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' REJOINDER ON PRELIMINARY OBJECTIONS

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22 November 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 Rejoinder on Preliminary Objections in response to Respondent's Reply to Claimants' Counter-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. In its Reply, Respondent ignores explanations, observations, and jurisprudence that directly undermine the very basis for its three preliminary objections, and asks the Tribunal to dismiss Claimants' claims on grounds that lack any support in the Treaty. In doing so, Respondent repeatedly mischaracterizes Claimants' claims and urges the Tribunal to disregard the logical consequences of accepting Respondent's misguided interpretations of the Treaty.

3. With respect to its first objection – that the Treaty disallows claims for reflective losses – Respondent fails even to consider the ordinary meaning of the Treaty's provisions. Instead, Respondent asks the Tribunal to override the plain language of the Treaty in favor of purported policy concerns that the State Parties could have – but did not – address in the Treaty to Respondent's apparent, current liking. Respondent then implores the Tribunal to disregard the fact that accepting its interpretation would mean that investors have less protection under the DR-CAFTA (and the NAFTA) than investors have under any other modern investment treaty, as adopting its interpretation would mean that shareholders could never recover for reflective loss, which is a common basis for investment treaty claims. Respondent's further suggestion, that a majority shareholder must file its claims on behalf of an enterprise when that option is available, is nothing more than another non-textual, self-serving interpretation.

4. Respondent also is unable to reconcile its past practice, as well as the object and purpose of the Treaty, with its current position that the DR-CAFTA disallows claims for reflective losses or that majority shareholders must make claims on behalf of their investments. Because Respondent's waiver objection is dependent upon accepting its proposition that Claimants only could have filed their claim on Exmingua's behalf, that objection likewise fails, as does Respondent's continued reliance on Annex 10-E, which by its express terms is inapplicable.

5. In maintaining its second objection – that Claimants' MFN claim should be dismissed because it was not notified in their Notice of Intent – Respondent seeks to re-characterize Claimants' claim, again ignores the ordinary meaning of the Treaty, and seeks a result that is at odds with the object and purpose of the Treaty as well as consistent jurisprudence. The Treaty does not provide for any consequence for omitting reference to a specific provision in a notice of intent, and the circumstances here clearly warrant admitting the claim. Claimants clearly articulated in their Notice of Intent that the Guatemalan courts and the Ministry of Energy and Mines ("MEM") had treated Exmingua less favorably than similarly-situated investments owned by nationals, as the basis for their national treatment claim. That a Guatemalan court took similar discriminatory action with respect to a foreign-owned investment *after* Claimants submitted their Notice of Intent, but before they submitted their Notice of Arbitration, where they noticed their MFN claim, cannot warrant dismissal of that claim.

6. Implicitly recognizing as much, Respondent attempts to restate Claimants' MFN claim, arguing that the basis for that claim is an earlier 2017 Supreme Court decision, which was issued before Claimants filed their Notice of Intent, and not the later 2018 Constitutional Court decision. This is incorrect and, in any event, Respondent is not at liberty to make and defend against claims of its choosing: Claimants have the right to formulate their own claims. Recognizing that where a respondent is not prejudiced by the omission of a claim in a notice letter, those claims invariably are admitted, Respondent inexplicably maintains that this omission deprived it of an opportunity to negotiate an amicable settlement and prepare its defense. Given that any discussions held were entirely unsuccessful, that Respondent has taken no steps to negotiate since the filing of the Notice of Arbitration more than a year ago, and that it will have nearly two years to prepare a defense to the MFN claim, these complaints strain credulity.

7. Like its MFN objection, Respondent's time-bar objection similarly depends upon its mischaracterization of Claimants' claim. In particular, Respondent continues to latch onto the word "continuous" in Claimants' Notice of Arbitration, and to insist that the protests and blockades in early 2016 that erupted after the Supreme Court's December 2015 decision and the MEM's refusal to immediately suspend Exmingua's license were a mere continuation of protests and blockades that began in 2012. In doing so, Respondent chooses to ignore that those earlier protests and blockades ended, which allowed Exmingua to commence and carry

out operations for two years, as clearly set out in Claimants' Notice of Arbitration. The exhibits that Claimants submitted with their Counter-Memorial provide further elaboration on this point, are entirely consistent with the facts set forth in Claimants' Notice of Arbitration, and are admissible, despite Respondent's objection to the contrary. Because Claimants' full protection and security claim is based upon measures that commenced within the three-year prescription period, which caused Claimants damages within that timeframe, that claim is timely.

8. Accordingly, all three of Respondent's preliminary objections are premised on a reconstructed and self-serving version of Claimants' claims, find no support in the Treaty's text or in jurisprudence, and should be rejected.

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

9. In their Counter-Memorial, Claimants demonstrated that 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.[1] Claimants further demonstrated that their interpretation is consistent with the object and purpose of the Treaty of establishing effective means of dispute resolution, whereas Respondent's interpretation disallowing claims for so-called reflective loss is incompatible with the Treaty's object and purpose.[2] Furthermore, Claimants explained that Respondent's own prior State practice, as well as the *jurisprudence constante* of investment treaty tribunals in investment arbitrations supports their interpretation.[3] Finally, Claimants showed that they complied with the Treaty's waiver requirement, and that DR-CAFTA Annex 10-E is inapplicable here.[4]

10. In its Reply, Respondent largely fails to address Claimants' positions based on principles of treaty interpretation, and as supported by numerous investment treaty cases. Instead, Respondent attempts to deflect from its failure to engage with Claimants' arguments and the robust international arbitral practice invoked by Claimants by referring to various

[1] Claimants' PO Counter-Mem. ¶¶ 13-34.
[2] *Id*. ¶¶ 35-55.
[3] *Id*. ¶¶ 25-34, 38-43, 58-63.
[4] *Id*. ¶¶ 64-81.

policies, commentaries, and arguments that do not give primacy to the text of the Treaty and have not been accepted by international tribunals for that reason, among others.

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

11. 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 taken against their investment. This interpretation is supported by the ordinary meaning of the term "loss or damage" as well as the inclusion of "shares" in the definition of "investment." Further, Respondent's own prior State practice shows that claims for reflective loss are admissible under the DR-CAFTA. Jurisprudence under the NAFTA further confirms the right of shareholders to bring claims on their own behalf for reflective loss.

1. The Ordinary Meaning Of The Term "Loss Or Damage" As Well As The Inclusion Of "Shares" In The Definition Of "Investment" Establishes That Claims For Reflective Loss Are Admissible

12. In accordance with the principles of treaty interpretation set forth in the Vienna Convention, Claimants in their Counter-Memorial showed that the plain language of Article 10.16.1(a) and (b), interpreted in context, confirms that Claimants' claims are properly submitted under Article 10.16.1(a).[5] In particular, Claimants demonstrated that there is no restrictive or limiting language in DR-CAFTA 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 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.[6] Claimants further showed that there is no 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.[7] Claimants further supported their interpretation by reference to arbitral decisions where tribunals have rejected attempts to read limiting or qualifying terms into the language of treaty provisions.[8] Finally, Claimants explained that the context of Article 10.16.1(a) and (b),

[5] *Id*. ¶¶ 14-24.
[6] *Id*. ¶ 15.
[7] *Id*. ¶ 15.
[8] *Id*. ¶¶ 16-19.

which includes "shares" in the definition of the term "investment," further undermines Respondent's argument that claimants cannot make claims for so-called reflective loss under the DR-CAFTA.[9]

13. In its Reply, Respondent ignores nearly all of these points, and makes no attempt to support its erroneous interpretation by recourse to the Treaty's ordinary meaning, in context. *First*, Respondent offers no response whatsoever to the fact that DR-CAFTA Article 10.16.1(a) allows claimants to submit claims for "loss or damage," without restricting or limiting the types of loss or damage which may be the subject of a claim.[10] Nor does Respondent respond to the fact that permitting claims for loss or damage "by reason of, or arising out of [a] breach," would be undermined if "loss or damage" was interpreted restrictively, as Respondent submits. Respondent similarly ignores that Article 10.16.1(b)'s language is permissive, and not mandatory, as it does not require a claimant that owns or controls an enterprise to submit any or all of its claims to arbitration on behalf of the enterprise.[11] Respondent further ignores that Article 10.16.1(b) provides an investor that owns or controls an enterprise an additional option to submit a claim on behalf of the enterprise,[12] and accordingly is not meaningless as Respondent repeatedly contends.[13] Notably, Respondent does not contest that interpreting Article 10.16.1(a) and (b) to preclude claims for so-called reflective loss would require the Tribunal to insert additional language into Article 10.16.1, and that tribunals consistently have refused to imply additional restrictive or limiting language into treaty text.[14] Nor does Respondent dispute that it would

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[9] *Id*. ¶¶ 22-24.

[10] *See* Dominican Republic-Central America-United States Free Trade Agreement signed 5 August 2004 ("DR-CAFTA"), Art. 10.16.1(a) (CL-0001-ENG-SPA) ("[T]he claimant on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A, . . . and (ii) that the claimant has incurred *loss or damage by reason of, or arising out of*, that breach . . . .") (emphasis added).

[11] *See id.*, Art. 10.16.1(b) ("[T]he 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.") (emphasis added).

[12] Claimants' PO Counter-Mem. ¶ 21; *see also infra* ¶¶ 28, 42.

[13] Respondent's PO Reply ¶¶ 68, 70-73, 81, 82, 90-96, 119.

[14] Claimants' PO Counter-Mem. ¶¶ 15-20; *see also 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") ¶ 110 (CL-0051-ENG/SPA) ("The arguments of Argentina effectively seek to insert a proviso into the wording of the BIT to the effect that an investor may bring proceedings for an alleged violation of the BIT with respect to the investor's investment '*except where the investment is a company and the alleged violation of the BIT consists of an alleged injury to the company or to assets or rights which are legally owned by the company rather than the investor.*' No such wording is apparent in the terms of the BIT, and the

have been straightforward for the State Parties to include language in the text of Article 10.16.1 to preclude claims for reflective loss, had they wished to do so.[15]

14. *Second*, Respondent fails to rebut Claimants' observation that the inclusion of "shares" within the definition of "investment" supports the conclusion that the Treaty allows claims for reflective loss.[16] Instead, Respondent attempts to dispense with this point, by asserting that it is "off point,"[17] "completely irrelevant,"[18] and "miss[es] the point."[19] This is incorrect. The fact that the State Parties intentionally included "shares" in a non-exclusive list of assets comprising an "investment," and provided for investor-State arbitration of claims for loss or damage to "investments," indicates that claims for loss or damage to a claimant's shares is cognizable.[20] As the *ad hoc* committee in *Azurix v. Argentina* reasoned, "there is nothing in the wording of Article I(1)(a) [of the U.S.-Argentina BIT, which contains a broad definition of 'investment'] that would suggest that it is only Azurix's legal rights as a shareholder in ABA that are protected."[21] Limiting claims to those for so-called "direct" injuries, such as a taking of shares as opposed to a loss in the value of shares, is thus inconsistent with the ordinary meaning, in context, of Articles 10.16.1 and 10.28.

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

15. In their Counter-Memorial, Claimants showed that Respondent's own past practice in the DR-CAFTA case of *TECO v. Guatemala* confirms that Article 10.16.1(a) 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

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Committee would see such an exception as inconsistent with the broad definition of 'investment' in Article I(1)(a) of the BIT.") (emphasis in original).

[15] Claimants' PO Counter-Mem. ¶ 21.

[16] *Id*. ¶¶ 22-24.

[17] Respondent's PO Reply ¶ 57.

[18] *Id*. ¶ 58.

[19] *Id*. ¶ 94.

[20] Claimants' PO Counter-Mem. ¶ 24.

[21] *Azurix v. Argentina*, Annulment Decision (CL-0051-ENG/SPA) ¶ 94; *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") ¶¶ 197-198 (CL-0059-ENG) ("The word 'indirectly' [in the definition of 'investment'] is a complete answer to Spain's corporate personality objection. . . . Spain responds to the Claimants' reliance on the text by saying that its objection is one of standing, rather than a dispute about the concept of 'Investment' as defined. However, the Claimants' standing under the ECT is not a matter of customary international law or of general legal principles. It is governed by the ECT and the ICSID Convention.").

obligations.[22] Claimants also explained that Guatemala had objected to an award being paid to the enterprise in the *RDC v. Guatemala* DR-CAFTA case – as would be required if the award was issued where the claim had been made on behalf of the enterprise – because that would result in Guatemalan nationals who were minority shareholders of the enterprise being indirectly compensated for Guatemala's treaty breach.[23]

16. In its Reply, Respondent argues that "Claimants and this Tribunal cannot use objections raised or not raised in other cases as grounds to evaluate the propriety of objections raised here."[24] It then offers speculation as to its own motivations, stating that the reason why Guatemala has raised certain defenses in some cases and not others "may have been for efficiency, an intentional allocation of resources, or to focus on any number of specific arguments."[25] Finally, it asserts that its "position in previous cases is fully consistent with its position here."[26] Respondent's past practice, however, confirms that Claimants' interpretation of the Treaty is correct, and Respondent's attempts to minimize and distinguish that past practice are unconvincing.

17. *First*, it remains undisputed that TECO brought a claim for so-called reflective loss under Article 10.16.1(a), that Guatemala failed to raise any objection in this regard, and that TECO obtained an award of damages for reflective loss.[27] Respondent cannot reconcile its positions in that case and this one, so instead puts forward a rash of excuses, speculating as to its own possible motivations.[28]

18. In the *TECO* case, Guatemala raised several objections as to jurisdiction and admissibility; it then raised multiple objections in an unsuccessful bid to annul the award; and it raised additional jurisdictional objections before a U.S. court in an effort to avoid

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[22] Claimants' PO Counter-Mem. ¶¶ 25-29.

[23] *Id*. ¶¶ 53-55; *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); *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") ¶ 266 (CL-0068-ENG).

[24] Respondent's PO Reply ¶ 87.

[25] *Id*. ¶ 87.

[26] *Id*. § IV.D.2; *see also id.* ¶ 85 (same).

[27] Claimants' PO Counter-Mem. ¶¶ 26-28; *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") ¶¶ 437-441, 488, 716, 742 (CL-0031-ENG/SPA).

[28] Respondent's PO Reply ¶¶ 87-88.

enforcement of the original tribunal's final award.[29] It has now been nine years since the claim in *TECO* was filed, and a portion of the claim remains pending before a new tribunal.[30] Certainly, Guatemala has not been guided by "efficiency" in that case, and a desire for efficiency cannot explain Respondent's failure to raise an objection that the DR-CAFTA purportedly does not allow claims for reflective loss.

19. In *Oil Platforms*, the ICJ acknowledged the significance of past failures by the parties to the Iran-U.S. Treaty of Amity to rely upon a provision of that Treaty for a claimed right. In that case, Iran invoked Article I of the Treaty of Amity, which provides that "[t]here shall be firm and enduring peace and sincere friendship between the United States . . . and Iran."[31] Iran contended that this provision "does not merely formulate a recommendation or desire . . . , but imposes actual obligations on the Contracting Parties, obliging them to maintain long-lasting peaceful and friendly relations."[32] Arguing that the provision should be interpreted so as to give it maximum effectiveness, Iran asserted in essence that the provision imported into the Treaty the general rules of international law on the threat and use of force, with the consequence that any violation of those general rules would also constitute a violation of the Treaty.[33]

20. The ICJ rejected Iran's interpretation of Article I of the Treaty and then found that the parties' subsequent practice in their prior pleadings before the ICJ in earlier cases based on the same Treaty confirmed its interpretation:

> The practice followed by the Parties in regard to the application of the Treaty does not lead to any different conclusions. The United States has never relied upon that Article in proceedings involving Iran and, more particularly, did not invoke that text in the case concerning *United States Diplomatic and Consular*

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[29] *TECO v. Guatemala*, Award ¶ 441 (CL-0031-ENG/SPA); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, DR-CAFTA, ICSID Case No. ARB/10/23, Decision on Annulment dated 5 Apr. 2016 ("*TECO v. Guatemala*, Decision on Annulment") §§ 1.7 to 1.14 (CL-0100-ENG/SPA); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, Civil Action No. 17-00102 (RBW), US District Court for the District of Columbia, Memorandum of Law in Support of Guatemala's Motion to Dismiss the Petition dated 17 Apr. 2017, at 2-3 (CL-0101-ENG).

[30] *TECO v. Guatemala* (Resubmission Proceedings), *see TECO Guatemala Holdings, LLC v. Republic of Guatemala*, DR-CAFTA, ICSID Case No. ARB/10/23, Case Details, *available at* https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/10/23 (accessed 22 November 2019) (CL-0102-ENG).

[31] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment dated 12 Dec. 1996, 1996 I.C.J. Rep. 803, at 812 ¶ 24 (CL-0103-ENG).

[32] *Id*., at 812 ¶ 25.

[33] *Id*., at 812-813 ¶ 25.

> *Staff in Tehran*. Neither did Iran rely on that Article, for example in the proceedings before this Court in the case concerning the *Aerial Incident of 3 July 1988*.[34]

21. Guatemala's past practice in the *TECO* case, in neglecting to raise any objection that claims for reflective loss are not cognizable under DR-CAFTA Article 10.16.1(a) likewise confirms Claimants' interpretation to the contrary. Respondent's plea that "the Tribunal does not need to address complex issues concerning unprotected or minority shareholders" merely underscores its inconsistent approach and the lack of merit of its position.[35] The Tribunal cannot simply ignore Guatemala's past practice in *TECO*, on account of the fact that TECO was a minority shareholder that could not have filed its claim on behalf of the enterprise. Allowing a minority shareholder to file a claim for reflective loss under Article 10.16.1(a), but requiring a majority or controlling shareholder to file that same claim under Article 10.16.1(b), finds no support in the Treaty's text, and would be inconsistent with Respondent's position that the DR-CAFTA does not allow *any* claims for reflective loss.[36] Simply put, Respondent's proffered interpretation of the Treaty in this case is irreconcilable with its past practice in *TECO*. Turning a blind eye to the "complex issues concerning . . . minority shareholders,"[37] cannot hide the fact Respondent has failed to advance a logical, consistent, and contextual interpretation of the Treaty that would deprive Claimants of their standing to submit their claims to arbitration under Article 10.16.1(a).

22. *Second*, Respondent has failed to reconcile its past practice in the *RDC* case with the position it advances in this case. As Claimants explained in their Counter-Memorial, the claimant in *RDC* brought its claim under both Article 10.16.1(a) and (b)[38] and, therefore, filed waivers on behalf of itself and its enterprise.[39] Guatemala objected to having the award paid to the enterprise – as would be required for any claim under Article 10.16.1(b) – on account of the fact that minority shareholders of the enterprise were Guatemalan nationals that would benefit indirectly from any such award, despite the fact that they lacked any Treaty rights.[40] Because the award, at Guatemala's urging, was paid to the claimant – and not to its enterprise

[34] *Id*., at 815 ¶ 30 (CL-0103-ENG).

[35] Respondent's PO Reply ¶ 9.

[36] Claimants' PO Counter-Mem. ¶ 29.

[37] Respondent's PO Reply ¶ 9.

[38] Claimants' PO Counter-Mem. ¶ 54; *Railroad Development v. Guatemala*, Award ¶ 1 (CL-0068-ENG).

[39] *Railroad Development Corp. (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Request for Institution of Arbitration Proceedings dated 14 June 2007 ¶ 14 (RL-0081-ENG).

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

– that award was made pursuant to a claim filed by the claimant on its own behalf under Article 10.16.1(a).

23. The measures at issue in *RDC* were directed towards the enterprise. Specifically, FVG, a Guatemalan company majority-owned and controlled by the claimant, entered into several usufruct contracts with FEGUA, a State-owned company responsible for certain railway services and management.[41] Subsequently, at FEGUA's request, the Attorney General recommended that Guatemala declare one of the contracts void, whereupon the Government issued a *lesivo* resolution to that effect.[42] Guatemala's insistence in *RDC* that the claim was properly brought by the claimant on its own behalf thus is irreconcilable with its arguments made here that Claimants do not have standing to bring their claims on their own behalf to challenge measures aimed at their investment. Once again, Respondent's plea that the Tribunal side-step the "complex issues concerning unprotected . . . shareholders"[43] simply underscores the fact that Respondent's interpretation of the Treaty advanced in this case is opportunistic and misguided.

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

24. In their Counter-Memorial, Claimants demonstrated that NAFTA tribunals repeatedly have rejected respondent States' objections that claimants may not recover for reflective loss under NAFTA Article 1116 (which corresponds to DR-CAFTA Article 10.16.1(a)), as measured by the damage to the value of their shareholding in an enterprise.[44] For example, in *GAMI v. Mexico*, a case where a minority shareholder claimed with respect to its Mexican enterprise whose assets were expropriated, the tribunal rejected Mexico's objection that the claimant lacked standing and noted that "[t]he 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."[45] 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

[41] *Id*. ¶¶ 30-34.

[42] *Id*. ¶¶ 35-37.

[43] Respondent's PO Reply ¶ 9.

[44] Claimants' PO Counter-Mem. ¶¶ 30-34.

[45] *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, 26-27 (CL-0036-ENG/SPA).

control, pursuant to Article 1117 (which corresponds to DR-CAFTA Article 10.16.1(b)).[46] In both *Pope & Talbot v. Canada* and *UPS v. Canada*, the tribunals thus rejected Canada's objection that the claimants could have only brought claims under Article 1117 with respect to damages suffered as a result of measures aimed at their wholly-owned subsidiaries.[47]

25. In its Reply, Respondent states that the "NAFTA offered a unique solution to address the policy concerns involving claims for reflective loss by providing shareholders standing to bring derivative claims, that is, claims on behalf of their local company, provided a few requirements are met."[48] Tellingly, Respondent supports its considerations on Articles 1116 and 1117 by references to scholarly work[49] and the NAFTA Parties' submissions in cases,[50] but not tribunal decisions. Respondent then argues that allowing claims for reflective loss under Article 1116 of NAFTA would render the mechanism under Article 1117 meaningless.[51] Finally, Respondent contends that "[t]he reason why Respondent did not identify cases dealing with reflective loss claims in its Preliminary Objections is because Claimants did not bring claims for reflective loss in their Notices."[52] Respondent's position is wrong for the following reasons.

