THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

Case No. ARB(AF)/18/43

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In the Matter of Arbitration between:

Daniel W. Kappes and Kappes, Cassiday & Associates,

Claimants,

and

REPUBLIC OF GUATEMALA,

Respondent.

- -x

HEARING ON PRELIMINARY OBJECTIONS

Monday, December 16, 2019

The World Bank Group
1225 Connecticut Avenue, N.W.
C Building
Conference Room C3-150
Washington, D.C.

The hearing in the above-entitled matter came on at 9:00 a.m., before:

MS. JEAN KALICKI, President of the Tribunal

MR. JOHN M. TOWNSEND, Co-Arbitrator

PROF. ZACHARY DOUGLAS QC, Co-Arbitrator

Also Present:

On behalf of ICSID:

MS. MARISSA PLANELLS-VALERO
Secretary of the Tribunal

Ms. Daniela Argüello
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C O N T E N T S

P R O C E E D I N G S

PRESIDENT KALICKI: Good morning, ladies and gentlemen. Welcome to this Hearing on Preliminary Objections in ICSID Case Number ARB/18/14, Daniel Kappes and Kappes, Cassiday & Associates versus the Republic of Guatemala. As you know, my name is Jean Kalicki, and I'm delighted to be here with my colleagues Mr. Townsend, Professor Douglas and also with our colleagues from the ICSID Secretariat, Mr. Grob and Ms. Argüelo.

Before we begin, I'd like to ask the Parties to identify who you have with you from your side, including anyone who pay be participating through WebEx. We understand that some of the Respondent's representatives may be participating in that fashion.

So, first for the Claimants.

MS. MENAKER: Thank you, Ms. President, Members of the Tribunal. Good morning.

So, I'm Andrea Menaker, on behalf of the Claimant at White & Case. To my immediate right is Rafael Llano and Agnieszka Zarowna and Eckhard Hellbeck, all from White & Case. And we will have

09:03:33 Victoria Todria from White & Case as well, and the Claimant Daniel Kappes.

PRESIDENT KALICKI: Thank you very much.

And for the Respondents?

MR. JIMÉNEZ: Good morning, Madam President and Members of the Tribunal. My name is Adolfo Jiménez, representing the Respondent, the Republic of Guatemala. To my left is Katharine Menéndez, and to my right is Brian Briz and Arantxa Cuadrado.

Attending remotely by WebEx are from the Attorney General's Office in Guatemala, Luisa Gatica, Mario Mérida, Maria Hernández, again from the Guatemala Attorney General's Office.

Thank you.

PRESIDENT KALICKI: Thank you very much. Welcome to all.

Before we begin with the sequence of arguments envisioned in Procedural Order Number 3, are there any logistical or procedural matters that the Parties wish to raise?

MS. MENAKER: I just note that we realized inadvertently off of the hyperlinked index that we

09:04:44 provided, that both Parties provided, we did not include the Notice of Intent and Notice of Arbitration. We do have hard copies that we could distribute, if needed.

PRESIDENT KALICKI: Thank you. I realized that, and I have downloaded mine. I don't know if either of my colleagues would like a hard copy. I think we're all set, but thank you very much. Any logistical or procedural issues?

MR. JIMÉNEZ: None on our side, thank you.

PRESIDENT KALICKI: Okay. Well, that puts us a little bit of ahead of schedule, which is always better than the alternative, so we can then begin with the Respondent's arguments up to 90 minutes--excuse me, yes, looking in the wrong direction, sorry, the Respondent's arguments up to 90 minutes.

Oh, and I see you have a handout for us, so if you could just give us a minute.

(Pause.)

SECRETARY GROB: Excuse me, do you happen to have a copy for the Interpreters?

(Pause.)

09:06:54 PRESIDENT KALICKI: Whenever you're ready, Mr. Jiménez.

OPENING STATEMENT BY COUNSEL FOR RESPONDENT

MR. JIMÉNEZ: Thank you, Madam President, Members of the Tribunal, Members of the Secretariat.

First of all, thank you very much for allowing us this opportunity to present the Republic of Guatemala's arguments regarding the Preliminary Objections.

Before we get started, we're going to start off with an overview of both the treaty language that we believe is relevant. We're going to then go through the allegations that are being made and the Notice of Intent and Notice of Arbitration. We will then go in and address each and every one of our objections:

First on the fact they've moved under the incorrect provision within CAFTA;

Second, the fact that the MFN claim is not contained within the Notice of Intent and the repercussions of that;

And, finally, with the

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09:07:59 full-protection-and-security claim and address each one. So, getting started--

PRESIDENT KALICKI: Sorry, if I could just ask you to move your microphone a little bit closer, if you're able to do that.

MR. JIMÉNEZ: There we go.

PRESIDENT KALICKI: Thank you.

MR. JIMÉNEZ: This case was brought under the Dominican Republic Central America Free Trade Agreement, which is, according to Claimants, a modern state-of-the-art treaty. This is the language that the Claimants in their submission have used to describe the provision. I first want to go into the goals of CAFTA-DR settlement mechanism because it may not be unique, but it is modern, and it is designed to address certain issues that I think the Treaty Parties wanted to confront.

The first is improving the efficiency of arbitrations. This treaty provision has a specific requirement that there be a Notice of Intent and that it particularized what the Parties are seeking and why. That needs to be disclosed at the outset.

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09:09:05 Secondly, deterring the filing of frivolous claims, addressing any frivolous claims up front early on and not having to wait until the entire process goes through;

Thirdly, protecting the Respondent's right of defense;

And, finally, creating effective procedures for the resolution of disputes. This is important--(microphone goes off)--more importantly are the features that are included within CAFTA-DR as a modern state-of-the-art treaty. It provides for a strict and specific notice requirements. This particular treaty, unlike NAFTA, says for each claim the legal and factual basis and the treaty provision that is at issue must be identified within the Notice of Intent. It provides a specific process for Preliminary Objections. That may not be new, that may not be unique, but the fact that it was incorporated within the Treaty itself is significant, and that a decision was made to make a determination on the admissibility and the validity of claims in the jurisdiction of the Tribunal as a preliminary matter.

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09:10:20 Thirdly, it has a specific provision for derivative claims. It provides investors a mechanism to bring claims on behalf of the enterprise.

So, a long-standing issue and problem that's been discussed at length by many, many commentators was to be addressed within CAFTA-DR, and this was, as we'll see later on, you find it in NAFTA, it was made even stronger and more important within CAFTA.

And then there's a strict limitations to consent, which we believe is a feature that's unique and important within CAFTA. It limits consent on submission of a waiver and a strict three-year limitations period.

Going through and addressing the mechanism regarding derivative claims, it provides a shareholder who owns or controls an enterprise to recover losses sustained by their local enterprise, and it's that standing that's important. All of a sudden, you have a shareholder that owns or controls that can now bring a claim on behalf of the enterprise. It's the specific feature incorporated here. Why was this done? It was done to deal with the fact that

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09:11:45 other--to do it otherwise would disregard the corporate formalities, the idea that corporations are separate individuals legally. It's to avoid benefiting majority shareholders to the detriment of creditors and to the detriment of Minority Shareholders. It's to avoid or lessen the risk of double recovery. It's to avoid conflicting outcomes for the same loss, which can arise unless the issue is addressed at the outset if a majority shareholder can just bring a claim for the enterprise's loss without some protections.

So, there are requirements built in withing the Treaty. Those requirements are: The Award must be payable to the enterprise, so the majority shareholder brings a claim, it's got to go to the enterprise; it doesn't go into the Claimants' pocket.

Secondly, the Award must be made without prejudice to any right that any person may have under applicable domestic law, so other creditors, other individuals can pursue actions on their own.

Thirdly, and very importantly, there's a waiver by the Claimant that's required as a condition,

and it must be submitted beforehand both on behalf of the enterprise and the Claimant if the Claimant is bringing an action for reflective loss.

Finally, the provision that doesn't allow for re-litigation of claims.

Article 10.16.2 requires the Claimant deliver a very specific Notice of Intent. The Notice of Intent must specify for each claim the provision of the Treaty allegedly breached for each claim; the legal and factual basis for each claim; and also the relief sought and the damages claimed. Those three words "for each claim" is something that's within CAFTA. You don't find that in NAFTA; you don't find that in many other provisions. It makes a disclosure early on with the Notice of Intent significant.

Article 10.18(1) limits Guatemala's consent to arbitration and makes such consent contingent on the Claimants' adherence to a strict limitations period. That limitations period is three years, and it's three years from when Claimant knew or should have known that a breach occurred, and that the Claimant or the enterprise incurred loss or damage.

So, if you bring a claim on behalf of the enterprise, it's when the enterprise knew or should have known that a loss was incurred and that there was a breach of the treaty provision.

What we find in what's been in the submissions is that the Notice of Intent and the Notice of Arbitration ignore the requirements under CAFTA-DR, and then the Claimants in their Counter-Memorial and in their Rejoinder ignore the Notice of Intent and Notice of Arbitration. In short, the Notices do not say what the Claimants are now arguing, which makes obviously this argument a little bit more difficult.

I want to turn to the purported investment and the structure that was adopted. This particular chart, which was used in our submission, this is the structure of the purported investment of Claimants in Guatemala. All these facts are in the Notice of Arbitration or have not been disputed by Claimants in this expedited stage of the arbitration.

And from this slide, you can see that Exmingua had been an existing corporation for more

than 10 years when Claimants bought an interest in it, and 16 years when they completed their acquisition in 2012. Exmingua has several projects; only two are in dispute in this arbitration. So, only two projects of multiple projects are at issue in this arbitration.

We prepared two slides regarding the two projects that are at issue that's based collusively on what's been alleged in the Notice of Arbitration or Notice of Intent, and so this first slide in--Slide 9 is a slide on Progreso VII Derivada Project. Here we see with the legend to the right, in green, actions for MEM; in pink, protests and blockades that were alleged within the Notice of Arbitration; and then the amparo proceedings before the Supreme Court and the Constitutional Court in Guatemala involving the License.

Similarly, in Slide 10, again we have an overview of what's been alleged in the Notice of Arbitration that we wanted to provide the Tribunal and we believe will be useful.

So, what claims did--what did Claimants bring as far as a claim? They brought a

national-treatment claim. They brought a most-favored-nation-treatment claim, a minimum standard of treatment that has two components, a fair and equitable treatment claim and a full-protection-and-security claim; and then a claim for expropriation and compensation. Importantly, the most-favored-nation-treatment claim was not contained within the Notice of Intent. It wasn't mentioned, it wasn't discussed, it wasn't referenced. It was only raised in the Notice of Arbitration for the first time.

And importantly, in one expect, one point of the CAFTA Treaty that was complied with by the Claimant is what are they seeking? What's the relief requested? And they were very specific. The relief Claimants requested in the arbitration's included in the Notice of Intent dated May 16, 2018, and the Notice of Arbitration filed on 9 November 2018. There is no reference to a loss of value in Claimants' shares in Exmingua, but to the impact that Guatemala's measures allegedly had on Exmingua's projects and assets. Progreso VII Derivada and Santa Margarita.

09:18:28 Nothing else.

And very importantly, it seeks damages for $500,000 for the concentrate shipment impounded by the State. The Claimant in this case is seeking to recover the damages that were suffered not by Claimant, but by the enterprise.

There are two types of Preliminary Objections that I would like to bring to the Tribunal's attention. Article 10.20.4 under this Article Respondent has objected as a matter of law; an award for claim cannot be made under Article 10.26 of CAFTA for the Claim submitted. CAFTA-DR imposes certain requirements to seek to recover an enterprise's losses that Claimants fail to meet. For objections filed under 10.20.4, Section C requires the Tribunal assume to be true Claimants' factual allegations in the Notice of Arbitration. Respondents have done that. We're not disputing a single fact that's contained within the Notice of Intent and the Notice of Arbitration for purposes of the Preliminary Objections.

Under Article 10.20.5, Respondent has made

09:19:46 several objections that the Claimants are not within the Tribunal's competence.

Slide 14 provides a summary of those objections, and it summarizes in summary form. You have it in our Memorials, but the chart may be useful, and we may get back to it later on to the extent it's necessary. Respondent brings three separate objections based on three deficiencies in Claimants' claim.

The first deficiency has three consequences. The four claims should be dismissed as a matter of law. They are outside the Tribunal's jurisdiction, and they are inadmissible.

The second deficiency makes the most favored nation claim inadmissible because Claimants did not specify it, identify it in their Notice of Intent.

The third deficiency is that the full-protection-and-security claim is time-barred; and, as a result, it is outside this Tribunal's jurisdiction.

I'd like to now turn to certain inconsistencies. I alluded to earlier the fact that

09:20:58 there were a number of contradictions, inconsistencies. I'd like to just point out three in the positions that are taken before with the Notice of Intent and Notice of Arbitration, and then the position that was taken afterwards.

They've changed the facts, the position and Agreements to fix the deficiency in their claims and give a sound response to Respondent's objections, but they cannot. We have just selected three for today, and I'm going to start with this first one, which is the relief requested.

In their Notices, Claimants focus on Exmingua's losses. They made no reference to any impact that Exmingua's losses had in their investment and addressed the alleged injuries sustained by Exmingua's projects and assets. They did not refer to the loss in Exmingua's shares as I mentioned earlier.

Afterwards, in their submissions, they changed their allegations. They said, in their Counter-Memorial and Rejoinder, Claimants bring--make the following statements, which are inconsistent with their claims. They say "loss in value of their direct

09:22:12 and indirect interest in Exmingua" in their Counter-Memorial. They argue in their Counter-Memorial that they're seeking the "value of Claimants' shares in Exmingua which were diminished." They argue in the Rejoinder that Respondent is wrong in maintaining its contention that Claimants are seeking to recover for Exmingua's loss or damage. In the Rejoinder they say, the diminution of value of Claimants' shares in Exmingua.

All of this is new and wasn't included in the relief requested either in the Notice of Intent or in the Notice of Arbitration.

Secondly, in connection with the most-favored-nation claim. In the first quote, Claimants concede that they did not refer to the most-favored-nation claim in the Notice of Intent because the specific facts giving rise to their motion--most-favored-nation claim did not exist at the time they filed the Notice of Intent.

In the second and third quotes, Claimants state that the facts and legal basis for the MFN claim were, indeed, included in their Notice of

09:23:19 Intent--again, an inconsistent position.

Thirdly, they say in connection with their full-protection-and-security claim, they say first--again, before the action was filed--"Exmingua and its consultants, however, were unable to complete the public consultations required for its EIA due to the continuous and systematic protests and blockades at the site since 2012." Every single reference in the Notice of Arbitration and the Notice of Intent refers to continuous blockades and protests dating back to 2012. Afterwards, in their submissions, they argue that it's not based on a single continuing breach; it cannot have been continuous. Elements and statements that are not found within the Notice of Intent and Notice of Arbitration, a completely different position, reversal from what they allege in their Notice of Intent and Notice of Arbitration.

We're going to go through these at length when I address that particular claim.

So, let me start with the first objection.

Respondent's first objection deals with a derivative mechanism that CAFTA-DR provides to an

09:24:47 otherwise covered investor, to seek to recover the losses sustained by the Investor's local enterprise because Claimants seek to recover Exmingua's losses and not Claimants' direct injury, Claimants could only bring their claims under CAFTA-DR-derivative mechanism embodied in Article 10.16.1(b).

However, Claimants brought their claims for Exmingua's losses under Article 10.16.1(a) without meeting the additional requirements of CAFTA's derivative mechanism. As a result, the Claim must be dismissed as a matter of law. This Tribunal has no jurisdiction to hear the Claims, and the Claims are inadmissible. CAFTA's derivative mechanism is included only in a few modern treaties. It is provided to a majority or controlling investor directly and not to the local enterprise. It provides the Shareholder with standing to bring claims on behalf of its enterprise. It admits claims from an investor who owns or controls a local enterprise on behalf of the enterprise.

Article 25(2)(b) of the ICSID Convention extends jurisdiction to a local enterprise only. It's

09:26:05 a significant difference. We find a similar mechanism in the NAFTA Articles 1116 and 1117. The U.S. Model BITs of 2004 and 2012 included perfected similar derivative mechanisms in their Article 24. CAFTA was modeled after the U.S. Model BIT of 2004 and includes a derivative mechanism in Article 10.16. This is the language of CAFTA's derivative mechanism.

As the Clayton Tribunal explained in its January 2019 Award for Articles 1116 and 1117 of NAFTA, both provisions (a) and (b) need to be read in their context. Article 10.16.1(a) states that when a Claimant has incurred loss or damage, the Claimant, on its own behalf, may submit to arbitration a claim. Article 10.16.1(b) provides that, when the enterprise has incurred loss or damage, then the majority or controlling Claimant on behalf of an enterprise may submit to arbitration a claim. If we quickly take a look at other provisions of the Treaty in an integrated fashion, we will see that the distinction between the Claimants' injury and the enterprise's injury embodied in this derivative mechanism is confirmed in several other provisions.

09:27:42 Turning first to Slide 22, the CAFTA-DR Parties conditioned their consents on a few elements. The first element is a three-year limitations period that starts running when the Claimant first acquired knowledge of the alleged breach by the State and the damage that the Claimant itself sustained for claims submitted under 10.16.1(a) or the enterprise sustained for claims submitted under 10.16.1(b). As far as this particular provision, it is clear that there was a limitations period that was wedded to was the action being brought on behalf of the enterprise or was it being brought by a Claimant for its direct damages?

Another example is the waiver requirement in 10.18. The CAFTA-DR Parties conditioned their consent to arbitration on submission of a waiver. Who has to sign this waiver and withdraw from related local litigation depends on who sustained the injury. Again, if the Claimants sustained the injury, then the waiver to be submitted is by the Claimant. If the enterprise sustained the injury, then the waiver to be submitted is by both the Claimant, who is submitting the Claim and the enterprise on behalf of which the

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09:29:06 Claim is being submitted.

There are two more provisions in the CAFTA-DR that I'd like to turn to. Article 10.26 of the Treaty deals with the awards issued under CAFTA-DR, and it makes important distinctions based on who sustained the injury. If the injury was sustained by the enterprise--that is for claims brought under Article 10.16.1(b)--the Award shall be paid to the enterprise, and the Award shall provide that it is made without prejudice to any third-party right under applicable domestic law. Also, Annex 10-E provides that Claims that have been already litigated locally cannot be brought in this arbitration. Litigated by whom? By the Claimant for claims brought under (a) or by the enterprise for claims brought under (b). And Annex 10-E is a "fork in the road" provision.

So, in this case, who sustained the injury? In the Notice of Intent, Claimants explained--Exmingua did--according to Claimants, the Progreso VII Project, the Exmingua Project had an estimated net current value of USD 150 million in 2017, and it has been suspended for years. In connection with the Santa

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09:30:28 Margarita project, Exmingua's project has not received an Exploitation License which would be Exmingua's asset; and, based on the quantity and quality of the mineral resources of Santa Margarita, Exmingua has lost an amount similar to that as the Progreso VII Project.

And finally, as I mentioned earlier, three concentrate shipments are being claimed. These are Exmingua's assets which were allegedly abruptly impounded and the value of those shipments was quantified at $500,000. That is what was requested.

One of the Claimants' arguments that they had no obligation to specify the nature of the damages in their notices, but they were very specific as required by CAFTA in their Notice of Intent about the damages Exmingua allegedly sustained. They referred to the value of Progreso VII, the quality and quantity of Santa Margarita's Mineral Resources, and the value of the concentrate shipments. They were silent as to any other assets that Exmingua had.

Similarly, in the Notice of Arbitration, they referred to the three projects or assets of

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09:31:45 Exmingua and updated the amount in damages they seek in this arbitration. Although Claimants have sought to rewrite their claims after Respondent's Preliminary Objections, there is an allegation that they have not modified. They stated: "The measures at issue were targeted at Exmingua, which also incurred damages as a result of Respondent's treaty breaches." Exmingua's rights were allegedly infringed, according to Claimants; as a result, Exmingua sustained injury. This is the injury Claimants seek to recover in this arbitration. Even if they were allowed to rewrite their claims, they still could not recover under 10.16.1(a) because they would be seeking to recover indirect damages, which are not recoverable under that subsection.

When the Treaty requirements were applied to Claimants' claims, it is easier to understand why Claimants brought their claims on their own behalf. We have seen that Claimants alleged that Exmingua's assets have lost value or have been impounded as a result of Guatemala's alleged breaches. The Treaty's language is clear: Claimants may submit to

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09:32:59 arbitration a claim on behalf of Exmingua to seek to recover Exmingua's loss or damage. However, the Treaty imposes a few requirements on a Claimant who seeks to recover its enterprise's loss.

The first requirement is simple: The Claimant must be a majority or controlling Shareholder of the local enterprise. Here, Exmingua is a local enterprise, and Mr. Kappes is the ultimate sole owner of Exmingua. This requirement is met. The Treaty imposes at least three additional requirements that the Claimants try to circumvent by submitting their claims on their own behalf under Subsection A.

The first one is that any award must be payable to Exmingua, but here Claimants seek an award payable to themselves. Claimants want to circumvent the separate legal personality of Exmingua, and Minerales KC, and get paid here in the U.S. directly by Guatemala. Claimants want to ignore Exmingua's creditors who would not get paid if Exmingua is disregarded, and any payable amount goes to Claimants directly.

And remember, the Treaty expressly provides

09:34:12 that any award payable to Exmingua shall be payable without prejudice to any third party's right under applicable domestic law.

The second requirement is that Claimants should have submitted a waiver by Exmingua and not only by Claimants. This requirement is very important because Guatemala limited its consent to arbitration to a Claimant submitting the enterprise's waiver in Claims for the enterprise's losses. This arbitration is for Exmingua's losses, and Claimants failed to submit an Exmingua's waiver. Guatemala has not consented to arbitrate the Claims Claimants have submitted here.

Moreover, there is an ongoing appeal filed by Exmingua in Guatemala seeking the reinstatement of the very same license Claimants allege in this arbitration that Guatemala has expropriated. This is precisely the type of parallel litigation and potential for double recovery that the derivative mechanisms CAFTA-DR seeks to avoid.

The third requirement is that claims that have already been litigated in Guatemala cannot be

09:35:21 re-litigated here. Exmingua already brought local claims against Guatemala in 2012 and 2016 for alleged lack of full protection and security. The Claims were rejected. Claimants should not be able to re-litigate these claims now.

Claimants' response to Respondent's Preliminary Objections was to rewrite the claims, while Claimants specified Exmingua's alleged losses in their notices, they included no reference to the connection between the alleged direct injury to Exmingua's assets and the indirect injury to Claimants' shares in Exmingua, which is a fundamental basis for any claim for reflective loss.

In the Notices, there was no reference to decrease in the value of the Shares, but instead reference in the decrease in the value of Progreso VII Derivada Project. In any event, Article 10.16.1(a) of CAFTA-DR does not allow majority shareholders such as Claimants to bring claims for reflective loss.

We now turn to review in Slide 28 what the other sources other than the Treaty itself are available to reach this conclusion. No CAFTA Tribunal

09:36:39 has ever decided whether claims for reflective loss by a Majority Shareholder are admissible under Article 10.16.1(a). This is the first case or the first tribunal we're aware of that will deal with that specific issue.

ARBITRATOR DOUGLAS: Could I just ask you a question about why you characterize this objection as an admissibility objection? If you go back to your table, it's clear on that slide there, but on the table on Slide 14, it's the same that this particular point on whether or not you can bring a claim for effective loss, you say, is a question of admissibility.

Just taking the text on Slide 21, of 10.16, essentially what you're saying is that the Claimant doesn't have the option to choose between the two possible recourses there, that it has to choose the option that is applicable by law.

