INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

DANIEL W. KAPPES
AND
KAPPES, CASSIDAY & ASSOCIATES
Claimants

v.

THE REPUBLIC OF GUATEMALA
Respondent

ICSID Case No. ARB/18/43

CLAIMANTS' COUNTER-MEMORIAL ON PRELIMINARY OBJECTIONS

---

27 September 2019

WHITE & CASE LLP
Counsel for Daniel W. Kappes and Kappes, Cassiday & Associates

TABLE OF CONTENTS

Page

I. INTRODUCTION

1. Pursuant to Procedural Order No. 1 dated 10 September 2019, Mr. Daniel W. Kappes and Kappes, Cassiday & Associates ("KCA," and jointly with Mr. Kappes, "Claimants") hereby submit this Counter-Memorial on Preliminary Objections in response to Respondent's Memorial on Preliminary Objections submitted under Article 10.20.5 of the Dominican Republic-Central America-United States Free Trade Agreement (the "DR-CAFTA" or the "Treaty").

2. As set forth in Claimants' Notice of Arbitration, this case is fundamentally about Respondent's unlawful, arbitrary, and discriminatory actions in indefinitely suspending Exmingua's validly issued exploitation and exportation licenses, and denying it the opportunity to obtain a further exploitation license for an adjacent project.[1]

3. In an attempt to avoid liability, Respondent has raised three preliminary objections, pursuant to DR-CAFTA Article 10.20.5, to be decided on an expedited basis. As set forth below, each of the three objections not only lacks merit, but Respondent inappropriately relies on disputed facts or fails to accept as true the facts alleged in Claimants' Notice of Arbitration, making its objections unsuitable for preliminary decision as well.[2]

4. DR-CAFTA Article 10.20.5 provides that a "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."[3] Paragraph 4, in turn, provides in relevant part 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 10.20.6.[4]

[1] *See* Claimants' Notice of Arbitration dated 9 Nov. 2018 ("Notice of Arbitration") ¶¶ 35-63.

[2] DR-CAFTA, Art. 10.20.4(c) ("In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) . . . . The tribunal may also consider any relevant facts not in dispute.") (CL-0001-ENG/SPA); *see also Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections dated 2 Aug. 2010 ("*Pac Rim v. El Salvador*, Decision on Preliminary Objections") ¶ 112 (RL-0003-ENG) (finding that the procedure under DR-CAFTA Article 10.20.4 is intended to "avoid the time and cost of a trial," so "there can be no evidence from the respondent contradicting the assumed facts alleged in the notice of arbitration; and it should not ordinarily be necessary to address at length complex issues of law, still less legal issues dependent on complex questions of fact or mixed questions of law and fact.").

[3] DR-CAFTA, Art. 10.20.5 (CL-0001-ENG/SPA).

[4] *Id.*, Art. 10.20.4.

As the tribunal in *Pac Rim v. El Salvador* explained, "the word ['may'] recognizes a position where a tribunal considers that an award could eventually be made upholding the claimant's claim or, equally, where the tribunal considers that it was premature at this early stage of the arbitration proceedings to decide whether or not such an award could be made."[5] Thus, "to grant a preliminary objection, 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 proceedings, without more."[6]

5. As that tribunal further remarked, "there are many reasons why a tribunal might reasonably decide not to exercise such a power against a claimant, even where it considered that such a claim appeared likely (but not certain) to fail if assessed only at the time of the preliminary objection."[7] Among other things, the expedited procedural timetable renders the Article 10.20.5 procedure unsuitable for objections that involve "complex issues of law, still less legal issues dependent on complex questions of fact or mixed questions of law and fact."[8] Indeed, the Article 10.20.5 expedited procedure is "not intended to be a 'mini-trial', even without evidence."[9] For these and other reasons explained more fully below, each of Respondent's objections warrants dismissal.

[5] *Pac Rim v. El Salvador*, Decision on Preliminary Objections ¶ 109 (RL-0003-ENG).

[6] *Id.* ¶ 110.

[7] *Id.*

[8] *Id*. ¶ 112; *see also id.* ¶ 246 (finding that "the issue of liability raises questions as to the interpretation and application of the Mining law (whether treated as fact or law) which are either to be assumed to be true for the present purposes or which cannot at present be decided finally in favour of the Respondent."); *id*. ¶ 246 (holding that, because the causation question raised "questions of fact or mixed law and fact," it was unsuitable for expedited, preliminary determination).

[9] *Id.* ¶ 107. DR-CAFTA Article 10.20.5 shares the same object and purpose as ICSID Arbitration Rule 41(5), which tribunals consistently have held is not designed to deal with complex legal issues or contested facts. *See PNG Sustainable Dev. Programme Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Respondent's Objections under Rule 41(5) of the ICSID Arbitration Rules, dated 28 Oct. 2015 ¶ 89 (CL-0002-ENG) (holding that Rule 41(5) "is not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts."); *id.* ¶ 90 (finding that "[g]iven the preliminary nature of the proceeding, a tribunal considering a Rule 41(5) application may not be in a position to decide upon disputed facts."); *see also Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case No. ARB/15/14, Reasoning of the Decision on Respondent's Preliminary Objection dated 4 Apr. 2016 ¶ 96 (CL-0003-SPA/ENG) ("A dispute on the factual matrix as the present one cannot be settled through an expedited procedure. Indeed, it is rather appropriate and in accordance with the Arbitral Rules that such dispute is claimed, proved and decided through a fully-fledged procedure with its corresponding judicial guarantees."); *Trans-Global Petroleum Inc. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules dated 12 May 2008 ¶ 97 (CL-0004-ENG) (holding that "[a]t this early stage of these proceedings, without any sufficient evidence, the Tribunal is in no position to decide disputed facts alleged by either side in a summary procedure.").

6. Respondent's first objection that Claimants' claims submitted on their own behalf under Article 10.16.1(a) are inadmissible, because Claimants seek to recover damages arising from measures aimed at Claimants' Guatemalan enterprise, Exmingua, is contrary to the plain language of the Treaty's text, as well as the Treaty's object and purpose. Indeed, Respondent's interpretation runs counter to consistent jurisprudence and would mean that U.S. investors in DR-CAFTA and NAFTA countries have significantly fewer rights than investors under any of the multitude of bilateral and multilateral treaties where tribunals universally have held that they may make claims for reflective loss.

7. Respondent's related complaint that Claimants have run afoul of the Treaty's waiver requirement fails for the same reason, as Claimants were not required to submit their claims on behalf of Exmingua and, therefore, were not required to submit a waiver for Exmingua. Further, Respondent's reliance on Annex 10-E is misplaced, as that Annex has no application here.

8. Respondent's second objection that Claimants' claim for breach of Article 10.4 of the DR-CAFTA (Most-Favored-Nation Treatment ("MFN")) is inadmissible, because Claimants did not mention this Treaty provision in their Notice of Intent, is also without foundation. Contrary to Respondent's position, the ordinary meaning of the notice provision – Article 10.16.2 – does not condition the State's consent to arbitrate on compliance therewith. Not only is Respondent's plea inconsistent with the plain language of the provision, but it is also at odds with the Treaty's object and purpose, which is to allow an opportunity for a negotiated settlement. That objective was fulfilled by Claimants' Notice of Intent, which provided the factual basis for Claimants' MFN claim by asserting, among other things, that "the Guatemalan courts notably have failed to rule in a consistent fashion when compared with other cases."[10]

9. Finally, Respondent's third objection that Claimants' claim for lack of full protection and security is time-barred, because Claimants allegedly first acquired knowledge of the breach and resulting damage in 2012 (more than three years before the submission of their Notice of Arbitration), relies on a fundamental misunderstanding of Claimants' claim.[11] As

[10] Claimants' Notice of Intent dated 16 May 2018 ("Notice of Intent") at 3.

[11] Respondent's allegations that Exmingua bears responsibility for the protests and blockades that took place at the Project site (*see* Respondent's Preliminary Objections under Article 10.20.5 of CAFTA-DR dated 16 Aug. 2019 ("Respondent's PO Mem.") ¶¶ 17, 19) is legally irrelevant as well as factually wrong. Respondent does not even attempt to explain how such allegations would affect the date at which Claimants first

described in their Notice of Arbitration and more fully below, Claimants are not claiming that Respondent's failure to respond in a reasonable and timely manner to the protests and blockades that prevented them and Exmingua from accessing their mining sites and commencing operations for nearly two years constitutes a violation of the Treaty for which they are seeking damages. Instead, Claimants' claim is based on Respondent's failure to provide full protection and security in connection with protests and blockades that began in 2016, in response to the Supreme Court's November 2015 ruling and the Ministry of Energy and Mines' ("MEM") actions in response thereto. Among other things, this breach prevented Exmingua from conducting the social consultations required to complete its Environmental Impact Assessment ("EIA") for Santa Margarita, in order to obtain an exploitation license. Respondent's objection thus not only is legally unfounded, but also requires delving into disputed factual issues that are integrally related to the merits of the case, making it particularly unsuitable for expedited decision at this preliminary phase.

II. CLAIMANTS′ CLAIMS WERE PROPERLY SUBMITTED TO ARBITRATION UNDER DR-CAFTA ARTICLE 10.16.1(A)

10. In its Memorial on Preliminary Objections, Respondent argues that, under DR-CAFTA Article 10.16.1(a), "Claimants' standing is limited to claims for losses arising out of direct injury to their shareholding rights,"[12] such as the right to vote their shares and the right to any declared dividend.[13] According to Respondent, Claimants' claims submitted on their own behalf under Article 10.16.1(a) are inadmissible, because "Claimants are seeking to recover damages arising out of purported injuries to Exmingua's rights . . . ."[14] Respondent contends that Claimants could only have submitted claims to arbitration on behalf of

knew or should have known of the breach and that they had suffered damage therefrom. In any event, Exmingua, assisted by professional consultants, carried out consultations as part of the process of obtaining its exploitation license for the Progreso VII project. *See* Notice of Arbitration ¶ 39. Although comments and objections to the project were sought, none were received. *See id.* ¶ 39. Likewise, Respondent's criticism that Claimants "do not reveal important details about their acquisition of Exmingua and entry into Guatemala," in their Notice of Arbitration, is misplaced. *See* Respondent's PO Mem. ¶ 3. While such detail might be provided in a memorial on the merits, it is neither required nor expected in a notice of arbitration. Nor are any of these alleged facts relevant to any of Respondent's preliminary objections.

[12] Respondent's PO Mem. ¶ 6.

[13] *Id*. ¶ 42(a) (quoting *Case Concerning Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, Judgment dated 5 Feb. 1970, 1970 I.C.J. Rep. 3 ("*Barcelona Traction (Belgium v. Spain)*, Judgment") ¶ 47 (RL-0006-ENG)).

[14] *Id*. ¶ 6; *see also id.* ¶ 1 (asserting that Claimants are seeking an award "for alleged damages caused to [Exmingua]."); *id.* ¶ 37 (alleging that "the Claims were brought on Claimants' own behalf, but for Exmingua's alleged losses.").

Exmingua, pursuant to DR-CAFTA Article 10.16.1(b).[15] Because Claimants did not do so, and therefore did not file a waiver on behalf of Exmingua, Respondent alleges that it has been prejudiced, the Tribunal lacks jurisdiction, and Claimants' claims should be dismissed.[16]

11. Respondent further complains that, because Exmingua has not terminated its appeal before the Guatemalan Constitutional Court of the definitive *amparo* issued by the Supreme Court that suspended the Progreso VII Project, which appeal has been awaiting decision by the Court for more than three years,[17] Claimants' claims run afoul of the DR-CAFTA's waiver provision and must be dismissed.[18] Finally, Respondent asserts that Exmingua's previous claims before the Guatemalan courts seeking an *amparo* directing that the police maintain public order violates Annex 10-E, depriving the Tribunal of jurisdiction over Claimants' full protection and security claim.[19]

12. Respondent's objections are meritless. As demonstrated below, Article 10.16.1(a)'s ordinary meaning, in context, allows Claimants to make claims on their own behalf for the loss in value of their direct and indirect interest in Exmingua, suffered as a result of measures taken by Respondent against Exmingua. Claimants' claims, moreover, are consistent with the object and purpose of the Treaty, whereas Respondent's interpretation is not. This is further demonstrated by Respondent's own prior State practice, as well as the consistent jurisprudence of tribunals in investment arbitrations. Finally, Claimants complied with the waiver requirement, and DR-CAFTA Annex 10-E is inapplicable here.

A. Article 10.16.1(A)'s Ordinary Meaning, In Context, Allows Claimants To Make Claims On Their Own Behalf For Injuries Suffered As A Result Of Measures Against Their Investment

13. Respondent asserts that Claimants' claims should be dismissed, because Claimants have submitted claims under DR-CAFTA Article 10.16.1(a), allegedly for damages to their investment, Exmingua, rather than for direct injury to themselves.[20] According to Respondent, Claimants were required to have submitted their claims *on behalf of Exmingua*, pursuant to DR-CAFTA Article 10.16.1(b).[21] In support of its argument, Respondent relies

[15] *Id*. ¶ 37.

[16] *Id*. ¶¶ 12, 38, 39, 69.

[17] *Id*. ¶ 21.

[18] *Id*. ¶¶ 69-70.

[19] *Id*. ¶¶ 7, 75-78.

[20] *Id*. ¶¶ 5-6.

[21] *Id*. ¶ 38 (arguing that "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.").

on the corresponding Articles in the NAFTA – Articles 1116 and 1117 – and contends that an investor may not make a claim for derivative or reflective loss under DR-CAFTA Article 10.16.1(a) (or under NAFTA Article 1116).[22] Furthermore, Respondent contends that a majority shareholder may recover for the loss in value of its shares, but only indirectly, if it files a claim on behalf of the enterprise pursuant to DR-CAFTA Article 10.16.1(b) (or NAFTA Article 1117).[23]

14. The plain language of Article 10.16.1(a) and (b), interpreted in context,[24] belies Respondent's claim that Claimants improperly submitted their claims under Article 10.16.1(a). Article 10.16.1(a) and (b) provide that:

> 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, . . . and (ii) that the claimant has incurred *loss or damage by reason of, or arising out of*, that breach . . . .
>
> 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, . . . and (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.[25]

Interpreting these provisions in accordance with their ordinary meaning, in context, dispels any question that Claimants' claims are properly submitted under Article 10.16.1(a).[26]

1. The Text of DR-CAFTA Article 10.16.1(A) And (B) Does Not Contain Any Limiting Or Restrictive Language

15. There is no restrictive or limiting language in Article 10.16.1(a) or (b) to support Respondent's contention that an investor may not submit a claim under Article 10.16.1(a) on

[22] *Id*. ¶ 45 (arguing that "indirect injury sustained by the shareholder, also called reflective loss, is barred from recovery under Article 1116 of the NAFTA.").

[23] *Id*. ¶ 42(b) (arguing that "if the claimant's injury is only indirect, that is, the shares lost value as a result of injury to the company, 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.").

[24] A provision's context includes the other provisions of the treaty, including its preamble. Vienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969 ("Vienna Convention"), Art. 31(2) (CL-0005-ENG/SPA) ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . . .").

[25] DR-CAFTA, Art. 10.16.1 (CL-0001-ENG/SPA) (emphasis added).

[26] *See, e.g.*, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction dated 21 Oct. 2005 ¶ 91 (CL-0006-ENG/SPA) ("Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation.").

its own behalf for a so-called "indirect" injury, by virtue of damage to the value of its investment in an enterprise or its shareholding, rather than a so-called "direct" injury. Nor is there any restrictive or limiting language in Article 10.16.1(a) to support Respondent's assertion that a majority shareholder that owns or controls an enterprise may not submit a claim pursuant to this Article, if its claim is for damage arising out of measures taken against its investment. To the contrary, the ordinary meaning of the text confirms that a claimant *may* submit a claim to arbitration under Article 10.16.1(a) alleging a breach of the Treaty when the claimant has incurred loss or damage arising out of that breach.

16. In accordance with Article 31(1) of the Vienna Convention, a good faith interpretation must take into account the consequences that the State Parties must "reasonably and legitimately be considered to have envisaged as flowing from their undertakings."[27] Applying this principle, tribunals have rejected attempts to read limiting or qualifying terms into the language of treaty provisions that were not supported by the text of the provisions or their context.[28]

---

[27] J. ROMESH WEERAMANTRY, TREATY INTERPRETATION IN INVESTMENT ARBITRATION at 47-48 (2012) (CL-0007-ENG); *see also Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No. ARB/82/1, Award dated 25 Feb. 1988 ("*Société Ouest Africaine des Bétons Industriels v. Senegal*, Award") ¶ 4.10 (CL-0008-ENG/FR) ("In the Tribunal's opinion, an arbitration agreement must be given, just as with any other agreement, an interpretation consistent with the principle of good faith. In other words, the interpretation must take into account the consequences which the parties must reasonably and legitimately have envisaged as flowing from their undertakings.")); *Amco Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction dated 25 Sept. 1983 ¶ 14(i)(a) (CL-0009-ENG) ("[A]ny convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged."); *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of Tribunal on Objections to Jurisdiction dated 24 May 1999 ¶ 34 (CL-0010-ENG) (quoting same with approval); *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Respondent's Further and Partial Objection to Jurisdiction dated 1 Dec. 2000 ¶ 25 (CL-0011-ENG) (same).

[28] *See, e.g., Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction dated 21 Dec. 2012 ("*Teinver v. Argentina*, Decision on Jurisdiction") ¶ 212 (CL-0012-ENG/SPA) ("It is notable that the *Suez* tribunals described the Treaty as not *limiting* the rights of shareholders to bring 'derivative' claims. The tribunals explicitly rejected the notion that there is any 'default' under international investment law that restricts what kinds of claims can be brought. In this respect, the tribunals refused to take their cues from domestic corporate law. Under this logic, the fact that the Treaty does not explicitly permit 'derivative' actions is irrelevant, because the very concept of a 'derivative' claim is alien to the Treaty or the ICSID Convention.") (emphasis in original) (citing *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction dated 16 May 2006 ("*Suez and InterAguas v. Argentina*, Decision on Jurisdiction") ¶ 49 (CL-0013-ENG/SPA); *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction dated 3 Aug. 2006 ("*Suez and Vivendi v. Argentina*, Decision on Jurisdiction") ¶ 49 (CL-0014-ENG/SPA)); *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award dated 4 May 2016 ¶ 178 (CL-0015-ENG) ("[I]f Montenegro and the Netherlands had wished to limit the application of the BIT to legal persons having a genuine link with one of the Contracting States, they could have done so. In fact, the aim of the parties to the BIT seems to have been the opposite: to afford wide protection with only the requirement of

17. Tribunals, for example, uniformly have refused to restrict coverage of investment treaties to "direct" investments and to dismiss claims where the investment was made indirectly, where the definition of "investment" contained no such qualifying language.[29] The tribunal in *Siemens v. Argentina* thus rejected Argentina's objection that the tribunal lacked jurisdiction because the claimant held its investment indirectly. In rejecting that objection, the tribunal explained that it had "conducted a detailed analysis of the references in the Treaty to 'investment' and 'investor,'" and observed that "there is no explicit reference to direct or indirect investment as such in the Treaty."[30] Looking at the definition of "investment," the tribunal remarked that it was "very broad."[31] Noting that among the illustrative assets listed as investments were "shares," the tribunal held that:

> [t]he plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.[32]

---

incorporation."); *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction dated 30 Apr. 2010 ¶ 158 (CL-0016-ENG) ("[H]ad the Parties wished to limit the definition of investment to particular types of assets or, to exclude certain assets such as loans, they could have embodied such restriction in this provision.") (citation omitted); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction dated 29 Apr. 2004 36, 52, 77 (CL-0017-ENG) ("[I]t is not for tribunals to impose limits on the scope of BITs not found in the text . . . we do not believe that arbitrators should read in to BITs limitations not found in the text . . . . The Respondent requests the Tribunal to infer, without textual foundation, that the Ukraine-Lithuania BIT requires the Claimant to demonstrate further that the capital used to make an investment in Ukraine originated from non-Ukrainian sources. In our view, however, neither the text of the definition of 'investment,' nor the context in which the term is defined, nor the object and purpose of the Treaty allow such an origin-of-capital requirement to be implied. The requirement is plainly absent from the text.").