26. *First*, Respondent submits that scholars have emphasized the uniqueness of the NAFTA mechanism to bring derivative claims.[53] Scholarly views, however, do not and cannot be substituted for or alter the meaning of the NAFTA's text. As held by numerous

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[46] Claimants' PO Counter-Mem. ¶¶ 33-34.

[47] *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") ¶¶ 74-75, 78, 80 (CL-0028-ENG) ("[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."); *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") ¶¶ 32-35 (CL-0037-ENG) ("[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 damage is directly to UPS or directly to UPS Canada and only indirectly to UPS is irrelevant to our jurisdiction over these claims.").

[48] Respondent's PO Reply ¶ 60.

[49] *Id*. ¶¶ 61-64, 71.

[50] *Id*. ¶¶ 65-69, 72.

[51] *Id*. § IV.C.3, ¶¶ 70-73.

[52] *Id*. ¶ 80.

[53] *Id*. § IV.C.1, ¶ 61.

tribunals, the plain language of the NAFTA allows shareholders to bring claims for reflective loss under Article 1116.[54] None of the sources invoked by Respondent, moreover, even states that the NAFTA *precludes* claims for reflective loss under Article 1116.[55] As also set forth in Claimants' Counter-Memorial, tribunals have means at their disposal to address the concerns raised by the authors Respondent references, including by fashioning awards so as to prevent double recovery or double payment.[56]

27. *Second*, Respondent asserts that the NAFTA Parties agree that Article 1116 does not allow a shareholder to recover reflective loss.[57] Respondent fails to acknowledge, however, that tribunals before which such submissions by respondent States and non-disputing Parties were made have refused to adopt the interpretation of the NAFTA Parties as proposed in these submissions and to decline jurisdiction or to find claims as brought under Article 1116 inadmissible.[58] In any event, the submissions to which Respondent cites do not and cannot alter the meaning of the NAFTA, which – as held by various tribunals – allows shareholders to recover under Article 1116 for injury they suffered due to measures aimed at their enterprise. Furthermore, the NAFTA Parties are not the DR-CAFTA Parties, and Respondent's reliance on the subsequent State practice of the Parties to the NAFTA is therefore misplaced: there has been no subsequent State practice of all of the DR-CAFTA

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[54] Claimants' PO Counter-Mem. ¶¶ 30-34; *see infra* ¶¶ 29-31.

[55] In their Guide to NAFTA Chapter Eleven, Ms. Meg Kinnear and Ms. Andrea Bjorklund, in fact, agree with Claimants that "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." MEG KINNEAR, ANDREA BJORKLUND *ET AL*., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 1116-8 (2006) (CL-0035-ENG).

[56] Claimants' PO Counter-Mem. ¶¶ 70-71 & nn. 140-141; Note by the Secretariat of the UNCITRAL Working Group III, *Possible reform of investor-State dispute settlement (ISDS) Shareholder Claims and Reflective Loss*, 9 Aug. 2019 ¶ 22 (RL-0058-ENG/SPA) ("[S]ome ISDS tribunals have been attentive to this issue and have taken proactive steps to avoid it, such as by considering related pending and prior claims and prorating recovery.").

[57] Respondent's PO Reply ¶¶ 65-69, § IV.C.2.

[58] *See* Claimants' PO Counter-Mem. ¶¶ 32-34 (discussing *Pope & Talbot v. Canada*, Award in Respect of Damages ¶¶ 74, 75, 78, 80 (CL-0028-ENG); *GAMI v. Mexico*, Final Award ¶¶ 12-13, 17, 26, 27, 33 (CL-0036-ENG/SPA); *UPS v. Canada*, Award on the Merits ¶¶ 32-35 (CL-0037-ENG)); *see also S.D. Myers, Inc. v. Government of Canada,* NAFTA, UNCITRAL, Partial Award dated 13 Nov. 2000 ("*S.D. Myers v. Canada*, Partial Award") ¶¶ 290, 301 (CL-0104-ENG) ("[T]he claim advanced by SDMI is that it has suffered economic harm to its investment through interference with its operations, lost contracts and opportunities in Canada. SDMI submits its claims pursuant to Article 1116 of the NAFTA. . . . The Tribunal has determined that CANADA's ban on PCB exports to the USA was a breach of CANADA's [NAFTA] obligations . . . . Insofar as this conduct caused harm to SDMI by injuring its investment, Myers Canada, CANADA must pay compensation to SDMI."). Claimants' PO Counter-Mem. ¶¶ 58-59 and *infra* ¶¶ 32-33 (discussing *William Ralph Clayton and others v. Government of Canada*, NAFTA, UNCITRAL, Award on Damages, dated 10 Jan. 2019 ("*Clayton v. Canada*, Award on Damages") (CL-0070-ENG)).

Parties regarding this interpretive issue that would be relevant for this Tribunal's interpretation of the Treaty.

28. *Third*, Respondent wrongly claims that allowing claims for reflective loss under Article 1116 of NAFTA would render the mechanism under Article 1117 meaningless.[59] Article 1117 (like the DR-CAFTA Article 10.16.1(b)) provides an additional option for an investor that owns or controls an enterprise to bring a claim.[60] It also provides for different coverage than Article 1116. This is because, by granting majority and controlling shareholders the right to bring claims on behalf of an enterprise, the NAFTA permits the claimant to obtain *broader* recovery for all other shareholders and creditors in the enterprise (some of whom may not even have any treaty rights), and thereby potentially increases the respondent State's liability.[61] Indeed, this provides an answer to Respondent's query as to why the NAFTA would "impose requirements on investors who seek to recover the company's injury (and the shareholder's indirect loss) if avoiding them were as easy as bringing a claim under Article 1116 for reflective loss, isolating the award from creditors and other shareholders."[62] Such requirements are linked to the broader recovery allowable under Article 1117.

29. *Fourth*, Respondent asserts that no NAFTA tribunal has ever granted damages for reflective loss under NAFTA Article 1116.[63] Claimants, however, referenced multiple NAFTA cases where tribunals found that shareholders were entitled to recover reflective loss under Article 1116 and rejected States' objections to the contrary.[64] That those particular claimants may not have prevailed on the merits of their cases is irrelevant; in none of the cases discussed by Respondent did the tribunal dismiss the claimant's claim or refuse to award damages on account of the fact that the claimant sought relief for its reflective loss.

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[59] Respondent's PO Reply ¶¶ 70-73, § IV.C.3.

[60] Claimants' PO Counter-Mem. ¶ 21.

[61] *Id*. ¶¶ 50-53; *see also infra* ¶¶ 53, 60.

[62] Respondent's PO Reply ¶ 73.

[63] *Id*. ¶¶ 74-81, § IV.C.4.

[64] Claimants' PO Counter-Mem. ¶¶ 30-34 (discussing *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); *GAMI v. Mexico*, Final Award ¶ 33 (CL-0036-ENG/SPA); *Pope & Talbot v. Canada*, Award in Respect of Damages ¶¶ 74-75, 78, 80 (CL-0028-ENG); *UPS v. Canada*, Award on the Merits ¶¶ 32-35 (CL-0037-ENG)).

30. Specifically, in *Mondev v. United States*, *GAMI v. Mexico*, and *UPS v. Canada*, the claims failed on the merits and, therefore, no damages were awarded.[65] In *Pope & Talbot v. Canada*, the tribunal expressly rejected Canada's objection that the claimant should have brought its claim on behalf of its wholly-owned enterprise pursuant to Article 1117 and could not make its claim for reflective loss under Article 1116.[66] Although the tribunal found that the claimant, in principle, could recover for reflective loss, it found that the claimant had failed to prove that its enterprise had lost profits as a result of the measure found by the tribunal to violate the NAFTA.[67] Consequently, the only damage that the claimant had proven was its expenses incurred in participating in the verification review that was found to have been conducted in violation of Canada's obligation to accord fair and equitable treatment.[68] In *S.D. Myers v. Canada*, the tribunal confirmed that, in principle, the claimant had standing to recover damages for the loss it suffered due to the measures that affected the claimant and its investment, the Canadian enterprise.[69] The tribunal then awarded damages

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[65] *Mondev v. United States*, Final Award, at 58 (RL-0018-ENG) ("For the foregoing reasons the Tribunal unanimously DECIDES: . . . (c) That the decisions of the United States courts did not involve any violation of Article 1105(1) of NAFTA or otherwise; (d) That Mondev's claims are accordingly dismissed in their entirety"); *GAMI v. Mexico*, Final Award ¶ 137 (CL-0036-ENG/SPA) ("For the reasons stated above the Tribunal hereby unanimously declares that it has jurisdiction over the claims and dismisses them in their entirety. All contentions to the contrary are rejected."); *UPS v. Canada*, Award on the Merits ¶¶ 78, 120, 181, 184, 187 (CL-0037-ENG) ("[T]he decisions of Canada Post . . . are not made in the exercise of 'governmental authority' . . . . It accordingly follows that this part of the claim made by UPS in respect of the actions of Canada Post fails. . . . UPS's claim under NAFTA article 1102 . . . fails since the Claimant . . . is not accorded less favourable treatment than Canada Post or treated differently because of nationality. . . . [I]n in the absence of any further specification of the claimed breaches of article 1103 (and 1104) this claim must fail. . . . UPS has demonstrated no sufficient interest to justify its pursuit of the other two claims nor any substantive ground which could begin to show a breach of the minimum standard reflected in article 1105. This claim too must fail."); *see also,* Respondent's PO Reply ¶¶ 75-76, 78 (stipulating the same).

[66] *Pope & Talbot v. Canada*, Award in Respect of Damages ¶¶ 79-80 (CL-0028-ENG) (*see supra* n. 47).

[67] *Id*. ¶ 84 ("The Tribunal was thus required to determine what, if any, loss of profits the Investment suffered as a result of the shutdown. At the same hearing, Canada produced evidence and analyses, based upon the Investment's own records, that convinced the Tribunal that the Investment at all relevant times had inventory sufficient to meet all its sales requirements, notwithstanding that shutdown. Therefore, the thesis advanced by the Investor that the Investment never recovered from that lost production was not borne out by the evidence. In fact, the Investment suffered no loss of profits from the shutdown because it was always able to meet the needs of its customers on a timely basis. There was no convincing evidence that replenishing that inventory cost the Investment more than it would have if the shutdown had not occurred.").

[68] *Pope & Talbot v. Canada*, Award in Respect of Damages ¶ 85 (CL-0028-ENG) ("The heads of damages claimed that the Tribunal finds to be recoverable are (1) out of pocket expenses relating to the Verification Review Episode, including the applicable accountants' and legal fees, as well as the fees and expenses incurred by the Investor in lobbying efforts to counter the actions of the SLD and the consequent possibility of reductions in the Investment's export quotas, and (2) out of pocket expenses directly incurred by the Investor with respect to the Interim Hearing held in January 2000.") (citation omitted).

[69] *S.D. Myers, Inc. v. Government of Canada,* NAFTA, UNCITRAL, Second Partial Award dated 21 Oct. 2002 ("*S.D. Myers v. Canada*, Second Partial Award") ¶¶ 116, 126 (RL-0077-ENG) ("The measures that CANADA introduced, contrary to Articles 1102 and 1105, interfered with the ability of MYERS Canada to carry on and expand its contribution to the overall operation. MYERS Canada was an investment of SDMI and a fundamental

to compensate the claimant for the value of the lost and delayed net income streams, which it calculated in a complex 12-step methodology.[70]

31. Respondent also mischaracterizes the *Mondev* award.[71] Specifically, Respondent references the *Mondev* tribunal's comparison between Article 1117, which permits a claimant to bring a claim on behalf of an enterprise that it owns or controls, with "the device commonly used" in BITs "deeming the local company to have the nationality of the foreign investor which owns or controls it."[72] Far from indicating that shareholders lack standing to recover injury they suffered due to the diminution of the value of their enterprise under Article 1116, that discussion shows that the NAFTA (and the DR-CAFTA) are not "unique" amongst investment treaties in providing multiple avenues for claimants to pursue claims. Indeed, as noted by Claimants in their Counter-Memorial, the *Mondev* tribunal held that the claimant could recover under Article 1116 "even if loss or damage was also suffered by the enterprise itself."[73]

32. Finally, while Respondent belatedly acknowledges the damages award in *Clayton v. Canada*, after focusing exclusively in its Memorial on Canada's and a non-disputing Party submission made in that case, Respondent still fails to confront the aspects of that award that undermine its position. As Claimants noted in their Counter-Memorial, despite being the only NAFTA tribunal to erroneously conclude that claims for reflective loss cannot be made

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and integral part of the efforts of SDMI to generate revenues. SDMI has established on the facts of this case that it sustained damages that have a sufficient causal link to the interference with an investment in Canada, contrary to the provisions of Chapter 11. . . . SDMI claims that it suffered loss because CANADA interfered with MYERS Canada. . . . The business of MYERS Canada was the marketing and logistical support for the provision by SDMI of a cross-border service."); *see also, supra* n. 58 (quoting *S.D. Myers v. Canada*, Partial Award ¶¶ 290, 301 (CL-0104-ENG)).

[70] *S.D. Myers v. Canada*, Second Partial Award ¶¶ 222-228, 300-301 (RL-0077-ENG) ("[T]he Tribunal has concluded that the appropriate measure of damages is the value of the lost and delayed net income streams. The Canadian closure had three adverse effects on SDMI's investment. Part of the total available inventory was irretrievably lost to others; part of the inventory that remained unprocessed after the border re-opened was lost to others; and another part was delayed, or lost because SDMI could not obtain the orders and export the material before the USA closed the border.").

[71] Respondent's PO Reply ¶ 75, n. 117.

[72] *Mondev v. United States*, Final Award ¶ 79 (RL-0018-ENG); *see also infra* ¶¶ 44-49.

[73] Claimants' PO Counter-Mem. ¶ 30 n. 52 (quoting *Mondev v. United States*, Final Award ¶ 82 (RL-0018-ENG)).

under NAFTA Article 1116, the tribunal found that the claimants had properly brought their claims on their own behalf pursuant to that Article.[74]

33. The U.S. claimants in *Clayton* had established a Canadian enterprise, which was denied a permit to develop and operate a quarry and maritime terminal in breach of Canada's NAFTA obligations.[75] The tribunal held that the opportunity to develop the project, which had been unlawfully denied, was that of the claimants and, therefore, the claimants had suffered a direct injury and properly submitted their claims pursuant to NAFTA Article 1116.[76] Even if this Tribunal were to agree with the *Clayton* tribunal's interpretation of Articles 1116 and 1117 – which it should not do for all of the reasons set forth in Claimants' Counter-Memorial and in this Rejoinder – that award underscores Claimants' ability to bring their claims pursuant to DR-CAFTA Article 10.16.1(a). Like the claimants in *Clayton*, Claimants here have lost their opportunity to develop the Tambor project.[77] In such circumstances, there can be no doubt that Claimants may make a claim on their own behalf to recover damages for Respondent's breach.

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

34. In their Counter-Memorial, Claimants demonstrated that their interpretation of Article 10.16.1(a) and (b) is consistent with the Treaty's object and purpose of promoting effective dispute resolution, increasing investment opportunities, and providing a predictable framework for investment, while Respondent's interpretation is inconsistent with those objectives.[78] Claimants also showed that Respondent had not shown that protecting creditors was an object and purpose of the Treaty and, in any event, its assertion that its interpretation furthered that purported objective was wrong.[79]

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[74] Claimants' PO Counter-Mem. ¶¶ 58-59; *Clayton v. Canada*, Award on Damages ¶ 396 (CL-0070-ENG) ("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.'").

[75] *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 dated 17 Mar. 2015 ¶ 742).

[76] *Id.* ¶ 396 (*see supra* n. 74).

[77] Claimants' PO Counter-Mem. ¶ 60; Notice of Arbitration ¶¶ 3-6, 68, 72, 74, 77.

[78] Claimants' PO Counter-Mem. ¶¶ 35-37.

[79] *Id.* ¶¶ 35, 48.

35. In its Reply, Respondent fails to respond to Claimants' showing that admitting claims for reflective loss is consistent with the DR-CAFTA's object and purpose, and unconvincingly attempts to dismiss the significance of the myriad investment treaty cases supporting Claimants' position.[80] It also reiterates its untenable argument that the purported objective of creditor protection precludes Claimants' claims under Article 10.16.1(a).[81] As demonstrated below, Respondent's arguments remain meritless.

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

36. Claimants demonstrated in their Counter-Memorial that admitting claims for reflective loss is consistent with the DR CAFTA's object and purpose of providing effective means of dispute resolution,[82] as well as to "substantially increase investment opportunities"[83] and to "ensure a predictable commercial framework for . . . investment."[84] Claimants showed that Respondent's reliance on the customary international law of diplomatic protection and the ICJ's *Barcelona Traction* and *Diallo* cases is inapposite, because 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.[85] Claimants further showed that investors' ability to bring claims for reflective loss has been confirmed by numerous tribunals interpreting a multitude of investment treaties (including those to which the United States is also a Party and another multilateral treaty, the ECT) that contain similar objects and purposes.[86] In fact, Claimants observed that Respondent had not identified in its Memorial a single case under any modern investment treaty where a tribunal has found to the contrary.[87] To deny standing to shareholder investors to make claims for losses suffered as a result of measures taken against their investments thus

[80] Respondent's PO Reply ¶¶ 35-59.

[81] *Id.* ¶¶ 97-104.

[82] Claimants' PO Counter-Mem. ¶¶ 35-47; DR-CAFTA, Article 1.2.1(f) (CL-0001-ENG/SPA).

[83] Claimants' PO Counter-Mem. ¶ 36; DR-CAFTA, Article 1.2.1(d) (CL-0001-ENG/SPA).

[84] Claimants' PO Counter-Mem. ¶ 36; DR-CAFTA, Preamble (CL-0001-ENG/SPA).

[85] Claimants' PO Counter-Mem. ¶¶ 44-46; *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 ¶ 88 (CL-0060-ENG). It is unclear whether, in its Reply, Respondent has abandoned that argument. *See* Respondent's PO Reply n. 92.

[86] Claimants' PO Counter-Mem. ¶¶ 38-42.

[87] *Id.* ¶ 43.

would provide *considerably less* protection to foreign investors than that provided by *any* of these other modern investment treaties.[88]

37. In its Reply, Respondent does not offer any response to Claimants' observation that their interpretation of DR-CAFTA Article 10.16.1(a) and (b) is consistent with the DR-CAFTA's object and purpose, whereas its interpretation is not. Instead, Respondent sets out purported "negative consequences of reflective loss,"[89] including that it "may lead to double recovery, conflicting outcomes in different proceedings, an undue windfall and it completely ignores creditors or other stakeholders who have an interest . . . in any potential recovery," stating that this is why such claims are precluded by many domestic systems.[90] Respondent further claims that "investment law organizations, contracting States, scholars and tribunals have identified the numerous undesirable consequences resulting from reflective loss claims,"[91] concluding that "[t]he problems associated with a reflective loss claim are therefore real and widely recognized by arbitrators, practitioners and scholars."[92] Respondent then suggests that, "[d]espite acknowledging the problems associated with investor claims for an enterprise's loss, international tribunals have oftentimes overlooked them."[93] Seeking to rationalize its position in this case, Respondent remarks that reflective loss claims were often permitted in disputes involving older treaties because they provided the only meaningful remedy for shareholders to recover direct damages sustained by their enterprise,[94] and it attaches to its Reply two annexes containing lists of investment treaty cases along with excerpts from the applicable treaties.[95] Respondent then posits that "[i]n none of those cases . . . did the applicable treaty offer a mechanism to recover injuries directly sustained by the local company as provided under CAFTA-DR," and that, "unlike Claimants here, the only way for the investors in the Argentine cases to recover for the injuries they indirectly sustained was through reflective loss claims."[96] Respondent's position is wrong for the following reasons.

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[88] *Id.* ¶ 37.
[89] Respondent's PO Reply ¶¶ 35-49.
[90] *Id.* ¶ 35.
[91] *Id.* ¶¶ 36-49.
[92] *Id.* ¶ 49.
[93] *Id.* ¶¶ 30, 50.
[94] *Id.* ¶¶ 30, 50-59, § IV.B.
[95] *Id.* Annexes I & II.
[96] *Id.* ¶¶ 30, 55-56.

38. *First*, Respondent's contention that most "advanced" national legal systems bar claims for reflective loss,[97] is inapposite. None of the domestic laws that Respondent quotes is applicable in this proceeding, which is governed by the DR-CAFTA and international law.[98] National laws cannot override the Treaty, which allows claims for reflective loss.[99] Indeed, Respondent itself has urged the Tribunal to "decide this case based on the specific regime that the CAFTA-DR Parties agreed to ('*lex specialis*')."[100]

39. *Second*, Respondent's lengthy discussion of the perceived negative consequences of allowing claims for reflective loss is inapt. As established, the DR-CAFTA allows a claimant to make a claim for reflective loss, and its plain language cannot be overridden by extraneous policy concerns.[101] None of the perceived negative consequences invoked by Respondent, such as the prospect of double recovery or double payment, or a multiplicity of proceedings[102] can affect Claimants' standing or the jurisdiction of the Tribunal.[103] Respondent thus is not assisted by invoking scholars and their policy-based considerations on the existing jurisprudence and investment law.[104] These cannot be substituted for or alter the meaning of the Treaty.[105]

40. Even less relevant are the submissions or objections based on such policies made by respondent States as considered (and rejected) by various tribunals.[106] In any event,

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[97] *Id.* ¶ 35.

[98] DR-CAFTA, Article 10.22.1 (CL-0001-ENG/SPA). ("Subject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.").

[99] *See supra* ¶¶ 12-14.

[100] Respondent's PO Reply ¶ 32.

[101] *See* Claimants' PO Counter-Mem. ¶¶ 69-71 (quoting *Railroad Development v. Guatemala*, Award ¶ 265 (CL-0068-ENG), *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), *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") ¶ 51 (CL-0013-ENG), *Nykomb Synergetics Technology Holding AB, Stockholm v. Republic of Latvia*, SCC Case, Award dated 16 December 2003 ("*Nykomb v. Latvia*, Award"), at 9 (CL-0073-ENG), and *GAMI v. Mexico*, Final Award ¶¶ 37-38 (CL-0036-ENG/SPA)).

[102] Respondent's PO Reply ¶ 35.