So, aren't these two options essentially the two different offers to arbitrate, what your position is that you have to accept one of them, you don't have a free choice as between them, but if you accept the

09:37:56 wrong offer to arbitrate, doesn't it go to consent and, therefore, jurisdiction? In other words, why do you say it's admissibility?

MR. JIMÉNEZ: Well, we actually say it's all three. We say that it--

ARBITRATOR DOUGLAS: It sounds like a hedge to me. It can't be all three.

MR. JIMÉNEZ: It's not basically because there are different grounds for dismissal. One is the waiver requirement creates a jurisdiction issue, so that's a significant issue. Guatemala did not consent to arbitrate if there isn't a waiver.

ARBITRATOR DOUGLAS: That's a different issue, but I'm talking strictly as to--if you're right that you have--you don't have a free choice as between whether you go down 10.16.1(a) or 10.16.1(b), aren't they two different offers then, and if you choose the wrong offer--if you accept the wrong offer, doesn't that go to consent and therefore jurisdiction?

MR. JIMÉNEZ: What we will maintain essentially is that you could bring a claim under both, depending on the damages that you're seeking to

recover. If you're seeking to recover your own damages as a shareholder, which you may have incurred because of an expropriation, for example, you can go under (a); or if for some reason your ownership rights had been infringed on, you can move under (a). If you're seeking to recover the indirect damages that were suffered by your enterprise, then you need to move under (b). So, it's the damages that were suffered that would control which one you would choose. Does that answer your question?

ARBITRATOR DOUGLAS: To be frank, I'm still a little bit uncertain as to whether or not it's properly characterized as "admissibility" rather than "jurisdiction." This is a notoriously difficult issue in these cases as to what the correct characterization is, but perhaps if both Parties have a bit more to say about that, that might be interesting.

MR. JIMÉNEZ: We may. We classify it primarily because of the standing issue. It's the fact that, under the terms of the Treaty, the language in the Treaty, the Treaty doesn't provide standing to the Party, so that's why we classified it as

"inadmissibility." I don't know if any of my colleagues have anything they want to add.

Okay. Turning back to Slide 29.

Although there are no CAFTA-DR cases, CAFTA was modeled after U.S. Model BIT of 2004, and commentators agree that the identical derivative mechanism of a U.S. Model BIT does not allow for reflective loss claims under the equivalent to Article 10.16.1(a) of the CAFTA-DR.

We now turn to the other Treaty, which includes a derivative mechanism similar to CAFTA's, and that is NAFTA, and it's Articles 1116 and 1117. NAFTA Chapter Eleven contains a very similar mechanism as in CAFTA, and it's important to note that CAFTA Parties have consistently adopted the position that Article 1116, which is the equivalent of Article 10.16.1(b) of CAFTA-DR does not allow claims for reflective loss. No NAFTA Tribunal has ever awarded claims for reflective loss under Article 1116. The most recent NAFTA Award on this issue, Clayton, discusses at length and states that Article 1116 of NAFTA does not allow for reflective-loss claims, and

the U.S. submission in Clayton stated clearly that reflective losses are not recoverable under Article 1116 of the NAFTA.

PRESIDENT KALICKI: Have any of the NAFTA State Parties addressed in their submissions the implications of that argument for Minority Shareholders? I know you've said in your pleadings here that that's not an issue we need to resolve because we're not faced with a Minority Shareholder, but obviously we're being asked to interpret a Treaty in its entirety and in its full context.

And so, I'm just curious what the implications would be of the argument that you're asking us to advance; and, if so, it seems to me the implications would be that a Minority Shareholder has no avenue of recourse under either NAFTA or CAFTA-DR. It's dependent on whether the majority or controlling shareholder chooses the path of pursuing damages on behalf of the enterprise, in which case it would benefit from that, but it's entirely dependent on whether that would happen.

If I'm right that that's the implication of

your argument, I'm curious whether any of the State Parties, the Contracting State Parties who you say have uniformly adopted this definition have come out and said "that was our intent. Our intent was to not provide an avenue for Minority Shareholders."

MR. JIMÉNEZ: Okay. Just to clarify our position in connection with Minority Shareholders before I turn to whether there's been any other submission, a Minority Shareholder can pursue a claim when a claim matures or is present so, it's possible at some point a particular investment is destroyed, and there a corporation is essentially liquidated, and that at that point the loss in value to that Shareholder is because of a violation of a treaty obligation may be actionable, and they can pursue it under Subsection (a).

PRESIDENT KALICKI: Sorry, just explain that further to me.

So, in an expropriation situation where there is no longer any investment, you're saying at that point it is no longer a reflective-loss claim essentially because the Minority Shareholders' Shares

have been rendered a zero value, but any of the other treaty claims presumably would not be available to the minority?

MR. JIMÉNEZ: Not until that Minority Shareholder has sustained a direct loss, essentially.

And then regarding the submissions that we've seen, we've seen no direct discussion by Treaty Parties on Minority Shareholders' rights, and so it's possible it's in there; we had the U.S. submission in Clayton that was submitted. I don't know if we have the reference, it's RL-0008, is the U.S. submission where it discusses the U.S. position on the non-recovery of reflective loss under Article 1116.

ARBITRATOR DOUGLAS: It might be said that it's slightly curious if all the NAFTA Parties agree, why doesn't the FTA issue an interpretation? There's all sorts of reasons why the FDA doesn't do things, but the question might be asked, if they all agree then why not an FTA interpretation?

MR. JIMÉNEZ: I wouldn't be able to answer that.

ARBITRATOR DOUGLAS: Or FTC, whatever it is.

MR. JIMÉNEZ: So, turning to Slide 31, we'll jump directly to the NAFTA cases just because I'm afraid I may be to be short on time. We've prepared two charts or we have summarized why none of the cases support Claimants' positions, and those are the NAFTA cases.

Again, no NAFTA Tribunal has ever awarded reflective-loss claims under Article 116. To the contrary, in the very last case decided by a NAFTA tribunal in which the issue was addressed, again Clayton, the Tribunal determined that Article 1116 of NAFTA does not allow for claims for reflective loss.

Turning to Slide 33, this case, the case before the Tribunal represents the exact situation that CAFTA-DR's derivative mechanism seeks to address. Claimants are Exmingua's sole shareholders. If the Tribunal holds that Claimants' rewritten claims for reflective loss survive Respondent's Preliminary Objections, the protections included in CAFTA-DR to creditors and against double recovery and contradictory outcomes, among other goals, would be rendered meaningless.

As the Mondev Tribunal said 17 years ago, "having regard to the distinctions drawn between claims brought under Articles 1116 and 1117, a NAFTA tribunal should be careful not to allow any recovery in a claim that should have been brought under Article 1117, to be paid directly to the Investor." Seventeen years later, we ask that this be--that the meaning within CAFTA that's only been strengthened under CAFTA be enforced.

Turning now to a review of our second objection, where the Claimants attempt to ignore that the Notice of Intent requirement under 10.16.2 of the CAFTA-DR was not respected. Claimants did not include the alleged breach of the most-favored-nation treatment provision in their Notice of Intent as required under Article 10.16.2 of CAFTA-DR. As a result, the Claim is inadmissible.

The Treaty requires a specific Notice of Intent as a condition to initiate a claim. It states that a Claimant shall deliver a written notice of its intention to submit the claim to arbitration, and the Notice shall specify for each claim the provision of

this Agreement alleged to have been breached, the legal and factual base for each Claim, and an approximate amount of damages in the relief sought.

This is important if we're going to give life and allow a preliminary objections proceeding to go forward. There is going to be early resolution of issues, if this particular notice requirement isn't respected, and if we don't give meaning to the fact that each claim is identified within the language in the Treaty.

Did Claimants comply with the Notice of Intent requirement? That response has already been provided by Claimants. They said they did not. At Paragraph 98 of their Rejoinder, they say: "Claimants have never suggested that they referenced their MFN claim in their Notice of Intent. The specific facts giving rise to that claim did not exist at the time Claimants submitted their Notice of Intent."

Claimants further admit that they included the MFN claim in the Notice of Arbitration. That's at Paragraph 91 of their Counter-Memorial.

Returning to the factual basis of Claimants'

09:49:58 MFN claim. Claimants allege that Exmingua's projects receive less favorable treatment than the Respondent according to Escobal, a silver mine operated by the Guatemalan subsidiary of the Canadian company. More precisely Claimants' MFN claim is based on two decisions in the Escobal case that you will see in blue in the timeline: First, the Supreme Court Decision of September 2017, which reinstated the Escobal license that had been suspended on the same grounds as Exmingua's was, while Exmingua's license has never been reinstated.

Second, the Constitutional Court Decision of 3 September 2018 which confirmed the suspension of the Escobal license in less than a year, while Exmingua's appeal against the suspension was pending since June of 2016.

So what was the factual basis of Claimants' MFN claim in their Notice of Arbitration? On Slide 39, you can see what is alleged within the Notice of Arbitration. Claimants claim that events giving rise to the claim occurred more than six months but less than three years prior to the submission of

09:51:14 this Notice of Arbitration. However, in Paragraph 63 they state: "In contrast with Exmingua's case, the Guatemalan Supreme Court reinstated Escobal's Mining License in September 2017. On 3 September 2018, the Constitutional Court ruled that the Escobal Mining License would remain suspended."

So, both the September 2017 and September 2018 decisions in Escobal existed, and September 2017 decision could have been referenced and incorporated.

As the Slide 40 depicts, Claimants decided when they filed their Notice of Arbitration on 9 November 2018 not to make any reference or include--I'm sorry.

When they filed their Notice of Intent on 16 May 2018, they didn't include any reference to the Escobal case, even though a ruling had been handed down in September 2017. Then when they filed their Notice of Arbitration in 9 November 2018, they did assert a claim for most-favored-nation state.

The fact that the September 2017 Decision was not specified in the Notice of Intent is fatal for

09:52:37 the MFN claim because the Notice of Intent requirement is mandatory. In the pleadings, Respondent interpreted 10.16.2 in detail in accordance with the means of interpretation listed in Article 31 of the Vienna Convention on the Law of Treaties, specifically the ordinary meaning, the fact that tribunals should give--look at its context, and the object and purpose of a provision within a treaty all confirm that the Notice of Intent requirement is mandatory.

In the interest of time in these two slides, the Tribunal can find the references to the specific sections of the pleadings, including Respondent's analysis.

Turning to Slide 43, because Claimants did not specify the MFN claim in the Notice of Intent and the Notice of Intent requirement is mandatory, the MFN claim is not admissible. In fact, other tribunals have dismissed claims for failure to meet the Notice requirement under CAFTA-DR and similar Treaties with a less stringent language than CAFTA-DR's.

ARBITRATOR DOUGLAS: Just a question again. Suppose you're right that it is mandatory you need to

09:53:59 notify the Claim, does that mean that there is no possibility during the course of the proceedings to amend or supplement claims? I mean, generally, under the Arbitration Rules, that there is such a power, and if I think about my dreadful experience in English Courts battling away on questions about amending pleadings where the rules are very, very strict, obviously you need to apply to the court, you have to seek permission to amend, and then there is a balancing test about whether or not you have a justifiable reason for asking to amend so late and whether or not it's going to cause prejudice to the other side and so on.

MR. JIMÉNEZ: So, I believe the answer is that it depends on what the nature of the amendment is. If it's a new claim, you need to submit a new claim, and the Treaty provides for what you need to do, and it's deemed submitted at the time that it's received. But you need to meet the requirements within the Treaty. You can't circumvent it by simply saying "I'm just going to amend my claim," and so that's very different, but you need to meet the

09:55:05 cooling-off period, which does provide a jurisdictional issue. You need to meet all those requirements before you assert a new claim.

If you are making a correction to a pleading, that may be a case, but you need to meet the rules and the requirements that are in force in this particular case.

ARBITRATOR DOUGLAS: So suppose in a hypothetical situation, after document disclosure, you discover--a Claimant discovers that there had been other entities that have been treated in a better way, and at that point you want to raise an MFN claim, that couldn't practically be done within the same proceedings because you would have to file a new notice and have a cooling-off period and so on?

MR. JIMÉNEZ: That's what I believe the Treaty requires. You would need to meet those requirements within the Treaty. You wouldn't just be able to add it on.

You could bring an ancillary claim provided you meet the requirements, if it truly is an ancillary claim. We don't have the characteristics or the--or

09:56:12 they don't meet the requirements in this case to do so.

PRESIDENT KALICKI: I know that's an issue you're planning to get to, I see that later in your slide deck, the issue of ancillary claims, but let me, since the issue has been raised now, let me just ask a follow-up question. And if you need to think about this one more, you could save it for the afternoon as well. I know you're short of time.

But on this issue of whether the DR-CAFTA allows amendments to add claims as opposed to simply corrective or clarifying amendments, Article 10.20, the Preliminary Objection section, Article 10.20.4 in particular which the Parties have discussed a lot, specifically refers twice to an amendment to the Notice of Arbitration, that neither Party has mentioned that in their pleadings, and I was curious why since it specifically refers to an amendment to Notice of Arbitration in both 4(a) and in 4(c). It doesn't say what type of amendment the Treaty Parties are looking at there, whether they're thinking about a new claim or just, as you say, a correction, but it

09:57:29 obviously envisions some form of amendment as being permissible.

Interestingly enough, there's no equivalent reference to amendments in the NAFTA, so this is something that's spelled out in DR-CAFTA anew, and I'm curious what the implications are of that. Various NAFTA Tribunals, both Metalclad and Methanex under the ICSID Rules and UNCITRAL Rules respectively, have allowed amendments even though there is no reference to "amendments" in the NAFTA, and here we have a reference, so what implications do we read from that? But you can think about that, if you wish, and revert to me.

This doesn't go to your primary point about whether what's been pled so far is insufficient. It goes to your secondary point about whether it's too late to invoke the ICSID ancillary-claim provision.

MR. JIMÉNEZ: We can take that up this afternoon? Is that okay?

PRESIDENT KALICKI: Yes.

MR. JIMÉNEZ: If we have extra time we'll do so, but I'm not anticipating we will.

09:58:39 Turning to Slide 43.

And before I leave the point, just as a general point on amendments and so forth, the Preliminary Objections and the tight time restrictions provided by CAFTA is an opportunity for Parties to go and address these issues early on. If something is not wrong, it does provide Claimants the opportunity to bring new claims, but that's what they need to do; otherwise, the whole function of expedited process is undermined, so I just wanted to make that point early on as far as the right to amend it, but we will address the Tribunal's question this afternoon.

In Aven v. Costa Rica, a case under the CAFTA-DR, the Tribunal said that Article 10.16.2 DR-CAFTA requires more from a Claimant, the notice to submit a claim to arbitration must specify, not only the specific provision of the Treaty alleged to have been breached, but the legal and factual basis for each claim. Since Claimants failed to timely plead a claim for breach of full protection and security, this claim is inadmissible in limine. Similarly here, the Claimant did not specify the MFN claim in the Notice

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of Intent, this claim is inadmissible.

So, what was Claimants' response to Respondent's objections? Their response and their arguments fail:

First, in addressing the basis for the MFN claim.

Claimants attempt to rewrite the factual basis for the MFN claim and minimize their failure to include the MFN claim in their Notice of Intent, ignoring their own allegations in the Notice of Arbitration. While stating in the Notice of Arbitration the factual basis for the MFN claim were both the 2017 and 2018 decisions in Escobal, now in the Counter-Memorial and Rejoinder, Claimants allege that the factual basis for the MFN claim is only the 2018 Constitutional Court Decision in Escobal.

The Claimants' first response fails. If the MFN claim is based on the 2018 ruling, then Claimants do not comply with the six-month cooling-off period under Article 10.16.3 of CAFTA-DR. Remember, the Claimants submitted the Notice of Arbitration on 9 November 2018, therefore less than two months elapsed

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between the 3 September 2018 Ruling and the Notice of Arbitration. Claimants are well-aware that a tribunal will not hear a claim that does not comply with the six-month cooling-off period.

They, themselves, Claimants in their submission, state in their Counter-Memorial, and specifically at Paragraph 87, they point out that where the State Parties intended to condition the submission of a claim on the satisfaction of certain requirements, they did so expressly, using the terms "provided that six months have elapsed since the events giving rise to a claim, a Claimant may submit a claim." they're using this as an example of something that's specifically mandatory language within the Treaty, so they, themselves are using as an example the six-month cooling-off period as something that's mandatory, and so they're essentially proving our case that they can't maintain the MFN claim because they failed to respect this claim because the Treaty makes it mandatory.

PRESIDENT KALICKI: Let me just make sure I understand your position. I understand your position

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with respect to the 2017 Court Decision that it pre-dated the Notice of Intent, and therefore if they had intended to invoke it, they should have invoked it.

But with respect to the 2018 Court Decision which postdated the Notice of Intent, I take it your position is that if a State takes a new measure after a Notice of Intent has already been filed, the only way a Claimant can complain about the new measure is if it gives a second Notice of Intent, waits the six months again, and only then either files a new case or makes an application to add it as an ancillary claim, although if you wait the six months, it may be too late under the rules to make such an application, but that for a new State measure, you still have to go through the second Notice of Intent and the cooling-off period again; that's your position?

MR. JIMÉNEZ: That's correct. Basically, it would have to be a new submission based on that new development, and you have to respect the six-month period.

And Claimants themselves point to this

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language as being mandatory, so it's not something that we were at odds necessarily with. They use this as an example of mandatory language that's within the case.

And yeah, just to point out, it's the intent to submit a claim on the satisfaction of certain requirements, so what Claimants state in their Counter-Memorial at Paragraph 87 is precisely that.

So, there was an argument in the rejoinder that we shouldn't have raised this, we should have raised this earlier, but it's impossible for us to raise something earlier that they did not raise beforehand. It's just from a briefing and due process standpoint, there is no way we could have responded any earlier than through our response, so I just wanted to point that out.

Turning to Slide 47, and the second argument. The Notice of Intent did not include the legal and factual basis for the Claim. In response to the Claimants' Preliminary Objection under Article 10.16.2 of CAFTA-DR, Claimants argue that although the MFN was not included in the Notice of Intent, the

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10:04:47 Notice of Intent did include the factual and legal basis for the Claim.

Claimants' second response fails as well. Claimants stated that the facts giving rise to that claim did not exist at the time Claimants submitted their Notice of Intent. If the facts giving rise to the claim did not exist, how could Claimants have included it--the MFN claim in the Notice of Intent?

The Notice of Intent itself only contrasts the treatment received by Exmingua with the treatment received by Guatemalan companies. No investors of Canada or of any other State are mentioned in the Notice of Intent.

Including the factual and legal basis of the Claim is not enough. The specific language of the Treaty requires that for each claim, the provision of the CAFTA-DR alleged to have been breached and the legal and factual basis for each claim must be specified. It is clear that Article 10.4 of CAFTA-DR, most-favored-nation treatment, was not specified in the Notice of Intent. Therefore, Claimants' second argument also fails.

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10:05:57 Third, Claimants argue that even if the Notice of Intent requirement is mandatory, noncompliance does not have consequences because Article 10.16.2 does not contain wording such as "provided that X" or a "Claimant may submit a claim" or "no claims may be submitted." Claimants add the Respondent provided no authority proving otherwise. This statement by Claimants is simply wrong.

The record is full of cases, and we provide them here on Slide 50, the full of cases where, even in the absence of restrictive language, in the absence of there being no consequence specifically identified in the language, mandatory language is enforced, and we provide these cases both in Slides 50 and 51 and summarized them; and in the interest of time, I will move forward.

On the other hand, the cases that Claimants cite at Slide 52 and 53 are inapposite to this arbitration. We summarize these cases both in Slides 52 and 53, but essentially there is not one case that arises under CAFTA-DR, and they just don't apply to the facts in this particular case.

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10:07:31 Slide 54. The fourth argument the Tribunal should disregard because Claimants' last minute argument in connection with the MFN claim that it's an ancillary claim, just doesn't apply in this particular case. Number one, it runs afoul of Rule 14.2 of Procedural Order No. 1, which provides that the pleadings in the second round must be strictly responsive and limited to rebutting the pleadings of the other Party in the immediately preceding round. Here Claimants did not rebut Respondent's reply. Once again, they rewrote their MFN claim, it is now an ancillary claim. This is contrary to ICSID Arbitration Rule 40.3. ICSID Rule 40 covers only ancillary claims, that is, claims ancillary to the claims already made. This isn't really a claim that's ancillary to any claim that's already made.

An ancillary claim can only be brought if there's a valid principal claim. In the present case--

PRESIDENT KALICKI: Sorry, let me just go back to your prior point where said it's not ancillary to any other claim. As I recall, the language in

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10:08:56 ICSID Rule 40, it speaks about ancillary claims and additional claims. They're two separate categories. I've dealt with this before in some of my writings about what those two words mean when juxtaposed with each other. But in any event, even accepting your points that it may or may not be an ancillary claim, would it qualify as an additional claim? Do we need to parse the word "ancillary" since the word "additional" is also in the ICSID rule?

MR. JIMÉNEZ: First, the point I would bring out is that no request has been made to bring a claim, so where this is brought--

PRESIDENT KALICKI: I understand completely your point that the procedures were not followed. I take that on board.

MR. JIMÉNEZ: Right.

PRESIDENT KALICKI: I'm just addressing your second point where you said this isn't really ancillary in nature, and my question is do we have to decide what it means to be ancillary in nature when the rule also talks about additional claims?

MR. JIMÉNEZ: Correct. If it's an

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10:09:54 additional claim, it's our position it would still need to comport with the CAFTA treaty requirements, so if it comported, which means they bring in a new claim, they're not foreclosed from bringing a new claim, and it may not to be consolidated in the future. The question is can they bring in another claim validly and still be in compliance with the treaty requirements. If so, then there may be an opportunity. I just don't see how they can meet all the different elements that are required under the Treaty; otherwise, we just disregard the Treaty, but that's what I believe is the critical issue is, can you do so in accordance with what the Treaty provides for.

So, in Slide 55, even if Claimants' claim were valid and the MFN claim could be considered ancillary, they couldn't add it to this particular case. They're not attempting to amend previously submitted claims in consideration of facts and events that occurred after the submission. This is a critical distinction here. This isn't something that occurred during the course of the process. It's not

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10:11:10 something that happened or developed or that they just discovered. It's something that's been in existence since before the Notice of Intent was filed. And they just didn't meet the requirements that the Treaty imposes. Thus, the Treaty--the Tribunal should not consider Claimants' fourth argument, and to the extent that it does, it should be disregarded.

I would like to point out that, out of fairness, if Parties can just bring in new claims and add ancillary claims, "let me just change what I said," then the whole Preliminary Objections process is undermined and frustrated, and we give no effect to that specific provision designed to provide an expedited resolution of those issues.

I turn now to the third objection, lack of full protection and security.

Claimants were well-aware at least six years before the submission of the Notice of Arbitration of Guatemala's alleged submissions, based on Claimants' Notice of Arbitration. As a result, the Tribunal should not have jurisdiction to decide the Claim. What does 10.18(1) provide? It states that more than

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10:12:26 three years no claim may be submitted to arbitration under this section if more than three years have elapsed from the date on which the Claimant first acquired, or should have first acquired, knowledge of the breach, and from the time that it has incurred or lost damage. I would like to point out again that it specifically identifies or the enterprise for "claims brought under Article 10.16.1(b)."

So, it's knowledge, it's when it first knew or should have known, and it's either the enterprise for actions brought under 10.16.1(b) or by the Claimant if it's brought under 10.16.1(a). The Treaty provides when the limitations period begins to run, and that's again when the Claimant knew or first should have known.

