
>
> of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16".

114. Article 10.18.2 of CAFTA-DR thus precludes an investor from initiating ICSID arbitral proceedings if it does not accompany its notice of arbitration by a written waiver of

> "[…] any right to initiate or continue before any administrative tribunal or court under the law of any Party […] any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16".

115. Both Parties rely on Article 31 of the Vienna Convention on the Law of Treaties to interpret this provision. Article 31 provides that

> "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[124].

116. Additionally, Honduras acknowledges in its pleadings that the Tribunal must apply the principle of effectiveness[125].

117. The Tribunal finds that an interpretation under these criteria supports Claimants' position.

118. The Tribunal concurs with Respondent that the purpose of Article 10.18.2 of CAFTA-DR is to protect Contracting States against parallel proceedings[126]. In fact, the practical consequence of a good faith reading of this provision, based on the ordinary meaning of its terms, serves this purpose: United States' investors who claim to be affected by measures taken by Honduras (like Claimants) may

[123] Claimants initiated these arbitral proceedings under Article 10.16.1(a) (Request, para. 74) and submitted the corresponding written waivers (Doc. **C-76**, PAC's Waiver Pursuant to Article 10.18 of CAFTA-DR, dated 15 December 2022; Doc. **C-84**, Honduras Próspera's Waiver Pursuant to Article 10.18 of CAFTA-DR, dated 19 December 2022; Doc. **C-85**, St. John's Bay's Waiver Pursuant to Article 10.18 of CAFTA-DR, dated 19 December 2022).

[124] Doc. **CL-1**, Vienna Convention on the Law of Treaties, 1155 U.N. Treaty Series, p. 331, done at Vienna on 23 May 1969, dated 27 January 1980, Art. 31.1.

[125] R Objection II, para. 75.

[126] R Objection II, para. 88.

- initiate proceedings with respect to such measures, under local law, before administrative tribunals or courts in Honduras and may, for any reason they deem appropriate, discontinue such proceedings before they are resolved, and subsequently initiate international arbitration proceedings under CAFTA-DR; or

- as Claimants did, directly initiate international arbitration proceedings with respect to such measures and waive their right to seek relief in Honduras.

119. The recognition in Article 10.18.2 of CAFTA-DR of these two avenues for investors is incompatible with the Republic's case: *CAFTA-DR's* provision forcing an investor to renounce all domestic proceedings in the host State (whether already initiated or yet to be initiated) before it is authorized to proceed to international arbitration is incompatible with the *Exhaustion Requirement* in *Decreto* 41-88. Indeed, Honduras cannot require an investor to exhaust local remedies before initiating arbitration, while simultaneously forcing such investor to renounce its right to initiate local proceedings or to continue proceedings already underway before proceeding to arbitration.

120. Since the Exhaustion Requirement and Article 10.18.2 of CAFTA-DR cannot coexist, the latter must prevail because:

- being subsequent in time, it implies a waiver of the previously established requirement; and

- in accordance with international law, the Honduran Constitution provides that "[e]*n caso de conflicto entre el tratado o convención* [in this case, CAFTA-DR] *y la ley* [*Decreto* 41-88]*, prevalecerá el primero*"[127].

Scholarly doctrine and other awards

121. The reading that Article 10.18.2 of CAFTA-DR constitutes a waiver to the exhaustion of local remedies requirement is not exclusive of this Tribunal. Professors Kaufmann-Kohler and Potestà assert that provisions in investment treaties

> "requir[ing] a prior waiver of all domestic proceedings as a condition to access investor-State arbitration […] have the effect opposite to the exhaustion of local remedies rule. The choice-of-forum requirements can only be enforced if read as an implied waiver of the local remedies rule"[128].

[127] Doc. **C-4**, Constitution of Honduras of 1982 with Amendments through 2013, dated 20 March 2013, Art. 18: "In case of conflict between the treaty or convention and the law, the former shall prevail". Claimants referred to this provision in C Objection II, para. 67.

[128] Doc. **RL-52**, G. Kaufmann-Kohler and M. Potestà, "The Interplay Between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework" in *European Yearbook of International Economic Law* (2020), para. 100 (emphasis added).

122. Other scholars have reached similar conclusions with regard to Article 1121 of NAFTA[129], which is drafted in very similar terms to Article 10.18.2 of CAFTA-DR[130].

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[129] "Article 1121: Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim under Article 1116 to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:
(a) consent to arbitration in accordance with the procedures set out in this Agreement; and
(b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration".