[103] *See* Claimants' PO Counter-Mem. ¶¶ 70-71 and nn. 140-141; *see also infra* ¶ 73.

[104] Respondent's PO Reply ¶¶ 40-42, 51-52; *see also supra* n. 55 (quoting MEG KINNEAR, ANDREA BJORKLUND *ET AL.*, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 1116-1118 (2006) (CL-0035-ENG)).

[105] *See supra* ¶ 26.

[106] *See* Respondent's PO Reply ¶¶ 39, 43-48.

Claimants also showed in their Counter-Memorial that the supposed "negative consequences" can be addressed in multiple ways, including that States can (and do) include provisions (such as consolidation) in their treaties to address some of these concerns, and that tribunals have means at their disposal to address them as well, including by fashioning awards so as to prevent double recovery or double payment.[107] Yet, Respondent fails to acknowledge or respond in any way in its Reply to these observations. Indeed, the fact that the referenced tribunals permitted claims for reflective loss despite such objections is instructive.[108] In short, none of the sources invoked by Respondent is able to alter the Treaty.

41. *Third*, Respondent fails in its attempt to minimize and distinguish cases under other investment treaties, and the fact that interpreting the DR-CAFTA to deny claimants standing to bring claims for reflective loss would mean that the DR-CAFTA (and the NAFTA) provide less investment protection than any other modern investment treaty. As an initial matter, Respondent's statement that, despite acknowledging the purported issues associated with investor claims for reflective loss, international tribunals have often "overlooked" these concerns,[109] conveniently ignores the fact that these same tribunals have considered submissions by respondent States and non-disputing Parties making the very same arguments that Respondent advances here, and have refused to decline jurisdiction or to find

[107] Claimants' PO Counter-Mem. ¶¶ 70-71 and nn. 140-141; Note by the Secretariat of the UNCITRAL Working Group III, *Possible reform of investor-State dispute settlement (ISDS) Shareholder Claims and Reflective Loss*, 9 Aug. 2019 ¶ 22 (RL-0058-ENG/SPA) ("[S]ome ISDS tribunals have been attentive to this issue and have taken proactive steps to avoid it, such as by considering related pending and prior claims and prorating recovery.").

[108] In none of the cases quoted by Respondent did a tribunal dismiss the claim based on the "difficulties" or "dangers" that Respondent associates with claims for reflective loss. *See 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."); *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."); *id.* ¶ 33 ("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."); *id.* ¶¶ 132-133 ("The Tribunal cannot be indifferent to the true effect on the value of the investment of the allegedly wrongful act. . . . GAMI has not proved that its investment was expropriated for the purposes of Article 1110."); *Nykomb v. Latvia*, Award, at 9 (CL-0073-ENG) (emphasizing that "clearly the Treaty based right to arbitration is not excluded or limited in cases where there is a possible risk of double payment."); *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"); *id.* ¶¶ 205-206 ("[T]hese instruments protect the rights of foreign shareholders in domestic companies, more precisely their own rights as shareholders (right to the shares, right to a dividend, participation in stockholders' meetings, etc.), including the right to compensation for loss of value of stocks imputable to measures taken by the host State."). Respondent's reliance on *OTMTI v. Algeria* is also misplaced. *See infra* ¶ 65.

[109] Respondent's PO Reply ¶ 50.

shareholders' claims inadmissible.[110] Those tribunals have not "overlooked" the arguments that Respondent is making; they have rejected them.

42. Respondent also unsuccessfully attempts to diminish the significance of the numerous cases allowing claims for reflective loss, by arguing that these cases relied on treaties that did not include any "derivative claim mechanism," unlike the DR-CAFTA (and the NAFTA), and, therefore, the only way for those investors to recover was to claim for reflective loss.[111] As shown in Claimants' Counter-Memorial, however, the plain language of the DR-CAFTA allows an investor to bring a claim on its own behalf under Article 10.16.1(a).[112] 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.[113] The language of the Treaty is permissive, and not mandatory, in this regard.[114] By no means does this *additional* option preclude an investor from bringing a claim for reflective loss on its own behalf. Claimants also illustrated that, contrary to Respondent's suggestion, this does not render Article 10.16.1(b) meaningless: it permits controlling claimants to recover the entirety of an enterprise's losses, even when that would result in indirectly compensating minority shareholders and creditors who may not even have Treaty rights.[115]

43. Respondent's argument that claims for reflective loss were often permitted in disputes involving "older" treaties because they provided the only meaningful remedy for shareholders to recover damages sustained by their enterprise and thus constituted "the lesser of two evils"[116] is thus baseless. It also is incorrect, as many of the treaties in the numerous cases cited by Claimants *did* contain so-called "derivative claim mechanisms."[117] In every

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[110] *See supra* ¶ 27 and cases referenced therein.

[111] Respondent's PO Reply ¶¶ 30, 55-56 & Annexes I and II.

[112] Claimants' PO Counter-Mem. ¶¶ 13-34.

[113] *Id.* ¶ 21.

[114] *Id.* The same was found by the tribunal in *Pope & Talbot v. Canada* with respect to the corresponding language in NAFTA Articles 1116 and 1117. *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.'").

[115] Claimants' PO Counter-Mem. ¶¶ 50-55.

[116] Respondent's PO Reply ¶ 30.

[117] *Id.* ¶¶ 107, 118, § IV.C.4. Respondent inexplicably refers to *Waste Management v. Mexico (II)* as an example of a case where the applicable treaty "did not provide standing to shareholders to bring claims on behalf of their injured local enterprise." *Id.* ¶ 57. The *Waste Management (II)* case, however, was brought under the NAFTA, which contains Article 1117, pursuant to which an investor who owns or controls an enterprise may submit to arbitration a claim on behalf of that enterprise. *Waste Management Inc. v. United Mexican States (II)*, NAFTA, ICSID Case No. ARB/AF/00/03, Award dated 30 Apr. 2004 ¶¶ 77-85 (CL-0022-ENG/SPA); NAFTA, Art. 1117 (CL-0034-ENG/SPA).

one of these cases, the tribunal held that it had jurisdiction over claimant's claim for reflective loss, despite the fact that the claimant chose not to file its claim under the available "derivative claim mechanism."

44. In addition, (and as conveniently omitted from Respondent's Annexes I and II to its Reply),[118] some treaties, for example, include certain local enterprises in the definition of an "investor,"[119] while others allow certain local companies to be treated as a national of the other Contracting Party in accordance with Article 25(2)(b) of the ICSID Convention.[120] ICSID Article 25(2)(b) provides that, where the Contracting Parties have agreed, an enterprise constituted in the host State that is controlled by a national of another Party may be treated as a national of that other Party.[121] This serves a purpose similar to DR-CAFTA Article 10.16.1(b), insofar as it provides a means for an enterprise of the host State to recover its losses suffered as a result of the host State's measures aimed at that enterprise. Whereas DR-CAFTA Article 10.16.1(b) does this by allowing a foreign national to bring a claim on behalf of that enterprise, ICSID Article 25(2)(b) accomplishes the same result by allowing the

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[118] Respondent also mistakenly quotes at times to the inter-State, rather than to the investor-State, dispute resolution mechanism. *See, e.g.*, Annex II (quoting Estonia-United States BIT, Art. VII(1); Greece-Slovakia BIT, Art. 9(2)).

[119] *See, e.g.*, Argentina-France BIT, Art. 1(2)(c) (CL-0105-ENG/SPA) ("The term 'investor' shall apply to: . . . [a]ny body corporate effectively controlled, directly or indirectly, by nationals of one Contracting Party, or bodies corporate having their registered office in the territory of one Contracting Party and constituted in accordance with that Party's legislation.").

[120] *See*, *e.g.*, Argentina-United States BIT, Art. VII(8) (CL-0106-ENG/SPA) ("For purposes of an arbitration . . . any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Art. 25(2)(b) of the ICSID Convention."); Ecuador-United States BIT, Art. VI(8) (CL-0107-ENG/SPA) ("For purposes of an arbitration . . . any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention."); Estonia-United States BIT, Art. VI(8) (CL-0108-ENG) (same); Energy Charter Treaty, Art. 26(7) (CL-0109-ENG/SPA) ("An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a 'national of another Contracting State' and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a 'national of another State'").

[121] ICSID Convention, Art. 25(2)(b) ("'National of another Contracting State' means: . . . any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and *any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention*.") (emphasis added).

enterprise to bring a claim on its own behalf, notwithstanding that it has the same nationality as the respondent State.

45. If the existence of Article 10.16.1(b) in the Treaty meant that a claimant who owns or controls an enterprise *must* bring a claim for any indirect (or reflective) loss pursuant to that Article, as Respondent suggests, then it would stand to reason that, where the Parties had agreed to treat foreign-controlled nationals as non-nationals of the respondent State pursuant to ICSID Article 25(2)(b), claimants likewise would be limited to making claims for reflective loss pursuant to Article 25(2)(b). Arbitral tribunals, however, have properly rejected that proposition.

46. In *Azurix v. Argentina*, for instance, the claimant challenged Argentina's treatment of its concession, to which an enterprise in the host State that Azurix owned and controlled was a party.[122] The tribunal ruled in Azurix's favor, awarding it damages for the value of the concession.[123] Argentina sought to annul the award, arguing, among other things, that because the applicable BIT granted the parties' consent to treat foreign-controlled enterprises as foreign for the purpose of ICSID Article 25(2)(b), Azurix could and should have caused its enterprise to bring the claim, and Azurix thus could not recover for reflective losses.[124] Much like Respondent here, Argentina argued:

> At the time of drafting of the ICSID Convention, drafters considered and rejected the possibility of granting a direct action to controlling shareholders of local companies. Instead, they included the possibility prescribed by Article 25(2)(b) of the ICSID Convention, which ensures that damages are paid to the company rather than to the shareholders thereby protecting the rights of the company's creditors and other third parties, while also eliminating the possibility of the local company and its shareholders pursuing different claims in different *fora* in respect of the same damage. By virtue of Article 25(2)(b), *if Azurix exercised control over ABA, it was obliged to bring claims under the BIT and the ICSID Convention in the name of ABA and for*

[122] *Azurix v. Argentina*, Annulment Decision ¶ 57 (CL-0051-ENG/SPA) ("Argentina raised an objection that Azurix had no standing to assert rights that arise from the Concession. Argentina argued, that because the Concession was a contract entered into between the Province and ABA, only ABA could assert rights under the Concession against the Province. Argentina claimed that Azurix, being only a shareholder of ABA, lacked *ius standi* to put forward 'indirect claims' or 'derivative claims' relating to ABA's contractual rights.").

[123] *Id.* ¶ 37 ("In its Award of July 14, 2006, the Tribunal unanimously decided: . . . . [t]o award compensation to Azurix on account of the fair market value of the Concession . . . including in part the additional investments made by Azurix to finance ABA.").

[124] *Id.* ¶ 61(f).

> *the account of ABA*. The Tribunal's decision circumvents the requirements of Article 25(2)(b) and makes that provision pointless.[125]

47. The *ad hoc* committee rejected Argentina's contention that the tribunal had manifestly exceeded its powers, holding that the enterprise's ability to bring a claim could not deprive Azurix of its rights under the treaty to bring its own claim for its own (reflective) loss:

> Although [Article VII(8) of the BIT and Article 25(2)(b) of the ICSID Convention] establish a possibility in certain circumstances for a company incorporated in the host State to bring proceedings against the host State for violations of the BIT, there is nothing in the wording of these provisions that derogates from any right that the shareholders in the company might otherwise have to bring proceedings under Article VII of the BIT.[126]

48. Like Argentina, Spain, in the *Cube Infrastructure* case, argued that ICSID Convention Article 25(2)(b), along with Article 26(7) of the ECT, which provides the parties' consent to treat foreign-controlled enterprises as foreign and submit claims to arbitration, "derive[d] from the general principle of non-recognition of active legitimation of the shareholder to claim for the company's losses,"[127] and that these Articles "would not be necessary if the foreign shareholders could claim for the company's losses."[128] The tribunal correctly rejected Spain's argument:

> The Tribunal is of the view that Article 26(7) ECT was necessary to permit the locally incorporated subsidiary to take proceedings. *A provision extending the protection of a treaty does not carry the implication that other clear words in the treaty*, which we discuss below, *must be read down.*[129]

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[125] *Id.* ¶ 61(f) (emphasis added and internal citation omitted) (summarizing Argentina's objection); *see also id.* ¶ 61(k) (reproducing Argentina's argument that "[t]his case is distinguishable from most other cases brought by shareholders against Argentina because ABA was in a position to bring a claim under Article 25(2)(b) . . . . ").

[126] *Id.* ¶ 102; *see also id.* ¶ 127 ("[T]he Committee is not satisfied that it has been established from the preparatory work that the inclusion of Article 25(2)(b) in the ICSID Convention was intended to preclude the possibility of a shareholder bringing proceedings in respect of a violation of an investment protection treaty in respect of the shareholder's own investment, merely because the investment consisted of the shareholder's participation in a company which might potentially instead have brought proceedings in its own name pursuant to Article 25(2)(b)."); *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 ¶ 119 (CL-0041-ENG/SPA) (after reviewing the definition of "investment" in the applicable treaty, Article 25 of the ICSID Convention, and principles of treaty interpretation in the Vienna Convention, holding that "[t]he Committee considers the legal reasoning in the *Azurix* Annulment Decision on the issue of 'derivative claims' to be correct, and adopts that reasoning.").

[127] *Cube Infrastructure v. Spain*, Decision on Jurisdiction, Liability and Partial Decision on Quantum ¶ 171 (CL-0059-ENG).

[128] *Id.* ¶ 172.

[129] *Id.* ¶ 174 (emphasis added); *see also, 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 ¶ 333 (CL-0057-ENG) ("Estonia also submits

49. The *Sempra v. Argentina* tribunal held similarly:

> In the present case, the Claimant in fact had an option. It could claim as a national of the United States, the other contracting State, insofar as it meets the requirements laid down in the Convention and the Treaty. Whether or not the definition of investment considers the case of a minority shareholder or an indirect investment is a separate issue that is the subject of another objection to jurisdiction. [The enterprise] also had the option to complain [under the Treaty] as a company incorporated in Argentina, if it is established that this company is under foreign control and, through it, the licensee companies too. This option was the subject of an agreement between the parties contained in Article VII(8) of the Treaty. The existence of this possibility does not prevent the investor claiming as such under the terms of the first sentence, if that option is also available.
>
> . . .
>
> The Tribunal can then conclude that the option offered by the second sentence of Article 25(2)(b) of the Convention, as well as by Article VII(8) of the Treaty, provides an additional or different alternative which does not in this case prevent an investor from opting to act under the first sentence of the Convention article if it meets the pertinent requirements.[130]

50. Although Respondent curiously asserts that *Eskosol v. Italy* supports its position that claims for reflective loss were only admissible because they were "the only remedy available under the applicable treaty [the ECT] to the shareholder to recover the direct loss sustained by its enterprise,"[131] that case is consistent with those described above. Eskosol was not a foreign shareholder in a local company; it was the local company that brought a claim on its own behalf.[132] The issue before the *Eskosol* tribunal was whether the local company was precluded from bringing a claim after its majority shareholder had brought a separate claim

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that since Article VI(8) of the BIT qualifies EIB as a U.S. 'national or company', its resort to the courts and administrative tribunals of Estonia should preclude the 'parents' from submission of their dispute to an ICSID arbitration. However, as mentioned above, EIB had no choice but to contest the revocation of its license in Estonia, in the interest of all its shareholders, whereas the Claimants submitted to ICSID arbitration an 'investment dispute', as defined by the BIT, seeking compensation for what they claim was a violation of their rights under the BIT."); *see infra* n. 120 (quoting the Estonia-United States BIT, Art. VI(8)).

[130] *Sempra v. Argentina*, Decision on Objections to Jurisdiction ¶¶ 42, 45 (CL-0072-ENG/SPA).

[131] Respondent's PO Reply ¶ 53.

[132] *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 ¶¶ 2, 20 (CL-0058-ENG) ("The claimant is Eskosol S.p.A. in liquidazione ('**Eskosol**' or the '**Claimant**'), a company incorporated in the Italian Republic" (emphasis in original).

on its own behalf (for reflective loss).[133] In finding that it had jurisdiction over the claimant's claim, the tribunal acknowledged the following:

> The ECT authorizes a variety of entities to proceed as qualified 'Investor[s]' under its terms. This includes *foreign* investors like Blusun, bringing suit relating to investments that they 'own[] or control[] directly or indirectly,' including 'a company or business enterprise, or shares, stock or other forms of equity participation in a company or business enterprise.' But it also includes *local companies* like Eskosol, which are expressly permitted to bring claims in their own name provided that they meet the foreign control requirements of Article 26(7).[134]

Although Respondent submits that "some" investment tribunals have rejected reflective loss claims, even if no alternative was available to the shareholders under the applicable treaty, it invokes a single case, *LESI-Dipenta v. Algeria*, which does not support that proposition.[135] In that case, the purported investment was not a shareholding in a local company, but a construction contract entered into by two separate companies, which later formed a consortium.[136] The tribunal found that the consortium, which was the claimant, lacked standing to claim for damages stemming from the performance and cancellation of the contract, because the consortium did not act on behalf of the companies that had formed it and "was not the holder of the rights and obligations of the [c]ontract under which the investment was made."[137] Nowhere in the award does the tribunal consider the issue of recoverability of reflective loss.

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[133] *Id.* ¶¶ 166-171.

[134] *Id.* ¶ 166 (footnote omitted; emphasis and brackets in original); *see also id.* ¶ 170 ("[N]either the ICSID system as presently designed, nor the ECT itself, incorporate clear avenues (much less a requirement) for joinder in a single proceeding of all stakeholders potentially affected by the outcome. *Absent such a system – which States have the power to create if they so wish – it would not be appropriate for tribunals to preclude arbitration by qualified investors, simply because other qualified investors may have proceeded before them without their participation. The possibility that domestic legal systems may afford potential remedies* – for example, claims by minority shareholders or bankruptcy receivers against majority shareholders who take unauthorized actions in contravention of domestic law – *is not sufficient basis for precluding qualified investors from exercising their fundamental right to access the ICSID system*.") (emphasis added).

[135] Respondent's PO Reply ¶ 54, n. 79 (referring to *Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award dated 10 Jan. 2005 ("*L.E.S.I.-DIPENTA v. Algeria*, Award") (RL-0055-ENG)).

[136] *L.E.S.I.-DIPENTA v. Algeria*, Award ¶ 47(iii) (The Facts) (RL-0055-ENG) (quoting to the claimant's memorial submitting that "*The Tribunal has jurisdiction* jure materiae *because the Contract in question qualifies as an investment under the terms both of the Convention and of the Bilateral Treaty*" (emphasis in original)); *id.* ¶¶ 12-13 (Questions of Law).

[137] *Id.* ¶ 39 (The Facts); *id.* ¶¶ 40-41 (Questions of Law).

51. For the above reasons, admitting claims for reflective loss is consistent with the DR-CAFTA's object and purpose of providing effective means of dispute settlement. Respondent's arguments to the contrary based on the purported "negative consequences of reflective loss," which find no basis in the Treaty and are unsupported by the jurisprudence, should be rejected.

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

52. In their Counter-Memorial, Claimants explained that there was no basis to interpret Article 10.16.1(a) and (b) to maximize protection of creditors.[138] Claimants further demonstrated that, in any event, Respondent's assertion that Claimants' interpretation "circumvent[s] creditors" is based on a misunderstanding of basic damages calculation and theory.[139] In particular, Claimants explained that, regardless of whether a claimant makes a claim on its own behalf or on behalf of an enterprise that it owns or controls, its recovery for loss or damage suffered as a result of the respondent State's breach will be the same.[140] This is because an investor's shares – and, hence, any damage suffered by a loss in value to those shares – will only have value to the extent the enterprise has a positive value after having paid off its creditors.[141] A claimant thus will recover the same amount whether it makes a claim on its own behalf and receives its award for damage directly, or whether it makes a claim on behalf of an enterprise that it owns or controls and receives compensation indirectly through an increase in the value of its shares.[142]

53. By contrast, as Claimants explained, a respondent State's liability for the same measure may be greater in a case where the enterprise has minority shareholders and/or creditors and the claimant files its claim on behalf of the enterprise, as opposed to filing the claim on its own behalf.[143] Claimants showed, in fact, that in the *RDC v. Guatemala* case, Guatemala objected to having the award paid to the enterprise, because this would result in Guatemalan nationals who were minority shareholders without any treaty rights being

[138] Claimants' PO Counter-Mem. ¶ 48.
[139] *Id.* ¶¶ 48-55.
[140] *Id.* ¶ 50.
[141] *Id.*
[142] *Id.*
[143] *Id.* ¶¶ 50-54.

indirectly compensated for damage they suffered on account of Respondent's treaty breach.[144]

54. In its Reply, Respondent maintains that the derivative claim mechanism provided under Article 10.16.1(b) of the DR-CAFTA does seek to protect creditors."[145] Respondent further asserts that Claimants "seek to receive compensation for Exmingua's alleged injury directly, circumventing 'any right that any person may have in the relief under applicable domestic law.'"[146] Respondent's arguments remain meritless.

55. *First*, Respondent still has failed to demonstrate that protecting creditors (particularly where such creditors may not otherwise be protected by the Treaty) is an object and purpose of the Treaty and, therefore, that Article 10.16.1(a) and (b) ought to be interpreted in a manner most protective of creditor rights. In support of its assertion to the contrary, Respondent cites DR-CAFTA Article 10.26.2(c), which provides that, where a claim is submitted by a claimant on behalf of an enterprise, pursuant to Article 10.16.1(b), "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."[147] This provision, however, merely recognizes that an award under the DR-CAFTA does not and cannot affect rights that others may have under domestic law to the proceeds of that award. Contrary to Respondent's contention, Claimants do not seek "to bypass" this provision; any award issued to Claimants likewise will be without prejudice to any rights that any person may have under applicable law to the proceeds of that award. Article 10.26.2(c) thus neither supports Respondent's view that the Treaty ought to be interpreted in a manner most favorable to creditors, nor sheds any light on whether a claimant may make a claim for reflective loss under DR-CAFTA Article 10.16.1(a).

