IN THE ARBITRATION UNDER CHAPTER TEN OF THE DOMINICAN REPUBLIC—CENTRAL AMERICA—UNITED STATES FREE TRADE AGREEMENT AND THE ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
BETWEEN

DANIEL W. KAPPES
AND
KAPPES, CASSIDAY & ASSOCIATES
Claimants

AND

THE REPUBLIC OF GUATEMALA
Respondent

ICSID Case No. ARB/18/43

RESPONDENT'S PRELIMINARY OBJECTIONS UNDER ARTICLE 10.20.5 OF CAFTA-DR

August 16, 2019

Before:
Ms. Jean E. Kalicki (Presiding Arbitrator)
Mr. John M. Townsend
Prof. Zachary Douglas, QC

Holland & Knight

PGN
Procuraduría General de la Nación

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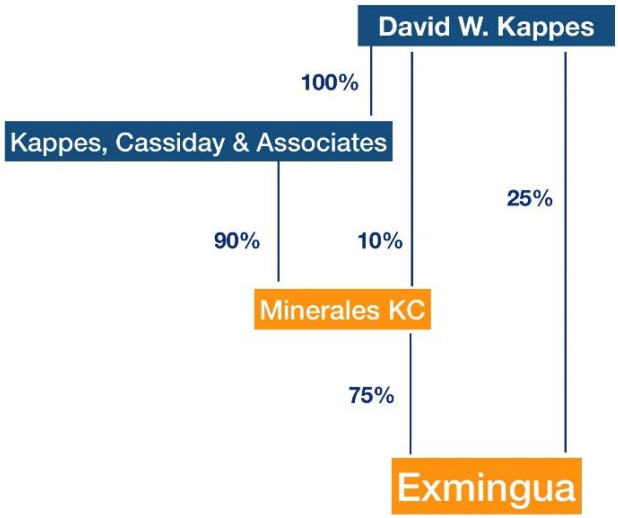
GUATEMALA'S PRELIMINARY OBJECTIONS UNDER ARTICLE 10.20.5

The Republic of Guatemala ("Guatemala," "Respondent" or the "Republic") hereby submits its preliminary objections[1] pursuant to the expedited procedures under Article 10.20.5 of the Dominican Republic-Central America-United States Free Trade Agreement (the "CAFTA-DR" or the "Treaty")[2] in the Case No. ARB/18/43 before the International Center for Settlement of Investment Disputes ("ICSID") (the "Arbitration"). Guatemala submits, together with these objections, factual exhibit R-001 and legal authorities RL-0001 through RL-0048.

I. INTRODUCTION

1. Daniel W. Kappes ("Mr. Kappes") and Kappes, Cassiday & Associates ("KCA," and jointly with Mr. Kappes, the "Claimants") seek an award in excess of 350,000,000 USD for alleged damages caused to Exploraciones Mineras de Guatemala, S.A. ("Exmingua"), a Guatemalan company. Mr. Kappes directly owns 25% of Exmingua's shares.[3] The remaining 75% of Exmingua's shares are held by Minerales KC Guatemala, Ltda. ("Minerales KC"), another Guatemalan company.[4] Mr. Kappes wholly owns KCA.[5] Mr. Kappes owns 10% of Minerales KC's shares, and KCA owns the remaining 90%.[6] As a result, Claimants indirectly own the remaining 75% of Exmingua through Minerales KC. The following chart shows the shareholding composition of Exmingua, Minerales KC and KCA, according to the allegations included in Claimants' Notice of Arbitration:[7]

[1] This document is submitted in Spanish with an English translation.
[2] Dominican Republic-Central America-United States-Free Trade Agreement, Preamble and Chapters One, Two and Ten, signed 5 August 2004, **RL-0001**.
[3] Notice of Arbitration, 9 November 2018, ¶ 35.
[4] *Ibid.*
[5] *Id.* ¶ 8.
[6] *Ibid.*
[7] *Id.* ¶¶ 8, 35.



2. Claimants attempt through this Arbitration to recover damages they did not suffer while ignoring CAFTA-DR's requirements.

3. Claimants, in their Notice of Arbitration, do not reveal important details about their acquisition of Exmingua and entry into Guatemala. For instance, they do not reveal how they acquired the shares of Exmingua and Minerales KC, how much they paid for the shares, and why they decided to take ownership of what was then called a "problematic asset[]" by the President of Radius Exploraciones Ltd. n/k/a Radius Gold Inc. ("Radius"), Exmingua's previous owner.[8] These issues, among others, are key to determine whether this Tribunal has jurisdiction to hear this dispute.[9]

4. Claimants submitted their claims to arbitration without complying with several requirements of the Treaty. As a result, their claims must be dismissed on an expedited basis.

5. First, Claimants seek to recover damages allegedly suffered not by them, but by *Exmingua*. Yet, for the reasons explained below, Claimants brought this action on their own behalf under Article 10.16.1(a) of CAFTA-DR, and not on behalf of Exmingua or Minerales KC under Article 10.16.1(b). Because Article 10.16.1(a) of CAFTA-DR only allows Claimants to recover

[8] *See* Radius Gold, Inc.'s News Release, *Radius Gold sells Interest in Guatemala Gold Property,* 31 August 2012, available at: http://www.radiusgold.com/s/NewsReleases.asp?ReportID=545012&_Type=News-Releases&_Title=Radius-Gold-sells-Interest-in-Guatemala-Gold-Property (last visited 16 August 2019), **R-0001-001**.

[9] Pending receipt of this information, the Republic of Guatemala expressly reserves its right to raise an objection to the jurisdiction of the Tribunal under CAFTA-DR, the ICSID Rules of Procedure for Arbitration Proceeding (the "ICSID Arbitration Rules") and any other applicable rule. *See* Section III of this memorial.

direct damages and Claimants are seeking to recover Exmingua's alleged damages, as a matter of law, Claimants have not alleged claims upon which an award in their favor can be made.

6. Second, in this Arbitration initiated under Article 10.16.1(a) of the Treaty, Claimants' standing is limited to claims for losses arising out of direct injury to their shareholding rights. Because Claimants are seeking to recover damages arising out of purported injuries to Exmingua's rights, Claimants' claims are inadmissible and should be dismissed.

7. Third, despite seeking to recover Exmingua's losses for their personal accounts, Claimants did not submit Exmingua's written waiver of any right to bring or continue claims in another forum with respect to measures alleged to constitute a breach of CAFTA-DR. Yet, Exmingua is pursuing a local proceeding before the Constitutional Court of Guatemala concerning the suspension of Progreso VII's exploitation license, a measure Claimants allege constitutes a breach of the Treaty in this Arbitration. Absent a waiver that fully complies with the Treaty, the Republic of Guatemala did not consent to arbitrate claims for Exmingua's losses, and therefore this Tribunal has no jurisdiction to hear them.

8. Claimants' Notice of Arbitration should be dismissed in its entirety based on the above three grounds. But even if the Tribunal were to disagree, additional grounds exist to dismiss two of the claims.

9. Fourth, Claimants' claim for the alleged breach of Article 10.4 (Most- Favored-Nation Treatment) of CAFTA-DR must be dismissed because Claimants did not include this alleged breach in their notice of intent dated May 16, 2018 (the "Notice of Intent") as required under Article 10.16.2 of CAFTA-DR.

10. Fifth, Claimants' claim for lack of full protection and security should also be dismissed because it is time-barred under the three-year statute of limitations contained in Article 10.18.1 of CAFTA-DR. The Republic of Guatemala did not consent to arbitration of time-barred claims.

11. To summarize, Respondent submits its preliminary objections under the expedited procedure of Article 10.20.5 of CAFTA-DR on the following grounds:

a) Claimants seek to recover on their own behalf *Exmingua*'s direct injury, which cannot be recovered as sought:

- As a matter of law Claimants have not alleged a claim upon which an award in favor of Claimants can be made under Article 10.16.1(a) of CAFTA-DR.

- Claimants lack standing to seek to recover Exmingua's losses.
- Exmingua did not waive its right to pursue local litigation with respect to the measures at issue in this Arbitration and it did not terminate pending litigation. As a result, this Tribunal does not have jurisdiction to decide claims for Exmingua's losses.

b) Claimants added a new claim in their Notice of Arbitration that they did not identify in their Notice of Intent and the claim is therefore inadmissible.

c) Claimants submit a time-barred claim which is therefore outside the Tribunal's jurisdiction.

12. The following chart identifies the objections and corresponding Treaty provisions requiring dismissal of all the Claimants' claims.

Section of Memorial	Affected Claims	Grounds for Dismissal	CAFTA-DR
V.	All Claims	**As a matter of law**, no award in favor of Claimants can be made.	10.20.4 and 10.16.1
		The Claims are **inadmissible**. Claimants do not have standing to seek to recover Exmingua's losses.	10.20.5 and 10.16.1
		The Tribunal does not have **jurisdiction** to determine the Claims for Exmingua's losses because Exmingua's waiver was not submitted with Claimants' Notice of Arbitration.	10.20.5 and 10.18.2
VI.	Most Favored Nation	The claim is **inadmissible** because it was not included in the Notice of Intent.	10.20.5 and 10.16.2
VII.	Lack of Full Protection and Security	The Tribunal has no **jurisdiction** to decide the claim because it is time barred.	10.20.5 and 10.18.1

Allowing Claimants to disregard the requirements of CAFTA-DR would result in substantial prejudice to Guatemala and would allow Claimants to: a) seek a recovery on purported claims that belong to Exmingua and not Claimants; b) circumvent Exmingua's creditors; c) proceed without having Exmingua waive its rights in the legal proceedings Exmingua is a party to in Guatemala with respect to measures that Claimants allege constitute a breach of CAFTA-DR in this Arbitration; d) submit a claim without providing the required notice under the Treaty; and e) maintain a time-barred claim.

II. BACKGROUND

A. The Republic of Guatemala

13. Guatemala is a country rich in natural resources. It has, among other things, deposits of gold, silver, nickel, iron and copper. Guatemala is also rich in cultural diversity. More than 80% of the population is indigenous and although Spanish is the official language, 22 Mayan languages are spoken.[10] The link between indigenous communities and their land is the foundation for their cultural identity, spiritual life and physical and economic survival. This means that exploration and exploitation of natural resources require significant outreach and responsiveness to local concerns and indigenous populations through lines of communication with community leaders and the management and maintenance of social programs.

B. Exmingua

14. Exmingua was incorporated in 1996, and during subsequent years acquired interests in several mining projects within the El Tambor region of Guatemala (the "Tambor Project"). Two of these projects are at issue in this Arbitration: the Progreso VII Derivada ("Progresso VII Project") and Santa Margarita projects ("Santa Margarita Project," and jointly with the Progreso VII Project, the "Projects").[11] Exmingua was first owned by Radius, a publicly traded exploration company headquartered in Vancouver, Canada.

15. In 2012, after spending nearly a decade conducting exploratory activities in Guatemala, Radius sold 100% of its interest in Exmingua to KCA while retaining an economic interest in future production. In the words of the president of Radius, "[t]he sale of [Radius'] interest in the Tambor Project is part of [its] corporate strategy to divest problematic assets, allowing [Radius] to concentrate capital and expertise on areas less conflicted regarding development in the region."[12]

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[10] Art. 3 of the Government Agreement number 320-2011 of the President of the Republic, Regulation of the National Languages Law.

[11] Notice of Arbitration, ¶ 36.

[12] *Radius Gold sells Interest in Guatemala Gold Property*, **R-0001-001**. According to the press release, Radius transferred the remainder of its interests in Exmingua to KCA, reportedly for a deferred repayment of a debt in the amount of 400,000 USD and future royalty payments to be made if, and only if, the Tambor Project ever reached commercial production. Royalty payments would be based on the then price of gold and the number of ounces produced from the property.

C. Claimant's Strategy of Using Guatemalan Police and Courts to Challenge Community Unrest

16. On September 3, 2012, within weeks of the sale of Exmingua to Claimants, Exmingua initiated an *amparo* action (a judicial proceeding seeking protection of constitutional rights) against the General Director of the National Civil Police, "claiming the 'omission of intervention, by the authority, to protect people and vehicles in and around the facilities of the mining project Progreso VII'" and alleging that "illegal arrests, harassment, injuries, threats and coercion against the project's workers had occurred on the project site, in addition to various damages to its facilities, and although the national police was aware of this situation, the necessary measures have not been taken to guarantee and protect the people and vehicles that must enter to the project."[13] An amparo was granted and later revoked on appeal.[14]

17. Over the next several years, the situation at the Projects deteriorated due to Exmingua's lack of commitment to build significant relationships with the communities impacted by Exmingua's activities. The neighboring communities increasingly vocalized their concerns and opposition to the Projects, and Exmingua and KCA drew international scrutiny from non-governmental organizations and governments alike.

18. In late 2015, at the request of a non-governmental organization, the Supreme Court of Guatemala granted an *amparo provisional* against the Ministry of Energy and Mines ("MEM") and suspended Exmingua's exploitation license for the Progreso VII Project.[15] Exmingua proceeded to appeal the *amparo provisional* to the Constitutional Court of Guatemala on February 23, 2016.[16]

19. Because protests and strikes continued and Exmingua failed to constructively engage with the communities, on April 22, 2016, Exmingua initiated a second *amparo* action, this time against the President of the Republic of Guatemala, the Ministry of Government, and the General Directorate of National Civil Police. In this action Exmingua claimed "the failure and the threat that the denounced authorities do not guarantee the constitutional rights and maintain public order in the blockades promoted . . . in areas . . . of the Progreso VII Derivada mining project."[17]

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[13] Notice of Arbitration, ¶ 43.
[14] *Id.* ¶ 44.
[15] *Id.* ¶ 54.
[16] *Ibid.*
[17] *Id.* ¶ 56.

20. Shortly thereafter, the Constitutional Court of Guatemala confirmed the *amparo provisional* granted by the Supreme Court and held that Exmingua's exploitation license for the Progreso VII Project would remain suspended[18] until consultations with the local communities were conducted pursuant to the ILO Convention.[19]

21. Later, on June 28, 2016, the Supreme Court granted an *amparo definitivo* and suspended Exmingua's exploitation license for the Progreso VII Project until the required consultations are conducted. On June 30, 2016, Exmingua appealed the Supreme Court's decision to Guatemala's Constitutional Court, and the appeal remains pending.[20]

22. On March 2, 2017, the Constitutional Court declined to grant the *amparo* requested by Exmingua against the President of the Republic of Guatemala, the Ministry of Government, and the General Directorate of National Civil Police in response to the blockades and protests. The Court found that the authorities acted appropriately and implemented the necessary measures to protect the public order.

D. Claimant's Notice of Intent Omits a Claim and Ignores the Pending Actions

23. On May 16, 2018, Claimants transmitted their Notice of Intent, in which they alleged the facts on which their claims are based and argued that these facts constituted a breach of the obligations that the Republic of Guatemala acquired when it entered into the CAFTA-DR, and specifically: i) Article 10.3 – National Treatment; ii) Article 10.5 – Minimum Standard of Treatment; and iii) Article 10.7 – Expropriation and Compensation.[21] Claimants alleged they suffered the following damages: i) the suspension of the Progreso VII Project, with "an estimated net current value of approximately US$150 million;" ii) the failure to obtain an exploitation license for the Santa Margarita Project, and that "based on the quantity and quality of the mineral resources . . . [damages are] very likely in excess of, the amount for the Progreso VII Project; and iii) three concentrate shipments valued at approximately 500,000 USD that were impounded.[22]

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[18] *Id.* ¶ 57.
[19] Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (the "ILO Convention"), adopted on 27 June 1989, in force since 5 September 1991, and ratified by Guatemala in 1996 before Radius and Claimants obtained an interest in Exmingua.
[20] Notice of Arbitration, ¶ 59.
[21] Claimants' Notice of Intent, 16 May 2018, p. 3, **C-5**.
[22] *Id.* p. 4.

