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A Local Remedies Pitfall Avoided—for Now: Key Takeaways from Honduras Próspera Inc. v. Honduras

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On February 26, 2025, the Tribunal in *Honduras Próspera Inc., et al. v. Republic of Honduras* rejected an unprecedented attempt to dismiss investment treaty claims for failure to exhaust local remedies. While respondent states have often contended that claimants should have pursued local remedies for one reason or another, Honduras advanced a novel argument in this case. Specifically, Honduras contended that the legislation by which it adopted the ICSID Convention in the 1980s imposed an exhaustion requirement as a precondition to ICSID arbitration, even though Honduras had never communicated this requirement to ICSID or invoked it in prior ICSID arbitrations.

Despite these circumstances, the Tribunal accepted that the legislation in question established an exhaustion requirement for ICSID claims. It also found that Honduras's failure to invoke the requirement previously was not a *per se* waiver of the requirement. Nevertheless, the Tribunal ruled that Honduras had waived the requirement for a different reason: by agreeing to a "no-U-turn" provision in the treaty at issue that the Tribunal found incompatible with an exhaustion requirement. The Tribunal also concluded that, even if Honduras had not waived the requirement, the claimants' pursuit of local remedies would have been futile. It therefore declined to dismiss the claims.

This post provides background on the dispute and summarizes the Tribunal's ruling. It also raises a concern about one aspect of the Tribunal's reasoning, which could have implications for claimants in future cases when evaluating whether to pursue local remedies.

Background to the Dispute

The claimants in this case describe themselves as a collection of U.S. business entities that invested in Honduras pursuant to a legal framework in place at the time that established special economic zones, known as "ZEDEs." (Request for Arbitration, paras. 4, 14-16.) The claimants sought to create their own local governance system as authorized by the ZEDE framework, as well as to undertake extensive real estate development and other ventures. (*Id.*, paras. 48-52.) However, in 2022 a new regime came to power in Honduras that repealed the ZEDE framework through a decree passed by the National Congress and signed by the new President. (Decision on Preliminary Objections, paras. 82-84.)

The claimants did not challenge this decree in Honduran courts. Instead, they instituted an ICSID arbitration in December 2022 pursuant to the Dominican Republic-Central America Free Trade Agreement ("CAFTA-DR"), asserting most-favored-nation, minimum standard of treatment, and expropriation claims. (Decision on Preliminary Objections, paras. 89-92; Request for Arbitration, para. 125.)

Honduras's Local Remedies Argument and Its Basis in 1988 Legislation

Honduras responded by asserting that the Tribunal lacked jurisdiction by virtue of the claimants' failure to exhaust local remedies. (Decision on Preliminary Objections, para. 5.) Honduras's objection rested on the fact that when Honduras ratified the ICSID Convention in 1988, the implementing legislation announced an exhaustion requirement. (*Id.*, paras. 47-49.) The Tribunal translated the relevant language in the legislation as follows:

> "*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*" (*Id.*, para. 49, n. 3, emphasis added).

Honduras argued that, by including this declaration in the 1988 legislation, it was exercising its right under Article 26 of the ICSID Convention. (*Id.*, para. 51.) That provision allows Contracting States to require the exhaustion of local administrative or judicial remedies as a condition of their consent to arbitration under the Convention.

The Tribunal noted that only a few ICSID Contracting States had ever notified ICSID that their consent to its jurisdiction was conditioned on the exhaustion of local remedies—and that Honduras was not one of them. (*Id.*, para. 32.) The Tribunal also pointed out that Honduras had signed multiple treaties since 1988 that provided consent to ICSID arbitration without mentioning any requirement to exhaust local remedies. (*Id.*, para. 54.) One of these was CAFTA-DR. (*Id.*, para. 62.) Further, Honduras had been a party to four prior ICSID arbitrations in which it had not raised failure to pursue local remedies as a defense. (*Id.*, para. 55.)

The Tribunal's Ruling on Honduras's Objection

Notwithstanding these factors, the Tribunal treated the 1988 legislation as having validly established an exhaustion requirement for ICSID arbitration. (*Id.*, para. 102.) Moreover, the Tribunal asserted that the circumstances described above "do not *per se* lead the Tribunal to conclude that Honduras has waived the Exhaustion Requirement vis-à-vis Claimants." (*Id.*, para. 110.) Rather, "[t]he 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." (*Id.*)

The Tribunal was referring here to the fact that CAFTA-DR's investment chapter, like a number of

other investment treaties, includes a “waiver” or “no-U-turn” provision that requires investors to suspend any local proceedings and waive the right to resume them before initiating treaty arbitration. In particular, Article 10.18(2) precludes an investor from initiating treaty arbitration unless it makes an irrevocable 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” of the treaty. This is coupled with a three-year limitation period for initiating treaty arbitration, set forth in Article 10.18(1).

The Tribunal explained as follows its conclusion that the no-U-turn provision resulted in a waiver of the exhaustion requirement:

> *“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 the 1988 legislation]. 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.”* (Decision on Preliminary Objections, para. 119.)

The Tribunal’s reasoning has a certain logic to it. It is indisputably correct that Honduras could not reasonably expect an investor to exhaust local remedies before initiating ICSID arbitration *if doing so were not feasible within the three-year limitation period set by CAFTA-DR*. However, the Tribunal does not fully account for the possibility that an investor could pursue local remedies for a period of time before waiving the right to continue them, and that an investor might even obtain a definitive ruling within three years in some cases. In fact, the Tribunal acknowledges elsewhere that the Honduran courts had reached a final determination on *the very measure at issue in this case* in less than three years, albeit in a proceeding initiated by a third party rather than by the claimants. (*Id.*, paras. 86-88.)

Specifically, in 2024 the Supreme Court of Honduras upheld the constitutionality of the decree by which the ZEDE framework was repealed, and also declared that framework itself to have been unconstitutional *ab initio*. (*Id.*, para. 88.) The Tribunal highlighted this fact when advancing a fallback argument: that even if Honduras had not waived the exhaustion requirement, the 2024 ruling by its highest court confirmed that the pursuit of local remedies would have been futile. (*Id.*, paras. 133-35.)

A Note of Caution

Honduras may not have succeeded in dismissing the claims in *Honduras Próspera Inc. v. Honduras*, but the Tribunal’s recognition of an exhaustion requirement should not go unnoticed. Honduras recently denounced the ICSID Convention, so the requirement may not be relevant in arbitrations involving that country going forward. Nonetheless, the Tribunal’s treatment of the 1988 legislation as validly establishing an exhaustion requirement—despite Honduras never having communicated it to ICSID or raised it in prior proceedings—raises the question of what other stealth local remedies requirements may be invoked by other Contracting States. Were a future

tribunal to uphold such a requirement but determine that the treaty at issue did not waive it entirely, then any decision to bypass local remedies might prove costly.

More broadly, investors need to be cautious in some cases about disregarding local remedies even where exhaustion is not a precondition to ICSID arbitration. Several tribunals have considered local remedies relevant to the *merits* of certain treaty claims—particularly denial of justice—as I have discussed in a prior article. Indeed, some tribunals have done so in cases brought under treaties with no-U-turn clauses like the one in CAFTA-DR. Notable examples include the NAFTA cases of *Loewen v. United States*, *Waste Management v. Mexico II*, and *Lion Mexico Consolidated v. Mexico*. The fact that NAFTA's no-U-turn clause did not dispose of the local remedies issue in those cases underscores that such clauses can coexist with an exhaustion requirement, at least if the latter is construed as an obligation to pursue reasonably available local remedies within the treaty's limitation period.

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