International Centre for Settlement of Investment Disputes
ICSID Case No. ARB/18/43

In the proceeding between

DANIEL W. KAPPES

y

KAPPES, CASSIDAY & ASSOCIATES

("Claimants")

C.

REPÚBLICA DE GUATEMALA

("Respondent")

GUATEMALA'S COUNTER-MEMORIAL

December 7, 2020

Members of the Tribunal

Sra. Jean Kalicki, *President*
Sr. John M. Townsend, *Arbitrator*
Prof. Zachary Douglas QC, *Arbitrator*

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TABLE OF CONTENTS

I. EXECUTIVE SUMMARY

1. Guatemala ratified ILO Convention 169 on the Rights of Indigenous and Tribal Peoples in Independent Countries in 1996. In its articles 6, 7, and 15, the Convention establishes the obligation of consultation with Indigenous Peoples before commencing a project that could alter their ancestral territories and cultures. Over the years, respect for these rights has grown in urgency and significance; the fact remains that, the Guatemalan Constitutional Court has, since the conception of the obligation, been developing constant jurisprudence that requires consultations with indigenous peoples. Likewise, the obligation has grown in the Inter-American System and has come to reach, in the understanding of the Inter-American Court of Human Rights, the status of "general principle of law." By the time of the alleged investment, not only was it an obligation under international law, but there was already a solid body of national and international jurisprudence that any investor who prides itself as such, and even more so, one who claims compensation of more than USD 300 million (for a project that, if successful, is worth barely 1% of that value), could not have ignored in its due diligence. Moreover, the obligation had already become an obligation of good practice for international companies through the opinion of legal bodies such as the International Council of Mining and Metals (ICMM) and the United Nations Guiding Principles on Business and Human Rights.

2. Daniel Kappes and his company Kappes, Cassiday and Associates ("KCA"), are not a mining company, their specialty is mining engineering as advisors to mining companies, rather than as those who operate a mining project to make it successful from its preparation, exploration, certification of reserves, to its exploitation and closure. There is no evidence in the record that shows that Daniel Kappes and/or KCA had carried out any other mining project prior to Progreso VII. On the contrary, the evidence points in the other direction: they were contractors for the Cerro Blanco mining company in Guatemala until shortly before attempting the adventure of partnering with Radius for the Progreso VII project, and after Radius had for almost 10 years failed to attract other partners with the international experience to exploit the mine; in fact two other more renowned companies, Gold Fields and Goldcorp, had participation in the project and abandoned it, always writing off the investments made or replacing them with future profits.

3. Significantly enough, most of KCA's alleged investment takes place after the social conflict around Progreso VII had already taken place. In fact, according to Claimants, they acquired the remaining 49% of the project in August 2012, when community protests had begun in 2012. Likewise, the construction of the mine, where the largest investment is located, takes place once the conflict is at its peak. Radius, on the other hand, leaves the project saying precisely that it would focus on an area with less conflict.

4. Beyond the fact that the State of Guatemala, in all its spheres of competence, did everything possible to peacefully resolve the conflict and protect all those involved, Claimants cannot make claim based on their

own negligence. The investments should not have been made by force, but in dialogue with the community and by acquiring the necessary social license to operate. Radius sold its 49% stake in El Tambor (which includes Progreso VII) to KCA for USD 100,000 upon the signing of the agreement and USD 300,000 upon the start of production of the mine, which reflects the transaction value of the mine. There is a maxim in the Civil Law system stating that no one can claim a better right than the one they receive. The same applies here, the Claimants cannot claim a better right than the one they acquired, nor can they make a claim the absurd amount of over USD 300 million for an investment made in a complicated social context, which the company did nothing to solve.

5. The Environmental Impact Assessment (EIA) is so incomplete that it does not meet the standards of domestic law and international practice on the subject. In addition, the EIA contains misrepresentations and promises that led the Authorities to approve it, when it should not have been approved. Furthermore, all this misinformation and its impact on the environment and the quality and quantity of water that would be consumed by the communities in the affected area, constitute the fuel that has kept the flame of social unrest burning. In addition, Claimants - through Exmingua - never submitted a mine plan or determined the existence of proven reserves during the time the mining project was in operation. Moreover, they only now present an unrealistic mining plan to justify their absurd claim for compensation. In this stated mine plan, and in Mr. Kappes' statement, attached to Claimants' Memorial, Claimants maintain that Exmingua would produce 250 tons per day, when the license had been granted on the premise that 150 tons per day would be produced. Operating above this self-imposed limit would constitute a violation of the principle of good faith and international mining practices and customs, as it not only misled the State, which could have refused to grant the license, but also invalidated any consultative process, as indigenous communities have the right to be informed accurately of measures that could affect their territory. Finally, it should be noted that Exmingua used every opportunity it had to breach the law; not only is the EIA in violation of Guatemala's Environmental Rules, but Exmingua incurred in contempt when it continued to produce after the Provisional *Amparo* Order was issued on November 11, 2015, which suspended the exploitation license. Exmingua also failed to obtain a valid municipal construction permit required for the construction of the mine and filed apocryphal documents in judicial proceedings in Guatemala.

6. Finally, in relation to the actions of the Guatemalan Courts, it must first be stated that Guatemala is a democratic country and a state of the rule of law. The decisions of the executive branch (including the acts of the Ministry of Environment and Natural Resources ("MARN") and the Ministry of Energy and Mines ("MEM") are subject to constitutional control by the Guatemalan Courts, including the possibility that such control is exercised through an *Amparo* Action, specifically established in the Political Constitution of the Republic and in the Law on *Amparo*, Personal Exhibition, and Constitutionality. Therefore, it was ultimately

up to the Constitutional Court to determine whether the exploitation license had been granted in accordance with the law. The Constitutional Court acted in accordance with the law, and all the Guatemalan Courts to which Exmingua resorted, always granted it the possibility to duly submit its case, and although the Claimants do not say so, many times courts decided in its favor. On the specific issue of the Indigenous Peoples' Consultations, the Constitutional Court did not deviate in any way from decisions issued in other cases under the same circumstances, and thus Exmingua has no valid grievance. Nor was there any denial of justice due to a delay in justice; first, because there was no intentionality in relation to Exmingua, but mainly because the Court acted within its powers and in the context required at the time, taking into consideration that this is not the only case before the Court. On the contrary, this is only one of the over approximately 6,000 cases that the Court decides annually.

7. In short, nothing in Guatemala's conduct violated the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR"). On the contrary, the State acted in accordance with international standards every time it had to intervene. It granted the Claimants the level of protection that international law requires it to provide, on a constant basis, from 2012 to date. And the rights granted were always granted within the framework of the rule of law, which grants powers and rights, but also imposes obligations. Just as the rights of any citizen, the rights of Claimants were subject to the controls and limitations imposed by the constitutional order of the State, and the judiciary granted them broad powers to enforce their rights, mechanisms that Claimants used extensively. And, even when the results before the Courts were not what Claimants would have wanted, although they were what they reasonably should have expected, the decisions of the Courts, particularly of the Constitutional Court, were in line with established and repeatedly confirmed jurisprudence, with no surprises in the application of the law.

8. In this Counter Memorial, Guatemala answers - or attempts to answer - all of the arguments presented by Claimants in their Memorial. If, however, by involuntary omission an argument has not been expressly answered, it must be deemed to have been denied, and Guatemala reserves the right to respond to it in due course. Furthermore, Guatemala reserves all rights that may correspond under the CAFTA-DR, the ICSID Convention, International Law and Guatemalan Law in relation to any argument that may correspond in relation to this dispute.

II. FACTUAL BACKGROUND

A. Guatemala

9. Guatemala is a sovereign and democratic State that has historically been friendly to foreign direct investment and has facilitated the conditions for its establishment by providing special protection, even before the signing of the Bilateral Investment Treaties (BITs) in the 90s. In 1997, through the National Council for

the Promotion of Exports – CONAPEX --, the State of Guatemala approved the Integrated Policy of Foreign Trade, which established among its objectives the promotion of foreign direct investment, given the importance it has for economic growth, employment generation, technology transfer and increased tax revenues, among other benefits.

10. As a result of this policy, which was updated in 2012, the State of Guatemala passed the Foreign Investment Law and has signed, to date, 19 bilateral agreements for the promotion and reciprocal protection of investments. Guatemala has also negotiated 7 trade agreements that include chapters for the protection of investments. This shows the importance for the State of Guatemala to promote foreign direct investment and to grant it a treatment in accordance with international commitments and with the national legislation in force.