56. *Second*, Respondent references DR-CAFTA Article 10.26.2, which requires that an award made in a claim filed on behalf of an enterprise be paid to the enterprise, and asserts that this "prevents investors 'from effectively stripping away a corporate asset.'"[148] This

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[144] *Id.* ¶¶ 54-55 (discussing *Railroad Development v. Guatemala*, Award (CL-0068-ENG)).

[145] Respondent's PO Reply ¶¶ 97-104.

[146] *Id.* ¶ 99.

[147] *Id.* ¶ 98 (quoting DR-CAFTA Article 10.26.2(c)).

[148] *Id.* ¶ 100 (quoting Lee Caplan and Jeremy Sharpe, *Commentary on the 2012 U.S. Model BIT*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 826 (Chester Brown, ed., 2013) (RL-0069-ENG)).

observation, however, also fails to support Respondent's interpretation of Article 10.16.1(a) and (b). If a claim is filed *on behalf of an enterprise* under Article 10.16.1(b), then, naturally, the award ought to be paid *to the enterprise*, as it is compensating *the enterprise* for *its* losses. If an award of damages to an enterprise instead was paid to a claimant shareholder, that claimant might recover more than its share of losses, to the extent that the enterprise had creditors and/or other shareholders. By paying the award directly to the enterprise, Article 10.26.2 thus ensures that the claimant shareholder cannot "strip away a corporate asset," by having the enterprise's award paid directly to it.

57. This concern, however, does not arise when a claimant files a claim *on its own behalf* under Article 10.16.1(a) for damages suffered by *it* in the form of a loss in value of its shares as a consequence of the respondent State's breach. In such circumstance, as Claimants explained in their Counter-Memorial, the claimant's share value (and, thus, any loss in that value) is derived by calculating the enterprise's value, deducting any enterprise debt, and taking the claimant's percentage ownership of the residual amount.[149] By paying an award under Article 10.16.1(a) to the claimant, there thus is no threat to creditor rights and no prospect that the claimant can "strip away a corporate asset."

58. Indeed, in its Reply, Respondent fails to respond to – or even acknowledge – Claimants' observation that a claimant who files a claim under Article 10.16.1(a) on its own behalf (for reflective loss or otherwise) does not recover any more than it would recover if it had filed a claim on behalf of an enterprise and then indirectly recouped its losses (or failed to recoup anything if the enterprise's value was negative).[150] This is fatal to Respondent's misstatement that Claimants' claim is prejudicial to creditors.

59. Furthermore, although Respondent states that "a key difference between a claim for reflective loss and for direct loss sustained by the company is that in that latter the creditors are actually paid,"[151] it fails to acknowledge the necessary corollary to that statement. As Claimants observed in their Counter-Memorial, while a claimant's recovery will remain constant whether it files a claim on its own behalf or on behalf of an enterprise that it owns or

[149] *See* Claimants' PO Counter-Mem. ¶¶ 49-50.
[150] *Id.* ¶ 50.
[151] Respondent's PO Reply ¶ 26.

controls, a respondent State's liability may be greater in the latter situation.[152] By compensating the enterprise for its losses, all shareholders – including minority shareholders as well as creditors – will be indirectly compensated, regardless of whether those minority shareholders or creditors would have had standing to bring a claim under the Treaty on their own behalf to recover their own losses.[153] Unsurprisingly, Respondent also fails to respond to or acknowledge that, in the *RDC v. Guatemala* case, it objected to having the award paid to the enterprise on the ground that this would indirectly compensate Guatemalan nationals who were minority shareholders of the enterprise and who lacked any Treaty rights.[154]

60. In sum, Respondent's contention that, by filing under Article 10.16.1(a), Claimants seek to benefit at the expense of creditors is wrong. When a claim is made on behalf of an enterprise, the award is paid to the enterprise, to ensure that the enterprise itself, as opposed to only one of its shareholders, obtains recovery. But when a claim is made by a claimant on its own behalf, the payment of that award to the claimant does not prejudice other shareholders or creditors of an enterprise in which the claimant owns shares. Likewise, the claimant's recovery is not increased by filing a claim on its own behalf, rather than on behalf of an enterprise that it owns or controls. A respondent State's liability, however, may be greater in the latter circumstance, where the State may even indirectly compensate shareholders and creditors who lack any treaty rights against the State.

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

61. In their Counter-Memorial, Claimants demonstrated that they are seeking to recover damages *they* have incurred by reason of, or arising out of, Guatemala's breach of its obligations under the DR-CAFTA.[155] In particular, Claimants' loss consists of the diminution of the value of Claimants' investment (Exmingua) and, therefore, the diminution of the value of Claimants' shares in Exmingua, incurred as a result of the measures that Guatemala has adopted and maintained.[156] Claimants explained that this was made clear throughout their Notice of Intent and Notice of Arbitration, and that Respondent mischaracterizes Claimants' claims when it concludes that Claimants are seeking damages

[152] Claimants' PO Counter-Mem. ¶ 50.

[153] *Id.*

[154] *See supra* ¶¶ 15, 22; Claimants' PO Counter-Mem. ¶¶ 50-54.

[155] Claimants' PO Counter-Mem. ¶¶ 57-63.

[156] *Id.* ¶ 57.

suffered by Exmingua, simply because Claimants complain about measures adopted and maintained by Guatemala in breach of its Treaty obligations that were aimed at Exmingua.[157] In fact, Claimants showed that, in many investment treaty cases, claimants who are owners of enterprises recover damage for injury that they have suffered as a result of measures aimed at their enterprise.[158] Finally, Claimants explained that it is premature to conduct a detailed examination into the extent of damage suffered by Claimants, and that Claimants' allegations that they have suffered damage as a result of Guatemala's breach must be accepted as true for purposes of Respondent's Article 10.20.5 objection.[159] Because Claimants' Notice of Intent and Notice of Arbitration complied with the Treaty's requirement to indicate the relief requested and approximate amount of damages sought,[160] Respondent's objection regarding Claimants' damages claim should be denied.

62. In its Reply, Respondent asserts that "Claimants now falsely argue that their claims are 'on their own behalf . . . .'"[161] Respondent also erroneously maintains that Claimants are seeking to recover damages for Exmingua's losses, because Claimants allegedly "only announced claims for alleged losses suffered by Exmingua in certain projects and assets, and not for any impact that Exmingua's direct losses had on the value of Claimants' shares in Exmingua or Minerales KC . . . ."[162] Mischaracterizing the jurisprudence as well as Claimants' claims, Respondent asserts that "[w]here a claimant confuses damages over its property and damages over the property of the company where the claimant owns shares, tribunals have dismissed the claims."[163] Although Respondent agrees with Claimants that "this is not the stage to quantify or prove Claimants' damages,"[164] it asserts that "[n]owhere do Claimants allege or seek to recover for any purported loss in the value of i) their interest in Exmingua, ii) their shares, or iii) any other type of reflective losses."[165] Finally, Respondent submits that Claimants' "belated attempt to amend their claims now and characterize the

[157] *Id.* ¶ 57.
[158] *Id.* ¶¶ 38-42.
[159] *Id.* ¶¶ 3-5, 61.
[160] *Id.* ¶¶ 62-63.
[161] Respondent's PO Reply ¶ 21.
[162] *Id.* ¶ 27.
[163] *Id.* ¶ 23.
[164] *Id.* ¶ 27.
[165] *Id.* ¶ 22.

damages they claimed as reflective losses in order to avoid Respondent's objections cannot be allowed."[166] Respondent's objection is meritless.

63. *First*, Respondent is wrong in maintaining its contention that Claimants are seeking to recover for *Exmingua's* loss or damage. As explained in their Counter-Memorial, Claimants made abundantly clear in their Notice of Intent and Notice of Arbitration that they seek damages for *their* losses.[167] Respondent notably ignores each and every reference in the Notice of Intent and Notice of Arbitration to *Claimants*' loss or damage suffered as a result of Respondent's actions, and instead focuses exclusively on the fact that the measures at issue were targeted at Exmingua, which also incurred damage as a result of Respondent's Treaty breaches. That, however, is irrelevant to Claimants' standing to bring their claims in arbitration.

64. *Second*, Respondent misconstrues the jurisprudence in concluding that, because Claimants complain about measures aimed at Exmingua, they did not allege and could not have suffered damages themselves. In its Counter-Memorial, Claimants set forth dozens of cases where investors successfully made claims for so-called reflective losses;[168] in those cases, the measures were targeted at the enterprise, and the claimants who were owners of

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[166] *Id.* ¶ 24.

[167] *See,* Claimants' PO Counter-Mem. ¶ 57; Notice of Intent at 2 ("*[T]he 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 ("*[T]he Investors* have been harmed by the stoppage of the Progreso VII Project for several years. . . . The MEM . . . further arbitrarily and unlawfully *harmed the Investors* by prohibiting Exmingua from exercising its right to export the minerals that it already had extracted from the Progreso VII Project before its Exploitation License was wrongfully suspended. *Mr. Kappes and KCA have incurred significant losses* as a consequence of [Guatemala's] breaches.") (emphasis added); Notice of Arbitration ¶ 3 ("The State has not compensated *Claimants* for *their* losses. . . . *Claimants* are paying the price for the State's own alleged wrongdoing.") (emphasis added); *id.* ¶ 18 ("Claimants are qualified to commence arbitration against Guatemala *pursuant to Article 10.16.1(a)* of the DR-CAFTA.") (emphasis added); *id*. ¶ 20 ("Both *Mr. Kappes and KCA have made significant investments in Guatemala through their Guatemalan company, Exmingua*, ... The Investors' investment in Exmingua, moreover, qualifies as an 'investment' under the DR-CAFTA, as it is *in the form of shares* and contains all of the characteristics of an investment, including the commitment of capital, the expectation of gain or profit, and the assumption of risk.") (emphasis added); *id*. ¶ 21 ("*Claimants* have incurred significant loss and damages by reason of, or arising out of, [Guatemala's] breaches. Claimants therefore satisfy the requirements to submit a claim to arbitration *under Article 10.16.1(a).*") (emphasis added); *id*. ¶ 51 ("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*.") (emphasis added); *id*. ¶ 64 ("*Claimants* have incurred significant losses as a result of [Guatemala's] breaches.") (emphasis added); *id*. ¶ 78 ("Claimants hereby request that the Arbitral Tribunal . . . issue a final award . . . ordering Guatemala to compensate *Claimants*" [in the amounts specified].) (emphasis added).

[168] Claimants' PO Counter-Mem. ¶¶ 38-42.

that enterprise made claims for damages they had suffered as a result.[169] Respondent is mistaken that the *OTMTI v. Algeria* award supports its view that "[w]here a claimant confuses damages over its property and damages over the property of the company where the claimant owns shares, tribunals have dismissed the claim."[170]

65. In *OTMTI*, the claimant OTMTI owned, through several layers of companies including OTH, an Egyptian company, an indirect interest in the Algerian company OTA.[171] OTMTI alleged that Algeria had taken unlawful measures in violation of the BIT against OTA and, by enacting legislation that purported to have extraterritorial effect, compelled it to sell at a distressed price its indirect interest in OTA above the corporate level of OTH.[172] After the sale, OTH – which was no longer owned or controlled by OTMTI – filed a treaty claim against Algeria.[173] OTMTI subsequently submitted its own claim against Algeria.[174] The tribunal found, among other things, that there was only one dispute regarding the measures against OTA, and that OTMTI had not suffered any loss or damage distinct from the loss or damage allegedly sustained by OTH.[175] It then held that the filing by OTH of its notice of intent "extinguished" any right of any other member of the then-existing corporate chain to submit a claim to arbitration, and that it constituted an "abuse of right" for OTMTI to have filed a request for arbitration.[176] That award is now the subject of a pending annulment proceeding.[177] Regardless, the policy concerns that motivated the *OTMTI* tribunal cannot override the terms of the Treaty and ICSID Convention.[178] Nor are those policy concerns

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[169] *Id.* ¶¶ 38-42.

[170] Respondent's PO Reply ¶ 23.

[171] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award dated 31 May 2017 ¶¶ 6-8, 142-172 (RL-0054-ENG).

[172] *Id.* ¶¶ 9-15.

[173] *Id.* ¶ 485.

[174] *Id.* ¶¶ 16-17, 485.

[175] *Id.* ¶¶ 488-489. Notably, both OTMTI and OTH were claiming for what Respondent would characterize as "reflective loss." There was no claim made by or on behalf of OTA, the Algerian enterprise.

[176] *Id.* ¶¶ 496-498, 539-545.

[177] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Case Details, *available at* https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/12/35 (CL-0110-ENG).

[178] *See Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment dated 3 July 2002 ¶¶ 102, 112 (CL-0111-ENG/SPA) ("[It] is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with [in another proceeding]. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. . . . [T]he Tribunal, faced with such a claim and having validly held that it had jurisdiction, was obliged to consider and to decide it.").

even implicated in this case: here, there are no multiple proceedings and there is no prospect of former shareholders in Exmingua bringing a claim challenging the same measures.

66. Respondent's reliance on *LESI-Dipenta v. Algeria* is also misplaced.[179] In that case, the claimant, a consortium, submitted a claim to arbitration alleging a breach of the treaty in connection with the performance and cancellation of a contract.[180] Because the parties to that contract were two companies, which later formed the consortium, but not the claimants themselves,[181] the tribunal dismissed the claim for lack of jurisdiction.[182] Subsequently, the two companies together filed another ICSID claim in their own names, over which the tribunal accepted jurisdiction.[183] That case has no bearing on the issues before this Tribunal. Unlike in the initial *LESI-Dipenta* case, where the claimant did not own the investment, here, Mr. Kappes and KCA hold shares in Exmingua, and those shares qualify as investments under the Treaty.

67. While Respondent also invokes the *Nykomb v. Latvia* case, neither does this case assist.[184] In *Nykomb*, the claimant sought to recover damages equal to its subsidiary's alleged loss of income.[185] The tribunal rejected that calculation, because it failed to take into account a number of factors affecting shareholder distributions.[186] Here, Claimants have not yet set out their quantification of their losses. Deficient calculations made in other cases thus are irrelevant. The Tribunal at this stage is not called upon to assess the *measure* of Claimants' reflective losses, but rather only whether Claimants can recover such losses; they undoubtedly can.

68. In a footnote, Respondent also cites to several cases, where tribunals commented that a claimant does not have a right to assets held by an enterprise in which that investor has an

[179] Respondent's PO Reply n. 40.

[180] *L.E.S.I.-DIPENTA v. Algeria*, Award ¶ 39 (The Facts) (RL-0055-ENG).

[181] *Id.* ¶¶ 37-39 (Questions of Law).

[182] *Id.* ¶ 41 (Questions of Law).

[183] *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision dated 12 July 2006, at 33 (CL-0112-FR/ENG) ("1. Le Tribunal arbitral est compétent pour se prononcer sur les demandes formulées par les Demanderesses pour autant qu'elles se fondent sur la violation l'Accord bilatéral et dans cette mesure seulement. 2. ASTALDI a qualité pour agir aux cotés de LESI et la requête est recevable.") ("1. The Arbitral Tribunal has the competence to adjudge the claims presented by the Claimants to the extent they are based on a violation of the bilateral Treaty, and only to that extent. 2. ASTALDI has standing to act alongside LESI, and the request is admissible.").

[184] Respondent's PO Reply ¶ 25.

[185] *Nykomb v. Latvia*, Award, at 3-5, 39 (CL-0073-ENG).

[186] *Id.* at 39.

ownership interest.[187] That is of no relevance here. Claimants are not making claims for loss of or damage to Exmingua's assets. To the extent that Exmingua's value has decreased as a result of action taken against its assets, however, that, in turn, harms Claimants, by decreasing the value of their investments in Exmingua. That loss is cognizable, and none of the jurisprudence cited by Respondent supports a contrary conclusion.[188]

69. *Finally*, Respondent's complaints that Claimants failed to use the term "reflective" to describe their losses in their Notice of Intent and Notice of Arbitration[189] are baseless and irrelevant. The DR-CAFTA requires that a claimant indicate in its notice of intent and notice of arbitration the relief requested and the approximate amount of damages it seeks.[190] The term "relief requested" is not defined in the DR-CAFTA, but should be interpreted in the context of Article 10.26, which distinguishes between the types of relief that a tribunal may award against a respondent, namely "monetary damages and any applicable interest" and/or "restitution of property," plus costs and attorneys' fees.[191] The DR-CAFTA does not require that a notice of arbitration further specify the relief requested.[192] Neither does the ICSID Convention or the ICSID Institution Rules.[193]

70. Claimants thus were under no compulsion to expressly characterize or label their damages in their Notice of Intent or Notice of Arbitration as "direct," "indirect" or

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[187] Respondent's PO Reply n. 39.

[188] The cases cited by Respondent, in fact, support Claimants' claims. *See ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction dated 18 July 2013 ¶ 282 (RL-0052-ENG) ("[A]n investor whose investment consists of shares . . . can, however, claim for any loss of value of its shares resulting from an interference with the assets or contracts of the company in which it owns the shares."); *Poštová Banka, A.S. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award dated 9 Apr. 2015 ¶ 245 (CL-0056-ENG) ("As clearly and consistently established by the above referenced decisions . . . 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."); *South American Silver Ltd. v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2013-15, Award dated 22 Nov. 2018 ¶ 800 (RL-0053-ENG) ("[F]or purposes of compensation, the valuation is based on the effect of the expropriation on the value of the shares that SAS indirectly owns in CMMK, taking into account that the Mining Concessions and the investment made in the Project by the Company are the only assets of CMMK that are established in the record.").

[189] Respondent's PO Reply ¶¶ 21-28, § III.

[190] *See* DR-CAFTA, Art. 10.16.2(d) (CL-0001-ENG/SPA) ("The notice [of intent] shall specify . . . the relief sought and the approximate amount of damages claimed."); Claimants' PO Counter-Mem. ¶ 62.

[191] *See* DR-CAFTA, Art. 10.26.1 (CL-0001-ENG/SPA) ("Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution. A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.").

[192] *See id.*, Arts. 10.16.4, 10.16.6.

[193] ICSID Convention, Art. 36(2); ICSID Institution Rules, Rule 2(1).

"reflective," as Respondent suggests.[194] Nor does the DR-CAFTA require Claimants to particularize their loss as "the value of i) their interest in Exmingua, ii) their shares, or iii) any other type of reflective losses," as Respondent further implies.[195] Respondent's observation that Claimants' Notice of Intent and Notice of Arbitration do not contain the term "reflective loss" is therefore irrelevant.

71. This is further confirmed by arbitral practice. In *TECO v. Guatemala*, for instance, as is the case here, the claimant indicated in its notice of intent and notice of arbitration that it indirectly held its interest in the enterprise in Guatemala.[196] It likewise identified its investment as an "ownership interest" "in the form of shares."[197] In its notice of intent, it stated that it "has suffered severe financial losses," without further characterizing those losses as direct or indirect.[198] Similarly, in its notice of arbitration, it reiterated that "[a]s a direct result of [Guatemala]'s unlawful actions, [it] has suffered severe financial damage," which "has had a significant financial impact on [its] investment in EEGSA [the Guatemalan enterprise]."[199] In its award, the tribunal recognized that the claimant's claim was for its own reflective loss,[200] and awarded it damages based on its share of the loss of revenue that it determined the Guatemalan enterprise had suffered as a result of the breach.[201]

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[194] Respondent's PO Mem. ¶ 55, n. 81; Respondent's PO Reply § III.

[195] Respondent's PO Reply ¶ 22.

[196] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, DR-CAFTA, ICSID Case No. ARB/10/23, Notice of Intent dated 13 Jan. 2009 ("*TECO v. Guatemala*, Notice of Intent") ¶ 3 (CL-0113-ENG/SPA); *TECO Guatemala Holdings, LLC v. Republic of v. Guatemala*, DR-CAFTA, ICSID Case No. ARB/10/23, Notice of Arbitration dated 20 Oct. 2010 ("*TECO v. Guatemala*, Notice of Arbitration") ¶¶ 4, 14 (CL-0030-ENG/SPA).

[197] *TECO v. Guatemala*, Notice of Intent ¶ 3 (CL-0113-ENG/SPA); *TECO v. Guatemala*, Notice of Arbitration ¶ 26 (CL-0030-ENG/SPA).

[198] *TECO v. Guatemala*, Notice of Intent ¶¶ 27, 31 (CL-0113-ENG/SPA).

[199] *TECO v. Guatemala*, Notice of Arbitration ¶ 69 (CL-0030-ENG/SPA); *TECO v. Guatemala*, Award ¶ 438 (CL-0031-ENG/SPA).

[200] *See TECO v. Guatemala*, Award ¶ 716 (CL-0031-ENG/SPA) ("The Claimant submits that it is entitled to two heads of damages. First of all, the Claimant seeks recovery for its portion of the cash flow lost by EEGSA from August 2008 until October 2010 (such date being the date of EEGSA's sale to EPM) as a result of the application of a tariff based on the Sigla study (historical losses). Second, the Claimant seeks to be compensated for the depressed value at which it sold its shares in October 2010 (loss of value)."); *see also,* Claimants' PO Counter-Mem. ¶¶ 26-28 (summarizing the *TECO* case).

[201] *See TECO v. Guatemala*, Award ¶ 742 (CL-0031-ENG/SPA) ("The Arbitral Tribunal finds that Respondent's breach caused losses to the Claimant. Such damages amount to the (i) Claimant's share of the higher revenues that EEGSA would have received had the CNEE observed due process in the tariff review, (ii) to run from the moment the high revenues would have been first received until the moment when the Claimant sold its share in EEGSA. The amount of such losses must be quantified in the 'but for' scenario discussed by the Parties, on the basis of what the tariffs should have been had the CNEE complied with the regulatory framework."). The tribunal declined to award the damages sought by the claimant for the loss of value of its shares in EEGSA, as reflected in the depressed value at which it sold its shares. *Id*. ¶ 761. This part of the

72. Similarly, in *Khan v. Mongolia*, the claimants held majority shareholdings in a joint venture (which held a mining exploitation license) and in a local company (which held a mining exploration licence).[202] In their notice of arbitration, the claimants complained about the invalidation of their licenses[203] and sought an award of "monetary damages . . . in compensation for all of their losses sustained as a result of being deprived of their rights" under the applicable instruments.[204] The tribunal awarded damages for the loss in value of the claimants' ownership interest in the mining project.[205]

73. Contrary to Respondent's assertions, Claimants are not attempting to "amend" or "re-characterize" their claims or to "reengineer" their Notices.[206] In their Notice of Intent and their Notice of Arbitration, Claimants indicated that they are seeking compensation for damage that *they* have sustained.[207] Nothing more was required. Indeed, as shown, claimants do not typically characterize their damage as direct or indirect, nor do they need to do so. Respondent's assertion that Claimants are "belated[ly] attempt[ing] to amend their claims now and characterize the damages they claimed as reflective losses"[208] is thus wrong. Furthermore, Respondent's complaint that accepting jurisdiction over Claimants' claims

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award has been annulled and is presently the subject of a resubmitted arbitration. *See TECO v. Guatemala*, Decision on Annulment ¶ 382 (CL-0100-ENG/SPA); *TECO Guatemala Holdings LLC v. Republic of Guatemala*, DR-CAFTA, ICSID Case No. ARB/10/23, DR-CAFTA, Case Details, *available at* https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/10/23 (CL-0102-ENG).