[29] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction dated 3 Aug. 2004 ("*Siemens v. Argentina*, Decision on Jurisdiction") ¶ 137 (CL-0018-ENG/SPA) ("The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.").

[30] *Id.*

[31] *Id.*

[32] *Id.*; *see also Noble Energy Inc. and MachalaPower Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction dated 5 Mar. 2008 ("*Noble Energy Inc. v. Ecuador*, Decision on Jurisdiction") ¶ 77 (CL-0019-ENG/SPA) ("The Tribunal concurs with previous tribunals that have held that an indirect shareholder can bring a claim under the ICSID Convention and under a BIT in respect of a direct and an indirect investment. Failing any contrary wording, the BIT and the ICSID Convention encompass actions of indirect shareholders for their damages."); *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence dated 19 June 2009 ¶¶ 106-107 (CL-0020-ENG/SPA) ("[T]he Tribunal interprets that the Contracting Parties, in their intention to promote and protect investments, chose to define investments through a broad formulation that generally covers all types of investments. Additionally, a consideration of the Tribunal is that no evidence has been submitted that indirect investments are not 'in accordance with the laws and regulations' of the Republic of Peru. Therefore, the Tribunal finds no indications in the [treaty] that lead it in principle to exclude from the scope of the Treaty the indirect

18. The *Waste Management v. Mexico II* tribunal similarly rejected Mexico's objection that, because the claimant lacked a direct interest in the affected local enterprise, in which it held shares through an intermediate company constituted in a non-NAFTA State, it did not qualify as an "investor" under the treaty:

> Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise. If the NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having the nationality of one of the other Parties they could have done so. Similarly they could have restricted claims of loss or damage by reference to the nationality of the corporation which itself suffered direct injury. No such restrictions appear in the text.[33]

19. Article 10.16.1(a)(i)(A) and (ii) provide that a claimant may submit to arbitration a claim on its own behalf that the respondent has breached an obligation under Section A and "that the claimant has incurred *loss or damage* by reason of, or arising out of that breach."[34] The DR-CAFTA does not define the term "loss or damage." As such, and given the term's indefinite form, there is no basis to read additional language into that term to restrict it to so-called "direct" loss or damage or "loss or damage, but not reflective loss or damage."

20. Furthermore, the words "by reason of, or arising out of that breach" immediately following the phrase "loss or damage" further support its broad meaning.[35] These words

---

investments of Chinese nationals in Peruvian territory, particularly when it is proven that they exercise ownership and control over them. The Tribunal would expect that a limitation in this regard would have been expressly expressed in the [treaty]. For example, the Contracting Parties to [the treaty] were able to agree on an article through which they would deny the benefits of the Treaty to those investors qualified under it but with investments channelled through third countries."); *Venezuela Hldgs. B.V. and others (formerly Mobil Corp. and others) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction dated 10 June 2010 ¶ 165 (CL-0021-ENG) ("The definition of investment given in Article 1 is very broad. It includes . . . shares . . . . The plain meaning of this provision is that shares or other kind of interests held by Dutch shareholders in a company or in a joint venture having made investment on Venezuelan territory are protected under Article 1. The BIT does not require that there be no interposed companies . . . . [A] literal reading of the BIT does not support the allegation that the definition of investment excludes indirect investments.").

[33] *Waste Management Inc. v. United Mexican States (II)*, NAFTA, ICSID Case No. ARB/AF/00/03, Award dated 30 Apr. 2004 ¶ 85 (CL-0022-ENG/SPA).

[34] DR-CAFTA, Art. 10.16.1 (CL-0001-ENG/SPA) (emphasis added).

[35] The wording of model arbitration clauses using similar phrases are intended to encompass a broad range of disputes relating to contracts. *See, e.g.*, Standard ICC Arbitration Clause, *available at*: https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/) (CL-0023-ENG/SPA) ("All disputes *arising out of or in connection with* the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.") (emphasis added); UNCITRAL Model arbitration clause for contracts, *available at*: https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf at 29 (CL-

signal a comprehensive approach to causation,[36] which would be undermined if the phrase "loss or damage" were interpreted in a restrictive manner.

21. Finally, Article 10.16.1(b)'s language – like Article 10.16.1(a)'s – is clearly permissive, and not mandatory, as the tribunal in *Pope & Talbot v. Canada* found with respect to the corresponding language in NAFTA Articles 1116 and 1117.[37] Thus, if an investor owns or controls an enterprise, it has the additional option of submitting a claim under Article 10.16.1(b), but it need not do so. If, as Respondent erroneously suggests, the Treaty *required* claimants that owned or controlled an affected enterprise in a host State to submit claims *on behalf of their enterprise* under Article 10.16.1(b) in order to recover (indirectly) for the loss in value of their shares, the Treaty would have so provided. It would have been easy for the State Parties to have drafted Article 10.16.1(b) to provide that, where a claimant owns or controls an enterprise and seeks to recover losses to its shares in an enterprise, it may *only* submit claims on behalf of that enterprise, and may *not* submit claims on its own behalf pursuant to Article 10.16.1(a). They did not do that, and there is nothing in the Treaty to support an interpretation that Claimants – who own and control Exmingua – are precluded from submitting their claims on their own behalf for damage to their investment, Exmingua, or for the loss in value of their shares in Exmingua as a result of Respondent's breach, pursuant to Article 10.16.1(a), and were required to have submitted those claims on behalf of Exmingua pursuant to Article 10.16.1(b).

0024-ENG/SPA) ("Any dispute, controversy or claim *arising out of or relating to* this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.") (emphasis added); LCIA Recommended clause, *available at*: https://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx (CL-0025-ENG) ("Any dispute *arising out of or in connection with* this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause . . . .") (emphasis added).

[36] *See, e.g.*, *Entes Industrial Plants Construction and Erection Contracting Co. Inc. v. Ministry of Transport and Communications of the Kyrgyz Republic*, UNCITRAL, Final Award dated 29 Sept. 2015 ¶ 715 (CL-0026-ENG) ("Concerning the question of jurisdiction, Clause 67.1 gives a very wide scope to the arbitration clause. It applies to any 'dispute of any kind whatsoever' which 'arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the works'. The present claim concerns the performance of a part of the work and allegedly wrongful payment for this part to a subcontractor as a result of the conduct of the Employer. The dispute is in 'in connection with' the execution of the works. The Tribunal has jurisdiction."); *see also SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction dated 29 Jan. 2004 ¶ 132(b) (CL-0027-ENG) ("The general term 'disputes with respect to investments' may be contrasted with the more specific term '[d]isputes… regarding the interpretation or application of the provisions of this Agreement' in Article IX. If the States Parties to the BIT had wanted to limit investor-State arbitration to claims concerning breaches of the substantive standards contained in the BIT, they would have said so expressly, using this or similar language.").

[37] *See Pope & Talbot, Inc. v. Government of Canada*, NAFTA, UNCITRAL, Award in Respect of Damages dated 31 May 2002 ("*Pope & Talbot v. Canada*, Award in Respect of Damages") ¶ 79 (CL-0028-ENG) ("Article 1117 is permissive, not mandatory, in its language 'may submit to arbitration.'").

2. The Inclusion of "Shares" In The Definition Of "Investment" Confirms That Claimants' Claim Is Admissible

22. The definition of the term "investment" in DR-CAFTA Article 10.28, which also provides context for purposes of interpreting Article 10.16.1(a), further supports Claimants' interpretation, and is at odds with Respondent's position. This is because that definition includes, among other things, shares in enterprises.[38]

23. To the extent that a qualifying claimant holds shares in a protected enterprise, that claimant will have made an investment within the meaning of the Treaty. That claimant's investment – whether it is a minority or majority shareholding – is its shares in the enterprise. Pursuant to Article 10.16.1(a), that claimant is entitled to bring a claim for damage that it has suffered as a result of a breach of the Treaty. Indeed, the most commonplace damage that a shareholder will suffer as a result of actions taken against its investment in an enterprise is the loss in value of its shareholding. Depriving investors of the ability to recover such loss would make the Treaty's protection "illusory."[39]

24. As shown above, "the interpretation [of a treaty] must take into account the consequences which the parties must reasonably and legitimately have envisaged as flowing from their undertakings."[40] It would not have made any sense for the State Parties to the DR-CAFTA to have included "shares" in the definition of "investment," and to have granted a claimant that has made an equity investment in an enterprise the ability to commence arbitration, if that claimant was prohibited from making claims to recover for damage to its shares suffered as a result of the respondent State's measures aimed at the enterprise. Claimants certainly "reasonably and legitimately" considered that the Treaty provided them with the ability to submit a claim to arbitration seeking recovery for harm suffered by them as a result of measures taken by Respondent against Exmingua.

---

[38] DR-CAFTA, Art. 10.28 (CL-0001-ENG/SPA) ("For purposes of this Chapter: . . . **investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise" (emphasis in original)).

[39] *See e.g.*, *Yury Bogdanov v. Republic of Moldova*, SCC Arbitration No. V114/2009, Final Award dated 30 Mar. 2010 ("*Yury v. Moldova*, Final Award") ¶ 67 (CL-0029-ENG) ("[D]amage inflicted on such company, which indirectly concerns the investor, entitles the investor to seek treaty protection. 'The shareholder may then pursue claims for adverse action by the host State against the local company that affects its value and profitability.' If not, the protection offered by bilateral and multilateral investment treaties would become rather illusory.") (citation omitted).

[40] J. ROMESH WEERAMANTRY, TREATY INTERPRETATION IN INVESTMENT ARBITRATION 47-48 (2012) (CL-0007-ENG); *Société Ouest Africaine des Bétons Industriels v. Senegal*, Award ¶ 4.10 (CL-0008-ENG/FR); *see also supra* n.27.

3. Respondent's Own Prior State Practice Shows That Claims For Reflective Loss Are Admissible Under The DR-CAFTA

25. Respondent's own past practice confirms that Article 10.16.1(a)'s ordinary meaning, in context, permits claimants to file claims on their own behalf for the loss of value of their shares in an enterprise that has been the target of measures that violate the respondent State's treaty obligations.

26. In *TECO v. Guatemala,* the claimant owned a minority interest in a Guatemalan enterprise, EEGSA.[41] TECO filed a DR-CAFTA claim pursuant to Article 10.16.1(a),[42] alleging that Guatemala had breached the fair and equitable treatment obligation in connection with the manner in which it had set EEGSA's electricity tariffs.[43] As a result of the imposition of those tariffs, EEGSA's revenues and profitability decreased sharply and, consequently, the value of TECO's indirect, minority shareholding also decreased.[44] TECO did not suffer – nor did it allege – any damage that Respondent characterizes as "direct" damage; TECO, through its indirect chain of ownership, remained in possession of its shares in EEGSA and TECO's voting rights and rights to obtain its portion of dividends distributed by EEGSA was not interfered with by Guatemala. Its damage claim was for "derivative" or "reflective" loss.[45]

27. Although Guatemala raised numerous jurisdictional and admissibility objections to TECO's claim, it did *not* raise any objection that TECO was not entitled to bring a claim under Article 10.16.1(a) for so-called reflective loss.[46] Respondent's position in this arbitration that Article 10.16.1(a) does not permit a claimant to file a claim for reflective loss is thus entirely inconsistent with its prior practice in the *TECO* case. It also is inconsistent with the *TECO* tribunal's holding, which awarded TECO damages based on its share of the loss of revenue that the Tribunal concluded it would have obtained had EEGSA's tariffs been

[41] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, DR-CAFTA, ICSID Case No. ARB/10/23, Notice of Arbitration dated 20 Oct. 2010 ("*TECO v. Guatemala*, Notice of Arbitration") ¶ 26 (CL-0030-ENG/SPA); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, DR-CAFTA, ICSID Case No. ARB/10/23, Award dated 19 Dec. 2013 (partially annulled) ("*TECO v. Guatemala*, Award") ¶ 438 (CL-0031-ENG/SPA).

[42] *TECO v. Guatemala*, Notice of Arbitration ¶ 23 (CL-0030-ENG/SPA).

[43] *Id*. ¶¶ 74-78.

[44] *Id*. ¶ 69; *TECO v. Guatemala*, Award ¶¶ 333, 716, 744 (CL-0031-ENG/SPA).

[45] *TECO v. Guatemala*, Award ¶ 716 (CL-0031-ENG/SPA).

[46] *Id*. ¶¶ 437-441, 488.

set in accordance with its Treaty obligation to accord its investment fair and equitable treatment.[47]

28. Respondent's attempt to dispense with its inconsistent State practice as well as the unfavorable jurisprudence from the *TECO* case, by remarking in a footnote that "[i]n *Teco*, the investor did not own or control directly or indirectly the enterprise, so Article 10.16.1(b) was not available to it,"[48] fails. Although TECO could not have submitted a claim pursuant to Article 10.16.1(b), the fact remains that it did submit a claim under Article 10.16.1(a) for reflective loss and was awarded damages for such loss, while Respondent now contends that *no* claimant may submit a claim for reflective loss under either Article 10.16.1(a) or (b).[49]

29. This highlights the unsustainability of Respondent's position. If Respondent were correct, minority shareholders would be left entirely unprotected, unable to make a claim for reflective loss. Such an outcome is inconsistent with the text as well as the object and purpose of the Treaty. Moreover, it is inconsistent with Respondent's argument, as well as with the DR-CAFTA's text, to conclude that a minority shareholder may make a claim on its own behalf for reflective loss under Article 10.16.1(a), but that a majority shareholder is precluded from doing so, and may only submit a claim on behalf of an enterprise, pursuant to Article 10.16.1(b).[50]

---

[47] *Id*. ¶ 742.

[48] Respondent's PO Mem. n.55.

[49] *Id*. ¶ 45 (arguing that "indirect injury sustained by the shareholder, also called reflective loss, is barred from recovery under Article 1116 of NAFTA" (citation omitted)); *id.* ¶ 42(b) (asserting that "if the claimant's injury is only indirect, that is, the shares lost value as a result of injury to the company, 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," in which case the enterprise would be compensated for its "direct" losses and the investors would be indirectly compensated for their losses, but would not have the ability to make claims for their reflective losses) (citation omitted).

[50] The claimants in *TCW Group, Inc and Dominican Energy Holdings, L.P.* also brought claims under the DR-CAFTA on their own behalf for reflective loss. *SeeTCW Group, Inc. and Dominican Energy Hldgs., L.P. v. The Dominican Republic*, DR-CAFTA, UNCITRAL, Respondent's Memorial on Jurisdiction dated 21 Nov. 2008 ¶ 1 (CL-0032-ENG/SPA) ("In this arbitration, Claimants allege 'catastrophic losses' to their subsidiary company Empresa Distribuidora De Electricidad Del Este, S.A. ('EDE Este') purportedly caused by measures taken by the Dominican Republic."). That claim was settled, pursuant to a consent award. *See TCW Group, Inc. and Dominican Energy Hldgs. L.P. v. The Dominican Republic*, DR-CAFTA, UNCITRAL, Consent Award dated 16 July 2009 (CL-0033-ENG/SPA).

4. NAFTA Jurisprudence Confirms The Right Of Shareholders To Bring Claims On Their Own Behalf For Reflective Loss

30. As Respondent recognizes, NAFTA Articles 1116 and 1117 correspond to DR-CAFTA Articles 10.16.1(a) and (b), respectively.[51] As noted by Ms. Meg Kinnear and Ms. Andrea Bjorklund in their Guide to NAFTA Chapter Eleven, "Article 1116 does permit an investor of a Party to submit a claim alleging that it has been harmed due to injuries suffered by its investment, including an investment that is itself an enterprise."[52]

31. Indeed, NAFTA tribunals repeatedly have rejected respondent States' objections that claimants may not recover for reflective loss under NAFTA Article 1116, as measured by the damage to the value of their shareholding in an enterprise. Tribunals likewise have rejected the assertion that majority shareholders may only recover for reflective loss indirectly, by submitting claims on behalf of the enterprise that they own or control, pursuant to Article 1117.

32. In *GAMI v. Mexico*, for instance, the claimant GAMI was a minority shareholder in GAM, a Mexican enterprise whose assets had been expropriated.[53] Mexico objected to GAMI's standing under NAFTA Article 1116.[54] The tribunal rejected Mexico's objection:

> The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment. Whether GAM[I] can establish such a prejudice is a matter to be examined on the merits.[55]

---

[51] Respondent's PO Mem. ¶ 45 ("Article 1116 [which is similar to Article 10.16.1(a) of CAFTA-DR] and . . . Article 1117 [which is similar to Article 10.16.1(b) of CAFTA-DR]" (quoting Submission of the United States in *Clayton v. Canada* dated 29 Dec. 2017 ¶ 5 (RL-0008-ENG) (brackets in original)). NAFTA Art. 1116(1) contains virtually identical language without any limitation: "a claim . . . that the investor has incurred loss or damage by reason of, or arising out of, that breach." NAFTA, Art. 1116 (CL-0034-ENG/SPA).

[52] MEG KINNEAR, ANDREA BJORKLUND *ET AL.*, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 1116-1118 (2006) (CL-0035-ENG); *see also Mondev Int'l Ltd. v. United States of America*, NAFTA, ICSID Case No. ARB(AF)/99/2, Final Award dated 11 Oct. 2002 ("*Mondev v. United States*, Final Award") ¶ 82 (RL-0018-ENG) ("[T]he United States did not really contest Mondev's standing under Article 1116, subject to the question whether it had actually suffered loss or damage. In the Tribunal's view, it is certainly open to Mondev to show that it has suffered loss or damage by reason of the decisions it complains of, even if loss or damage was also suffered by the enterprise itself, LPA.").

[53] *GAMI Investments, Inc. v. The Government of the United Mexican States*, NAFTA, UNCITRAL, Final Award dated 15 Nov. 2004 ("*GAMI v. Mexico*, Final Award") ¶¶ 12-13, 17, 26 (CL-0036-ENG/SPA).

[54] *Id.* ¶ 27 (CL-0036-ENG/SPA) ("The disputing Parties have devoted considerable efforts to the issue whether GAMI is entitled to claim on account of its derivative prejudice as a shareholder. The heart of this debate is whether governmental acts or omissions that adversely affect GAM may be pleaded as breaches of NAFTA because they had the result of reducing the value of GAMI's stake in GAM.").

[55] *Id.* ¶ 33 (CL-0036-ENG/SPA).