11. Furthermore, Guatemala has historically maintained a "non-discriminatory policy" in terms of foreign investment, which is prior to and precedes by many years the international commitments undertaken through BITs and the national Foreign Investment Law, passed in 1998. As established in the considerations section of the mentioned law, whose objective was to systematize in a single legal body the precepts related to foreign investments, **"...the State of Guatemala has been characterized by having a legal framework that is based, mainly, in the full equality of treatment between domestic and foreign investors..."**

B. Indigenous Communities in Guatemala

12. Indigenous and tribal peoples constitute at least 5,000 peoples with distinctive characteristics and a population of over 370 million, present in 70 different countries.[1] Convention 169 of the International Labor Organization ("ILO") describes the peoples it protects, including tribal peoples "whose social, cultural and economic conditions distinguish them from other sections of the national community"[2] and those indigenous peoples considered as such "on account of their descent from the populations which inhabited the country, or a geographic region to which the country belongs, at the time of conquest or colonization […]".[3]

13. Guatemala is one of the Latin American countries with the largest indigenous population. According to the most recent population and housing census of 2018, Guatemala has 14.9 million inhabitants, of which 6.5 million (43.80%) identify themselves as indigenous of the Mayan, Garifuna, Xinca and Creoles peoples or of African descent.[4] The Mayan peoples are divided into 22 ethnic groups, each with its own language,

[1] *Indigenous and Tribal Peoples' Rights in Practice,* A Guide to the ILO Convention No. 169, International Labour Standards Department (2009), p. 9 (**RL-0119**).

[2] ILO Convention on Indigenous and Tribal Peoples, No. 169 (1989) (**CL-0152**).

[3] *Id.*

[4] National Institute of Statistics in Guatemala, XII National Census of Population and VII of Housing **(R-0002)**

idiosyncrasy and customs.[5] The importance of the native peoples is evidenced, among other things, by the fact that Guatemala has created a Vice-Ministry of Bilingual and Intercultural Education aimed at teaching both the Spanish language and the languages of the native peoples,[6] and an Academy of Mayan Languages, created by law.[7]

14. According to the data available on the website of the National Institute of Statistics, there are indigenous populations in the two municipalities surrounding the Progreso VII mining project.[8] In the municipality of San Pedro de Ayampuc, approximately 14,891 people are indigenous, and in San José del Golfo, 156 people are indigenous.[9] It is important to mention that, in the 1985 Political Constitution of the Republic of Guatemala, the State recognized for the first time that the country is made up of various ethnic groups with the right to their cultural identity. Since then, the Constitution of the Republic has established that the State has the obligation to "recognize, respect and promote" the culture and social organization of the different "ethnic groups".[10]

15. A number of armed movements took place in Latin America between 1960 and 1996, and Guatemala was no exception. Thus, when the Agreement on a Firm and Lasting Peace was signed in Guatemala City between the Government and the Guatemalan National Revolutionary Unity ("*URNG*"), putting an end to three decades of armed movements, a series of agreements came into force that were fundamental and conditions for reconciliation, including the Agreement on Identity and Rights of Indigenous Peoples, executed in Mexico City on March 31, 1996, which has among its goals the recognition and respect of indigenous peoples.

16. To give actual realization to the recognition of and respect for indigenous peoples, the agreement established a series of substantive commitments and actions, divided into three sections:

1. Fight against discrimination,
2. Cultural rights, and

[5] Twenty-two ethnicities exist in the Mayan community: Chuj, Itza', Ixil, Jacalteco, Kaqchikel, Kíche', Mam, Mopan, Poqomam, Poqomchi', Qnjóbal, Qéchi', Skapulteco, Sipakapense, Tektiteko, Tzútujil, Uspanteco.

[6] Saquil Bol, Oscar René, *Curriculum Vitae* **(R-0003)**.

[7] In accordance with the Law of National Languages of Guatemala, established by decree 19-2003 (**R-0004)** (in the context of precisely the ILO Convention 169) the official language of Guatemala is Spanish, but the State recognizes, promotes and respects the languages of Maya, Garífuna, and Xinca peoples.

[8] Environmental Impact Assessment ("EIA"), p. 270 (**C-0082**).

[9] National Institute of Statistics – General Characteristics of the Population (2018 Census), Table A5.2- Population by town per municipality **(R-0005**).

[10] Agreement on the Identity and Rights of Indigenous Peoples: Advances and Challenges: 20 years after the signing of the Peace Accords, United Nations Development Programme (2016), p. 15 (**R-0006**).

3. Civil, political, social and economic rights.[11]

17. In this regard, the Government of Guatemala, through this agreement, committed itself to implement a series of legislative, dissemination and institutional actions, and to adapt the national regulations to the international human rights framework. Among them, and at the level of international law, to promote the recognition of the competence of the Committee on the Elimination of Racial Discrimination, to conclude the ratification of ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries of the International Labor Organization ("Convention 169"), and the approval of the draft Declaration on the Rights of Indigenous Peoples at the United Nations.[12]

18. To date, the State of Guatemala has made significant progress in recognizing and asserting the rights of Indigenous peoples, including ratifying ILO Convention 169 and promoting and conducting consultations pursuant thereto, as discussed below in section III.

C. The Discovery of Gold in Tambor and the Exploration Activities Undertaken

19. The mining concessions that form the basis of this dispute are northwest of Guatemala City in the department (similar to a province) called Guatemala. While much of Guatemala receives high amounts of rain, the concessions are within an arid belt. By car, it is about 30 kilometers, or just over an hour, from the main gate of the mine to downtown Guatemala City. Indigenous communities inhabit the area.[13]

20. Radius Explorations Ltd., a Canadian mining company listed on the Toronto Stock Exchange, allegedly discovered gold in 2000.[14] Today, the name has changed to Radius Gold (or "Radius" and referring to Radius Explorations and Radius Gold) and its shares are sold at the price of USD 0.20 per share. It has always been a "penny stock" with low values per share price.

21. The founder of Radius, Simon Ridgway, had substantial experience and connections in Guatemala when he turned his attention to El Tambor. Ridgway and his Vice President of Exploration, Robert Wasylyshyn, worked for Mar-West Resources, which managed Cerro Blanco and a nearby gold mine in Honduras, called San Martin.[15]

22. Radius began to acquire mining concessions through Exploraciones de Minera Guatemala, S.A. ("Exmingua"), a subsidiary beneficially owned by Radius. On November 21, 2000, according to an assignment

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[11] *Id.*

[12] *Id.* pp. 18-19.

[13] National Institute of Statistics – General Characteristics of the Population (2018 Census), Table A5.2- Population by town per municipality **(R-0005**).

[14] Press Release, Radius, *Radius Closes Acquisition of Tambor Interest* (March 30, 2004) (**C-0216**).

[15] *See* Rob Robertson, *Gold Fields joins Radius in Guatemala*, THE NORTHERN MINER, p. 4. (**R-0007**).

of mineral rights, Quimicos S.A. ("Quimicos") conveyed Unidad Tipo, and Geominas S.A. ("Geominas") conveyed Santa Margarita, both on a conditional basis.[16] Exmingua assumed the obligation to make a schedule of payments, starting at USD 10,000 and increasing to USD 160,000 over the course of four years.[17] Exmingua did not have the surface rights, and it undertook to "pay the holders and owners of the affected lands any damages that may occur to crops, roads or land surface due to the exploration activities in accordance with the Mining Law."[18] Exmingua also agreed to pay a royalty of 2.5% of the Net Smelter Return, which the agreement defined as "the net value received by Exmingua, sociedad anonima, or its controlling entity," deducting certain costs of transportation, smelting, and other related costs.[19] Exmingua also agreed, four years and one month after signing the agreement, to pay a monthly sum of USD 10,000.[20] This was a "down payment" on future royalties.[21]

23. At that time of the discovery by Radius, mining companies were in the beginning stages of exploring a gold belt in southern Guatemala, where there had been little exploration in the past. In 2001, Gold Fields, a South African miner described by Radius as a "major,"[22] purchased a 12% stake[23] in Radius and also entered into a joint venture with Radius (the "Gold Fields Joint Venture").[24] Orogen Holding (BVI) Limited ("Orogen"), a company affiliated with Gold Fields acquired the right to invest USD 5 million in exchange for a 55% interest in properties owned by Radius.

24. The Gold Fields Joint Venture included three projects owned by Radius: Bella Vista, Tierra Blanca, and Tambor.[25] The Progreso VII and Santa Margarita concessions, the focus of this arbitration, are a part of Tambor and not Bella Vista or Tierra Blanca.[26] Gold Fields took over as the operator of these three projects.[27] After Gold Fields spent its initial USD 5 million of exploration costs, Radius had the right to either proportionally share the future development expenses or grant Gold Fields the right to dilute Radius by an

[16] Letter from Minera Del Sur, S.A. to Exmingua dated April 6, 2015 (**C-0045**).

[17] *Id.*

[18] Conditional Assignment of Mining Rights, p. 5 (**C-0041**).