The Critical Date. There should be no dispute of what is the Critical Date. It's three years before the Notice of Arbitration was submitted, so that's November 9, 2015. If we turn to the Notice of Intent, if we turn to the Notice of Arbitration, there is no allegations of any kind in the notices about new protests, about blockades after November 9,

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10:13:37 2015. There are no allegations that anything changed after this date. There are no allegations in the Notice of Arbitration that anything erupted or developed after this date that led to protests or blockades that were not already taking place. I'm going to go through what the Notice of Arbitration states because a thorough review leaves no question. There's just no illusion to anything occurring that's new, that's after November of 2015. It states--it refers to February 2012, and this is under the factual basis for the Claim, that section of the Notice of Arbitration. It's not in the background section of their submission.

In the Notice of Arbitration it says, one month after February 2012, and then it references two months later, ongoing unlawful blockade of the Progreso VII Project.

Paragraph 43, it says on September 3, 2012, Exmingua filed an amparo action alleging illegal arrests, harassment, injuries, threats and coercion about the Project's workers that occurred on the Project site.

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10:14:52 I want to turn to, in its entirety, Paragraph 45 which Claimants had previously referenced, it reads: "Following considerable efforts by Claimants, on 25 May 2014, the exploitation activities of Progreso VII resumed and, by year-end, Exmingua made its first concentrate shipment. Irregular blockades continued, however, without effective responses from the State." That's their allegation.

Again, Paragraph 52, which they've also used, it says: "To compound these problems, three months after one of the gate blockades was lifted and Exmingua's activities in Progreso VII resumed." Again, it's only one of the gates' blockades was lifted, presumably the other gates continued to be blocked.

The Santa Margarita Project also has this very same language about continuance and systematic protests since 2012, so here on Slide 60, I go through each one of those. In the conclusion in the Notice of Arbitration is that, again in Paragraph 50, it says: "Meanwhile, the continuous blockades and protests

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10:16:01 severely affected both of Exmingua's projects."

In Paragraph 56, it states: "In response to the continuous blockades, and as part of Exmingua's efforts to protect its investment, on 22 April 2016, Exmingua filed an amparo against the President of Guatemala," et cetera.

So, these particular allegations is what's contained in the Notice of Arbitration. They're summarized here on Slide 62, and it all goes to a continuous and systematic starting back since 2012 when they became complete owners of the Project, so it's an event that's never changed.

We want to point out that the Ansung Case, which I believe is very relevant, it's not a CAFTA case, but it does provides the same discussion regarding very similar language of how a continuous series of events should be handled, so here in Ansung involving a construction of a golf course that was--suffered a continuing blockade. It states: "The limitation period begins when an Investor's first knowledge of the fact that it has incurred loss or damage, not with the date on which it gains knowledge

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10:17:28 of the quantum of that loss or damage." So, to the extent they're claiming that we didn't know what the damages were, that's not enough. If you know that you suffered damage, that's when it starts to count.

"Even assuming a continuing omission breach," the Ansung Tribunal stated, "and even assuming Ansung might wish to claim damages from a date later than the first knowledge of China's continuing omission, that could not change the date on which Ansung first knew it had incurred damage."

After the Notices of Arbitration were filed and after the Preliminary Objections, Claimants brought in brand-new arguments that are completely in contradiction of what's in their notices. They attempt to rewrite their full-protection-and-security claim in order to circumvent the three-year limitations period. While in their notices, Claimants insisted that Claimants omissions were continuous and systematic. They now allege that Respondent's omissions only began in early 2016, and the full-protection-and-security claim is not based in a single continuing breach.

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10:18:39 It's impossible. If, turning to Slide 65, if we look at--analyze what the Notices said, the word "wave" is not contained at all in those Notices. They not to state the word "new" in connection with protests or blockades anywhere. They do not make any references to a specific protest or blockades in 2016 or later. All references are to "continuous," "ongoing," "continuous and systematic," "continued."

With their Counter-Memorial, Claimants filed a series of exhibits to supplement their claim. Those exhibits, all they do is prove, if you will, that these were continuous and systematic blockades. Turning to Exhibit C-0015, it says: "Since the Year 2012, several social groups are opposing mining activities. This situation remains to this day and has prevented the Project from being presented to the community." This was a letter from Exmingua to the Ministry of Environment and Natural Resources, provided by Claimants and it's dated 7 April 2017.

Another exhibit submitted says this: "Since 2 March 2012 the residents of communities located in San José del Golfo blocked the entrance to the

company." This is a news article submitted by Claimants dated 26 March 2016.

Then they submitted a series of documents that we believe should be disregarded again because they were submitted late, not with their Notice of Arbitration, but they're misleading because the protests that they're referencing here are protests before the Ministry of Energy and Mines and not protests and blockades that are in front of their facilities, so those should be disregarded.

Finally, even if it were true that the protests before 2016--the protests before 2016 were distinct, the Claim is still time-barred under Corona. In Corona, the tribunal explained that where "a series of similar and related actions by a Respondent State is at issue, an Investor cannot evade the limitations period by basing its claim on the most recent transgression in that series." Here, Respondents alleged omissions or both. Similar because they all involve Respondent's alleged failure to provide police protection to protect Exmingua from the community's protests and blockades and related because they all

concern Exmingua's Projects. Therefore, Respondent cannot base its full-protection-and-security claim on the purported most recent transgression.

Second, Claimants now alleged that in the Notice of Arbitration, the pre-2016 events were only referred to as "background facts." However, as we've seen, it is clear that the factual basis of the Claim in the Notices were the continuous and systematic protests since 2012. Claimants' recharacterization of the pre-2016 events as mere "background" should be rejected as the Tribunal in Ansung stated. In Ansung, the Tribunal stated: About these multiple and clear pleadings, the Tribunal cannot accept Ansung's attempts to characterize these pre-October 2011 dates in its Observations at the Rule 41(5) Hearing as mere background information."

In conclusion, Respondent respectively requests that the Arbitral Tribunal dismiss all claims submitted by Claimants:

First, as a matter of law, an award in favor of Claimants cannot be made under Article 10.26 of CAFTA.

The Claims are inadmissible because Claimants lack standing in this arbitration initiated under Article 10.16(a) of the Treaty to seek to recover Exmingua's losses or damages or a reflective loss.

Three, the Claims for Exmingua's losses are not within the Tribunal's jurisdiction because Claimants did not submit a waiver by Exmingua. As a result, Guatemala has not provided its consent to arbitrate the Claims for Exmingua's losses.

Fourth, Claimants failed to specify the most-favored-nation treatment claim in their Notice of Intent and, as a result, the Claim is inadmissible.

Fifth, Claimants' full-protection-and-security claim is time-barred and, as a result, it is not within this Tribunal's jurisdiction.

We ask that the Tribunal issue an order awarding the Republic of Guatemala its share of the arbitration costs and the attorney's fees it incurred.

We close by pointing out again that CAFTA-DR is a modern, state-of-the-art treaty which

incorporates enhancements and protections. Dismissing Respondent's Preliminary Objections would undermine these improvements. It contains, CAFTA-DR's specific Notice Requirements requiring that the Claims be identified early on to avoid having to go weeks, months, years into a process with items that could have been resolved early on. It provides for an expedited process to dispose of deficient claims. It provides a mechanism that the Treaty Parties specifically developed and wanted to execute on to deal with the difficult issue of reflective loss.

And finally, to deter submission of deficient claims.

We ask that the Tribunal enforce the CAFTA-DR's provisions.

Thank you very much.

PRESIDENT KALICKI: Thank you very much.

Questions, John?

ARBITRATOR TOWNSEND: No.

ARBITRATOR DOUGLAS: No.

PRESIDENT KALICKI: Thank you very much.

So, we continue to be a little bit ahead of

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the original schedule. We had envisioned a 30-minute morning break, so if we start that now, we will resume at five minutes to 11:00. Okay?

Thank you very much.

MR. JIMÉNEZ: Thank you.

(Pause.)

MS. MENAKER: Madam President, can I--I just note that I thought on the schedule we were having a 15-minute break. We're happy to take the longer, but we will be ready to go in 15 minutes, if the Tribunal would prefer.

PRESIDENT KALICKI: Well, I certainly don't object to a shorter break. The Schedule had provided for 30 based on some of the conversation in our procedural conference call where I thought there was a request for that, but if you no longer need it, we can certainly resume in 15 minutes.

MS. MENAKER: We're happy to resume until 15.

PRESIDENT KALICKI: Okay. So, 10:40--why don't we say 10:45 at this point just to give everyone a minute or two's grace. Thank you.

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(Brief recess.)

PRESIDENT KALICKI: So welcome back to counsel after the morning break. We are now ready to resume with the Claimants' arguments.

During the break we've had a request from the interpreters that I remind counsel to try to take things slow. They're having a little trouble keeping up.

And I apologize to our interpreters that I did not make such a reminder during the First Session, but if you could bear it in mind, and we will continue to remind everybody as the day goes forward.

OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

MS. MENAKER: So thank you again, and good morning again, Madam President, Members of the Tribunal.

So I will begin this morning by just very briefly summarizing some key facts and background in order to put the objections and our responses in context.

As you heard and as you've seen, Mr. Dan Kappes, the Claimant here, along with his company,

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Kappes Cassiday & Associates, have directly and indirectly invested in Guatemala, and particularly through Exmingua, in certain mining projects, and those are under the umbrella of what we call the "Tambor" Project, which is a gold region in Guatemala. And there are two adjacent areas in which Exmingua holds certain mining rights, and those are Progreso VII and Santa Margarita.

This morning, we heard that Exmingua, they said something like these are two of their projects, and there are others. Just so the record is clear, there are no others. This is what Exmingua holds are the mining rights in these two projects.

Mr. Dan Kappes is a mining and metallurgical engineer with over 45 years of experience in multiple areas, including heap-leach mining, and does everything from the precious metals, heap-leach mining, engineering, the design work, feasibility studies for these types of projects, laboratory, field testing and the like, and is involved in mining projects around the world. And most of this work is done through his company, KCA, which is constituted in

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Nevada.

Now, the crux of our claim, of course, is that Respondent has breached its treaty obligations with respect to with Claimants' investments in Guatemala, and more particularly with respect to the Progreso VII project, or I should back up and say that prior to the testimony that Claimants invested in Guatemala, there are been some exploration work done on these mining sites, quite a lot, in fact, and then Claimants purchased those rights and reviewed that data, did other work, and then went forward in moving the areas along and perfecting their mining rights. And they sought and obtained in September of 2011 a 25-year exploitation license for Progreso VII.

Unfortunately, quite immediately after receiving that Exploitation License, were an eruption of protests and blockades that prevented Claimants from accessing their mining sites. And that last approximately two years, until with the assistance of the police, the blockade was ended, and Claimants were able, and Exmingua, were able to gain access to their mining site, and that was in 2014.

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Then as of 2014 Claimants were finally able to begin operations, and they began doing that. They had a laboratory on site. They had a modular facility on site that they brought down and reconstructed. They engaged in construction. They had open pits. They had tailings ponds and the like. They began mining on Progreso VII. They began then to work with that ore, and manufactured concentrate and actually had their first shipments of that concentrate. And these projects are self-financed. And the plan was to use the money that they were generating through Progreso VII, there were starting with that project and moving forward with Santa Margarita.

So they were at the point when they had first begun to generate revenue and were shipping concentrate and were going to move forward to get their Exploitation License for Santa Margarita.

But at that time then what had happened was the environmental NGO filed an amparo proceedings against the MEM, the Ministry of Energy and Mining, and sought to suspend the Exploitation License on the grounds that at the time when the License was

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submitted, the Claimant, or Exmingua, had hired an independent consultant and had done social consultations which had been approved. And the License was then issued in 2011, as I said, but there was an argument that rather than the independent consultant conducting these social consultations, they should have been done by the State.

And the Courts agreed with that, and imposed a retroactive requirement on the Claimants insofar as they then suspended the License until the Ministry would go ahead and conduct these consultations.

There were further appeals of that, but to no avail, and the License remained suspended and remains suspended to this day.

At the time, then, when the License was suspended, there were--was an eruption of protests and more blockades which prevented access to the sites, and prevented the Claimant from moving forward with completing its EIA in order to get--have a full application license for its exploitation license for Santa Margarita.

So these form the very summarized, basic

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facts underlying our claims in the arbitration.

ARBITRATOR TOWNSEND: Ms. Menaker--

MS. MENAKER: Yes.

ARBITRATOR TOWNSEND: Would it be fair to say that the same, basic facts underlie all of your separate treaty claims?

MS. MENAKER: The facts that I've just indicated would underlie all. Yes, I mean, they would be particularities because of the discriminatory treatment, the disparate treatment granted by both the courts and the MEM in dealing with some other projects as compared with ours obviously underlie the National Treatment and the Most Favored Nation Treatment, but underlying the FET and exploit claims, those same basic claims, yes.

ARBITRATOR TOWNSEND: Thank you.

MS. MENAKER: So this morning, we're going to address Respondent's Preliminary Objections in the following manner: I'll begin by explaining why Claimants' claims are properly submitted on their own behalf under Article 10.16.1(a), and that Respondent's objection to the contrary is without merit.

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I'll then pass the floor over to my partner, Mr. Rafael Llano, who will address Respondent's argument that the lack of full-protection-and-security claim is untimely, and he'll show how they have mischaracterized our claim in that regard and demonstrate that it is in fact timely. Then I will address our most-favored-nation-treatment claim and explain why that is admissible.

So to begin, I want to make clear that we have in fact filed our claims on our own behalf for loss or damage that we as Claimants have sustained. We are not seeking damages suffered by our investment, Exmingua.

It ought to come as no surprise and we've never hid the fact, contrary to what Respondent suggested this morning, that the measures at issue were aimed at Exmingua, and that is almost--well, I will--almost--nearly almost always the case in investment treaty arbitrations. Because investment treaties, they protect investments of foreign investors.

We're the foreign investors. We made an

10:55:52 investment in Guatemala, and the State typically, when they take adverse action, they take adverse action that is aimed at that foreign investment located in the Host State, and that gives rise to damages to the Claimant, who owns the investment.

We have made that clear throughout our Notice of Intent and our Notice of Arbitration. We have never framed our claim as seeking damages for losses suffered by the investment, Exmingua. We've always said that we are seeking damages that we ourselves have suffered.

So if you start by looking at the Notice of Intent, for instance, we have alleged that the Investors have been deprived of the use and enjoyment of their investment in Exmingua, that Mr. Kappes and KCA have incurred significant losses as a consequence of those breaches, and that the Investors have been harmed by the propping of the Progreso VII project for several years, and Guatemala's arbitrary and unlawful actions have harmed the Investors.

Similarly, in our Notice of Arbitration, we've said the same thing, that Claimants have

10:57:03 incurred significant loss and damage by reason of or arising out of the alleged breaches of the Treaty; that Guatemala's unlawful actions and in breach of the Treaty have prevented the Claimants from reaping any benefits from their investments, and that Claimants have incurred significant loss or damage as a result of these breaches.

This morning, Respondent looked at the request for relief in our Notice of Arbitration, and said that we are seeking relief for damages suffered by Exmingua because we referenced the Progreso VII and Santa Margarita Projects, and that's incorrect.

If you look at the language in the Notice of Arbitration, it said, we are seeking relief requested in connection with the Progreso VII Project and the Santa Margarita Project, and of course we are. Our damages flow from harm that has been suffered as foreign investors where the state has taken adverse action in violation of the Treaty against our foreign investment that is protected.

So there's just no inconsistency with what we're saying now and what we've said in our pleadings,

10:58:15 and what we have alleged in our Notice of Intent and our Notice of Arbitration. And it certainly is not the case as Respondents said this morning, and I quote, that "We have made no reference to any impact to Exmingua's losses to our investments."

That's not the case. And those quotations that I just read from the Notice of Intent and Notice of Arbitration show otherwise.

Now, we were not required to further characterize our loss or damage in our Notice of Arbitration. Respondent in its pleadings complained that we did not indicate that we were seeking reflective loss or damage, or that we did not say that we suffered loss or damage by virtue of a diminution in the value of the shares that we held in Exmingua, but there is no such requirement.

We clearly laid out the fact that we had a protected investment. The investment is Exmingua. Investments are defined as an enterprise. They're also defined as shares. They're also defined as interests in an enterprise. So all of those are our investments. So we were an investor with an

10:59:20 investment, and we alleged that we suffered loss or damage, and nothing more was required.

The provision 10.16.2(d) in the DR-CAFTA indicates in a Notice of Intent, you need to specify the relief sought and the approximate amount of damages claimed. It doesn't indicate what is meant by the relief sought, but the Tribunal is only authorized to award damages, or in some cases you can seek restitution, but you need to give the respondent State the ability to--or the option to pay damages in lieu of restitution, and here, we were seeking damages. That was the relief sought.

So there's simply no merit to the Respondent's suggestion that we are seeking to amend our claim because we did not indicate that we were seeking so-called "reflective loss" or "indirect loss" or "damage."

And indeed, tribunals faced with similar contentions have rejected them, and I would draw the Tribunal's attention to the UPS NAFTA case where Canada raised an objection that the Claimant itself had not suffered loss or damage as a result of the

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11:00:30 alleged breaches. And the Tribunal dismissed that, saying that at this juncture, all that is needed is an allegation of loss or damage, and whether or not that loss or damage was actually suffered is to be determined at a later stage of the proceeds.

Now, going to the crux of the Respondent's objection which is that no loss/damages are compensable under the DR-CAFTA. That, we strenuously disagree with, and when you begin to analyze this, one needs to look at of course, the plain language of the Treaty. And oddly, did you not see that this morning. You did not--you were not taken to the language of the Treaty which grants an investor the right to bring a claim on its own behalf.

But if you look at that language, it states here that "Claimant may submit a claim to arbitration alleging that the Respondent has breached an obligation under the Treaty and that it has incurred loss or damage by reason of or arising out of that breach."

It doesn't further qualify or restrict the type of loss or damage, and it has a very broad,

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11:01:47 connective language insofar as you are able to claim for loss or damage that arises out of or in connection with that breach, and that those are clear, very broad, causally connected words.

What it Respondent is seeking is a limitation that is not in the Treaty, and in order to uphold its interpretation, one would be interpreting this provision to include words that aren't there. To basically restrict the Claimant to bringing a claim for direct loss or damage, or for loss or damage that excludes loss or damage to the value of its shares in an enterprise. And those words simply don't exist in 10.16.1(a).

And in similar circumstances, tribunals have properly refused to read such limiting language into treaties where no such language exist. This often has arisen in the context of a Claimant who is seeking to bring a claim when it has a chain of companies, when it does not own the investment directly, but rather, through a chain of companies.

So if you have a A, B, and C company that then invests in the State, and instead of the company that has the

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11:03:10 most direct investment in the State, the company further up the chain has brought the Claim, and Respondent States have objected and said, well, that is not an investment because it is not a direct investment. It is an indirect investment. And tribunals have rightfully refused to read in the word direct to qualify or limit the types of investments when treaty contained no such in limitation.

So in Waste Management, for instance, the US company held its investment the Mexican enterprise through a company that was incorporated in a non-NAFTA State. And Mexico raised this objection and said it was that non-NAFTA company that directly owned that investment, and that is the protected investor and the Tribunal rejected that and said the parties could have restricted claims for loss or damage by reference to the nationality of the corporation which itself had suffered a direct injury. But no restrictions are in the text, and they refused to read any into the text.

Similarly in the Siemens Case, there was no reference. It just said "investment." It did not restrict coverage to direct investments. And the

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11:04:26 Tribunal noted that the Investor there was an indirect investor who owned shares indirectly in the covered investment; and therefore, would be covered because a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investment.

And the same is true here. A literal reading of the Treaty just does not support any reading that a loss or damage, we clearly have suffered a loss or damage, that it has to be a direct loss or damage and not an indirect loss or damage.

Tribunals also have properly have looked at the broad definition of the term investment in the investment treaties like the DR-CAFTA. The DR-CAFTA, as I noted includes shares as an investment, and as you can see, in the Suez Case, for instance, the Tribunal noted there, too, that the shares that the Investor owned were investments, and therefore, they have access to ICSID arbitration because there's no limitation anywhere in the Treaty that limits the rights of shareholders to bring action for direct as opposed to derivative or indirect claims or claims for

reflective loss.

Another example, and there are dozens of these examples, is the Gas Natural Case where again, the Tribunal looks to the definition of "investment," which includes shares, and says that a claim asserting the impairment for the value of the shares gives rise to an actionable claim by the Investor, and the Investor has standing to bring that claim before a Tribunal.

And in this regard, I note that Respondent's objection here is wholly inconsistent with its past practice and its previous interpretation of the DR-CAFTA. It has said that no Tribunal has awarded claims for reflective loss in this context. But that's not correct, because the TECO Tribunal did in fact award claims to TECO for reflective loss that it suffered.

It was a Minority Shareholder in an enterprise in Guatemala, and that claim related to a challenge to the tariffs that were set for an electronic distribution company.

So there those tariffs had a detrimental

effect on the profitability of that electricity company in which TECO was a minority investor, and TECO prevailed in its claim. And what the Tribunal did was to determine the loss and value to the shares of--or to the cash flow that the Investor would have received but for that breach.

So there is a clear example, and all that Respondent has said is, well, we didn't raise the objection, and there might have been other reasons for it. But what it does show is that this clearly is not a fundamental restriction in this Treaty. That case has--it's still pending. It's been going on for ten years. They've raised multiple objections, and they have not interpreted this Treaty to restrict those types of claims. Yes.

PRESIDENT KALICKI: I'm a little curious as to your conclusion from the fact that that argument has not been raised in TECO.

Are you suggesting that once a state in one case fails to identify or pursue a particular objection, it's forever foreclosed from pursuing that in subsequent cases? You seem to be making a waiver

argument from TECO.

MS. MENAKER: And I'm not going that far, but I do think that it is relevant insofar as it shows that their objection here I believe is opportunistic, and is not based on a fair reading of the Treaty, and is certainly not something that is so--this is such a fundamental issue.

And if this Treaty truly prohibited reflective loss, that would be, you know, a big deal, right? You would be prohibiting protection over a large, large class of investors. And so to suggest that now, you know, a decade later, this has just suddenly popped into their heads and they're saying, of course, it's very clear in the Treaty. I just don't think that that stands--withstands scrutiny.

And we did point to the Oil Platforms Case before the ICJ where the ICJ did take into account the fact that neither Iran or United States had previously relied on a provision. I believe it must have been the Treaty of Amity as the basis for the jurisdiction of the Tribunal.

And their lack of doing that again, while

not a--perhaps not a waiver, per se, it did inform their decision and certainly confirm their conclusion that that provision did not have the meaning that Iran was then seeking to ascribe to it in that particular proceeding.

So, then--and this is why I think that Respondent is very keen for this Tribunal to ignore the fact that its preferred interpretation would mean that the DR-CAFTA offers less protection than any other modern investment treaty. Because it would deny protection to Minority Shareholders that constitute the vast majority of claims that Minority Shareholders bring under investment treaty arbitrations.

There are very few claims where Minority Shareholders allege that their rights to vote their shares have been interfered with by the Host State. The majority of cases brought by Minority Shareholders under investment treaties are claims for reflective loss.

And one cannot say that because this case concerns a Majority Shareholder and not a Minority Shareholder, you can just ignore that, because you're

11:10:47 interpreting the Treaty. You're ascribing an interpretation to these very provisions, and that would be the interpretation that you would be accepting.

ARBITRATOR DOUGLAS: I must ask, though, suppose this was the first investment treaty case, and we were approaching this provision for the very first time without the background of the CMS-Argentina line cases onwards. The data points would be that no domestic legal system allows claims for reflective loss. No other international system allows claims for reflective loss. And I'm talking about customary international law, the European Court of Human Rights, the Inter American Court of Human Rights. So there wouldn't be any data points out there that would point in the direction that you're encouraging us to interpret this provision.