24. On November 9, 2018, Claimants submitted their Notice of Arbitration that includes not only the breaches alleged in the Notice of Intent, but also a breach of Article 10.4 (Most-Favored-Nation Treatment) of CAFTA-DR, and seek damages in the following amounts: i) no less than 175,000,000 USD in connection with the Progreso VII Project; ii) no less than 175,000,000 USD in connection with the Santa Margarita Project; and iii) no less than 500,000 USD for the seized concentrate shipments.[23] The four claims submitted by Claimants in their Notice of Arbitration will be referred to as the "Claims."

III. RESERVATION OF RIGHTS

25. Nothing herein is intended to waive any rights or objections, and the Republic expressly reserves any and all rights to raise objections in defending the claims in any future phases of this Arbitration, including but not limited to objections to the jurisdiction of the Tribunal or the admissibility of claims, and including preliminary objections under Article 10.20.4 of CAFTA-DR and under Rule 41 of the ICSID Arbitration Rules.

IV. THE EXPEDITED MECHANISM UNDER 10.20.5 OF CAFTA-DR

26. CAFTA-DR provides a mechanism that allows the arbitral tribunal to promptly and expeditiously decide certain objections of the defendant with the goal of efficiently ending an arbitration or claims that cannot succeed.

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

28. Respondent submits both types of preliminary objections under the expedited procedure provided for under Article 10.20.5 of CAFTA-DR. Guatemala's preliminary objections filed in accordance with Articles 10.20.4 and 10.20.5 of CAFTA-DR must be determined on the basis of the pertinent provisions of the Treaty and applicable rules of international law.[24]

[23] Notice of Arbitration, pp. 13-17.

[24] Art. 10.22 of CAFTA-DR, Governing Law ("[…] when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law"), **RL-0001-027**; *see also Corona Materials, LLC v. Dominican Republic*, ICSID

29. Article 10.20.5 of CAFTA-DR provides 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. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.*

30. Article 10.20.4 of CAFTA-DR states the following:

Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question ***any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made*** *under Article 10.26.*

> *(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).*
>
> *(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.*
>
> *(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.*
>
> *(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.*

Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 185, **RL-0002-058**.

31. Article 10.20.4 of CAFTA-DR provides that "a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26."[25] To grant an objection under this provision, "a tribunal must have reached a position, both as to all relevant questions of law and all relevant alleged or undisputed facts, that an award should be made finally dismissing the claimant's claim at the very outset of the arbitration proceedings. . ."[26] In *The Renco Group Inc. v. Republic of Peru*, the tribunal held that "the principal . . . clause in Article 10.20.4 refers to objections alleging the insufficiency of a claim as a matter of law which a tribunal is mandated to decide as a preliminary issue based on assumed facts."[27] *Renco* was decided under the United States-Peru Trade Promotion Agreement ("US-Peru TPA"), which includes an almost identical provision to 10.20.4 of CAFTA-DR.

32. Article 10.20.5 of CAFTA-DR expressly allows objections under both 10.20.4 and "any objection that the dispute is not within the tribunal's competence," to be resolved expeditiously. In other words, Article 10.20.5 of CAFTA-DR provides for "an additional ground of objection as to competence."[28] The competence of a CAFTA-DR tribunal is prescribed by the language of the Treaty and the applicable arbitration rules, here, the ICSID Arbitration Rules.[29] The provisions of the Treaty prevail over the ICSID Arbitration Rules.[30]

33. The expedited procedure under Article 10.20.5 of CAFTA-DR sets forth the following schedule:

a. The respondent must file the request for an expedited decision within 45 days after the tribunal is constituted;[31]

b. The tribunal must suspend the proceedings on the merits;

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[25] Art. 10.20.4 of the CAFTA-DR, **RL-0001-024**.

[26] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶ 110, **RL-0003-058**.

[27] *The Renco Group, Inc. v. The Republic of Peru*, ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4, 18 December 2014, ¶ 191, **RL-0004-046**.

[28] *Pac Rim*, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶ 106, **RL-0003-057**.

[29] *See* Art. 10.16 of CAFTA-DR, Submission of a Claim to Arbitration; Art. 10.17 of CAFTA-DR, Consent of Each Party to Arbitration; and Art. 10.18 of CAFTA-DR, Conditions and Limitations on Consent of Each Party, **RL-0001-019-023**.

[30] Art. 10.16.5 of CAFTA-DR ("The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement."), **RL-0001-021**.

[31] Here, the Arbitral Tribunal was constituted on 2 July 2019; therefore, the deadline to file preliminary objections under Art. 10.20.5 of CAFTA-DR is 16 August 2019. *See* Letter from ICSID to the Parties of 2 July 2019.

c. The tribunal must issue a decision or award on the objections no later than 150 days after the date of the request;

d. The tribunal may take an additional 30 days to issue the decision or award if a disputing party requests a hearing;

e. On a showing of extraordinary cause, a tribunal may take an additional 30 days to issue the decision or award.

34. While objections filed under Article 10.20.4 of CAFTA-DR require the tribunal "assume to be true claimant's factual allegations in support of any claim in the notice of arbitration,"[32] this requirement does not apply to objections to the tribunal's jurisdiction or the admissibility of claims under Article 10.20.5 of CAFTA-DR.[33] Under 10.20.4 of CAFTA-DR, "[t]he tribunal may also consider any relevant facts not in dispute."[34]

35. Finally, a respondent does not waive "any objection as to competence or any argument on the merits"[35] by making use of the expedited procedure set out under Article 10.20.5 of CAFTA-DR (including an objection under Article of 10.20.4 of CAFTA-DR[36]). For the avoidance of doubt, as previously stated at Section III above, Guatemala has expressly reserved its rights to raise additional objections under Article 10.20.4 of CAFTA-DR or as to the Tribunal's jurisdiction or the admissibility of claims under the ICSID Arbitration Rules, at a later time.

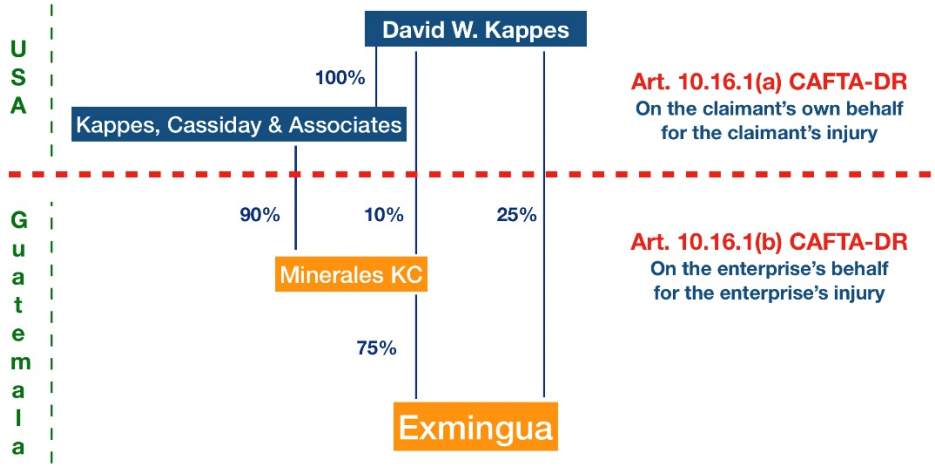
V. THE CLAIMS SHOULD BE DISMISSED BECAUSE CLAIMANTS SEEK TO RECOVER EXMINGUA'S LOSSES AND THEY VIOLATE CAFTA-DR'S PROCEDURE AND REQUIREMENTS

36. CAFTA-DR provides Claimants with two avenues for recovery: a) one for the damages they directly suffered; and b) another for the damages suffered by their enterprise. Claimants commenced this Arbitration under Article 10.16.1**(a)** of CAFTA-DR "on [their] own behalf," alleging that the Republic of Guatemala has breached several of its obligations under the

[32] Art. 10.20.4(c) of CAFTA-DR, **RL-0001-024**.
[33] The language is absent in Art. 10.20.5 of CAFTA-DR, **RL-0001-024**. *See also Renco*, Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4, 18 December 2014, ¶ 220 ("The Tribunal is **unpersuaded** by Professor Reisman's suggestion that **preliminary objections** in which **there may be disputed issues of fact** (as per Article 23(3) of the UNCITRAL Rules, and **Article 10.20.5 of the Treaty**, and unlike Article 10.20.4 of the Treaty) **are somehow incapable of being determined with expedition**") (emphasis added), **RL-0004-053**. *Renco* was decided under the Peru-United States Trade Promotion Agreement, which includes an identical provision to Art. 10.20.5 of CAFTA-DR, **RL-0001-024**.
[34] Article 10.20.4(c) *in fine* of CAFTA-DR, **RL-0001-024**.
[35] Article 10.20.4(d) of CAFTA-DR, **RL-0001-024**.
[36] *Ibid.*

Investment Section of the Treaty. Claimants did not use the mechanism provided under Article 10.16.1**(b)** of CAFTA-DR to bring an arbitration "on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly," that is, Exmingua.

37. While the mechanism that Claimants did NOT choose, (b), would have allowed a claim that "*the enterprise* has incurred loss or damage by reason of, or arising out of, that breach,"[37] Claimants' choice, (a), only allows a claim where "*the claimant* has incurred loss or damage by reason of, or arising out of, that breach."[38] In other words, a key difference between the two provisions is the type of loss or damage available to a claimant under the section of the article invoked.[39] While section (a) of Article 10.16.1 allows a claimant to recover the direct injury it sustained, section (b) is the avenue to seek to recover, on behalf of a local enterprise, the damage that enterprise sustained. Claimants' fatal flaw is that they ignore this important distinction: the Claims were brought on Claimants' own behalf, but for Exmingua's alleged losses. The following chart shows the two avenues available under CAFTA-DR:



38. The distinction is not a mere formality. It is a built-in mechanism that seeks the resolution of disputes in a fair and efficient manner,[40] to avoid double recovery and the multiplicity of proceedings, respecting the separate legal personality of a company and its shareholders. As such, when a claimant who owns or controls an enterprise seeks to recover damages for an injury to the enterprise, CAFTA-DR requires the claimant to bring the claim on the enterprise's behalf and sets at least three additional obligations: i) any requested monetary compensation is to be paid

[37] Art. 10.16.1(b) *in fine* of CAFTA-DR, **RL-0001-020**.
[38] Art. 10.16.1(a) *in fine* of CAFTA-DR, **RL-0001-019-020**.
[39] A claimant may bring distinct claims under both Arts. 10.16.1(a) and 10.16.1(b) of CAFTA-DR; however, the relief available for each claim is restricted to the article under which that particular claim was submitted.
[40] CAFTA-DR, Chapter 1, Article 1.2.1(f) ("effective procedures. . . for the resolution of disputes."), **RL-0001-003**.

to the *enterprise* (Article 10.26 of CAFTA-DR); ii) any right to initiate or continue *any* local litigation in the host State with respect to any measure alleged to constitute a breach in the arbitration must be waived (Article 10.18.2 of CAFTA-DR); and iii) claims for breach of protections already litigated in the host State are foreclosed (Annex 10-E of CAFTA-DR). Claimants have met none of these requirements, yet Claimants: i) request the Republic of Guatemala be ordered to pay *them* more than $350 million dollars for *Exmingua's* alleged losses; ii) failed to submit a waiver signed by Exmingua to any right to be a party to local proceedings with respect to measures alleged to constitute a breach in this Arbitration (and continue to be a party in such proceedings); and iii) bring claims in this Arbitration for alleged breaches that Exmingua has already litigated in Guatemala (and lost).

39. Because the Claims are for Exmingua's alleged losses and fail to comply with the Treaty's requirements for claims "on behalf of an enterprise":

a. The Claims must be dismissed under 10.20.4 of CAFTA-DR because, as a matter of law, they are not claims for which an award in favor of Claimants can be made under Article 10.26 of CAFTA-DR.

b. The Claims must be dismissed under Articles 10.20.5 and 10.16.1(a) of CAFTA-DR because they are inadmissible. Claimants lack standing in this Arbitration, initiated under Article 10.16.1(a) of the Treaty, to seek to recover the losses or damages suffered by their local enterprise, here, Exmingua. Claimants' standing is limited to claims seeking alleged losses or damages they have directly sustained.

c. The Claims must be dismissed under Articles 10.20.5 and 10.18.2 of CAFTA-DR because they are not within the Tribunal's jurisdiction. Claimants did not submit a waiver of Exmingua's right to initiate or continue local litigation "with respect to any measure alleged to constitute a breach referred to in Article 10.16."[41] As a result, Guatemala has not provided its consent to arbitrate the Claims for Exmingua's losses under Article 10.16.1(a) of CAFTA-DR.[42]

[41] CAFTA-DR, Art. 10.18.2(b), **RL-0001-022**.

[42] *Renco*, Second Submission of the United States of America, 1 September 2015, ¶ 15 (noting, in relation to a provision identical to Article 10.16.1 of CAFTA-DR, that "[f]ailure to make a claim under the appropriate provision(s) in Article 10.16 and to comply with the conditions and limitations on consent in Article 10.18, including the waiver provision, results in lack of consent by the Party and the concomitant lack of jurisdiction of the tribunal with respect to that claim."), **RL-0005-006**.

A. Under CAFTA-DR a Claimant Who Owns or Controls an Enterprise Cannot Bring Claims on Its Own Behalf for its Enterprise's Alleged Losses

40. Section B of Chapter 10 of CAFTA-DR sets forth the "Investor-State Dispute Settlement" mechanism to resolve disputes between an investor of a contracting Party and the host State relating to the latter's obligations under Section A of Chapter Ten of the Treaty entitled "Investment."

41. Article 10.16.1 of CAFTA-DR offers two avenues to bring claims if an investment dispute "cannot be settled by consultation or negotiation":

> **(a)** **the claimant, on its own behalf**, may submit to arbitration under this Section a claim
> (i) that the respondent has breached
> (A) an obligation under Section A,
> (B) an investment authorization, or
> (C) an investment agreement; and
> (ii) that **the claimant has incurred loss** or damage by reason of, or arising out of, that breach; and
> **(b)** **the claimant, on behalf of an enterprise** of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim
> (i) that the respondent has breached
> (A) an obligation under Section A,
> (B) an investment authorization, or
> (C) an investment agreement; and
> (ii) **that the enterprise has incurred loss** or damage by reason of, or arising out of, that breach.[43]

42. The relief available for each claim is determined by the article under which the claim falls.

a) Article 10.16.1(a) allows a claimant to seek to recover direct injury to shareholders. Such direct injury results from violations to their rights as shareholders, which usually include the "the right to any declared dividend, the right to attend and vote at general meetings, [and] the right to share in the residual assets of the company on liquidation."[44]

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[43] Art. 10.16.1 of CAFTA-DR, **RL-0001-019-020**.

[44] *Case Concerning Barcelona Traction, Light, and Power Co., Ltd (Belgium v. Spain)*, Judgment, 5 February 1970, 1970 I.C.J. Rep. 3, ¶ 47, **RL-0006-027**. *See also* Z. Douglas, *The International Law of Investment Claims* (2009), ¶ 773 ("The right to dividends and to share in the proceeds of liquidation . . . The right to participate in the functioning and administration of the company. The right to exercise control and in particular the right to participate in shareholder meetings."), **RL-0007-003**; *William Ralph Clayton, et al. v. Government of Canada*, PCA Case No. 2009-04,

b) Article 10.16.1(b) permits recovery for losses sustained by the enterprise that the claimant owns or controls. If the injury is to the company, CAFTA-DR requires the claim be submitted by the investor on the company's behalf. Also, if the claimant's injury is only indirect, that is, the shares lost value as a result of injury to the company,[45] that claimant has to bring a claim on behalf of the enterprise that sustained the injury under Article 10.16.1(b) of CAFTA-DR.