[19] *Id.* p. 4.

[20] *Id.* p. 8.

[21] Letter from Minera Del Sur, S.A. to Exmingua dated April 6, 2015 (**C-0045**). The timing is not all that relevant, but Químicos assigned its rights on December 31, 2007 and Geominas did it December 12, 2013.

[22] SEC Form 6k, Radius Gold (February 25, 2002) p. 3 (**R-0008**).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* pp. 3-4.

[27] *Id.* p. 3.

additional 15% in exchange for the preparation of a bankable feasibility study.[28] Gold Fields never spent the full amount.

25. While Gold Fields focused on other concessions, in 2002, Exmingua acquired a 100% interest in La Laguna.[29] That same year, Exmingua acquired a 100% interest in Progreso VII, under a lease and option agreement with Entre Mares de Guatemala S.A. ("EMG") and subject to a 4% royalty, Net Smelter Return.[30]

26. Despite the local expertise, drilling did not return eye-opening results. As noted by Exmingua's consulting geologist, Stephen R. Maynard, "the geology of Central Guatemala is complicated."[31] As drilling continued, "the first pass of some 30 widely spaced reverse-circulation and core holes on the Bridge, Sastre and Lupita zones dashed market expectations for Radius by failing to match surface values."

27. Instead of choosing to continue drilling, Gold Fields sold its entire interest in the Gold Fields Joint Venture to Radius in exchange for an additional 1,300,000 common shares of Radius stock.[32] Radius valued these shares at CAD 1,937,000 (USD 1,478,899.50 as of March 31, 2004),[33] with a restricted sale period until June 2004, when the value had dropped to USD 1,352,000. Gold Fields never spent $5 million, concluding with $3,250,000 in costs. At this time, Gold Fields had prepared its own resource estimates that were not publicly shared.[34] Following this transaction, Radius retained Chlumsky, Ambrust & Meyer, a consulting firm in Colorado, to conduct a resource estimation (the "CAM Report").[35] Radius claimed that the CAM Report was a due diligence to prepare for a future share issuance.[36]

28. The CAM Report sought only to estimate the amount of gold based on the drilling done. It claimed to satisfy the standard of an "independent report" under National Instrument 43-101 ("NI 43-101"),[37] which is a Canadian regulatory standard for reporting resources and reserves of mining properties. For those unfamiliar with Canadian mining terminology, the Canadian Institute of Mining, Metallurgy & Petroleum ("CIM") sets standards for a variety of activities as well as terminology for such terms as "Mineral Reserves" and "Mineral

[28] Id., p. 10.

[29] SEC Form 20-F, Radius (2005), p. 11 (**R-0011**).

[30] *Id.*

[31] *See* Rob Robertson, *Gold Fields joins Radius in Guatemala*, THE NORTHERN MINER, p. 3. (**R-0007**).

[32] SEC Form 6k for October 2003, Radius (February 12 2004), p. 3 (**R-0009**).

[33] *Id.* p. 19.

[34] SEC Form 20-F, Radius (2005), p. 12 (**R-0010**).

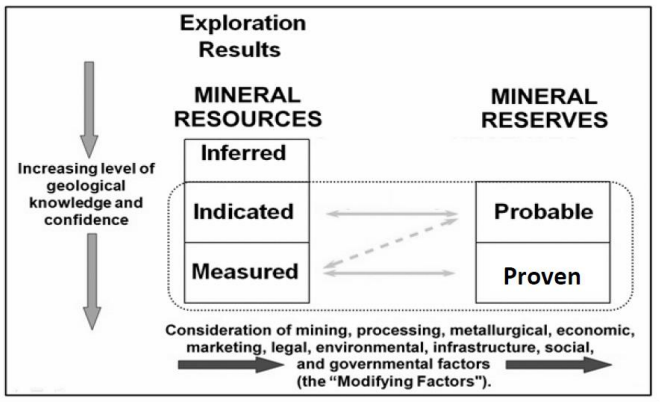
[35] SEC Form 6k for October 2003, Radius (February 12 2004), p. 4 (**R-0009**).

[36] *Id.*

[37] Report of Chlumsky, Ambrust and Meyer ("CAM Report"), section 2.2. p. 2.1. (**C-0039**).

Resources."

29. The below image helps to show how Mineral Resources relate to Mineral Reserves.



30. The definitions for these terms have changed over time, becoming more stringent. For example, the 2004 CIM Standards, define "Mineral Resources" as "a concentration or occurrence of natural, solid, inorganic or fossilized organic material in or on the Earth's crust in such form and quantity and of such a grade or quality that it has reasonable prospects for economic extraction."[38] The phrase "reasonable prospects for economic extraction" has a definition in the 2004 CIM Standards, which do not deviate from the 2000 CIM Standards.[39] The CMA Report only required "a judgement by the Qualified Person in respect of the technical and economic factors likely to influence the prospect of economic extraction."[40]

31. Ten years later, the standard changed. In 2014, the CIM Standards defined those same words, "reasonable prospects for economic extraction" to require the "basis" for the determination, taking into assumptions that include "estimates of cutoff grade and geological continuity at the selected cut-off, metallurgical recovery, smelter payments, commodity price or product value, mining and processing method and mining, processing and general and administrative costs."[41] The CAM Report did not include any metallurgical processing, smelter payments, commodity price or product value, mining and processing method and mining, processing and general and administrative costs.[42] The CAM Report had other limitations. Gold Fields conducted no drilling on two of the thirteen mineralized zones, and the CAM Report found that it was "difficult to demonstrate continuity of individual zones."[43] The CAM Report made no calculation of Mineral

[38] CIM, Definition Standards on Mineral Resources and Mineral Reserves (2004) (**R-0012**).

[39] *Id.* p. 1

[40] *Id.* p. 4.

[41] CIM Definition Standards for Mineral Resources and Mineral Reserves (2014), p. 5 (**R-0013**).

[42] *See generally,* CAM Report (**C-0039**).

[43] *Id.* p. 31.1

Reserves.

32. After the CAM Report, Radius mischaracterized its findings. Although the CAM Report reviewed no metallurgical testing and only speculated as to the potential processing methods,[44] Radius proclaimed that the CAM Report "assumed a heap leach scenario."[45] Radius also stated it knew of no other factors that would affect the estimate of Mineral Resources.[46] Radius provided no studies to support this conclusion.

33. Upon exiting the project, Gold Fields made little mention in its public presentations. In the 2005 Annual Report, Gold Fields only stated that it exited Tambor, among two other projects, because the company was "responding to favorable gold market conditions by aggressively increasing its exploration program and continuing its search for quality acquisitions and value added."[47] Apparently, Tambor did not fit the parameters of that search.

34. While Radius still intimated that many companies had an interest in Tambor, [48] Ralph Rushton, VP of Corporate Development at Radius, had a different take. He stated that the Tambor project "is not structurally or geologically straightforward."[49] A few months later, and only in a news release directed at the Canadian market, Radius announced a new joint venture project, now with Fortuna Ventures ("Fortuna"), another Canadian mining company.[50] Fortuna has a deep connection to Radius. Simon Ridgway founded both companies, serving as the CEO of Radius and the Chairman of the Board of Directors of Fortuna.[51] Fortuna agreed to invest USD 4 million to earn 60% of the joint venture.[52] Fortuna did not invest USD 4 million; it was much less. In 2005, Fortuna decided to exit the joint venture and wrote off a little more than $108,000, a fraction of the committed value.[53]

35. During this time, another Radius project hit a roadblock. On July 11, 2005, Radius announced that Glamis Gold, its joint venture partner at the Banderas Project, "was involved in a major community relations

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[44] *Id.* p. 10.1.

[45] SEC Form 6k, Radius (Feb 18, 2004), p. 7 (**R-0014**).

[46] *Id.*

[47] News Release, Gold Fields, Q2 F2004 Results (Quarter ended 31 December 2003), p. 7 **(R-0014**).

[48] SEC Form 6K (Feb 18, 2004), p. 2 (**R-0009**).

[49] *Radius, Fortuna reach Tambor gold JV*, BN Americas (December 3, 2004) (**R-0015**).

[50] Press Release, Radius, *Radius & Fortuna Reach a Joint Venture Agreement on the High Grade Tambor Project, Guatemala* (December 4, 2004) (**C-0217**).

[51] Web page of Radius Gold Inc., available http://www.radiusgold.com/s/Management.asp?ReportID=414064 Fortuna Ventures Inc. has the same ticker symbol as Fortuna Silver Mines Inc. **(R-0016)**.

[52] Press Release, Radius, *Radius & Fortuna Reach a Joint Venture Agreement on the High Grade Tambor Project, Guatemala* (December 4, 2004) (**C-0217**).