You're absolutely right. There's been a long string of decisions in the classic investment context which have allowed it. But if we were looking at this provision for the first time, wouldn't we necessarily, given the distinction between the two

11:11:59 types of claims, come to the conclusion, well, given those data points, we would nonetheless allow reflective loss claims on behalf of Minority Shareholders.

MS. MENAKER: I would think so, and the reason is, first, I don't believe that there is a full-blown prohibition on reflective loss claims under domestic legal systems, all domestic legal systems in all circumstances. So I just put that aside.

But even as the ICJ recognized in both the Barcelona Traction and the Diallo cases, when it was basically looking to the domestic legal systems to determine who had standing, you know, for what type of loss you could bring a claim.

It recognized that it would be the rare circumstance when you would need to do that, and look to those domestic loss sources because of the advent of investment treaties that do grant rights to investors, and they do interpret and define shares. Excuse me, investments to include shareholdings.

And then as I have shown in 10.16.1(a) they grant the Investor the right to bring a claim for loss

11:13:21 or damage to its investment, and its investment is its shares.

So you're having a--it's like a cause of action that you are writing into the treaty, and you're granting the Investor this right that may not exist in domestic law, but you have done it through a Treaty. And if you wanted to restrict that right, if you wanted it to mirror the rights that exist in most domestic legal systems, you would change that wording either along the lines that I've suggested, or otherwise, but there would be many, many ways where you could do that.

PRESIDENT KALICKI: I guess another point would be that this is not the first treaty. That the contracting parties here were not drafting against a tabula rasa, or they were drafting against this long stream of cases. But whether those are right or wrong is a separate question, but they exist. And the question is whether the contracting state parties agreeing to this treaty commented in any way, rejected in any way, those cases.

MS. MENAKER: Right. And I would again say

11:14:25 they haven't.

Because, first of all, knowing those long line of cases, they clearly could have written this in order to prohibit reflective loss claims. It would not have been difficult. You could have used my language. I'm sure you could tweak it or come up with different language, but it's a fairly straightforward thing to do. And this is coming on the background of all of those cases, so they know how Tribunals have interpreted this, and they haven't done it.

Now what they did do is they split into (a) and (b), and I will discuss that in a moment as to why that also does not--it grants an additional option, which provides broader recovery, potential broader recovery for a claimant, but does not restrict the Claimants' ability to seek damage for reflective loss claims because that would require really different language than what does exist in the Treaty.

You can see here, we heard this morning about the DR-CAFTA being a modern investment treaty. The object and the purpose of the Treaty was to provide and is to provide enhanced protection for

investment as well as effective means of settlement. This morning, when he emphasized, you know, enhanced protections, it seemed like all he was looking at was enhanced protections for the State to dismiss claims. But of course, the enhanced protections are the enhanced protections to the foreign investors, and that is what would be left unfulfilled if you adopted that interpretation.

And in fact, when you look at the history here, you can see that the provisions were largely based on prior treaties, and these are the same prior treaties that have been interpreted consistently by investment treaty tribunals to allow reflective claims.

So they say here that the provisions are largely based on bilateral investment treaties to which the United States is a Party. And we've included in our pleadings, and I have on some of the slides some of the cases on US Bilateral Investment Treaties where tribunals have found reflective loss claims to be permissible. So here they're adopting and doing it very consciously, adopting the same types

of protections.

The policy concerns that Respondent has emphasized; again, that is not a basis even to decline jurisdiction. The policy concerns, as an aside, I mean, can be dealt with through both drafting treaty language and also via tribunals in fashioning their awards, but ultimately, it's up to the states.

If they share these policy concerns, then they can draft treaties to address them. They can draft and amend arbitration rules to address them. And yes, some of it may be difficult. You may have multiplicity of claims under different it arbitration--arbitration rules or under different treaties, but states can do that, too. There's no reason why they can't seek to consolidate claims under different treaties or adopt different arbitration rules or do a whole host of things, if these are really of the concern.

But you can't let those alleged policy concerns guide your interpretation here, and certainly it's not a grounds to decline jurisdiction over a claim.

Now, obviously, I won't go through these list of cases, but I list them here just to show you the sheer number. And these are not all of them. These are just the ones that are in the record. But the sheer number of tribunals have that have looked at treaties and have determined that claims for reflective loss are permissible.

And again, the reason why I think that aside from their reasoning, which I think is compelling, and a lot of that applies equally to here, including their focus on the definition of "investment" and their focus on the standing, but I think one needs to also bear in mind that a contrary interpretation here would be to say that investors under all of these treaties have greater rights than investors under the NAFTA or the DR-CAFTA, which just simply is not the case.

Now, you may recall that during the pre-hearing conference call when Respondent was seeking time for rebuttal and asserted that these were really novel issues, and that these--this was a case of first impression, and this morning he made a comment also about this being really a case of first

impression, but really, it's far from it. These are the same objections that have been raised time and time and time again by States, and have been rejected by states across the board.

And I would note that even if its reply in Paragraph 18(C), Respondent itself said that there is, quote, "Nothing complex about Respondent's Preliminary Objections." And indeed, there really isn't.

Now, in the interest of time, again, I will not go through these cases. I just wanted to point out that in--there are multiple. The Argentina cases I'm sure you're well familiar with them, but in those cases under various different BITs, tribunals repeatedly have rejected the notion that reflective loss claims can't be brought.

The same has held true under multiple US treaties, including with Estonia, Ecuador, Ukraine, and the like. And under other multilateral treaties, including the Energy Charter Treaty.

Now, Respondent says, well, you can ignore that because here, you know, the DR-CAFTA is unique because it has 10.16.1(b). It allows the Claimant to

bring a claim on behalf of the enterprise. And you can see here, their arguments in this regard really have been somewhat internally inconsistent. Because when you read their pleadings, it's not all that clear whether they are saying there is no reflective loss allowed under the CAFTA, but if you happen to be a Majority Shareholder, you can bring your claim under 10.16.1(b) and recover indirectly. Or if they're saying, well, you can bring reflective loss under 10.16.1(a), but only if you're a Minority Shareholder. And if you happen to be a Majority Shareholder, then you have to go under 10.16.1(b).

And it's not clear because when they talk about these other cases, they say, well, these other tribunals allowed it because it was the only way that there could be recovery. Well, if that's true, then reflective loss is not prohibited. Then what they're really saying is it's okay to have reflective loss, but here we've given you an additional option, and you needed to go that route. That's an entirely different argument and it's actually at odds with the majority of the arguments they do make. That's why I say it's

hard to know what they're really saying.

But if they're saying that, and they're saying you need to file under 10.16.1(b) when you're a Majority Shareholder, that also is just not supported by the plain language of the Treaty itself. The Treaty itself says if you own or control an enterprise, you may file a claim under--on behalf of the enterprise. It says, "you may". It doesn't say "you must."

If what the Treaty drafters wanted to do was to insure that when you had a controlling shareholder, it always filed a claim on behalf of the enterprise, unless it suffered a direct loss to its shares, in the context of a non-reflective loss claim. They would have said, you can bring a claim for reflective loss under (a), or you can bring a claim for loss or damage under (a) except, when you own or control the enterprise, the Claimant may only submit a claim under 10.16.1(b) on behalf of the enterprise, and may not submit a claim to arbitration under 10.16.1(a) on its own behalf.

And the Treaty, again, just doesn't say

that. That is adding words and restrictions to the Treaty that just are not there.

ARBITRATOR DOUGLAS: I guess one question--

MS. MENAKER: Yes.

ARBITRATOR DOUGLAS: --that might arise, then, what would--when would any Majority Shareholder bring a claim under (b)?

Doesn't it read out the mechanism envisaged by (b) because no one in their right mind would ever go down that route if they had the option.

MS. MENAKER: Sure you would. You could. I mean, there could be very different examples.

So for example--

ARBITRATOR DOUGLAS: Maybe in this case, but why--we haven't been told why the Claimants haven't brought a claim under (b). But if it is optional, why would you ever do that, I mean, you would risk not recovering the full amount because creditors would have to be paid, taxes would have to be paid, and all of the rest of it. So why would you ever bother with (b)?

MS. MENAKER: I mean, there could be a

variety of reasons why one would choose to go under one or the other, which would be reasonable just like you, if you were in a chain of companies and had a choice of treaties under which to bring a claim, and you decided to have the company that was here bring the Claim instead of the company here because it was a different treaty, and it was more favorable.

So just for instance, you could have a country like Panama, I understand, has a very low tax rate, and you may choose, you could say, well, if I bring my claim on behalf of the enterprise and recover an award, and have that award paid to the enterprise, then I will be taxed at a much lower rate than if I have it paid to the foreign investor, say, in the United States. And you might want to do that.

Or if your investment was still a going concern, and the Investor had every intention of taking any award that it might recover, and it would repatriate that money back to the Host State, to the enterprise, it would want to avoid the cost and inefficiency and the currency conversion hassle of having the award paid to the Claimant, and then having

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it repatriated back to the Host country.

So that could be a reason why you would want it paid directly to the Host State.

PRESIDENT KALICKI: At a very simple level, it would seem to me that going through the path of (b) eliminates the need, which can be very complex in certain cases, that for a claimant to have to trace out on causation and damages the reflective loss consequences to its shares, which would have to do on path (a).

MS. MENAKER: Yes.

PRESIDENT KALICKI: That could be very tricky--

MS. MENAKER: Yes.

PRESIDENT KALICKI: --to sometimes have to prove that what the enterprise would have recovered would have flown upstream in any particular demonstrable percentage to the shareholders.

MS. MENAKER: Yes. Absolutely.

PRESIDENT KALICKI: If you go the path (b), you can sort of do it in the confidence that one way or another it will sort itself out, and you hope it

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will sort itself out, but you don't have to prove it to the Tribunal.

MS. MENAKER: Right.

PRESIDENT KALICKI: Whereas path (a) you have to prove to the Tribunal by a preponderance of evidence, that it would have flown up to the shareholders.

MS. MENAKER: Absolutely.

You know, and on the other hand, you know, if you had a case where there had been some sort of drastic, unlawful tax assessment against the enterprise, and you were fearful that if you made your claim on behalf of the enterprise, the money would go there and immediately the state would enact another unlawful tax assessment and grab that money. Then maybe that would give rise to another claim, but then do you want to wait for our five years and argue that claim, or would you rather that award be paid to the Claimant outside that host State. So you might choose to do that and take the risks with calculating the reflective loss in order to do that.

So I feel like there are a number of

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different reasons, and it does not make one or the other superfluous, and there's an option. So one should be able to choose which option is best for it.

ARBITRATOR DOUGLAS: Of course, in this case there is an additional advantage of going through (a) for you, which is that you get to maintain your domestic legal proceedings on behalf of the enterprise at the same time as bringing a claim for reflective loss through (a).

And this does give rise to the possibility that you will prevail in domestic proceedings, and we would then be in a very difficult position as to what to do with the international claim.

I mean, it happened in GAMI where the domestic proceedings were successful and the Claim was struck out in NAFTA.

I mean, I know you say that there's--that wouldn't make you whole necessarily, but it would certainly require pretty drastic amendment to your present claims, wouldn't it?

MS. MENAKER: And--on that, I mean, there was a lot packed into that question.

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ARBITRATOR DOUGLAS: Yeah. I apologize.

MS. MENAKER: So I would just say that, you know, again, first, I don't know if I would call it much of an advantage. Just from our perspective, the Court has no intention of ruling under its own law. It should have ruled in five days. It's been three-and-a-half years.

Had we stopped that claim when we brought this proceeding, we would undoubtedly have been faced with all sorts of defenses that we could not make the denial of justice claim. We had not exhausted. We did not show futility.

That there was an opportunity, there was a chance they would rule in our favor, et cetera. If you look the at Clayton award, the concurring opinion elaborates upon the Tribunal's decision on damages wherein that case, the Claimant had been denied a permit, the Tribunal found that it was a fair and equitable treatment violation because it had been unlawfully by its courts or administrative agency denied the permit.

And they sought the lost profits from that

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project, and they were denied that. And they said, no, you're denied that because we think the decision was so wrong that you should have gone to court. You should have tried to reverse it. And because you didn't, you failed to mitigate your damages, and so we're not going to give you lost profits. We're only going to give you some costs. A difference of hundreds of millions of dollars.

And they said and you could have pursued those simultaneously. You could have pursued your NAFTA claim along with the arbitration claim. And then as if, as you say, if you failed in the NAFTA claim, then, yes, you would have gotten your--in the courts, would you have gotten lost profits, and if the courts had agreed with you, then maybe you would have just had basically the delay damages and whatever costs were involved in going to court to get that decision reversed. So there are a lot of different complexities there.

I think the case is very different from GAMI. Because in GAMI, the state had acknowledged the expropriation and was in the process of calculating

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compensation for the expropriated mills. So they were going to award compensation, and the question was just how much. What was going to come out of that proceeding.

And then it was--so since they were going to get something, the Tribunal couldn't say it was an expropriation because they weren't denied all value, and how could they calculate any kind of loss in value because you don't know what they were going to get. So that's very different from here.

ARBITRATOR DOUGLAS: Just to be here in GAMI--that decision occurred during the proceedings.

MS. MENAKER: Yes.

ARBITRATOR DOUGLAS: Yeah.

PRESIDENT KALICKI: Let me just follow up on this, and I realize we're taking some of your time here.

But you've made the point in your papers that because tribunals have tools to deal with the risk of double recovery, we shouldn't be terribly worried about, you say, the potential consequences of the parallel tracks. That only works if we're the

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second to rule, and therefore, we can consider the consequences of a local court decision.

But one of the risks that the Respondent has identified is if an Arbitral Tribunal is the first to rule, if it awards damages on the assumption that there are no remedies available locally, and then the enterprise continues its local court proceedings and perhaps gets its investment back, or gets its permits, or in some way then there's a windfall, and we no longer have any power to address it.

I guess the question is, I've not seen any proffer or any offer in this case to deal with that risk by withdrawing local proceedings, if they are still pending at the time we're done.

Are you attempting to have your cake and eat it, too, as the Respondent says.

MS. MENAKER: No. So we are not.

And just to make clear that what we--what we are not willing to do is to withdraw the case, refile under 1(b), and have--because we don't believe we need to file under on behalf of the enterprise, and Guatemala then would raise an objection that our claim

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was time barred. Because the date that you then submit a waiver is the date when your claim is deemed resubmitted to arbitration, and then everything that was more than three years before that date would be time barred.

And that--they are trying to have their cake and eat it, too, if that's what they want.

If the concern is just the pending proceeding, which like we said is the Constitutional Court, I have to say has no inclination to rule on this case, clearly, I think, as we can see from the chronology. So it matters very little to us if we were to just write and say, well, you haven't decided for three-and-a-half years now. We're withdrawing this. Do that. That's fine.

So whether we would do that now, whether we would say we would do that before you were ready to rule just to avoid that remote, remote possibility that they would ever rule in our favor and restore rights, that, we have no problem with, because we are not looking to receive any double recovery or to impose on them any double payment. And so that is not

a problem.

We just do not want to be placed in a position where we are deemed to have been resubmitting our claim at a later date where then they are going to use a time barred defense.

ARBITRATOR DOUGLAS: It might be said, well, why not just simply have submitted it under (b) in the first place. If you had no real expectation that the Constitutional Court was going to decide in a timely manner in your favor, then why not just go down to (b) in the first place?

MS. MENAKER: Again, without getting into attorney-client privilege and strategy--

ARBITRATOR DOUGLAS: No, no--

MS. MENAKER: I would just note that at the time we submitted our claim, so it had been two years when they had failed to rule. In our view, that was clear in our minds that they were not ruling and they were not going to rule, but yet we were making the denial of justice claim, we were still making arguments that we could see inviting objections or asking for inferences from the Tribunal that we hadn't

given it a long enough time.

We had no--you know, we did not believe that they would rule, but yet, in order to avoid having to deal with those objections when we wouldn't have anything concrete to point to, now, it's been another year-and-a-half. It's been three-and-a-half years. I think it's been long enough that we can safely conclude that they have not ruled and don't intend to rule. So the situation has somewhat changed in that regard.

ARBITRATOR DOUGLAS: And has the Respondent said that if you refile, they'll raise the time bar objection. Has that been discussed between the parties?

MS. MENAKER: It has not, and if you'd like to ask them...

ARBITRATOR DOUGLAS: It's not really their turn, but I will ask. Yeah. Thank you.

PRESIDENT KALICKI: Let me just go back to your answer to my question about the risk of a windfall if the local court proceeding remains pending even after we rule.

I think you responded by saying that in theory--in theory, the Claimants could withdraw the Constitutional Court action either shortly after we rule or shortly before we rule. Would it be within a Tribunal's authority to request that that be done, or not? I mean, that wasn't quite--that wasn't quite an offer to do it. It wasn't quite a commitment to do it. It was a in theory, we could, but it's not clear to me that--what is on the table.

You can think about that over the lunch break, if you wish.

MS. MENAKER: Okay. I will think about it, but if--certainly, if that would assist the Tribunal, then it's something that we would be willing to do. Does that help? Okay.

PRESIDENT KALICKI: We'll think about it. Thank you.

MS. MENAKER: All right. So it now I just want to move on.

I was saying that the CAFTA isn't unique amongst investment treaties, and including this type of provision that allows you to bring a claim on

behalf of an enterprise. And there are two different other models out there. One is the NAFTA, which is exactly like the CAFTA in this regard, that you can bring a claim on behalf of an enterprise. The other is ICSID Convention Article 25(2)(b) which deals with it in a slightly different way, but it allows the local enterprise itself to be a named claimant, although it shares the nationality of the host State, but it accomplishes the same thing, just through a different means, right?

In both cases you are recovering the enterprise's losses, either by doing it directly by having them be a Claimant, or doing it by making a claim on their own behalf. And you can see that there are--in BITs that include the 25(2)(b) reference and also the CAFTA. Now, that ability does not deprive a claimant from making a claim for reflective loss under the provision where it can bring a claim on its own behalf.

So here under 10.16.1(a), and that's true in both contexts. So if it were the case that because you could have the enterprise, you wholly own the

enterprise, or you are a Majority Shareholder of the enterprise, and the Treaty gives you the right to have the enterprise as the Claimant, then you were deprived of your right to bring a claim, then that would be the case whenever there was a 25(2)(b) reference in the BIT, and tribunals have repeatedly rejected that. They have indicated that this offers an additional option, as we've just discussed.

There are reasons why you might choose to have the enterprise bring the Claim. There are reasons why as a Majority Shareholder, you might choose to bring it on your own behalf. And it's an additional option, and you're not obligated to choose that option, and you don't lose the right to bring a claim on your own behalf. So it's not a limitation in that regard.

And the same thing is true under the NAFTA, which has the same provision as the CAFTA. You can bring a claim as a majority and even as a wholly-owned shareholder under Article 1116 even when you could is brought it under Article 1117. And every tribunal that has looked at that has said that, so you have

Pope & Talbot which has said that a claim for loss or damage may be brought under Article 1116. And the existence of Article 1117 does not barbering a claim under Article 1116, and the same thing with UPS.

Now, this morning Claimant--Respondent, excuse me, discussed the Clayton award on damages. And I just want to note two things, because that is the only tribunal that seemingly determined that--or that reflective loss was not permissible.

And there, when you look at its reasoning, it's simply unpersuasive. First, they disregard the ordinary meaning of Article 1116. They--in fact they say when they look at the term that you can recover for loss or damage, in Paragraph 371 they say the terms of Article 1116 do not make it clear whether they're limited to direct loss, or if they can include indirect loss; that is, reflective loss.

So looking at the terms of the Treaty itself, all they say is, well, it's not clear. So they are not following what we contend is the much better analysis, which is when there's no restriction, you don't read one in, but what they do next is they

say, so we're going to go to context.

And in Paragraph 372, they look at context, which is Article 1117, and they make an erroneous conclusion. They draw an erroneous conclusion.

What they say is you have to read 1116 in context with 1117. And Article 1117 allows--and this is a quote--"Allows an investor to claim for loss to an enterprise thus providing for the recovery of reflective loss." And that's simply not true.

It only would be true in the case of a Majority Shareholder who could bring a claim on behalf of the enterprise and indirectly recover for reflective loss. It is not the case for a Minority Shareholder who can never bring a claim on behalf of the enterprise. So it's just simply not true to say that 1117 provides the avenue to recover for reflective loss.

And in response to the President's question this morning about Minority Shareholder rights; that is, you know, an incorrect interpretation there, and there's been no commentary as far as we've seen from the NAFTA parties as to what the ramifications of that

would be, that there would be no reflective loss avenue for Minority Shareholders. And certainly, there have been no submissions by the non-disputing parties on this issue in this proceeding.

So as I just noted before, and I realize I'm a bit behind time, but I hope the Tribunal would give a little leeway with the questions.

So our interpretation, it does not render Article 10.16.1(b) meaningless, as we've discussed, and particularly as we've shown in our pleadings, you could have greater liability under 10.16.1(b), of course.

And I want to briefly address the argument that Claimants would benefit at the expense of creditors under our interpretation, which again is not the case.

Here, the only way that a Claimant would benefit at the expense of the enterprise is if you made a claim on behalf of the enterprise, you recovered for the enterprise's losses, but you paid that award to the Claimant. Then the Claimant is getting the award for damages to the enterprise.

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11:43:14 As long as the Claimant is recovering its own damages, it's not recovering at the expense of a creditor. And you can see that in this diagram here where a Claimant, when it recovers on its own behalf, it will only get the equity value of its investment; whereas, when the enterprise recovers, it recovers for the full enterprise value, but again, what will flow up to the shareholder is still only the equity value.

So in the latter case, when you make the Claim on behalf of the enterprise, yes, a creditor may recover, and it may not recover when the Claimant makes the Claim on its own behalf, but you're not recovering at the expense. You're not taking that creditor's money. The creditor simply isn't recovering.

Again, we think that it is hypocritical for the Respondent to argue here that you should interpret the Treaty in a manner that provides the greatest protection to creditors, or that somehow it is an objective of the Treaty that where there is a remedy that would compensate creditors, that somehow that is an interpretation to be preferred. I would just

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11:44:30 direct your attention again to the RDC Case, where the Claimant filed on its own behalf and on behalf of the enterprise.

At the end of the day, it was recovering for a reflective loss claim because the measures were aimed at the enterprise, and so it was a claim for the loss and value of its shareholding in that the enterprise.

And the Respondent here, Guatemala, objected to having the Claim be deemed to be won on behalf of the enterprise, and having that award paid to the enterprise because the Minority Shareholders in that case were Guatemalans. So they would have indirectly benefited from that award, as would always be the case when you make a claim on behalf of the enterprise. No matter the nationality of the Minority Shareholders or creditors, they will indirectly benefit, and they said that's not a purpose of the Treaty. So they convinced the Tribunal to make the award on the Claimant's behalf and only to recover the amount owed to the Claimant.

In this case here they're insisting that we

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11:45:34 ought to have filed on behalf of enterprise and the award should be paid there, but that is entirely inconsistent with what they argued in that case.

And I won't go through in the interest of time these two slides, but just to show that their arguments are wrong and inconsistent, and as I mentioned before, it's not entirely clear whether they are even arguing that you can never have reflective loss, but you can recover it indirectly if you happen to be a Majority Shareholder, or you can get reflective loss, but only if you're a Minority Shareholder. And if you're a Majority Shareholder, you have to go under the provision that allows recovery on behalf of an enterprise. But under either scenario, their arguments are inconsistent. They're not supported by the text of the Treaty. They're contrary to the text of the Treaty as well as the object and purpose of the Treaty. They contradict their past practice in other cases. And they are not supported at all, and in fact are undermined by all of the jurisprudence in the area.