43. The CAFTA-DR is modeled after the United States Model Bilateral Investment Treaty ("U.S. Model BIT") of 2004,[46] which includes an identical mechanism for an investor to bring claims on its own behalf for damage it directly sustained or on behalf of its local enterprise for loss the enterprise incurred.[47] This dual system was already present in the North America Free Trade Agreement ("NAFTA"),[48] and was later perfected in the U.S. Model BIT of 2004 and 2012.[49] It was drafted in light of two core principles of international law,[50] namely, that "a company has a legal personality distinct from that of its shareholders,"[51] and that no international claim may be brought against a State on behalf of the State's own nationals.[52] That is, to avoid leaving an investor without international recourse where (i) its investment is made through a local

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Submission of the United States of America, 29 December 2017, ¶ 8 ("Examples of claims that would allow a shareholding investor to seek direct loss or damage include where the investor alleges that it was denied its right to a declared dividend, to vote its shares, or to share in the residual assets of the enterprise upon dissolution. Another example of a direct loss or damage suffered by shareholders is where the disputing State wrongfully expropriates the shareholders' ownership interests—whether directly through an expropriation of the shares or indirectly by expropriating the enterprise as a whole."), **RL-0008-004**.

[45] M. Clodfelter and J. Klingler, *Reflective Loss and Its Limits under International Investment Law*, in C. Beharry (ed.), *Contemporary and Emerging Issues on the Law of Damages and valuation in International Investment Arbitration* (2018), p. 58 (defining reflective loss as "a decrease in the value of a shareholding caused by injury to the company in which the shares are held.") (citations omitted), **RL-0009-002**.

[46] C. Dugan, et al., *Investor-State Arbitration* (2008), p. 72, **RL-0010-004**.

[47] U.S. Model Bilateral Investment Treaty (2004), Section B, Art. 24, "Submission of a Claim to Arbitration," **RL-0011-023-024**.

[48] *See* North American Free Trade Agreement, signed 17 December 1992, Arts. 1116 and 1117, **RL-0012-010-011**. For a discussion on the comparison between Article 10.16.1(a) and (b) of CAFTA-DR and Articles 1116 and 1117 of NAFTA *see* J. Thornton, *Courts and Tribunals Established by Regional Economic Integration* Agreements, in C. Giorgetti (ed.), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (2012), pp. 501-02, fn. 63, **RL-0013-015-016**.

[49] *Renco*, Peru's Reply on Waiver, 17 August 2015, ¶ 20, **RL-0014-008**.

[50] *Clayton*, Submission of the United States of America, 29 December 2017, ¶¶ 6-9 (discussing the distinction between Articles 1116 and 1117 of NAFTA, which structure is similar to that of Articles 10.16.1(a) and 10.16.1(b) of CAFTA-DR), **RL-0008-003-004**.

[51] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 30 November 2010, 2010 I.C.J. Rep. 639, ¶ 155 (noting also that "[t]his remains true even in the case of [a corporation] which may have become unipersonal"), **RL-0015-054**.

[52] I. Brownlie, *Principles of Public International Law* (5th ed. 1998), p. 483 (stating that in order for a claim to be admissible under international law, a claimant must "(a) hav[e] the nationality of the State by whom it is put forward, and (b) not hav[e] the nationality of the State against whom it is put forward"), **RL-0016-021**.

enterprise, and (ii) only the local enterprise suffered direct injury, several investment treaties based on NAFTA and the U.S. Model BIT expressly provide an investor with an avenue to bring a claim on behalf of its locally incorporated company, provided certain requirements are met.[53] This dual mechanism is common in more recent U.S. investment treaties, such as the US-Peru TPA[54] and the CAFTA-DR.

44. Although there is no investment arbitration award under CAFTA-DR that has directly dealt with the damages available under Article 10.16.1(a) as opposed to Article 10.16.1(b) of CAFTA-DR yet,[55] the parties in *Renco* argued this issue under the identical provision in the US-Peru TPA. In the arbitration Peru correctly argued that the claimant who wholly-owned the enterprise "was obligated to bring its claims for injury to [the local enterprise] DRP under Article 10.16.1(b), and accompany such claims with a waiver for [the local enterprise] DRP."[56] Although the Tribunal decided the waiver issue on different grounds, Peru addressed the principles behind this requirement, such as avoiding that the claimant obtain a recovery for the totality of the enterprise's losses, at the expense of the enterprise's creditors.[57] Likewise, the Arbitral Tribunal in *Renco* held that the objective of the waiver is to protect a respondent State from "having to litigate multiple proceedings in different fora relating to the same measure, and to minimise the risk of double recovery and inconsistent determinations of fact and law by different tribunals."[58]

45. The three NAFTA contracting Parties, the United States of America, Canada and Mexico, have consistently maintained that "investors must allege direct damage to recover under Article 1116 [which is similar to Article 10.16.1(a) of CAFTA-DR] and that indirect damage to an investor, based on injury to an enterprise the investor owns or controls, may only be claimed through Article 1117 [which is similar to Article 10.16.1(b) of CAFTA-DR]."[59] Further, indirect

[53] *Clayton*, Submission of the United States of America, 29 December 2017, ¶¶ 9-11, **RL-0008-004-005**.
[54] *Renco*, Peru's Reply on Waiver, 17 August 2015, ¶ 20, **RL-0014-008-009**.
[55] Only nine cases have been brought under CAFTA-DR since the Treaty entered into effect. In five of those cases, claimants brought their claims on behalf of both themselves and their locally incorporated enterprises (*Commerce*, *Ballantine*, *Pac Rim*, *Aven*, *Railroad Corporation).* In *Railroad* brought their claims under both Arts. 10.16.1(a) and (b) of CAFTA-DR. The Tribunal recognized that an award should be paid to the enterprise and awarded damages to the claimant provided it relinquished all rights in the enterprise. In *Teco*, the investor did not own or control directly or indirectly the enterprise, so Article 10.16.1(b) was not available to it. Two cases were dismissed on unrelated jurisdictional grounds (*Berkowitz*, *Corona*), and one was settled before any decision was issued by the Tribunal (*TCW*).
[56] *Renco*, Peru's Reply on Waiver, 17 August 2015, ¶ 23, **RL-0014-010**; *see also id.*, ¶ 28, **RL-0014-012**.
[57] *Id.* ¶ 31, **RL-0014-13-014**.
[58] *Renco*, Partial Award on Jurisdiction, 15 July 2016, ¶ 84, **RL-0019-021**.
[59] *Clayton*, Submission of the United States of America, 29 December 2017, ¶ 5, **RL-0008-002**.

injury sustained by the shareholder, also called reflective loss,[60] is barred from recovery under Article 1116 of NAFTA.[61] Several tribunals have heard arguments under Articles 1116 and 1117 of NAFTA addressing the type of injury available to a claimant on the basis of the article invoked. For instance, in *Mondev*, the Tribunal considered the implications of allowing a claimant to recover for its enterprise's loss under Article 1116. The Tribunal concluded that,

> [H]aving regard to the distinctions drawn between claims brought under Articles 1116 and 1117, a . . . tribunal should be careful **not to allow any recovery**, in a **claim that should have been brought under Article 1117**, to be **paid directly** to the **investor**.[62]

46. The corresponding provisions in CAFTA-DR establish the right of shareholders to bring claims on their own behalf for "direct injury,"[63] and on behalf of their enterprise for injury to that enterprise.[64] The distinction is ultimately based on the right that has been allegedly infringed.[65] If it is the shareholder's right, the shareholder may bring a claim on its own name for direct injury. If the right of the enterprise that the shareholder owns or controls has been infringed, then the shareholder must sue on behalf of the enterprise. In other words, a shareholder who owns or controls an enterprise cannot recover its company's alleged loss in an arbitration brought on the shareholder's own behalf.

B. Claimants Are Pursuing Claims on Their Own Behalf but Seek Compensation for the Alleged Losses of Exmingua, the Enterprise They Fully Own and Control

47. Here, in an effort to circumvent the requirements of CAFTA-DR, Claimants are claiming the damages allegedly suffered by the enterprise they own or control, Exmingua, but purport to bring the Claims on their own behalf.

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[60] M. Clodfelter and J. Klingler, p. 58 (defining reflective loss as "a decrease in the value of a shareholding caused by injury to the company in which the shares are held."), **RL-0009-002**.
[61] *Clayton*, Government of Canada Counter-Memorial on Damages, 9 June 2017, ¶ 28 ("The NAFTA Parties agree that investors must allege direct damage, not reflective losses, to recover under Article 1116."), **RL-0017-019-020**.
[62] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 86, **RL-0018-030**.
[63] Thornton, p. 502, fn. 63, **RL-0013-016**.
[64] Art. 10.16.1 of CAFTA-DR uses the conjunction "and" between sections (a) and (b), **RL-0001-020**.
[65] *Diallo*, Judgment, 30 November 2010, ¶ 156 ("a wrong done to the company frequently causes prejudice to its shareholders . . . damage affecting both company and shareholder will not mean that both are entitled to claim compensation. . . . distinction between injury in respect of a right and injury to a simple interest . . . Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.") (quoting *Case Concerning Barcelona Traction, Light, and Power Co., Ltd (Belgium v. Spain)*, Judgment, 5 February 1970, ¶¶ 44, 46), **RL-0015-054-055**.

48. Claimants "commence[d] arbitration against Guatemala pursuant to Article 10.16.1**(a)** of CAFTA-DR,"[66] which provides that,

> [T]he claimant, **on its own behalf**, may submit to arbitration under this Section a claim . . . (i) that the respondent has breached . . . (A) an obligation under Section A . . .; and (ii) that **the claimant has incurred loss or damage** by reason of, or arising out of, that breach.

49. Despite having selected the Treaty's avenue that allows recovery for "the claimant['s] . . . loss or damage,"[67] Claimants seek recovery for "the enterprise['s] . . . loss or damage."[68] Claimants have not alleged any direct damage caused to their shareholder rights and have solely sought to recover damages allegedly incurred by the enterprise, that is, Exmingua.

50. First, Claimants request relief based on the value of Exmingua's assets and projects, not on any direct injury to Claimants' shareholder rights in Exmingua or Minerales KC. In their Notice of Intent, Claimants announced claims for i) the "**estimated net current value**" of the **Progreso VII** Project, "of approximately $150 million in 2017;" ii) the "**losses** of at least" $150 million "based on the **quantity and quality of the mineral resources**" of **Santa Margarita** Project; and iii) "three **concentrate shipments** with a value of US$500,000" which Claimants allege were "abruptly impounded."[69]

51. In their Notice of Arbitration, Claimants seek compensation for the following:[70]

> (i) Damages of no less than US$ 175 million in connection with the **Progreso VII** Project;
> (ii) Damages of no less than US$ 175 million in connection with the **Santa Margarita** Project;
> (iii) Damages of no less than US$ 500,000 for the **concentrate shipments** impounded by the State …

52. However, Exmingua is the owner of the three assets Claimants allege have been diminished in value, namely, the Progreso VII Exploitation License, the Santa Margarita Exploration License, and the concentrate shipments. The only assets Claimants have are their shares in Minerales KC and Exmingua. None of Claimants' allegations refer to any injury to their shareholding rights.

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[66] Notice of Arbitration, ¶ 18 (emphasis added).
[67] Art. 10.16.1(a) of CAFTA-DR, **RL-0001-019-020**.
[68] Art. 10.16.1(b) of CAFTA-DR, **RL-0001-020**.
[69] Notice of Intent, p. 4, **C-5**.
[70] Notice of Arbitration, ¶ 78.

53. Claimants assert that "[a]s owners of Exmingua, the Investors acquired all legal and beneficial rights, title, and interest in two mining projects located within the orogenic Regional Gold Belt (Cinturón Regional de Oro) called "Tambor" in Guatemala, *i.e.*, Progreso VII Derivada … and Santa Margarita."[71] However, Claimants' own allegations, assuming *arguendo* that they are true, confirm their assertion is wrong. Indeed, Exmingua, Minerales KC and Claimants are four different entities. KCA acquired shares in Minerales KC, and Mr. Kappes acquired shares in Minerales KC and Exmingua. However, the direct or indirect owners of Exmingua do not own Exmingua's assets or rights, just as they are not directly responsible for Exmingua's liabilities or obligations. As a legal entity separate from its shareholders, Exmingua holds its own rights and assets in its own name. In fact, Claimants acknowledge that "the MEM granted Exmingua a 25-year exploitation license for the Progreso VII Project;"[72] "Exmingua applied for a 25-year exploitation license for Santa Margarita and, as a result, its exploration license for the Santa Margarita Project was automatically extended;"[73] and "the General Directorate of Mining granted a one-year, renewable certificate of exportation in favor of Exmingua."[74] As per Claimants' allegations, the three assets belong to Exmingua, not to Claimants.

54. Second, Claimants' factual allegations evidence that the damages allegedly sustained are Exmingua's, not Claimants'. For instance, Claimants contend that "Exmingua obtained some police support, which attempted to break the resistance at the mining site, but the protesters denied them passage and the police ultimately turned around and left."[75] Claimants also assert that "the continuous blockades and protests severely affected both of Exmingua's projects."[76] Claimants allege that "Exmingua was prevented from exploiting the mine and processing and extracting product for export."[77] As to the Santa Margarita project, Claimants allege that "the blockades to the mining site prevented Exmingua from completing the [Environmental Impact Assessment], which was a condition for securing an exploitation license."[78] Generally, Claimants allege that "Guatemala has breached its obligation to provide

[71] *Id*. ¶ 36.
[72] *Id*. ¶ 40 (emphasis added).
[73] *Id*. ¶ 47 (emphasis added). *See also Id*. ¶ 46 (". . . Exmingua also acquired the exploration license for Santa Margarita by an assignment agreement in 2005.")
[74] *Id*. ¶ 40 (emphasis added).
[75] *Id*. ¶ 42.
[76] *Id*. ¶ 50.
[77] *Ibid*.
[78] *Ibid*.

Exmingua full protection and security"[79] and that "Exmingua faced other unlawful and arbitrary actions and omissions of the State that destroyed its investments."[80]

55. The Notice of Arbitration makes no reference to any direct damages Claimants sustained.[81] Any such injury could only result from a breach of CAFTA-DR that causes a direct injury to Claimants' shareholder rights in Exmingua. Direct loss is surely not the damages Claimants seek in this Arbitration for more than $350 million, and for that reason the claims must be dismissed.

C. Claimants Failed to Meet the Additional Requirements CAFTA-DR Imposes on Them if They Seek to Recover Exmingua's Losses on Exmingua's Behalf

56. At least three other provisions in the Treaty establish specific requirements for claims relating to an investment that takes the form of ownership of an enterprise, that is, claims brought on behalf of the local enterprise (Article 10.16.1(b)). The provisions are focused on avoiding double recovery and multiplicity of proceedings, as well as protecting creditors of the enterprise when a claimant brings claims before a tribunal constituted under CAFTA-DR. These requirements are: i) monetary compensation in the investment award must be made directly to the enterprise; ii) ongoing or future litigation in local courts with respect to any measure alleged to constitute a breach of the Treaty must be waived; and iii) claims for alleged violations of the Treaty that the enterprise has already litigated in local courts cannot be relitigated in the arbitration. The following chart summarizes these requirements:

	CAFTA-DR Requirements	Right ➡ Injury	Goal
Art. 10.16.1(a) CAFTA-DR **On a claimant's own behalf for a claimant's injury**	1. Damages paid to claimant (Art. 10.26) 2. Claimant's waiver (Art. 10.18.2(b)(i)) 3. No relitigation of local claims (Annex 10-E)	Violation of Claimant's right ⬇ Claimant recovers direct injury	- Claimant is given **standing** to claim on behalf of its enterprise - **No double recovery** - Respect to **enterprise's separate personality** - Respect to **enterprise's creditors** - **No multiplicity** of proceedings
Art. 10.16.1(b) CAFTA-DR **On the enterprise's behalf for the enterprise's injury**	1. Damages paid to enterprise (Art. 10.26.2) 2. Enterprise's and claimant's waiver (Art. 10.18.2(b)(ii)) 3. No relitigation of local claims (Annex 10-E)	Violation of enterprise's right ⬇ Enterprise recovers direct injury	

[79] *Id.* ¶ 74.
[80] *Id.* ¶ 51 (emphasis added).
[81] Nor is there a request for indirect damages or reflective loss—a type of injury barred from recovery under Art. 10.16.1(a) of CAFTA-DR. *See supra* ¶¶ 40-46.