33. Other NAFTA tribunals likewise have rejected the proposition put forward by NAFTA respondent States, and adopted by Respondent here, 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]."[56] For example, in *Pope & Talbot v. Canada,* the claimant submitted a claim on its own behalf under NAFTA Article 1116 with respect to its wholly-owned subsidiary in Canada.[57] Canada – much like Respondent here – objected, arguing that the claim should have been submitted under Article 1117, because the claimant had not claimed any direct injury, but only derivative injury as a result of the alleged harm caused to its investment.[58] The tribunal rejected Canada's objection, holding that:

> [I]t could scarcely be clearer that claims may be brought under Article 1116 by an investor who is claiming for loss or damage to its interest in the relevant enterprise, which is a juridical person that the investor owns. In the present case, therefore, where the investor is the sole owner of the enterprise (which is a corporation, and thus an investment within the definitions contained in Articles 1139 and 201), it is plain that a claim for loss or damage to its interest in that enterprise/investment may be brought under Article 1116. . . . [T]he existence of Article 1117 does not bar bringing a claim under Article 1116.[59]

34. Similarly, in *UPS v. Canada*, UPS brought a claim under NAFTA Article 1116 for losses it incurred as a result of the loss in value of its shareholding in its wholly-owned subsidiary, UPS Canada.[60] Canada again objected that the claims should have been submitted under Article 1117, on behalf of the enterprise.[61] As in *Pope & Talbot*, the *UPS* tribunal rejected Canada's objection:

> [T]he claims here are properly brought under article 1116 and [we] agree as well that the distinction between claiming under article 1116 or article 1117, in the context of this dispute at least, is an almost entirely formal one, without any significant implication for the substance of the claims or the rights of the parties. UPS is the sole owner of UPS Canada. As such, it is entitled to file a claim for its losses, including losses incurred by UPS Canada. . . . Whether the

---

[56] Respondent's PO Mem. ¶ 45 (quoting Submission of the United States in *Clayton v. Canada* dated 29 Dec. 2017 ¶ 5 (RL-0008-ENG) (brackets in original)).

[57] *Pope & Talbot v. Canada*, Award in Respect of Damages ¶¶ 74, 80 (CL-0028-ENG).

[58] *Id.* ¶¶ 75, 78.

[59] *Id.* ¶ 80.

[60] *United Parcel Service of America Inc. v. Government of Canada*, NAFTA, ICSID Case No. UNCT/02/1, Award on the Merits dated 24 May 2007 ("*UPS v. Canada*, Award on the Merits") ¶ 34 (CL-0037-ENG).

[61] *Id.* ¶¶ 32-33.

damage is directly to UPS or directly to UPS Canada and only indirectly to UPS is irrelevant to our jurisdiction over these claims.[62]

B. Claimants' Claims Are Consistent With The Object And Purpose Of Article 10.16.1(A)

35. Respondent's objection that the DR-CAFTA does not permit investors to bring claims for reflective loss not only is contrary to the Treaty's language, but also is inconsistent with the object and purpose of the Treaty, which is to provide effective and broad-based investment rights and recourse to arbitration. Contrary to those objectives, Respondent's interpretation would deprive shareholder investors of any opportunity to seek investor-State arbitration for the most commonly suffered damages. Respondent's implication that its interpretation comports with the customary international law governing diplomatic protection[63] ignores that modern investment treaties intentionally deviate from those rules in order to provide necessary protection to investor shareholders. In addition, Respondent's contention that its interpretation is necessary in order to protect creditors[64] finds no support in the object and purpose of the Treaty and, furthermore, is premised on an incorrect understanding of the way in which damages are calculated and, once again, is contravened by Respondent's own past practice.

1. Admitting Claims For Reflective Loss Is Consistent With The DR-CAFTA's Object And Purpose Of Providing Effective Means Of Dispute Settlement

36. Respondent's assertion that investors may not recover for reflective loss under the DR-CAFTA (or the NAFTA) is contrary to what Respondent acknowledges is one of the Treaty's objects and purposes of providing an effective means of dispute settlement through international arbitration.[65] It also is contrary to other objectives of the Treaty, which are to "substantially increase investment opportunities"[66] and to "ensure a predictable commercial framework for . . . investment."[67]

---

[62] *Id.* ¶ 35.

[63] Respondent's PO Mem. ¶¶ 42(a), 43 (referring to *Barcelona Traction (Belgium v. Spain)*, Judgment ¶ 47 (RL-0006-ENG) and *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment dated 30 Nov. 2010, 2010 I.C.J. Rep. 639 ("*Diallo (Guinea v. DRC)*, Judgment") ¶ 155 (RL-0015-ENG)).

[64] Respondent's PO Mem. ¶¶ 60-62.

[65] DR-CAFTA Art. 1.2.1(f) (CL-0001-ENG/SPA); Respondent's PO Mem. ¶ 38 (quoting same); *see also* NAFTA, Art. 102.1(e) (CL-0034-ENG/SPA) (same).

[66] DR-CAFTA, Art. 1.2.1(d) (CL-0001-ENG/SPA); *see also* NAFTA, Art. 102.1(c) (CL-0034-ENG/SPA) (same).

[67] DR-CAFTA, Preamble (CL-0001-ENG/SPA); *see also* NAFTA, Preamble (CL-0034-ENG/SPA) (same).

37. At the time the NAFTA was concluded, it was promoted as a modern, state-of-the-art treaty that provided the highest protection for investors.[68] The same is true for the DR-CAFTA.[69] It would be inconsistent with the object and purpose of providing broad-based investment protection and recourse to international arbitration to interpret the DR-CAFTA in the manner in which Respondent urges, which would deny standing to shareholder investors to make claims for losses suffered as a result of measures taken against their investments.[70] Indeed, were the Treaty (and the NAFTA, as Respondent suggests) interpreted in this manner, the DR-CAFTA (and the NAFTA) would provide *considerably less* protection to foreign investors than *any* of the multitude of modern investment treaties. Moreover, interpreting the DR-CAFTA contrary to its stated objectives would violate its Article 1.2.2, which expressly requires that "[t]he Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 . . . ."[71]

38. Tribunals interpreting Argentina's investment treaties with various countries, including the United States, the United Kingdom, Spain, Italy, Germany, and France all have

---

[68] *See* Message from the President of the United States Transmitting North American Free Trade Agreement, Texts of Agreement, Implementing Bill, Statement of Administrative Action and Required Supporting Statements, Statement as to How NAFTA Serves the Interests of United States Commerce, 3 Nov. 1993, H. Doc. 103-159, Vol. 1, 681, at 685, 690 (C-0001-ENG) ("The NAFTA provides an historic investor-state dispute settlement mechanism, so that individual U.S. companies no longer face an unbalanced environment in an investment dispute with the Mexican government but can seek arbitration outside Mexico by an independent body. . . . The NAFTA provides for the settlement of investment disputes between a NAFTA country and an investor of another NAFTA country through international arbitration. These provisions are modelled largely on the investor-state dispute settlement provisions of bilateral investment treaties to which the United States is a party."); North American Free Trade Agreement, Canadian Statement on Implementation, Canada Gazette Part I, 1 Jan. 1994, at 147 (C-0002-ENG) ("Over the years, Canada has negotiated investment agreements both to protect the interests of Canadian investors abroad and to provide a rules-based approach to the resolution of disputes involving foreign investors in Canada or Canadian investors abroad. The [Canada-U.S.] FTA marked the first time that Canada entered into a comprehensive set of rules governing both inward and outward investment. The NAFTA builds on that experience. It includes a more integrated and extensive set of obligations which will ensure that Canadian interests will continue to be protected within a set of generic rules. It also includes important new provisions for dispute resolution and addresses a broader range of issues related to the conduct of business. The NAFTA chapter thus reflects not only the addition of Mexico, but also the increasing importance of an open investment regime in underwriting economic growth and development in Canada.").

[69] *See* Message from the President of the United States Transmitting Legislation and Supporting Documents to Implement the Dominican Republic-Central America-United States Free Trade Agreement, Summary of the Agreement, 23 June 2005, H. Doc. 109-36, Vol. 1, 1071, at 1084-1085 (C-0003-ENG) ("Chapter Ten['s] . . . provisions reflect traditional standards incorporated in earlier U.S. investment agreements (including those in the North American Free Trade Agreement and U.S. bilateral investment treaties) and in customary international law, and contain several innovations that were incorporated in the free trade agreements with Chile and Singapore as well as others.").

[70] *See*, *e.g.*, Respondent's PO Mem. ¶ 42(b) (arguing that "if the claimant's injury is only indirect, that is, the shares lost value as a result of injury to the company, 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.") (emphasis added; citation omitted). A minority shareholder, of course, *cannot* bring a claim on behalf of the enterprise, so would have no recourse to recover for so-called "indirect" injuries.

[71] DR-CAFTA, Art. 1.2.2 (CL-0001-ENG/SPA); *see also* NAFTA, Art. 102.2 (CL-0034-ENG/SPA) (same).

found that claimants may bring claims for reflective loss.[72] In *BG v. Argentina*, for example, the tribunal explained:

[72] *See, e.g.*, *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award on Jurisdiction dated 17 July 2003 ¶ 48 (CL-0038-ENG/SPA) ("The Tribunal . . . finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders. . . . ."); *id.* ¶¶ 59, 65 (dismissing Argentina's objection that "an investment in shares . . . would only allow claims for measures affecting the shares as such, for example, expropriation of the shares or interference with the political and economic rights tied to those shares," and holding that "there is a direct right of action of shareholders"); *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic dated 25 Sept. 2007 ¶¶ 62, 76 (CL-0039-ENG/SPA) (rejecting Argentina's argument that "the Tribunal manifestly exceeded its powers by exercising jurisdiction over claims by a company's shareholder for income lost by the company" and that the claimant's claims were "for alleged breaches of rights belonging not to it, but to [the company]"); *id*. ¶ 74 (holding that "whether the locally incorporated company may itself claim for the violation of its rights . . . does not affect the right of action of foreign shareholders under the BIT in order to protect their own interests . . . ."); *Siemens v. Argentina*, Decision on Jurisdiction ¶¶ 138-144 (CL-0018-ENG/SPA) (rejecting Argentina's objection against indirect claims by a shareholder based on damage to the company in which it held shares); *Enron Creditors Recovery Corp. (formerly Enron Corp.) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim) dated 2 Aug. 2004 ¶¶ 17, 27 (CL-0040-ENG/SPA) (rejecting Argentina's objection that "shareholders cannot claim separately from the corporation, not even in proportion to their interest, as they would have only an indirect claim" and holding that the claimants had "*ius standi* to claim in their own right as they are protected investors under the Treaty"); *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic dated 30 July 2010 ¶¶ 114(a), 127 (CL-0041-ENG/SPA) (remarking that the issue was not "the *ius standi* of the Claimants to bring a claim on TGS's behalf or in respect of TGS's rights. The issue was whether the Claimants had *ius standi* to bring a claim alleging a violation of the BIT in respect of their own investment . . . ." and holding that the tribunal did not manifestly exceed its powers in finding standing); *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction dated 17 June 2005 ¶ 35 (CL-0042-ENG/SPA) (accepting jurisdiction over "a claim asserting the impairment of the value of the shares held by Claimant as a result of measures taken by the host government"); *Suez and InterAguas v. Argentina*, Decision on Jurisdiction ¶ 49 (CL-0013-ENG) ("Neither the Argentina-France BIT, the Argentina-Spain BIT, nor the ICSID Convention limit the rights of shareholders to bring actions for direct, as opposed to derivative claims. This distinction, present in domestic corporate law of many countries, does not exist in any of the treaties applicable to this case."); *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision of the Tribunal on Objections to Jurisdiction dated 25 Aug. 2006 ¶ 81 (CL-0043-ENG/SPA) ("Total . . . invokes here treaty rights concerning its investment in Argentina protected by the BIT. The claims of Total cannot therefore be defined as indirect claims (or 'derivative' claims), as if Total was claiming on behalf or in lieu of its subsidiaries in respect of rights granted to the latter by the laws of Argentina. It is therefore irrelevant that such claims would be inadmissible under those laws); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award dated 22 Aug. 2012 ¶ 84 (CL-0044-ENG) ("[T]he BIT's protection extends beyond the mere free enjoyment of the Claimant's shares in the Argentine Subsidiary . . . . [T]he BIT's protections are not limited to shareholders' rights qua shareholders."); *Impregilo S.p.A. v. Argentine Republic I*, ICSID Case No. ARB/07/17, Award dated 21 June 2011 ¶¶ 138-140 (CL-0045-ENG/SPA) ("If AGBA was subjected to expropriation or unfair treatment . . . such action must also be considered to have affected Impregilo's rights as an investor, rights that were protected under the BIT."); *Hochtief Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability dated 29 Dec. 2014 ("*Hochtief v. Argentina*, Decision on Liability") ¶ 172 (CL-0046-ENG/SPA) ("Claimant owns 26% of the shares in PdL and is plainly entitled to bring a claim in respect of that shareholding . . . ."); *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award dated 31 Oct. 2011 ¶ 202 (CL-0047-ENG/SPA) ("There is no limitation regarding . . . claims for losses in the value of shares"); *SAUR Int'l S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability dated 6 June 2012 ¶ 437 (CL-0048-ENG/SPA) ("[T]he treaty must be considered to extend to an investor who has an indirect and minority participation in an Argentinean company . . . . [T]he breaches which attract liability may pertain to the investor's shareholding as well as assets of the Argentinean company in question."); *Teinver v. Argentina*, Decision on Jurisdiction ¶ 214 (CL-0012-ENG) (rejecting respondent's arguments "that the 'derivative' distinction matters for purposes of interpreting the Treaty," in light of the

> BG's claims are derivative. BG does not claim that Argentina's measures were specifically directed against its shareholding in GASA and MetroGAS. BG claims instead that damage to the value of its shares was caused by (or derives from) measures adopted by Argentina which had a negative impact on the activities of MetroGAS and, hence, on the value of its shareholding in GASA and in MetroGAS.[73]

39. The tribunal further considered that under the Argentina-UK BIT, "BG is clearly an 'Investor' and its shareholding interest in GASA and MetroGAS is undoubtedly an 'Investment.'"[74] Accordingly, the tribunal held that it "has jurisdiction to hear BG's claims as they relate to its indirect shareholding in MetroGAS and GASA"[75] and, therefore, rejected Argentina's objection that "derivative claims are proscribed by international law and by domestic corporate law."[76]

40. Likewise, the *ad hoc* committee in *Azurix v. Argentina* explained:

> [I]f ABA itself is an investment of Azurix for the purposes of the BIT, it follows that conduct towards ABA also will be characterised as conduct towards an investment of Azurix. Thus, for instance, a failure to afford fair and equitable treatment to ABA would be a failure to afford fair and equitable treatment to an investment of Azurix.
>
> . . .
>
> The Committee sees no reason in principle why an investment protection treaty cannot protect such an interest of a foreign investor, and enable the foreign investor to bring arbitration proceedings in respect of alleged violations of the treaty with respect to that interest. An investment protection treaty having this effect does not alter the legal nature of the investor's interest nor that of the legal owner of the investment, nor does it ignore the separate legal personalities and separate legal rights and obligations of the shareholder and the company. Rather, it merely ensures that whatever interest, legal or otherwise, that the investor does have will be accorded certain protections.[77]

---

treaty's definition of investor as including shareholders); *Salini Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility dated 23 Feb. 2018 ¶¶ 174-178 (CL-0049-ENG) (rejecting Argentina's objection that the claimant lacked standing because its claims allegedly were "derivative and 'contractual,'" and finding that the claimant's "right to claim compensation is independent from that of the local subsidiary directly affected by the actions of the host state.").

[73] *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award dated 24 Dec. 2007 ("*BG Group v. Argentina*, Award") ¶ 190 (CL-0050-ENG).

[74] *Id*. ¶ 203.

[75] *Id*. ¶ 205 (citation omitted).

[76] *Id*. ¶¶ 191, 203-205.

[77] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic dated 1 Sept. 2009 ("*Azurix v. Argentina*, Annulment Decision") ¶¶ 105, 108 (CL-0051-ENG/SPA).

41. The same is true under various other investment treaties. For example, in cases under the Czech Republic-Netherlands BIT; Russia's BITs with Moldova, the United Kingdom, and Mongolia; the United States' BITs with Ecuador and Estonia; the Austria-Slovak Republic BIT; the Slovakia-Greece BIT; as well as under the Energy Charter Treaty ("ECT"), tribunals have reached the same result.[78]

42. Recently, for example, the tribunal in *Cube Infrastructure Fund v. Spain* rejected Spain's objection that the claimants lacked standing to claim for losses sustained by renewable energy plants owned by Spanish companies in which the claimants indirectly held

[78] *See, e.g.*, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 Sept. 2001 ¶ 392 (CL-0052-ENG) ("[T]he Claimant was and still is owner of 99 % of these shares in ČNTS . . . . [T]he shares themselves were not directly affected by the Respondent's alleged breach of the Treaty. The dispute [concerns] the value of the shares . . . such shares clearly being an 'investment' in accordance with Article 1 of the Treaty."); *Noble Energy Inc. v. Ecuador*, Decision on Jurisdiction ¶¶ 77-79 (CL-0019-ENG/SPA) ("The Tribunal concurs with previous tribunals that have held that an indirect shareholder can bring a claim under the ICSID Convention and under a BIT in respect of a direct and an indirect investment." (citation omitted)); *Yury v. Moldova*, Final Award ¶ 67 (CL-0029-ENG) ("[D]amage inflicted on such company, which indirectly concerns the investor, entitles the investor to seek treaty protection. 'The shareholder may then pursue claims for adverse action by the host State against the local company that affects its value and profitability.' If not, the protection offered by bilateral and multilateral investment treaties would become rather illusory.") (citation omitted); *RosInvestCo UK Ltd. v. Russia*, SCC Case No. V079/2005, Final Award dated 12 Sept. 2010 ¶ 608 (CL-0053-ENG) ("[T]he ability for shareholders to claim for measures taken against the company in which they hold shares [ ] has been developed to the point accepting that minority shareholders have made claims for indirect damage . . . . [M]odern investment treaty arbitration does not require that a shareholder can only claim protection in respect of measures that directly affect shares in their own right, but that the investor can also claim protection for the effect on its shares by measures of the host state taken against the company.") (set aside on unrelated grounds); *Sergei Paushok* et al. *v. Government of Mongolia*, UNCITRAL Arbitration Proceeding, Award on Jurisdiction and Liability dated 28 Apr. 2011 ¶ 202 (CL-0054-ENG) ("Claimants' investment are the shares of GEM . . . Claimants are entitled to make claims concerning alleged Treaty breaches resulting from actions affecting the assets of GEM, including its rights to mine gold deposits or its contractual rights and thereby affecting the value of their shares . . . ."); *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction dated 22 Oct. 2012 ¶ 323 (CL-0055-ENG) ("[W]here the foreign investor owns not the factory itself but a shareholding (even a very small one) in the local company which owns the factory . . . adequate compensation must nevertheless be paid to that foreign investor."); *Postova Banka, A.S. v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award dated 9 Apr. 2015 ¶ 245 (CL-0056-ENG) ("[A] shareholder of a company incorporated in the host State may assert claims based on measures taken against such company's assets that impair the value of the claimant's shares."); *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award dated 25 June 2001 ¶¶ 324-325 (CL-0057-ENG) ("[T]he Claimants' ownership interest in EIB, is an investment in 'shares of stock or other interests in a company' that was 'owned or controlled, directly or indirectly' by Claimants. The investment of Claimants in EIB is also embraced by the meaning of the term 'investment' under the Convention. An 'investment dispute' is defined in Article VI(I) of the BIT . . . . The revocation of EIB's license is, without doubt, covered by this definition."); *Eskosol S.p.A. in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Application Under Rule 41(5) dated 20 Mar. 2017 ("*Eskosol v. Italy*, Decision on Respondent's Application Under Rule 41(5)") ¶ 166 (CL-0058-ENG) ("A shareholder's claim for its reflective loss through an entity in which it holds shares cannot be equated automatically to that entity's claim for its direct losses.").

shares.[79] Rejecting Spain's objection that the claimants could not pursue claims for reflective loss,[80] the tribunal observed the broad definition of "investment" in the ECT:

> It is difficult to envisage a broader definition of the word 'Investment.' The formulation 'asset owned . . . indirectly' clearly applies to the assets of which the Claimants indirectly hold an interest. . . . The assets of the companies operating the PV and hydro plants are all indirectly owned and, all but three hydro plants, are indirectly controlled by the Claimants.[81]

Having determined that the claimants qualified as investors, and that the renewable energy plants constituted investments, the tribunal concluded that the claimants had standing to claim for losses suffered by them as a result of measures taken against their renewable energy plants.[82]

43. In fact, Respondent has not identified a single case under any modern investment treaty where a tribunal has found that an investor lacked standing to bring a claim for reflective loss as a result of a respondent State's alleged breach of the treaty.