Very briefly, on the waiver of objection.

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11:46:42 Of course, if you find that our claim is properly submitted under 10.16.1(a), there can be no waiver problem because the Treaty specifically provides that you only need to give a waiver on behalf of Claimant. It's only if you would find, which for all of the reasons I've discussed you ought not to find, that the Claim was really submitted under 10.16.1(b), although not titled that way, that a waiver would be needed.

And I just note, we noted in our briefs but in the NAFTA context, the reason why some of the Claimants did submit waivers even when they made a claim on their own behalf was because the Treaty language differs from the CAFTA in that it requires it in some circumstance.

And again in the interest of time, I'm not going to spend time on an Annex 10(e) as I think we've shown and made it clear that this is not a fork-in-the-road provision, a general fork-in-the-road provision. If it were, it would be in the text of the Treaty itself, not in an Annex. And certainly, it would be inconsistent with the waiver provision, which--yes.

11:47:52 PRESIDENT KALICKI: I'm just wondering whether either in contracting party submissions in past cases or in any of the other ancillary material to DR-CAFTA at the time it was negotiated and signed, whether there's been an explanation as to why the DR-CAFTA parties did not require the dual waivers whereas NAFTA did?

MS. MENAKER: I have looked and have found nothing, and not even in secondary sources. Yes. There's nothing there, that I found, at least.

So on 10(e), again, it would be--to read this as a general fork-in-the-road, of course, also would be inconsistent with the waiver, which indicates that a Party needs to waive the commencement or continuation of an action which presupposes that there could have been an action challenging the same measure.

As you can see, the very language of the submission indicates that it only applies in civil law countries where you can bring a direct cause of action for a violation of the Treaty itself in court. And here, there is not even any allegation that that has

11:49:05 been done. So it just is clearly inapplicable.

So with that, unless the Tribunal has more questions at this time, I'll turn it over to Mr. Llano.

MR. LLANO: Thank you.

Claimants' full-protection-and-security claim is timely. And let me make a clarification here. The Claim that we're discussing now has to do with the Santa Margarita property, not because the Progreso VII was not affected by the currently ongoing blockades, but because the situation with Progreso VII was particularly affected by the Constitutional Court delay and the ongoing or the standing rulings from the Supreme Court suspending the License for the Progreso VII Project such that the damage arising from the blockade is coextensive with the damage that is already suffered by that part of the Project.

So the Santa Margarita Project is more specifically and directly affected by the blockades, and that is why we will discuss Santa Margarita in more detail as we go along.

So the issue here on this objection has to

11:50:17 do with prescription, or limitations periods. We show on this Slide, Number 41, the provision 10.17.1, that has to do with the prescription period in DR-CAFTA. And we can see the two elements there, including the knowledge of the breach and the knowledge that the Claimant has suffered or, rather, incurred loss or damage. So there are two elements, as we can see in the prescription period, and we will come back to that.

What is Respondent's position, Guatemala's position, on this. They assert that the blockades at issue actually began in 2012, and that they have been continuously running ever since then; and therefore, they say, the prescription period has run because the prescription period runs as of November 9, 2015, which is the three-year mark counting backwards from the Notice of Arbitration filed in 2018.

So they say if you start counting from 2012 and you assume, you accept, that these blockades were indeed continuous ever since then, then we're out of time. So the key issue here has to do with that allegedly continuous or continuously running nature

11:51:37 from 2012.

But in fact, in fact, and the facts will show and the record confirms, that these blockades were not continuous ever since 2012. And we see that on Slide Number 43. We see that there are two, distinct periods of blockades, and they are marked in red in this timeline on Slide 43.

The first period of blockades started soon after the Progreso VII Project began its execution, which happened in February 2012. Starting in March of 2012, the Project was blockaded, and that affected both Progreso VII and Santa Margarita. It goes--it went on for a period of about two years.

And then in May 2014, the Guatemalan National Police were able to break the blockade, and the mining operations resumed. So that is the first period of blockades. And this is all in the Notice of Arbitration. It is marked as the moment when Progreso VII started operating, and it operated for two years.

PRESIDENT KALICKI: As I understand it, I think the Respondent's objection is that this two distinct periods notion is not in the Notice of

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11:53:04 Intent. It may be in the Notice of Arbitration, but they say not in the Notice of Intent.

So first, is that accurate that it's not in the Notice of Intent, and then you'll get to does that matter. But first, is that an accurate description in the Notice of Intent?

MR. LLANO: The answer is no and no. It's not accurate, and it does not matter, but we'll get to that in the very next slide.

But just to conclude on the blockade periods.

So you have a new period of blockades which began in March 2016. I'll come back to this in more detail with the documents, but basically, you have that two-year period when the mining operations were taking place, and there was no blockade claimed to be made against the Guatemalan State for that period. It was open. And then the blockade begins anew in March 2016. We'll see the causes. And it's currently ongoing.

So here we have the Notice of Intent and the Notice of Arbitration. And we see that in the Notice

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11:54:11 of Intent, Claimants made clear that in 2014 Progreso VII was in full production, not halfway production, not stalled. Full production. And it achieved a concentrate shipment in December of that year. There were over 180 employees working, and during that two-year period, more than 60 shipments were made.

So there is no claim for that period of time. There can be no claim because the mining operations were taking place. Similarly, in the Notice of Arbitration, you see that on 25 May, this is consistent again with the Notice of Intent, as of 25 May 2014, the exploitation activities at Progreso VII resumed, and again, by year end Exmingua made its first concentrate shipment.

So what happened after that. In November of 2015, the Guatemalan Supreme Court ordered the suspension of the Progreso VII Exploitation License. And this is, of course, a key fact with respect to the various claims that Claimants are bringing. And you see the decision on Slide Number 45 suspending the granting of the mining license for the Progreso VII Project.

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11:55:34 Then on Slide Number 46, what you see is that initially, the MEM, which is the Ministry of Energy and Mines, refused to suspend that license. And you see here, a quote, a quotation from a press article indicating that at a high official from the MEM explained that the amparo was groundless because the License had already been granted, and this was a done deal, in effect. So initially, the MEM found no reason to do anything or change anything with respect to the Progreso VII license.

So that refusal, and we see this on Slide 47, triggered a new round of protests starting in March of 2016. And those protests were--rather, the protesters were asking the MEM to comply with the Supreme Court ruling suspending the operations for Progreso VII.

Now, we heard this morning that--and we're now on Slide Number 48--we heard this morning that the exhibits that were provided by Claimants indicated only blockades in front of the MEM offices rather than at the actual mining facilities. Well, that is not correct.

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11:56:57 And we show here an extract from Exhibit C10, which indicates that since 2 March 2012, the residents of the communities located in San Pedro de Golfo took action to reject the mine. This is a typo. It should say--typo in the original article. It should say 2 March 2016.

"The residents of the communities located in San Pedro de Golfo, Guatemala, took action to reject the mine and blocked the entrance to the company because they installed huts on the road."

The reference to 2 March is from 2016. This is the new round of blockades that were triggered by the MEM resolution.

PRESIDENT KALICKI: So you're saying the original article conveniently had--or inconveniently had a typo precisely addressing the point that we're going to decide?

MR. LLANO: I believe the typo is in the translation.

PRESIDENT KALICKI: Okay.

MR. LLANO: This is the English translation to a Spanish language article. So what do we have

here.

The facts are the facts. Whatever construction or interpretation the Respondent wants to give to the allegations in Claimant's Notice of Arbitration do not change these distinct periods of blockades.

It is apparent on the face of the Notice of Arbitration, which makes clear that the site was available for two years, and mining operations took place during that period.

So Guatemala's reference to the use of the word continuous in the notice refers only to the ongoing nature of the blockades while they lasted. They were indeed continuous during those distinct periods of time.

But if the Tribunal were to find that there was any ambiguity in these facts, that is precisely, and that includes, of course, the Annexes that have been submitted, that is precisely what the point of the merits phase of this arbitration should be, including determining the cause and the effect of each of these blockades.

Because what you have here, and what has been alleged and put forth, is that there are distinct blockades with distinct causes, with distinct sets of facts, and distinct damages. And we'll get to why these distinctions are relevant under the law.

PRESIDENT KALICKI: So as I understand your reference to the merits, are you saying that it would be open to the Tribunal to simply say at this juncture that the allegations that these were two distinct periods are sufficient for present purposes, but that we might return to a limitations defense if we were to find later on the facts that this was a continuous situation, and not two distinct periods?

MR. LLANO: So for purposes of Preliminary Objections, the scope of review the Tribunal has before it includes both the Notice of Arbitration, of course, the Notice of Intent, but also the documents that have been put forth. And these allegations are sufficient to conclude that the prescription period has not befallen with respect to these claims.

Now, if later in the process the Tribunal were to come to a different determination that indeed

the mine was blocked during the 2014-2016 period, which is, again, contrary to all allegations here and the documents, then that is a jurisdictional decision that the Tribunal could review in the context of its final award. But it certainly is not enough, as we stand here today, to uphold the Preliminary Objection.

What are the legal issues here.

So the key legal issue is whether a series of events can be separated into distinct components. We're showing the Grand River decision versus the US, and it there, the case was about measures in the cigarettes industry.

And there had been a settlement agreement in the '90s with the various tobacco producers, and new producers had to comply with that settlement agreement. And later on the states, the individual states within the US, began to adopt additional laws to make enforcement of that settlement agreement more likely or more tough.

And so the issue was, this is the settlement agreement, so intertwined with these later laws that the prescription period would affect both. And the

Tribunal held that they were not; that while the settlement agreement and the initial laws that were issued, the so-called escrow laws that were issued prior to the prescription period, did indeed fall by the wayside as a result of the statute of limitations. The later laws, which were separate acts, did not fall under the limitations period.

So these series of events were separated into two distinct components. So, too, here, the blockades are different; different causes, different facts, different damages.

In the Berkowitz Case against Costa Rica, the issue here had to do with expropriation of multiple pieces of land. And what the Tribunal found was that that the expropriatory conduct by Costa Rica preceded--for all of the lots, preceded the statute of limitations period; however, for certain of the lots there had been judicial conduct in respect of those particular tracts of land that post-dated the start of the limitations period. And for those judicial actions and decisions, the Tribunal was able to segregate the limitations period.

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12:03:30 So the fact that there is a connection between events, because they relate to the same project, or they relate to similar issues does not necessarily prevent their independent actionability.

Now, the one case--or one of the two cases that was cited by Respondent this morning was Ansung, and Ansung actually corroborates Claimant's position.

Because in Ansung, not only had all the State acts happened prior to the limitations period, it was so clear that the investment was fully and finally affected that the Investor had sold the entirety of its investment prior to the limitations period.

The land at issue was sold. It was gone. So there was no action following the start of the limitations period that could add any further damage to what already had crystallized.

So Ansung actually stands for the proposition, we submit, respectfully, that when you have a discrete and concrete set of facts that precedes the statute of limitations, and the investment is gone forever, yes, that falls under the

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12:04:56 statute of limitations. But here, we have an ongoing project that was blockaded after the start of the statute of limitations began.

In Corona--this is the other case that was mentioned by Respondent this morning--the issue was that a Motion For Reconsideration of a prior judicial decision was filed after the start of the prescription period.

Now, as the Tribunal earlier noted, the Motion For Reconsideration, the very purpose of the Motion For Reconsideration was to have the Ministry reopen the proceeding and render a different decision.

So it's literally part and parcel of the action that was the source of the damage initially. Here, again, we have two different blockades; two different sets of facts; two different sets of damages.

Finally, in the Nissan case versus India, there the issue was a long series of failing--failings or failures by the State to honor tax incentives. And so the question here is is each of these failures by the State a separate and actionable cause of action?

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12:06:25 And the Tribunal found that they were. Why, because each one of these events was a separate source, but had not--but none of them had constituted a full repudiation of the obligation to pay those tax incentives.

And even Nissan had acknowledged in that case that had the state government in India come out and said, we will never again pay these tax incentives, then that statement or that failing would have crystalized the damage forevermore, but that had not happened.

And again, the fact that things--bad things have happened in the past do not imply bad things happening in the future. Past is not necessarily prologue for the purposes of the Statute of Limitations.

And here we have blockade number one, two years of operation, blockade number two. Separate facts, separate causes of action.

So to conclude, Claimants' full protection and security claim is timely because the blockades that are at issue in this arbitration began in March

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12:07:44 of 2016; and therefore, post-dated the start of the limitations period in November of 2015, as you can see from the dates of the Notice of Intent and more importantly, the Notice of Arbitration. Hence, the objections should be dismissed. Thank you.

MS. MENAKER: So thank you. So now I will address our MFN claim, and explain why that claim is admissible.

So as Respondent acknowledges, its objection in this regard is not jurisdictional. It's one of admissibility, and the reason why that is important is that compliance with--or I ought to say that the non-notification of the MFN claim in the Notice of Intent did not--their consent to arbitrate was not contingent upon having every provision of the Treaty that is eventually alleged to have been breached indicated in that Notice of Intent because it is not a jurisdictional provision.

And in fact the Treaty, when it does have jurisdictional provisions of this nature, where states consent to arbitrate is contingent upon compliance therewith, it indicates that very closely in the

Treaty. It says, no claim can be submitted until or unless X, Y, Z.

That is no consequence ascribed to a failure to comply with each and every condition or each and every sub-paragraph of the Notice of Intent. And so in those circumstances, in order to determine whether a claim that was not notified in the Notice of Intent is admissible, tribunals have looked to certain various factors. And one of the things they've looked at is whether the basis for the Claim was notified.

Because the object and purpose of having this notification is to provide Notice to the State that they are being sued, and to provide an opportunity for amicable settlement negotiations during that period. And that objective would be thwarted if you notice or add a new claim that has no relationship to the old claim. Then that objective would not have been fulfilled.

So tribunals often look to see on whether there is a close enough connection between the newly notified claim and the ones that had been notified previously. And you can see that in cases where, in

the Supervision case, which is not a CAFTA or NAFTA case. It's under the Spanish-Costa Rica BIT, but the Chemtura Case is a NAFTA case, which has the same notification provisions.

And when they look at that, they look at whether the basis for the Claim was essentially the same as the new claim that is being--that was not notified.

And in doing that, tribunals are also cognizant, as they always are, of insuring that the Respondent has sufficient time to defend against a claim, and that a new claim is not raised at too late of a time.

So--and particularly, in the context of a notification provision, they want to ensure that the objective of amicable settlement is fulfilled by ensuring that the Respondent has an ample time to take that into account. You see that in both the Chemtura and the ADF Case, tribunals looking at that.

So here just to go back to the factual basis for the MFN claim. Will you see here in blue is our case; in light gray is the Oxec Case; and in dark gray

is the Escobal case.

So in our case, as you know, we have had the operations of Progreso VII suspended, and then that was appealed. The Supreme Court issued definitive amparo on June 2016, and that was appealed to the Constitutional Court in late June of 2016. And that is the case that remains pending.

In the Oxec case, what you had there is initially their case, again, on the same grounds as ours, that license was suspended, and then in May of 27, the Constitutional Court allowed them to continue operations. They said, even though apparently your license was affected by the same alleged defect as our license, insofar as the State had not conducted the social consultations at issue, that's okay. You continue operating. We're not going to suspend operations, but MEM, you know, do your consultations.

They said had that in late May of 2017 and a mere few months later, those consultations by the end of the year, they were completed, and that was it, and you can see that in December 2017. And we complained about that as disparate treatment in our Notice of

Intent, and again, obviously, in our Notice of Arbitration. And that is the Guatemalan owned investment.

In Escobal, they, too, were subjected to the same type of court ruling. And you can see here in September 2017 that the Supreme Court allowed Escobal to continue to operate, notwithstanding that they found that the State had failed to conduct the consultations. But that victory was really very short lived because a mere month later, they said, oh, no, just like Exmingua, you have to halt the operations. Your license is suspended until MEM conducts the consultations.

Now, then what happens is they do exactly what we do. They appeal to the Constitutional Court. Their appeal they make over one year after we have made our appeal, and yet you see that the Constitutional Court in September 2018 rules on their case. And that is the disparate treatment that we complain about in our Notice of Arbitration, which--

PRESIDENT KALICKI: Well--

MS. MENAKER: Yes.

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PRESIDENT KALICKI: --to be clear, you complain about both. I mean, in Paragraph 63 of the Notice of Arbitration, you say, "In contrast with Exmingua's case, the Guatemalan Supreme Court reinstated Escobal's mining license of September 2017."

MS. MENAKER: Yes.

PRESIDENT KALICKI: Then you go on and you also complain about the Constitutional Court acting promptly there, whereas not in your case. But there is a--there is an actual complaint that the Supreme Court stepped in in that investor's favor there and not in our case. So are you complaining about both.

MS. MENAKER: Right. Right. No, that's fair. I would say that it's evidence of the arbitrariness of the Court's behavior.

As far as damages are concerned, it's a much different situation. I mean, the fact that they operated for a mere few weeks while we were suspended, that is not a basis for the damages flowing from the disparate treatment as it is for the Oxec case, for instance.

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Now, the reason why we do complain about the disparate treatment with respect to the September 2018 ruling is because despite the fact that MEM has been ordered to do these consultations for all of these projects, it has taken the position that they will not act until there is a final Court resolution. And so now Escobal has that final Court resolution. We do not. Oxec, obviously, never needed it because they just got their consultations.

So we have alleged that we are--that we suffered--that we have been prejudiced by that, and that allegation is sufficient at this stage certainly for us to have made that claim for an MFN violation.

Now--

PRESIDENT KALICKI: You mention--

MS. MENAKER: Yes.

PRESIDENT KALICKI: --I know you're more or less out of time. We've asked quite a few questions. So if you need some additional time within reason, but please bear it in mind and try to be wrapping up.

MS. MENAKER: Okay. Thank you. I will do so.

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So just to indicate, I know you've seen these provisions in the Notice of Intent and Notice of Arbitration, and just so there's no confusion, we have consistently--it's no secret that we did not have an MFN claim in the Notice of Intent. So those particular facts relating to the Escobal decision were not there.

But when we say the same underlying factual basis, perhaps it is better to say the same underlying basis, but I hope that you understand what we're saying is that we are complaining about the disparate treatment by the Courts and by the regulatory agencies on the basis of nationality as compared with our--the treatment that we have been accorded.

And that basis for that claim, that discrimination claim, was contained in the Notice of Intent, and is further elaborated upon in the Notice of Arbitration with additional facts.

The notion that they have--Respondent has been deprived somehow of an opportunity for amicable settlement is simply absurd given the calendar of events here. Respondent has not even been able to

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articulate how it could possibly have made any difference to any amicable settlement negotiations had this fact of the Escobal ruling been indicated in the Notice of Intent, and had an MFN claim been added to the Notice of Intent in addition to the national treatment claim, and it is illogical.

And in fact in the B-MEX claim, as you've seen, there the tribunal noted that there was no indication that the settlement prospects would have been any different had additional Claimants been notified in the Notice of Intent, and it remarked that five months had passed between the Notice of Intent and the Constitution of the Tribunal. Here it's been eight months.

And Respondent, of course, will have nearly two years to respond to the MFN claim, and that is because, of course, they have brought these Preliminary Objections. It does not need to respond to the substance of that claim until its Counter-Memorial. That is certainly more than enough time.

And obviously, when Tribunals are looking at

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these things, we're even now going beyond the object and purpose of the notification, this is when tribunals are looking at whether to allow amendments to claims. They naturally as a matter of due process, they want to insure that the party has an opportunity to fully respond. And they have allowed amendments at much, much later stages of the proceedings.

What we're talking about now is not an amendment to a claim, because our claim was only brought to arbitration with the Notice of Arbitration, and that's why we have not--we couched it the way we did. We're not saying it's an ancillary incidental or additional claim because it is our claim. It is the only claim has--not the only claim--it is the Claim that has been brought in the Notice of Arbitration. So we're not even in the context of Amendment of Claims.

As you noted, as the President noted this morning, the CAFTA specifically acknowledges that you may actually bring claims after the Notice of Arbitration has been filed, and that is fine. All they're saying is that that is deemed to be submitted

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to arbitration for purposes of the limitations period of the time that you actually make that amended claim and it doesn't date back to the original Notice of Arbitration. But that presupposes that, of course, you can amend claims. And as the President also noted this morning, the NAFTA did not contain any such express language.

So it was a question, or at least Mexico raised it, as a question as to whether such amendments could be made under the NAFTA despite the fact that you had this notification provision and this cooling off provision, or if those could--or you could nevertheless make ordinary amendments under the ICSID Arbitration Rules. This was under the Additional Facility Rules which are the same. And the Tribunal clearly found that that you can in accordance with the ICSID Rules have ordinary amendments, ancillary, incidental claims.

And interestingly, in this case after the British Columbia Supreme Court had partially set aside the award, the sole basis for liability was the environmental decree that had been passed, enacted by

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Mexico months after the Notice of Arbitration had been submitted. And there were no further Cooling Off Periods or Notice of Intent required or anything like that.

As far as the argument that you should disregard that case as well as the other jurisprudence under the NAFTA because the CAFTA somehow enhanced these provisions or made them stricter, there's simply no basis for that.

If you look at the language of the two Treaties, under the CAFTA, it says, "The Notice of Intent shall specify for each claim the provision of this agreement alleged to have been breached and any other relevant provisions."

The NAFTA language says, "The notice shall specify the provisions of this agreement alleged to have been breached and any other relevant provisions." There's simply no difference there.

And the jurisprudence shows that, indeed, our MFN claim is admissible. When you look at ADF, which is a NAFTA case, there the MFN claim in that case was first raised in the reply. So well after the

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Notice of Arbitration, and the fact on which it was based post-dated the Notice of Intent. The Tribunal found that the Respondent had ample opportunity to respond in its Rejoinder, so it was admissible.

In Aven versus Costa Rica, by contrast, that was a DR-CAFTA case. It was found to be inadmissible, but that's only because the Claim was raised merely in passing in the Memorial, and it was first really made at the closing of the hearing on the merits. So they said it was too late. The other party did not have an adequate opportunity to respond. Clearly, not the same as here where we're making the Claim in our very Notice of Arbitration.

B-MEX, which I explained before, you had additional Claimants that were added in the Notice of Arbitration. That was fine. Chemtura, also fine, where the same underlying facts for the MFN claim were essentially those put in the Notice of Intent, and there was ample time to respond. In Ethyl the measure that was being challenged was actually not enacted into law until a few days after the Notice of Arbitration was filed, and that was deemed fine. That

claim was admissible. Pope & Talbot, the only basis for liability was a verification review that had been started after--three months after the Notice of Intent.

And again, the implications of Respondent's argument is that any retaliatory measure taken by a state against an investment or an investor could not become part of the case. That naturally would occur after the filing of at least the Notice of Intent if not after the Notice of Arbitration. It could not be added. The Claimant would need to re-file a new case, wait for the Cooling Off Period, wait for six months, and that's just simply absurd.

And again, Merrill & Ring is distinguishable. There the Claim was made one year after the Notice of Intent after the Statement of Claim, Statement of Defense was filed. It didn't have the same basis. It didn't challenge the same measure.

So just to show you the absurdity of what Respondent is seeking here: If you were to rule--let's just hypothetically--that no, the MFN--you have to comply with all of these preconditions as far

as timing is concerned, essentially, then, we could file another claim just for our MFN claim.

Then what we would do is wait three months, then file a Notice of Arbitration and simultaneously seek consolidation of that MFN claim with these claims.