[53] Annual Report, Fortuna Silver Mines, Inc. **(R-0017**).

incident which resulted in the Guatemalan government placing a moratorium on the issuance of new exploitation permits."[54] Radius went on to clarify that "[u]ntil the permitting situation is fully and transparently resolved, Radius will maintain a presence through its joint venture partners only and no new generative work is anticipated for Guatemala during 2005."[55]

36. After Gold Fields left, and with the CAM Report in hand, Radius elected to buy-out EMG's leasehold interest in Progreso VII. Radius had spent the contractually required USD 800,000 in exploration costs, and on May 6, 2006, Radius paid an additional $250,000 to become the sole owner of Progreso VII.[56] The 4% royalty remained, with Radius retaining the right to purchase half of the royalty for USD 2 million.

37. Neither Goldcorp nor Radius did a press release on the acquisition, and the transaction never appeared in the public filings of either company. On December 13, 2007, International Royalty Corp. ("IRC") purchased this royalty from Goldcorp as a part of a package. For USD 4 million, IRC bought part of the royalty on two projects operated by Barrick Gold, a major gold mining company, and three functioning oil wells in Montana.[57]

38. In June 2008, Radius and Kappes, Cassiday & Associates ("KCA") signed a binding letter of intent where KCA committed to invest USD 6.5 million in exploration costs over four years to earn 51% of the project.[58] For the first time, Radius announced the size of the operation: 150 tons per day (or "tpd").[59] The recovery rate dropped from 98% to 66%.[60] In early 2009, Radius was looking forward to a "small gold operation" with production slated to start that same year.[61] This prediction proved wrong. Exmingua was also unable to make its USD 10,000 down payments on the royalties it owed Minera del Sur.[62] Later that year, Radius pushed the timeline back, noting that several elements of the plant had already been purchased but that commissioning would be in 2010.[63]

39. In 2010, another transaction closed involving El Tambor. Royal Gold purchased the shares of IRC, becoming the sole owner of the 4% NSR royalty on the project. In its following Annual Report, Royal Gold

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[54] SEC Form 6K, Radius (July 11, 2005), p. 18 (**R-0018**).

[55] *Id.*, pp. 18-19.

[56] SEC Form 20-F, Radius (2005) (**R-0010**).

[57] *Id.*

[58] Press Release, Radius, *Radius Signs Agreement to Develop its Tambor Gold Deposit* (June 3, 2008) (**C-0064)**.

[59] *Id.*

[60] *Id.*

[61] SEC Form 6K, Radius (May 20, 2009), p. 2 (**R-0019**).

[62] Letter from Minera Del Sur, S.A. to Exmingua dated April 6, 2015 p. 2. (**C-0045**).

[63] Press Release, Radius, *Update on Tambor Gold Mine Project, Guatemala* (October 6, 2009) (**R-0024**) *See also,* SEC Form 6k, Radius (October 13, 2009) p. 26 (**R-0020**).

made only a passing mention of El Tambor and ascribed no particular value to the transaction.[64] Radius made a few changes, none related to this most recent transaction. In a note to its financials, the size of the operation changed from 150 tpd to 200 tpd, and the start date continued to lag. [65] The market did not react favorably to the start of construction and announcement of the plans. The plan was to mine aboveground and underground simultaneously, even though this did not occur.[66] The share price of Radius, which still owned 100% of the project[67], continued to fall from USD 0.89 in June 2011 to USD 0.32 in March 2012.[68]

40. In June 2012, Radius expressed his dismay at the shooting that left activist Yolanda Oqueli Veliz with permanent injuries.[69] The incident occurred close to the property, and in August 2012, Radius announced its exit from the project, selling its stake in Exmingua. Radius received a mere USD 100,000 at the time of sale with USD 300,000 to follow when the mine began production. [70] In its third quarter financials, Radius booked a loss of CAD 3,823,118, with the carrying value of the property comprising CAD 3,489,495 of the total.[71]

41. While Radius was optimistic that it would get "reimbursed" in the future based on the then price of gold and the number of ounces produced,"[72] the reality was more sobering: "[d]ue to the uncertainty of receiving future production payments from KCA, the Company wrote-off a receivable balance of USD 429,728 and has not recognized a contingent gain on potential royalty payments[.]"[73]

42. Radius's board of directors made it clear that "since the sale in 2012, Radius has had no input in the day-to-day management of the project, and has had no influence on the process of requesting permits for the proposed mine, its construction, its operation, or any decision about access to the project."[74] The president of

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[64] SEC Form 10-K, Radius (June 30, 2010) (**R-0025**).

[65] SEC Form 6K, Radius (Feb. 11, 2011) p. 26 (**R-0021**).

[66] Press Release, Radius, *Construction Underway at Radius's Tambor Gold Project, Guatemala* (February 27, 2012) (**C-0222**).

[67] SEC Form 6K, Radius (May 2012) p. 18 (**R-0023)**.

[68] Historic Share Prices, Radius Gold, Inc. (2011-2012) (**R-0026**).

[69] Letter from Human Rights Ombudsman, (December 20, 2012) (**R-0027**); News Release, Radius, *Radius Gold Updates on Recent Events at the Tambor Joint Venture, Guatemala* (June 20, 2012) (**R-0028**). Based on information obtained, Mr. Simon Ridgway lives in Guatemala with his wife, who is of Guatemalan nationality.

[70] News Release, Radius, *Radius sells its interest in Gold Mine in Guatemala* (August 31, 2012) (**C-0223**).

[71] SEC Form 6K, Radius (Dec. 17, 2012), p. 11 (**R-0022**).

[72] SEC Form 6k, Ex. 99.2 (Dec. 17, 2012), p. 3 (**R-0022**).

[73] *Id.*

[74] News Release, Radius, *Radius sells its interest in Gold Mine in Guatemala* (August 31, 2012) (**C-0223**). ("Radius' Board of Directors would like to make clear that since the sale in 2012, Radius has had no input into the day-to-day management of the project, and has no influence on the permitting of the proposed mine, its construction, its operation or any decisions concerning access to the project").

Radius stated that the sale of Tambor was part of the "corporate strategy to divest problematic assets . . ." in order to allow Radius to focus its efforts "on areas less conflicted regarding development in the region."[75]

43. Royal Gold, the royalty holder, had little to say. The company continued to see El Tambor as a marginal project in the larger mining landscape. At a presentation in September 2012, Royal Gold noted El Tambor in passing, clarifying that there was no public declaration of a reserve.[76] The project barely figured in the presentation.[77]

44. Even as the production stage was underway, Exmingua did not make the advance payments owed to Minera del Sur, which led Minera del Sur to formally demand payment on April 6, 2015.[78] There is no evidence that either Exmingua, Radius or KCA have made these contractually obligated payments. In fact, these royalty payments are not included in the discounted cash-flow (DCF) analysis of Exmingua until 2021. Moreover, KCA paid only part of the money owed to Radius. In 2015, KCA paid USD 341,063 to settle the open receivable and USD 436,293 in royalty income, still owing Radius USD 662,619 for 2015.[79]KCA made another 2015 royalty payment, for a total of USD 178,879, booked in 2016. Later, on May 11, 2016, Radius announced that it was aware of the suspension of mining activity at El Tambor.[80] There are no other public reports available that reflect the status of royalty payments, including any royalties to Royal Gold.

D. Daniel K. Kappes y Kappes Cassidy y Asociados (KCA)

45. Daniel W. Kappes is a mining and metallurgical engineering professional and is the founder and president of Kappes, Cassiday & Associates (KCA), which specializes in all aspects of cyanide processing and heap leaching.[81] During his career, Mr. Kappes has focused his work primarily on metallurgical engineering.[82] Both Kappes and KCA are primarily known for their heap leaching expertise.[83]

46. KCA is a company that primarily provides metallurgical processing services. It is not a company

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[75] *Id.*

[76] Presentation of Royal Gold at Denver Gold Forum (September 2012), slide 34 (**R-0029**).

[77] Web page of Royal Gold, Inc., *available at* https://www.royalgold.com/our-portfolio/evaluation-exploration/evaluation/ (Royal Gold still claims the right to a 4% NSR royalty in El Tambor) (**R-0030**).

[78] Letter from Minera Del Sur, S.A. to Exmingua dated April 6, 2015 (**C-0045**).

[79] Consolidated Financial Statements for Radius Gold Inc., year ending Dec. 31, 2015, p. 24 (**R-0031)**.

[80] *Radius Gold Comments on Media Reports of Temporary Suspension of Mining Operations at KCA's Tambor Mine in Guatemala*, CANADIAN INSIDER (May 11, 2016) (**R-0032**).

[81] Web Page American Institute of Mining, Metallurgical, and Petroleum Engineers (AIME), *available at http://www.aimehq.org/programs/award/bio/daniel-w-kappes* (**R-0033**).