[202] *Khan Resources Inc., Khan Resources B.V., and Cauc Hldg. Co. Ltd. v. The Government of Mongolia*, UNCITRAL, Award on the Merits dated 2 Mar. 2015 ("*Khan v. Mongolia*, Award on the Merits") ¶ 384 (CL-0114-ENG) ("As at the Valuation Date, Khan Canada and CAUC Holding owned 58 percent of CAUC (which held the Mining Licence over the Main Property), while Khan Netherlands owned 75 percent of Khan Mongolia (which held the Exploration Licence over the Additional Property), with the remaining 25 percent being held by Khan Bermuda (and, through it, by Khan Canada).").

[203] *Khan Resources Inc., Khan Resources B.V., and Cauc Hldg. Co. Ltd. v. The Government of Mongolia*, UNCITRAL, Notice of Arbitration dated 10 Jan. 2011 ¶ 76 (CL-0115-ENG) ("Since the illegal suspension and subsequent revocation of Claimants' mining and exploration licenses and through the date of this Notice, Claimants have suffered the loss of their investment (including lost profits and other damages).").

[204] *Id.* ¶ 77(2) ("Claimants request the Tribunal to: . . . Award Claimants monetary damages of not less than **US$ 200 million (Two hundred million U.S. dollars)** in compensation for all of their losses sustained as a result of being deprived of their rights under the ECT and international law, the Foreign Investment Law, under the Founding Agreement and Mongolian law, including, *inter alia*, reasonable lost profits, direct and indirect losses (including, without limitation, loss of reputation and goodwill) and losses of all tangible and intangible property caused by Respondents.") (emphasis in original); *see also Khan v. Mongolia*, Award on the Merits ¶ 285 (CL-0114-ENG) (same, quoting the claimants' memorial and reply submissions).

[205] *Khan v. Mongolia*, Award on the Merits ¶¶ 389, 421 (CL-0114-ENG) ("The Tribunal therefore finds that the correct ownership percentage to adopt is 62 percent (of the value of the Dornod Project). . . . . [T]he Tribunal considers that the fair value of the Claimants' investment as at July 2009 is USD 80 million.").

[206] Respondent's PO Reply ¶¶ 20, 24, 28.

[207] *See supra* ¶ 61; Claimants' PO Counter-Mem. ¶ 57 (citing examples from the Notice of Intent at 2, 3 and the Notice of Arbitration ¶¶ 3, 21, 51, 64).

[208] Respondent's PO Reply ¶ 24.

would violate Respondent's unspecified "due process rights," "the integrity of the proceedings," and "the CAFTA-DR structure"[209] is nonsensical and meritless. Respondent clearly had "notice" that Claimants' claims were for "reflective" loss, as that forms the very basis for its preliminary objection. Respondent's suggestion that "the policies adopted in CAFTA-DR for early disclosure of claims, the efficient resolution of disputes and the ability to address preliminary objections"[210] is undermined by Claimants' claims as set forth in their Notice of Intent and Notice of Arbitration and is therefore meritless.

D. Claimants Complied With The Waiver Requirement

74. In their Counter-Memorial, Claimants demonstrated that Respondent's objection regarding the waiver requirement under Article 10.18.2(b)(i) was meritless, because Claimants submitted conforming waivers which Respondent has not even alleged are defective in any respect.[211] Claimants further showed that they were not required to file a waiver on behalf of Exmingua, because they filed their claims under Article 10.16.1(a) and, pursuant to the Treaty's express terms, were therefore only required to file waivers on their own behalf.[212] Among other things, Claimants pointed out that, while the NAFTA requires a claimant making a claim on its own behalf to file a waiver on behalf of an enterprise in certain circumstances,[213] the DR-CAFTA contains no corresponding language, and there is no basis to insert additional language into the Treaty.[214] Finally, Claimants observed that Respondent's resort to the perceived advantages and objectives of a waiver cannot override the plain language of the Treaty,[215] and, in any event, cannot be obtained in all instances, even under Respondent's unsupported interpretation.[216]

75. In its Reply, Respondent does not contest that Claimants have provided compliant waivers, and that the ordinary meaning of Article 10.18.2(b) does not require Claimants to provide a waiver on behalf of Exmingua. Nevertheless, Respondent states that "[a]bsent a waiver signed by Exmingua, Guatemala did not provide consent to arbitrate claims arising

[209] *Id.* ¶ 24.
[210] *Id.*
[211] Claimants' PO Counter-Mem. ¶ 66.
[212] *Id.* ¶¶ 68-72.
[213] *See* NAFTA, Art. 1121(1)(b) (CL-0034-ENG/SPA).
[214] Claimants' PO Counter-Mem. ¶ 72.
[215] *Id.* ¶ 69.
[216] *Id.* ¶¶ 69-72.

out of a direct injury sustained by Exmingua."[217] Respondent further asserts that "Claimants' attempt to circumvent the waiver requirement must be rejected," because "[u]nder Claimants' logic, the safeguards against double recovery and multiple proceedings established under the Treaty can be completely disregarded by simply submitting a claim under Article 10.16.1(a) for reflective loss and avoid the waiver requirement by having the party to the local litigation (the enterprise) not waive the same claims asserted in an arbitration by a shareholder investor."[218] Respondent's objection is wrong and must be dismissed.

76. *First*, Respondent does not – nor could it – contest that the ordinary meaning of Article 10.18.2(b) does not require claimants submitting claims under Article 10.16.1(a) to provide a waiver on behalf of an enterprise. In particular, Article 10.18.2(b)(i) provides that a notice of arbitration must be accompanied "for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver."[219] Respondent's bald assertion that "[a]bsent a waiver signed by Exmingua, Guatemala did not provide consent to arbitrate claims arising out of a direct injury sustained by Exmingua"[220] is thus contravened by the plain language of the Treaty.[221] Accordingly, if the Tribunal decides that Claimants are permitted to bring claims under Article 10.16.1(a) – which indeed they are, as explained above and in Claimants' Counter-Memorial – then Respondent's arguments regarding the need for an enterprise's waiver are moot.

77. *Second*, Respondent's statements that "Claimants concede that their claims are related to harm sustained 'as a result of the respondent State's measures aimed at the enterprise'"; that it "therefore follows that it is Exmingua that 'has incurred loss or damage by reason of, or arising out of, [Guatemala's alleged] breach'"; and that Claimants therefore should have filed their claims on behalf of Exmingua and submitted a waiver for Exmingua,[222] are misguided. The vast majority of investment treaty claims arise out of measures aimed at an enterprise or other asset in the host State. In such instances, not only will that enterprise be harmed, but the owners of that enterprise likewise will suffer harm. The premise of Respondent's argument, namely, that because the measures that give rise to Claimants'

[217] Respondent's PO Reply ¶¶ 105-109, § IV.D.5.
[218] *Id.* ¶ 107.
[219] DR-CAFTA, Art. 10.18(2)(b)(i) (CL-0001-ENG/SPA).
[220] Respondent's PO Reply ¶¶ 105-109, § IV.D.5.
[221] Claimants' PO Counter-Mem. ¶¶ 66-72.
[222] Respondent's PO Reply ¶ 106 (brackets in original).

claims were aimed at Exmingua, only Exmingua, and not Claimants who own Exmingua, has been harmed, is thus illogical and wrong.

78. *Third*, Respondent's assertion that Claimants' claims are "exactly the type of outcome the CAFTA-DR's derivative claim mechanism seeks to prevent,"[223] is unsupported and belied by the plain text of the Treaty. Had the Treaty Parties wanted to *require* claimants who owned or controlled an enterprise to bring claims on behalf of that enterprise and/or to submit a waiver on behalf of that enterprise for all or certain types of claims, they easily could have done so.[224]

79. Indeed, as Claimants in their Counter-Memorial observed, the Treaty Parties could have included language like that contained in the NAFTA.[225] Specifically, the DR-CAFTA provides that, where a claimant files a claim on its own behalf under Article 10.16.1(a), it must submit a waiver, and where the claimant files a claim on behalf of an enterprise under Article 10.16.1(b), it must file a waiver for itself and for the enterprise. The NAFTA, by contrast, provides that, where a claimant files a claim on its own behalf under Article 1116, it must submit a waiver for itself and "where the claim is for loss or damage to an interest in an enterprise . . . that the investor owns or controls directly or indirectly . . .", the claimant must also submit a waiver for that enterprise.[226] In the absence of such language, there is no basis to read a requirement into the DR-CAFTA to require a claimant to submit a waiver on behalf of an enterprise when it makes a claim on its own behalf for harm that it has suffered as a result of measures aimed at its enterprise.

80. In response, Respondent asserts, without explanation, that the "CAFTA-DR enhanced the NAFTA by eliminating the requirement that the enterprise must also submit a waiver on behalf of the enterprise even for claims brought under Article 1116."[227] Respondent cites nothing in support of its bald assertion. Nor does it explain how the DR-CAFTA has been allegedly "enhanced." Rather, without citation to any tribunal decision or award, it speculates that "[t]he inclusion [of the additional language in Article 1116] made tribunals

[223] *Id.* ¶ 107.
[224] *See supra* ¶ 10; Claimants' PO Counter-Mem. ¶¶ 21, 72.
[225] Claimants' PO Counter-Mem. ¶ 72.
[226] NAFTA, Art. 1121(1)(b) (CL-0034-ENG/SPA).
[227] Respondent's PO Reply ¶ 108.

question whether claims for reflective loss could be brought under Article 1116 . . . ."[228] Regardless, to construe the absence of such language in the DR-CAFTA's waiver provision to mean that the Parties to the DR-CAFTA wished to prohibit claims for reflective loss (although they did not include any text in Article 10.16.1(a) or (b) to that effect) and they intended to require that any claims for loss suffered by a claimant as a result of measures aimed at an enterprise that it owns or controls be accompanied by an enterprise waiver (although they did not include any text in Article 10.18.2 to that effect) defies principles of treaty interpretation set forth in the Vienna Convention.

81. *Finally*, Respondent's resort to the objectives of preventing the multiplicity of claims, inconsistency of decisions, and double recovery, cannot override the plain language of the Treaty. Respondent does not and cannot contest the fact that a tribunal is not at liberty to impose additional obligations on a party in order to further a perceived objective of the treaty. Nor does Respondent even attempt to contest Claimants' observation that, even if the DR-CAFTA did contain a requirement that a claimant submit a waiver on behalf of its enterprise whenever it makes a claim for reflective loss, this would not eliminate the identified problems that a waiver is designed to address.[229] Respondent likewise fails to acknowledge that tribunals have at their disposal many other means to prevent inconsistent decisions, as well as double payment or double recovery, that "do not require that the investor be deprived of its standing."[230]

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

82. In their Counter-Memorial, Claimants demonstrated that their full protection and security claim is not precluded by DR-CAFTA Annex 10-E.[231] In particular, Claimants showed that the DR-CAFTA does not contain a fork-in-the-road provision, but, rather, has a no-u-turn provision, which allows claimants to first pursue remedies before local courts before commencing arbitration.[232] Claimants also established that the limited exception to the no-u-turn rule in DR-CAFTA Annex 10-E is inapposite here. This is because the plain

[228] *Id.* ¶ 108.

[229] Claimants' PO Counter-Mem. ¶¶ 69-72.

[230] Christoph Schreuer, *Shareholder Protection in International Investment Law*, in COMMON VALUES IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 601, 612 (Pierre-Marie Dupuy *et al.* eds., 2006) (CL-0076-ENG); *see also,* Claimants' PO Counter-Mem. ¶ 71 n. 141.

[231] Claimants' PO Counter-Mem. ¶¶ 73-81.

[232] *Id.* ¶ 74.

language of Annex 10-E only precludes an investor from submitting its claims to international arbitration if the investor or the enterprise, in certain cases, has alleged before a local court or administrative tribunal a breach of a State's obligation under Section A of Chapter 10 of the DR-CAFTA.[233]

83. Claimants further explained that the purpose of Annex 10-E is to avoid Treaty breaches from being litigated both locally and in arbitration in those civil law countries where treaties are self-executing and individuals may bring claims before the courts for a breach of the Treaty itself.[234] Because there is not even any allegation that Claimants have submitted any claims before the Guatemalan courts, Claimants explained that Annex 10-E is inapplicable here.[235] Moreover, even if Claimants had brought a claim on behalf of Exmingua – which they did not do and were not required to do – Annex 10-E still would be inapplicable, because Exmingua never has brought a claim before any Guatemalan court alleging a violation of the Treaty.[236]

84. In its Reply, Respondent maintains that the DR-CAFTA contains a fork-in-the-road provision, and asserts that Claimants "brought their claims under Article 10.16.1(a) of CAFTA-DR to bypass the restrictions under Annex 10-E of CAFTA-DR."[237] Specifically, Respondent contends that "Annex 10-E of CAFTA-DR would prevent Exmingua from bringing a claim for full protection and security."[238] Ignoring that the Treaty does not contain a general fork-in-the-road provision and the plain language of Annex 10-E, Respondent insists that "CAFTA-DR Annex 10-E does not mandate that the specific CAFTA-DR provision allegedly breached by the Respondent be invoked before the domestic courts" in order to trigger the purported fork-in-the-road provision.[239] It argues that "requiring that a violation of Section A of Chapter 10 of CAFTA-DR be invoked before a domestic court would

[233] *Id.* ¶¶ 76-77; DR-CAFTA, Annex 10-E (CL-0001-ENG/SPA).

[234] Claimants' PO Counter-Mem. ¶¶ 78-79.

[235] *Id.* ¶¶ 80-81.

[236] *Id.* ¶ 81.

[237] Respondent's PO Reply ¶ 111.

[238] *Id.* ¶¶ 110-117. Respondent takes issue with Claimants' characterization of its Annex 10-E argument, although the distinction it draws and the relevance of its objection, if any, remain unclear. *See id.* ¶ 110.

[239] *Id.* ¶ 115.

deprive" Annex 10-E of its practical effect.[240] Respondent's arguments and interpretation of Annex 10-E are wrong.

85. *First*, Respondent's assertion that "the law under which Exmingua initiated the local proceedings in Guatemala is not relevant to determine whether Annex 10-E of CAFTA-DR applies"[241] directly contradicts the plain language of the Treaty. Annex 10-E provides, in relevant part, that a claim may not be submitted to arbitration if the claimant or the enterprise, if the claim is made on behalf of the enterprise, "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."[242] Respondent's insistence that this plain language "does not require specifically that a violation of CAFTA-DR be invoked before a domestic court"[243] does not withstand scrutiny. Respondent's assertion that the term "that breach" in Annex 10-E means that the claimant or the enterprise, as the case may be, may not have submitted "a claim before domestic courts for the same *breach* as the breach alleged before a CAFTA-DR arbitral tribunal,"[244] disregards the words "of an obligation under Section A" that immediately follow the word "breach."

86. *Second*, Respondent's contention that "requiring that a violation of Section A of Chapter 10 of CAFTA-DR be invoked before a domestic court would deprive" Annex 10-E of its practical effect, not only ignores the ordinary language of the provision, but also fails to take account of the Treaty's object and purpose. As explained in Claimants' Counter-Memorial, Annex 10-E addresses the particular circumstance in some civil law countries where claims may be made in domestic court for a breach of the Treaty itself.[245] Notably, Respondent fails to respond to or even acknowledge that the United States' Statement of Administrative Action accompanying the NAFTA described an identical provision that

[240] *Id.* ¶¶ 115-116.
[241] *Id.* ¶ 112.
[242] DR-CAFTA, Annex 10-E (CL-0001-ENG/SPA) (emphasis added).
[243] Respondent's PO Reply ¶ 116.
[244] *Id.* ¶ 115.
[245] Claimants' PO Counter-Mem. ¶¶ 78-79.

applied only to Mexico, and explained that the applicable NAFTA annex was included "[b]ecause the NAFTA will give rise to private rights of action under Mexican law."[246]

87. Respondent likewise fails to respond to or even acknowledge the *Corona v. Dominican Republic* decision, in which the tribunal explained that DR-CAFTA Annex 10-E "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 State."[247] Nor does Respondent address *Nissan v. India*, where the tribunal interpreted a similar provision, and rejected the respondent's objection because the claimant had not presented any claim for breach of the treaty before local courts.[248]

88. Instead, Respondent relies on two cases, arguing that the Tribunal ought to adopt the minority interpretation of ordinary fork-in-the-road clauses and assess whether the local proceedings and the claims brought in international arbitration share the same fundamental basis.[249] At issue in *H&H Enterprises v. Egypt*, however, was not a provision akin to Annex 10-E, but instead was Article VII of the U.S.-Egypt BIT, which provided that a dispute could be submitted to arbitration only if that dispute had not been submitted for resolution in accordance with any previously-agreed procedure or to the courts.[250] Similarly, in *Pantechniki v. Albania*, the applicable provision provided that the claimant "may submit the dispute either to the competent court of the Contracting Party or to an international arbitration tribunal . . . ."[251] Both provisions thus precluded the claimant from submitting to arbitration a claim when it had previously submitted the *dispute* to court; neither provision limited its application to when the dispute submitted to court was for a breach of the treaty.

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[246] 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-Resubmitted).

[247] *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).

[248] *See* Claimants' PO Counter-Mem. n. 156 (quoting *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)).

[249] Respondent's PO Reply ¶¶ 112-117.

[250] *See id.* ¶ 113 (quoting United States-Egypt BIT, Art. VII (RL-0083-ENG)).

[251] *Pantechniki S.A. Contractors and Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award dated 30 July 2009 ¶ 53 (RL-0025-ENG) (quoting treaty); Respondent's PO Reply ¶ 112.

89. As explained, the DR-CAFTA does not contain a general fork-in-the-road clause. Indeed, the existence of the waiver provision in Article 10.18.2(b) is at odds with a fork-in-the-road clause, because it presupposes that a claimant or an enterprise, as the case may be, may have initiated local court proceedings challenging the same measure at issue in the arbitration.[252] Interpreting Annex 10-E to preclude a claimant from submitting its claim to arbitration if it (or its enterprise, to the extent that the claimant filed a claim on behalf of the enterprise) had filed a claim in local court that had the same fundamental basis as the treaty claim thus would contravene the plain meaning of Article 10.18.2(b). Jurisprudence interpreting ordinary fork-in-the-road clauses is thus irrelevant to the interpretation of Annex 10-E, which contains a limited exception that expressly bars arbitral claims only when claims for breaches of the Treaty have been litigated locally.[253]

90. Respondent does not dispute that Claimants have not submitted any claims before the Guatemalan courts. Although Claimants have not brought their claims on behalf of Exmingua – nor were they required to do so – Respondent also does not contest the fact that Exmingua has not claimed a violation of Section A of Chapter 10 of the DR-CAFTA before any Guatemalan court. Respondent's objection on the basis of Annex 10-E is thus wholly without merit.

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

91. Claimants established in their Counter-Memorial that the factual basis for their MFN claim was set forth in their Notice of Intent.[254] In particular, Claimants showed that, in their Notice of Intent, they complained that the Guatemalan courts and the MEM have acted in an arbitrary and discriminatory manner with respect to their treatment of Exmingua, as compared with their treatment of investments owned by others.[255] Claimants also demonstrated that the ordinary meaning of DR-CAFTA Article 10.16.2, read in its context,

[252] DR-CAFTA, Art. 10.18.2 (CL-0001-ENG/SPA) ("No claim may be submitted to arbitration under this Section unless: . . . (b) the notice of arbitration is accompanied, i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, 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.").

[253] Claimants' PO Counter-Mem. ¶¶ 78-79.

[254] *Id.* ¶¶ 83-84.

[255] *Id.*; Notice of Intent at 3 ("In issuing these adverse rulings, the Guatemalan courts notably have failed to rule in a consistent fashion when compared with other cases.").

confirms that Claimants' MFN claim is admissible.[256] Finally, Claimants established that their Notice of Intent fulfilled the Treaty's object and purpose of allowing attempts at amicable settlement.[257]

92. In its Reply, Respondent erroneously argues that the basis of Claimants' MFN claim is a Guatemalan Supreme Court decision issued in September 2017, *i.e.*, almost one year before Claimants filed their Notice of Intent.[258] Respondent further misinterprets the ordinary meaning of DR-CAFTA Article 10.16.2, in its context, as well as the object and purpose of the Treaty, in maintaining its objection that Claimants' MFN claim is inadmissible.[259]

A. Respondent's Objection Depends Upon A Mischaracterization Of Claimants' Claim

93. As explained in their Counter-Memorial, Claimants in their Notice of Intent alleged that Respondent has treated their investment in an arbitrary and discriminatory manner as compared with other investments.[260] In this regard, Claimants noted that Exmingua's exploitation license for Progreso VII has been suspended; that Exmingua has been precluded from operating until the MEM conducts consultations; and that Exmingua's appeal to the Guatemalan Constitutional Court of that suspension order has been pending since June 2016.[261]

94. By comparison, as set forth in Claimants' Notice of Intent and Notice of Arbitration, while the license for the *Oxec* project owned by Guatemalan nationals was held to have been wrongfully granted on the same legal basis,[262] that project was permitted by the Guatemalan Constitutional Court to continue operating while the MEM conducted consultations.[263] Furthermore, the appeal to the Constitutional Court in the *Oxec* case was decided in May 2017, despite being filed *one year after* Exmingua's appeal.[264] Upon the Constitutional

[256] Claimants' PO Counter-Mem. § III.A.
[257] *Id.* § III.B.
[258] Respondent's PO Reply ¶¶ 121-123.
[259] *Id.* §§ V.B-C.
[260] Claimants' PO Counter-Mem. § III.B.
[261] *Id.* ¶ 83.
[262] Notice of Intent at 3; Notice of Arbitration ¶ 61.
[263] Notice of Arbitration ¶ 61.
[264] Notice of Intent at 3; Notice of Arbitration ¶¶ 61-62.