44. Respondent's reliance on the customary international law of diplomatic protection and, in particular, on the ICJ's judgment in *Barcelona Traction*,[83] ignores that the Treaty derogates from customary international law by providing shareholders the right to recover for losses suffered as a result of actions taken against the enterprise in which they invested.[84] This was made clear in the ICJ's Judgment on Preliminary Objections in the *Diallo* case. Although Respondent cites to the *Diallo* Final Judgment for the proposition that "[t]he distinction [between the right of shareholders to bring claims on their own behalf and on behalf of their enterprise] is ultimately based on the right that has been allegedly infringed,"[85]

---

[79] *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum dated 19 Feb. 2019 ("*Cube Infrastructure v. Spain*, Decision on Jurisdiction, Liability and Partial Decision on Quantum") ¶¶ 161-202 (CL-0059-ENG).

[80] *Id*. ¶ 162.

[81] *Id*. ¶¶ 185, 196.

[82] *Id*. ¶¶ 201-202.

[83] Respondent's PO Mem. ¶ 42(a) (quoting *Barcelona Traction (Belgium v. Spain)*, Judgment ¶ 47 (RL-0006-ENG)).

[84] Respondent's complaint that Claimants' claim "ignor[es] basic principles of corporate and international law" (Respondent's PO Mem. ¶ 79) likewise fails to recognize that domestic "corporate" law is inapplicable here. General international law, moreover, applies only insofar as there is not any *lex specialis* in the terms of the Treaty itself. As shown, DR-CAFTA Article 10.16.1 derogates from customary international law by granting standing to claimants to make claims for reflective loss and also by granting majority shareholders the right to bring claims on behalf of an enterprise. For the same reason, Respondent's protest that Claimants have ignored "corporate formalities" is meritless. *See id.*

[85] Respondent's PO Mem. ¶ 46 (citing *Diallo (Guinea v. DRC)*, Judgment ¶ 156 (RL-0015-ENG)).

it fails to acknowledge the Court's explanation for its ruling, set forth in its earlier Judgment on Preliminary Objections.

45. In that Judgment, the Court explained that it had denied Guinea's application for "'substitution' or 'protection by substitution' . . . [by which Guinea sought] to exercise its diplomatic protection on behalf of nationals who are shareholders in a foreign company whenever the company has been a victim of wrongful acts committed by the State under whose law it has been incorporated."[86] The Court explained that "Guinea does not confine itself to exercising protection of Mr. Diallo in respect of the violations of his direct rights as shareholder in Africom-Zaire and Africontainers-Zaire but seeks to protect him 'in respect of the injuries suffered by [these] companies [themselves].'"[87] In rejecting Guinea's application in this regard, the Court stated:

> The Court is bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the [ICSID Convention]. . . . In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative. It is in this particular and relatively limited context that the question of protection by substitution might be raised. . . . Protection by 'substitution' would therefore appear to constitute the very last resort for the protection of foreign investments.[88]

46. The Court thus recognized that investment treaties deviate from the customary international law of diplomatic protection, which restricts States from making claims on behalf of their nationals for harm that they suffered as a result of actions taken against companies in which they are shareholders, as opposed to action taken against them directly.[89] Indeed, in their Dissenting Opinion to the Court's Judgment on the Merits, Judges Al-

---

[86] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment (Preliminary Objections) dated 24 May 2007, 2007 I.C.J. Rep. 582 ("*Diallo*, Judgment (Preliminary Objections)") ¶ 30 (CL-0060-ENG).

[87] *Id.* ¶ 30 (brackets in original).

[88] *Id.* ¶ 88.

[89] *See Azurix v. Argentina*, Annulment Decision ¶ 90 (CL-0051-ENG/SPA) ("The Committee accepts that a treaty may need to be interpreted against the general fabric of customary international law. However, except where norms of *ius cogens* are involved, a treaty is capable of modifying the rules of customary international law that would otherwise be applicable as between the States parties to the treaty. Indeed, often the very purpose of a treaty is to effect such a modification. The purpose of investment protection treaties is generally is to augment or modify the customary international law procedures for protection of foreign investors. Hence the starting point in determining the effect of the treaty is the terms of the treaty itself, rather than the principles of customary international law that may or may not be displaced by the treaty provisions.").

Khasawneh and Yusuf lament the fact that the Court's Judgment means that "the low standard of protection of shareholders under customary international law is now confined to the wretched of the earth like Mr. Diallo . . . we believe this case sets a dangerous precedent for foreign investors unprotected by bilateral investment treaties."[90]

47. Thankfully, U.S. investors in DR-CAFTA countries are not "wretched[ly]" confined to the protections offered under customary international law, unlike Mr. Diallo who did not have the advantage of having the protections of a bilateral or multilateral investment treaty. Surely, it is inconsistent with the object and purpose of the DR-CAFTA (as well as with the NAFTA) to interpret its provisions in such a manner so as to deprive Claimants of their ability to bring claims on their own behalf for reflective loss, which right is available under all modern investment treaties. Those treaties – like the DR-CAFTA and the NAFTA before it – are intended to expand the rights of investors to bring claims that otherwise would have been unavailable under the customary international law of diplomatic protection or "substitution."

2. Shareholders Bringing Claims For Reflective Loss On Their Own Behalf Do Not Recover At The Expense Of Creditors

48. Respondent's assertion that admitting Claimants' claims under Article 10.16.1(a) would allow Claimants "to circumvent creditors"[91] is unfounded. As an initial matter, Respondent's suggestion that Article 10.16.1(a) and (b) ought to be interpreted in a manner that is most protective of creditors[92] is entirely unsupported. There is no indication anywhere in the text of the DR-CAFTA that an object and purpose of the Treaty is to provide protection to creditors. Nor has Respondent produced any evidence that the Parties intended to protect creditors when structuring Article 10.16.1(a) and (b).

49. In any event, Respondent's argument is based on a misunderstanding of basic damages calculation and theory. When a claimant makes a claim for reflective loss, its loss is

[90] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Joint Dissenting Opinion of Judges Al-Khasawneh and Yusuf dated 30 Nov. 2010, 2010 I.C.J. Rep. 700, at 706, 711 (CL-0061-ENG); *see also id.*, at 705, 708 (further criticizing the Court's reliance on *Barcelona Traction* insofar as, in that case, there were multiple shareholders and, thus, there existed the potential for multiple claims, unlike in the *Diallo* case, where – like here – Mr. Diallo was the sole and controlling shareholder of the enterprise: "[W]here there is in effect one *associé/gérant* the infringement of the company rights is *ipso facto* infringement of the direct rights of the owner.").

[91] Respondent's PO Mem. ¶ 12; *see also id.* ¶ 60 (arguing that allowing Claimants to submit claims under Article 10.16.1(a) "would ultimately prevent Exmingua's creditors from enforcing any rights they may have over the assets of the enterprise, including an arbitral award.").

[92] *See id.* ¶ 56 (arguing that Article 10.16.1(a) and (b) are "focused," among other things, on "protecting creditors of the enterprise when a claimant brings claims before a tribunal constituted under CAFTA-DR.").

equivalent to the damage to the value of its shares in an enterprise.[93] Equity is a residual claim to an enterprise's cash flows. Therefore, an investor's shares in an enterprise only have value to the extent that the enterprise has a positive value after having paid off its creditors, as those creditors have priority over equity.[94] To assume that an enterprise continues operating and creates value for its shareholders, is to assume that creditors (including lenders, employees and suppliers) are paid. Thus, when calculating damage to a shareholder as a result of its reflective loss, one does not simply calculate the loss in cash flow to the enterprise and apply the claimant's percentage ownership to that amount.[95] Rather, it is only after the enterprise's debt has been satisfied that there is any value to be assigned to shareholders.[96] As Mark Kantor has explained:

> If the issue before the arbitrators involves measuring the loss of value suffered by an equity investor as a consequence of injury to the underlying business, the 'equity value' is the proper measure of value, the 'enterprise value' adjusted to reflect the fact that equity investors are subordinated claims to debt holders of the company. Said another way, equity investors are entitled to all the cash flows after the debt holders are fully paid.[97]

---

[93] *See Hochtief v. Argentina*, Decision on Liability ¶ 154 (CL-0046-ENG/SPA) ("[T]he harm to Claimant alleged to have resulted from Respondent's breach of the Treaty is the diminution in the value of Claimant's investments in PdL caused by Respondent's treatment of PdL: it is what is sometimes called 'reflective loss.'").

[94] "Creditors" have a broader definition than just debtholders. They include, for example, those with contractual claims against the company, such as suppliers, employees, bondholders, and other lenders.

[95] There are numerous examples where tribunals have calculated the value of a claimant's shares by first calculating the value of the enterprise and then deducting the enterprise's debt. This "indirect method" is a commonly-used valuation technique for valuing equity; another method is the "direct method," which calculates cash flows directly available to equity holders after the enterprise has paid interest and principal on debt. *See, e.g.*, *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award dated 12 May 2005 ¶ 430 (CL-0062-ENG/SPA) (describing the direct versus indirect method of valuing equity); *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/1, Award dated 27 Nov. 2013 ¶ 128 n. 208 (CL-0063-ENG/SPA) ("The Tribunal has taken note that, *in conformity with standard valuation practice*, Total's experts have obtained the companies' equity in both scenarios by subtracting the financial debt from the firms' value [*i.e.*, enterprise value] (based on the firm's overall discounted cash flows.") (emphasis added); *Antin Infrastructure Services Luxembourg S.À.R.L., and Antin Energia Termosolar v. The Kingdom of Spain*, ICSID Case No. ARB/13/31, Award dated 15 June 2018 ¶¶ 585-586 (CL-0064-ENG) (defining "final equity value" and describing that the claimant's experts calculated the value of the plants and then deducted the value of debt, after which they applied the claimant's 45% shareholding); *9REN Hldg. S.À.R.L. v. The Kingdom of Spain*, ICSID Case No. ARB/15/15, Award dated 31 May 2019 ¶ 399 (CL-0065-ENG/SPA) (explaining that "[t]o arrive at the value of the Claimant's investment in Solaica in the Counterfactual Position, FTI subtracted the net third-party debt held by Solaica from its enterprise value.").

[96] This is evident from bankruptcy proceedings where equity holders are among the lowest priority claimants, preceded by all other creditors. Consequently, when debt value exceeds the value of a business enterprise, equity has no value.

[97] MARK A. KANTOR, VALUATION FOR ARBITRATION 197 (2008) (CL-0066-ENG).

50. Tribunals commonly recognize this basic fact, which prevents shareholders from benefitting at the expense of an enterprise's creditors.[98] As such, a shareholder's recovery for reflective loss will be the same whether it recovers that amount directly (pursuant to a claim under DR-CAFTA Article 10.16.1(a)), or whether the enterprise recovers the full amount of its loss (pursuant to a claim made under DR-CAFTA Article 10.16.1(b)), pays off its creditors, and distributes the remaining equity value to its shareholders. In fact, while the shareholder-investor's recovery will be the same in both scenarios, the respondent State's *liability* may be greater where a majority shareholder files a claim on behalf of the enterprise pursuant to DR-CAFTA Article 10.16.1(b), when that enterprise has minority shareholders and/or creditors, some of whom *may not even have any treaty rights*.

51. In *TECO v. Guatemala*, for instance, TECO held its indirect interest in EEGSA through a consortium in which it held a minority stake along with Electricidad de Portugual S.A ("EDP"), a Portuguese company that also held a minority stake, and Iberdrola Energía S.A. ("Iberdrola"), a Spanish company that was the majority shareholder.[99] As noted above, TECO filed its claim for reflective loss pursuant to DR-CAFTA 10.16.1(a), and was awarded damages in accordance with its percentage ownership in EEGSA.[100] Iberdrola filed a claim under the Spain-Guatemala BIT, and its claim was dismissed for lack of jurisdiction.[101] EDP, as a Portuguese company, had no treaty rights.

52. Had TECO's and Iberdrola's roles been reversed, and had TECO been the majority shareholder in the consortium, TECO still could have filed a claim on its own behalf for reflective loss pursuant to Article 10.16.1(a). It, however, also could have chosen to file a claim on behalf of its investment, EEGSA. Had it done so, the full amount of damage suffered by EEGSA as a result of Guatemala's breach would have been awarded to EEGSA.

---

[98] *See, e.g.*, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31 Award dated 21 Dec. 2016 ¶ 70 (CL-0067-ENG/SPA) (rejecting claimant's expert's calculation of damages, which would have meant that the claimant was "entitled to 26% of the dollarized cash flows due to PdL directly (evidently without regard to any [of] PdL's liabilities and debts). In contrast, Respondent quantified the entitlement as 26% of the dollarized dividends that Clamant might have received *qua* shareholder of PdL after all of PdL's creditors had been satisfied"); *id.* ¶ 71 ("As a shareholder in PdL, Claimant has obligations as well as rights; and one of those obligations is to accept that the assets of PdL would be properly applied to satisfy the legitimate demands of all PdL's creditors and all PdL's shareholders, according to the priorities laid down by law.") (quoting from its Decision on Liability); *id.* ¶ 84 (noting that "[i]n simple terms, the debt actually owing to [creditors] had to be assumed to be paid off before any funds could be freed up for dividends to the shareholders"); *id.* ¶ 88 ("Thus, it was inevitable that when the loans were held not to be recoverable in these proceedings, they would form part of the company's liabilities that had to be paid off before dividends could be paid.").

[99] *TECO v. Guatemala*, Award ¶¶ 6-7, (CL-0031-ENG/SPA).

[100] *Id.* ¶¶ 333, 716, 742.

[101] *See id.* ¶¶ 252, 486.

Through this award, TECO would have recovered the same amount as it would have recovered by filing a claim on its own behalf. Iberdrola, whose own claim had failed, however, also would have recovered through this award. Further, EDP, which had no treaty rights, would have recovered through this award. The same is true for EEGSA's creditors, all of whom would have been made whole through an award of damages to EEGSA.

53. By allowing shareholders to bring claims for reflective loss on their own behalf, claimants thus do not recover at the expense of creditors. By granting majority and controlling shareholders the right to bring claims on behalf of an enterprise, the DR-CAFTA and the NAFTA permit the claimant to obtain *broader* recovery for all other shareholders and creditors in the enterprise, and thereby increase the respondent State's liability. Respondent's assertion that Claimants' interpretation renders one or the other of Article 10.16.1(a) or (b) ineffective is thus wrong, as is Respondent's suggestion that it is somehow prejudiced by Claimants having filed their claim pursuant to Article 10.16.1(a).[102] Respondent, in fact, has recognized as much in the *RDC v. Guatemala* case.

54. In *RDC v. Guatemala*, the claimant filed its claim under the DR-CAFTA on its own behalf and on behalf of the enterprise (FVG) in which it was a majority owner.[103] The minority shareholders in that enterprise were Guatemalan nationals. Guatemala objected to having that tribunal make an award of damages to the enterprise, as it would be obligated to do for a claim submitted under Article 10.16.1(b) on behalf of the enterprise,[104] on account of the fact that this would result in compensation to the minority shareholders who did not have treaty rights.[105] The tribunal accepted Guatemala's objection, and awarded damages to the claimant, rather than to the enterprise:

---

[102] *See, e.g.*, Respondent's PO Mem. ¶¶ 12, 61.

[103] *Railroad Development Corp. v. Republic of Guatemala*, DR-CAFTA, ICSID Case No. ARB/07/23, Award dated 29 June 2012 ("*Railroad Development v. Guatemala*, Award") ¶ 1 (CL-0068-ENG).

[104] *See* DR-CAFTA Art. 10.26.2 (CL-0001-ENG/SPA) ("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.").

[105] *See, e.g.*, *Railroad Development Corp. v. Republic of Guatemala*, DR-CAFTA, ICSID Case No. ARB/07/23, Guatemala's Rejoinder on the Merits dated 21 Oct. 2011 ¶ 375 (CL-0069-ENG) (arguing that DR-CAFTA Article 10.16.1(b) "like NAFTA Article 1117, was intended to protect *enterprises* that could be injured 'in a manner that does not directly injure the investor/shareholders. It was not, however, intended or drafted to allow an investor who claims to have been injured directly (like RDC in this case) to recover damages allegedly suffered by domestic investors in the enterprise who are not claimants in the case and over whom the Tribunal would have no jurisdiction to award damages under the treaty.") (quoting Non-Disputing Party Submission of the United States in *GAMI v. Mexico* dated 30 June 2003 ¶ 11, which interpretation was *rejected* by the GAMI

> As to the interpretation of Article 10.16.1 of CAFTA, the Tribunal notes a certain inconsistency in the way Claimant has pleaded its case. On the one hand, Claimant filed its arbitration request both on its own behalf and on behalf of FVG. On the other hand, Claimant has pleaded that compensation be paid by Respondent to Claimant. Article 10.16.1(a) covers submission to arbitration of a claimant on its own behalf. Article 10.16.1(b) provides for submission to arbitration by a claimant on behalf of 'an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly.' As pointed out by Respondent, Claimant ignores Article 10.26.2's requirement that, where a claim is submitted to arbitration under Article 10.16.1(b), an award of monetary damages shall provide that the sum be paid to the enterprise. In the instant case, the minority shareholders of FVG are all nationals of Respondent and do not qualify as investors under CAFTA. For these reasons the amounts awarded for its loss from its investment should be paid to Claimant and be calculated on the basis of the percentage of the total amount invested by FVG's shareholders, which was contributed by Claimant.[106]

55. Respondent's arguments made in *RDC* as well as the *RDC* tribunal's award indicates that protecting creditors' rights was *not* an object and purpose of the DR-CAFTA. It lies ill in the mouth of Respondent to argue now before this Tribunal that Claimants ought to have filed their claims on behalf of Exmingua, that any award ought to be paid to Exmingua, and that Claimants' claims should be dismissed because they have filed their claims on their own behalf, rather than on behalf of Exmingua.[107]

C. Claimants Have Submitted Claims For Losses Suffered By Them As A Result Of Measures Against Their Investment

56. In its Memorial on Preliminary Objections, Respondent misreads or mischaracterizes Claimants' claims when asserting that Claimants are purportedly seeking to recover damages for an injury to Exmingua, an enterprise that Claimants own and control.[108] In particular, Respondent quotes from Claimants' Notice of Arbitration where Claimants complain about actions or omissions by Guatemala with respect to Exmingua.[109] Respondent then arrives at

---

tribunal); *see also GAMI v. Mexico*, Final Award ¶¶ 29-30 (CL-0036-ENG/SPA) (holding that it does "not accept that Barcelona Traction established a rule that must be extended beyond the issue of the right of espousal by diplomatic protection.").

[106] *Railroad Development v. Guatemala*, Award ¶ 266 (CL-0068-ENG).

[107] *See* Respondent's PO Mem. ¶ 58 (arguing that Claimants should have filed their claims under Article 10.16.1(b) and that any award should be paid to the enterprise pursuant to Article 10.26.2, because "the creditors of the enterprise are entitled to protection.").

[108] *Id.* ¶¶ 1, 47-55.