[82] *Id.*

[83] Web page of Kappes, Cassiday & Associates, *available via* https://www.kcareno.com/ **(R-0034**).

known as a mining project operator.[84] Therefore, Progreso VII would have been the first and only mine to date operated by Kappes and KCA. There is no publicly available information demonstrating that Kappes or KCA have ever assumed full responsibility for a mining operation.

47. KCA is not a mining company, but an engineering company for the mining industry, which allegedly provided services to Radius (former concessionaires for the exploration and exploitation of the mine) and took advantage of the opportunity left by Radius when it withdrew from the mine, either because of its low productivity or because of issues related to the social conflict surrounding its development.

E. Mining Operations at Progreso VII

48. Between 2004 and 2005, the communities surrounding the Marlín mine, a nearby mine on the same fault line as Progreso VII, protested against the project. Partly as a result of this opposition, in 2009, the International Labor Organization (the "ILO") asked Guatemala not to grant or renew any permits related to Marlín without consulting indigenous peoples and including them in development plans.[85] In response to the request of certain communities, on May 20, 2010, the Inter-American Court of Human Rights asked Guatemala to suspend operations at the mine.[86]

49. As a result of community opposition, Goldcorp, the owner of Marlin, conducted a comprehensive audit of its operations. The findings, published in 2010, recommended that a multi-stakeholder dialogue process be established; that the Environmental and Social Impact Assessment and proposed expansion plans be fully disclosed; that formal feedback processes be created; that consultations be expanded to include land acquisition, environmental performance, closure, post-closure, social investment and security; and that other steps be taken to improve and expand the consultation process.[87] The report also advised that consultations under ILO Article 169 should take place.

50. With respect to environmental issues, the report called for the creation of a bond for costs related to closure, as well as greater transparency regarding potential issues and oversight.[88] The report included other recommendations related to labor issues, land acquisition, economic and social investment, security, and access

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[84] *Id.*

[85] Report of the Committee of Experts on the Application of Conventions and Recommendations, ILO Labour Conference, 98th Session (2009) (**R-0035**).

[86] Report No. 20/14, Petition 1566-07, Report on Admissability, Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Istahuacán, Guatemala (April 3, 2014)(**CL-0225**); SEC Exhibit 99.1, GoldCorp (June 9, 2010) (**R-0036**).

[87] Human Rights Assessment of Goldcorp's Marlin Mine, prepared by On Common Ground Consultants, Inc. (May 2010) p. 193 (**R-0037**)

[88] *Id.* p. 196

to legal remedies (or effective grievance and dispute resolution procedures). Once the recommendations were implemented, Marlín was able to continue operating until closure.

51. Communities also began to take administrative and legal action. Several municipal authorities convened popular consultation processes with a view to obtaining the opinion of their inhabitants and indigenous peoples on mining projects and their environmental impact. Other communities took action to compensate for the failure to carry out the prior consultations provided for in ILO Convention 169. This resulted in a series of legal actions that would shape the ongoing jurisprudence of the Guatemalan Constitutional Court on the issue of prior consultation with indigenous peoples. These decisions will be analyzed in depth in the following sections of this Memorial, but it should be clarified from this point that since 1996 the Constitutional Court has recognized the existence of the right to prior consultation as a human right, rooted in International Human Rights Law.

52. Unlike Goldcorp and Marlin, unfortunately, the Claimants were not as sophisticated. The Claimants assumed responsibility for carrying out the consultations prior to applying for an environmental permit. The central document was the Environmental Impact Assessment ("EIA"), in which Exmingua promised to plan and execute the project "with the highest standards of environmental and social management.[89] To work on the EIA, Exmingua hired the Sierra Madre Group ("GSM"), which claimed to be an environmental consultant.[90]

53. The EIA includes notes of meetings held with community members, however, as discussed here, participation by the communities involved was minimal or none at all, and the project never obtained a social license. On March 1, 2012, Ms. Estela Reyes, a resident of the nearby village of El Carrizal,[91] decided to park her car in front of the El Tambor gate, blocking the entrance to the mine.[92] Nearby residents joined her, and the roots of a social movement known as La Puya began to take hold.[93]

54. Contrary to Mr. Kappes' repeated claims,[94] there is no evidence that the first protestors acted at the

[89] EIA, p. 437 (**C-0082**).

[90] *See* Registered Environmental License of Consulting Company No. 11 (March 16, 2010) (**R-0038**).

[91] Oswaldo Hernandez and José Andrés Ochoa, *Gold so Close to the Capital*, PLAZA PÚBLICA (June 22, 2012) (**R-0039**).

[92] Rob Mercatante, *Guatemala: The Peaceful Anti-Mining Resistance at "La Puya" Celebrates Two Years of Struggle*, THE UPSIDE DOWN World (March 11, 2014) (**R-0040**). In reality the movement had begun in 2011 with the initial news of the development of the mine. *See also*, Detailed Report of the Nacional Civil Police ("NCP") of the conflict La Puya in the years 2012 to 2016 (May 10, 2016) (**R-0206**).

[93] News Release, GoldCorp Out News, *Guatemala: "Blue Helmets" organized by companies for conflict, not peace* (November 12, 2012) (**R-0041**).

[94] Letter from KCA (January 5, 2013), *available at* http://www.businesshumanrights.org/media/documents/kappes-cassiday-&-associates-re-el-tambor-mine.doc (**R-0042**).

request of any non-profit or other organization, pursuing interests exogenous to those always stated: the movement was committed to non-violence and expressed concern about the impact on the water consumed by the surrounding communities, as well as the impact on the environment that the Progreso VII Derivada project involved.

55. Unfortunately, from the beginning, Exmingua adopted an aggressive approach towards the protesters and carried out actions totally contrary to activities aimed at obtaining a social license. Exmingua sent ex-military personnel to threaten the protesters and even to attack the women who mostly constituted the resistance.[95] Exmingua hired the company Servicios Mineros de Centroamérica ("SMC") to act as a spokesperson and supposedly coordinate the social projects. José Arias, an employee of SMC, gave an interview in June 2012, in which Mr. Arias admitted that it was difficult to explain the project and that Radius would have to explain its dimensions.[96] Mr. Arias said that a construction permit already existed, a false statement, as we will see below, and that the mine would process 150 tons per day, which is also false, according to Mr. Kappes' own statements in this case file.[97]

56. As the social resistance movement grew, Exmingua - instead of developing activities that would contribute to the development and acquisition of a social license, appealed to aggressive tactics to intimidate the protesters.[98] In November 2012, in a disturbing video, a man wearing an Exmingua camisole, and supported by another large group also identified with the company's camisole, approached the protesters with a megaphone. He mocks them, and takes out his anger on another man who is filming the scene. The Exmingua employee starts verbally attacking the man with the camera, calling him a "faggot" and mocking him for shaking. Many other men support the Exmingua employee, standing behind him and laughing.[99] This Exmingua employee is a former member of the Guatemalan army, who, as explained below, pleaded guilty in front of the criminal Courts to the violence that occurred at that time.[100]

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[95] Kelsey Alford-Jones, *A Roadblock Becomes a Gateway to Resistance in Guatemala*, UPRISING (January 28, 2013) (**R-0207**).

[96] Oswaldo Hernandez and José Andrés Ochoa, *Gold so Close to the Capital*, PLAZA PÚBLICA (June 22, 2012) (**R-0039**).

[97] Kappes Statement, ¶ 109.

[98] News Release, GoldCorp Out News, *Guatemala: "Blue Helmets" organized by companies for conflict, not peace* (November 12, 2012) (**R-0041**).

[99] Q. De León, *Former Military Man Convicted: Worker of a Mining Company for Threatening Journalist (contains video)* (October 17, 2013) (**R-0043**); *see also*, News Release, Guatemala Human Rights Commission, *La Puya, San José del Golfo* (November 28, 2012) (**R-0044**); News Release, *La Puya Resists against Attacks by Exmingua in San José del Golfo* (November 14, 2012) (**R-0045**).