57. According to the principle of effectiveness (*effet utile*), each provision of a treaty must be given meaning and no provision can be ignored.[82] Moreover, CAFTA-DR requires claimants to formally consent in writing to arbitrate disputes "in accordance with the procedures set out in [the Treaty]."[83] In their Notice of Arbitration, Claimants expressly "consent to arbitration in accordance with the procedures set forth in Chapter 10 of DR-CAFTA,"[84] and yet they failed to meet each of the requirements addressed below.

1. An Investment Arbitration Award Must Provide that Monetary Compensation Be Paid Directly to the Enterprise for Losses Suffered by the Enterprise.

58. Any claim brought on behalf of a local enterprise must necessarily seek compensation *for that enterprise* under CAFTA-DR, Article 10.26.2. If the enterprise suffered the loss, its owner cannot recover compensation for that loss and any damages must be directed to the local enterprise. This basic rule safeguards at least two core principles: (i) an enterprise and its shareholders are different entities; and (ii) the creditors of the enterprise are entitled to protection.

59. To this end, Article 10.26.2 provides:

> Subject to paragraph 1, **where a claim is submitted to arbitration under Article 10.16.1(b)**:
>
> a) an award of restitution of property shall provide that restitution be made to the enterprise;
>
> b) **an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise**; and
>
> c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

60. This provision expressly governs claims brought on behalf of the enterprise, that is, under Article 10.16.1(b) of CAFTA-DR. Sections (a) and (b) of Article 10.26.2 provide that any restitution of property or monetary compensation must go directly to the enterprise. Section (c) protects the enterprise's creditors inasmuch as the award is made without prejudice to any right in the relief that any entity may have under applicable domestic law. Allowing Claimants to seek to

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[82] *Renco*, Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4, 18 December 2014, ¶ 177 ("The Tribunal also notes that the principle of effectiveness (*effet utile*) is broadly accepted as a fundamental principle of treaty interpretation. This principle requires that provisions of a treaty be read together and that 'every provision in a treaty be interpreted in a way that renders it meaningful rather than meaningless (or *inutile*)"), **RL-0004-044**.

[83] Art. 10.18.2(a) of CAFTA-DR, **RL-0001-022**.

[84] Notice of Arbitration, ¶ 16.

recover Exmingua's alleged damages under Article 10.16.1(a) of CAFTA-DR would ultimately prevent Exmingua's creditors from enforcing any rights they may have over the assets of the enterprise, including an arbitral award.[85]

61. As explained by the United States in *Renco v. Peru*: [86]

> [Article 10.26.2] prevents the investor from effectively stripping away a corporate asset – the claim – to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors. […] If an investor could bring a claim under Article 10.16.1(a) for losses or damages incurred by an enterprise, both Articles 10.16.1(b) and 10.26.2 would be rendered ineffective, contrary to the customary international law principle of effectiveness.

62. In other words, allowing a shareholder who owns or controls an enterprise to bring a claim under Article 10.16.1(a) of CAFTA-DR for damages incurred by the enterprise would amount to allowing the shareholder to circumvent the safeguard built into Article 10.26.2 of CAFTA-DR to the detriment of the creditors of the enterprise. Article 10.26.2 of CAFTA-DR would be nullified. Thus, a claim to recover an enterprise's loss must be brought under Article 10.16.1(b) of CAFTA-DR and the damages must be paid to the enterprise and not to the claimant, as mandated by Article 10.26 of CAFTA-DR.[87]

63. Here, in both their Notice of Intent and Notice of Arbitration, Claimants request compensation be paid to Claimants directly for Exmingua's alleged losses.[88] Claimants should not be allowed to circumvent Article 10.26.2 of CAFTA-DR.

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[85] *See Mondev*, Award, 11 October 2002, ¶ 84 (referring to the United States' position, "If the claim is brought under Article 1117, [damages] must be paid to the enterprise, not to the investor . . . This would enable third parties with, for example, security interests or other rights against the enterprise to seek to satisfy these out of the damages paid."), **RL-0018-029-030**; *see also Clayton*, Submission of the United States of America, 29 December 2017, ¶ 19 (noting that the requirement that any restitution be made, or monetary damages be paid, to the enterprise, "is aimed at preventing the investor from effectively stripping away a corporate asset (the claim) to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors."), **RL-0008-008**.

[86] *Renco*, Second Submission of the United States of America, 1 September 2015, fn. 14 (interpreting the US-Peru TPA, which contains an identical provision to CAFTA-DR) (internal citations omitted), **RL-0005-005**.

[87] *Mondev*, Award, 11 October 2002, ¶ 86 (stating, in relation to Articles 1116, 1117 and 1135(2) of NAFTA, that, "[h]aving regard to the distinctions drawn between claims brought under Articles 1116 and 1117, a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor."), **RL-0018-030**.

[88] Notice of Intent, p. 4 ("the Investors intend to submit a claim for arbitration under the Treaty, seeking damages for the harm and in the amounts described above…"), **C-5**; Notice of Arbitration, ¶ 78 ("Claimants hereby request that the Arbitral Tribunal to be constituted in this case issue a final award . . . ordering Guatemala *to compensate Claimants* in the amount of…") (emphasis added).

2. Exmingua Must Waive Ongoing or Future Claims

64. CAFTA-DR, Article 10.18.2(b)(ii), provides that a claimant who brings a claim on behalf of its local enterprise for the losses of the enterprise must submit "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."[89] This waiver provision "reaffirms the distinction between claims by investors for direct injury and claims by investors for injury to their investments."[90]

65. The purpose of this provision is to avoid double recovery, multiplicity of proceedings, contradictory findings from different tribunals and legal uncertainty.[91] Otherwise, multiple parallel proceedings could occur involving the same measure alleged to constitute a breach, or a claimant could bring a claim on behalf of its local enterprise before an investment tribunal and recover losses sustained by the enterprise while, at the same time, the enterprise pursues litigation locally and obtains additional recovery for the same loss.

66. Further, the waiver requirement under CAFTA-DR is not a formal requirement, but it incorporates a material component that requires a claimant to ensure that its local enterprise withdraws from any ongoing proceeding with respect to any measure alleged to constitute a breach under the Treaty. In *Commerce Group Corp. v. The Republic of El Salvador*, the Tribunal concluded that, "Article 10.18(2)(b) of CAFTA requires Claimants to file a formal 'written waiver', and then materially ensure that no other legal proceedings are 'initiated' or 'continued'."[92] To understand the waiver as a mere formal prerequisite "would render it devoid of meaning . . . a waiver must be more than just words; it must accomplish its intended effect."[93]

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[89] Art. 10.18.2(b)(ii) of CAFTA-DR (emphasis added), **RL-0001-022**.
[90] Thornton, p. 502, fn. 63, **RL-0013-016**.
[91] *Renco*, Partial Award on Jurisdiction, 15 July 2016, ¶¶ 84-85, **RL-00019-021-022**.
[92] *Id.* ¶ 84, **RL-00019-021**. *See also Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000, ¶ 20 ("Any waiver, and by extension, that one which is now the subject of debate, implies **a formal and material act** on the part of the person tendering [the] same. To this end, this Tribunal will therefore have to ascertain whether Waste Management did indeed **submit the waiver in accordance with the formalities envisaged under NAFTA and whether it has respected the terms of same** through the material act of either dropping or desisting from initiating parallel proceedings before other courts or tribunals.") (emphasis in the original in part and added in part), **RL-0022-017**.
[93] *Commerce*, Award, 14 March 2011, ¶ 80, **RL-0021-028**.

67. Importantly, Article 10.18.2 of CAFTA-DR requires the waiver to cover "any proceeding," and the requirement is "not restricted to damages claims."[94] The "key question[]" in the analysis of the material element of the waiver is whether the measure[95] before the local court or tribunal is the same measure at issue in the CAFTA-DR arbitration.[96] This proves that the object and purpose of the waiver requirement go beyond foreclosing double recovery. In *Commerce Group Corp. v. The Republic of El Salvador*, the tribunal held that the waiver requirement under Article 10.18.2 of CAFTA-DR required Commerce Group to discontinue Commerce Group's petitions before the Supreme Court of El Salvador to reinstate claimants' environmental permits.[97] Indeed, the proceedings before the local court "relate[d] very much to the same 'measures' as those at issue" in the arbitration[98] where the claimants alleged that El Salvador breached its Chapter Ten obligations when revoking their environmental permits and failing to renew claimants' exploration licenses.[99]

68. Consequently, CAFTA-DR requires a shareholder who seeks to recover its enterprise's losses to: i) submit an enterprise's written waiver of "any" right to initiate or continue "any" local proceeding, monetary or not, with respect to "any" measure alleged to constitute a breach in the Arbitration; and ii) withdraw from any corresponding local proceedings. Both the

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[94] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, ¶ 53 ("**The waivers under Article 10.18.2 are not restricted to damages claims.** They should also cover claims seeking performance. A reading of **Article 10.18.3** confirms this understanding. This paragraph excepts from the waivers actions seeking interim injunctive relief which do not involve the payment of monetary damages and brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration. This exception would have been unnecessary if Article 10.18.2 waivers were limited to damage claims. […]") (emphasis added), **RL-0020-023**. The only type of proceedings which is excluded from the rule waiver are "an action that seeks interim injunctive relief and does not involve the payment of monetary damages . . . provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration."; *see* Art. 10.18.3 of CAFTA-DR, **RL-0001-022**.

[95] Under Art. 2.1 of CAFTA-DR "**measure** includes any law, regulation, procedure, requirement, or practice.", **RL-0001-006**.

[96] *Railroad*, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, ¶¶ 48, 54, **RL-0020-021-024**; *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, ¶ 101, **RL-0021-034-035**. *See also* Thornton, pp. 500-501 ("CAFTA-DR Article 10.18.2(b) instructs that a Claimant must waive its right to initiate or continue '*any proceeding* with respect to *any measure*' alleged to constitute a breach of the Agreement as defined in CAFTA-DR Article 10.16. This means that a CAFTA-DR Claimant must abandon any right to pursue proceedings challenging measures at issue in a Chapter Ten case that it might have had otherwise before the municipal tribunals or courts of the CAFTA-DR Parties, or under dispute settlement procedures established by contract or another instrument."), **RL-0013-014-015**.

[97] *Commerce*, Award, 14 March 2011, ¶ 107, **RL-0021-037**.

[98] *Id.* ¶¶ 101, 62, 63, **RL-0021-034-035**.

[99] *Id.* ¶¶ 9, 10, **RL-0021-006**.

formal and material requirements must be met at the time the notice of arbitration is filed in order for jurisdiction to vest in the Tribunal.[100]

69. Claimants have failed to meet both elements of the waiver requirement. The waiver submitted by Claimants with their Notice of Arbitration was signed only by them; no written waiver for Exmingua was submitted.[101] Failing to submit Exmingua's written waiver is enough for the Tribunal to dismiss all the Claims, disregarding whether or not there is any related litigation ongoing in Guatemala. Guatemala did not give its consent to arbitrate any claim for Exmingua's losses unless a waiver signed by Exmingua was submitted with the Notice of Arbitration.[102] A CAFTA-DR arbitral tribunal "has no jurisdiction without agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver" and "[i]t is for the Respondent and not the Tribunal to waive any deficiency under Article 10.18 or to allow a defective waiver to be remedied."[103]

70. As regards the material requirement of the waiver requirement, the measure that is alleged to amount to a violation here and in the local proceedings is the suspension of Exmingua's exploitation license for the Progreso VII Project in 2015. Exmingua has appealed the suspension several times, the latest to Guatemala's Constitutional Court. That proceeding "remains pending."[104] This ongoing litigation relates "very much to the same '**measures**' as those at issue"[105] in this Arbitration, in particular, to the suspension of Exmingua's Progreso VII exploitation license.[106] Specifically, Claimants brought claims for violation of the national treatment and most favored nation treatment standards as well as for a breach of the minimum standard of treatment and an expropriation on the basis of that suspension.[107] Further, Claimants allege that there is a *de facto* moratorium on exploitation licenses in Guatemala, which constitutes a breach of the minimum standard of treatment and an expropriation.[108] Even if the *de facto* moratorium constituted a measure under CAFTA-DR – which it does not[109] –, it is not a "separate

[100] *Id.* ¶¶ 96-97, **RL-0021-033-034**.
[101] Claimants' Waiver Pursuant to DR-CAFTA Article 10.18, 2 November 2018, **C-4**.
[102] Art. 10.18.2 of CAFTA-DR, **RL-0001-022**.
[103] *Railroad*, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, ¶ 61, **RL-0020-026**.
[104] Notice of Arbitration, ¶ 59.
[105] *Commerce*, Award, 14 March 2011, ¶ 101, **RL-0021-030**.
[106] Notice of Arbitration, ¶ 59.
[107] *Id.* ¶¶ 68, 72, 77.
[108] *Id.* ¶¶ 72, 77.
[109] *Commerce*, Award, 14 March 2011, ¶ 112 ("the *de facto* mining ban policy . . . is a policy of the Government as opposed to a 'measure' taken by it."), **RL-0021-039**.

and distinct" claim from the revocation of Exmingua's Progreso VII exploitation license.[110] Claimants' own allegations in the Arbitration show that the Claims are based on the suspension of the license of the Progreso VII Project:

a. Claim for an Alleged Violation of the National Treatment and Most Favored Nation Treatment. According to Claimants, "Exmingua has received less favorable treatment by the courts and by MEM than has been accorded to . . . other projects."[111] Claimants complain that "the **Progreso VII Project been suspended** for over two years, during which time an appeal to the Constitutional Court has been pending . . ."[112]

b. Claim for an Alleged Violation of the Minimum Standard of Treatment. According to Claimants, "Guatemala breached its obligation to accord Claimants' investment fair and equitable treatment by, among other things, **suspending Exmingua's operations at Progreso VII** although it was in possession of a validly-issued exploitation license . . . and adopting a *de facto* moratorium on granting exploitation licenses, contrary to law and Claimants' legitimate expectations."[113]

c. Claim for Alleged Expropriation. Claimants argue that "Guatemala has expropriated Claimants' investment in Exmingua, because the State's **suspension of the exploitation license for the Progreso VII Project** and its illegal *moratorium* have deprived Exmingua of the use and enjoyment of its mining rights to the Progreso VII and Santa Margarita Projects."[114]

71. To make things worse, if Claimants obtain the relief they seek in this Arbitration, they will obtain compensation for Exmingua's inability to exploit its mine over the past several years, while Exmingua may have its exploitation license reinstated by the Constitutional Court of Guatemala which would continue to be effective for another 25 years. This would result in a windfall to Claimants and a potential double recovery because, in the event Exmingua's

[110] *Id.* ¶¶ 111-112 (finding that Commerce Group's claims regarding the alleged *de facto* mining ban policy was not "separate and distinct" from the measures at issue before the Supreme Court of El Salvador where Commerce Group had challenged the revocation of the environmental permits that allowed the company to mine precious metals in El Salvador. Thus, the claim was also barred by Article 10.18.2 of CAFTA-DR.), **RL-0021-038-039**.
[111] Notice of Arbitration, ¶ 68.
[112] *Ibid.*
[113] *Id.* ¶ 72.
[114] *Id.* ¶ 77.

exploitation license is reinstated, Exmingua would then have sufficient time to exploit a mine that, per Claimants' own allegations, has an operational phase of only five years.[115] In other words, Claimants would obtain a double recovery which CAFTA-DR expressly prohibits.