[109] *Id.* ¶ 54.

the erroneous conclusion that Claimants have made claims on behalf of Exmingua, and should therefore have filed their claims under DR-CAFTA Article 10.16.1(b).[110]

57. Contrary to Respondent's allegations, Claimants are seeking to recover damages *they* have incurred by reason of, or arising out of, Guatemala's breach of its obligations under Section A of the DR-CAFTA. More specifically, the value of Claimants' investment (Exmingua) and, therefore, the value of Claimants' shares in Exmingua were diminished as a result of the measures Guatemala took against Exmingua. This constitutes a loss to Claimants, who indirectly own Exmingua through their equity investments. Claimants make clear throughout their Notice of Intent and Notice of Arbitration that, contrary to Respondent's allegations, they are seeking compensation for damage that they themselves have sustained:

- "This self-imposed determination [to stop issuing exploitation licenses] does not accord with domestic law, is contrary to the Investors' legitimate expectations when they made their investments in Guatemala, and *prevented the Claimants from reaping any benefits from their investments*;"[111]
- "*Mr. Kappes and KCA* have incurred significant losses as a consequence of [Guatemala's] breaches;"[112]
- "*the Investors* have been harmed by the stoppage of the Progreso VII Project for several years;"[113]
- "*Claimants* have incurred significant losses as a result of [Guatemala's] breaches;"[114]
- "The State has not compensated *Claimants* for *their* losses";[115] and
- "*Claimants* are paying the price for the State's own alleged wrongdoing."[116]

58. That Claimants' alleged losses may be remedied through an Article 10.16.1(a) claim is further supported by the *Clayton v. Canada* damages award.[117] In that case, the tribunal

[110] *See id*. ¶¶ 5, 39(b), 79.

[111] Notice of Arbitration ¶ 51.

[112] Notice of Intent at 3 (emphasis added).

[113] *Id*. (emphasis added).

[114] Notice of Arbitration ¶¶ 21, 64 (emphasis added).

[115] *Id*. ¶ 3 (emphasis added).

[116] *Id*. (emphasis added); *see also* Notice of Intent at 2 (stating that "*the Investors have been deprived* of the use and enjoyment of their investment in Exmingua, which has been subjected to a series of acts and omissions by the State that were arbitrary, unfair, and contrary to due process.") (emphasis added); *id.* at 3 (asserting that the MEM had "arbitrarily and unlawfully *harmed the Investors* by prohibiting Exmingua from exercising its right to export the minerals.") (emphasis added).

found that Canada had breached its treaty obligations by denying Bilcon Canada, an enterprise wholly owned by the claimant, a permit for a quarry and marine terminal.[118] Despite misinterpreting NAFTA Articles 1116 and 1117, the *Clayton* tribunal properly rejected Canada's objection that the claimant was making a claim for losses suffered by its enterprise, and that the claimant's only recourse would have been to have filed a claim on behalf of its wholly-owned enterprise, pursuant to NAFTA Article 1117.[119]

59. In so doing, the *Clayton* tribunal explained that the claimant, and not the Canadian enterprise in which it held shares and which was denied the permit, had suffered losses as a result of Canada's breach.[120] This was so because the opportunity to develop the project was that of the claimants, who had invested in the opportunity.[121] As the tribunal explained:

> [T]he sole purpose of Bilcon of Nova Scotia was to build and operate a quarry, a role that it never got to fulfill. It was not an entity set up to establish and manage an investment in a quarry and a marine terminal with the Claytons just as passive investors. The fact that the Claytons used a local enterprise as an instrument for pursuing their opportunity, however, does not turn that opportunity into Bilcon of Nova Scotia's opportunity. Bilcon of Nova Scotia was no more than a conduit to facilitate the Claytons' operations.[122]

60. The same is true here. The sole purpose of Exmingua was to build and operate the Tambor mining project. Like Bilcon Canada, Exmingua was not established with Dan Kappes and KCA as passive investors; quite the contrary, Mr. Kappes and KCA were integrally involved with Exmingua, providing their expertise as well as financial backing to the venture.[123] Moreover, as Claimants set out in their Notice of Arbitration, Claimants'

---

[117] Although Respondent quotes and cites at length the United States' non-disputing Party submission filed in the *Clayton* case, it notably does not reference the Award on Damages, which followed that submission. *See* Respondent's PO Mem. nn.44, 50, 53, 59, 61, 85.

[118] *William Ralph Clayton and others v. Government of Canada*, NAFTA, UNCITRAL, Award on Damages, dated 10 Jan. 2019 ("*Clayton v. Canada*, Award on Damages") ¶ 19 (CL-0070-ENG) (quoting *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 Mar. 2015, ¶ 742).

[119] *Id.* ¶ 396 ("The opportunity to invest in a quarry and a marine terminal, which was denied by the Respondent's unlawful conduct, was an opportunity of the Investors and not an opportunity of Bilcon of Nova Scotia. Accordingly, compensation is owed directly to the Investors pursuant to Article 1116. It is not precluded by the prohibition against awarding 'reflective loss.'").

[120] *Id.* ¶¶ 390-396.

[121] *Id.* ¶ 396.

[122] *Id.* ¶ 394.

[123] *See, e.g.*, Notice of Arbitration ¶ 3 (referring to Claimants "making significant investments to improve the infrastructure in the area, assemble a plant and laboratory, and provide employment to the surrounding communities"); *id.* ¶ 7 ("Mr. Kappes is . . . a registered professional engineer in Nevada and Idaho, who has served for more than 45 years as a mining and metallurgical engineer, specializing in precious metals heap leaching. In addition to providing engineering and design work on numerous projects around the world, Mr.

investment in Exmingua has been rendered useless as a result of Respondent's actions and omissions.[124] In such circumstances, where an investor is precluded from operating or enjoying any of the benefits of its investment, there can be no doubt that the investor has suffered a "direct" injury and may make a claim on its own behalf to recover damages for the respondent's breach.

61. In any event, it is premature to conduct a detailed examination to determine the nature and extent of damages caused to Claimants as a result of Respondent's alleged Treaty breaches. For purposes of Respondent's Article 10.20.5 preliminary objections, DR-CAFTA Article 10.20(4)(c) directs the Tribunal to assume as true the claimant's factual allegations in the Notice of Arbitration.[125] As set forth above, Claimants have alleged that they themselves have suffered damages as a result of Respondent's Treaty breaches, and that fact should be accepted as true for purposes of determining Respondent's Article 10.20.5 preliminary objections.

62. The DR-CAFTA, moreover, requires only that the claimant indicate the relief requested and the approximate amount of damages it seeks. Claimants indisputably did so, by seeking a "declar[ation] that Guatemala has breached its obligations under the DR-CAFTA and ordering Guatemala to compensate Claimants," in the approximate amount specified.[126] There is no requirement that Claimants expressly characterize their damages in their Notice of Arbitration as "direct," "indirect" or "reflective," as Respondent suggests.[127]

63. The *Glamis Gold* tribunal thus rejected the United States' assertion that the claimant lacked standing because it had not suffered a loss, as required by NAFTA Article 1117(1).

Kappes has directed laboratory and field-testing on several projects that have subsequently become major precious metal mines."); *id.* ¶ 8 ("KCA is a corporation . . . with the purpose of providing process metallurgical services to the international mining industry, specializing in all aspects of heap leach and cyanide processing, including laboratory testing, project feasibility studies, engineering design, construction, and operation management."); *id.* ¶ 38 ("After the Investors acquired Exmingua, Exmingua filed an application with the General Directorate of Mining for a 25-year exploitation license in order to exploit gold and silver located on the site."); *id.* ¶ 6 ("Claimants continue to expend resources to maintain equipment and staff"); *id.* ¶ 45 ("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").

[124] Notice of Arbitration ¶ 3; *id*. ¶¶ 4-6, 68, 72, 74, 77.

[125] DR-CAFTA, Art. 10.20.4(c) (CL-0001-ENG/SPA) ("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.").

[126] Notice of Arbitration ¶ 78.

[127] Respondent's PO Mem. ¶ 55, n.81; DR-CAFTA, Art. 10.16.2 (CL-0001-ENG/SPA).

The tribunal held that the existence of loss was an issue for the merits.[128] Similarly, in *UPS*, Canada raised an objection to jurisdiction, contending that the claimant had not suffered any damage from the conduct alleged by it to have breached the treaty. The *UPS* tribunal rejected the objection, holding that it was sufficient for UPS at the preliminary objections stage "to state a *prima facie* case of damage to UPS from Canada's actions at issue in this proceeding."[129] For all the same reasons, this Tribunal should find the same.

D. Claimants Complied With The Waiver Requirement

64. Respondent asserts that the Tribunal lacks jurisdiction because Claimants have failed to submit a waiver on behalf of Exmingua, pursuant to DR-CAFTA Article 10.18.2(b)(ii).[130] Respondent further contends that Exmingua has acted contrary to this non-existent waiver, thus depriving the Tribunal of jurisdiction over Claimants' claims.[131] Respondent's objection finds no support in the Treaty. Claimants have fully complied with the DR-CAFTA's waiver provision, as explained below.

65. DR-CAFTA Article 10.18.2(b) provides that a notice of arbitration must be accompanied:

> i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and
>
> ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.
>
> 3. Notwithstanding [the above], the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought

[128] *Glamis Gold Ltd. v. United States of America*, NAFTA, UNCITRAL, Procedural Order No. 2 (revised) dated 31 May 2005 ¶¶ 22-23 (CL-0071-ENG).

[129] *UPS v. Canada*, Award on the Merits ¶ 37 (CL-0037-ENG); *see also Pope & Talbot v. Canada*, Award in Respect of Damages ¶ 80 (CL-0028-ENG) (holding that "it could scarcely be clearer that claims may be brought under Article 1116 by an investor who is *claiming* for loss or damage to its interest in the relevant enterprise," and that "[i]t remains of course for the Investor to prove that loss or damage was caused to its interest, and that it was causally connected to the breach complained of.") (emphasis added).

[130] Respondent's PO Mem. ¶¶ 7, 12, 39(c), 69.

[131] *Id*. ¶¶ 7, 70.

> for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.[132]

66. Claimants submitted their claims pursuant to Article 10.16.1(a) and, consequently, in accordance with the plain language of Article 10.18.2(b)(i), were required to submit a waiver on behalf of themselves. There is no allegation that the waivers Claimants submitted in accordance with Article 10.18.2(b)(i) are defective in any respect.

67. For this and other reasons, Respondent's reliance on *Commerce Group v. El Salvador*[133] is inapposite. In that case, the tribunal found that the claimants had acted contrary to the waiver that they had provided because they had not terminated court proceedings relating to the measure to which they themselves were parties.[134] Here, Claimants are not parties to *any* proceedings before any Guatemalan court or administrative tribunal. Consequently, the plain terms of the Treaty require dismissal of Respondent's objection that Claimants have acted contrary to the waiver obligation in the DR-CAFTA.

68. Respondent's contention that *Exmingua* was required to have filed a waiver finds no support in the Treaty. DR-CAFTA Article 10.18.2(b)(ii) provides that an enterprise must submit a waiver when a claim is submitted to arbitration *on behalf of the enterprise* pursuant to Article 10.16.1(b). Claimants filed their claim under 10.16.1(a) and, therefore, were not required to file a waiver on behalf of Exmingua. Respondent's objection to the contrary is therefore inconsistent with the plain language of the Treaty. Indeed, the only support for its argument that Respondent references is an argument made by another respondent State in another arbitration under a different (albeit similar) treaty, where the tribunal failed to rule on the objection.[135]

69. Respondent's resort to the perceived advantages and objective of requiring a waiver fails to acknowledge that those objectives cannot be obtained in all instances even under its interpretation and cannot override the Treaty's plain language, in any event. Respondent notes that the waiver is intended to prevent the respondent from having to defend against multiple actions in different fora that challenge the same measure; to avoid inconsistent decisions; and to avoid double recovery by the claimant and double payment by the

---

[132] DR-CAFTA, Art. 10.18.2-3 (CL-0001-ENG/SPA).

[133] *See* Respondent's PO Mem. ¶ 67.

[134] *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award dated 14 Mar. 2011 ¶¶ 100-102 (RL-0021-ENG).

[135] Respondent's PO Mem. ¶ 44.

respondent.[136] While these indeed may be valid objectives, the waiver obligation (even as interpreted by Respondent) is incapable of achieving these objectives in every situation, and, when this is the case, there is no basis to impose *additional* requirements on claimants.

70. As an initial matter, tribunals have means at their disposal to guard against double recovery or double payment, and numerous tribunals have confirmed that the risk of double recovery or double payment is irrelevant to a tribunal's jurisdiction.[137] As the tribunal in *Nykomb v. Latvia* explained, "[t]he risk of double payment is admittedly an effect of the establishment of an arbitration facility also for alleged losses or damages suffered indirectly by an investor, for instance through violations against its subsidiary in a country that has adhered to the Treaty."[138] The *Nykomb* tribunal emphasized, however, that "clearly the Treaty based right to arbitration is not excluded or limited in cases where there is a possible risk of double payment."[139] Rather, as the tribunal in *Suez v. Argentina* explained, where there is such a risk, "any eventual award in th[e] case could be fashioned in such a way as to prevent double recovery" or double payment.[140]

---

[136] *Id*. ¶ 65.

[137] *Railroad Development v. Guatemala*, Award ¶ 265 (CL-0068-ENG) ("The Tribunal notes that it has the capacity to render an award tailored so as to minimize the risk of double recovery between the parties. In the circumstances this situation is best resolved by requiring Claimant, on the full and effective payment of the prescribed compensation by Respondent, to transfer to Respondent or its nominee all the Claimant's shares in FVG."); *see also Sempra Energy Int'l v. The Argentine Republic*, ICSID Case No ARB/02/16, Decision on Objections to Jurisdiction dated 11 May 2005 ("*Sempra v. Argentina*, Decision on Objections to Jurisdiction") ¶ 102 (CL-0072-ENG/SPA) ("[I]nternational law and decisions offer numerous mechanisms for preventing the possibility of double recovery"); *Suez and InterAguas v. Argentina*, Decision on Jurisdiction ¶ 51 (CL-0013-ENG) ("[A]ny eventual award in this case could be fashioned in such a way as to prevent double recovery").

[138] *Nykomb Synergetics Technology Holding AB, Stockholm v. Republic of Latvia*, SCC Case, Award dated 16 Dec. 2003 ("*Nykomb v. Latvia*, Award"), at 9 (CL-0073-ENG).

[139] *Id*.

[140] *Suez and InterAguas v. Argentina*, Decision on Jurisdiction ¶ 51 (CL-0013-ENG); *see also Hochtief v. Argentina*, Decision on Liability ¶ 180 (CL-0046-ENG/SPA) ("Even assuming that such a possibility [of double recovery] exists, however, that is a matter concerning the remedy rather than the claim. It is not a bar to the admissibility of a claim – unless, perhaps, it arises as an aspect of an argument based upon the principle of res judicata, which is not the case here."); *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction dated 19 Dec. 2012 ¶ 253 (CL-0074-ENG) ("Such a risk [of double recovery], however, is inherent in many investment disputes that also raise, directly or indirectly, a possible option for recovery on the purely domestic level. This configuration does not in any way constitute a restriction on the jurisdiction of this Tribunal pursuant to the Argentina-Spain BIT."); *Camuzzi Int'l S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction dated 11 May 2005 ¶ 91 (CL-0075-ENG/SPA) (double recovery "is an issue belonging to the merits of the dispute."); *Sempra v. Argentina*, Decision on Objections to Jurisdiction ¶ 102 (CL-0072-ENG/SPA) (double recovery "is an issue belonging to the merits of the dispute."); *Eskosol v. Italy*, Decision on Respondent's Application Under Rule 41(5) ¶ 170 n. 294 (CL-0058-ENG) ("Had Italy instead not prevailed in the prior proceeding, but been ordered to pay compensation to the *Blusun* claimants, the Tribunal of course would have to be vigilant to prevent double recovery from Italy for the same loss.").

71. With regard to the multiplicity of claims and the possibility of inconsistent decisions, as Professor Schreuer explains, "[a]ny difficulties arising from a multiplicity of claimants can be taken care of by a number of devices *but do not require that the investor be deprived of its standing*."[141] It is indisputable that a minority shareholder cannot provide a waiver on behalf of an enterprise, in which case the respondent State may be faced with defending against both an arbitration claim filed by that shareholder as well as a court claim filed by the enterprise. This fact cannot deprive the claimant of its right to submit its claim to arbitration.[142]

72. As for majority shareholders, the DR-CAFTA could have required them to submit waivers on behalf of their enterprises when making any claim for loss or damage to the value of their shares in that enterprise, but the State Parties to the Treaty chose not to do so. In the NAFTA, by contrast, the State Parties required that, where a claimant makes a claim on its own behalf, pursuant to Article 1116, and that claim is for loss or damage arising out of the claimant's interest in an enterprise that it owns or controls, the claimant must provide a waiver for itself as well as for the enterprise.[143] There is *no* corresponding language in DR-CAFTA Article 10.18.2, however, and no basis to insert that additional requirement into the Treaty, as Respondent implicitly urges.

E. DR-CAFTA Annex 10-E Is Inapplicable Here

73. Respondent asserts that Claimants have acted in contravention of DR-CAFTA Annex 10-E, by submitting to arbitration their claims that Guatemala violated its obligation to provide full protection and security, after Guatemalan courts had ruled on Exmingua's

---

[141] Christoph Schreuer, *Shareholder Protection in International Investment Law*, in COMMON VALUES IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 612 (Pierre-Marie Dupuy *et al*. eds., 2006) (CL-0076-ENG) (emphasis added).

[142] *See, e.g., GAMI v. Mexico*, Final Award ¶¶ 37-38 (CL-0036-ENG/SPA) ("NAFTA Article 1117 would have allowed GAMI as a 100% shareholder of GAM to seek relief for alleged breaches of the treaty by Mexico. GAMI would not have been required to cause GAM to seek relief before the Mexican courts. It has been shown above that the fact that GAMI is only a minority shareholder does not affect its right to seek the international arbitral remedy. Does this conclusion need to be reconsidered because of the initiatives of other shareholders in GAM? The owners of the other 85.82% shares might for reasons of their own have chosen not to cause GAM to seek relief before the Mexican courts. (They might simply have been defeatists. Or they might have made their separate peace with the Government and abandoned any complaint in return for offsetting benefits.) That would not disentitle GAMI. It is difficult to see why GAMI's position under NAFTA should be impaired because the controlling shareholder caused GAM to seek redress in the Mexican courts . . . .").

[143] *See* NAFTA, Art. 1121(1)(b) (CL-0034-ENG/SPA) ("1. A disputing investor may submit a claim under Article 1116 to arbitration only if . . . (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.").

amparo actions seeking declarations that the police had failed to maintain public order.[144] Respondent wrongly contends that Annex 10-E introduces a fork-in-the-road clause into the DR-CAFTA, requiring claimants to choose whether to pursue international arbitration or litigation in national courts with respect to the challenged measure, and that once that choice has been made, it is irrevocable.[145] Because, according to Respondent, the fundamental bases for Exmingua's claim before the Guatemalan courts and Claimants' full protection and security claim before this Tribunal are the same, Respondent has not consented to arbitrate that claim.[146] Respondent misconstrues Annex 10-E in making this meritless objection.

74. Respondent is wrong to assert that the DR-CAFTA contains a fork-in-the-road provision, requiring a claimant to choose whether to challenge a measure in local courts or international arbitration.[147] As Article 10.18 indicates, the DR-CAFTA is one of several treaties that contains a general no-u-turn provision, as opposed to a fork-in-the-road provision. The DR-CAFTA, like nearly all modern investment treaties, does not require exhaustion of local remedies before a claim may be submitted to international arbitration.[148] Nevertheless, the DR-CAFTA, like the NAFTA, *encourages* resort to local courts before initiating arbitration. It does this by requiring the claimant to submit a waiver to initiate *or continue* local court proceedings relating to the challenged measure only once the claimant decides to submit a claim to international arbitration.[149] It also expressly permits the claimant to continue certain types of proceedings before local courts or administrative tribunals even after it commences international arbitration.[150] Accordingly, a claimant first may pursue a remedy before the local courts and then, within the requisite timeframe, may submit a claim to international arbitration challenging that same measure; after doing so, however, it may not subsequently submit or re-submit a claim to local courts.

---

[144] Respondent's PO Mem. ¶¶ 72-75.