[100] In October 2013, the aggressive tactics, which started in November 2012, led to the conviction of two Exmingua employees, Juan José Reyes Carrera y Pablo Silas Orozco Cifuentes, both of whom admitted to the crime of threatening journalists. Orozco was the Operations Director of Exmingua and a former lieutenant in the Guatemalan military, and

57. Exmingua maintained its strategy of trying to force things. On December 7, 2012, it attempted to drive through the entrance with vehicles.[101] Subsequent interviews with the demonstrators revealed tense scenes in which the demonstrators lay down on the road to block the entrance. Security forces used tear gas and some protesters were beaten. One protester, Paola Aquino Gutierrez, spoke to an independent news organization: "My 12-year-old daughter was beaten on Friday… Many people still have sore throats because of the tear gas that was used against us. My daughter and I are more determined than ever to continue this fight".[102] On other occasions, Exmingua flew over the area with helicopters in acts of intimidation, throwing leaflets criticizing local politicians.[103]

58. After the clashes of 7 December 2012, human rights groups from Canada and the United States began to put pressure on KCA. Three days later, in an open letter, Mr. Kappes responded by stating that "[w]e spent three years interviewing all the inhabitants of the area and preparing a three-volume socio-environmental study describing what we propose to do". There is no evidence, however, that "all" were interviewed; on the contrary, the evidence shows that if there were consultations, they were insignificant. Mr. Kappes went on to state that "[w]e are not displacing anyone from their land, nor are we affecting the local water supply (we do not discharge any water at all)". Mr. Kappes stated that "most of the local citizens support us. The protests at our door involve a few people who are paid by NGOs to be there"[104]

59. A number of mining professionals led by an engineer named Robert Robinson reviewed the Project EIA.[105] These professionals identified numerous errors, lack of information and misinformation in the document, which supports the concerns of the surrounding communities and reflect the poor work done during the permit granting process.[106] Mr. Robinson identified, among others, the following problems with the Environmental Impact Assessment (EIA): (i) lack of baseline studies on surface soils, mineralogy, potential

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who is visible in the photos and videos haranguing mine workers to use force to enter the mine. At the hearing, Exmingua provided a lawyer for both Reyes and Orozco, and during the hearing itself, a representative of Exmingua, retired col. Mario RicardoFigueroa Archila. *Video available:* https://www.youtube.com/watch?v=0nYwlTR9vog. **(R-0144)**

[101] News Release, Guatemala Human Rights Commission, *Update from La Puya: New Alert as More Machinery Arrives*, (May 23, 2014) (**R-0046**).

[102] News Release, Gold Corp Out News, *Guatemalans Resist Invasion of North American Mines* (January 7, 2013) (**R-0047**).

[103] Oswaldo Hernandez and José Andrés Ochoa, *Gold so Close to the Capital*, PLAZA PÚBLICA (June 22, 2012) (**R-0039**).

[104] Graham Russell, *Guatemalan Police Use Tear Gas and Violence on Behalf of KCA Mining Company (&Radius Gold Inc.) to Try and Evict Community and Environmental Defenders*, MAC: MINES AND COMMUNITIES (December 10, 2012), pp. 4-7 (**R-0048**).

[105] Report by Mr. Robert Robinson ("Robinson Report") (December 29, 2012) (**R-0049**).

[106] News Release, Guatemala Human Rights Commission, *The Tambor Mine License Should be Suspended* (February 15, 2013) (**R-0050**).

for toxic acid metal mine effluents, groundwater pathways, and hydrogeology (ii) minimal or incomplete study of potential toxic metal releases from landfills to air and water (iii) little information on high-risk mill tailings including chemical and physical characteristics, stability of the landfill, landfill cover, surface water detour and filtration of retained process water and rain (iv) monitoring plan is minimal during mine operations and non-existent for the post-mining period and (v) lack of water management.[107] Subsequently, in May 2014, another international expert, and Colorado School of Mines professor, Mr. Robert E. Moran, would also testify to the shortcomings of the EIA. Mr. Moran describes the EIA as "the worst quality EIA I have reviewed in over 42 years of professional experience in hydrogeology/geochemistry, which include hundreds of mines around the world.[108]

60. Although Kappes makes a case for lack of protection and safety, the reality indicates otherwise. The presence of the State during social demonstrations has always been there, through different bodies that acted either by providing physical protection, as in the case of the National Civil Police,[109] or by mediating between the company and the protesters through the Human Rights Ombudsman, the Presidential Commission for the Coordination of Executive Policy on Human Rights (*COPREDEH*) and the National System for Dialogue.[110] In an effort to resolve the conflict, on June 12, 2013, the President of Guatemala chaired a session in which representatives of the Government, La Puya and Exmingua, including Mr. Kappes, participated.[111] La Puya presented a series of concerns regarding environmental impacts, the amount of arsenic, the possible displacement of communities, and the tactics employed by Exmingua, which included verbal and written threats, flyers with defamatory messages, and aggressive tactics designed to provoke a violent response from

[107] *See* Robinson Report (**R-0049**).

[108] Report by Dr. Robert Moran ("Moran Report") (May 22, 2014), p. 1 (**R-0051**).

[109] Detailed Report by the Nacional Civil Police presented in Case No. 1904-2016 before the Constitutional Court (**R-0052).** On the contrary, if any situation existed at the time, it was the constant police presence supporting the company, which is supported by analysis of the totality of the evidence presented. The means to demonstrate these extremes are abundant.

[110] *Id. See also,* Detailed Report of Operations by the Nacional Civil Police from 2016 to date (**R-0053**); Report No. 196-2015/REF/UHGH/dl of the Head of the Sub-Station 12-52 of San Jose del Golfo dated May 24, 2015, wherein the actions of the Civil Nacional Police are noted (**R-0054)**. Detailed Report regarding the Actions taken by the Ombudsman in the case of Exmingua and La Puya, (June 10, 2019) (**R-0055**). *See* Report "La Puya Conflict, Mining Proyect, San José del Golfo and San Pedro Ayampuc, Guatemala in opposition of mining company" emanating from the Office of the Ombudsman dated (December 1, 2020) (**R-0056**) (Exmingua also enjoyed protection from the part of the Guatemalan judicial power, which resolved some of their requests regarding personal petitions defending the rights of Exmingua and their employees. *See* Reports of Interventions in Individual Petitions in the case "La Puya" of the Municipal Judge of San José del Golfo, Department of Guatemala, dated November 21, 2020, p. 1 (a personal petition was issued in favor of Exmingua on April 10, 2012).

[111] News Release, Guatemala Human Rights Commission, *La Puya Pacific Resistance in meeting with the President of the Republic* (June 12, 2013) (**R-0057**).

protesters.[112]

61. On May 22, 2014, with police assistance, the heavy machinery for work in the mine finally broke through and knocked down the gate built in front of the mine by the social movement La Puya. Exmingua spokesperson Dennis Colindres continued with the company's invariable line: "we believe that there is disinformation, and this generates concern, they ignore the benefits that the mine can bring them".[113] There was no mention at all of the effects of the mine's operation on groundwater, the contamination of surrounding bodies of water, ensuring that locals have access to quality work, or responding to any other complaints raised by communities. The local archbishop lamented the lack of dialogue prior to the project.[114]

62. Mr. Kappes adopted a disdainful attitude towards the protests. In comments made to the press and published on August 4, 2015, Mr. Kappes said that "the resistance is not coming from the local people" and that "they are being manipulated by external influences".[115] In Mr. Kappes' account, the protesters "think that if they are hateful enough, the mine will disappear". There is no mention of addressing any of the concerns expressed by the protesters. Mr. Kappes even admitted that Exmingua built the mine without a construction permit, noting that "the construction permit is an irrelevant point...construction ended in 2014".[116] However, the lack of a Construction Permit, as discussed in the respective sections of this Memorial, are fundamental issues affecting the legality with which the project was carried out. At the request of two assistant mayors of the two neighboring communities of San Pedro Ayampuc and San José del Golfo, on July 15, 2015, the Guatemalan courts suspended Exmingua's exploitation license and ordered that the operation be stopped completely.[117]

63. In the resolution, the Court of First Instance in Civil Matters pronounced on the request for amparo, an action that is conducted to guarantee fundamental rights. While the amparo was directed against the Municipality of San Pedro Ayampuc, Exmingua was an interested party in the process, and had the power to submit evidence and arguments. Exmingua submitted a large number of jurisdictional arguments.[118] The court

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[112] Letter from the Director General of Mining at the Ministry of Energy and Mines ("MEM"), Fernando Castellanos Barquín to the Vice-Minister of MEM (October 11, 2012) (**R-0058**).

[113] Julio Lara, *Violent Eviction at La Puya leaves 23 injured,* PRENSA LIBRE (May 23, 2014) (**R-0059**).

[114] News Release, *Archbishop Óscar Vian advocates for dialogue in La Puya,* PRENSA LIBRE (May 25, 2014) (**R-0060**).

[115] J. Abott, *'Obnoxious' Protesters Will Not Make Guatemalan Gold Mine Go Away, CEO Says,* VICE NEWS (August 25, 2015) (**R-0061**).

[116] *Id.; see also,* Part 7 of record of first court in proceeding No. 3580[1050-2014-871], pp. 173 to 175 (**R-0062-SPA**).

[117] Community Press, *La Puya: Manage to get suspension of North American company's mining license,* PRENSA COMUNITARIA (July 15, 2015) (**R-0063**).