Court's ruling, the MEM commenced consultations and completed those consultations in seven months.[265] By contrast, Exmingua's license remains suspended; it is prohibited from operating while its appeal is pending; the MEM has refused to commence consultations in connection with Progreso VII; and its appeal remains pending after more than three years.[266] These facts form the basis for Claimants' national treatment claim.[267]

95. As Claimants' also explained, four months after they submitted their Notice of Intent, the Guatemalan Constitutional Court issued a ruling in the *Escobal* case, upholding the suspension of the license for the San Rafael mine, which license had been suspended on the same legal ground that formed the basis for the suspension of Exmingua's license.[268] The Guatemalan Constitutional Court issued that ruling on 3 September 2018, despite the fact that the case had been appealed to the Constitutional Court more than one year *after* Exmingua's case, which remains pending.[269] Claimants explained that the Court had thus granted treatment to the Canadian owners of the San Rafael mine that was more favorable than that which had been granted to Exmingua, and Claimants therefore included an MFN claim in their Notice of Arbitration.[270]

96. In its Reply, Respondent attempts to re-characterize Claimants' MFN claim, by misstating that the basis for the claim is the Guatemalan Supreme Court's decision of September 2017 in the *Escobal* case, and *not* the Guatemalan Constitutional Court's decision of September 2018.[271] Respondent thus argues that the facts giving rise to Claimants' MFN claim were known at the time Claimants submitted their Notice of Intent and, therefore, Claimants should not be excused from omitting their MFN claim from that Notice.[272] Respondent also asserts that Claimants' "MFN claim is doomed because the relief sought and the amount of damages that Claimants specified in the Notice of Intent did not and could not have included the relief and damages now sought for the alleged breach of Article 10.4 of

[265] Notice of Arbitration ¶ 62.
[266] *Id.* ¶ 59.
[267] Notice of Intent at 3; Notice of Arbitration ¶¶ 61-62.
[268] Notice of Arbitration ¶ 63.
[269] *Id.* ¶¶ 59, 63.
[270] Claimants' PO Counter-Mem. ¶ 84.
[271] Respondent's PO Reply ¶ 122.
[272] *Id.* ¶ 123.

CAFTA-DR."[273] In so arguing, Respondent mischaracterizes the very nature of Claimants' MFN claim.

97. The Supreme Court decision of September 2017 in the *Escobal* case does not form the basis for Claimants' MFN claim. As noted in Claimants' Notice of Arbitration, that decision reinstated the project's mining license, which had been suspended on the same legal grounds as Exmingua's license.[274] That reprieve, however, was short-lived, because the Supreme Court's decision was reversed only one month later.[275] The basis for Claimants' MFN claim thus is *not* the Supreme Court's September 2017 decision in the *Escobal* case. Rather, as Claimants explained, the basis for their MFN claim is the Constitutional Court's September 2018 decision in the *Escobal* case.[276] Although Exmingua filed its appeal from the Supreme Court's decision more than one year *before* the *Escobal* appeal was filed – and although both appeals raised the same legal issues – the Constitutional Court issued its decision on the *Escobal* appeal on 3 September 2018, while Exmingua's appeal remains pending.[277] It is this discriminatory treatment that forms the basis for Claimants' MFN claim. Contrary to Respondent's contention, Claimants in their Counter-Memorial did not "re-write the factual basis for their MFN claim":[278] the same factual basis for their MFN claim is clearly set forth in their Notice of Arbitration.[279]

98. Accordingly, although Respondent devotes an entire section of its Reply to the contention that "Claimants admit they omitted the MFN claim in their Notice of Intent,"[280] this misses the point. Claimants have never have suggested that they referenced their MFN claim in their Notice of Intent. As explained in their Notice of Arbitration and Counter-Memorial as well as above, the specific facts giving rise to that claim did not exist at the time Claimants submitted their Notice of Intent.[281] Claimants' MFN claim is not unique in this

[273] Respondent's PO Reply ¶ 129.

[274] Notice of Arbitration ¶ 63.

[275] *Id.*

[276] Notice of Arbitration ¶ 63; Claimants' PO Counter-Mem. ¶ 84.

[277] Notice of Arbitration ¶ 63.

[278] Respondent's PO Reply ¶ 121.

[279] *See*, *e.g.*, Notice of Arbitration ¶ 63 ("On 3 September 2018, the Constitutional Court ruled that the Escobal mining license would remain suspended until the MEM completed public consultations in accordance with the ILO Convention. This final ruling was rendered even though the Escobal appeal was filed more than one year after Exmingua filed its appeal with the Constitutional Court, which the Court has failed to act upon.").

[280] Respondent's PO Reply § V.A.

[281] Notice of Arbitration ¶ 63; Claimants' PO Counter-Mem. ¶ 84; *see supra* ¶ 95.

respect. For example, in *Pope & Talbot v. Canada,* the tribunal found liability in respect of the respondent's verification review, which was launched more than three months after the claimant filed its notice of intent and, therefore, could not have been referenced in that notice.[282] Critically, however, Claimants discussed in their Notice of Intent Respondent's discriminatory treatment of Exmingua, as compared with its treatment of the investments owned by others, which forms the basis for both their national treatment and MFN claim.[283]

99. Claimants' national treatment and MFN claims are, at bottom, discrimination claims.[284] Claimants' MFN claim thus does not add additional damages over and above the

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[282] *Pope & Talbot Inc. v. Government of Canada*, NAFTA, UNCITRAL, Award on the Merits of Phase 2 dated 10 Apr. 2001 (CL-0116-ENG) ¶¶ 156, 160-163, 171 ("On December 24, 1998, the Investor served upon Canada a Notice of Intent to Submit a Claim to Arbitration under Article 1119 of NAFTA . . . . On April 7, 1999, [the SLD, a division of the Export and Import Controls Bureau within Canada's Department of Foreign Affairs and International Trade] faxed a letter to the Investment, notifying it of the decision to institute a 'verification review' . . . . [The SLD] denied any relationship between the NAFTA claim and verification . . . . The Investor contends that Canada's conduct during this 'verification episode' was a denial of fair and equitable treatment in violation of Article 1105 [NAFTA]. For the following reasons, the Tribunal agrees . . . ."); *see also Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award dated 31 Jan. 2014 ("*Guaracachi v. Bolivia*, Award") ¶ 399 (RL-0102-ENG/SPA) ("The Tribunal recalls that, in *CMS v. Argentina*, cited by Rurelec, the notification of the dispute related to a claim that was followed (after the notification) by a new, further claim which was not individually notified (because it did not exist at the time of the notification). Meanwhile, in the present case, the facts are quite different, or more correctly, exactly the opposite. The notification of a claim cannot be interpreted as incorporating previous potential claims that were not asserted in the notification even though they were already in existence (and known by Rurelec) at the time of such notification.").

[283] Claimants' PO Counter-Mem. ¶¶ 83-84, 101; Notice of Intent at 2-3; *see also Chevron Corp. (U.S.A.) and Texaco Petroleum Co. (U.S.A.) v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II dated 30 Aug. 2018 ("*Chevron v. Ecuador*, Second Partial Award on Track II") ¶¶ 7.156, 7.170, 7.178 (CL-0117-ENG) (finding that the claimants' denial of justice claim, which arose out of a judgment issued more than one year after claimants' notice of arbitration was submitted, was admissible because, *inter alia*, the claim arose directly from the parties' dispute pre-dating the notice of arbitration: "[I]t would be an unreasonable, if not absurd, result for the Claimants to advance their amended claims as new claims in a new arbitration before a new arbitral tribunal, at unnecessarily greater expense and delay, with the risk of inconsistent decisions. It could serve no useful purpose to any of the Parties . . . . Before the International Court of Justice, the appropriate test for determining the existence of jurisdiction over facts occurring after the filing of an Application is whether those facts 'aris[e] directly out of the question which is the subject-matter of [the] Application'. In the Tribunal's view, the Claimants' amended claims under Articles II(3)(a) and II(3)(c) of the Treaty clearly arise directly from the Parties' dispute pre-dating the Claimants' Notice of Arbitration.").

[284] *See* CHRISTOPHER F. DUGAN, *ET AL.*, INVESTOR-STATE ARBITRATION 414 (2008) (CL-0118-ENG) ("A typical MFN clause of an investment treaty provides that each contracting state shall treat investors of the other contracting state no less favorably than it treats investors of a third country. Thus, the focus of an MFN clause is on discriminatory treatment as between foreign investors of different nationalities, as opposed to discrimination in favor of local investors, which is the focus of national treatment clauses."); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction dated 3 Aug. 2004 ¶ 93 (CL-0018-ENG/SPA) ("The simple ordinary meaning of this clause [providing for both national treatment and MFN treatment] is that investors should not be discriminated against for being foreigners and at the same time should be given the best treatment afforded any other foreign investor."); *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award dated 11 Sep. 2007 ¶¶ 366-367 (RL-0084-ENG) ("*Most-favoured-nation (MFN)* clauses are by essence very similar to '*National Treatment*' clauses. They have similar conditions of application and basically afford indirect advantages to their beneficiaries, namely a treatment no less favourable than the one granted to third parties.") (emphasis in original).

damages in respect of Claimants' national treatment claim.[285] Respondent's suggestion that the lack of reference to the MFN claim in Claimants' Notice of Intent thereby violated the Treaty's requirement to estimate their damages[286] is therefore unfounded.

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

100. Claimants demonstrated in their Counter-Memorial that it would be inconsistent with the ordinary meaning of DR-CAFTA Article 10.16.2, interpreted in its context, to dismiss Claimants' MFN claim because that claim was not expressly referenced in their Notice of Intent.[287] In doing so, Claimants contrasted the language of Article 10.16.2 with other provisions in the DR-CAFTA, which reveal that, where the State Parties intended to condition the submission of a claim on the satisfaction of certain requirements, they did so expressly by using language such as "provided that 'x,' a claimant may submit a claim," and "no claim may be submitted."[288] Claimants showed that the absence of such language from Article 10.16.2 indicates that non-compliance with Article 10.16.2 is not a bar to the admissibility of claims.[289] Claimants also referenced cases interpreting NAFTA Article 1119, which is identical to DR-CAFTA Article 10.16.2 in all relevant respects, and which further support Claimants' interpretation.[290]

101. In its Reply, Respondent argues that the plain language of DR-CAFTA Article 10.16.2 requires dismissal of Claimants' MFN claim on inadmissibility grounds.[291] In particular, Respondent contends that the terms "shall specify" and "for each claim" would be "devoid of any legal effect and can simply be ignored" if the Tribunal were to adopt Claimants' interpretation,[292] and that "only the claims properly identified in the notice of

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[285] The Treaty requires only that the Claimant indicate "the relief sought and the approximate amount of damages claimed." It does not require that the Claimant specify damages suffered as a result of each breach of the Treaty. *See* DR-CAFTA, Art. 10.16.2(d) (CL-0001-ENG/SPA).

[286] Respondent's PO Reply ¶ 129.

[287] Claimants' PO Counter-Mem. § III.A.

[288] *Id.* ¶ 87.

[289] *Id.* ¶ 88.

[290] *Id.* ¶¶ 89-90 (discussing *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") (CL-0080-ENG/SPA) and *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") (CL-0081-ENG)).

[291] Respondent's PO Reply § V.B.

[292] *Id.* ¶ 132.

intent are admissible."[293] Respondent further asserts that the provisions of the DR-CAFTA that include the language "provided that 'x,' a claimant may submit a claim" and "no claim may be submitted," limit a tribunal's jurisdiction, but not the admissibility of claims, and contends that jurisprudence, as well as the context of Article 10.16.2, supports its position.[294] Finally, Respondent contends that *B-Mex v. Mexico* and *ADF v. United States* are distinguishable on the purported basis that the NAFTA's notice requirements are "less stringent" than those in the DR-CAFTA.[295] Respondent's arguments are meritless for the reasons set out below.

102. *First*, Respondent wrongly asserts that Claimants have ignored the "ordinary meaning" component of Article 31 of the Vienna Convention in interpreting DR-CAFTA Article 10.16.2, and have engaged in construction of Article 10.16.2 "*only* on the basis of context."[296] Respondent focuses exclusively on the "modal verb" "shall" in Article 10.16.2, which it states denotes an obligation, and supports its conclusion that "only the claims properly identified in the notice of intent are admissible."[297]

103. As Respondent itself acknowledges, however, Article 31 of the Vienna Convention requires an "integrated exercise of interpretation."[298] As explained by the International Law Commission's commentary on what is now Article 31 of the Vienna Convention, "the application of the means of interpretation in the article [is] a single combined operation . . . [and] the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule."[299] The approach to interpretation of DR-CAFTA Article 10.16.2, pursuant to Article 31 of the Vienna Convention, is therefore a unitary one in which ordinary meaning, context, and object and purpose all must be taken into consideration in their totality. The literal meaning of a word in a treaty provision cannot be interpreted in isolation, outside of its context.[300] Claimants'

[293] *Id.* ¶ 134.

[294] *Id.* ¶¶ 135-137.

[295] *Id.* ¶¶ 138-141.

[296] *Id.* ¶ 132 (emphasis in original).

[297] *Id.* ¶¶ 134, 137.

[298] *Id.* ¶ 131.

[299] International Law Commission, Draft Articles on the Law of Treaties with Commentaries, adopted by the International Law Commission at its Eighteenth Session (26 March – 24 May 1968; 9 April – 22 May 1969) (A/CONF.39/11/Add.2), at 39 (RL-0087-ENG).

[300] *See 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) ("The meaning of a word or phrase is

consideration of the context in which the words of the Treaty appear and the object and purpose of the Treaty in informing their understanding of the ordinary meaning of Article 10.16.2 is thus the correct approach.

104. While the word "shall" may denote that an obligation is mandatory, as Claimants observed in their Counter-Memorial, Article 10.16.2 makes no reference to the consequences of non-compliance with that obligation.[301] Respondent cites no authority in support of its far-reaching assertion that inadmissibility automatically flows from non-compliance with a mandatory obligation, in the absence of language to that effect in the Treaty. The converse is, in fact, the case. For instance, DR-CAFTA Article 10.5.1 (Minimum Standard of Treatment), like Article 10.16.2, also contains the "mandatory" verb "shall": "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."[302] That Article, like 10.16.2, however, does not provide any consequence for non-compliance. Without other provisions of the Treaty – notably, Article 10.16.1, which provides the consent of each Party to arbitrate for alleged breaches of obligations set forth in Section A of Chapter 10 of the Treaty – a claimant would have no right to claim damages from a State for non-compliance with the mandatory obligation to provide fair and equitable treatment to investments. Accordingly, absent language spelling out the consequences of non-compliance with the

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not solely a matter of dictionaries and linguistics. As Schwarzenberger observed, the word 'meaning' itself has at least sixteen dictionary meanings. Rather, the interpretation of a word or phrase involves a complex task of considering the ordinary meaning of a word or phrase in the context in which that word or phrase is found and in light of the object and purpose of the document.") (citing Georg Schwarzenberger, *Myths and Realities of Treaty Interpretation: Articles 27-29 of the Vienna Draft Convention on the Law of Treaties*, 22 CURRENT LEGAL PROBLEMS 205, 219 (1969)); J. ROMESH WEERAMANTRY, TREATY INTERPRETATION IN INVESTMENT ARBITRATION (2012) ¶¶ 3.35, 3.38, 3.41 (CL-0007-ENG) ("While the ordinary meaning may be the starting point that directs the interpreter first and foremost to the treaty's text, tribunals have held that it is determinative only if it is confirmed or supported by other Article 31 criteria. Many FIATs [foreign investment arbitral tribunals] expressly acknowledge the importance of examining the text without expressly referring to the ordinary meaning criterion. This suggests that they consider the context and the object and purpose (which is also mainly apparent from the treaty's text) also to be significant . . . . Recourse to a contextual analysis and an examination as to the object and purpose of the treaty is often still required to confirm the ordinary meaning . . . . FIATs have frequently shown a willingness to refer to dictionary definitions of words to cast light on the ordinary meaning of terms. Usually, these definitions offer some degree of guidance but care needs to be exercised, as the use of dictionaries also have limitations. A sharp critique has been made by Douglas: 'The cult of the dictionary in treaty interpretation leads to the erosion of settled meanings for international legal concepts and, instead, fixates upon the lowest common denominator of meaning generated by a sterile linguistic analysis of treaty terms.'") (quoting Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 J. INT'L DISPUTE SETTLEMENT 97, 101 (2010)).

[301] Claimants' PO Counter-Mem. ¶¶ 87-88.

[302] DR-CAFTA, Art. 10.5.1 (CL-0001-ENG/SPA).

obligations contained in Article 10.16.2, the context and object and purpose of the Treaty must be considered in order to properly interpret the Article.

105. Indeed, this is precisely what the *B-Mex* tribunal found in interpreting the materially identical notice provision in the NAFTA:

> Article 1119 imposes an obligation on the investor, but the existence of an obligation says nothing about the consequences of failure to meet that obligation. The Treaty does not in terms require a sanction of dismissal . . . . 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. [303]

106. Having interpreted the plain language of the provision in its context, the *B-Mex* tribunal then considered the object and purpose of the NAFTA in determining that non-compliance by the investors in that case did not warrant dismissal of their claims.[304]

107. *Second*, Respondent's attempt to distinguish the NAFTA jurisprudence that rejects its interpretation on the basis that NAFTA Article 1119 is "less stringent" than DR-CAFTA Article 10.16.2[305] fails. The sole difference between the two Articles relied upon by Respondent is the inclusion of the words "for each claim" in Articles 10.16.2(b) and (c): "The notice shall specify: . . . (b) *for each claim*, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions; (c) the legal and factual basis *for each claim* . . . ."[306] The language in NAFTA Article 1119, requiring inclusion in the notice of intent of "the provisions of this Agreement alleged to have been breached and any other relevant provisions,"[307] however, has the same meaning. Requiring identification in the notice of intent of "the provisions" alleged to have been breached cannot be read as requiring notification of only *some* of the provisions alleged to have been breached. The ordinary meaning of "the provisions alleged to have been

[303] *B-Mex v. Mexico*, Partial Award ¶¶ 122-123 (CL-0080-ENG/SPA) (emphasis in original).

[304] *Id.* ¶¶ 124-129.

[305] Respondent's PO Reply ¶ 138.

[306] DR-CAFTA, Arts. 10.16.2(b)-(c) (CL-0001-ENG/SPA) (emphasis added); *see also* Respondent's PO Reply ¶ 138 ("While a notice of intent under NAFTA must include 'the provisions [. . .] alleged to have been breached' and the 'issues and the factual basis for the claim,' a notice of intent under CAFTA-DR must include 'for each claim, the provision [. . .] alleged to have been breached' and 'the legal and factual basis for each claim.'").

[307] NAFTA, Art. 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: . . . (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 . . . .").

breached" is "all of the provisions alleged to have been breached" for each of the claims set forth in the notice. There thus is no material difference between the language of NAFTA Article 1119 and DR-CAFTA Article 10.16.2, and the ordinary meaning of both provisions is the same.

108. Claimants' reliance on NAFTA decisions interpreting the notice provision, and the legal consequences of alleged failings in such notices, is therefore justified. As set forth in the Counter-Memorial, that jurisprudence supports Claimants' interpretation.[308] In *ADF v. United States*, for example, the tribunal admitted the claimant's belated MFN claim, which was made to respond to a new fact, namely, "the impact of the FTC Interpretation upon the Investor's Article 1105 claim."[309] Similarly, Claimants have included their MFN claim in their Notice of Arbitration in response to a new fact, which arose after Claimants submitted their Notice of Intent, namely, the September 2018 Guatemalan Constitutional Court's ruling in the *Escobal* case.

109. Respondent further contends that *B-Mex v. Mexico* is "inapposite" because, unlike in that case, the claims specified in Claimants' Notice of Intent are not "co-extensive" with the MFN claim alleged in their Notice of Arbitration.[310] This is incorrect. The factual basis for Claimants' MFN claim – the arbitrary and discriminatory treatment of the Guatemalan courts and the MEM with respect to their treatment of Exmingua as compared with their treatment of the investments owned by others – was set out in Claimants' Notice of Intent.[311] The Article 10.3 claim raised in Claimants' Notice of Intent is therefore "co-extensive" with the Article 10.4 claim in the Notice of Arbitration.

110. Finally, Respondent mischaracterizes *Aven v. Costa Rica* in concluding that Claimants' interpretation of the ordinary meaning of Article 10.16.2, read in its context, is wrong.[312] Respondent ignores that the *Aven* tribunal did not engage with the ordinary meaning of DR-CAFTA Article 10.16.2, and based its decision on the purported object and purpose of allowing the Respondent adequate time to prepare its defense.[313] In this regard,

[308] *See* Claimants' PO Counter-Mem. ¶¶ 89-90, 100.

[309] Respondent's PO Reply ¶ 139; *ADF v. United States*, Award ¶ 136 (CL-0081-ENG).

[310] Respondent's PO Reply ¶ 140.

[311] Claimants' PO Counter-Mem. ¶¶ 83-84, 101.

[312] Respondent's PO Reply ¶ 141; *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") (RL-0031-ENG).

[313] *David R. Aven v. Costa Rica*, Final Award ¶¶ 343-346 (RL-0031-ENG).

Respondent fails to acknowledge that the *Aven* tribunal found the late-raised claim to be inadmissible on the basis that "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,"[314] a situation far from that which exists here.

111. For all of these reasons, dismissal of Claimants' MFN claim on the basis that a breach of Article 10.4 was not alleged in Claimants' Notice of Intent would be inconsistent with the ordinary meaning of DR-CAFTA Article 10.16.2, read in its context.