Then a consolidation Tribunal would be established under the DR-CAFTA, which would decide the issue of consolidation. They invariably would decide to consolidate the Claims because they share all of the same factual bases, the same legal claims. There's no reason not to consolidate. They order consolidation, and then either that consolidation Tribunal would take over this entire claim, this claim and that one, or it would revert back to this Tribunal, and you would hear this claim and the MFN claim. But we would have spent several months, probably nearly a year, going through all of that procedural inefficiency which is not called for by the Treaty.

So thank you.

PRESIDENT KALICKI: Do you have any

questions? No. Any questions?

Thank you very much. So this concludes the morning's arguments. We'll now take our lunch break, which we had agreed would be about an hour. Why don't we return then at 1:30.

MR. JIMENEZ: Madam President, I wanted to request just to allow us some time so we can print some documents in the rebuttal session. Could we extend it to 1:45, which was the original lunch time?

PRESIDENT KALICKI: Sure. No, that's fine. That would get us back to the original schedule. It won't, therefore, harm anything and give everyone a little bit more time for lunch.

MR. JIMENEZ: Thank you.

PRESIDENT KALICKI: Okay. So 1:45.

(Whereupon, at 12:26 p.m., the Hearing was adjourned until 1:45 p.m.)

AFTERNOON SESSION

PRESIDENT KALICKI: Okay. We will resume now with the Respondent's rebuttal arguments. You have up to an hour.

MR. JIMÉNEZ: Great.

REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

MR. JIMÉNEZ: Thank you, Madame President.

And if I may, and just to first apologize for the brief delay and also qualify that this had been prepared somewhat hurriedly, and so we apologize for any typos or other inaccuracies that may appear, but it should be relatively complete.

This morning, the Tribunal asked if any dealt Treaty Parties had ever dealt with the issue of Minority Shareholders, and we provided a response which I think was incorrect, and we wanted to correct that, and it's on Slide Number 2. There are references to Minority Shareholders in the U.S. submission that was submitted within the Clayton matter.

And if I may just read from some of these, it states: "Minority Shareholders who do not own or

control the enterprise may not bring a claim for loss or damage under Article 1117, thereby reducing the risk of multiple actions with respect to the same disputed measures."

In the same submission by the United States, it states that: "A minority or non-controlling shareholder under such a scenario, however, could submit only a claim for direct damages--the loss of dividends--under Article 1116." It also states--and this is now Canada's Counter-Memorial on damages, and it's submitted also in the Clayton matter--it says: "All three NAFTA Parties consistently interpret Articles 1116 and 1117 as distinct provisions, pursuant to which indirect losses can only be claimed through Article 1117. The NAFTA Parties agree that investors must allege direct damage, not reflective losses, to recover under Article 1116."

And Mexico, in its Statement of Defense in the GAMI arbitration stated: "A shareholder cannot bring a claim in accordance with Article 1116 for damages or losses suffered directly by an enterprise."

So, there were references from States

dealing with Article 1116 and 1117 of NAFTA, so we just wanted to bring that to the Tribunal's attention.

And I am going to turn it over now--and I'm happy to turn it over to my colleague, Katharine Menéndez, who's going to respond to the Claimants' Opening Arguments.

MS. MENÉNDEZ de la CUESTRA: Thank you.

So, included in the few slides some of the arguments that Claimants have made, and we tried to maintain this formatting to help the Tribunal, you will see Claimants' arguments on the left and Respondent's Reply on the right.

An argument that Claimants have made is that they actually did include references to how investors have been harmed or deprived of the use of their investment. They have included a few, it's at Slide 5, and our response to that is that Claimants may have included very general references. I think they referred to three or four general references in their Notice of Arbitration, to their condition as investors' investment maybe to cover elements of ratione materiae and personae, but they didn't claim

anywhere in their notices that they were bringing these claims to recover any direct or indirect loss they sustained.

The general references to requirements and the Notice of Intent do not refer to reflective loss, but they imply that any harm to Exmingua is directly harm to Kappes. It is not.

If we go to our slides this morning 24 and 25 and briefly review the references--included in their Request for Relief, Slide 24, we see that, for instance, in reference to the concentrates shipments, Claimants state: "three concentrate shipments with a value USD 500,000 were abruptly impounded depriving the investors of that revenue." That revenue is not investor's revenue. It would be Exmingua's revenue. And this is just an example of how easily Claimants have conflated Exmingua's assets and projects and potential revenues with Claimants' assets, projects, and conflated revenues.

As Claimants' counsel have pointed out, the Investment here is the shares in Exmingua and not concentrate shipments or specific licenses. Those

belong to Exmingua.

So, to summarize, general references of how investors may have been affected by Exmingua's direct injury is not enough to assert now or to allege now they actually asserted claims for reflective loss.

Claimants' counsel have also talked about TECO and Guatemala, and there are important differences between this case and TECO and Guatemala. This chart summarizes some of them.

TECO did not control the enterprise in that case because it was a Minority Shareholder. Here, as you know, Kappes has full control and ownership ultimately through several Companies of Exmingua.

Second, Claimants' counsel has alleged in a different case, Renco v. Peru, that TECO as a Minority Shareholder could not have brought a claim under Article 10.16.1(b) of the DR-CAFTA. Here, Claimants as majority shareholders could and should have brought a claim under 10.16.1(b) of the CAFTA-DR. Third, another allegation made by Claimants' counsel in Renco v. Peru, the TECO Tribunal didn't address a flow through of damages in circumstances where the

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01:57:06 Claimants purports to seek compensation of its alleged own injuries resulting from measures undertaken by the host State vis-à-vis an investment which the Claimants owns and controls. Here, this Tribunal is addressing just that. Exmingua was a target of measures, Exmingua suffered direct damages, and that is what Claimants are claiming in this arbitration or, alternatively, reflective loss.

And at the time the arbitration was initiated, important, TECO had already agreed to sell its interest in the enterprise. There was no parallel litigation or holding of shares throughout the arbitration or later. The day after the arbitration was brought, the sale of the enterprise closed.

Not only have Claimants a participation in Exmingua, but as you know, they maintained prior litigation to try to recover in Guatemala and here through these claims for the same alleged loss.

And two more, in TECO, Claimant filed two different claims: One was for its share of its lost cash flow that its investment would have earned, and would have been ultimately distributed to TECO--that

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01:58:26 one was granted--but the difference between the price for which TECO sold its shares and the amount that its shares would have been worth had Guatemala not breached its Treaty obligation, that one was rejected, so the typical claim for reflective loss in TECO and Guatemala was rejected, and what was left was a claim for lost cash flow that the enterprise would have earned and had been ultimately distributed to TECO.

Importantly, Guatemala did not take a position back then as to whether Minority Shareholders can or cannot bring claims for reflective loss under (a), and as we've said, it is not an issue this Tribunal needs to decide here strictly.

We do not want to speculate about, as Claimants suggested, the reasons why Guatemala did or didn't raise an objection. We believe the fact that Guatemala did not raise an objection then doesn't mean it is foreclosed for raising an objection now. But to be clear, Guatemala could have not adopted or could have not made the argument that it's making now because, in TECO, TECO did not have the available, so Guatemala could not have requested TECO to file or

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01:59:48 allege that TECO should have filed under (b). Here, Claimants should have filed under (b) because (b) was available to them.

Claimants have also alleged this morning or--that drafters of CAFTA could have added language to the Treaty, and that the policy concerns raised by Respondent can be addressed by States and Tribunals, and that tribunals could come up with a solution to address this concern. Well, Respondent's response to that is that CAFTA includes this mechanism precisely to address these concerns.

As we've seen, the U.S. has given opinions about this issue in NAFTA cases. No indirect injury under 1116. The U.S. included this mechanism, CAFTA mechanism, in its Model BIT in 2004, and later also in 2012. And this Tribunal, for that reason, doesn't have to come up with a solution to this problem, doesn't need to fashion the Award in a way that would prevent the double recovery. It doesn't need to do that because CAFTA did it for them. CAFTA already designed a mechanism or implemented a mechanism designed to prevent this situation we have.

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02:01:26 And not only in 10.16.1, but as we've seen this morning, if we go through the Treaty, there are several provisions with this concern that address this concern. There is a difference between an injury sustained by the enterprise and by the Claimants, and the Treaty is designed not in one Article, but in several, making that distinction very clear.

The Tribunal then does not have to add additional language to the Treaty. This morning, we were accused of not going through the language of the Treaty. We included several slides on the language of the Treaty, and when the language of the Treaty is interpreted in context, the conclusion is clear. Claimants should have filed claims under (b), and what this Tribunal needs to do is not to add additional Treaty, but we believe, respectfully, just to enforce the CAFTA-DR. In Slide 19, Claimants list Commerce as a case in which the Tribunal found that the Treaty allows investors to claim for reflective loss.

In Commerce, Claimants--and this is a CAFTA case, so it's important--in Commerce, Claimants submitted to arbitration under (a) and (b), and El

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02:02:58 Salvador argued that Claimants did not comply with the CAFTA waiver requirement provision because they did not withdraw from a local litigation in El Salvador. The Tribunal dismissed all the claims because Claimants failed to fulfill the requirements of the waiver provision with respect to all the Claims.

A different tribunal, and not this one, and I'm sorry for that typo there, held that the Tribunal did not have jurisdiction to allow Claimants to amend or modify the waiver. The reference is Railroad in the Decision Paragraph 61, which is the Legal Authority, Respondent's 20.

So, Commerce made clear the waiver provision under CAFTA has two separate--includes the separate requirements, a formal one and a material one. The formal one is that the waiver needs to be submitted in the Notice of Arbitration; the material one is that Claimants need to withdraw from local litigation; and a third point made in Railroad is no jurisdiction in a CAFTA Tribunal to let Claimants to amend or fix a waiver or submit a waiver later on. Why? Article 10.18.2 lists the waiver as a limitation or as a

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02:04:14 condition to consent by the State Parties, and so Guatemala did not consent to arbitrate claims for Exmingua's reflective loss that should--sorry, for Exmingua's direct loss that it should have filed under (b).

Claimants have also discussed Clayton, and it is important that we remember that Clayton first expressly held that no reflective loss is allowed under 1116; and, second, the damages that the Tribunal awarded in Clayton, the Tribunal granted or awarded those damages only after concluding that they were not reflective loss. The Tribunal specifically analyzed the nature of the damages that were granted to conclude this is not reflective loss, so this case does not help Claimants' position.

Importantly, the Tribunal in Clayton analyzed the NAFTA mechanism in context and it concluded that Articles 1116 and 1117 are to be interpreted to prevent claims for reflective loss from being brought under Article 1116, the wording of Article 1116, in its context which includes 1121 and 1135, these are, you know, the waiver provisions and

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02:05:49 others that the Tribunal analyzed in context to reach that conclusion, which is what we are requesting this Tribunal to do.

Another case that we discussed this morning is Railroad v. Guatemala. This is a CAFTA case in which Guatemala was a Party, and a few differences here.

Railroad brought claims on its own behalf and on behalf of its local enterprise, FVG in that case. Here, as we know, Claimants have only brought claims on their own behalf. Importantly, Railroad submitted waivers by both the investor and the enterprise. And we know what happened here. We don't have a waiver of Exmingua, and we have parallel litigation going on in Guatemala.

Despite bringing claims on behalf of FVG, Railroad requested the Award be directly payable to Railroad for the damage that Railroad sustained and the Minority Shareholders sustained. Obviously, Guatemala posted that; Guatemala alleged you have filed under (b), and Article 10.26 of CAFTA requires the Tribunal make the Award payable to the enterprise.

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02:07:14 Railroad, as an investor, cannot expect to recover for the damage that the Minority Shareholders sustained. And, in Railroad, the Tribunal requested Railroad transfer to Guatemala all its shares in FVG.

So, this slide includes the two paragraphs of the Award that I mentioned, and also a summary of the point I made or tried to make. Guatemala objected to Railroad directly receiving compensations for injuries sustained by both Railroad and the Minority Shareholders for two reasons: 10.26.2 requires damages be paid to the enterprise, and FVG are Minority Shareholders who cannot receive direct compensation in the arbitration because they are not covered. This is different from Guatemala opposing the enterprise receives the damages it sustained because it will indirectly compensate Minority Shareholders. Railroad requested to directly receive the full amount of damages itself, not the enterprise, and that was the problem in Railroad.

We've already addressed this point, interpreting Article--Claimants' argument interpreting Article--the mechanism will require the Tribunal to

02:08:51 insert additional language. We've already said it would not. The ordinary meaning in its context supports Respondent's position.

And one additional point we wanted to make here is there has been discussion this morning about an absent word "direct" or "indirect" in the section where it addresses who sustained the injury, if it was the enterprise or the Claimants, and here we have Barcelona Traction and Diallo explaining to us that the difference between direct and indirect injury is not who sustained it, but whose rights were infringed upon, so the Tribunal needs additional input or authorities as to what's understood for loss or damage, Barcelona Traction and Diallo might be useful. That's already included in our memorials with our references.

So, we've asked in our briefs and Memorials, and we've raised this issue: Why then would a shareholder file under (a) if they can avoid its requirements by filing under (b)? And Claimants this morning finally said it is maybe because of a low tax rate in another State, to avoid taxes that would be

02:10:19 due (presumably to a Contracting State)--the words in parentheses are ours--different burden of proof. But in the end, what this leads to is that this would be a windfall for Claimants. I mean, their position means that it would deprive Guatemala of taxes, it would ignore Guatemala's creditors being paid, would adversely impact a Minority Shareholder who would never be indirectly compensated under (b) because they will--always Claimants and Shareholders take (a).

Our position is that the requirements are clear; these are the policy concerns that the State Parties were trying to address when they drafted CAFTA, and it cannot be that the reason why they included a mechanism is to allow potential investors to decide which option is more tax-efficient.

ARBITRATOR TOWNSEND: Ms. Menéndez, your team has put a good deal of stress on the use of "shall" in other provisions of the Treaty. What do you make of the use of "may" in this one?

MS. MENÉNDEZ de la CUESTRA: Thank you.

Our position there is that if we substitute the word "may" submit a Claim to arbitration with the

02:11:41 word "shall," we are imposing an obligation to anyone who has sustained damage or injury to file a claim for arbitration, and that certainly cannot be an obligation; it is a right. So, we do not think that the word "may" there implies that they have two options. It means that they have one option: If the damage has been sustained by the enterprise, they may file a claim for arbitration under (b). If it's to Claimant, then under (a), it is a right. But the Treaty and the language itself establishes when, depending on the injury the Investor or Shareholder has to go under (a) or under (b).

Claimants have also raised Article 25(2)(b) of the ICSID Convention. Claimants allege here and in Claimants Rejoinder 2 that this Article achieves the same result as CAFTA-DR derivative-claim mechanism. And Respondent disagrees. Respondent disagrees because first of all, what this article does, Article 25, is that it extends to the jurisdiction of the Centre to an additional corporation or enterprise. It needs additional consent from the State. It is true that some treaties, including the Argentina-U.S.

02:13:02 Treaty on which Claimants' cases or most of Claimants' cases have relied or been decided under includes such consent.

However, ICSID Article 25, as I said, provides the Centre with jurisdiction over a dispute, whereas Article 25 does not necessarily address the issues concerning reflective loss. CAFTA-DR does because it requires the enterprise to submit a waiver. Its Article 25 doesn't contain any such requirement, nor does the Argentina-U.S. BIT or the Energy Charter Treaty.

And more importantly, it is important to emphasize that Article 25 gives an alternative to the enterprise where CAFTA goes a step further: It is giving an alternative to a Claimant to the Shareholder.

Now, the Shareholder doesn't have to wait or maybe make an enterprise, file a complaint--sorry, bring a claim to an arbitration. The resource, the remedy procedurally is in the Shareholder's hand. It is the Shareholder that can directly bring the Claim on behalf of the enterprise to recover for the

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02:14:26 enterprise's loss. And we believe that difference is critical, and it further supports Respondent's decision that Claimants had in their hands the solution that CAFTA State Parties decide and they disregard it.

Now, my colleague, Mr. Jiménez, will continue addressing other arguments by Claimants. Thank you.

ARBITRATOR DOUGLAS: Just before you pass the baton, there was a comment this morning that if there was a resubmission on the basis of (b), then you take the point that all the Claims would be out of time. Is that a point that you would take or have you considered that?

MS. MENÉNDEZ de la CUESTRA: We are not ready to take a position on that. It is an issue that, as you may imagine, we would need to discuss.

As regards to the waiver--and I understand there are two separate issues, but as regards to the waiver because this morning there was also address the issue of whether Claimants would be ready to withdraw in Guatemala. We want to emphasize--and we did

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02:15:40 already--that it is an issue of jurisdiction, so, you know, the Tribunal could not allow Claimants to withdraw or fix the waiver or submit a waiver. It would be something the Respondent would need to consent to.

ARBITRATOR DOUGLAS: Thanks.

MS. MENÉNDEZ de la CUESTRA: Thank you.

We're now going to move to the full-protection-and-security claim, and we just wanted to point out the Claims that were asserted both in the Notice of Intent and the Notice of Arbitration both provided for the Santa Margarita Project and the Progreso VII Project. In the Notice of Intent, Claimants wrote: "Guatemala has failed to provide full protection and security to Exmingua." It references protester, it says "have illegally blocked the entrance of the Progreso VII and Santa Margarita Projects."

In Paragraph 74, their Notice of Arbitration, they complained about access to the Progreso VII and Santa Margarita Project sites.

In the Notice of Arbitration Paragraph 48,

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02:17:01 which I read this morning, and I think it's important to point out that it says: "As part of the process to obtain the Exploitation License for the Santa Margarita project, Exmingua undertook all necessary efforts to prepare its EIA. Exmingua and its consultants, however, were unable to complete the public consultations required for its EIA due to the continuous and systematic protests and blockades at the site since 2012," so again it's dating back to 2012.

In Paragraph 50 of the Notice of Arbitration, the Claimants wrote: "As to the Progreso VII Project, Exmingua was prevented from exploiting the mine and processing and extracting product for export. As to the Santa Margarita Project, the blockade to the mining site prevented Exmingua from completing the EIA, which was a condition for securing an Exploitation License."

In the Counter-Memorial, Claimants alleged for the first time that the full-protection-and-security claim is only premised on the protests and blockades that effected Santa

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02:18:12 Margarita. However, in the same document in the Counter-Memorial, they state at Paragraph 126 of their Counter-Memorial that Claimants' claim under Article 10.5 of the DR-CAFTA for lack of full protection and security thus arises out of Respondent's failure, "to take reasonable measures to ensure that Claimants and Exmingua have access to the Progreso VII and Santa Margarita Project sites." This makes it very difficult for us to address challenges if the Claims continuously change, and it would seem that the Claimants should be held to what is stated in their own Notice of Arbitration and that those facts should be considered to be correct and true and not ever-changing.

This year, now they're claiming that it's only the Santa Margarita Project is an issue. Nevertheless, the same condition is--persisted since 2012 as they themselves allege. It's not our allegation; it's not our statements that we're relying on. We're relying on their statements and their proof that they were submitted.

I believe Mr. Llano made a mistake this

morning when he attributed a reference in a news article as being a "typo." If we turn to their proof, which is Number C-0010-SP, which was submitted, the language in Spanish is "Desde el 2 de marzo de 2010," "since March 2nd, 2012"--

(Overlapping interpretation with speaker.)

MR. JIMÉNEZ: --translation issue, because if you translate that, it's since March 2, 2012.

PRESIDENT KALICKI: I don't know if you have in front of you, but could you remind me which of Claimants' slides that was? I had made a mark on it before about the typo issue.

MR. JIMÉNEZ: Yes, one minute.

PRESIDENT KALICKI: Maybe Claimants can direct me to it.

MR. JIMÉNEZ: It's Page 48.

PRESIDENT KALICKI: 48, did you say?

MR. JIMÉNEZ: Correct. We will check it.

Correct, it's Slide 48 in Claimant's submission from this morning in their Opening Statement.

And so, it's the evidence that they,

themselves have presented indicate that it's a continuing condition, a very succinct slide was introduced this morning showing a big green gap--and I should probably reference the timeline for the sake of the Tribunal, but, which is Slide 43, where it seems to indicate that everything stopped in May 2014, and then the suggestion is there was access--well, not the "suggestion," it actually states access to the mining sites continued between 2014 and 2016. Yet every single reference and statement that's in the Notice of Arbitration and in the Notice of Intent shows no break in the blockades and protests that they were suffering.

And if we turn to Paragraph 45 of the Notice of Arbitration, it's important to note that, in their presentation from this morning at Slide 44, Claimants selectively quoted from Paragraph 45, but the paragraph in full, which I read this morning, finishes off by saying "irregular blockades continued, however, without effective responses from the State."

So, in short, each and every allegation as contained within the allegations that are before the

Tribunal indicate that the Claimants were pointing to a systematic continuous situation that dates back to 2012 with no interruption, and so that's a very important note to make.

Reference was made this morning to the Grand River Case as an example that would suggest that different events or I guess the suggestion is different protests can be actionable, and they rely on Grand River which has to do with the enactment of legislation.

Yet, what the Grand River Tribunal found that yes, the legislation was related, but it wasn't similar. And because they weren't similar because you're dealing with a completely different situation where new legislation was being enacted, because that element was not met, it was not actionable, so you need those two elements: Related and similar.

In this case, we have protests and blockades that Claimants themselves have alleged have led to their inability to obtain the necessary licenses to exploit their properties.

It was also mentioned that Ansung is

different because Ansung there was a sale of actions--sorry, of shares in 2011. That's of no consequence to the points that we raised and which we rely on in connection with the continuing situation that was faced by the Claimant in that property, and the fact that the Claimant did not act within the specific time frame meant that they couldn't. And if a Claimant cannot sit back and wait until it happens again so that it can then bring an action and forget the past. That's why the term "first" within the Treaty is so important.

I will now ask my colleague, Brian Briz, to address the most-favored-nation argument.

MR. BRIZ: Thank you. Good afternoon.

I will keep my portion brief, but the Parties do agree that Respondent's most-favored-nation objection for lack of notice under Article 10.16.2 of the Treaty is an objection as to the admissibility of the Claim, that much is not in dispute.

The Notice of Intent here, however, makes no reference to Article 10.4 of NAFTA, which is the most-favored-nation treaty provision--

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COURT REPORTER: Little slower.

MR. BRIZ: It makes no reference to the MFN Claim and it also makes no reference to CAFTA Article 10.4, and it makes no reference even to favorable treatment received by non-nationals, non-Guatemalan nationals.

Now, Claimant argues that the MFN claim could not have been notified in the Notice of Intent because the Claim did not arise until the second Escobal decision was issued in September of 2018, and I believe that argument was found at Slide 60 of Claimants' presentation this morning. If that's true, the MFN claim must still be dismissed under Article 10.16.3 because Claimant failed to comply with the six-month cooling-off period, and the Tribunal need only look at Claimants' own presentation from this morning and specifically at Slide 57 of that presentation where they can see that noncompliance with the cooling-off period warrants dismissal as a consequence because Claimants argued there is no consequence under 10.16.2--let me rephrase that. Article 10.16.2 does not provide a consequence for

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non-compliance, but they argue Article 10.16.3 does.

While Claimant clearly did not comply with Article 10.16.3 if, in fact, its claim is based off the second Escobal decision from September 2018 because, as everyone knows, the Notice of Arbitration was not filed until November of 2018, so rather than waiting six months, Claimant waited--or Claimants waited two months.

We heard a discussion this morning about arbitral tribunals adopting a flexible standard in determining whether or not a claim has been properly notified. I'm going to address the cases a little bit in a moment, but I think is important to note is that none of the cases that Claimants rely on arise under CAFTA. CAFTA contains requirements, and the State Parties included those requirements for a reason, and we've heard a back and forth as to what those reasons may have been. Apparently there's disagreement as to what the reasons were behind CAFTA Article 10.16.2. It doesn't matter what the reason was. There was a reason for it and the Article must be respected.