[130] For the sake of clarity, the Tribunal relies on the above-mentioned authority cited by the Parties. However, it notes that other scholars – not cited by the Parties on this particular matter – have reached the same conclusion. For instance, according to Professor Dodge, the *no-U-turn* clause in Article 1121 of NAFTA is "<u>inconsistent with a requirement that the investor exhaust local remedies because the act of exhausting such remedies would preclude resort to arbitration under the terms of the treaty</u>" (W. Dodge, *Local Remedies under NAFTA*, Chapter 11 (2011), fn. 43 (emphasis added), https://ssrn.com/abstract=2217059 (last accessed 9 February 2025)). The International Institute for Sustainable Development has published that, "<u>although not directly waiving the ELR rule itself, Chapter 11 of the NAFTA tacitly waives it</u>, as the text requires investors or investments to 'waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach …, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party'" (IISD Best Practices Series: Exhaustion of Local Remedies in International Investment Law, 2017, https://www.iisd.org/system/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf (last accessed 9 February 2025), Section 3.1.5 (emphasis added)). Finally, Professor Bjorklund has stated that "encouraging local recourse while simultaneously permitting investment arbitration would force States to face multiple cases and if not managed properly could allow an investor duplicative recovery. One way States signing investment treaties have dealt with this problem is the so-called 'no-U-turn' approach, which permits an investor to seek relief in local courts first, but if and when the investor shifts to international relief under the treaty the investor must waive its right to initiate or continue litigation in local courts […]. This is the approach taken [in Article 1121 NAFTA]" (A. Bjorklund, Chapter 17: *Waiver of Local Remedies and Limitation Periods*, in M. Kinnear et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID* (2015), p. 238).

123. Likewise, when dealing with Article 1121 of NAFTA, the tribunal in *Metalclad v. Mexico* described Mexico's decision of not insisting on a defense based on lack of exhaustion of local remedies as

> "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"[131].

124. Other ICSID tribunals and the Federal Court of Canada have subsequently adopted similar positions on Article 1121 of NAFTA, echoing the *Metalclad v. Mexico* decision[132].

125. There is thus a general consensus regarding the incompatibility of a requirement to exhaust local remedies, on the one hand, and provisions like Article 10.18.2 of CAFTA-DR, on the other.

Conclusion

126. In light of the foregoing, the Tribunal has come to the conclusion that *Decreto* 10-2005, through which Honduras incorporated CAFTA-DR into its legal system, repealed, for the purposes of such Treaty, the Exhaustion Requirement in

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[131] Doc. **CL-56**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, dated 30 August 2000, fn. 4.

[132] For the sake of clarity, the Tribunal relies on the award in *Metalclad v. Mexico*. However, it notes that other tribunals have held a similar position in decisions that have not been submitted by the Parties. For instance, in the Award in *Waste Management v. United Mexican States* (which is, however, cited in Doc. **RLA-52**, fn. 75), the tribunal held that "the exhaustion of local remedies is a procedural prerequisite for the bringing of an international claim, one which is dispensed with by NAFTA Chapter 11" (*Waste Management v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, dated 30 April 2004, https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf, para. 116 (emphasis added)). Likewise, in *Marvin Roy Feldman v. Mexico*, the tribunal found that "Article 1121(2)(b) and (3) substitutes itself as a qualified and special rule on the relationship between domestic and international judicial proceedings, and a departure from the general rule of customary international law on the exhaustion of local remedies" (*Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, dated 16 December 2002, para. 72 (emphasis added). Available on https://www.italaw.com/sites/default/files/case-documents/ita0319.pdf). In a decision cited in Doc. **RLA-52**, fn. 75, the Federal Court of Canada, also with respect to Article 1121 of NAFTA, observed that "the prevailing view appears to be that Article 1121 of Chapter Eleven of NAFTA tacitly waives the requirement that litigants must exhaust local remedies before accessing the Chapter Eleven NAFTA arbitration process" (*William Ralph Clayton et al v. Government of Canada,* PCA Case No. 2009-04, Judgment of the Federal Court of Canada, 2 May 2018, https://jusmundi.com/en/document/decision/en-clayton-and-bilcon-of-delaware-inc-v-government-of-canada-judgment-of-the-federal-court-of-canada-wednesday-2nd-may-2018#decision_1419, para. 191 (emphasis added)). *Contra*, unconvincingly, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, dated 26 June 2003, https://www.italaw.com/sites/default/files/case-documents/ita0470.pdf, paras. 158-164.