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

112. In their Counter-Memorial, Claimants established that their interpretation of Article 10.16.2 is consistent with the object and purpose of the Treaty.[315] Claimants further showed that dismissing their MFN claim, as Respondent requests, would not advance the object and purpose of providing an opportunity for amicable negotiations and settlement, because the factual basis for their MFN claim was set forth in their Notice of Intent.[316] Claimants, moreover, made considerable efforts to engage in ultimately unsuccessful settlement discussions with Respondent, and established that it was nonsensical for Respondent to suggest that a reference to DR-CAFTA Article 10.4 in Claimants' Notice of Intent would have made any difference as to the outcome of those negotiations.[317] Finally, Claimants demonstrated that the omission of a reference to Claimants' MFN claim in their Notice of Intent had not infringed Respondent's right of defense, because that claim was set forth in Claimants' Notice of Arbitration, and Respondent will have nearly two years before it is scheduled to respond to the MFN claim in its Counter-Memorial on the Merits.[318]

113. In its Reply, Respondent complains that it was deprived of the opportunity to obtain legal advice in respect of Claimants' MFN claim "before the start of the arbitration."[319] Respondent further complains that it had only two months between the time Claimants' MFN claim arose, on 3 September 2018, and the filing of Claimants' Notice of Arbitration to

[314] Claimants' PO Counter-Mem. ¶ 100.
[315] *Id.* § III.B.
[316] *Id.* ¶ 101.
[317] *Id.* ¶ 102.
[318] *Id.* ¶ 103.
[319] Respondent's PO Reply ¶ 144.

engage in settlement discussions in respect of that claim.[320] According to Respondent, the lack of opportunity to engage in such negotiations "runs afoul of CAFTA-DR's goal to strengthen the relations among the CAFTA-DR Parties."[321] Respondent then mischaracterizes the jurisprudence, in concluding that "cooling-off periods have to be strictly complied with," and Claimants' MFN claim should be dismissed.[322] Respondent's submissions fail for the following reasons.

114. *First*, Respondent argues that it was deprived of the opportunity to engage in meaningful settlement discussions in respect of Claimants' MFN claim, because the claim arose two months before Claimants filed their Notice of Arbitration.[323] Unsurprisingly, however, Respondent fails to address Claimants' point that "[i]t defies logic to suggest – as Respondent does – that although [the Parties'] negotiations were entirely unsuccessful, the outcome might have been different had Claimants' Notice of Intent contained reference to DR-CAFTA Article 10.4."[324] Indeed, there was nothing stopping Respondent from pursuing settlement discussions in the eight months between Claimants' filing of their Notice of Arbitration and the constitution of the Tribunal, or to this day.[325]

115. As such, Claimants' Notice of Intent enabled amicable settlement discussions, thereby fulfilling the widely accepted object and purpose of the Treaty.[326] In such circumstances, tribunals properly have taken a flexible and pragmatic approach, and have refused to dismiss claims on account of a defect in a notice. For example, in *Ethyl v. Canada*, Canada sought dismissal of the claim, because the challenged measure, an Act of Parliament, came into force several days after the claimant submitted its notice of arbitration.[327] In denying Canada's objection, the tribunal found that it had "been given no reason to believe that any 'consultation or negotiation' . . . was even possible," that "[i]t is not doubted that today

[320] *Id.* ¶ 145.

[321] *Id.* ¶ 146.

[322] *Id.* § V.D, ¶ 155.

[323] *Id.* ¶ 145.

[324] Claimants' PO Counter-Mem. ¶ 102.

[325] *See Id.* ¶ 102 n. 206 (explaining that the tribunal in *B-Mex v. Mexico* considered the time for settlement discussions between the filing of a notice of arbitration and the constitution of the tribunal (in that case, five months) was a relevant factor in determining whether the object and purpose of the notice provisions had been fulfilled).

[326] *See*, *e.g.*, Claimants' PO Counter-Mem. ¶ 95 n. 183.

[327] *Ethyl Corp. v. The Government of Canada*, NAFTA, UNCITRAL, Award on Jurisdiction dated 24 June 1998 ¶¶ 65, 69, 80 (CL-0086-ENG).

Claimant could resubmit the very claim advanced here . . . ,"[328] and that dismissing the claim "would disserve, rather than serve, the object and purpose of NAFTA."[329]

116. With respect to the other cases referenced by Claimants, Respondent remarks that *Al-Bahloul v. Tajikistan* is inapposite, because it dealt with the three-month cooling-off period, as opposed to the notice provision.[330] The salient point, however, remains: the tribunal focused on 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."[331]

117. In its Reply, and to support its contrary conclusion, Respondent continues to rely on cases it cited in its Memorial, without meaningfully engaging with the points made by Claimants in their Counter-Memorial distinguishing those cases. For example, in *Goetz v. Burundi* and *Burlington v. Ecuador*, the claims that had not been properly notified – and which the tribunals dismissed – were factually unrelated to the notified claims.[332] The object and purpose of allowing meaningful settlement negotiations thus would not have been fulfilled if those claims had been admitted.

118. The unrelated nature of the un-notified claims to the notified claims was also a relevant factor for the tribunal in *Rurelec v. Bolivia*, relied on by Respondent in its Reply.[333]

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[328] *Id.* ¶¶ 84-85.

[329] *Id.* ¶ 85; *see also B-Mex v. Mexico*, Partial Award ¶¶ 130-132 (CL-0080-ENG/SPA) ("It 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 . . . [because] the Notice still provided the Respondent with sufficient information regarding the dispute to enable a meaningful settlement effort.").

[330] Respondent's PO Reply ¶ 154; *see* Claimants' PO Counter-Mem. ¶ 95. Respondent's passing reference that compliance with Article 10.16.3's cooling-off period precludes the Tribunal from exercising jurisdiction over Claimants' MFN claim is untimely and meritless. *See* Respondent's PO Reply ¶ 139 ("Beyond that, the Tribunal would not have jurisdiction to hear the claim under CAFTA-DR Article 10.16.3 because Claimants would have needed to allow six months to elapse before bringing such a claim."). No such objection has been made by Respondent in its Memorial and any such objection would, in any event, fail for the same reasons that its objections to the MFN claim fail.

[331] *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).

[332] Claimants' PO Counter-Mem. ¶ 98 (discussing *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award dated 10 Feb. 1999 ¶¶ 91-93 (RL-0035-FR/ENG) and *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction dated 2 June 2010 ¶¶ 263, 308-309 (RL-0037-ENG)).

[333] Respondent's PO Reply ¶¶ 155; *see also Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, ICSID Administered, Decision on a Motion to Add a New Party, 31 January 2008 ¶¶ 24, 29-30 (RL-0097-ENG) (finding that "it is not evident that the original and the new claim have enough questions

In that case, the new claims that were advanced in the statement of claim were entirely unrelated to the dispute as set out in notice of dispute and notice of arbitration, both of which concerned only a nationalization decree.[334] The tribunal rejected the claimant's argument that its challenges to spot prices and capacity payments were related to the nationalization dispute and were the initial steps of a creeping expropriation, because the regulatory measures occurred years before the nationalization, were unconnected to the nationalization, and the claimant had not before alleged a creeping expropriation.[335]

119. Likewise, in *Supervision y Control v. Costa Rica*, only some of the new claims the claimant sought to advance in its memorial were related to claims raised in its notice of intent.[336] Respondent's attempt to disregard this case on the basis that the notice requirements under DR-CAFTA are purportedly stricter than those under the Costa Rica–Spain BIT,[337] after relying on the case itself in its Memorial,[338] should be rejected. Article XI(1) of the Costa Rica–Spain BIT requires notice to be given in respect of "*any* investment-related dispute arising between one of the parties and an investor of the other Party with respect to matters governed by this Treaty."[339] As such, the tribunal in *Supervision* considered that "[i]n the event that the Investor notifies certain claims to the State, but upon presenting the Request for Arbitration or its Claim Memorial it adds claims different *and not directly related to those previously presented*, all the claims not notified will be inadmissible."[340] The tribunal therefore clearly considered that "each claim [a claimant] intends to submit to arbitration" should be notified.[341]

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of 'law or fact' in common as would allow [consolidation of the claims]" and, relatedly, the notice of intent and cooling-off periods would have to be complied with in respect of these new claims, because, otherwise, the respondent would be deprived "of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim announced.") (emphasis added).

[334] *Guaracachi v. Bolivia*, Award ¶ 397 (RL-0102-ENG/SPA).

[335] *Id.* ¶¶ 387, 396, 398.

[336] *See* Claimants' PO Counter-Mem. ¶ 98 (discussing *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") ¶¶ 342, 344-345 (RL-0032-ENG)); Respondent's PO Reply ¶ 149.

[337] Respondent's PO Reply ¶ 150.

[338] Respondent's PO Mem. ¶ 100.

[339] *Supervision v. Costa Rica*, Award ¶ 336 n. 447 (RL-0032-ENG) (emphasis added).

[340] *Id.* ¶ 341 (emphasis added).

[341] Respondent's PO Reply ¶ 150.

120. *Tulip v. Turkey* and *Salini v. Morocco* provide further support in favor of Claimants' interpretation.[342] As explained in the Counter-Memorial, those tribunals adopted a flexible approach, and admitted claims where the "most perfect forms" of notification were absent, because doing so was consistent with the object and purpose of the treaties.[343] Respondent fails to show otherwise.

121. *Second*, Respondent has failed to demonstrate that adequate time to prepare a defense is an object and purpose of Treaty that should be used to interpret DR-CAFTA Article 10.16.2.[344] As support for its proposition, Respondent relies on two cases – *Aven v. Costa Rica* and *Merril v. Canada* – and on the submission of the United States in *Mesa Power Group v. Canada*.[345] Respondent, however, has not pointed to *any* language in the Treaty in support of its contention, and the two cases and one submission on which it relies likewise fail to reference any language in the applicable treaties in those cases. That one of the consequences of filing a notice of intent may include that the respondent uses that time to "coordinate among relevant national and subnational officials . . ."[346] does not elevate that consequence into an object and purpose of the Treaty.

122. Respondent's further contention that it has been "deprived of the opportunity to obtain legal advice with respect to the MFN claim before the start of the arbitration" also is without factual or legal merit.[347] As explained above, Claimants put Respondent on notice in their Notice of Intent of their allegation that Respondent's courts and the MEM had acted in a discriminatory manner towards Exmingua.[348]

123. Furthermore, it is absurd for Respondent to suggest that it was deprived of an opportunity to prepare its defense or obtain legal advice with respect to the MFN claim as a result of the content of Claimants' Notice of Intent, as the time for responding to that claim

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[342] *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 (RL-0029-ENG); *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 (RL-0036-ENG).

[343] Claimants' PO Counter-Mem. ¶ 97.

[344] Respondent's PO Reply ¶ 144.

[345] *Id.*

[346] *Mesa Power Group LLC v. Canada*, PCA Case No. 2012-17, Submission of the United States of America dated 25 July 2014 ¶ 3 (RL-0098-ENG).

[347] Respondent's PO Reply ¶ 144.

[348] *See supra* ¶¶ 93-94, 97-98.

still has not lapsed. As noted, Respondent will have nearly two years from the time of Claimants' Notice of Arbitration to submit its Counter-Memorial on the Merits.[349] This clearly distinguishes this case from *Aven v. Costa Rica*, where the claimants "failed to expressly plead a claim for breach of full protection and security,"[350] only raising that claim at the closing of the hearing on jurisdiction and the merits.[351]

124. As Claimants have shown, where the respondent has had adequate time to respond to a claim thereby suffering no prejudice by an alleged omission in a notice of intent, tribunals have adopted a flexible approach.[352] As noted in their Counter-Memorial, the *ADF v. United States* tribunal thus allowed an MFN claim first raised in the reply, because the United States "had ample opportunity to address and meet, and did address and meet, that claim and the Investor's supporting arguments, in its Rejoinder."[353]

125. Similarly, in *Chemtura v. Canada*, the tribunal admitted the MFN claim, where 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.[354] Respondent attempts to distinguish *Chemtura*, arguing that "the tribunal focused on the question of whether the addition of a *new argument* in connection with the NAFTA MFN clause in the memorial had caused any prejudice to the respondent."[355] While the respondent had raised an MFN claim in its second notice of intent, that claim "did not concern the potential import of a fair and equitable treatment provision from another treaty . . . ."[356] The MFN claim raised in claimant's memorial was therefore new. The *Chemtura* tribunal nevertheless admitted the claim, because, like here, "the facts mentioned [in the second notice of intent] are essentially the same as those subsequently referred to in the Claimant's Memorial in support of the claim under Article 1103."[357] Respondent's further assertion that the *Chemtura* (and *ADF*) case is

[349] Claimants' PO Counter-Mem. ¶ 103.
[350] *David R. Aven v. Costa Rica*, Final Award ¶ 345 (RL-0031-ENG).
[351] *Id.* ¶ 343.
[352] Claimants' PO Counter-Mem. ¶¶ 98-100.
[353] *ADF v. United States*, Award ¶ 138 (CL-0081-ENG).
[354] Claimants' PO Counter-Mem. ¶ 99.
[355] Respondent's PO Reply ¶ 153 (emphasis added).
[356] *Chemtura v. Canada*, Award ¶ 103 (CL-0087-ENG).
[357] *Id*.

distinguishable because it is a NAFTA case[358] also is meritless. As shown above, there is no material difference between the notice provisions in the NAFTA and the DR-CAFTA.[359]

126. *Third*, Respondent contends that, in filing their Notice of Arbitration raising an MFN claim, Claimants adopted an "adversarial approach" which "[ran] afoul of CAFTA-DR's goal to strengthen the relations among the CAFTA-DR Parties."[360] However, it is not Claimants' responsibility to strengthen the relationship between the State Parties to the DR-CAFTA. Nor does Respondent even explain how the filing of a notice of arbitration by a claimant under the Treaty, which provides for investor-State arbitration, has a deleterious effect on relations between the State Parties to the Treaty.

127. *Finally*, the DR-CAFTA's object and purpose of promoting the efficient resolution of disputes,[361] which Respondent itself has invoked,[362] is furthered by Claimants', and thwarted by Respondent's, interpretation. The result of accepting Respondent's interpretation and dismissing Claimants' MFN claim would be massive inefficiency of the arbitral process.[363] If, as Respondent pleads, Claimants' MFN claim were to be dismissed, Claimants would be entitled to re-submit that claim to arbitration, by filing a notice of intent to include that single claim, waiting three months, and then filing a notice of arbitration. At that point, either Claimants or Respondent could seek to consolidate that new claim with this one.[364] That would require the constitution of a new tribunal to decide the issue of consolidation[365] –

[358] Respondent's PO Reply ¶ 153.

[359] *See supra* ¶ 107.

[360] Respondent's PO Reply ¶ 146.

[361] *See* DR-CAFTA, Art. 1.2.1(f) (CL-0001-ENG/SPA) ("The objectives of this Agreement . . . are to . . . create effective procedures for the implementation and application of this Agreement . . . and for the resolution of disputes . . . .").

[362] *See* Respondent's PO Memorial ¶ 38, n. 40 (quoting the DR-CAFTA's objective stated in its Article 1.2.1(f) of "effective procedures . . . for the resolution of disputes").

[363] *See, e.g.*, *Chevron v. Ecuador*, Second Partial Award on Track II ¶ 7.170 (CL-0117-ENG) ("[I]t would be an unreasonable, if not absurd, result for the Claimants to advance their amended claims as new claims in a new arbitration before a new arbitral tribunal, at unnecessarily greater expense and delay, with the risk of inconsistent decisions. It could serve no useful purpose to any of the Parties. If the Claimants had sought to do so, the Respondent would have had every right to object to such an abuse of process.").

[364] DR-CAFTA, Art. 10.25(1) (CL-0001-ENG/SPA) ("Where two or more claims have been submitted separately to arbitration under Article 10.16.1 and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.").

[365] *Id.*, Art. 10.25(3) ("Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 [for consolidation] that the request is manifestly unfounded, a tribunal shall be established under this Article.").

which almost certainly would be ordered given the identity of the parties and the identical facts and legal issues raised by the claims[366] – and the possible dissolution of this Tribunal.[367] That would be a manifestly inefficient and absurd result, at odds with the Treaty's object and purpose of effective dispute resolution, and would be especially unwarranted here, where Respondent has suffered no prejudice whatsoever.

D. Claimants' MFN Claim Is Admissible As An Ancillary Claim Under Rule 40 Of The ICSID Arbitration Rules

128. Claimants have established that their MFN claim is admissible pursuant to the ordinary meaning of DR-CAFTA Article 10.16.2, read in its context, and in light of the Treaty's object and purpose. Even were that not the case, however, the claim is admissible because it is an ancillary claim pursuant to Rule 40 of the ICSID Arbitration Rules. ICSID Arbitration Rule 40 provides:

> (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
>
> (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.
>
> (3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

129. Claimants' MFN claim arises directly out of the subject-matter of the dispute in these proceedings. The subject matter of this dispute, as explained above, includes Respondent's discriminatory treatment of Claimants' investment as compared to that of investments of other investors.[368] As explained by the *CMS v. Argentina* tribunal, "[t]he test to satisfy [the

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[366] *See id.*, Art. 10.25(6) ("Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 10.16.1 have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, [order consolidation].").

[367] *Id.*, Art. 10.25(6) ("Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 10.16.1 have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order: (a) assume jurisdiction over, and hear and determine together, all or part of the claims . . . .").

[368] *See supra* ¶¶ 93-94; 97-98.

condition that the claim arises directly out of the subject-matter of the dispute] is whether the factual connection between the original and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute, the object being to dispose of all grounds of dispute arising out of the same subject matter."[369] Clearly, the dispute could not be settled if the Tribunal were to consider only Respondent's discriminatory behavior as it relates to Claimants' national treatment claim concerning the Respondent's treatment of the *Oxec* investment, and not its MFN claim concerning Respondent's treatment of the *Escobal* investment.

130. Claimants also raised their MFN claim in their Notice of Arbitration, well before Rule 40's deadline of the submission of their Reply. This grants Respondent ample time to prepare a defense to the claim, as discussed above.

131. Finally, Claimants' MFN claim is within "the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre."[370] In particular, ICSID Arbitration Rule 40 applies along with the notification requirement of DR-CAFTA Article 10.16.2,[371] and is not displaced by the latter.

132. Indeed, the *Metalclad v. Mexico* tribunal considered the applicability of Article 48 of the 1978 ICSID Additional Facility Rules (equivalent to Article 40 of the ICSID Arbitration Rules) in the context of NAFTA Articles 1119 and 1120.[372] In that case, as an additional basis for its expropriation claim, the claimant relied on an ecological decree that was enacted *after* the claimant had filed its notice of intent.[373] Mexico objected, arguing that the NAFTA "does not contemplate the amendment of ripened claims to include post-claim events" and

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[369] *CMS Gas Transmission Co. v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award on Jurisdiction dated 17 July 2003 ¶ 116 (CL-0038-ENG); *see also Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award dated 6 July 2012 ¶ 138 (CL-0119-ENG) ("In the present case, in its Request for Arbitration, the Claimant complained of various breaches of the BIT due to acts and omissions 'undertaken by the Respondent and its entities, mainly SEC, but also the Basic and Appellate courts in Skopje' and submitted that, as a result of those acts or omissions, it had suffered a de facto expropriation. It now also complains of decisions or judgments rendered since that time by the same bodies or courts which, according to Swisslion, violated the BIT, in particular its provisions relating to expropriation. Those claims are part of the issues presented in the Request for Arbitration, or, to take the words of the French and Spanish version of Article 36, enter within the subject matter of the original claim and are admissible as such and may be presented without requiring further consultations between the Parties.").

[370] ICSID Arbitration Rule 40(1).

[371] Notice of Arbitration ¶ 2.

[372] *Metalclad Corp. v. The United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/97/1, Award dated 30 Aug. 2000 ("*Metalclad v. Mexico*, Award") (CL-0120-ENG/SPA).

[373] *Id.* ¶ 64.

"modifies the [1978] Additional Facility Rules as regards the amendment of claims and the filing of ancillary claims, making Article 48 of the Additional Facility Rules inapplicable."[374] The tribunal rejected Mexico's objection:

> [NAFTA] Article 1120(2) provides that the arbitration rules under which the claim is submitted shall govern the arbitration except to the extent modified by Section B of Chapter Eleven. Article 48(1) of the [1978 Additional Facility] Rules clearly states that a party may present an incidental or additional claim provided that the ancillary claim is within the scope of the arbitration agreement of the parties.
>
> The Tribunal believes it was not the intent of the drafters of NAFTA, Articles 1119 and 1120, to limit the jurisdiction of a Tribunal under Chapter Eleven in this way. Rather, [the tribunal would prefer to construe] NAFTA Chapter Eleven, Section B, and Article 48 of the [1978 Additional Facility] Rules as permitting amendments to previously submitted claims and consideration of facts and events occurring subsequent to the submission of a Notice of Claim, particularly where the facts and events arise out of and/or are directly related to the original claim. A contrary holding would require a claimant to file multiple subsequent and related actions and would lead to inefficiency and inequity.[375]

133. The same is true here. Thus, to the extent that the Tribunal does not find that Claimants' MFN claim is admissible, by applying the ordinary meaning, in context, of Article 10.16.2, interpreted in light of the object and purpose of the Treaty, it should find Claimants' MFN claim to be admissible as an ancillary claim pursuant to ICSID Arbitration Rule 40.

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[374] *Id.*; *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") ¶ 54 (CL-0094-ENG/SPA) ("Respondent relies on NAFTA Article 1120(2), under which '[t]he applicable arbitration rules shall govern the arbitration except to the extent modified by this Section'. The Respondent argues that Section B of Chapter Eleven, and precisely NAFTA Articles 1119, 1120 and 1121 have modified Article 48 of the Arbitration Rules. . . . The Tribunal cannot accept this approach. It considers that, for the exception in NAFTA Article 1120(2) to become operative, there must be a rule in Section B of Chapter Eleven which specifically addresses the issue of ancillary claims. Such rule does not appear to exist. Therefore, the issue of ancillary claims remains untouched by Section B of Chapter Eleven and is governed by Article 48 of the Arbitration Rules."). The DR-CAFTA contains the same rule as NAFTA Article 1120(2). *See* DR-CAFTA, Art. 10.16.5 (CL-0001-ENG/SPA) ("The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement."). Like Section B of NAFTA's Chapter 11, Section B of the DR-CAFTA's Section 10 does not contain any rule that specifically addresses ancillary claims.