So, going back to CAFTA-DR, yes, it does

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contemplate amendments that I believe there was some questioning and discussion on that this morning, the language in the Treaty does contemplate there being some amendments, but the language of Article 10.16.4, which Claimant quotes in full at Slide 65 of its presentation states, and I quote: "A Claimant--sorry, a claim asserted for the first time after such Notice of Arbitration is submitted shall be deemed submitted to arbitration under this section on the date of its receipt under the applicable Arbitral Rules," and we can't ignore that last section: "Under the applicable Arbitral Rules." The "under the applicable Arbitral Rules" language thus requires a Claimant to comply with the rules under CAFTA-DR in order to bring a new claim or amend a claim, and those requirements also include Articles 10.16.2 and 10.16.3 of CAFTA-DR.

Now, I understand that adherence to the requirements under CAFTA-DR and under those specific provisions in this proceeding at the stage where we are will result in an outcome that the Claimant is not happy with, and the Claimant does not like the outcome. It's going to result perhaps in a delay or

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perhaps a Second Arbitration. It's a little bit unclear what the result will be, but Claimants clearly do not like that outcome. But that's no reason for ignoring the language of a Treaty. The Claimants are not going to be happy with the outcome or the Claimants are going to be inconvenienced is not a reason to ignore the language of a Treaty.

Now, going to the cases, admittedly, investor tribunals have reached differing outcomes, I think that much is clear with respect to the consequences of a Party's failure to comply with notice provisions under a treaty. That much is clear from the Parties' presentations this morning. There's literally dozens of cases, they're going different ways.

I'm not going to go over all the cases. They've been addressed ad nauseam in the Parties' Memorial, and they are also summarized in the Parties' presentations from this morning--

ARBITRATOR TOWNSEND: Mr. Briz, before you go to the cases, tell us what you make of the last sentence of Paragraph 4. This is 10.16.4.

MR. BRIZ: Right.

So, in terms of--I think it does suggest--sorry, let me approach the microphone here--I believe it does suggest that there can be a new claim or an amendment, but I think we need to also--I think we also need to read the entire sentence. It says: "A claim asserted for the first time after such Notice of Arbitration is submitted shall be deemed submitted to arbitration under this section on the date of its receipt under the applicable arbitral rules." So, I think this is just informing the Parties yes, you can have a claim submitted after the original Notice of Arbitration, but--and then that will determine when the Claim is deemed submitted, but it has to be submitted under the applicable rules, and those applicable rules include the Notice of Provision and the cooling-off period, among other things.

ARBITRATOR TOWNSEND: So, if the "applicable rules" refers to ICSID or UNCITRAL or Additional Facility, which seems to me the logical way to read that sentence, doesn't that take you to the amendment provisions of those rules respectively, depending

which rules you've selected?

MR. BRIZ: Well--

ARBITRATOR TOWNSEND: This follows immediately after you can go to the ICSID Rules or the Additional Facility Rules or the UNCITRAL Rules.

THE WITNESS: Right, but I do think that you still have to follow--well, I'm sorry, can you rephrase the question?

ARBITRATOR TOWNSEND: Let me suggest that the applicable rules could well be read to refer back to Paragraph 3, which provides a choice of ICSID Rules or Additional Facility Rules or UNCITRAL Rules. And then if you read that last sentence--I mean, 4 to mean "under the applicable arbitration rules," wouldn't that take you to the amendment provisions of those rules, depending which ones you'd elected?

MR. BRIZ: Yes, I do think to the extent there's a conflict CAFTA would trump there, but I do think obviously the Parties are going to select whichever rules govern the dispute.

ARBITRATOR TOWNSEND: This is a provision of CAFTA.

MR. BRIZ: Right.

ARBITRATOR TOWNSEND: So if CAFTA takes you to those rules, there's no trumping. You're just implementing CAFTA.

THE WITNESS: Understood, but CAFTA has requirements. I think by adopting rules of an arbitral institution under the CAFTA, you still have to follow the Treaty, the Treaty requirements under CAFTA.

ARBITRATOR TOWNSEND: But isn't this a provision of CAFTA which explicitly contemplates an amendment to a claim?

MR. BRIZ: I wouldn't say it's "explicit." I would agree with you it definitely contemplates an amendment and suggests an amendment can't be done. I would say it doesn't expressly provide that--but it doesn't expressly state an amendment can be made and this is how you do it. It doesn't provide those requirements for how to amend or what needs to happen.

Oh, I'm sorry, I thought you had a question as well.

And I will point out--and I understand this

is focusing on--well, if you turn to the next paragraph, Paragraph 5, it says: "The arbitration rules applicable under Paragraph 3 and in effect on the date of the claim or claims were submitted to arbitration shall govern the arbitration except to the extent modified by this agreement," so there may be a disagreement as to what "modified by this agreement" means, but I would suggest that implies that we have to still follow this "Agreement" being the Treaty.

So, going to the cases, the only case--the only case--the only case I do want to the address now is the Aven versus Costa Rica Decision as that's the only decision that arises under CAFTA-DR, and this morning Claimant correctly represented that, in Aven, the new claim that arose in that case was briefly mentioned by the Claimants in the Memorials, and then directly addressed during the final hearing. That much is true. But what Claimant did--Claimants' counsel did state, though, that that was the only reason why the Tribunal there denied the Claim, and that's not true. There is simply no--there is no--there is no discussion in the Aven Decision as to

02:35:36 the timing of the Claim being the reason for why the Claim was denied.

In fact, read from the language of Aven in Paragraph 346, and this is RL-0031, the reasoning that the Tribunal provided, and I quote: "The Tribunal finds that even though there were limited mentions in Claimants' Memorial and Reply to the breaches on the part of Respondent to the standard of full protection and security, Article 10.16.2 DR-CAFTA requires more from a Claimant. The Notice to submit a claim to arbitration," and that's in quotes, "must specify not only the specific provision of the Treaty alleged to have been breached but the 'legal and factual basis for each claim.'"

"Similar provisions are found in UNCITRAL Arbitration Rules Article 20, the need to timely and properly submit a claim as evident to allow a Respondent State to prepare and argue its defense; therefore, since Claimants fail to timely plead a claim for breach of full protection and security, it declares this claim as inadmissible in limine."

So, there is no discussion there as to the

02:36:58 fact that the Claim was raised when it was raised. It's simply saying the language under Article 10.16.2 requires more, the Notice to Submit requires--of Intent to Submit requires identification of the specific provision that's been breached and the basis for the breach. And that's what we have here. The Notice of Intent that the Claimants submitted in this case does not identify in the MFN claim, does not identify Article 10.4 of NAFTA--sorry, CAFTA, and for that reason we submit that the Claim is not admissible.

Thank you.

MR. JIMÉNEZ: So, before we close, I just wanted to just comment very, very briefly on something that was stated this morning which suggested that CAFTA was somehow punitive or unfair to investors, and I think nothing could be further from the truth in this particular case. An investor under CAFTA is able to pursue claims and is able to pursue them in a manner that ensures that their investment receives all the rights that it is entitled to. It's a vehicle that's provided for that protects other Parties at no

02:38:14 cost to the Investor. The Investor is no worse off than they otherwise would have been had their investment had proceeded the way it should have.

What it does is it precludes the Investor from obtaining a windfall, from obtaining a recovery that it was never entitled to. And so to allow the Claimants in this case to circumvent the specific vehicle that's provided for for an investor in this particular case to obtain reflective loss is improper.

Similarly, I believe it is appropriate and not harsh or wrong to expect somebody who wants to bring a claim under CAFTA to comply with the Notice requirements that are provided in CAFTA so that, in this particular case, a proceeding like this can go forward properly where we can have a Preliminary Objection that's based on the Notice of Intent and Notice of Allegations, where we don't go through years and years and not have very direct claims that can be addressed early on and either remedied or withdrawn in a proceeding.

So, in order to give life to what CAFTA-DR is about, in order to give life to what the Treaty

02:39:33 Parties agreed to and should determine how these proceedings should proceed and what claims Claimants can bring, we believe that it should be enforced.

Thank you very much.

PRESIDENT KALICKI: Thank you. Any questions?

All right. Thank you very much.

So, pursuant to the Schedule we've agreed, we'll now take a 15-minute break. We will come back at five to 3:00, then.

MS. MENAKER: Madam President, may I ask that if we could extend this break a little longer, we didn't need it earlier, but in order to prepare?

PRESIDENT KALICKI: Sure. How long?

MS. MENAKER: If we could do 30 minutes and that way we might be able to generate some slides; otherwise, we will be giving the rebuttal without any.

MR. JIMÉNEZ: No objection.

MS. MENAKER: Thank you.

PRESIDENT KALICKI: So, just to be clear, we will come back then at 10 after 3:00.

(Brief recess.)

REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANTS

MS. MENAKER: So I will begin with making a few comments on the reflective loss objection. And to begin, one thing that I just think warrants a bit--we don't need this quite yet--warrants a bit of clarification is we heard Respondent speak a lot about the fact that Exmingua had suffered loss or damage, or pointing to instances where it thought that the Notices indicated that Exmingua had suffered a loss or damage.

But of course, more than one entity can suffer a loss or damage as a result of a measure. And in a reflective loss case scenario, the measure, as we've discussed, is aimed at the enterprise. So the enterprise will suffer a loss or damage, as will the owners of that enterprise. They, too, will suffer a loss or damage.

And the question before you is are those owners who are investors who have made an investment, do they have standing to recover for their loss or damage.

So we have never said that Exmingua itself

03:15:23 wasn't damaged. That's the case in every reflective loss case. The enterprise necessarily will have suffered its own damage, and the question is whether or not it has brought a claim, if someone has brought a claim on its behalf or it has not brought a claim. But that does not affect or take away from the fact that we, as owners of that investment, have suffered loss or damage.

Now, we heard again this afternoon a lot about the views of the NAFTA parties, as if they have expressed in non-disputing third party submissions in various cases.

I hardly need to remind the Tribunal that, of course, the NAFTA parties are not coextensive with the CAFTA parties. So that is of little import here.

And as Arbitrator Douglas asked this morning, what are we to make of the fact that the NAFTA parties, although they seemingly agree, they have not issued an FTC interpretation on this issue. And I do think that is significant. There, under the Vienna Convention, of course, under Article 31.3(a) and (c), when you can look at subsequent state

03:16:31 practice or subsequent state agreement, and any such agreement or practice shall be taken into account by a tribunal, an FTC interpretation has greater impact, because an FTC interpretation is binding on a tribunal. It just--it doesn't only have to be taken into account, it is, indeed, binding.

And they have not taken that step to issue a binding interpretation that would say that reflective loss is not permitted. And the implications of doing so would, indeed, be huge because, as I mentioned before, and as we've said repeatedly throughout our pleadings, there are dozens and dozens of cases under many, many different investment treaties where both minority and Majority Shareholders recuperate and recover for reflective loss claims.

And in particular with respect to those Minority Shareholders, they would not be able to do that if reflective losses were not permitted, and the implication of that is that the CAFTA and also the NAFTA would afford much less protection than any of these other modern investment treaties.

This afternoon--

03:17:42 PRESIDENT KALICKI: Sorry, before you go on.

MS. MENAKER: Yes, please.

PRESIDENT KALICKI: You've made the point that an FTC interpretation would itself be much clearer evidence of subsequent state practice. Are the submissions that states submit in proceedings under NAFTA or CAFTA themselves evidence of subsequent state practice? Do they qualify as such under the VCLT or--or not?

MS. MENAKER: It depends. It is in a particular proceeding, if the parties make submissions, if they are in that proceeding sufficiently clear that a tribunal could find that the--all of the parties to the treaty are in agreement with respect to a particular interpretation, the tribunal might find that that constitutes either a subsequent agreement of the state parties or subsequent state practice, but tribunals ordinarily, and I think quite properly, have a pretty high threshold when it is disparate submissions being made as opposed to one cohesive statement, because when the

parties act together, then in issuing a statement, you know that there is agreement because you have one unitary statement.

When they're doing it in a piecemeal fashion, it needs to line up very clearly in order to find such an agreement. But again, that is wholly lacking here.

And so we have not said that--Respondent this afternoon said that we had somehow indicated that the CAFTA was punitive. That's not at all what we've said. What we've said is that the CAFTA is a modern investment treaty, that one of its objects and purposes is to accord a high level of protection to investors. And that objective would be undermined and is inconsistent with their interpretation, which would deprive a large class of investors from being able to protect their covered investments under the treaty.

And we showed this in our opening this morning. We had a list of dozens of cases on two slides. Those were Slides 19 and 20, where we showed, under a variety of different investment treaties, reflective loss had been recovered. And I just wanted

to point out that the--as Respondent noted, the inclusion of the Commerce Group Case versus El Salvador on page 19 was an error and that--so we apologize for that.

On those two slides, we had not intended to include any NAFTA or CAFTA Cases because that is--was prior to the discussion. And the discussion that follows those slides, of course, we, then, discussed the NAFTA and CAFTA Cases.

So as I stand here right now, I don't recall if that was just inadvertently put in there or if it's supposed to reflect a different case name, but I don't know that offhand, but that case did not discuss the issue of reflective loss one way or the other.

Now I want to just make a few comments about the TECO Case. There, it's--it's no answer that TECO was a Minority Shareholder and could not bring a claim under 10.16.1(b) on behalf of the enterprise. That, in essence, is admitting that it is okay to bring a claim for reflective loss, and that you just need to bring a claim on behalf of the enterprise when you have the ability to do so. That is entirely

inconsistent with the vast majority of the arguments that we've seen in the written pleadings and we've heard earlier today.

So when they come back, like they did this afternoon, and say, well, ignore TECO because they couldn't bring a claim under (b), it just is--makes no sense, because then they are, in essence, saying, well, then, they brought it under (a) because they could only bring it under (a), but that means that when you are a Minority Shareholder, you can bring a claim for reflective loss under (a).

Now, they also misstated the very nature of that claim, because they tried to say, well, they brought it under (a), but they didn't recover for reflective loss. And that's--that's incorrect.

So let me just spend a moment to describe the nature of that claim.

They said this afternoon that TECO brought two claims. That's not correct. They brought one claim for one breach of the treaty, and fair-and-equitable-treatment violation. Based on the manner in which the tariff review had been conducted

and the tariffs that were ultimately imposed on the electricity distributor in Guatemala.

In calculating the damages, the damages experts both for Claimant and Respondent did it the same way. They were calculating damages for one breach, but they did it in two tranches. And the reason they did that is because TECO sold its interest in the consortium immediately before it filed a claim--or immediately after, excuse me, it filed the claim for arbitration.

And so the measure of damages is what would your investment have been worth absent the breach, and what is it worth today? And their investment were their shares in the enterprise.

And so what they did is because everyone accepted that the sale took place at fair market value, as of the date of the sale, they already knew what the actual investment was worth, and they just needed to know what the investment would have been worth absent the breach. And the sale occurred--it was two years after the breach and two years after the claim had been submitted--well, it occurred when the

claim had been submitted to arbitration, but two years after the breach.

So for the first two years of that time period, both experts calculated the--and at that point, it was historical, the cash flows that the enterprise actually received versus the cash flows the enterprise would have received had the tariff been set at a higher rate. And then they subtracted any debt that the enterprise had and then took TECO's 14 or so percentage share ownership in the investment and got its amount of those lost cash flows for that two-year period.

Then looking forward, they had to project the future cash flows of the enterprise, what it would have been absent the breach, which is what they did, and then they subtracted that from the actual value, which was the sale amount, and that was the amount that was claimed for so-called lost share value.

In both--both of those tranches were both reflective loss because it was both calculated as loss to the enterprise, lost cash flow to the enterprise, and TECO's percentage of that.

In the first arbitration, the tribunal awarded TECO 100 percent of those lost cash flows for the two-year period, but did not award it anything for the loss in share value post-sale.

TECO sought--well, both TECO and Guatemala sought annulment and partial annulment of the award respectively. And Guatemala's annulment was rejected. TECO's request for partial annulment was granted. So the denial of that damages that were calculated as a loss of share value post-sale is now the subject of a resubmitted arbitration proceeding.

So I know that is a fairly long explanation, but the upshot is that all of the damages were arising from the same measure and they were all reflective in nature. And they were, in fact--a portion of that recuperated, and TECO is currently sitting and trying to get the rest of that. And it's just pending a tribunal decision at this stage.

So at bottom, they were reflective damages and there was no objection by Guatemala. And we do think that is significant for the reasons I discussed this morning.

Respondent also discussed the Renco Case this afternoon. And one thing which I believe is clear to the Tribunal, but just to make sure there is no--no uncertainty, is that what they are quoting is not a decision by the Tribunal, it's argument by the party. It's argument by Peru, as Respondent, when it is seeking--when it's making an objection to Renco's claim. And it is arguing that the claim should have been brought on behalf of the enterprise and not on Renco's own behalf.

That was an objection that the Tribunal never ruled upon, because the waiver that the Claimant itself submitted in that proceeding on its face did not comport with the language in the treaty. They had added conditions to the waiver. And Peru had made multiple Preliminary Objections, and the Renco Tribunal dismissed the claim for lack of jurisdiction on account of the defective waiver, so it never addressed this argument that the claim should have been submitted on behalf of the enterprise. So all you have here are arguments by one Respondent party that were never ruled upon.

And also, just in the context of that case, it also is different than here, which may give you some further background, insofar as Renco initially filed its claim listing itself, a US company as a Claimant, and also DRP, Doe Run Peru, which was a Peruvian company, as a named Claimant in the UNCITRAL arbitration under the treaty.

And in its Notice of Arbitration, it indicated that it was bringing the claim on its own behalf and on behalf of its Peruvian enterprise. Then Peru objected and said, you can't have a Peruvian entity as a named Claimant in an UNCITRAL Case under this proceeding, and they filed an amended notice of claim and they dropped it. They dropped DRP as a Claimant.

So then Peru said, well, you just dropped the Claimant, but you didn't change the nature of your claim. You, in essence, are still bringing the claim on behalf of the enterprise and you should have filed a waiver for the enterprise. So it was--did arise in a different context. But that is--again, it's all background, because ultimately, the tribunal never

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ruled on that objection at all.

With respect to Clayton, this morning, I discussed that decision, and pointed out that the tribunal did not engage with the ordinary language of Article 1116, it noted that loss or damage was not qualified or limited, and just said, so, we don't know. If that includes reflective loss, let's look at the context. And when it looked at the context, as I mentioned this morning also, it made a quite major error, because it says, let's see, we have to look at the context, and Article 1117 has to be considered. That provision allows an investor to claim for loss to an enterprise, thus providing for the recovery of reflective loss.

As a result, if we allowed reflective loss under Article 1116, it would render 1117 inutile or ineffective or meaningless. But that's based on a major error, because as we all know, Article 1117 does not allow an investor to claim for a reflective loss. It allows an investor to claim for direct loss to the enterprise to the extent that the investor owns or controls the enterprise. And there are--in that

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instance, a Majority Shareholder may recuperate for its reflective losses indirectly, but a Minority Shareholder may never recover for a reflective loss under Article 1117. So that is just mistaken.

And so their conclusion--

ARBITRATOR DOUGLAS: Is--

MS. MENAKER: Yes.

ARBITRATOR DOUGLAS: Is it mistaken or did they just not address Minority Shareholders at all? That was my reading of it.

MS. MENAKER: They--they may not have, but that in and of itself is a mistake, because in order to--if you're going to say that an interpretation renders a provision meaningless or inutile, it needs to do so in all circumstances, not just in the particular circumstances in front of you, because one can always think of certain hypotheticals or situations where two provisions would be--you know, essentially have the same interpretation in any particular circumstance. That doesn't render one meaningless. It has to be across the board. And so clearly here, it doesn't render their

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interpretation--allowing reflective loss under Article 1116 does not render Article 1117 inutile. Only under their mistaken interpretation does it.

ARBITRATOR DOUGLAS: Well, I mean, in our situation, between (a) and (b), and it's--I guess, it's the same with 1116, 1117, why--again, why would you go down 1117 if you could always go under 1116?

MS. MENAKER: But--and that, I would just go back to what we discussed this morning--

ARBITRATOR DOUGLAS: Yeah.

MS. MENAKER: -- because in any particular case, it might not make a difference, but in any particular case, you may choose to do so, as Madam President said, in order to avoid the complexity in actually calculating reflective loss. You might also have tax advantages one way or the other. It's not as if, as Respondent said this morning, it's a windfall for the Claimant. No, I mean, it could cut one way or the other in any particular circumstance.

And if the State parties did not want to grant that option to the Claimant, all they needed to do was to say it. So the Claimants--

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ARBITRATOR DOUGLAS: I still don't quite--

MS. MENAKER: --know what to do.

ARBITRATOR DOUGLAS: Still don't quite understand why you say--- I mean, that you can criticize the Clayton Tribunal perhaps for not referring to minority shareholders, but why is the statement in 372 incorrect?

MS. MENAKER: Because it says, "Article 1117 allows an investor to claim for loss to an enterprise, thus providing for the recovery of reflective loss."

ARBITRATOR DOUGLAS: Yeah.

MS. MENAKER: Right? But it doesn't allow an investor to claim for that loss and recover reflective loss in all instances, only in some instances. Only when--

ARBITRATOR DOUGLAS: Oh, so you're saying because it's not--

MS. MENAKER: Yes.

ARBITRATOR DOUGLAS: --differentiating between them?

MS. MENAKER: Yes.

ARBITRATOR DOUGLAS: All right.

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03:32:12 PRESIDENT KALICKI: So I gather that the issue of minority shareholders was argued to the Clayton Tribunal, well, at least based on the submission, the US submission that the Respondent cited to in their rebuttal. They--in other words, the question is was it--was it argued and simply not addressed, or was it not even argued by the parties?

But the Respondent's rebuttal slides have given us at least a quote from the US submission about minority shareholders. But I can go back and check. I was just--if you don't know offhand.

MS. MENAKER: I mean, my recollection, and--is that the Tribunal's discussion is really rather short. It goes into some detail about the party's submissions, but their analysis, you know, it starts on, I think, Paragraph 369, goes on for a few pages, I don't--

ARBITRATOR DOUGLAS: (Comment off microphone.)

MS. MENAKER: Yeah, I have to look at it. I have to look, but I don't want to--

PRESIDENT KALICKI: That's okay.

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03:33:20 MS. MENAKER: -- misspeak. I don't recall them discussing the problem that they would be depriving minority shareholders of a remedy in some cases, but I--I would need to re-read it.

Now, so as I was mentioning, you know, there can be legitimate reasons why a Claimant would choose to file under one or the other, but I think even more importantly, if the Respondent states, "Did not want to grant that choice to Claimants," all they needed to do was to indicate it in the treaty, and then Claimants would know how to file, where to file, what to do. But they can't grant them an option and then tell them that they're not at liberty to choose that option, because it's not a restriction, it is an option. As Arbitrator Townsend noted, today, it does include the word "may." And if you also look between Sections (a) and (b) of 10.16.1, it has the word "and." It says, "You may file under 10.16.1(a) and under 10.16.1(b) if you own or control the enterprise." It doesn't say "or." It's not a binary choice there.

And the last thing that I want to mention

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03:34:35 about Clayton, and I don't believe that we have ever heard a response from Respondent on this point, they noted that ultimately in that case, the Tribunal had held that the Claimant had properly brought its claims under Article 1116, which is equivalent to 10.16.1(a), and we have said, and under the Tribunal's analysis, our claims also would properly be characterized as claims for direct losses under 10.16.1(a).