Decreto 41-88. Therefore, Claimants were not obliged to exhaust local remedies before initiating this arbitration[133].

127. In any event, such local remedies would have been futile, as explained below.

2. THE FUTILITY OF LOCAL REMEDIES

128. Even if the Tribunal were to find that the Exhaustion Requirement applies to an arbitration filed under CAFTA-DR, the Tribunal agrees with Claimants that in this case all local remedies were futile.

129. As noted above (see Section III.1.3), exhaustion of local remedies can be complied with either by appealing against the impugned measure to the highest Court in the land or by proving that such an appeal would be futile.

130. The impugned measures in these proceedings consist in *Decretos* 32 and 33 adopted by the Parliament of Honduras (and some lesser administrative measures originating from or aligned with said *Decretos*[134]). When Claimants initiated this arbitration, in December 2022, Honduras had already issued *Decretos* 32 and 33. As indicated by Claimants in their Request for Arbitration:

- *Decreto* 32

> "[…] provides for the repeal of Decrees Nos. 236-2012 and 9-2013 which had introduced the Constitutional ZEDE Provisions, and states that any law, regulation, contract, concession or any other norm in favor of ZEDEs 'shall not be legally valid"[135],

- and *Decreto* 33

> "[…] repeals the ZEDE Law with immediate effect, along with all other legislation, legal norms, dispositions or legal precepts derived from or relating to the Organic ZEDE Law"[136].

[133] Claimants have also brought claims under the LSA, which permits that certain disputes be adjudicated by ICSID arbitration. The Tribunal has not analysed in this Decision the alleged incompatibility between the LSA and the Declaration, because there is a debate among the Parties as to whether the LSA is binding on Honduras. Such debate requires further argumentation and submission of evidence, which the Tribunal understands will take place in a later phase of these arbitral proceedings. In any event, Respondent's objection to claims brought under the LSA based on Claimants' failure to comply with the Exhaustion Requirement cannot succeed because in this case, as discussed in the next section, local remedies in any case would be futile.

[134] English Tr., p. 162:3-15 (Santens); Request for Arbitration, para. 64. Some of these measures are: Honduras' Tax Authority allegedly not processing requests for tax identification numbers for entities incorporated in Próspera ZEDE; Honduras' Commercial Registry allegedly not registering the minutes of Honduran corporations referencing transactions in Próspera ZEDE; and a number of Honduras' Customs Administration Agency's officials having allegedly refused to recognize Próspera ZEDE's independent customs authority.

[135] Request for Arbitration, para. 60.

[136] Request for Arbitration, para. 61.

131. In its Preliminary Objection, Honduras stated that,

> "[…] if Claimants believed that the Republic of Honduras violated their rights by simply promulgating Decrees Nos. 32-2022 and 33-2022, they should have had recourse – and may still have recourse – to the judicial courts of Honduras"[137].

132. At the Hearing, Honduras' counsel submitted that, prior to filing the Request for Arbitration, Claimants could have, for instance,

> "[…] go[ne] [against *Decretos* 32 and 33] directly before the Supreme Court with a remedy of unconstitutionality"[138].

Futility

133. In the Tribunal's opinion the "remedy of unconstitutionality", which in Honduras' submission Claimants should have filed before the Supreme Court, would have been futile, and Claimants can be exempted from exhausting local remedies, even without having initiated such action.

134. The futility of such "remedy of unconstitutionality" is proven by the fact that the Supreme Court of Honduras, the highest Court in the land, against whose decisions there is no internal recourse (as acknowledged by Honduras' counsel during the Hearing[139]), has already reviewed *Decreto* 33[140] and has already stated its conclusions regarding its constitutionality. In the Supreme Court Decision, the Supreme Court of the Republic has indeed

- confirmed the constitutionality of *Decreto* 33; and
- additionally, has declared the entire ZEDE Legal Framework unconstitutional with *ex tunc* effect[141].