3. *Claims for Losses to the Enterprise that Have Been Litigated Locally Cannot Be Re-litigated Before International Tribunals*

72. Under Annex 10-E of CAFTA-DR, a U.S. investor cannot submit to arbitration a claim for breach of an obligation under the Treaty on behalf of an enterprise if the enterprise "has alleged that breach of an obligation" in proceedings before a local court.

73. Annex 10-E of CAFTA-DR, Section 1, states that:

> 1. An investor of the United States may not submit to arbitration under Section B a claim that a Central American Party or the Dominican Republic has breached an obligation under Section A either:
>
> (a) on its own behalf under Article 10.16.1(a), or
>
> (b) on behalf of an enterprise of a Central American Party or the Dominican Republic that is a juridical person that the investor owns or controls directly or indirectly under Article 10.16.1(b),
>
> if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section A in proceedings before a court or administrative tribunal of a Central American Party or the Dominican Republic.

74. This 'Fork-in-the-Road' provision requires the claimant to make an election between seeking a remedy before a local court or an arbitral tribunal.[116] The provision embodies the general principle of *electa via*, which precludes dual pursuit of the same claim in two or more *fora*. As a result, when the enterprise chooses to assert "claims [that] share the same fundamental basis"[117] as the claims asserted before the CAFTA-DR tribunal before a host State's court, it forfeits the right to sue—or have its owner sue on its behalf—before an investment tribunal. In

[115] *Id.* ¶ 40.
[116] C. McLachlan QC, et al., *International Investment Arbitration* (2nd ed. 2017), ¶ 4.100, **RL-0023-029**.
[117] *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award (excerpts), 6 May 2014, ¶¶ 368-370, **RL-0024-036-037**; *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania,* ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶ 61 (*citing* the *Woodruff* case), **RL-0025-017**; Annex 10-E of CAFTA-DR, **RL-0001-039**.

other words, "[t]he key is to assess whether the same dispute has been submitted to both national and international fora."[118] Claimants have breached the fork-in-the-road provision.

75. Claimants bring a claim, on their own behalf, for Guatemala's alleged violation of its "obligation to provide full protection and security" to Exmingua under the Treaty.[119] Claimants' allegations to support this claim are almost identical to Exmingua's allegations regarding the same purported breach (*i.e.*, the State's failure to act) before the Guatemalan courts in two separate proceedings, initiated by Exmingua on September 3, 2012, and April 22, 2016.[120] Below is a chart which compares the allegations in the three proceedings:

Notice of Arbitration	**2012 Litigation**	**2016 Litigation**
"Guatemala's failure to act in this regard . . . have resulted in **Exmingua's employees being threatened** when attempting to access the sites and work stoppages at the site."[121] "One month after construction began, members of the communities near the project, supported by non-governmental organizations, **blockaded access** to the mine. Two months later, Exmingua obtained some police support, which attempted to break the resistance at the mining site, but the protesters denied them passage and **the police ultimately turned around and left.** KCA and Exmingua sought assistance from various local and national government authorities, but the **State failed to take meaningful or effective action** to stop the ongoing,	"[T]he '**omission of intervention,** by the authority, **to protect people and vehicles** in and around the facilities of the mining project Progreso VII. . ."[123] "[I]llegal arrests, harassment, injuries, **threats and coercion against the project's workers** had occurred on the project site, in addition to various damages to its facilities, and although the national police was aware of this situation, **the necessary measures have not been taken** to guarantee and protect the people and vehicles that must enter to the project."[124]	"[T]he **failure and the threat** that the … **authorities** do not guarantee the constitutional rights and **maintain public order in the blockades** promoted … in areas … of the Progreso VII Derivada mining project."[125]

[118] *Pantechniki*, Award, 30 July 2009, ¶ 61, **RL-0025-017**.
[119] Notice of Arbitration, ¶¶ 73-74.
[120] *Id.* ¶¶ 42-44, 56, 74.
[121] *Id.* ¶ 74.
[123] *Id.* ¶ 43.
[124] *Id.* ¶ 43.
[125] *Id.* ¶ 56.

unlawful blockade of the Progreso VII Project.[122]		

76. As regards the 2012 litigation, Exmingua filed an amparo action against several authorities in Guatemala.[126] Although the amparo was initially granted, the amparo was later revoked by the Guatemalan Constitutional Court.[127]

77. On April 22, 2016, Exmingua filed a new amparo action before the Constitutional Court, this time against the President of the Republic of Guatemala, the Ministry of Government, and the General Directorate of the National Civil Police. Exmingua lost, and the Constitutional Court of Guatemala did not grant the amparo.[128]

78. Had Claimants initiated this Arbitration on behalf of Exmingua under Article 10.16.1(b) of CAFTA-DR, they would be precluded from bringing their full protection and security claim again in this Arbitration under Annex 10-E of CAFTA-DR. Claimants should not be allowed to circumvent the "Fork-in-the-Road" provision by disguising their claims as claims made on their own behalf under Article 10.16.1(a) of CAFTA-DR.

* * *

79. In conclusion, Claimants seek to recover Exmingua's alleged losses under a CAFTA-DR provision which only allows a claimant who owns or controls an enterprise to recover for injuries directly sustained by the claimant. Although the Treaty provides a mechanism for Claimants to seek, on behalf of Exmingua, to recover any losses sustained by Exmingua, Claimants have not availed themselves of that mechanism. To the contrary, ignoring basic principles of corporate and international law, and seeking to obtain a windfall and potential double recovery, Claimants: (i) failed to request an award seeking compensation for alleged losses incurred by Exmingua, and instead seek to recover any such losses themselves (for losses they did not sustain), ignoring corporate formalities, the rights of Exmingua's creditors and the high risk of double recovery; (ii) failed to waive Exmingua's rights to litigate the same claims in Guatemala, and worse, allowed Exmingua to maintain litigation proceedings in Guatemala; and (iii) refused to relinquish claims that have already been litigated, while instead choosing to relitigate claims that the Guatemalan courts have already decided.

[122] *Id.* ¶ 42.
[126] *Id.* ¶ 44.
[127] *Id.* ¶ 44.
[128] *Id.* ¶ 56.

80. The Tribunal should reject Claimants' attempt to circumvent CAFTA-DR's procedures and restrictions and dismiss all their claims for the reasons provided.

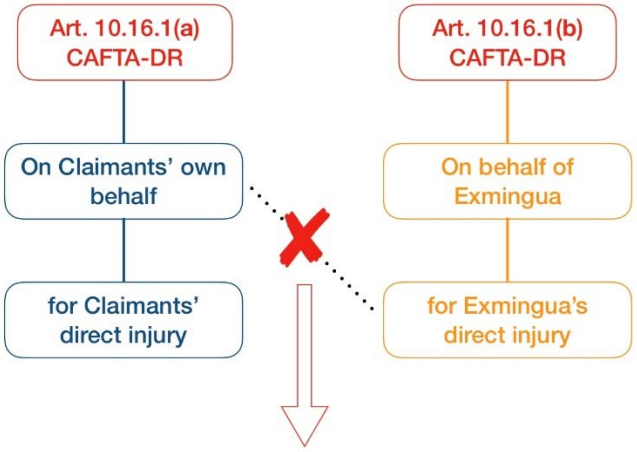
81. First, assuming that Claimants' "factual allegations in support of [their] claim[s]"[129] are true, as a matter of law, Claimants' are not claims "for which an award in favor of the claimant[s]" can be made under Article 10.26 of CAFTA-DR"[130] and other CAFTA-DR provisions. The Notice of Arbitration does not set forth a cause of action upon which relief can be granted under CAFTA-DR. The relief available under Article 10.16.1(a) of CAFTA-DR for a claimant who owns or controls an enterprise is compensation for direct injury sustained by a claimant. Because Claimants have only alleged direct injury to Exmingua, they have not alleged a claim upon which relief can be granted. The Claims fail as a matter of law and must be dismissed under Article 10.20.4 of CAFTA-DR.

82. Second, the Claims must be dismissed under Article 10.20.5 of CAFTA-DR because they fall outside the Tribunal's jurisdiction. Despite seeking to recover Exmingua's alleged injuries, Claimants did not waive Exmingua's rights to initiate or continue local litigation "with respect to any measure alleged to constitute a breach referred to in Article 10.16."[131] As a result, Guatemala has not provided its consent to arbitrate the Claims.[132]

83. Third, the Claims must be dismissed under Article 10.20.5 of CAFTA-DR because they are inadmissible. Claimants lack standing in this Arbitration initiated under Article 10.16.1(a) of the Treaty to seek to recover the losses or damages suffered by the local enterprise.

[129] Art. 10.20.4(c) of CAFTA-DR, **RL-0001-024**.
[130] Art. 10.20.4 of CAFTA-DR, **RL-0001-024**.
[131] Art. 10.18.2(b) of CAFTA-DR, **RL-0001-022**.
[132] *Renco*, Second Submission of the United States of America, 1 September 2015, ¶ 15 (noting, in relation to a provision identical to Article 10.16.1 of CAFTA-DR, that "[f]ailure to make a claim under the appropriate provision(s) in Article 10.16 and to comply with the conditions and limitations on consent in Article 10.18, including the waiver provision, results in lack of consent by the Party and the concomitant lack of jurisdiction of the tribunal with respect to that claim."), **RL-0005-006**.

84. Respondent's first objection may be summarized as follows:



Consequence	Grounds for Dismissal	CAFTA-DR
Claimants **failed to meet CAFTA-DR requirements** to seek to recover Exmingua's alleged losses	**As a matter of law**, an award cannot be made in favor of Claimants	10.16.1 **10.20.4**
Claimants **lack standing** to seek to recover Exmingua's alleged losses	Claims are **inadmissible**	10.16.1 **10.20.5**
The Respondent **did not consent to arbitrate** claims for Exmingua's alleged losses without Exmingua's waiver	The Tribunal lacks **jurisdiction**	10.18.2(b)(ii) **10.20.5**

85. The Tribunal must dismiss all the Claims for the reasons provided. There are also two claims that must be dismissed on separate grounds even if the Tribunal were to deny this first objection, as will be explained below.

VI. CLAIMANTS OMITTED THE MOST-FAVORED-NATION TREATMENT CLAIM IN ITS NOTICE UNDER ARTICLE 10.16.2 OF CAFTA-DR AND MUST BE DISMISSED

86. Claimants ignore the fact that they did not include a Most-Favored-Nation Claim in their Notice of Intent. This Arbitral Tribunal cannot. The CAFTA-DR requires that arbitral tribunals enforce the notice of intent required under the Treaty.

87. Article 10.16.2 of CAFTA-DR, obligates a claimant to deliver "a written notice of its intention to submit the claim to arbitration ('notice of intent') . . . [a]t least 90 days before submitting *any* claim to arbitration[.]"[133] Claimants sent a Notice of Intent to Guatemala on May 16, 2018, which did not include a claim for violation of the Most-Favored-Nation Treatment

[133] Art. 10.16.2 of CAFTA-DR (emphasis added), **RL-0001-020**.

protection under Article 10.4 of CAFTA-DR.[134] Claimants identified this claim for the first time in their Notice of Arbitration of November 9, 2018, failing to satisfy the CAFTA-DR's notification requirement and ignoring its "required 90-day period," as described by Claimants.[135] As a result, Claimants' Most-Favored-Nation Treatment claim must be dismissed based on the language of Article 10.16.2 of CAFTA-DR, the object and purpose of the provision and prior decisions of investment arbitral tribunals. Claimants' untimely claim cannot be heard by the Tribunal.

D. Article 10.16.2 of CAFTA-DR Requires Notice of a Claim at Least 90 Days Before It May Be Submitted to Arbitration

88. Article 10.16.2 of CAFTA-DR reads as follows:

> 2. At least 90 days before submitting any claim to arbitration under this Section**, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration** ("notice of intent"). **The notice shall specify:**
>
> (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
>
> (b) **for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached** and any other relevant provisions;
>
> (c) **the legal and factual basis for each claim**; and
>
> (d) the relief sought and the approximate amount of damages claimed.
>
> (emphasis added)

Pursuant to the express terms of CAFTA-DR, a prerequisite to the submission of a claim to arbitration is the written presentation to respondent of a notice of intent.[136] The notice of intent must not merely provide general information, but must specify, "for each claim, the provision of [CAFTA-DR] . . . alleged to have been breached," "the legal and factual basis for each claim," and "the relief sought," among other elements.[137] A claimant must then wait at least 90 days before

[134] *See* Notice of Intent, **C-5**.
[135] Notice of Arbitration, ¶ 28.
[136] Art. 10.16.2 of CAFTA-DR, **RL-0001-020**.
[137] *Ibid.*

submitting the notice of arbitration with each of those claims under Article 10.16.4 of CAFTA-DR.

89. Both the submission of the notice of intent and the 90 day waiting period are mandatory.[138] The Tribunal shall examine the "ordinary meaning" of the terms of Article 10.16.2 of CAFTA-DR "in their context and in the light of their object and purpose."[139] "The Tribunal shall also be guided by the principle of *effet utile*."[140]

90. The term "shall" in Article 10.16.2 of CAFTA-DR, as opposed to "may" or "should" in other provisions (*e.g.* Article 10.15 and Article 10.16.1 of CAFTA-DR), indicates the CAFTA-DR Parties' deliberate choice to make the notice of intent mandatory.[141] Further, the term "each" means "every one of two or more people or things, regarded and identified separately."[142] Only the claims properly identified in the notice of intent can be heard by an arbitral tribunal.

91. Moreover, the CAFTA-DR should be read so that meaning is attributed to the words in the text.[143] Recasting the delivery of the notice of intent to a discretionary condition or optional

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[138] C. Leathley, *International Dispute Resolution in Latin America: An Institutional Overview* (2007), p. 243 ("Given the **obligation** to file a notice of intent, this will often mean that at the slightest sign of a claim, a disputing investor will tend to lodge a notice of intent, to ensure the relevant timeframes do not become an obstacle in the event negotiations are unsuccessful.") (emphasis added), **RL-0026-006**; *Pac Rim*, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶¶ 92-93, **RL-0003-054-055**.

[139] Vienna Convention on the Law of Treaties ("VCLT"), signed 23 May 1969, Art. 31 (General rule of interpretation) ("1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."), **RL-0027-019-020**.

[140] *Murphy Exploration & Production Company International v. Republic of Ecuador*, PCA Case No. 2012-16 (formerly AA 434), Partial Award on Jurisdiction, 13 November 2013, ¶ 171, **RL-0028-049-050**.

[141] *See e.g. Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶¶ 71-72 (interpreting Article 8 of the BIT between the Kingdom of the Netherlands and the Republic of Turkey) ("71. **The language is mandatory in form.** The explicit requirements that the parties must seek to engage in consultations and negotiations with respect to the dispute as arising under the BIT and that there be a one-year waiting period from the date the dispute arose are accepted by the Tribunal as pre-conditions to submitting the dispute to arbitration. . . 72. . . . **The explicit requirements to give notice of the dispute** as arising under the BIT and to seek consultations and negotiations until one year has elapsed from the date of notification of the dispute **is not to be watered down to a mere statement of aspiration**.") (emphasis added), **RL-0029-019-020**.

[142] "Each" in Lexico.com, Oxford University Press, https://www.lexico.com/en/definition/each (last accessed 16 August 2019), **RL-0030-001**.