[145] *Id*. ¶ 74.

[146] *Id*. ¶ 78.

[147] *Id*. ¶ 74.

[148] *See, e.g.*, Christoph Schreuer, *Consent to Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 830, at 846 (Peter Muchlinski *et al*., eds., 2008) (CL-0077-ENG) ("Provisions giving consent to investment arbitration do not, in general, require the exhaustion of local remedies before international proceedings are instituted. One of the purposes of investor-State arbitration is to avoid the vagaries of proceedings in the host State's courts.").

[149] DR-CAFTA, Art. 10.18.2 (CL-0001-ENG/SPA).

[150] *Id*., Art. 10.18.3.

75. A limited exception to this general no-u-turn rule is found in Annex 10-E,[151] which provides that:

> 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*.[152]

76. As the language of the text clearly provides, the Annex only precludes an investor from submitting its claims to international arbitration "if the investor or the enterprise, respectively, has alleged that *breach of an obligation under Section A [of Chapter 10 of the DR-CAFTA] . . . in proceedings before a court or administrative tribunal* of a Central American Party or the Dominican Republic."[153]

77. Accordingly, not all proceedings brought by an investor or an enterprise before local courts or tribunals are the subject of DR-CAFTA Annex 10-E. Only local proceedings alleging a breach of a State's obligation under Section A of Chapter 10 of the DR-CAFTA fall within that scope.

78. This comports with the object and purpose of the Treaty. Annex 10-E was included in the DR-CAFTA because, in some civil law countries, treaties are self-executing, meaning that they become part of domestic law without further implementing legislation and individuals may bring claims before the courts for a breach of the treaty itself. This is the case in Mexico, for example, unlike that in the United States or Canada. Consequently, the NAFTA contains Annex 1120.1, which is similar to DR-CAFTA Annex 10-E, except that it

---

[151] Another exception to the no-u-turn approach is with respect to claims for breaches of investment agreements or authorizations. *See* DR-CAFTA, Art. 10.18.4 (CL-0001-ENG/SPA) ("No claim may be submitted to arbitration: (a) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or (b) for breach of an investment agreement under 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C), if the claimant (for claims brought under Article 10.16.1(a)) or the claimant or the enterprise (for claims brought under Article 10.16.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for adjudication or resolution.").

[152] *Id.*, Annex 10-E (emphasis added).

[153] *Id.*

expressly applies only to Mexico[154] – the only one of the three NAFTA countries where treaties are self-executing. This is explained by the United States in its Statement of Administrative Action, provided to the U.S. Congress, a document which accompanies the implementing bill for the relevant trade agreement, which states:

> Because the NAFTA will give rise to private rights of action under Mexican law, Annex 1120.1 avoids subjecting the Mexican Government to possible 'double exposure' by providing that a claim cannot be submitted to Chapter Eleven arbitration where the same claim has been made before a Mexican court or administrative tribunal.[155]

79. Annex 10-E of the DR-CAFTA likewise contains a fork-in-the-road provision for claims alleging breaches of the Treaty in local courts for U.S. investors, as all of the State Parties to the Treaty, other than the United States, are civil-law countries. As the tribunal in *Corona v. Dominican Republic* thus held:

> DR-CAFTA Article 10.18.4 then sets out the 'fork in the road' provision. *But this applies only to claims of an alleged breach of an obligation under Section A of Chapter 10 in proceedings before a court or administrative tribunal of a Central American State Party or the Dominican Republic.* Annex 10-E applies to claims by US investors only. *This 'fork in the road' is clearly intended to deal with the situation in certain civil law countries where international treaties have direct effect and thus an alleged breach of an international treaty can form a cause of action under the domestic law of such States*.[156]

80. As Annex 10-E provides, in the case of claims submitted by a U.S. claimant under Article 10.16.1(a), those claims are only barred if *that claimant* has submitted claims alleging a breach of Section A of Chapter 10 of the DR-CAFTA to a local court or administrative

[154] NAFTA, Annex 1120.1 (CL-0034-ENG/SPA).

[155] Message from the President of the United States Transmitting North American Free Trade Agreement, Texts of Agreement, Implementing Bill, Statement of Administrative Action and Required Supporting Statements, Statement of Administrative Action, 3 Nov. 1993, H. Doc. 103-159, Vol. 1, 450, at 595 (C-0001-ENG).

[156] *Corona Materials LLC v. Dominican Republic*, ICSID 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 dated 31 May 2016 ("*Corona v. Dominican Republic*, Award on the Respondent's Expedited Preliminary Objections") ¶ 269 (RL-0002-ENG) (emphasis added, citations omitted); *see also Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction dated 29 Apr. 2019 ("*Nissan Motor v. India*, Decision on Jurisdiction") ¶ 214 (CL-0078-ENG) ("[U]sing the terms that the CEPA itself expressly defines, India's jurisdictional objection cannot be sustained. It is clear that the Writ Proceedings do not present any claim of a CEPA breach, but rather challenge the constitutionality of Tamil Nadu's amendment of the TN VAT Act. This is not an 'investment dispute' as defined by the CEPA. That the Writ Proceedings nonetheless may involve certain overlapping facts with the CEPA claim does not change the analysis of Article 96(6)'s clear text.").

tribunal.[157] Because there is not even any allegation that *Claimants* have submitted *any* claims before the Guatemalan courts, Annex 10-E is entirely inapplicable here.

81. Further, and in any event, there likewise is no allegation that Exmingua has submitted any claim before any Guatemalan court or administrative tribunal alleging any violation of any provision of Section A of Chapter 10 of the DR-CAFTA. Respondent's assertion that the "fundamental bases" for Exmingua's prior *amparo* actions seeking an order directing the police to maintain public order and Claimants' full protection and security claims before this Tribunal are the same,[158] is off-point. Even *assuming arguendo* that this were the case, Respondent ignores the plain text of Annex 10-E, as well as the Treaty's object and purpose, which only bars arbitral claims when claims alleging "*that breach of an obligation under Section A [of Chapter 10 of the DR-CAFTA have been submitted] in proceedings before a court or administrative tribunal*."[159] Because Exmingua's proceedings before the Guatemalan courts have all alleged violations of *Guatemala's* laws, and have not alleged any violations of Section A of Chapter 10 of the DR-CAFTA, its actions cannot implicate Annex 10-E's fork-in-the-road provision in any event.

III. CLAIMANTS' MOST-FAVORED-NATION TREATMENT CLAIM IS ADMISSIBLE

82. Respondent argues that Claimants' claim for violation of the MFN standard of protection in Article 10.4 of the DR-CAFTA is inadmissible, because Claimants failed to identify such claim in their Notice of Intent.[160] Respondent asserts that Article 10.16.2 of the Treaty requires notification of "the legal and factual basis for each claim," and states that, although Claimants raised a breach of the National Treatment standard under Article 10.3 the DR-CAFTA, they did not claim for a breach of MFN.[161] According to Respondent, Claimants' MFN claim set forth in their Notice of Arbitration is therefore inadmissible. Respondent's objection is meritless.

83. In their Notice of Intent, Claimants set forth the essential facts and legal basis for their MFN claim. In particular, Claimants explained that the Guatemalan courts and the MEM have acted in an inconsistent and arbitrary manner with respect to their treatment of

[157] DR-CAFTA, Annex 10-E, ¶ 1(a) (CL-0001-ENG/SPA).
[158] Respondent's PO Mem. ¶¶ 75-78.
[159] DR-CAFTA, Annex 10-E, ¶ 1 (CL-0001-ENG/SPA).
[160] Respondent's PO Mem. ¶ 87.
[161] DR-CAFTA, Art. 10.16.2 (CL-0001-ENG/SPA); Respondent's PO Mem. ¶¶ 87-88, 91.

Exmingua, as compared with their treatment of the investments owned by others. Specifically, the Notice of Intent discussed how the Supreme Court suspended the exploitation license for Progreso VII pending the completion of consultations by Respondent; how the MEM had failed to even commence consultations; and how Exmingua's appeal before the Constitutional Court remained pending, for more than two years after it was filed.[162] Claimants then explained that, by contrast, the Constitutional Court ruled that the investments of Oxec, S.A. and Oxec II, S.A. – indirectly owned by Guatemalan nationals – could continue operating pending consultations conducted by the State; that the Constitutional Court ruled on that case, which was filed after Exmingua's, within three months; and that the MEM commenced and quickly completed consultations in relation to that project.[163] All of this formed the factual and legal basis for Claimants' National Treatment claim.

84. A few months after Claimants submitted their Notice of Intent, the Constitutional Court ruled in the *Escobal* case on an appeal to a suspension order filed in connection with the San Rafael mine. That appeal was filed more than one year after Exmingua's, but the Court issued its ruling more than one year ago, while Exmingua's appeal *still* remains pending.[164] This further confirms Respondent's arbitrary and discriminatory treatment. Claimants referenced these facts in their Notice of Arbitration and, because the San Rafael mine was operated by the Guatemalan subsidiary of Tahoe Resources, a Canadian company, Claimants included an MFN claim in their Notice of Arbitration. Accordingly, the factual bases for this claim, including the nature of the measures giving rise to the MFN claim, which concerns the differential treatment afforded by Respondent's courts, were set forth in Claimants' Notice of Intent, and Respondent cannot credibly suggest that it was not on notice as to these complaints.

85. As explained below, for this and other reasons, Respondent's objection should be dismissed. It would be contrary to both the ordinary meaning as well as the object and purpose of the Treaty to dismiss Claimants' MFN claim. This is especially so in circumstances where, as here, Respondent has suffered no prejudice by the alleged "deficiency" in Claimants' Notice of Intent.

[162] Notice of Intent at 2-3.

[163] *Id*. at 3; *see also* Notice of Arbitration ¶¶ 61-62, 67-68.

[164] Notice of Arbitration ¶¶ 63, 67-68.

A. The Ordinary Meaning Of Article 10.16.2, In Its Context, Confirms That Claimants' MFN Claim Is Admissible

86. Respondent notes that the language of Article 10.16.2 provides that a notice of intent shall include "for each claim, the provisions of [the DR-CAFTA]…alleged to have been breached" and "the legal and factual basis for each claim."[165] It then asserts, without any textual support, that Claimants' MFN claim should be dismissed because Claimants omitted including the legal basis for their MFN claim in their Notice of Intent. This conclusion is at odds with the Treaty's text.

87. Article 10.16.2 does not provide that compliance therewith is a precondition to the respondent State's consent to arbitrate certain claims, or that non-compliance warrants dismissal of a claim. This is confirmed by the context of the Article, which context includes the other provisions in the Treaty.[166] Other provisions of the DR-CAFTA reveal that, where the State Parties intended to condition the submission of a claim on the satisfaction of certain requirements, they did so expressly:

- "*Provided that* six months have elapsed since the events giving rise to the claim, a claimant may submit a claim . . . ."[167]
- "*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 . . . ."[168]
- "*No claim may be submitted* to arbitration under this Section unless: (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and (b) the notice of arbitration is accompanied [by the relevant waivers]."[169]
- "*No claim may be submitted* to arbitration: (a) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or (b) for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C) . . . ."[170]

[165] Respondent's PO Mem. ¶ 88.

[166] Vienna Convention, Art. 31(2) (CL-0005-ENG/SPA); VIENNA CONVENTION ON THE LAW OF TREATIES, A COMMENTARY 582 (Oliver Dörr & Kirsten Schmalenbach, eds., 2018) (CL-0079-ENG).

[167] DR-CAFTA, Article 10.16.3 (CL-0001-ENG/SPA) (emphasis added).

[168] *Id.*, Article 10.18.1 (emphasis added).

[169] *Id.*, Article 10.18.2 (emphasis added).

[170] *Id.*, Article 10.18.4 (emphasis added).

88. The absence of wording such as "no claims may be submitted," or "provided that 'x,' a claimant may submit a claim," indicates that non-compliance with Article 10.16.2 is not a bar to the admissibility of claims.

89. The tribunal in *B-Mex v. Mexico* confirmed as much when interpreting NAFTA Article 1119, which is identical to DR-CAFTA Article 10.16.2 in all relevant respects.[171] In that case, Mexico argued that, because 32 additional claimants were named in the notice of arbitration who were not named in the notice of intent, Mexico had not consented to arbitrate the claims of those 31 claimants. Following an examination of the ordinary meaning of the notice of intent provision, in its context, the tribunal held:

> Article 1119 imposes an obligation on the investor, but the existence of an obligation says nothing about the consequences of a failure to meet that obligation.
>
> The Treaty does not in terms require a sanction of dismissal. As seen above, unlike the provisions of Articles 1116, 1117, 1120 and 1121(1), neither Article 1119 nor any other provision of the Treaty provides that a claim can be submitted to arbitration 'only if' or 'provided that' the requirements of Article 1119 have been met. . . . Absent any language in the treaty so mandating, the Tribunal cannot imply a *right* to dismissal of the claim merely because to some it might seem desirable to do so.[172]

90. Similarly, in *ADF v. United States*, the tribunal rejected the respondent's argument that a procedural defect in a notice of intent warranted dismissal of the claim. In that case, the claimant first raised an MFN claim in its counter-memorial, after having failed to mention it either in its notice of intent or notice of arbitration.[173] In admitting the claim, the tribunal considered the ordinary language of the relevant NAFTA provisions, and concluded that a procedural irregularity in the notice of intent did not affect the consent of a NAFTA party to arbitrate, and therefore did not deprive the tribunal of jurisdiction.[174] The tribunal explained:

---

[171] NAFTA, Article 1119 (CL-0034-ENG/SPA) ("The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify: (a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise; (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions; (c) the issues and the factual basis for the claim; and (d) the relief sought and the approximate amount of damages claimed.").

[172] *B-Mex, LLC and others v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/16/3, Partial Award dated 19 July 2019 ("*B-Mex v. Mexico*, Partial Award") ¶¶ 122-123 (CL-0080-ENG/SPA) (emphasis in original).

[173] *ADF Group Inc. v. United States of America*, NAFTA, ICSID Case No. ARB(AF)/00/1, Award dated 9 Jan. 2003 ("*ADF v. United States*, Award") ¶ 127 (CL-0081-ENG).

[174] *Id*. ¶ 120 (CL-0081-ENG).

> Turning back to Article 1119(b) . . . . We find it difficult to conclude that failure on the part of the investor to set out an exhaustive list of 'other relevant provisions' in its Notice of Intention to Submit a Claim to Arbitration must result in the loss of jurisdiction to consider and rely upon any unlisted but pertinent NAFTA provision in the process of resolving the dispute.[175]

91. The same result should obtain here. It would be inconsistent with the plain language of the DR-CAFTA's notice provisions, interpreted in their context, to dismiss Claimants' MFN claim because that claim was not expressly referenced in their Notice of Intent.

B. Claimants' Notice Of Intent Fulfills The Object And Purpose Of Article 10.16.2 Of The DR-CAFTA

92. Respondent asserts that the object and purpose of Article 10.16.2 of the DR-CAFTA is to allow for attempts at amicable settlement between the parties and to grant the respondent State time to prepare its defense.[176] It further contends that admitting Claimants' MFN claim would run afoul of the Treaty's object and purpose, because the omission of Claimants' MFN claim from their Notice of Intent (i) deprived it of an opportunity to assess the costs-benefit of settlement and to engage in a "meaningful dialogue" with Claimants;[177] and (ii) harmed its ability to prepare and argue its defense.[178] Respondent's arguments are meritless.

93. Claimants' interpretation of the notification provisions in the DR-CAFTA are fully consonant with the object and purpose of allowing attempts at an amicable settlement.[179] Nor did Claimants' Notice of Intent deprive Respondent in any way from engaging in meaningful dialogue with Claimants. And although Respondent has not shown that preparing a defense is an object and purpose of the notification provision, Respondent was not deprived of any opportunity to prepare its defense as a result of the content of Claimants' Notice of Intent.

---

[175] *Id*. ¶ 134 (CL-0081-ENG).

[176] Respondent's PO Mem. ¶¶ 92-94.

[177] *Id*. ¶¶ 93-94.

[178] *Id*. ¶ 92.

[179] *See, e.g.*, *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award dated 18 Jan. 2017 ("*Supervision v. Costa Rica*, Award") ¶ 339 (RL-0032-ENG) ("Indeed, proper notice allows the State to examine and possibly resolve the dispute through negotiation."); *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order dated 16 Mar. 2006 ¶ 5 (RL-0033-ENG) ("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."); *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award dated 5 Mar. 2011 ¶ 209 (CL-0082-ENG) ("This is precisely the rationale of the BIT requirement, i.e. avoiding that a State be brought before an international investment tribunal all of a sudden, without being given the opportunity to discuss the matter with the other party."); *see also* NAFTA Free Trade Commission, Statement on Notices of Intent to Submit a Claim to Arbitration Under NAFTA Article 1119 dated 7 Oct. 2003 ¶ 2 (RL-0034-ENG) ("The notice of intent naturally serves as the basis for consultations or negotiations between the disputing investor and the competent authorities of a Party.").

94. Where a notice provision's object and purpose of apprising the respondent of the dispute and granting time for attempts at a settlement have been satisfied, tribunals properly have refused to dismiss claims on account of a defect in the notice. In *B-Mex*, for example, in refusing to dismiss the claims of the 31 claimants who had not been named in the notice of intent, the tribunal considered that the respondent had been provided with sufficient information in the claimants' notice of intent to engage in meaningful settlement negotiations.[180] The tribunal remarked that "[i]t is possible for that purpose [*i.e.*, amicable settlement] to be fulfilled even where the notice of intent fails to include all of the requisite information."[181] The question is whether the notice "still provided the Respondent with sufficient information regarding the dispute to enable a meaningful settlement effort."[182]

95. Likewise, in *Al-Bahloul v. Tajikistan*, where the claimant filed its request for arbitration two weeks before the three-month cooling off period would have expired, the tribunal focused on the question as to whether "the State had in fact been given an opportunity to negotiate (and simply failed to do so) or not," and remarked that, "[i]n cases where the State did not react to the notice of dispute, tribunals have considered that dismissing the claim and asking Claimant to resubmit it would be an unnecessary formality. This is an eminently sound approach."[183]

---

[180] *B-Mex v. Mexico*, Partial Award ¶ 132 (CL-0080-ENG/SPA).

[181] *Id*. ¶ 130.

[182] *Id*. ¶ 132.