And if you look at the language here, what did the Tribunal do? This, again, was an instance where the Claimants had a wholly-owned enterprise in Canada, and they were seeking to develop a quarry, a maritime terminal, but were denied a permit to do so.

And the Tribunal says the opportunity to develop and submit the project was an opportunity of the foreign investors, the US investors. It's owned and run by the individual Claimants. They prospected the sites. They invested their money in the opportunity. So did Mr. Dan Kappes and his company, KCA. They prospected things. They invested their money. The sole purpose of Bilcon of Nova Scotia was to build and operate a quarry just like the sole

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03:35:51 purpose of Exmingua is to construct and operate and develop these mines.

It was not an entity set up to establish and manage an investment with the Claytons just as passive investors, nor was Exmingua set up to manage the Progreso VII and Santa Margarita mining sites with Mr. Dan Kappes and KCA as passive investors, quite to the contrary.

The fact that the Claytons used a local enterprise as an instrument for pursuing their opportunity does not turn that opportunity into Bilcon of Nova Scotia's opportunity.

So the fact that Claimants here, Mr. Dan Kappes and KCA, used a local enterprise, Exmingua, as they needed to do, because the local enterprise has to hold the permit, the fact that they use the local enterprise does not turn that opportunity into Exmingua's opportunity. And they said, "Accordingly, compensation is owed directly to the investors pursuant to Article 1116."

So to the extent that this Tribunal would find any of the arguments that Respondent has made

compelling on this point, that the claim should have been--that claims under (a) can only be brought for so-called direct losses, our claims fit squarely into that characterization of direct losses under 10.16.1(a).

Now Respondent, this afternoon, said--they attempted to distinguish the jurisprudence under ICSID Convention Article 25.2(b) which I--with respect, we don't find compelling at all. It's unclear how there is a difference between allowing an enterprise to bring a claim when the enterprise, in order to do that, of course, the shareholder has to act in order to get the enterprise to bring the claim, or by having the shareholder bring a claim on behalf of an enterprise. It's unclear why that would make any difference. At the end of the day, it is just a device in order to allow recovery of an enterprise's losses under an investment treaty when, otherwise, that would not be permissible, because the enterprise shares the same nationality as the host State.

So again, the jurisprudence that interprets that article and treaties with that provision that

have said that Majority Shareholders can bring claims for reflective loss on their own behalf, notwithstanding the fact that they could have had the enterprise bring that same claim, are instructive here.

Respondent also this morning said that CAFTA resolved the concern of reflective loss, but it never explains how it did that. It says that there was this concern in the NAFTA jurisprudence, and we've shown you that the NAFTA jurisprudence, up until Clayton, had unanimously rejected the proposition that you could not bring reflective loss under Article 1116, namely, the Pope & Talbot and the UPS Cases. Then--and of course, Clayton is post-CAFTA.

Then you have CAFTA, which they say was modeled after the 2004 BIT, but CAFTA doesn't change any language from the NAFTA that's pertinent to this inquiry. It has the same language in 1116 and 1117 as in 10.16.1(a) and (b). So query how it resolves any uncertainty regarding reflective loss, and clearly, it doesn't resolve it in favor of Respondent's interpretation. The NAFTA--the CAFTA parties were

well aware of that jurisprudence and adopted the same language.

And I think on that note, the only thing that I would add is, in further response to the President's question this morning about a possible discontinuance of the Constitutional Court pending action, and again, we're not affirmatively doing anything before that Court, we haven't for over three years, it's just sitting there, I would just note that, again, this is not an issue of jurisdiction. It's not an issue of admissibility. As I understood it from the questions this morning, was that whether the pendency of that case might have any impact on the merits or damages insofar as there was a concern if you were to rule--if the Court would ever rule and you were to rule second, of course, you could take that into account. But if you were to rule first and did not want to depend upon the Guatemalan Court doing the right thing with your ruling, if we could address that by discontinuing.

So again, I would just say that that does not affect the jurisdiction of the Tribunal or the

admissibility of the claims, but if that is something that would assist the Tribunal, then that is something that certainly we would be open to considering. And perhaps not surprisingly, as you've heard from Respondent this morning, they were, you know, unwilling to make any type of commitment with respect to any time bar. So of course, that would not entail any resubmission of the claim under a different article. It would merely be a discontinuance of the pending proceeding, or a request to the Court to no longer attempt to rule or no longer issue a ruling.

So, to sum up, I just wanted to spend a minute discussing these slides that were in the slide deck this morning that you have that I did not have an opportunity to go over. And this is just to summarize the issues with Respondent's interpretation.

And as I noted, their arguments, we believe, have been internally inconsistent. On the one hand, if their argument is that you cannot recover for reflective loss under the CAFTA or the NAFTA, that when you file a claim on your own behalf, it is solely for so-called direct losses, that is inconsistent with

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the ordinary meaning of 10.16.1(a), which allows claims for any loss or damage without restriction.

It's inconsistent with the ordinary meaning of the definition of "investment" to include enterprises, shares in enterprises and other interests in enterprises.

It's inconsistent with the object and purpose of providing a high level of protection to investors, because it would--bless you--preclude minority investors for recovering for their most common cause of injury.

It's inconsistent with Respondent's past state practice in the TECO Case, where a Minority Shareholder did, indeed, recover for reflective loss under 10.16.1(a).

And it's inconsistent with the NAFTA jurisprudence that I have discussed, namely, Pope & Talbot and UPS, where you had wholly-owned enterprises, and Canada argued unsuccessfully that those claims should have been brought under Article 1117 and the Tribunal outright rejected those objections.

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If, alternatively, Respondent is saying, well, let's have an exception. You can recover for reflective loss under 10.16.1(a), but where you own or control the enterprise, you no longer have that option, you have to move under 10.16.1(b). That itself is inconsistent with its own arguments.

It's also inconsistent with the United States's submissions on which it relies, which clearly say they don't believe reflective loss is available.

It's inconsistent with the ordinary meaning of 10.16.1(b), which uses the word "may," that you may file a claim, not that you "shall." And I showed how it easily could be drafted if that were a requirement for a Majority Shareholder to file under that article.

It's inconsistent with NAFTA jurisprudence confirming that a Majority Shareholder does not need to file under Article 1117.

It's inconsistent with the jurisprudence under ICSID Convention Article 25.2(b), which holds that in--where the option for an enterprise to file a claim is available, the controlling shareholder still may file its own claim on its own behalf for

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reflective loss.

And it's inconsistent with Respondent's state practice--prior state practice in the RDC Case where it objected to having a claim for enterprise's losses paid to the enterprise because it would indirectly compensate Guatemala nationals who were minority shareholders.

So with that, I will turn the floor over to Mr. Llano, again, who will address the full-protection-and-security objection. Thank you.

MR. LLANO: Thank you.

I have three points, simple points, that I want to make.

The first point has to do with pleadings. And we heard a comment to the effect that Claimants are modifying or altering their pleadings with respect to the scope of the full-protection-and-security claim, and whether or not it covers Progreso VII and/or Santa Margarita. The facts are clear, and the claim is clear. Obviously, the blockades affected both of the properties. They affected Progreso VII and Santa Margarita.

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The reason why--and I explained that this morning, the reason why we focused in particular on Santa Margarita as--in the context of this discussion is because the damage to Santa Margarita is--arises specifically out of these blockades; whereas in the case of Progreso VII, you have the Constitutional--the Supreme Court and Constitutional Court rulings which barred or suspended the License and access to the site in any event. And so therefore, the damage from those blockades in the case of Progreso VII was coextensive with the damage that resulted from these other rulings which would have barred access anyway. And so that's why we have--we have focussed in more detail in the--on the case of Santa Margarita.

My second point has to do with the facts. And we had some discussion about this typo issue. And it is correct that the article that I was referring to this morning talks about March 2, 2012. And the reason why we understand that to be a typo is because the contemporaneous documents were discussing a date of March 2nd in the context of the new wave of protests and blockades that resulted from the MEM's

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03:46:58 non-compliance or initial non-compliance with the Supreme Court's order to suspend the Progreso VII License.

You see here on this rebuttal slide, two articles in the record, C9 and C10, which are both from March of 2016, both refer to March 2nd as the--as the relevant date. And of course, one talks about the MEM protests. The other talks about protests at--and blockades at the mine.

But in any event, what really matters here in terms of the facts and your contemplation of the facts in connection with this Preliminary Objection is what Respondent has not disputed in regards to the full-protection-and-security claim. What have they not disputed? They have not disputed that the mine operated--and the Claimants have alleged, rather, that the mine operated for two years.

They have not disputed this allegation made by Claimant. They have not disputed that between 2014 and 2016, the mine operated. It produced more than it 60 shipments. It allowed for the entrance of more than 180 operators and employees. None of these facts

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03:48:19 and allegations in the papers are disputed.

And therefore, what they're really asking you to do is to make a factual determination now that these facts, these inconvenient facts, should be left aside, and that you should accept, as a factual matter, that the mine was blockaded continuously, notwithstanding these specific allegations in Claimants' papers.

Now, of course, as a matter of your review and scope of review for purposes of Preliminary Objections, that is not called for. That is what the merits phase is for. And what matters here are the allegations put before you. These allegations include, and this is, again, undisputed, the fact that the mine operated. And if the mine operated, there was access. And if there was access, there was no claim to be made.

So if it is true--if it is true that there were two periods of blockades, one between 2012 and 2014, and another 2016 onward as Claimants allege, then this objection should be dismissed. The fact is, for purposes of Preliminary Objections, you cannot

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03:49:34 discount these allegations. And so therefore, this is enough for now to go forward with this claim.

There was also a mention about irregular blockades. The word speaks for itself. "Irregular." It's not continuous. So again, facts are facts. For purposes of--for present purposes, we have enough to dismiss the objection.

My final point is on law.

There were two cases that were mentioned on rebuttal by Respondent. One was the Grand River Case. And the suggestion was made that the--within the series of events at issue in the Grand River Case, the events were dissimilar enough to warrant their separation for purposes of the limitations period.

We submit that we're no different in this case. Where in the Grand River Case, you had a series of laws regarding the tobacco industry, here, you have a series of blockades. Two blockades, indeed. Two distinct periods of blockades, which had, again, different causes, different damage outcomes, and so forth. And therefore, the Grand River Case is clearly opposite for--for this--for this case.

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03:51:01 And I would compare it, also, to the Nissan Case. Once again, where you had a long series of equivalent mistreatments or violations by this Indian state, which had to do with tax incentives. One after the other. They were all alike. The difference was that there had been no continuous repudiation of the obligation to grant these tax incentives.

Here, again, there was no way to assume, just because there was a blockade in the past which was lifted, that there would be future blockades, and therefore, that an arbitration should have been brought perhaps in the middle of 2015, when my client was operating the mine. That would have made no sense.

The other case, and I will conclude with this, is the Ansung Case. And Respondent said that the fact that the investment was sold prior to the start of the limitations period is, quote, of no consequence.

Well, that can't be right. This would be tantamount to saying that if my client had sold their--the entire project, Progreso VII and Santa

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Margarita, prior to the blockade, then that would be the same fact pattern that we had in the Ansung Case. Well, clearly, that's not the case.

The mine is still owned by my client. The blockades happened after, the--the blockades at issue in this arbitration happened after the start of the limitations periods. We're not in a situation where the investment has been lost, where the lands have been completely sold and divested. So Ansung actually does, as I said this morning, support--support our position.

So with that, I will conclude and I thank you for your attention.

PRESIDENT KALICKI: Do you have any questions?

ARBITRATOR TOWNSEND: No.

PRESIDENT KALICKI: Questions?

ARBITRATOR DOUGLAS: No.

PRESIDENT KALICKI: All right. Thank you, both, to both parties for your--

ARBITRATOR DOUGLAS: (Comments off microphone.) Still more to come.

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PRESIDENT KALICKI: Oh, I apologize. I thought you were--when you say, I will conclude, I thought you meant collectively.

Please, please continue.

MS. MENAKER: Thank you. I will be brief, though. So I just have a few comments on the MFN objection.

So first, I just want to clarify, make--make sure that my statements this morning were clear as I know that we were tight for time. As the President noted, you had said, well, we do complain about the earlier Escobal decision in our Notice of Intent, the one where we indicate that they were permitted to operate.

And yes, we note that decision, and you can say, we complain about that decision, but that is, again, a fact that we may very well rely upon in order to show arbitrariness of--further show the arbitrariness of the Courts, but that is not a new claim. That is a fact that is relevant to--or potentially relevant, say, to our FET claim, which is notified in the Notice of Intent.

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We were not making a new claim on the basis of that Court decision because, unlike in the Oxec Case, where we--there was disparate treatment because as soon as the Court ruled against us, we were suspended. But when the Court ruled against them, they were permitted to continue operating. And that was the basis for the National Treatment Claim.

Here, in the equivalent Escobal Case, they were only permitted to operate for--it was three to four weeks. And so we were not bringing a claim that gave rise to loss or damage as a result of that decision. It might be a relevant fact or a background fact just to discuss, but it did not give rise to an independent claim.

What gave rise to the claim was the fact that the Constitutional Court decided, definitively decided their appeal in 2018, in September or October of 2018, even though they had filed that appeal more than one year after we filed our appeal, and our appeal is still pending three-and-a-half years later. That was the discriminatory treatment that gave rise to the MFN claim, and that's why we say that that fact

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arose after the Notice of Intent, before the Notice of Arbitration, and it was added there.

Now, in--according to Respondent's interpretation, if you could never add a claim in your Notice of Arbitration or even thereafter, of course, as we've said, a state would be free to take retaliatory action against an investor, and the investor would have no choice but to continuously file new claims, wait for new Notice periods, wait for Cooling Off Periods, and it's just not the way the treaty works or is intended to work. It's not the way the Treaty's language is written.

As we showed in Article 10.16.4, the last sentence, it presupposes that there may be amendments, and as the President pointed out, there are other provisions, particularly, 10.20.4(a) and (c), which also indicate that the Notice of Arbitration may be amended. And As Arbitrator Townsend pointed out, the Treaty incorporates the arbitration rules. And the arbitration rules allow amendments as well as ancillary incidental claims.

Again, I don't even think we're there

because we're not even amending a claim, we have just made a claim. But if you can amend a claim without having to go through and wait for all of these Notice procedures, certainly, you can add a claim in the Notice of Arbitration. And in fact, that is what all of the jurisprudence shows.

Respondent, this afternoon, said, there are dozens of cases going in different ways. And that--that's not true. They all go in the same way. They may have reached different outcomes, but they're remarkably consistent. They all look at whether the facts were sufficiently related to the notified claims, and whether the Respondent had an opportunity to engage in amicable settlement. And then, of course, when you're looking at later amendments, they look at whether the facts were known at an earlier time or whether it was a later-in-time fact and that warranted the amendment, and whether the party will have an ample opportunity or an adequate opportunity to respond to the claim. And we tick all of those boxes here.

And I won't go through that all again other

than to remark on the Aven v. Costa Rica Case. Now, Respondent quoted from that case and said that while it's true that the claim was only raised in passing in the memorial and was only really made at the close of the hearing, we don't know that the Tribunal decided to disallow the amendment on that ground.

And he quoted from the decision where it talked about the notification provisions, and he said that those provisions are "clearly intended to allow time to prepare a defense."

And then, of course, what do we find out? That the claim is actually raised at the close of the hearings on the merit. So of course, it was the timing of making that claim that led the Tribunal to disallow that claim. And that would be the case probably under any type of treaty when you're making a claim for the first time at the close of the hearing. And that is so far from what's happening here that I think that is hopefully clear to all.

So with that, unless the Tribunal has questions--

PRESIDENT KALICKI: Just one question.

I understand your point about the Treaty's multiple references to amendment of claims, but if we accept that point, what does that do to the word "shall" or "shall include" in the notice provision? Does it render it entirely predicatory? In other words, you shall include it in the notice, but if you forget, it's fine, because you can always add it within at least a reasonable period of time.

MS. MENAKER: Well, I would think not, because again, you can't always add it, right, so you would have to--it shall include it unless the arbitration rules would allow you to do it later. And so it's like, you know, we made the analogy in our pleading when you can have a mandatory provision, but if there is no consequence provided for in the Treaty, then you look at several factors. So for instance, the obligation to accord fair and equitable treatment. It says, you shall accord fair and equitable treatment, but if you did not have another provision that granted the state's consent to arbitrate for a violation of that provision, you know, it wouldn't be ineffective, you were still under an obligation to do

it, but the--you wouldn't have the ability to bring a claim.

And here, it's just--it doesn't warrant dismissal just because it's an obligation. It doesn't mean that you can raise claims whenever you would like. There will still be some things for the Tribunal to consider as far as the timeliness of that. But that is where one would revert to the arbitration rules and the different factors that Tribunals have taken into consideration.

PRESIDENT KALICKI: Okay. Thank you.

ARBITRATOR DOUGLAS: Just got one tiny, little factual question.

The Oxec Case, when it got to the Constitutional Court, the Constitutional Court rendered its decision, I can't remember exactly when, but what was the outcome of that decision? I know we're--this is not exactly germane to what we're discussing. I understand. I'm just interested.

MS. MENAKER: And this is with respect to the Oxec Case?

ARBITRATOR DOUGLAS: The Oxec Case, yeah.

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MS. MENAKER: The Oxec case?

So the Courts basically said--they ruled just like in our case, that the License should not have been granted because the state should have conducted the consultations, but nevertheless, continue operating while the state conducts the consultations. And so that was their ruling.

And then the state went ahead and in a--I believe it was like a five-month period commenced and concluded the consultations, and that was it. So the project was never interrupted and just continued to operate. And the License was never suspended.

ARBITRATOR DOUGLAS: And so the status of that now is that they're operating, they have their License--

MS. MENAKER: That's correct.

ARBITRATOR DOUGLAS: --it's going?

And the same with Escobal?

MS. MENAKER: No. So with Escobal, they--again, they had that little three or four-week period when they could operate. Then the Court said, no, you're suspended. And then they said, so you will

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remain suspended until the MEM commences and concludes the consultations.

Then they had the Constitutional Court Case where, you know, they lost. They didn't reverse that.

And then the MEM announced that it would commence consultations, but it has not--to the best of my knowledge, it's just been in limbo.

PRESIDENT KALICKI: So Escobal is only more favorable in the sense that at least there was a Court ruling as opposed to waiting for a Court ruling, even though it was an adverse Court ruling?

MS. MENAKER: That's correct. And the reason is because at the time, MEM was taking the position that notwithstanding the fact that the Court had previously ordered it to conduct consultations, it would not do so until there was a final resolution, and they interpreted the final resolution as a decision by the Constitutional Court on all of these appeals.

So, by not ruling, they were say, well, we can't do it. We're just sitting here. But with Escobal, they had that ruling, and at least initially,

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after that ruling, there was an announcement that they would do the consultations.

PRESIDENT KALICKI: Thank you.

John, anything else? Any questions?

ARBITRATOR DOUGLAS: No.

PRESIDENT KALICKI: All right. Thank you, to both parties.

MR. JIMENEZ: Madam President, if I may, before we finish. I just wanted to address one question that you raised regarding the Clayton Tribunal decision. And I just wanted to point out that there are 75 paragraphs that address the reflective loss. And specifically, Paragraphs 334 through 341 make reference to minority shareholders.

The relevant pages are pages 92 through 119. And that was it.

PRESIDENT KALICKI: Thank you. You can be assured that the Tribunal will review that very carefully. Thank you.

MS. MENAKER: I just--

PRESIDENT KALICKI: Yes.

MS. MENAKER: Could I just note that some of

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those paragraphs from 334 is under Respondent's position. All the way to 341. It's still under Respondent's position. It's not under the Tribunal's analysis.

PRESIDENT KALICKI: Okay.

ARBITRATOR DOUGLAS: We can read it.

PRESIDENT KALICKI: Well, as I said, we will--we will, in fact, read it very carefully.

So I think the Tribunal has now exhausted its questions for both parties, and therefore, there is no need for us to make use of the time we had reserved in the calendar for additional questions to the parties.

I think, then, that brings us to the close of the substantive arguments today.

PROCEDURAL DISCUSSION

PRESIDENT KALICKI: The procedural calendar had also envisioned that we take a few minutes to discuss next steps, if there are to be any, and by that, I think we had left open the possibility that one or both parties might ask for additional briefing or might not it. We wanted to put that to you.

I will say one difficulty if you were to ask for that is, as I understand it, our timetable under the DR-CAFTA to render a decision runs from the date when the Preliminary Objections were filed and not the date when the parties stop briefing us, as you often have under arbitral rules. So the additional filing of briefs, unless the parties were to agree jointly to extend our deadline, just squeezes us at the back end. It doesn't actually extend our time.

That said, if there's something that the parties feel it important to brief in writing and you want to discuss that and let us know your position, as well as your position on our timetable, again, I'm certainly open to hearing from you.

Any--do you want to take a break and discuss this, or--

MR. JIMENEZ: On behalf of Respondent, we're cognizant of the limited time provided and we're willing to forego any further briefing. Don't believe it's necessary, either.

PRESIDENT KALICKI: Thank you.

MR. JIMENEZ: Thank you.

MS. MENAKER: And Claimant agrees, as long as the Tribunal did not have any questions that it wanted, and it doesn't seem as if it does. So from our perspective, we don't feel it's necessary.

PRESIDENT KALICKI: Okay. All right. Then the only other procedural step that I can envision at this stage is the question, depending how we rule, and we have not even completed our deliberations, so please read nothing into this, but depending how--how we were to rule, the question might arise whether we need to address costs or not at this stage.

So do the parties wish to make cost submissions to us at this stage, and if so, by when? But again, if you want to discuss this, or--but it does seem to be something we need to build in one way or the other.

MR. JIMENEZ: On behalf of Respondent, we would request letting the Tribunal know within the next two days just so that we can consult with our client on that issue.

PRESIDENT KALICKI: Okay.

MR. JIMENEZ: And we can always explore having a second round should it be necessary. So that we address it later on, but we would like to be able to consult with our clients.

PRESIDENT KALICKI: Well, if the parties haven't had a chance to discuss this together, it probably makes sense to give you some room to do that.

Do you want to--I don't know if two days is the right number of days or you need longer, but what would the Claimants propose?

MS. MENAKER: That would be fine. We can--if you consult with your client and then we can talk with one another over the next couple of days and revert to the Tribunal.

MR. JIMENEZ: Agreed.

PRESIDENT KALICKI: Okay. Very good.

Are there other procedural matters that I have left out that the parties think need discussing at this stage?

MR. JIMENEZ: On behalf of Respondents, nothing else, just want to thank the Tribunal, the members of the Secretariat, the Staff, the

Interpreters and the Court Reporters and opposing counsel and the parties. Thank you very much.

PRESIDENT KALICKI: Yes. Anything else?

MS. MENAKER: Nothing from Claimants, and we also extend our thanks to Tribunal and everybody else. So thank you.

PRESIDENT KALICKI: Well, thank you.

I think--think I speak for my colleagues in also saying that we're grateful for the high quality of both the written and the oral submissions in the case. You've given us a lot to think about. But in our thinking, we certainly can't complain that we've not had adequate briefing. So thank you for all the assistance. And as always, thank you to David and to his colleagues. And thank you to the very hard-working interpreters, whom I know we have taxed today. I appreciate their efforts. And of course, thank you to our colleagues from ICSID.

So with that, I think we're concluded, and safe travels home to everybody.

(Discussion off the record.)

(Whereupon, at 4:09 p.m., the Hearing was

04:09:14 concluded.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAVID A. KASDAN

CERTIFICATE OF REPORTER

I, Marjorie Peters, FAPR, RMR, CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

MARJORIE PETERS