[375] *Metalclad v. Mexico*, Award ¶¶ 66-67 (CL-0120-ENG/SPA).

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

134. In their Counter-Memorial, Claimants demonstrated that their full protection and security claim is timely because it relates to a breach that first occurred and gave rise to damage in 2016, *i.e.*, within the three-year limitation period.[376] In its Reply, Respondent contends that Claimants have rewritten their narrative to avoid the limitation period, and have misinterpreted or misapplied the law.[377]

135. As shown below, Claimants' narrative remains consistent with the events described in their Notice of Arbitration, and Respondent's continued reliance on the arbitral decisions it cites is misplaced.

A. Respondent Misconstrues The Nature of Claimants' Claim

136. In their Counter-Memorial, Claimants demonstrated that their claim for lack of full protection and security arises out of Respondent's failure to provide full protection and security in connection with the protests and blockades that commenced in early 2016, after the Guatemalan Supreme Court's decision to grant an *amparo* against the MEM.[378] As Claimants explained, this breach caused Claimants damage, as it prevented Exmingua from carrying out the social consultations for the Santa Margarita Environmental Impact Assessment ("EIA"), a prerequisite for obtaining an exploitation license.[379] Further, Claimants explained that they are not alleging any breach or claiming any damages arising out of the 2012 protests and Respondent's associated failure to protect Claimants' investments during the approximate two-year period that Exmingua was unable to commence operations at Progreso VII as a result of those events.[380]

137. In its Reply, Respondent asserts that Claimants have attempted to "rewrite their claim in an effort to avoid the limitation period,"[381] including by inserting "numerous inaccurate and misleading representations or cites to purported factual allegations"[382] and have

[376] Claimants' PO Counter-Mem. ¶¶ 104-128.
[377] Respondent's PO Reply ¶¶ 158, 168.
[378] Claimants' PO Counter-Mem. ¶¶ 113-115.
[379] *Id.* ¶ 116.
[380] *Id.* ¶ 118.
[381] Respondent's PO Reply ¶ 158.
[382] *Id.* ¶ 166.

introduced a "new factual account" that "contradicts the Notice of Arbitration wherein Claimants allege a continuing violation by the Respondent since 2012."[383] Respondent further asserts that Claimants' contention that "their full protection and security claim is only premised on the protests and blockades" that occurred in 2016 contradicts the "scope of their full protection and security claim" in their Notices.[384] In this regard, Respondent asserts that the "new information" presented by Claimants in their Counter-Memorial about the protests in 2016 is "irrelevant" and, even if the new exhibits could be considered (which Respondent contends they cannot), they confirm "the fact that Claimants' claim is directed against a 'continuous and systematic' event giving rise to the same breach of CAFTA-DR."[385] Respondent also asserts that "Claimants cannot evade the limitation period under Article 10.18.1 of CAFTA-DR, by basing their claim on the 'most recent transgression' of a 'series of similar and related actions' by Respondent."[386] As explained below, Respondent's arguments rest on a mischaracterization of Claimants' claim, which has remained consistent throughout their pleadings.

138. *First*, in its Reply, Respondent maintains, based on selective quotes from Claimants' pleadings, that the alleged breach began in 2012 and was "continuous."[387] In doing so, Respondent has focused on alleged "inaccurate citations and representations" in Claimants' Counter-Memorial, which not only miss the mark but fail to assist Respondent in discharging its burden of proving that the protects and blockades were continuous and that any claim arising out of the State's measures in that regard are time barred.[388]

139. Claimants' assertion that there was a new breach in 2016 from which they suffered damages as a result is not, as Respondent suggests, a re-articulation of Claimants' case;[389] it is the centerpiece of Claimants' factual narration in the Notice of Arbitration. Claimants explained in their Counter-Memorial that their claim for breach of full protection and security is based on a new wave of protests that arose in early 2016, following the ruling of the

[383] *Id.* ¶ 159.
[384] *Id.* ¶ 163.
[385] *Id.* ¶ 165.
[386] *Id.* ¶ 162.
[387] *Id.* ¶¶ 160, 166.
[388] *Id.* ¶ 166.
[389] *Id.* ¶ 158.

Guatemalan Supreme Court in late 2015.[390] Contrary to Respondent's assertion, Claimants' narrative as set out in their Counter-Memorial is entirely consistent with the facts pleaded in their Notice of Arbitration; it simply elaborates on the factual basis for their claim. Respondent fails to address the inconsistency in its own position, namely, that the protests and blockades that started in 2012 cannot have been "continuous," because they ended in 2014 following intervention from Respondent, which allowed exploitation activities at Progreso VII to commence.[391]

140. Respondent cannot have missed the fact – openly described in the Notice of Arbitration – that construction at the Progreso VII mine resumed in May 2014 and operations commenced shortly thereafter, after the protesters were removed by Respondent's national police.[392] Operations at the Progreso VII site then proceeded for nearly two years, during which time Exmingua engaged in mining, processing, and shipment of concentrate.[393] New protests and blockades, however, began in early 2016 triggered by a decision of the Supreme Court granting an *amparo provisional* against the MEM, ordering it to suspend Exmingua's exploitation license.[394] Those protests and blockades, unlike the earlier ones, were not quelled by Respondent. These are the State actions that make up the basis for Claimants' full protection and security claim at issue in this arbitration.

141. *Second*, as explained in their Counter-Memorial, the loss or damage for which Claimants are claiming is the loss of an opportunity to obtain an exploitation license for the Santa Margarita Project.[395] As discussed above, this loss or damage arose out of the new wave of protests that occurred in early 2016 and Respondent's failure to intervene. Respondent fails to explain how Claimants could have first acquired knowledge of this specific loss or damage incurred in respect of the Santa Margarita Project prior to the events in early 2016.

142. Respondent observes that Claimants are claiming loss or damage arising out of the full protection and security breach only in respect of Santa Margarita, and contend that this

[390] Claimants' Counter-Mem. ¶¶ 119-127.
[391] *Id.* ¶ 118; Notice of Arbitration ¶ 45.
[392] Notice of Arbitration ¶ 45.
[393] Claimants' PO Counter-Mem. ¶¶ 118-119.
[394] *Id.* ¶¶ 119-122.
[395] *Id.* ¶ 116.

marks a change in their claim from that which was presented in their Notice of Arbitration.[396] This also is incorrect. While the breach that occurred in early 2016 prevented Claimants from accessing the Progreso VII site, Claimants did not discuss damages arising out of that breach in their Counter-Memorial, because Exmingua at that time was prohibited from engaging in mining activities at the Progreso VII site as a result of the Supreme Court's *amparo* ruling and the MEM's suspension order.[397] Claimants thus did not suffer loss or damage as a consequence of Respondent's full protection and security breach in connection with the Progreso VII project that is distinct from the loss or damage they suffered as a result of Respondent's breaches in arbitrarily and unlawfully suspending Exmingua's exploitation license for Progreso VII.

143. *Finally*, the factual exhibits submitted by Claimants with their Counter-Memorial simply confirm the facts set forth in Claimants' Notice of Arbitration, showing that the MEM's refusal to implement the Supreme Court's *amparo* ruling led to a period of uncertainty and controversy with new protests against Claimants' mining properties in 2016.[398] Contrary to Respondent's assertion, the new exhibits do not show that the protests and blockades were continuous.[399] Rather, they demonstrate that the ruling of the Supreme Court in November 2015 and the subsequent refusal of the MEM to immediately suspend Exmingua's license spurred the protesters to protest and blockade the sites.[400] The factual exhibits provide context to the factual allegations underlying Claimants' claim, as set out in their Notice of Arbitration, and do not purport to offer any new factual allegations that differ from those set out in Claimants' Notice of Arbitration.

144. Respondent, in any event, also is wrong in asserting that the Tribunal may not consider these factual exhibits.[401] Relying on DR-CAFTA Article 10.20.4(c) and the decision in *Pac Rim v. El Salvador*, Respondent contends that the Tribunal must accept the facts as stated in the Notice of Arbitration as true, and thus may not consider Claimants'

[396] *Id.* ¶¶ 116, 122, 127.

[397] Notice of Arbitration ¶¶ 54-55; *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).

[398] Claimants' PO Counter-Mem. ¶ 121.

[399] Respondent's PO Reply ¶ 165.

[400] Claimants' PO Counter-Mem. ¶ 121.

[401] Respondent's PO Reply ¶¶ 20, 165.

exhibits.[402] Respondent, however, ignores the fact that it has raised objections under both DR-CAFTA Articles 10.20.4 and 10.20.5.[403] Respondent acknowledges, moreover, that jurisdictional objections may be made pursuant to Article 10.20.5, but not Article 10.20.4.[404] The limitations period in Article 10.18 is jurisdictional in nature, and Respondent itself characterizes it as such.[405] Accordingly, Article 10.20.4(c) does not apply to Respondent's objection as to timeliness of Claimants' full protection and security claim, and the Tribunal may consider facts beyond those set forth in Claimants' Notice of Arbitration in deciding that objection.[406]

B. Respondent Misstates The Law

145. As Claimants demonstrated in their Counter-Memorial, and as many investment tribunals have determined, it is possible and appropriate for tribunals when deciding on the timeliness of a claim to separate a series of actions by a respondent State into distinct components.[407] Where the breach and damage first occur within the limitations period, Claimants demonstrated that tribunals appropriately have accepted jurisdiction over the claim, even when relevant facts or other distinct breaches have occurred earlier.[408] In this respect, Claimants established that a claimant may refer to measures that occurred prior to the limitation period without affecting the timeliness of the claim, and that tribunals routinely take such facts into account as background.[409] Claimants also demonstrated that the three-year prescription period under DR-CAFTA Article 10.18.1 starts to run only when the claimant first acquires knowledge of the breach and that the claimant has suffered loss or

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[402] *Id.* ¶¶ 19-20.

[403] Respondent's PO Mem. ¶ 12.

[404] Respondent's PO Reply ¶ 15.

[405] *See* Respondent's PO Mem. ¶ 12 (citing DR-CAFTA Articles 10.20.5 and 10.18.1, and stating, in respect of the claim for lack of full protection and security, that "[t]he Tribunal has no jurisdiction to decide the claim because it is time barred"); *see also id.* ¶¶ 109, 112, 129; Respondent's PO Reply ¶ 183.

[406] *See, e.g.*, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections dated 13 Dec. 2017 ¶¶ 102, 104 (CL-0121-ENG) (finding that the claimant placed "a substantial body of evidence in support of their claims . . . in case the Tribunal should rule that the objections to competence would fall to be decided on the evidence," and holding that "the evidentiary rule in Article 10.20.4(c) of the U.S.-Panama TPA [which is same as DR-CAFTA Article 10.20.4(c)] has no application in the present proceeding [an objection to competence under Article 10.20.5 of the U.S.-Panama TPA] and the Tribunal will address the issues on the basis of the evidence.").

[407] Claimants' PO Counter-Mem. ¶¶ 107-108.

[408] *Id.* ¶ 109.

[409] *Id.*

damage as a consequence of the specific measure which it alleges constitutes a breach.[410] In addition, Claimants showed that certain investment treaty tribunals and international courts and tribunals applying international law have held that a "continuing breach" renews the limitation period.[411]

146. In its Reply, Respondent contends that Claimants "either interpret incorrectly or misapply"[412] arbitral awards, which do not support Claimants' position that "different limitation periods should be applied to the pre-2016 and post-2015 alleged inactions by Respondent."[413] Respondent further asserts that Claimants "did not ask the Tribunal to consider events prior to the CAFTA-DR limitations period as *background facts*," and they cannot rely on such events as background facts because "they are *bringing a claim* on the basis of events that occurred before the Critical Date."[414] In addition, Respondent claims that Claimants' assertion that the three-year limitations period did not start to run until 2016 is "simply wrong," because Claimants' claim allegedly is based on Respondent's failure to respond to the protests and blockades in 2012 which, according to Respondent, is when Claimants first acquired knowledge of the breach and resulting damage.[415] Finally, Respondent contests that a continuous breach renews the limitation period, and states that Claimants' contrary assertion is not in line with NAFTA and DR-CAFTA decisions, and that the jurisprudence from other international courts is "irrelevant."[416] Respondent's arguments are unfounded.

147. *First*, as Claimants demonstrated in their Counter-Memorial, it is "possible and appropriate" for tribunals "to separate a series of events into distinct components" when assessing whether a claim is time-barred under a treaty.[417] Thus, as Respondent acknowledges,[418] the tribunal in *Grand River* held that the claimants' challenge to the "complementary legislation / contraband laws" and the amendments made to the escrow laws adopted *within* the limitation period was not time-barred, even though those provisions were

[410] *Id.* ¶¶ 110-112.
[411] *Id.* ¶¶ 113-115.
[412] Respondent's PO Reply ¶ 168.
[413] *Id.* ¶ 169.
[414] *Id.* ¶¶ 174-175 (emphasis in original).
[415] *Id.* ¶¶ 176-178.
[416] *Id.* ¶¶ 179-183.
[417] Claimants' Counter-Mem. ¶ 107.
[418] Respondent's PO Reply ¶ 169.

integrally related to time-barred measures, including the master settlement agreement, which anticipated the enactment of these laws.[419] Respondent nevertheless maintains that "different limitation periods cannot be applied to" different acts or omissions of a respondent State.[420] In support of its assertion, Respondent relies on the *Grand River* tribunal's finding that the separate implementing measures of the master settlement agreement adopted by each State did not start new limitation periods.[421]

148. Contrary to Respondent's assertion, this finding by the *Grand River* tribunal is not "opposite" to Claimants' position.[422] Rather, it confirms that once a claim has crystallized prior to the cut-off date, a claimant cannot rely on additional conduct of a respondent State occurring after the cut-off date to renew the limitation period where such conduct relates to the same underlying harm, or does not produce "any separate effects."[423] Here, however, this is not a situation relating to the "implementation" of the same measure; instead, in early 2016 there were new protests and a new blockade, triggered by a new event.[424]

149. This case thus is not akin to *Ansung v. China*, relied upon by Respondent.[425] In *Ansung*, the claimant challenged the respondent's conduct in relation to its investment in a project for the construction of a golf course and condominiums, including the respondent's failure to enjoin the illegal operation of a nearby golf course and increasing the agreed price for the land use rights.[426] In response to the respondent's time-bar objection, the claimant argued that its claim crystallized "only after its expectation and plan for the 27-hole golf course was completely frustrated," which it alleged occurred after the cut-off date due to the State's failure to provide the additional land for the second phase of the project and the actual

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[419] *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).

[420] Respondent's PO Reply ¶ 169.

[421] *Id.*

[422] *Id.*

[423] *Corona v. Dominican Republic*, Award on the Respondent's Expedited Preliminary Objections ¶ 219 (RL-0002-ENG); *Grand River v. United States*, Decision on Objections to Jurisdiction ¶¶ 71, 82-83, 86-87 (RL-0039-ENG) (finding that, prior to the cut-off date for the limitation period, the claimants "should have known of the MSA and of the Escrow Laws" and "of loss or damage they incurred as a result," but, by contrast, "the complementary/contraband laws adopted after" the cut-off date that allegedly caused significant injury "remain[ed] for consideration at the merits stage.").

[424] Claimants' Counter-Mem. ¶¶ 119-122.

[425] Respondent's PO Reply ¶ 170.

[426] *Ansung Housing Co., Ltd v. People's Republic of China*, ICSID Case No. ARB/14/25, Award dated 9 Mar. 2017 ¶¶ 44, 46 (RL-0103-ENG).

sale of its shares in the investment.[427] The tribunal, however, concluded that it was clear from the claimant's pleadings that the claimant's claim had crystallized prior to the cut-off date, when the claimant made the decision "to dispose of its entire share capital" in its investment "in order to avoid further losses."[428] This was the date that the claimant first acquired knowledge of the fact that it had incurred loss or damage.[429] The additional conduct or inaction that the claimant sought to rely on after the cut-off date did not result in new damage or loss to the claimant separate from the loss that it had already incurred from its ill-fated project.[430] Rather, the date of the actual sale of the shares in the investment "marked the date on which it could *finalize* or *liquidate* its damage."[431] This scenario bears no resemblance to the facts in this case.

150. Similar to *Ansung*, in *Corona v. Dominican Republic*, the tribunal observed that the claimant could not rely on the respondent's failure to reconsider its license application as the basis for a breach that fell within the limitations period, because that refusal to reconsider would not have produced any loss or damage separate or independent from the loss or damage incurred as a result of the Ministry's refusal to grant the claimant an environmental license.[432] Likewise, the tribunal in *Berkowitz v. Costa Rica* held that the claimant's claim crystallized when it acquired knowledge of the breach and resulting damage when expropriation decrees were issued, and not with the subsequent determination of compensation by the administrative and judicial authorities.[433] The *Berkowitz* tribunal found that the latter acts were not "independently actionable breaches, separable from the pre-entry into force conduct in which they are deeply rooted."[434] Once again, here we are dealing with new protests and blockades, in response to a new government action, that resulted in damage to Claimants.

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[427] *Id.* ¶ 93.

[428] *Id.* ¶ 107.

[429] *Id.* ¶ 114.

[430] *Id.* ¶¶ 109-110.

[431] *Id.* ¶ 110 (emphasis in original).

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

[433] *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence Int'l Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) dated 30 May 2017 ¶ 245 (RL-0038-ENG).

[434] *Id.* ¶¶ 252, 264.

151. *Second*, in their Counter-Memorial, Claimants demonstrated that it is appropriate and usual for claimants to reference and for the Tribunal to take into account facts that occurred prior to the limitation period as background.[435] Respondent does not dispute this.[436] Instead, Respondent asserts that, in their Notice of Arbitration, "Claimants did not ask the Tribunal to consider events prior to the CAFTA-DR limitation period as background facts."[437] There is no requirement under the DR-CAFTA, however, for claimants to designate certain facts in their notice of arbitration as "background facts." In any event, in their Counter-Memorial and as set out above, Claimants have clarified the factual basis for their full protection and security claim (as is typically done in a memorial or statement of claim), and the background facts that the Tribunal may consider in determining their claim.

152. *Third*, as Claimants explained in their Counter-Memorial, in cases involving a series of similar or related actions or omissions, the limitation period under Article 10.18.1 of the DR-CAFTA does not start to run until a claimant first acquires knowledge of the loss or damage suffered as a consequence of the specific measure which it alleges constitutes the breach.[438] Respondent asserts that Claimants' interpretation of the cases in support of their argument is "simply wrong," but fails to distinguish the cases relied on by Claimants.[439]

153. With respect to *Nissan v. India*, for instance, Respondent emphasizes that the claimant's claim crystallized within the limitation period.[440] Respondent, however, ignores the fact that the claimant in that case suffered losses both before and after the cut-off date arising out of the respondent's failure to pay incentives.[441] Like here, however, the claimant's claim was limited to losses suffered after the cut-off date.[442] On that basis, the tribunal held that the claimant's claim was timely, despite the claimant's knowledge of the respondent's failure to pay incentives due before the cut-off date.[443] This was because the respondent had not categorically repudiated its payment obligations prior to the cut-off date,

[435] Claimants' PO Counter-Mem. ¶ 107.
[436] Respondent's PO Reply ¶¶ 174-175.
[437] *Id.* ¶ 174.
[438] Claimants' PO Counter-Mem. ¶ 111.
[439] Respondent's PO Reply ¶ 178.
[440] *Id.* ¶ 177 (discussing *Nissan Motor v. India*, Decision on Jurisdiction (CL-0078-ENG)).
[441] *Nissan Motor v. India*, Decision on Jurisdiction ¶¶ 325-327 (CL-0078-ENG).
[442] *Id.* ¶ 327.
[443] *Id.* ¶¶ 325-328.

and, therefore, the claimant was not on actual or constructive notice that it would incur loss or damage with regard to non-payment of incentives arising after the cut-off date.[444]

154. *Fourth*, the holding of the *UPS v. Canada* tribunal is clear that "continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly."[445] Thus, as Claimants indicated in their Counter-Memorial, should the Tribunal find that the protests and blockades were continuous since 2012 – which it should not do – then this would constitute a continuous breach, and Claimants would be entitled to recover for any loss or damage suffered within the renewed three-year limitation period as a result of that breach.[446] In its Reply, Respondent asserts that the *UPS* tribunal's decision in this regard has been widely criticized and that Claimants disregard the "subsequent practice of contracting parties," which it alleges confirms that continuing breaches do not renew the limitation period under the Treaties.[447]

155. The Tribunal, however, may only take the subsequent practice of contracting parties into account to the extent that it "establishes the agreement of the parties regarding [the Treaty's] interpretation."[448] Respondent has failed to demonstrate that the subsequent practice of *all* of the contracting Parties to the DR-CAFTA establishes the agreement of those Parties regarding the interpretation of Article 10.18.1 of the Treaty;[449] the "subsequent practice" of the *NAFTA* Parties does not assist in this respect.[450] Moreover, Respondent ignores that other tribunals have adopted approaches in line with that of the *UPS* tribunal, including the NAFTA tribunal in *Feldman v. Mexico*.[451]

156. Finally, and contrary to Respondent's contention, the cases of the European Court of Human Rights ("ECHR") cited by Claimants are relevant, because they relate to the protection of property rights, which are also at issue in this arbitration.[452] As Claimants

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[444] *Id.* ¶ 328 (CL-0078-ENG).

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

[446] Claimants' Counter-Mem. ¶ 128.

[447] Respondent's PO Reply ¶ 180.

[448] Vienna Convention on the Law of Treaties, Art. 31(3)(b) (CL-0005-ENG/SPA).

[449] *See* Respondent's PO Mem. ¶¶ 133-135.

[450] *See* Respondent's PO Reply ¶ 180.

[451] *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/99/1, Award on the Merits dated 16 Dec. 2002 (CL-0093-ENG); *see also Marvin Roy v. Mexico*, Award on Jurisdiction (CL-0094-ENG); Claimants' Counter-Mem. ¶ 114.

[452] Claimants' Counter-Mem. ¶ 115.

showed in their Counter-Memorial, the ECHR consistently has held that time-limit rules do not bar claims challenging acts that are continuing.[453] Accordingly, the Tribunal should take into account the ECHR jurisprudence when assessing Respondent's time-bar objection.

Respectfully submitted,

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[453] *Id.* ¶ 115.