[183] *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability dated 2 Sept. 2009 ¶ 154 (CL-0083-ENG); *see also Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction dated 14 Nov. 2005 ¶ 102 (CL-0084-ENG) ("The Tribunal further notes that Pakistan made no proposal to engage in negotiations with Bayindir following Bayindir's notification . . . . [I]f Pakistan had been willing to engage in negotiations with Bayindir, in the spirit of Article VII of the BIT, it would have had many opportunities to do so during the six months following the notification of 4 April 2002. . . . [P]reventing the commencement of the arbitration proceedings until six months after the 4 April 2002 notification would, in the circumstances of this case, amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties . . . ."); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction dated 16 July 2001 ("*Salini Construttori v. Morocco*, Decision on Jurisdiction") ¶ 19 (RL-0036-ENG) ("The mission of this Tribunal is not to set strict rules that the Parties should have followed; the Tribunal is satisfied to determine if it is possible to deduce from the entirety of the Parties' actions whether, while respecting the term of six months, the Claimants actually took the necessary and appropriate steps to contact the relevant authorities in view of reaching a settlement, thereby putting an end to their dispute."); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008 ¶¶ 343-346 (CL-0085-ENG) (finding that the "underlying purpose" of the relevant notice provision "is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding."); *Ethyl Corp. v. The Government of Canada*, NAFTA, UNCITRAL, Award on Jurisdiction dated 24 June 1998 ¶¶ 84-85 (CL-0086-ENG) (noting that "[t]he Tribunal has been given no reason to believe that any 'consultation or negotiation' pursuant to Article

96. None of the cases relied upon by Respondent indicate otherwise or support the dire consequence which Respondent seeks to impose on Claimants. Respondent, for instance, relies on *Pac Rim v. El Salvador*[184] in support of its assertion that the DR-CAFTA imposes a heightened requirement to identify the legal and factual basis for each claim, in order to facilitate settlement discussions.[185] The *Pac Rim* tribunal, however, did not even consider the effect of non-compliance with a notice requirement. Rather, the respondent in *Pac Rim* objected to the claimant's *notice of arbitration* because, it argued, that notice did not contain factual details to substantiate the claimant's claims for breach of the national treatment, MFN, and investment authorization obligations.[186] In response, the claimant asserted that it had pled such facts in its notice of intent, which it requested be incorporated into its notice of arbitration. The tribunal agreed, and, on that basis, found that the claims had been sufficiently pleaded.[187]

97. Moreover, the decisions in *Tulip v. Turkey* [188] and *Salini v. Morocco*,[189] relied upon by Respondent,[190] further support *Claimants'* interpretation of the notice provisions. The tribunals in those cases adopted a flexible approach to the notice provisions in the applicable BITs, and found that, despite claimants not employing the "most perfect forms" of notification, claimants' claims were admissible.[191]

1120 . . . was even possible," and thus dismissing the objection based on insufficient notice because doing otherwise "would disserve, rather than serve, the object and purpose of NAFTA."); Christoph Schreuer, *Consent to Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 830, at 846 (Peter Muchlinski *et al*., eds., 2008) (CL-0077-ENG) ("It would seem that the question of whether a mandatory waiting period is jurisdictional or procedural is of secondary importance. What matters is whether or not there was a promising opportunity for a settlement. There would be little point in declining jurisdiction and sending the parties back to the negotiating table if these negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending.").

[184] *Pac Rim v. El Salvador*, Decision on Preliminary Objections (RL-0003-ENG).

[185] Respondent's PO Mem. ¶ 93.

[186] *Pac Rim v. El Salvador*, Decision on Preliminary Objections ¶ 189 (RL-0003-ENG).

[187] *Id*. ¶¶ 220-222, 248. As regards the investment authorization claims, the tribunal noted that "these claims raise issues of Salvadoran law which (whether treated as fact or law) cannot be decided finally at this stage in favour of the Respondent; and accordingly, the Tribunal does not accept the Respondent's Objection under CAFTA Article 10.20.4." *Id.* ¶ 249.

[188] *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue dated 5 Mar. 2013 ("*Tulip Real Estate v. Turkey*, Decision on Bifurcated Jurisdictional Issue") (RL-0029-ENG).

[189] *Salini Construttori v. Morocco*, Decision on Jurisdiction (RL-0036-ENG).

[190] Respondent's PO Mem. ¶ 102.

[191] *Tulip Real Estate v. Turkey*, Decision on Bifurcated Jurisdictional Issue ¶ 121 (RL-0029-ENG) (finding the claim admissible despite the claimant's "confusing correspondences" and that the claimant "clearly did not employ the most perfect forms when it notified Respondent of the dispute"); *Salini Construttori v. Morocco*, Decision on Jurisdiction ¶¶ 18-19 (RL-0036-ENG) (finding that notice to the Minister of Infrastructure in his

98. None of the cases relied upon by Respondent supports a contrary conclusion. In *Supervision y Control v. Costa Rica*, for instance, the claimant sought to advance new claims in its memorial, only some of which related to the claims raised in the notice of intent.[192] The tribunal took into account the purpose of notice, which "allows the State to examine and possibly resolve the dispute through negotiation."[193] With that in mind, it found that the new claims which were "directly linked" to the issues set forth in the notice letter were admissible, whereas those that were not were inadmissible.[194] Likewise, the tribunal in *Goetz v. Burundi* rejected new claims concerning the payment of taxes and duties which were found to be unrelated to the claims that had been notified, which concerned the legality and the legal consequences of the withdrawal of a "certificate of free zone."[195] Similarly, in *Burlington v. Ecuador*, the tribunal found claimant's full protection and security claim, based on the State's alleged failure to provide security against opposition groups, inadmissible, but only because that claim was completely unrelated to the notified claims, which alleged noncompliance with a domestic profit-sharing law.[196]

99. As for any objective of permitting the Respondent adequate time to prepare its defense, tribunals that have considered such an objective also have taken a pragmatic approach. In the NAFTA case *Chemtura v. Canada*, for example, the claimant argued for the first time *in its memorial* that the MFN clause could be used to import a fair and equitable treatment provision from another treaty.[197] While acknowledging that this argument had not been made in either the three notices of intent or in the notice of arbitration, the tribunal concluded that "the facts mentioned [in two of the notices of intent] are essentially the same as those subsequently referred to in the Claimant's Memorial in support of the claim under

---

capacity as president of a private operating company that was a party to the concession agreement, rather than in his capacity of Minister, satisfied the notice requirement, because "[t]he mission of this Tribunal is not to set strict rules that the Parties should have followed," but rather to ascertain whether "the Claimants actually took the necessary and appropriate steps to contact the relevant authorities in view of reaching a settlement, thereby putting an end to their dispute.").

[192] *Supervision v. Costa Rica*, Award ¶¶ 342, 344-345 (RL-0032-ENG).

[193] *Id*. ¶ 339.

[194] *Id*. ¶¶ 345-346.

[195] *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award dated 10 Feb. 1999 ("*Antoine Goetz v. Burundi*, Award") ¶¶ 91-93 (RL-0035-FR/ENG).

[196] *Burlington Resources Inc. v. Republic of Ecuador (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador))*, ICSID Case No. ARB/08/5, Decision on Jurisdiction dated 2 June 2010 ("*Burlington Resources v. Ecuador*, Decision on Jurisdiction").¶¶ 263, 308-309 (RL-0037-ENG).

[197] *Chemtura Corp. v. Government of Canada*, NAFTA, UNCITRAL, Award dated 2 Aug. 2010 ("*Chemtura v. Canada*, Award") ¶ 92 (CL-0087-ENG).

Article 1103."[198] On that basis, the tribunal held that the omission of the claim from the notices of intent and arbitration did not prejudice the respondent's right to respond:

> More fundamentally, the fact that the Claimant may have advanced arguments in its Memorial which were not spelled out in its previous submissions in connection with Article 1103 [MFN] has not caused any prejudice to the ability of the Respondent to respond to such arguments. Indeed, the Respondent has had ample opportunity to state its position, and has done so in its briefs and at the hearings.[199]

100. Likewise, in *ADF v. United States*, the tribunal "observe[d] that the Respondent has not shown that it has sustained any prejudice by virtue of the non-specification of Article 1103 [MFN] as one of the provisions allegedly breached by the Respondent. Although the Investor first specified its claim concerning Article 1103 *in its Reply* to the Respondent's Counter-Memorial, the Respondent had ample opportunity to address and meet, and did address and meet, that claim and the Investor's supporting arguments, in its Rejoinder."[200] In *Aven v. Costa Rica*, by contrast, the claimants referred to the full protection and security obligation for the first time only in passing in their memorial, and only raised such a claim at the closing of the hearing on the merits.[201] The tribunal accordingly held the claim inadmissible.[202]

101. Here, the object and purpose of the notice provision has been satisfied. *First*, as shown above, Claimants are not seeking to advance an entirely separate claim distinct from the measures complained of in their Notice of Intent. The factual basis for their MFN claim – the arbitrary and discriminatory treatment by the Courts and the MEM – by allowing other projects to continue operating while the MEM conducted consultations; by ruling on appeals in other cases filed long after Exmingua's; and by commencing and concluding consultations in other cases – all were set forth in Claimants' Notice of Intent.[203] Claimants' Notice of Intent thus indisputably fulfilled the object and purpose of Article 10.16.2, as it provided

---

[198] *Id*. ¶ 103.

[199] *Id*. ¶ 104.

[200] *ADF v. United States*, Award ¶ 138 (CL-0081-ENG) (emphasis added).

[201] *David R. Aven* et al. *v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award dated 18 Sept. 2018 ("*David R. Aven v. Costa Rica*, Final Award") ¶¶ 343, 345 (RL-0031-ENG).

[202] *Id*. ¶¶ 343, 346 (finding that, because the claimants "only brought the claim [for breach of full protection and security] at the closing of the [hearing on jurisdiction and the merits]" that claim was inadmissible, as the respondent was deprived of an opportunity "to prepare and argue its defense.").

[203] Notice of Intent at 2-3.

Respondent with sufficient information to pursue amicable settlement discussions with Claimants.

102. Claimants, in fact, made considerable efforts to engage in a meaningful dialogue with Respondent, including travelling to Guatemala to meet in person with representatives from Respondent.[204] It defies logic to suggest – as Respondent does – that although those negotiations were entirely unsuccessful, the outcome might have been different had Claimants' Notice of Intent contained reference to DR-CAFTA Article 10.4. The real obstacle to a "meaningful"[205] dialogue was Respondent's approach to settlement discussions, and not the content of Claimants' Notice of Intent. Indeed, Respondent had an additional eight months from the date of the Notice of Arbitration until the constitution of the Tribunal to engage in settlement discussions,[206] but made no such efforts during this period or at any other subsequent time.

103. *Second*, the omission of a reference to Claimants' MFN claim in their Notice of Intent has not infringed Respondent's right of defense. Respondent has had, and will have, ample opportunity to respond to Claimants' MFN claim. As explained, the facts giving rise to an MFN claim were described in the Notice of Intent, and breach of Article 10.4 of DR-CAFTA was raised explicitly in Claimants' Notice of Arbitration. Respondent is not scheduled to submit its Counter-Memorial on the Merits until 14 September 2020 – nearly *two years* after the submission of Claimants' Notice of Arbitration.[207] Clearly, Respondent has suffered no prejudice and, to the extent that an object and purpose of the notice provision is to grant the respondent an adequate opportunity to defend itself, that objective has been served.

IV. CLAIMANTS' CLAIM FOR LACK OF FULL PROTECTION AND SECURITY IS TIMELY

104. In its Preliminary Objections, Respondent alleges that Claimants' claim for full protection and security "is time barred because it was filed after the prescribed limitations

[204] Notice of Arbitration ¶ 28.

[205] *B-Mex v. Mexico*, Partial Award ¶¶ 132, 137 (CL-0080-ENG/SPA).

[206] Claimants' Notice of Arbitration is dated 9 November 2018; Procedural Order No. 1 dated 10 Sep. 2019 ¶ 2.1 ("The Tribunal was constituted on July 2, 2019 in accordance with the ICSID Convention, the ICSID Arbitration Rules and the DR-CAFTA."); *B-Mex v. Mexico*, Partial Award ¶ 137 (CL-0080-ENG/SPA) ("First, where, as here, the Notice did in fact contain information sufficient to enable meaningful settlement discussions prior to the arbitration, there is no discernible prejudice to the Respondent. Second, even if that had not been the case, where the parties then still had more than five months before the constitution of the Tribunal to pursue settlement efforts, the appropriate sanction would not have been dismissal.").

[207] Procedural Order No. 1 dated 10 Sept. 2019, Annex B.

period" in Article 10.18.1 of the DR-CAFTA, which requires a claim to be brought within three years from the date on which a claimant first acquired, or should have first acquired, knowledge of the breach and loss or damage arising therefrom.[208] Guatemala asserts that Claimants claim a "continuing" breach or "a 'series of similar and related actions' or omissions," which began with Respondent's alleged failure to respond to the protests and blockades at the project site in 2012, as the basis for their full protection and security violation.[209] On that basis, Respondent contends that, because Claimants "were well aware more than six years before that date [*i.e.*, the date of filing of Claimants' Notice of Arbitration] of Guatemala's alleged omission," the Tribunal does not have jurisdiction to hear this claim.[210]

105. As explained below, Respondent's objection ignores or misstates the law, and mischaracterizes Claimants' claim. Respondent mistakenly contends that Claimants' claim arises out of Guatemala's failure to provide full protection and security in respect of the protests and blockades that began in 2012,[211] when the violation alleged by Claimants actually concerns a distinct breach that first occurred and gave rise to damages in 2016. Respondents' criticism of the "continuing breach" theory thus is legally irrelevant, as it is not implicated by Claimants' claim. Even if it were, however, the claim would not be time-barred, because the prescription period only begins to run from the date that the continuous breach ceased.

A. Respondent Misstates The Law

106. Respondent misconstrues the approach taken by tribunals when deciding on the timeliness of a claim involving a series of actions by a respondent State. The cases it relies on in support of its argument that the limitations period does not start to run from the last breach in a series of actions relate to singular breaches and are therefore distinguishable. Further, Respondent misinterprets Article 10.18.1, and fails to discuss key cases that address the effect of a continuing breach on a limitations period.

[208] Respondent's PO Mem. ¶¶ 106-107.
[209] *Id.* ¶¶ 117-119.
[210] *Id.* ¶ 107.
[211] *Id.* ¶ 117 (emphasis added).

107. *First*, for purposes of assessing the timeliness of a claim, it is "possible and appropriate … to separate a series of events into distinct components . . . ."[212] In *Grand River v. United States*, on which Respondent relies, for instance, the tribunal noted that the claims "involv[ed] a series of similar and related actions by a respondent state."[213] There, the tribunal found that a challenge to a master settlement agreement, which had been concluded more than three years before arbitration commenced, was time-barred.[214] It held, however, that the claimant's challenge to a statutory obligation to place their funds into escrow, which was enacted within the three-year period, was not time barred, despite the fact that the escrow statutes were contemplated in and enacted pursuant to the time-barred agreement.[215]

108. This is unlike other cases cited by Respondent, where there was a singular measure at issue, which gave rise to a breach and damage outside of the limitations period. In *Corona Materials v. Dominican Republic*, for example, the challenge concerned one central measure – the Environment Ministry's refusal to grant an environmental license[216] – which occurred prior to the critical date.[217] The tribunal rejected the claimant's argument that the respondent's failure to *reconsider* its license application was "an autonomous breach," finding that it did not produce "any separate effects on its investment other than those that were already produced by the initial decision."[218] Likewise, in *Berkowitz v. Costa Rica*, the tribunal dismissed the claimant's argument that some of the alleged breaches – namely, respondent's failure to provide prompt and adequate compensation for the expropriation of

---

[212] *William Ralph Clayton and others v. Government of Canada*, NAFTA, UNCITRAL, Award on Jurisdiction and Liability dated 17 Mar. 2015 ("*Clayton v. Canada*, Award on Jurisdiction and Liability") ¶¶ 266-269 (CL-0088-ENG); *see also Grand River Enterprises Six Nations, Ltd.*, et al. *v. United States of America*, NAFTA, UNCITRAL, Decision on Objections to Jurisdiction dated 20 July 2006 ("*Grand River v. United States*, Decision on Objections to Jurisdiction") ¶¶ 86-87 (RL-0039-ENG) ("[T]he Tribunal has difficulty seeing how NAFTA Articles 1116(2) and 1117(2) can be interpreted to bar consideration of the merits of properly presented claims challenging important statutory provisions that were enacted within three years of the filing of the claim and that allegedly caused significant injury, even if those provisions are related to earlier events. . . . The adoption and implementation of the states' complementary legislation/contraband laws in late 2001 or 2002 (that is, less than three years before the claim was filed) were clearly identified as included in the claim in the Notice of Arbitration and the Particularized Statement of Claim. Accordingly, Claimants' claims in respect of those enactments remain for consideration at the merits stage."); *The Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), Preliminary Objection*, Judgment dated 4 Apr. 1939, PCIJ Series A/B No. 77 ¶ 87 (CL-0089-ENG) ("It is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to the situation or fact.").

[213] *Grand River v. United States*, Decision on Objections to Jurisdiction ¶ 81 (RL-0039-ENG).

[214] *Id.* ¶ 83.

[215] *Id.* ¶¶ 86-87.

[216] *Corona v. Dominican Republic*, Award on the Respondent's Expedited Preliminary Objections ¶ 219 (RL-0002-ENG).

[217] *Id.* ¶ 237.

[218] *Id.* ¶ 212.

claimants' residential properties – were "continuing breaches," because they were not "independently actionable" and "separable" from "the pre-entry into force conduct in which they are deeply rooted," which was the issuance of an expropriation decree.[219]

109. *Second*, claimants may reference and tribunals may take into account measures that occurred prior to the limitations period as factual background and context, without running afoul of the Treaty's limitations period. Tribunals have consistently ruled that a factual predicate to a claim is distinct from the occurrence of the breach and the incurrence of a loss related to such breach. As the *Eli Lilly v. Canada* tribunal explained:

> Many previous NAFTA tribunals [ ] have found it appropriate to consider earlier events that provide the factual background to a timely claim. As stated by the tribunal in *Glamis Gold v. United States*, a claimant is permitted to cite 'factual predicates' occurring outside the limitation period, even though they are not necessarily the legal basis for its claim.[220]

Indeed, the *Mondev* tribunal confirmed that, not only may such facts be referenced, but that "events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation."[221]

110. *Third*, DR-CAFTA Article 10.18(1) is clear that the three-year prescription period does not begin to run until the claimant first acquires or should have first acquired knowledge

---

[219] *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) dated 30 May 2017, ¶¶ 252, 264 (RL-0038-ENG). The tribunal held that other claims were not time barred. *See id.* ¶¶ 270, 286 ("[T]he Tribunal concludes, and so finds, that it has jurisdiction over the Claimants' allegations that, by reference to the relevant and applicable judgments of the Costa Rican courts, the assessment of compensation in respect of Lots B3, B8, A40, SPG1 and SPG2 amounts to manifest arbitrariness and / or to blatant unfairness contrary to CAFTA Article 10.5.").

[220] *Eli Lilly and Co. v. The Government of Canada*, NAFTA, ICSID Case No. UNCT/14/2, Final Award dated 16 Mar. 2017 ("*Eli Lilly v. Canada*, Final Award") ¶ 172 (RL-0040-ENG); *see also Clayton v. Canada*, Award on Jurisdiction and Liability ¶ 282 (CL-0088-ENG) ("While Article 1116(2) bars breaches in respect of events that took place more than three years before the claim was made, events prior to the three-year bar . . . are by no means irrelevant. They can provide necessary background or context for determining whether breaches occurred during the time-eligible period."); *Glamis Gold Ltd. v. The United States of America*, NAFTA, UNCITRAL, Award dated 8 June 2009 ¶¶ 348-350 (RL-0041-ENG) ("Both claimant and respondent state that a claim brought on the basis of an event properly within the time limit of Article 1117(2) may cite to earlier events as 'background facts' or 'factual predicates.' The Tribunal agrees."); *Grand River v. United States*, Decision on Objections to Jurisdiction ¶ 86 (RL-0039-ENG) ("[T]he Tribunal has difficulty seeing how NAFTA Articles 1116(2) and 1117(2) can be interpreted to bar consideration of the merits of properly presented claims challenging important statutory provisions that were enacted within three years of the filing of the claim and that allegedly caused significant injury, even if those provisions are related to earlier events").