[143] *Murphy*, Partial Award on Jurisdiction, 13 November 2013, ¶ 171 (*citing* R. Gardiner, *Treaty Interpretation* (2008), p. 64) ("The Tribunal shall also be guided by the principle of *effet utile*, which requires tribunals to interpret treaty

requirement would ignore and in essence delete the words "shall deliver" and "shall specify" set out in Article 10.16.2 of CAFTA-DR. Allowing a claimant to bring a claim now which was omitted from the notice of intent would ignore the words "each claim" in Article 10.16.2 of CAFTA-DR. It would reduce this language to surplusage and to be of no effect when the CAFTA-DR Parties agreed to those words for a reason. Importantly, CAFTA-DR's formal notice of intent requirement is not included in the ICSID Arbitration Rules.[144] That is, it is an additional step the CAFTA-DR Parties purposely added. *A fortiori*, an interpreter should be careful to interpret the provision so as to give them their fullest weight and effect. In order to give full effect to the terms of Article 10.16.2 of CAFTA-DR, the notice of intent requirement must be enforced.

E. The Object And Purpose of the Notice of Intent Provision Requires the Dismissal of the Most-Favored-Nation Treatment Claim

92. First, the object and purpose of the notice of intent requirement under CAFTA-DR "is evident: to allow a respondent State to prepare and argue its defense."[145] Indeed, "[i]t is a right of the Respondent to have a clear framework of the claims from the outset."[146]

93. Second, the notice of intent gives respondents an opportunity to assess the cost-benefit of settlement before the claims are submitted to arbitration. "[P]roper notice allows the State to examine and possibly resolve the dispute through negotiation."[147] This is especially true in the case of arbitrations under CAFTA-DR. The CAFTA-DR Parties intentionally included a heightened requirement to identify, in the notice of intent, each claim, the factual and legal basis

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provisions 'so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.'"), **RL-0028-049-050**.

[144] Art. 10.16.5 of CAFTA-DR ("The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement."), **RL-0001-021**.

[145] *David R. Aven et. al. v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, ¶ 346, **RL-0031-120**.

[146] *Id.* ¶ 344, **RL-0031-119-120**.

[147] *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, ¶ 339, **RL-0032-149**; *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order, 16 March 2006, ¶ 5 ("Proper notice is an important element of the State's consent to arbitration, as it allows the State, acting through its competent organs, to examine and possibly resolve the dispute by negotiations."), **RL-0033-001**. *See also* NAFTA Free Trade Commission, Statement on Notices of Intent to Submit a Claim to Arbitration Under NAFTA Article 1119, 7 October 2003, ¶ 2 ("Efforts to settle NAFTA investment claims through consultation or negotiation have generally taken place only after the delivery of the notice of intent. The notice of intent naturally serves as the basis for consultations or negotiations between the disputing investor and the competent authorities of a Party. **In order to provide a solid foundation for such discussions, it is important that the notice of intent clearly identify the investor and the investment and specify the precise nature of the claims asserted.**") (emphasis added), **RL-0034-001**.

for each one of them, and the damages claimed. In the words of the tribunal in *Pac Rim*, "liability, causation and damages must be pleaded under CAFTA . . . as regards the notice of intent."[148] The goal is to allow a respondent to preliminarily assess any potential liability and to measure the consequences that would follow should it fail to reach a settlement with a potential claimant. For that purpose, each and every claim must be specified in the notice of intent. Recasting the delivery of the notice of intent to a discretionary condition or optional requirement, or limiting its scope to some claims as opposed to "each claim," would deprive a sovereign of the clarity, certainty, warning and corresponding decision-making opportunities afforded by a 90-day notice of intent before facing an ICSID arbitration for that specific claim.

94. Third, the specific notice requirement was adopted in line with the CAFTA-DR goals to "STRENGTHEN the special bonds of friendship and cooperation among their nations," "CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation," and "CONTRIBUTE to hemispheric integration".[149] Parties should attempt to resolve a dispute wherever possible and avoid an arbitration that can destroy a relationship and render future investment and constructive opportunities more difficult. If investors do not specify all their claims in the notice of intent, the policy function of Article 10.16.2 of CAFTA-DR is thwarted. The state party would be unable to engage in a meaningful dialogue with an investor before a claimant initiates an international investment dispute.

95. Fourth, specifying each and every claim in the notice of intent provides legal certainty and promotes fairness, efficiency and transparency.

96. Thus, the object, purpose and express language of the notice provision in CAFTA-DR mandates that claims not included in a notice of intent be dismissed.

F. Investment Arbitration Tribunals Dismiss Claims for Failure to Meet the Notice Requirement under CAFTA-DR and Similar Treaties

97. In *Pac Rim v. El Salvador*, the arbitral tribunal explained that compliance with the notice requirement under Article 10.16.2 of CAFTA-DR is mandatory: [150]

[148] *Pac Rim*, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶ 93, **RL-0003-055**.
[149] Preamble of CAFTA-DR, **RL-0001-001-002**.
[150] *Pac Rim*, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶¶ 92-93, **RL-0003-054-055**.

> 92. Moreover, the procedure under CAFTA Article 10.20.4 is to be read with CAFTA Articles 10.16.1 and 10.16.2 which requires a claimant's notice of intent to claim liability for a breach and to "specify" (*inter alia*):
>
> > *"(b)* ***for each claim the provision of [CAFTA]****, investment authorization, or investment agreement* ***alleged to have been breached*** *and any other relevant provisions;*
> > *(b)* ***the legal and factual basis for each claim****; and*
> > *(c) the relief sought and the approximate amount of damages claimed."*
>
> 93. **It would therefore be impermissible for a claimant to evade pleading the factual basis for each of its claims in the notice of intent**: a mere conclusion could not specify a factual basis. Accordingly, **liability, causation and damages must be pleaded under CAFTA Article 10.16.1** and Article 10.16.2(b), (c) and (d) as regards the notice of intent.
>
> (emphasis added)

98. Accordingly, a claimant's failure to follow the agreed sequencing under Article 10.16.2 of CAFTA-DR and to notify a respondent of a claim in the notice of intent renders the claim inadmissible.

99. In *Aven v. Costa Rica*, the arbitral tribunal emphasized that Article 10.16.2 of CAFTA-DR requires the identification of the investor's claims in the notice of intent and pointed out that proper notice ensures the respondent's right of defense. Thus, the tribunal determined that any claims not included in the notice of intent were inadmissible:[151]

> 344. The Tribunal agrees that the State's consent to arbitration under CAFTA-DR presupposes the compliance with the requirement for the submission of a claim, including but not limited to those under **article 10.16(2)**, which establish **the need to include in the notice of intent not only a factual description for each claim, but also the "legal basis" thereof. It is a right of the Respondent to have a clear framework of the claims from the outset.**
>
> […]
>
> 346. … **The need to timely and properly submit a claim is evident: to allow a respondent State to prepare and argue its defense.** Therefore, **since Claimants failed to timely plead a claim for breach of full protection and security, it declares this claim as inadmissible *in limine*.** The Tribunal nonetheless expressly states that this does not prejudice the

[151] *Aven*, Final Award, 18 September 2018, ¶¶ 344-346, **RL-0031-119-120**.

> rest of the claims timely presented by Claimants, and these will be examined below.
>
> (emphasis added)

100. The inadmissibility of claims that have not been properly notified to respondent is not unique to CAFTA-DR. For example, in *Supervisión y Control, S.A. v. Costa Rica*, the tribunal constituted under the Costa Rica – Spain BIT dismissed claims that had not been properly notified to Costa Rica. The *Supervision* tribunal stressed the importance of complying with the agreed-to notice requirements in order to favor the amicable settlement of disputes. The tribunal held that claims not notified and first included in the request for arbitration are inadmissible:[152]

> 339. Additionally, **the Tribunal would like to remind the importance of proper notice, which is an important element of the State's consent to arbitration.** Indeed, **proper notice allows the State to examine and possibly resolve the dispute through negotiation.**
>
> 340. The failure to duly notify the State receiving the investment of the existence of a dispute constitutes a violation of Article XI.1 of the Treaty. **This implies that any claim that has not been notified is inadmissible in the respective proceeding, because the prior negotiation process agreed to by the parties has not been exhausted.**
>
> 341. In the event that the Investor notifies certain claims to the State, but upon presenting the Request for Arbitration or its Claim Memorial it adds claims different and not directly related to those previously presented, **all the claims not notified will be inadmissible**. Thus, the proceeding will only address the previously notified claims under the requirement set forth in Article XI.1 of the Treaty.
>
> (emphasis added)

Importantly, the provision governing notices under CAFTA-DR is stricter than the analogous provision under the Costa Rica – Spain BIT. First, Article XI(1) of the Costa Rica – Spain BIT only requires claimant to give written "[n]otice of any investment-related **dispute**"[153] whereas

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[152] *Supervision*, Award, 18 January 2017, ¶¶ 339-341, **RL-0032-149-150**.

[153] *Id.* ¶ 5 ("Article XI. Disputes between a Party and investors of the other Party. 1. **Notice of any investment-related dispute** arising between one of the Parties and an investor of the other Party with respect to matters governed by this Treaty **shall be given in writing, including detailed information, by the investor to the Party receiving the investment.** To the extent possible, the parties to the dispute shall try to settle such disputes by an amicable agreement. 2. If the dispute cannot be settled in such manner within a period of six months after the date of the written notice referred to in Paragraph 1, the investor may submit the dispute: a) to the competent courts of the Party in whose territory the investment was made; b) to an international arbitral tribunal from among those cited below: i) the International Centre for Settlement of Investment Disputes (ICSID), created by the 'Convention on the Settlement of

Article 10.16.2 of CAFTA-DR requires claimant to provide "written notice of its intention to submit **the claim** to arbitration".[154] Second, Article XI(1) of the Costa Rica – Spain BIT merely requires claimant to include "**detailed information**" in the notice,[155] whereas notices under Article 10.16.2 of CAFTA-DR must specify, "**for each claim, the provision of [CAFTA-DR]** . . . alleged to have been breached," "the legal and factual basis for each claim," and "the relief sought," among other elements.[156] Therefore, the inadmissibility of claims not identified in the notice of intent is even more straightforward under Article 10.16.2 of CAFTA-DR.

101. Likewise, in *Antoine Goetz et consorts v. République du Burundi*, a claim that had not been properly notified was also dismissed. While claimants notified Burundi of their claim regarding the withdrawal of a certificate of free zone issued by Burundi, they failed to give notice of their claims regarding the reimbursement of taxes, duties and convertible shares, as the Belgium – Burundi Investment Convention required. The tribunal found that claimants' failure to comply with the procedural prerequisite requirements, rendered the latter claims inadmissible:[157]

> 90. The second problem of admissibility pertains to the procedural requirements prior to the filing of the request for arbitration. According to Article 8 (2) and (3) of the Belgian-Burundian Investment Convention,

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Investment Disputes between States and Nationals of Other States', opened for signature on March 18, 1965, when each State party to this Treaty adhered to such;…") (emphasis added), **RL-0032-011**.

[154] Art. 10.16.2 of CAFTA-DR (emphasis added), **RL-0001-020**.

[155] *Supervision*, Award, 18 January 2017, ¶ 5 (emphasis added), **RL-0032-001**.

[156] Art. 10.16.2 of CAFTA-DR (emphasis added), **RL-0001-020**.

[157] *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, ¶¶ 90-93 ("90. Le second problème de recevabilité tient à l'exigence d'une procédure préalable au dépôt de la requête d'arbitrage. En effet, aux termes de l'article 8, paragraphes 2 et 3, de la Convention belgo-burundaise d'investissement, 2. **Tout différend relatif aux investissements fait l'objet d'une notification écrite, accompagnée d'un aide-mémoire suffisamment détaillé établi à l'initiative de l'investisseur de l'une des parties, à l'autre partie contractante.** Ce différend est, de préférence, réglé à l'amiable par un arrangement entre les parties au différend et, à défaut, par la conciliation entre les parties contractantes, par la voie diplomatique. 3. Si le différend ne peut être réglé dans les trois mois à compter de la notification écrite visée au paragraphe 230, il est soumis, à la demande de l'investisseur concerné, pour conciliation ou arbitrage au Centre international pour le règlement des différends relatifs aux investissements (CIRDI). […] 92. Il ressort de ce qui précède que **les conditions de recevabilité énoncées par l'article 8, paragraphes 2 et 3, de la Convention belgo-burundaise d'investissement sont satisfaites en ce qui concerne les conclusions de la requête portant sur la légalité et les conséquences juridiques du retrait du certificat d'entreprise franche en date du 29 mai 1995.** 93. **Les conditions énoncées par les dispositions précitées de l'article 8, paragraphes 2 et 3, de la Convention belgo-burundaise de protection des investissements ne sont, en revanche, pas remplies en ce qui concerne les conclusions de la requête tendant à la condamnation de la République du Burundi à rembourser les taxes fiscales et douanières acquittées par AFFIMET, ainsi que les devises convertibles échangées en francs burundais par AFFIMET**, pendant la période antérieure au cours de laquelle le certificat d'entreprise franche avait été suspendu, soit entre le 20 août 1993 et le 10 janvier 1994. **Ces conclusions sont, en conséquence, irrecevables**, et le différend sur lequel le Tribunal est appelé à se prononcer porte exclusivement sur la licéité et les conséquences de la décision du 29 mai 1995 portant retrait du certificat d'entreprise franche accordé à la société AFFIMET.") (emphasis added), **RL-0035-001-002**.

> 2. **Any dispute relating to investments shall be the object of a written notice, accompanied by a sufficiently detailed memorandum addressed, at the initiative of the investor of one of the parties, to the other contracting party.**
>
> In the first place such a dispute should be amicably settled by an agreement between the parties to the dispute and, in the absence of such, by conciliation between the contracting parties, through diplomatic channels.
>
> 3. If the dispute cannot be settled within three months following the written notice referred to in paragraph 2, it is submitted, at the request of the investor concerned, to conciliation or arbitration before the International Center for the Settlement of Investment Disputes (ICSID).
>
> […]
>
> 92. It results from the above that **the admissibility requirements set out in Article 8 (2) and (3) of the Belgian-Burundian Investment Convention are satisfied as regards the claims concerning the legality and the legal consequences of the withdrawal of the certificate of free zone dated May 29, 1995.**
>
> 93. **The conditions laid down by the aforementioned provisions of Article 8 (2) and (3) of the Belgium-Burundi Investment Protection Convention are, however, not fulfilled as regards the claims seeking an order that the Republic of Burundi returns the taxes and duties paid by AFFIMET, as well as the convertible shares exchanged in Burundi francs by AFFIMET**, during the period prior to which the free zone company certificate was suspended, that is between August 20, 1993 and January 10, 1994. **These claims are, accordingly, inadmissible**, and the dispute on which the Tribunal is called upon to decide relates exclusively to the legality and consequences of the decision of May 29, 1995, on the withdrawal of the free zone company certificate granted to the company AFFIMET.
>
> (our translation) (emphasis added)

Again, as was the case with the Costa Rica – Spain BIT, the notice requirements in the Belgium – Burundi Investment Convention are less stringent than CAFTA-DR's, and under that less stringent standard the tribunal dismissed the claims for failure to meet the notice requirement. While the Belgium – Burundi Investment Convention merely requires that investors submit a notice of the

dispute which includes a "**sufficiently detailed** memorandum",[158] Article 10.16.2 of CAFTA-DR requires investors to notify respondents of "**each claim**" and to include "**for each claim, the provision of [CAFTA-DR]**, . . . alleged to have been breached . . ."[159] The inadmissibility of claims not identified in the notice of intent is undeniable under Article 10.16.2 of CAFTA-DR.