[118] Decision of the Third Civil Court of First Instance, Case No. 01050-2014-00871, (July 13, 2015) pp. 13-16 (**R-0064-SPA**).

determined that no consultations had been held with the communities involved under the terms of Article 63-66 of the Municipal Code[119] and that the consultations were not intended to provide adequate notice to nearby residents.[120] Exmingua argued that its meeting with municipal officials was sufficient to give due notice, but the court disagreed, determining that the local population was not aware of the project and had no opportunity to express their opinion.[121]

64. On the issue of environmental degradation, the court concluded that Exmingua had not conducted sufficient studies to determine whether the naturally high levels of arsenic in the municipality's waters would increase with mining activities.[122] Exmingua had simply argued that mining had not generated any negative effects so far, which meant that further studies were unnecessary. The court did not adopt this line of argument. The court also disagreed with the EIA, determining that the MEM notified Exmingua of several deficiencies, allowed Exmingua to correct those deficiencies, but that Exmingua never adopted mitigation measures or a Contingency Plan.[123]

65. Moving on to the third and final point, the court considered the lack of a construction permit. There was no doubt that Exmingua lacked a construction permit.[124] The court set forth possible options for the lack of a permit, including temporary closure or destruction, in whole or in part, of the facility. The court did not rule on the consequences of the lack of a permit, leaving the issue to the municipal government. The court also sent the file to the criminal justice system, in order for it to determine whether an illegal act had been committed, whether it was the falsification of the construction certificate.[125]

66. In the meantime, and as will be discussed in detail in the following sections, the communities took other actions in opposition to the project. One of these resulted in an Amparo Judgment issued on November 15, 2016, whereby the Guatemalan Supreme Court, acting as an Amparo Court, issued a court order suspending Exmingua's exploitation license. Nonetheless, mining activities continued. People in the community filmed

[119] *Id.* p. 18

[120] *Id.* p. 21

[121] *Id.* p. 25.

[122] *Id.* pp. 23-24.

[123] *Id.* pp. 25-26.

[124] *Id.* p. 28.

[125] Judgment issued by the Third Civil Court of First Instance, Department of Guatemala dated July 13, 2015 (**R-0064**). The decision attracted international attention. Members of U.S. Congress intervened, requesting that the President of Guatemala use his "authority to ensure that KCA and Exmingua immediately comply with the July 15, 2015 court ruling and cease all illegal operations. *See also* Letter from U.S. Congress members to President Alejandro Maldonado Aguirre, dated October 26, 2015 (**R-0066**).

with their phones helicopters entering and leaving the mine.[126] Independent journalists also found invoices that revealed that Exmingua had hired a helicopter to transport material on March 29, 2016.[127] The MEM took administrative measures to enforce the court's decision, suspending Exmingua's Exploitation license on March 10, 2016.[128]

67. Despite the fact that the Supreme Court ordered the MEM to suspend the license, and it did so following the Court's order, which Claimants identify as an alleged violation of CAFTA-DR, the truth is that by the time the MEM decided to physically notify Exmingua of the Amparo, its effects had already taken place due to the automatic nature of provisional amparos, and therefore, the license suspension became fully effective as of the issuance thereof on November 15, 2015.[129]

68. In April 2016, MEM inspectors confirmed that it continued to operate[130], and approximately one month later, on May 9, 2016, police and prosecutors surprised Exmingua employees transporting gold concentrate from the mine.[131] Authorities estimated that each bag was worth $100,000. Exmingua claims for this material, which was seized as evidence [pursuant to Articles 198, 200 and 201 of the Guatemalan Code of Criminal Procedure[132]]. Although the Court of First Instance in Criminal Matters, Drug Trafficking, and Environmental Crimes[133] ruled that Exmingua's personnel lacked merit, under the Roman continental law (civil law) system this does not mean that the investigation has been completed or that these individuals have been exonerated[134], as Claimants contend.

F. The Alleged Delay in the Issuance of the Appellate Decision in the case of Exmingua

69. The Claimants argue that there were political reasons that led the Constitutional Court to delay the

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[126] Press Release, Guatemala Human Rights Commission, *U.S. Company continues illegal mining operations in El Tambor* (March 22, 2016) (**R-0067**).

[127] Web Page fdodocuments.net, *Illegal exploitation and air transport of minerals in La Puya: on the trail of the TG-ECU, available at* https://fdocuments.net/document/transporte-ilegal-de-minera-en-la-puya-cementos-progreso-crimen-organizado (July 9, 2016) (**R-0068**).

[128] Press Release, Guatemala Human Rights Commission, *International Organizations Reiterate Support for Rule of Law and Respect for Human Rights in the Case of the Communities of La Puya and el Tambor Mine* (May 24, 2016) (**R-0069**).

[129] Report of Mr. Marcelo Richter ("Richter Report"), ¶¶ 127, 130 and 133.

[130] Press Release, Office of the Public Prosecutor, *Environmental Crime Prosecutor's Office coordinates apprehension of four individuals for illegal exploitation of natural resources* (May 9, 2016) (**R-0070**).

[131] *Id.*

[132] Guatemala Code of Criminal Procedure, Articles 198, 200 and 201 (**C-0506**).

[133] Throughout the Counter-Memorial, when referring to a Criminal Court of First Instance, we will be referring to the Criminal Court of First Instance of Drug Trafficking and Crimes Against the Environment of Guatemala.

[134] The term "Falta de Mérito" is not exoneration. Rather, it means that the investigation remains open and that if sufficient proof is obtained, the procedure will continue. *See* Order of Lack of Merit (*Auto de Falta de Mérito*) issued by the Criminal Court of First Instance of Drug Trafficking and Crimes Against the Environment (May 10, 2016) (**R-0071**).

rendering of the appeal judgment in this case.[135] This is unjustified, and absolutely lacking in any proving evidence. This is all the more incredible when one considers that the result is exactly the same as in the other mining industry cases. As the Constitutional Court explains in a completely transparent manner in the report on the responses to the questions posed by the Guatemalan Attorney General's Office[136], there was no intentionality in the Exmingua appeal case (an appeal also filed by the MARN), but rather circumstances of excessive work by the judicial body, and a political climate that was strained by events absolutely unrelated to this case.

70. The Constitutional Court renews all but one (1) of its members every five years.[137] The Judiciary that acted in the Exmingua case file under analysis was Judiciary VII (period VII), whose activity began on April 14, 2016.[138] As can be expected, the new group of judges takes some time to adjust its legal criteria to the new structure and to establish the new modality of work. Likewise, this Judiciary had to face extraordinary events for the life of the country, which consumed enormous efforts: (1) Ruling of the Law on Public Order, (2) Unconstitutionality of the Law on the Judicial Career, (3) cases of La Línea, which has been one of the most important crises in the country,[139] (4) cases related to the departure of the CICIG (International Commission against Impunity in Guatemala),[140] (5) cases related to the initiative of the government of President Trump to make Guatemala a Safe Third Country,[141] as well as the huge amount of other cases whose number is shown in the report provided by the Constitutional Court.[142]

71. In the activity of the Constitutional Court and in the work of Judge Bonerge Amilcar Mejia Orellana, it is worth noting that the case of the San Rafael mining company was assigned to him by draw. Due to the fact that two communities with opposing interests, one in favor of the mining activity and the other against it, set up camp in front of the building of the Constitutional Court, exerting social pressure and sometimes physical

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[135] Claimants' Memorial, ¶¶ 133-142.

[136] Report from the Constitutional Court (**R-0074**).

[137] For general issues concerning the functioning of the Constitutional Court, *see* Wikipedia Web Page, *available at* https://es.wikipedia.org/wiki/Corte_de_Constitucionalidad_de_Guatemala, (last visited on November 14, 2020) (**R-0073**). *See also* Report from the Constitutional Court, pp. 8-14 (**R-0074)**.

[138] *Magistrates of the Constitutional Court assume the position*, PRENSA LIBRE (April 14, 2016) (**R-0075**).

[139] Report from the Constitutional Court, p. 10 (**R-0074**).