135. If Claimants had filed the "remedy of unconstitutionality", as now advocated by Honduras, the outcome would have been the same: the remedy would have been filed with the Supreme Court, and the Supreme Court would have dismissed Claimants' action and would have confirmed the constitutionality of *Decreto* 33, for the same reasons set forth in the Supreme Court Decision. Claimants' endeavors

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[137] R Objection I, para. 39: "*si las Demandantes consideraban que la República de Honduras vulneró sus derechos con tan solo promulgar los Decretos No. 32-2022 y 33-2022, debieron haber recurrido – y pueden todavía hacerlo – a los tribunales de justicia de Honduras*".
[138] English Tr., p. 165, l. 3-5 (Gil); Spanish Tr., p. 194:1-3 (Gil): "*recurrir directamente [contra los Decretos 32 and 33] hacia la Corte Suprema presentando un recurso, una acción de inconstitucionalidad".*
[139] Spanish Tr., p. 192:17-21 (Gil): *"Ahora, respecto de la sentencia que acaba de ser publicada, la sentencia de la Corte Suprema, esa es una decisión definitiva de la República de Honduras respecto de la cual no procede recurso alguno*"; English Tr., p. 164:3-5 (Gil): "Now, regarding the Judgment by the Supreme Court, this is something that – it cannot be contested".
[140] *Decreto* 32 never came into effect (see paragraph 83 *supra*).
[141] Doc. **R-66,** Supreme Court of Justice, Constitutional Challenge SCO-0738-2021, Judgment, dated 20 September 2024, p. 58.

would have been futile, and no claimant can be required, to meet the exhaustion of local remedies standard, to engage in meaningless recourses.

A belated argument by Honduras

136. At the Hearing, Honduras seemed to argue for the first time that the Tribunal should carry out a theoretical exercise: it should revert to the time when Claimants submitted their Request for Arbitration in December 2022, and examine whether, at that time, it was futile to attempt to exhaust local remedies against the *Decretos*[142].

137. The Tribunal disagrees with Honduras' position: the analysis of futility must be carried out when the relevant tribunal adjudicates the issue, and the tribunal must take into consideration all facts known at the time of its decision – there is no reasons to exclude facts which have occurred between the commencement of the proceedings and the date of its decision. Respondent has not submitted any precedents or opinions in support of its thesis, nor has it advanced any reasoning which justify the exclusion.

138. But even if *arguendo* the Tribunal were to accept Honduras' position, the outcome would still be the same: any recourse by Claimants, at the time when they filed their Request for Arbitration in 2022, would have been futile. The proceedings which eventually led to the Supreme Court Decision had already been filed by the *Rector* of the *Universidad Nacional Autónoma* in 2021. Given the *erga omnes* effects of constitutionality decisions adopted by constitutional courts, to file a further "remedy of unconstitutionality" before the same Supreme Court would have led to the same outcome.

Conclusion

139. In sum, the Tribunal finds that the local remedies, which Honduras asserts Claimants should have pursued, would have been futile. Therefore, independently of the Tribunal's previous decision in paragraph 126 *supra* (finding that *Decreto* 10-2005, which incorporated CAFTA-DR into the Honduran legal system, repealed, for the purposes of such Treaty, the Exhaustion Requirement in *Decreto* 41-88, and

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[142] The Tribunal deduces this from the following exchange between its President and Honduras' counsel:

President Fernández-Armesto: "[…] *si nos centramos en los decretos 32/22 y 33/22 y la decisión del Tribunal Supremo que ha sido publicada en la gaceta el 15 de noviembre, ¿cuáles son los recursos internos que debían haber acometido los demandantes para cumplir con el requisito de agotamiento de los recursos internos?*"

Mr. Gil: "[…] *Aquí hay algo bien importante que precisar, señor presidente, que es la mirada temporal en la cual se presentó la solicitud de arbitraje* […]" (Spanish Tr., p. 192:7-10);

President Fernández-Armesto: "[…] if we concentrate on Decrees 32/22, and 33/22, the Decision by the Supreme Court published in La Gaceta on 15 November, what are the internal domestic remedies that should have been undertaken by the Claimants in order to fulfill the requirements of the exhaustion of internal remedies?"

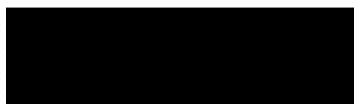
Mr. Gil: "[…] we have to state that in the time frame for the Request for Arbitration […]" (English Tr., p. 163:11-21).

that Claimants were not obliged to exhaust local remedies before initiating this arbitration), the Tribunal decides that Claimants were in any event exempted from complying with the Exhaustion Requirement, because any further recourse against *Decretos* 32 and 33 would have been futile.

V. DECISION

140. For the foregoing reasons the Tribunal decides to:

- Reject Respondent's Preliminary Objection;
- Postpone its decision on the costs of this Preliminary Phase; and
- Order the continuation of the proceedings.



Mr. David W. Rivkin
Arbitrator

Prof. Raúl E. Vinuesa
Arbitrator

Prof. Dr. Juan Fernández-Armesto
President of the Tribunal