102. Other cases where tribunals have found that adherence to the notice requirement in the applicable BIT is a pre-condition to submitting the claims to arbitration include *Tulip v. Republic of Turkey*,[160] *Salini v. Morocco*,[161] *Waste Management I*[162] and *Burlington v. Ecuador*.[163] While in the former two cases the respective tribunals determined that the investors had complied with the notice requirement, in *Waste Management I* the tribunal noted that ICSID had refused to continue the proceedings until claimant met the "**mandatory** notice of intent to submit the claim to arbitration under NAFTA Article 1119".[164] In *Burlington v. Ecuador*, the tribunal did not hear the claims relating to lack of full protection and security, as the claimant did not comply with the notice requirements of the BIT.[165]

G. Claimants' Most-Favored-Nation Treatment Claim Should Be Dismissed

103. Here, Claimants did not identify the Most-Favored-Nation Treatment claim (Article 10.4 of CAFTA-DR) in the Notice of Intent of May 16, 2018.[166] Claimants only added this claim in the Notice of Arbitration of November 9, 2018.[167] Pursuant to the express terms of Article 10.16.2 of CAFTA-DR, the Most-Favored-Nation Treatment claim must therefore be dismissed.

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[158] *Id.* ¶ 90, **RL-0035-001**.
[159] Art. 10.16.2 of CAFTA-DR (emphasis added), **RL-0001-020**.
[160] *Tulip*, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶¶ 71-72, **RL-0029-019-020**.
[161] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, ¶¶ 15-16, 19-21, **RL-0036-004-006**.
[162] *Waste Management I*, Arbitral Award, 2 June 2000, §§ 4-5 (noting that ICSID refused to accept a request for arbitration under NAFTA because claimant failed to satisfy "one of the procedural requirements to be met by the Claimant, namely, **mandatory notice of intent to submit the claim to arbitration under NAFTA Article 1119**" and noting that the proceedings could not be continued until "the formal defect . . . had been remedied by notice of intent to submit a claim to arbitration being forwarded to the body designated by the Government of Mexico" and 90 days had elapsed) (emphasis added), **RL-0022-006-009**.
[163] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*), Decision on Jurisdiction, 2 June 2010, ¶¶ 337-338 ("337. While the Tribunal agrees with Claimant that Article VI does not impose a formal notice requirement, it considers that Article VI **requires** evidence of some form or another that allegations of Treaty breach have been made. . . .") (emphasis added), **RL-0037-071**.
[164] *Waste Management I*, Arbitral Award, 2 June 2000, §§ 4-5 (emphasis added), **RL-0022-006-009**.
[165] *Burlington*, Decision on Jurisdiction, 2 June 2010, ¶¶ 337, 340, **RL-0037-071**.
[166] Notice of Intent, **C-5**.
[167] Notice of Arbitration, pp. 13-14.

104. Further, in order to protect the rights guaranteed by Article 10.16.2 of CAFTA-DR, the Most-Favored-Nation Treatment claim must be dismissed. Guatemala had a right to know from the outset each and every claim being made in order to prepare its defense. Guatemala also had a right to assess the cost-benefit of settlement as soon as it received the Notice of Intent including being able to effectively engage in the necessary and time-consuming exercise of investigating, coordinating, informing and communicating within a large and complex governmental structure. The CAFTA-DR Parties, including Guatemala and the United States, introduced a specific article in the applicable agreement to safeguard these rights. Claimants, however, chose not to include a Most-Favored-Nation Treatment claim in their Notice of Intent, or the factual and legal information required by CAFTA-DR to support such a claim. Accordingly, Guatemala was deprived of the opportunity to investigate, consult and prepare its defense to Claimants' Most-Favored-Nation Treatment claim from May 16, 2018 – when the Notice of Intent was submitted – to November 9, 2018 – when the Notice of Arbitration was submitted. Guatemala was also deprived of the opportunity to "engage in discussions and negotiations with a view to achieving an amicable resolution"[168] of the claim before the start of the arbitration.[169]

105. CAFTA-DR's clear language cannot be ignored. Because Claimants did not comply with the notice of intent requirement of Article 10.16.2 of CAFTA-DR, and in order to guarantee Guatemala's right of defense, the Most-Favored-Nation Treatment claim must be dismissed.

VII. THE CLAIM FOR LACK OF FULL PROTECTION AND SECURITY IS TIME-BARRED UNDER ARTICLE 10.18.1 OF CAFTA-DR AND IS NOT WITHIN THE TRIBUNAL'S JURISDICTION

106. Claimants allege that "Guatemala has breached its obligation to provide Exmingua full protection and security by failing to take reasonable measures to ensure that Claimants and Exmingua have access to the Progreso VII and Santa Margarita project sites."[170] Claimants' allegations are unfounded but the Tribunal does not need to reach the merits of this claim. As set forth below, the claim is time barred because it was filed after the prescribed limitations period.

[168] *Id*. ¶ 28 (*quoting* the Notice of Intent, **C-5**).
[169] *Ibid*. "A negotiation meeting took place, [after the submission of the Notice of Intent] but the Parties reached no agreement on the settlement of the dispute during or after the conclusion of this negotiation period." At that time, Respondent had not been notified of the Most-Favored-Nation Treatment Claim.
[170] *Id*. ¶ 74.

107. Article 10.18.1 of CAFTA-DR prohibits the submission of claims if more than three years have passed since a claimant first knew or should have known of the breaches and related loss or damage it claims. Claimants submitted the Notice of Arbitration on November 9, 2018. But Claimants were well aware **more than six years** before that date of Guatemala's alleged omissions, based on Claimant's Notice of Arbitration.

A. Article 10.18.1 of CAFTA-DR Requires the Submission of a Claim to Arbitration Within Three Years of the Date That Claimant First Acquired Or Should Have Acquired Knowledge of the Breach and of the Related Loss Or Damage as a Condition to Jurisdiction Over the Claim

108. Article 10.18.1 of CAFTA-DR sets a strict three-year time limit within which a claimant must file a claim. Article 10.18.1 of CAFTA-DR provides:[171]

> **Article 10.18: Conditions and Limitations on Consent of Each Party**
>
> 1. No claim may be submitted to arbitration under this Section if **more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach** alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) **has incurred loss or damage.**
>
> (emphasis added)

109. Adherence to the time limitation established under Article 10.18.1 is one of the "[c]onditions [to Guatemala's] consent" to arbitration.[172] Thus, an arbitral tribunal does not have jurisdiction if the claimant does not submit its claims within three years of the date that the claimant (i) *first* acquired or should have acquired knowledge of the breach; and (ii) *first* acquired or should have acquired knowledge of the incurred loss or damage.

110. The acquisition of relevant knowledge can be actual or constructive. Actual knowledge is "what the Claimant did in fact know at a given time"[173] whereas constructive knowledge is "what the Claimant should have known at a given time."[174]

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[171] Art. 10.18.1 of CAFTA-DR (emphasis added), **RL-0001-022**.
[172] *Ibid*. *See Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶¶ 188-191, **RL-0002-059-060**.
[173] *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 217, **RL-0002-068**.
[174] *Ibid.*

111. Also, knowledge of the full extent or quantification of the loss or damage is not required. First appreciation of the loss or damage triggers the three-year limitation period under the Treaty. In the words of the *Berkowitz* tribunal:[175]

> . . . the Article 10.18.1 requirement, *inter alia*, to point to the date on which the claimant *first* acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that **such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result.** It is the first appreciation of loss or damage in consequence of a breach that starts the limitation clock ticking.

112. As shown below, Claimants *first* acquired knowledge of the alleged breach and related loss or damage more than six years before the submission of the full protection and security claim to arbitration. The claim is barred under Article 10.18.1 of CAFTA-DR and falls outside the Tribunal's jurisdiction.

B. Claimants State They Acquired Knowledge of the Alleged Breach of the Full Protection and Security Standard and Related Loss or Damage More Than Six Years Before Submission of the Claim to Arbitration

1. Because Claimants Submitted the Claim to Arbitration on November 9, 2018, the Critical Date is November 9, 2015

113. A claim is "deemed submitted to arbitration . . . when the claimant's notice of . . . arbitration . . . is received by the Secretary-General."[176] Claimants submitted their claims to arbitration on November 9, 2018. Thus, the Tribunal should not entertain claims that arose prior to November 9, 2015,[177] "the earliest possible date on which the [Claimants] would be permitted

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[175] *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶ 213 (emphasis added), **RL-0038-137**. *See also Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 194, **RL-0002-061**. NAFTA tribunals have adopted the same interpretation of NAFTA Article 1116(2)'s requirement of knowledge of loss or damage. *See Mondev*, Award, 11 October 2002, ¶ 87, **RL-0018-031**; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 78, **RL-0039-033**.

[176] Art. 10.16.4(b) of CAFTA-DR, **RL-0001-023**.

[177] *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 199 ("There is little room for discussion about what is the critical date; as agreed by both Parties, it is uncontroversial that the Claimant submitted its claims to arbitration when it initiated the present proceedings, *i.e*., by way of its Request for Arbitration which was dated June 10, 2014. The application of Article 10.18.1 leads to the conclusion that the critical date is three years earlier, i.e. June 10, 2011."), **RL-0002-062**. *See also Berkowitz*, Interim Award (Corrected), 30 May 2017, ¶ 11 ("In accordance with CAFTA Article 10.16.4, a claim shall be deemed submitted to arbitration when the Claimants' notice of arbitration and statement of claim, as referred to in the UNCITRAL Arbitration Rules, are received by the Respondent. No point having been taken on the date on which

to have acquired actual or constructive knowledge of the alleged breach of the Treaty and of the incurred loss or damage…."[178]

114. If Claimants, however, acquired such knowledge before November 9, 2015, the claim is time-barred.

2. *Claimants Identified Guatemala's Alleged Failure to Respond to the Continuous and Systematic Protests and Blockades as Early as 2012*

115. Once the critical date has been established – November 9, 2015 –, the date on which Claimants acquired knowledge of the breach and related loss or damage must be determined. For that purpose, the alleged breach must be identified by reference to the Claimants' submissions.[179]

116. In the Notice of Arbitration, Claimants described Guatemala's alleged breach as follows:[180]

> Guatemala has breached its obligation to provide Exmingua full protection and security by failing to take reasonable measures to ensure that Claimants and Exmingua have access to the Progreso VII and Santa Margarita project sites. Among other things, Guatemala's failure to act in this regard despite Claimants' and Exmingua's entreaties and petitions have resulted in Exmingua's employees being threatened when attempting to access the sites and work stoppages at the site, and have prevented Exmingua's consultants from being able to complete the social studies required for the EIA and thereby complete the application for an exploitation license for the Santa Margarita Project.

117. In support of the full protection and security claim, Claimants pointed to the "continuous and systematic protests" and the associated failure by Guatemala to protect Exmingua since 2012.[181] Claimants themselves describe the alleged breach of the full protection and security

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the claims were submitted to arbitration, the Tribunal deems the claims to have been submitted to arbitration on 10 June 2013."), **RL-0038-015**.

[178] *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 196, **RL-0002-061-062**.

[179] *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, ¶ 163 ("… as Claimant is the Party asserting the Tribunal's jurisdiction to decide its substantive claim, the "alleged breach" must, in the first instance, be identified by reference to Claimant's submissions."), **RL-0040-055-056**; *Glamis Gold Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 349 ("The basis of the claim is to be determined with reference to the submissions of Claimant."), **RL-0041-161**. *See also* the analysis of Claimant's allegations in *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶¶ 203-209, **RL-0002-064-065**.

[180] Notice of Arbitration, ¶ 74.

[181] *Id*. ¶¶ 48, 42.

standard as a continuing violation by Guatemala of its substantive obligations under CAFTA-DR. In particular, Claimants allege that:

- "Following considerable efforts by Claimants, on 25 May 2014, the exploitation activities at Progreso VII resumed, and, by year-end, Exmingua made its first concentrate shipment. Irregular blockades **continued**, however, without effective responses from the State."[182]
- "Exmingua and its consultants, however, were unable to complete the public consultations required for its EIA due to the **continuous and systematic** protests and blockades at the site **since 2012**."[183]
- "Exmingua informed the MEM that due to the **continuous** protests and blockades at the site, it and its consultants could not access the site to complete the local consultations for the EIA."[184]
- "[T]he **continuous** blockades and protests severely affected both of Exmingua's projects,"[185]
- "In response to the **continuous** blockades, and as part of Exmingua's efforts to protect its investments, on 22 April 2016, Exmingua filed an *amparo* against the President of Guatemala, the Ministry of Government, and the General Directorate of the National Police…"[186]

118. Thus, Claimants' claim is built on the premise that the "**continuous and systematic** protests and blockades at the site **since 2012**"[187] and the alleged failure by Guatemala to take reasonable measures or effectively respond constitute a "breach [… of Guatemala's] obligation to provide Exmingua full protection and security."[188] In other words, Claimants submit that a "series of similar and related actions"[189] or omissions amount to a breach of CAFTA-DR by the Respondent.

[182] *Id*. ¶ 45 (emphasis added).
[183] *Id*. ¶ 48 (emphasis added).
[184] *Id*. ¶ 49 (emphasis added).
[185] *Id*. ¶ 50 (emphasis added).
[186] *Id*. ¶ 56 (emphasis added).
[187] *Id*. ¶ 48 (emphasis added).
[188] *Id*. ¶ 74.
[189] *Grand River*, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 81, **RL-0039-035**; *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 215 (*citing Grand River*, ¶ 81), **RL-0002-067**.

3. *Claimants Acquired Knowledge of the Alleged Breach and Related Loss or Damage in 2012 or before*

119. Claimants attempt to escape the three-year limitation period and seek compensation in 2018 for an alleged breach which they admit they acquired knowledge of in 2012. This is impermissible under CAFTA-DR.

120. Claimants' own submissions to the Tribunal confirm that, as early as 2012 and, in any case, before November 9, 2015, Claimants had acquired knowledge of the two elements required by Article 10.18.1 of CAFTA-DR in order for the limitation period to start running. First, that a purported breach of CAFTA-DR could be claimed against Respondent. Second, that this alleged breach had caused loss or damage to Claimants.

121. Claimants themselves refer throughout the Notice of Arbitration to several occasions – all prior to November 9, 2015 – when Claimants were aware of the alleged omission and related loss or damage for which they now seek compensation in this Arbitration.

122. First, Claimants' own allegations confirm that, between March and May of 2012, Claimants gained knowledge of Guatemala's alleged breach and related loss or damage. They state in the Notice of Arbitration:[190]

> **One month after construction began [in February 2012], members of the communities** near the project, supported by non-governmental organizations, **blockaded access to the mine. Two months later**, Exmingua obtained some police support, which attempted to break the resistance at the mining site, but the protesters denied them passage and **the police ultimately turned around and left. KCA and Exmingua sought assistance from various local and national government authorities, but the State failed to take meaningful or effective action to stop the ongoing, unlawful blockade of the Progreso VII Project.**

Thus, as early as the first half of 2012, Claimants knew of Guatemala's purported failure to take reasonable measures that they now allege constituted a breach of Guatemala's "obligation to provide Exmingua full protection and security."[191] Indeed, according to Claimants, "KCA . . . sought assistance from . . . government authorities."[192] Claimants were aware by then of the alleged loss or damage caused by Guatemala's purported breach for failing to effectively respond to blockades.

[190] Notice of Arbitration, ¶ 42 (emphasis added).
[191] *Id.* ¶ 74.
[192] *Id.* ¶ 42.

123. Second, on September 3, 2012, Exmingua "filed an *amparo* action against the General Director of the National Civil Police, claiming the '**omission of intervention**, by the authority, **to protect people and vehicles** in and around the facilities of the mining project Progreso VII. . . .'"[193] Exmingua argued that "the necessary measures ha[d] not been taken to guarantee and protect the people and vehicles that must enter to the project" despite the police's awareness "of th[e] situation. . . ."[194] As a result, Claimants contend, "illegal arrests, harassment, injuries, threats and coercion against the project's workers had occurred on the project site, in addition to various **damages** to [Exmingua's] facilities…."[195]

124. Further, Claimants admit in the Notice of Arbitration that Exmingua was "unable to complete the public consultations required for its EIA due to the continuous and systematic protests and blockades at the site **since 2012**."[196]

125. Exmingua's allegations in the September 3, 2012 *amparo* action are almost identical to the allegations asserted against Guatemala in Claimants' Notice of Arbitration, which also refers to the blockades that purportedly prevented Exmingua from carrying out the consultations at the site:[197]

> Guatemala has breached its obligation to provide Exmingua full protection and security by **failing to take reasonable measures** to ensure that Claimants and Exmingua have access to the Progreso VII and Santa Margarita project sites. Among other things, Guatemala's failure to act in this regard despite Claimants' and Exmingua's entreaties and petitions have resulted in Exmingua's **employees being threatened** when attempting to access the sites and work stoppages at the site, and **have prevented Exmingua's consultants from being able to complete the social studies required for the EIA** and thereby complete the application for an exploitation license for the Santa Margarita Project.