[221] *Mondev v. United States*, Final Award ¶ 70 (RL-0018-ENG).

of the breach *and* that the claimant has suffered loss or damage.[222] While the claimant need not appreciate the full extent of its damage for the limitations period to commence, a mere suspicion or expectation that damage *might* occur is insufficient to commence that period. As the NAFTA tribunal in the *Mobil v. Canada* case explained:

> To suspect that something will happen is not at all the same as knowing that it will do so. Knowledge entails much more than suspicion or concern and requires a degree of certainty. While the Tribunal agrees with Canada that it is not necessary that the quantum of loss or damage be known, it is clear that there must be at least a reasonable degree of certainty on the part of the investor that some loss or damage will be sustained.[223]

111. Respondent asserts that jurisprudence confirms that "when the alleged breach is based on similar and related actions or omissions, such knowledge [of the breach and damage] cannot be acquired on a recurring basis."[224] In doing so, Respondent ignores that the prescription period does not begin to run until the claimant has first acquired or should have acquired knowledge of the loss or damage suffered as a consequence of the specific measure which it alleges constitutes the breach and damages resulting therefrom. As the *UPS v. Canada* tribunal explained:

> A continuing course of conduct might generate *losses of a different dimension at different times*. It is incumbent on claimants to establish the damages associated with asserted breaches, and for continuing conduct that must

---

[222] *See* DR-CAFTA, Art. 10.18(1) (CL-0001-ENG/SPA) ("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). NAFTA contains substantially identical provisions. *See* NAFTA, Art. 1116(2) (CL-0034-ENG/SPA) ("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."); *id*., Art 1117(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.").

[223] *Mobil Investments Canada Inc. v. Canada*, NAFTA, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility dated 13 July 2018, ¶ 155 (CL-0090-ENG); *see also Eli Lilly v. Canada*, Final Award ¶ 169 (RL-0040-ENG) (holding that the NAFTA's limitations period "do[es] not require investors to bring claims for possible future breaches on the basis of potential (and therefore necessarily hypothetical) losses to their investments or the increased risks of such losses."); *Pope & Talbot Inc. v. The Government of Canada*, NAFTA, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada dated 24 Feb. 2000 ¶ 12 (CL-0091-ENG) ("[T]he critical requirement is that the loss *has occurred* and was known or should have been known by the Investor. Not that it was or should have been known that the *loss could or would occur*.") (emphasis added); *Resolute Forest Prods. Inc. v. Government of Canada*, NAFTA, UNCITRAL, Decision on Jurisdiction and Admissibility dated 30 Jan. 2018 ¶ 178 (CL-0092-ENG) ("In the Tribunal's view, the Claimant did not know, and could not reasonably have known, by December 2012, that it had already incurred loss or damage by reason of the alleged breach. . . . *A fortiori* it is not enough to trigger the time limit.").

[224] Respondent's PO Mem. ¶ 131.

> include a showing of damages not from the inception of the course of conduct but only from the conduct occurring within the period allowed by article 1116(2) [of NAFTA].[225]

112. Likewise, in the recent *Nissan v. India* decision, the respondent objected that the claimant's claims were time-barred, because the claimant would have first acquired knowledge that its incentives had not been paid more than three years prior to the submission of the claim to arbitration.[226] The tribunal found that the claimant had clarified that it was only pursuing a claim for non-payment of incentives that arose *after* the relevant cut-off date.[227] The tribunal found the respondent had not "categorically repudiated its payment obligation" prior to the cut-off date.[228] In rejecting the respondent's assertion that admitting the claim would "'effectively denude [the Article] of its essential purpose,' by enabling investors to avoid the effect of the time bar simply by waiving claims of loss incurred prior to the critical date,"[229] the tribunal explained:

> The limitations period still serves an important purpose, by limiting any claims – and therefore any damages exposure to the respondent State – to only such instances where the investor can demonstrate it incurred a qualitatively new instance of 'loss or damage' after the critical date, because of a new State act that it alleges constituted a treaty breach.[230]

113. *Fourth*, Respondent asserts that Claimants claim a continuous beach and that a "'continuing breach' does not renew the three-year statute of limitations period . . . ."[231] This is incorrect, both factually and legally. In *UPS v. Canada*, for example, the NAFTA tribunal interpreting the same prescription period that is present in the DR-CAFTA acknowledged that "continuing courses of conduct constitute breaches of legal obligations and renew the limitation period accordingly."[232] The tribunal explained that "[t]he use of the term 'first acquired' is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the

[225] *UPS v. Canada*, Award on the Merits ¶ 30 (CL-0037-ENG) (emphasis added).
[226] *Nissan Motor v. India*, Decision on Jurisdiction ¶¶ 57, 285 (CL-0078-ENG).
[227] *Id.* ¶ 327.
[228] *Id.* ¶ 328.
[229] *Id.* ¶ 329.
[230] *Id.*
[231] Respondent's PO Mem. ¶ 130.
[232] *UPS v. Canada*, Award on the Merits ¶ 28 (CL-0037-ENG).

investor later acquired further information confirming the conduct or allowing more precise computation of loss."[233]

114. Far from being alone amongst the "*jurisprudence constante*,"[234] the *UPS* tribunal's determination is concordant with that of other tribunals. In the *Feldman v. Mexico* case, for example, the tribunal acknowledged the claimant's claim for lost profits during a period after the entry into force of the NAFTA even though the claim related to measures adopted by Mexico before the entry into force of the treaty.[235] The tribunal observed that "if there has been a permanent course of action by Respondent which started before January 1, 1994 [*i.e.*, the date of the NAFTA's entry into force] and went on after that date and which, therefore, 'became breaches' of NAFTA Chapter Eleven . . . that post-January 1, 1994 part of Respondent' alleged activity *is* subject to the Tribunal's jurisdiction."[236]

115. This is in line with international law, as applied by other international courts and tribunals. In *Agrotexim v. Greece*, for example, the applicants complained that the expropriation of their property was in breach of Article 1 of Protocol 1 to the European Convention on Human Rights.[237] In rejecting the respondent's time-bar objection, the European Commission on Human Rights held that "the applicants' complaints relate to a continuing situation and that in such circumstances the six months period runs from the termination of the situation concerned."[238]

---

[233] *UPS v. Canada*, Award on the Merits ¶ 28 (CL-0037-ENG).

[234] Respondent's Mem. PO ¶ 130. Although Respondent expressly refers to the "jurisprudence constante" under the DR-CAFTA, it ignores that the time limitation provision in the DR-CAFTA is identical to that in the NAFTA, and the contrary jurisprudence under that Treaty, as well as in other decisions applying international law.

[235] *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/99/1, Award on the Merits dated 16 Dec. 2002 ¶ 199 (CL-0093-ENG/SPA); *see also Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues dated 6 Dec. 2000 ("*Marvin Roy v. Mexico*, Award on Jurisdiction") ¶ 43 (CL-0094-ENG/SPA).

[236] *Marvin Roy v. Mexico*, Award on Jurisdiction ¶ 62 (CL-0094-ENG/SPA) (emphasis in original).

[237] *Agrotexim Hellas S.A. and Others v. Greece*, Commission decision dated 12 Feb. 1992 ("*Agrotexim v. Greece*, Commission decision"), DR 72, at 5, 9 (CL-0095-ENG).

[238] *Id.* at 9; *see also, Varnava and Others v. Turkey*, Grand Chamber, Appl. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment dated 18 Sep. 2009, ECHR 2009 ¶ 159 (CL-0096-ENG) ("Nonetheless, it has been said that the six-month time-limit does not apply as such to continuing situations (citations omitted); this is because, if there is a situation of ongoing breach, the time-limit in effect starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end"); *Cone v. Romania*, ECtHR (app no. 35935/02), Judgment dated 24 June 2008, ¶ 22 (CL-0097-FR/ENG) ("[W]hen the alleged violation consists of a continuous situation, the six-month period only begins as from the point in time when the continuous situation ends") (citations omitted); COUNCIL OF EUROPE/CONSEIL DE L'EUROPE, YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS/ANNUAIRE DE LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME, Vol. 34 (1991), on *De Becker v. Belgium*, European Court of Human

B. Respondent Misconstrues The Nature Of Claimants' Claim

116. Selectively referencing Claimants' factual description in their Notice of Arbitration, Guatemala mischaracterizes Claimants' claim for lack of full protection and security as relating to the "continuous and systematic protests . . . since 2012"[239] and Guatemala's "continuing"[240] failure to protect claimants investments. Claimants' full protection and security claim, however, does not arise out of events that occurred in 2012. Rather, Claimants' claim arises out of Respondent's failure to provide full protection and security in connection with protests and blockades that erupted in early 2016, following the decision of the Guatemalan Supreme Court on 11 November 2015, granting an *amparo* against the MEM. This breach caused damage to Claimants insofar as Exmingua was unable to obtain an exploitation license for Santa Margarita, because it could not conduct consultations to complete its EIA. Claimants thus did not first acquire knowledge of Respondent's breach and their resulting damage therefrom until early 2016.

117. As described in their Notice of Arbitration, in 2012, protests broke out against Claimants' mining project and the gate to the mining site was blockaded.[241] Despite Exmingua's and Claimants' multiple entreaties to the Government, Respondent failed to take reasonable measures to grant Claimants and their investment access to the project sites.[242] This resulted in a nearly two-year delay (from February 2012 to May 2014), during which time Claimants and Exmingua were denied access to their property, and unable to commence construction or operations.[243]

118. As also explained in the Notice of Arbitration, in May 2014, Respondent's national police broke through the blockade and evicted the protesters from the site.[244] Claimants and

---

Rights Application No. 214/56 (9 June 1958), at 244 (CL-0098-ENG) ("[W]hen the Commission receives an application concerning ... a permanent state of affairs ... the problem of the six months period specified in Article 26 can arise only after this state of affairs has ceased to exist; whereas in the circumstances, it is exactly as though the alleged violation was being repeated daily thus preventing the running of the six months period"); *McDaid and others v. the United Kingdom*, European Court of Human Rights Application No. 25681/94 dated 9 Apr. 1996, at 5 (CL-0099-ENG) ("Insofar as the applicants complain that they are victims of a continuing violation to which the six month period is inapplicable, the Commission recalls that the concept of a 'continuing situation' refers to a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims.").

[239] Respondent's PO Mem. ¶ 118.

[240] *Id.*, Section VII, ¶ 117.

[241] Notice of Arbitration ¶ 42.

[242] *Id.* ¶ 45.

[243] *Id.* ¶ 50.

[244] *Id.* ¶ 45.

Exmingua then were able to access the site, and construction commenced, soon followed by operations.[245] Although the 2012 protests and Respondent's associated failure to protect Claimants' investments delayed the start of exploitation activities at the Progreso VII site for more than two years – and even though Respondent never compensated Claimants for the delay and damages sustained – Claimants have not and are not alleging any breach in respect of that failure. Nor have Claimants sought damages incurred as a result of this two-year delay.

119. Rather, as explained in Claimants' Notice of Arbitration, Claimants' full protection and security claim stems from Respondent's failure to protect Claimants' investments from protests and blockades that began in early 2016, nearly two years *after* operations had commenced at Progreso VII, which caused Claimants specific and separate damages.

120. Specifically, as noted in Claimants' Notice of Arbitration, on 11 November 2015, the Guatemalan Supreme Court issued an *amparo provisional* against the MEM, "suspending the granting of the exploitation license for the Progreso VII Project."[246] On 23 February 2016, Exmingua appealed the Supreme Court's ruling to the Constitutional Court.[247] Significantly, the MEM initially refused to enforce the Supreme Court's ruling. According to the MEM, the Supreme Court's decision lacked "substance,"[248] because the license had been granted in 2011 and had not been challenged at that time.[249] As the MEM remarked, the granting of the license thus had been "consummated."[250] Shortly thereafter, on 10 March 2016, the MEM filed a petition before the Guatemalan Supreme Court requesting clarification as to what actions it was required to take in light of the ruling.[251]

121. The Supreme Court's ruling and the MEM's initial refusal to suspend Exmingua's license provoked confusion and controversy, which gave rise to a new wave of protests in

[245] Notice of Arbitration ¶ 45.

[246] *Id*. ¶ 54; *see also* Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo provisional*, 11 Nov. 2015, at III (C-0004-SPA/ENG).

[247] Notice of Arbitration ¶ 54; Supreme Court of Justice of Guatemala, Case No. 1592-2014, Appeal by Exmingua against the Ruling granting *amparo provisional*, 23 Feb. 2016 (C-0005-SPA/ENG).

[248] Maria Rosa Bolaños, "The MEM will not suspend the project," *La Prensa Libre*, 1 Mar. 2016 (C-0006-SPA/ENG).

[249] Natiana Gándara, "CIG urges the MEM to not bend over pressure," *La Prensa Libre*, 11 Mar. 2016 (C-0007-SPA/ENG).

[250] Maria Rosa Bolaños, "The MEM will not suspend the project," *La Prensa Libre*, 1 Mar. 2016 (C-0006-SPA/ENG).

[251] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ministry of Energy and Mines' submission in relation to compliance with *amparo provisional* dated 10 Mar. 2016, at 5 (C-0008-SPA/ENG).

early 2016.[252] The protestors "urged the authorities to close the operations" of the Progreso VII Project.[253] In contrast, the Chamber of Industry of Guatemala ("CIG") publicly supported at a press conference the MEM's "correct legal position" that it could not "suspend the license granted," because "the act granting the license, at the time, was never challenged by any person."[254] The CIG claimed that it would be "illegal" to suspend activities that had been ongoing for years on the basis of a validly-issued license.[255] In light of the "threat to the legal certainty in Guatemala," the CIG requested the Constitutional Court to resolve this issue promptly, and urged the MEM "to not surrender to the de facto measures of protesters who violate the free locomotion and access of officials to their workplace."[256]

122. This new wave of protests and blockades, and Respondent's associated failure to provide full protection and security, prevented Exmingua from carrying out the social consultations and completing the EIA for Santa Margarita, in furtherance of its application for an exploitation license.

123. As explained in Claimants' Notice of Arbitration, on 21 December 2016, the MEM issued Resolution No. 4056, directing Exmingua to file the EIA for the Santa Margarita Project, duly approved by the Ministry of Environment and Natural Resources ("MARN"), within 30 days.[257] In response, by letter dated 22 March 2017, Exmingua informed the MEM that "due to the continuous protests and blockades at the site," Exmingua and its consultant "could not access the site to complete the local consultations for the EIA."[258] Exmingua explained that "intimidations" from the communities protesting against the Project were "putting at risk" Exmingua's own personnel and that of its environmental consultant, who

[252] Maria Rosa Bolaños, "The MEM will not suspend the project," *La Prensa Libre*, 1 Mar. 2016 (C-0006-SPA/ENG); Natiana Gándara, "CIG urges the MEM to not bend over pressure," *La Prensa Libre*, 11 Mar. 2016 (C-0007-SPA/ENG); Geovani Contreras, "Locals from La Puya continue with the protests," *La Prensa Libre*, 13 Mar. 2016 (C-0009-SPA/ENG); Jerson Ramos and Jose Rosales, "Protesters of La Puya burn doll of the Minister of Energy," *La Prensa Libre*, 26 Mar. 2016 (C-0010-SPA/ENG); Nelton Rivera, "The new camp at the peaceful resistance La Puya," *Prensa Comunitaria Km. 169*, 19 May 2019 (C-0011-SPA/ENG).

[253] Natiana Gándara, "CIG urges the MEM to not bend over pressure," *La Prensa Libre*, 11 Mar. 2016 (C-0007-SPA/ENG).

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] Notice of Arbitration ¶ 49; *see also* Official Notification No. 497 from the MEM to Exmingua, attaching Resolution No. 4056, dated 21 Dec. 2016 (C-0012-SPA/ENG).

[258] Notice of Arbitration ¶ 49; *see also* Letter from Exmingua to the MEM, attaching Notary Public's Certification dated 21 Mar. 2012 (C-0013-SPA/ENG).

could not enter the area.[259] Accordingly, Exmingua requested the MEM to suspend the requirement for the social studies, including the approval by the MARN, until it was possible to complete the consultations.[260] Exmingua's letter attached a certificate from a notary public, who had visited the Santa Margarita site a few days earlier, and certified the blockades and protests at the entrance of the site in the Municipality of San Pedro Ayampuc.[261]

124. On 5 April 2017, the MEM issued Resolution No. 1191, denying Exmingua's request to suspend the EIA requirement to conduct local consultations and directed Exmingua to file the EIA for its Santa Margarita Project within 30 days following Exmingua's notification of the resolution.[262] The MEM's Resolution No. 1191 was notified to Exmingua on 21 September 2017.[263]

125. Against this background, on 7 April 2017, Exmingua submitted to the MARN (copying to the MEM) the EIA for Santa Margarita that had been prepared several years earlier, before work was stopped to focus on the Progreso VII site, *without* the section on the social studies.[264] In its cover letter to the MARN, Exmingua explained that the groups opposing Exmingua's mining activities were fostering a climate of "social conflict," making it "impossible" to carry out the "socialization of the [Santa Margarita] project," as required by the applicable rules and regulations.[265] Consequently, Exmingua asked the MARN to provide "guidelines" and "recommendations" to complete the public consultations for the EIA.[266] Exmingua did not receive any response from the MARN.

---

[259] Notice of Arbitration ¶ 49; *see also* Letter from Exmingua to the MEM, attaching Notary Public's Certification dated 21 Mar. 2012 (C-0013-SPA/ENG).

[260] Notice of Arbitration ¶ 49; *see also* Letter from Exmingua to the MEM, attaching Notary Public's Certification dated 21 Mar. 2012 (C-0013-SPA/ENG).

[261] Letter from Exmingua to the MEM, attaching Notary Public's Certification dated 21 Mar. 2012, at 3 (C-0013-SPA/ENG) (indicating that at the entrance of the Municipality of San Pedro de Ayampuc, "you can find banners and blankets that manifest against mining activities" and one of them reads "this municipality does not want mining") (emphasis removed).

[262] Official Notification No. 5099 from the MEM to Exmingua, attaching Resolution No. 1191 dated 5 Apr. 2017 (C-0014-SPA/ENG).

[263] *Id.*

[264] Letter from Exmingua to the MARN dated 7 Apr. 2017 (C-0015-SPA/ENG); Letter from Exmingua to the MEM dated 7 Apr. 2017 (C-0016-SPA/ENG).

[265] Letter from Exmingua to the MARN dated 7 Apr. 2017 (C-0015-SPA/ENG); Letter from Exmingua to the MEM dated 7 Apr. 2017 (C-0016-SPA/ENG).

[266] Letter from Exmingua to the MARN dated 7 Apr. 2017 (C-0015-SPA/ENG); Letter from Exmingua to the MEM dated 7 Apr. 2017 (C-0016-SPA/ENG).

126. As set forth in Claimants' Notice of Arbitration and as explained more fully above, Claimants' claim under Article 10.5 of the DR-CAFTA for lack of full protection and security thus arises out of Respondent's failure, beginning in early 2016 after the Supreme Court's ruling, "to take reasonable measures to ensure that Claimants and Exmingua have access to the Progresso VII and Santa Margarita project sites."[267] This breach "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."[268]

127. Claimants' full protection and security claim thus is not based on a single continuing breach. Rather, it concerns Respondent's failure to provide full protection and security in connection with the protests and blockades that commenced in early 2016, after the Supreme Court's *amparo* ruling, and which prevented Exmingua from completing the social studies for the Santa Margarita EIA to obtain an exploitation permit.

128. Claimants' description of events in their Notice of Arbitration relating to the 2012 protests, and Guatemala's associated failure to protect Claimants' investment, was provided by way of factual background. Even if the Tribunal were to consider that the relevant breach for which Claimants' claim loss and damage was a continuous breach which began in 2012 – which it is not – Claimants' claim still would not be time-barred, because the limitations period was renewed with the continuing breaches that occurred in 2016 and thereafter.

[267] Notice of Arbitration ¶ 74.

[268] *Id*.

V. CONCLUSION

129. For all the reasons set forth above, Claimants respectfully request that the Tribunal dismiss Respondent's preliminary objections in their entirety and award Claimants all of their expenses, fees, and costs associated with defending against Respondent's preliminary objections under DR-CAFTA Article 10.20.5.

Respectfully submitted,

Andrea J. Menaker
Rafael Llano
Eckhard Hellbeck
Ronan O'Reilly
Mariele Coulet-Diaz
Agnieszka Zarówna
Alexa Romanelli

WHITE & CASE LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

Counsel for Claimants
27 September 2019