126. On the day Exmingua filed the *amparo* action, Claimants surely knew of the measure that amounts to Guatemala's alleged breach of the standard of full protection and security, that is, Guatemala's alleged omission to provide access to the Projects sites.[198]

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[193] *Id.* ¶ 43 (emphasis added).
[194] *Ibid*.
[195] *Ibid* (emphasis added).
[196] *Id.* ¶ 48 (emphasis added).
[197] *Id.* ¶ 74 (emphasis added).
[198] *See e.g. Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 221 ("As Mr. French is one of Corona's three principals, there is no doubt that the day on which he received that letter must be considered to be the date on which Claimant first gained *actual* knowledge of the non-issuance of the license."), **RL-0002-069**.

127. Third, in support of their full protection and security claim, Claimants point to Guatemala's alleged failure to adopt "effective responses" to the "[i]rregular blockades [that] continued" in 2014.[199] Thus, Claimants affirm they knew of Respondent's alleged breach in 2012, and 2014 at the latest.

128. Finally, Claimants are charged with constructive knowledge. The allegations in the Notice of Arbitration establish that Claimants "should have first acquired" knowledge of the alleged breach and loss or damage incurred in 2012, and in 2014 at the latest. Exmingua was the plaintiff in two local lawsuits in 2012 and 2014 for Guatemala's alleged failure to provide access to the Projects sites. As Exmingua's sole owners, it is unreasonable for Claimants to maintain they should not have been aware of the lawsuits Exmingua filed to address the "continuous and systematic protests and blockades . . . since 2012."[200] Also, as described in the Notice of Arbitration, Claimants have skilled knowledge and substantial expertise relating to high-profile mining and metallurgical projects.[201] Their expertise combined with the location of the Progreso VII and Santa Margarita Projects would have revealed the "continuous and systematic protests and blockades . . . since 2012"[202] and the alleged failure by Guatemala to address the situation. Therefore, it cannot be reasonably said that the Claimants should not have known in 2012, and in 2014 at the latest, of Respondent's alleged breach and the loss or damage that Claimant's allegedly suffered as a result.

129. Significantly, each one of the dates from the Notice of Arbitration mentioned in the above paragraphs, in which Claimants acquired or should have acquired knowledge of

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[199] Notice of Arbitration, ¶ 45.
[200] *Id*. ¶ 48.
[201] *Id*. ¶¶ 7-8.
[202] *Id*. ¶ 48. *See Grand River*, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 73 ("Given the Claimants' situation as **experienced participants in the** U.S. tobacco **market**, the **scale of their investments** and **plans** as presented to the Tribunal, and the **availability of relevant information from multiple possible sources**, they should have acquired knowledge of the escrow statutes and other measures being taken by U.S. states to implement the MSA. And, to the extent that these measures necessarily resulted in loss or damage to the Claimants before March 12, 2001, **appropriate diligence would have disclosed that fact**.") (emphasis added), **RL-0039-030**. *See also Berkowitz*, Interim Award (Corrected), 30 May 2017, ¶¶ 171, 199 (". . . **A reasonable property investor**, **faced with the information described below**, ought at the very least to have concluded that it was highly likely that the properties in question fell within the Park. **This should at the very least have led to due diligence enquiries**. . . . Given that Mr Spence is a **professional** real estate developer, that he and the Cophers . . . **visited Costa Rica** together to explore property purchases, that they did so with the assistance of a real estate agent and obtained other professional assistance in respect of their purchases, the Tribunal considers that, at the very least, Mr Spence and the Cophers would and should have been aware that it was highly likely that the properties they purchased fell within the boundaries of the Las Baulas National Park and were therefore at risk of expropriation in due course.") (emphasis added), **RL-0038-121**.

Guatemala's alleged breach and related loss or damage – March 2012, May 2012, September 2012 and 2014 –, occurred *before* November 9, 2015, and thus fall outside the statute-of-limitations period. Claimants' cannot ignore Article 10.18.1 of CAFTA-DR and the fact that they filed the full protection and security claim **six years after** they acquired the relevant knowledge. The claim falls outside of the Tribunal's jurisdiction.

C. Claimants' Characterization of the Breach As "Continuing" Does Not Allow Them to Escape the Three-Year Time Limit for Submission of a Claim to Arbitration

130. Claimants consistently describe the protests and blockades at the site, and the alleged associated inaction of Guatemala since 2012, as "continuous and systematic."[203] However, the *jurisprudence constante* of CAFTA-DR tribunals, subsequent practice of the CAFTA-DR Parties under Article 31(3)(b) of the VCLT, the ordinary meaning, context, object and purpose of Article 10.18.1 of CAFTA-DR are consistent: A "continuing breach" does not renew the three-year statute of limitations period under Article 10.18.1 of CAFTA-DR.

131. CAFTA-DR tribunals have consistently held that the running of the three-year statute of limitations is to be calculated from the "first" acquisition of relevant knowledge, not subsequent or ultimate acquisition of such knowledge. Also, Article 10.18.1 of CAFTA-DR requires the identification of a specific date on which the claimant acquires knowledge of the alleged breach and of the loss or damage incurred. Therefore, when the alleged breach is based on similar and related actions or omissions, such knowledge cannot be acquired on a recurring basis. As stated by the *Berkowitz* tribunal:[204]

> 208. The first enquiry for purposes of Article 10.18.1 concerns *the date* on which the claimant *first* acquired knowledge of the breach that is alleged. **The linkage between the date and the claimant's first acquisition of knowledge requires the identification of a date certain on which knowledge was first acquired.** While it is possible to conceive of a claim in which a sequence of temporally closely linked events warrants a conclusion that the claimant first acquired knowledge *on or about* a given date, a plain reading of the text of the provision, legal certainty and the object and purpose of **the limitation clause**, all **require the identification of a specific date on which the claimant must have been said to have acquired knowledge of the breach.** In this regard, the Tribunal disagrees with the analysis in the *UPS* Award that 'continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation

[203] Notice of Arbitration, ¶ 48. *See also id.* ¶¶ 42, 45, 49, 50, 56.
[204] *Berkowitz*, Interim Award (Corrected), 30 May 2017, ¶ 208, **RL-0038-134-135**.

> period accordingly.' . . . **While it may be that a continuing course of conduct constitutes a continuing breach, the Tribunal considers that such conduct cannot without more renew the limitation period** . . .
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> (emphasis in the original in part and added in part)

132. Likewise, the *Corona* tribunal endorsed the *Grand River* tribunal's reading of the limitation language in Articles 1116(2) and 1117(2) of the NAFTA[205], which are similar to CAFTA-DR Article 10.18.1, and noted the following:[206]

> 198. The Tribunal's first task is thus to determine **the earliest possible date on which the Claimant would have obtained knowledge of the alleged breach of the Treaty and of the incurred loss or damage** for the Claimant's claims to have been submitted within the time limit for the purpose of Article 10.18.1.
>
> […]
>
> 215. . . .***"Where a 'series of similar and related actions by a respondent State' is at issue, an investor cannot evade the limitations period by basing its claim on 'the most recent transgression in that series'".***
>
> (emphasis added)

133. The "subsequent practice [of the CAFTA-DR Parties] in the application"[207] of Article 10.18.1 of CAFTA-DR is fully consistent with the CAFTA-DR tribunals' reading of the provision. In *Corona v. Dominican Republic*, the United States argued, in its non-disputing State Party submission to the tribunal, that "Article 10.18.1 refers to knowledge of the alleged breach and loss first acquired as of a particular 'date.' Such knowledge cannot be acquired at multiple points in time or on a recurring basis."[208]

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[205] Art. 1116(2) of NAFTA provides: "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."; Article 1117(2) of NAFTA reads as follows: "2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage." *See* **RL-0012-010-011**.

[206] *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶¶ 198, 215 (*citing Grand River*, Decision on Objections to Jurisdiction, ¶ 81), **RL-0002-062**.

[207] VCLT, Art. 31(3)(b), **RL-0027-020**.

[208] *Corona*, Submission of the United States of America, 11 March 2016, ¶¶ 3-5 ("3. **Article 10.18.1 refers to knowledge of the alleged breach and loss first acquired as of a particular "date." Such knowledge cannot be acquired at multiple points in time or on a recurring basis.** Accordingly, a continuing course of conduct cannot renew the limitations period under Article 10.18.1. A legally distinct injury, by contrast, can give rise to a separate limitations period under CAFTA-DR Chapter Ten. . . . 5. Where a "series of similar and related actions by a respondent

134. The United States put forth the same argument in *Berkowitz v. Costa Rica*,[209] a case in which the Republic of El Salvador concurred on the argument as follows:[210]

> 31. Because the requirement refers to "the date on which the claimant first acquired, or should have first acquired, knowledge of a breach", it is irrelevant whether the measure is characterized as an act having a continuing character. El Salvador agrees with the United States' submission regarding the same language in NAFTA:
>
> > An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under Article 1116(2), that knowledge is acquired on a particular "date." Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis.

135. Costa Rica and the Dominican Republic have also endorsed this same interpretation of Article 10.18.1 of CAFTA-DR.[211] Guatemala agrees. The statements made by these CAFTA-DR Parties constitute "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" under Article 31(3)(b) of the VCLT.[212] The consistent position of the United States, the Republic of El Salvador, Costa Rica, the Dominican Republic and the Republic of Guatemala "shall be taken into account"[213] in interpreting CAFTA-DR's limitation provision.

136. If Article 10.18.1 of CAFTA-DR were interpreted otherwise to allow knowledge to be acquired on a recurring basis and the limitation period to start running anew each time, the

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state" is at issue, an investor cannot evade the limitations period by basing its claim on "the most recent transgression in that series." . . . Accordingly, once a claimant *first* acquires (or should have acquired) knowledge of breach and loss, subsequent transgressions by the State Party arising from a continuing course of conduct, as opposed to a legally distinct injury, do not renew the limitations period under Article 10.18.1."), **RL-0042-001-002**.

[209] *Berkowitz*, Submission of the United States of America, 17 April 2015, ¶¶ 4-7, **RL-0043-002-002**.

[210] *Berkowitz*, Non-Disputing Party Submission of The Republic of El Salvador, 17 April 2015, ¶ 31, **RL-0044-012**.

[211] *Berkowitz*, Respondent's Post-Hearing Submission, 26 May 2015, ¶¶ 32-36, **RL-0045-012-013**; *Corona*, Respondent's Reply Memorial on Expedited Preliminary Objections, 19 February 2016, ¶¶ 84-89, **RL-0046-001-003**.

[212] VCLT, Art. 31(3)(b), **RL-0027-020**; Report of the International Law Commission, 65th Session, 6 May – 7 June and 8 July – 9 August 2013, A/68/10, Chapter IV, pp. 35-36, (17) ("**Subsequent practice under article 31 (3) (b) must be conduct "in the application of the treaty". This includes** not only official acts at the international or at the internal level which serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, inter alia, **official statements regarding its interpretation, such as** statements at a diplomatic conference, **statements in the course of a legal dispute**, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level.") (emphasis added), **RL-0047-031-032**. *See also* G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II (1995), p. 796 (the participation of "at least the great majority" of the parties suffices to constitute subsequent practice in the application of the treaty), **RL-0048-010**.

[213] VCLT, Art. 31(3), **RL-0027-020**.

terms "first acquired" would in effect be transformed into "last acquired." This is just the opposite to the "ordinary meaning to be given to the terms of the treaty" under Article 31(1) of the VCLT.[214]

137. Further, such reading of the limitations provision would be incompatible with its object and purpose. Indeed, finding that a continuing course of conduct renews the three-year statute of limitations "would . . . encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period."[215] As the *Grand River* tribunal explained:[216]

> [T]his analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries.

138. Allowing Claimants to evade the three-year limitation period by basing its claim on "the most recent transgression" in the "series of similar and related actions"[217], would "**effectively denude the limitation clause of its essential purpose**, namely, to draw a line under the prosecution of historic claims."[218]

139. The consistent interpretation of the limitations provision by CAFTA-DR tribunals and CAFTA-DR Parties is not only aligned with the object and purpose of the provision, but also helps to enhance the objectives of CAFTA-DR. Pursuant to Article 1.2.1(f) of CAFTA-DR, the CAFTA-DR Parties intended to "create effective procedures . . . for the resolution of disputes [.]" The limitations period ensures that investors bring their claims within the prescribed time since they first acquired the requisite knowledge. If claimants are permitted to base their claims on "the most recent transgression" in the "series of similar and related actions"[219], uncertainty and instability would prevail in the relationship between the CAFTA-DR Parties and the investors. This does not comport with the objectives of CAFTA-DR.

140. In sum, the express language of Article 10.18.1 of CAFTA-DR, the consistent interpretation of the CAFTA-DR tribunals and CAFTA-DR Parties, as well as the ordinary

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[214] *Id*. Art. 31(1), **RL-0027-019**.
[215] *Berkowitz*, Interim Award (Corrected), 30 May 2017, ¶ 208, **RL-0038-134-135**.
[216] *Grand River*, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 81, **RL-0039-035**.
[217] *Ibid*.
[218] *Berkowitz*, Interim Award (Corrected), 30 May 2017, ¶ 208 (emphasis added), **RL-0038-134-135**. *See also Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 215 (*citing Grand River*, ¶ 81), **RL-0002-067**.
[219] *Ibid*.

meaning, context, object and purpose of the limitations provision, support the same interpretation of Article 10.18.1 of CAFTA-DR. Claimants cannot disregard Article 10.18.1 of CAFTA-DR. The three-year statute of limitations runs from the point at which Claimants *first* acquired the relevant knowledge. The limitations period does not commence to count when Claimants acquired knowledge of the *last* breach in a "series of similar and related actions."[220]

D. Conclusion

141. Claimants ignore the language of Article 10.18.1 of CAFTA-DR, its ordinary meaning, context, object and purpose, as well as the consistent interpretation of the provision by the CAFTA-DR Parties, and the CAFTA-DR's tribunals.

142. By Claimants' own admission, they were aware of the acts and omissions that they consider constitute a breach by Guatemala of the full protection and security standard as early as March 2012 and, in any case, before November 9, 2015. These dates fall outside of CAFTA-DR's statute of limitations, which, in this case, bars any claims that arose prior to November 9, 2015. Because Claimants knew or should have known of Guatemala's alleged breach of the full protection and security standard more than six years before the submission of the Notice of Arbitration, the Tribunal lacks jurisdiction to hear Claimants' claim.

VIII. RELIEF REQUESTED

143. Respondent respectfully requests the Arbitral Tribunal:

a. Suspend the proceedings on the merits;

b. Decide Respondent's preliminary objections expeditiously under Article 10.20.5 of CAFTA-DR;

c. Set up an expedited procedural calendar for the resolution of these objections that includes a hearing, in accordance with Article 10.25 of CAFTA-DR;

d. Dismiss all claims submitted by Claimants in accordance with the foregoing;

e. Issue an order awarding the Republic of Guatemala its share of the Arbitration costs and the attorney's fees it incurred; and

[220] *Grand River*, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 81, **RL-0039-035**; *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 215 (*citing Grand River*, ¶ 81), **RL-0002-067**.

f. Award the Republic of Guatemala any other remedy the Tribunal deems proper and just.