[140] *Id.*

[141] *Id.*

[142] *Id.* The Constitutional Court had 6,530 cases in the year 2016, 6,316 in the year 2017, 6,303 in the year 2018, 7,354 in the year 2019 and 3,835 in the year 2020, despite the COVID-19 crisis. Another alarming figure is the amount of sessions that each of the magistrates has participated in the relevant years, 168 in the year 168, 173 in the year 2017, 181 in the year 2018, 167 in the year 2019 and 162 in the year 2020. This means a full session, in other words, a meeting to deliberate the content of the decisions that the Court issues *en banc*, every other day, if we include weekends and holidays.

and psychological violence, led the Court to give priority to this case, complicating other cases in which the Judge was rapporteur, including the case of Exmingua.[143]

72. With respect to the Exmingua case file, it should be noted that the assignment of cases is done by random assignment through the computer system.[144] The case went to Judge Dina Ochoa Escribá,[145] who shortly thereafter recused herself from intervening in the case. Upon her recusal, the case was passed on to Judge Bonerge Mejía Orellana who, as already mentioned, was also in charge of the San Rafael case. In this period (2016-2020), the fourth term of the Court, under the leadership Judge Mejía Orellana (alone, i.e., not counting the cases in prior periods), heard 5188 amparo cases and appeals related to amparo, of which 4796 have been resolved to date, that is, an average of over one thousand (1000) amparo cases per year.[146] Likewise, in 2018, case file 3344-2016 was consolidated with case file 3207-2016, which delayed its treatment.

73. In 2019, Judge Bonerge Mejía, in charge of the case, had to preside over the Constitutional Court, which required him to dedicate a significant part of his time to the administrative matters of the Court. During the time that the Judges serve as President of the Court, they are only assigned cases during the first quarter of the year, since it is expected that they will be extremely busy with administrative tasks. As the Court explains, in 2019, Judge Bonerge Mejía signed as President of the Court an extraordinary number of 32,818 procedural resolutions, and as a Judge he participated in the signing of 2,628 judgments and 6,601 orders.[147] Likewise, the consolidated case file 3207-2016 and 3344-2016 reached plenary hearings 6 times from the end of 2019,[148] before the final sentence was issued.

74. More importantly, this means that since the Constitutional Court confirmed, in less than 3 months, the provisional Amparo issued by the Supreme Court, this decision contained all the elements that Exmingua expected from the decision, which were already sustained therein. In all subsequent decisions on mining and consultation with indigenous peoples, the Constitutional Court maintained the same position. Nothing could have surprised Exmingua or the Claimants because nothing surprising existed. This proves that there was no intentionality, nor a black hand that pursued interests that Exmingua does yet define, given that the rulings are all the same and do not differ in any way, when it comes to mining cases, which have similar and contemporary rulings.

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[143] S. Dalmasso, *San Rafael Mine: Seven and a half months of protests before the Constitutional Court*, PLAZA PÚBLICA (April 19, 2018) (**R-0076)**.

[144] Report from the Constitutional Court, pp. 15-17 (**R-0074)**.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

III. ASPECTS OF GUATEMALAN LAW APPLICABLE TO THE DISPUTE

75. The Claimants allege that the decisions made by the Guatemalan Supreme Court and Constitutional Court (as well as their acts of execution) were made arbitrarily and in violation of or retroactively applying Guatemalan law. This is false.

76. In fact, the relevant facts of the case demonstrate that we are dealing with a measure adopted by the Executive Branch (the granting of an exploitation license) and subject to a judicial control of constitutionality, by an independent body and in accordance with mechanisms provided for in the Constitution and the laws of Guatemala. This pattern of conduct is clear evidence of the correct functioning of the system of checks and balances that every country governed by a system of separation of powers must have, as expressed by the Constitutional Court in the ruling issued on May 19, 1992 in case file No. 113-1992.[149]

77. In this case, the Constitutional Court was faced with an administrative act issued in violation of constitutional rights and general principles of international law, which compromised the general interest of the members of an indigenous community and the international responsibility of the Republic of Guatemala. The Constitutional Court, in its capacity as the highest interpreter of the Guatemalan constitution and in respect for its own jurisprudence and that of the Inter-American Court of Human Rights, carried out a weighting exercise and established a mechanism that allows for the re-establishment of the infringed legal situation, preserving the general interest and respecting the international Human Rights obligations of the Republic of Guatemala; at the same time allowing for a path to preserve the particular and economic interests of the Claimants.

78. Consequently, the complaints made by the Claimants against the decisions of the Constitutional Court and the reasons thereof are unfounded.

A. The decisions of the Constitutional Court were issued in accordance with substantive law

79. The Claimants have failed to inform the Tribunal of the existence and preferential application of constitutional rules and international treaties concerning Human Rights, which provide for the right of indigenous peoples to be consulted in advance through good faith and culturally appropriate mechanisms. They also omitted the role of the jurisprudence of the Inter-American Court of Human Rights and the obligation of

[149]Judgment of the Constitutional Court issued on May 19, 1992, Case No. 113-1992 (**R-0077**). " One of the basic principles of the rule of law is that of the division or separation of powers in which the function of creating laws is attributed primarily to the Legislative Branch; to the Judicial Branch the one to apply them and declare the rights in contentious cases that are submitted to its knowledge and to the Executive Branch the power to govern and administer. The sense of the distribution of state power in various branches is not basically to distribute functions among them in order to obtain efficient performance; its primary purpose is that by developing their functions separately and in coordination, such bodies mutually limit each other, so that each one of them acts within the sphere of its competence and constitutes a brake or counterweight to the activity of the others, that is, that exercise reciprocal control among themselves in order to be framed within the legality regime"

the Guatemalan Constitutional Court to adapt its interpretations thereto in order to give the provisions of the aforementioned convention a useful effect.

80. Finally, the Claimants conveniently omitted that the jurisprudence of the Constitutional Court has recognized - for decades - the unquestionable nature of the right to consultation and the need to comply with it prior to the adoption of any administrative measure, such as the Exmingua mining license.

1) Incorporation of ILO Convention 169 into Guatemalan domestic law

81. Under Guatemalan law, all acts of the public administration are subject to the principle of legality. This principle is provided for in Articles 5 and 152 of the Guatemalan Constitution and, pursuant thereto, all acts of the public administration (including the granting of mining licenses and the decisions of the Constitutional Court) are subject to the constitution and the law. This applicable regulatory framework also includes the international treaties concerning Human Rights ratified by Guatemala, including especially ILO Convention 169.

82. The foregoing is a consequence of the provisions of Article 46 of the Guatemalan Constitution, according to which "[t]he general principle established is that in matters of human rights, treaties and conventions accepted and ratified by Guatemala take precedence over domestic law".[150] This article is supplemented by the provisions of Article 44, which confirms the status of the rules of international law on human rights by stating that "[t]he laws and governmental or other provisions that diminish, restrict or distort the rights guaranteed by the Constitution shall be ipso jure null and void".[151]

83. The constitutional status of international treaties on human rights is also confirmed in rules of legal rank, for example, Article 3 of the Amparo Law clearly states that "...in matters of human rights, the treaties and conventions accepted and ratified by Guatemala prevail over domestic law".[152] This rule is further developed in Article 114 of the same law, which states that "...in matters of human rights, international treaties and conventions accepted and ratified by Guatemala prevail".[153]

84. Finally, the rule applicable to the Guatemalan Judiciary reiterates this criterion as follows: [T]he courts shall always observe the principle of regulatory hierarchy and the supremacy of the Political Constitution of the Republic over any law or treaty, with the exception of treaties or conventions on human rights, which take precedence over domestic law.[154]

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[150] *See* Political Constitution of Guatemala, Art. 46 **(C-0414)**.

[151] *Ibid*, Art. 44.

[152] *See* Amparo, Personal Exhibition and Constitutionality Law, Art. 3 **(C-0416)**.

[153] *Ibid*, Art. 114.

[154] *See* Guatemala´s Judicial Branch Law, Art. 9 **(C-0415)**.

85. The Constitutional Court has ruled on the constitutional or supralegal status of human rights treaties on several occasions. For example, on May 18, 1995, the Constitutional Court issued an advisory opinion on ILO Convention 169, establishing its compatibility with the Guatemalan Constitution.[155] In the same vein, in its October 31, 2000 ruling, the Constitutional Court analyzed the pre-eminence of the American Convention on Human Rights over domestic law and concluded that: "...by virtue of article 46, it submits to the general principle that treaties and conventions accepted and ratified by Guatemala have pre-eminence over domestic law".[156]

86. In summary, the applicable legal framework for analyzing the validity of mining licenses in Guatemala should include the rules of domestic law and those of international law on Human Rights as provided for in the Human Rights treaties that have been ratified by Guatemala.

87. In analyzing the regulations in particular, we find that Articles 66 to 69 of the Guatemalan Constitution recognize a catalog of rights in favor of indigenous peoples, emphasizing that the "...State recognizes, respects and promotes their ways of life, customs, traditions, forms of social organization, the use of indigenous clothes by men and women, languages and dialects".[157] . To wit:

- Universal Declaration of Human Rights.
- American Convention on Human Rights.
- International Convention on the Elimination of All Forms of Racial Discrimination.
- United Nations Declaration on the Rights of Indigenous Peoples.
- Agreement on the Identity and Rights of Indigenous Peoples. International Labor Organization Convention 169 on Indigenous Peoples.

88. The Guatemalan Constitutional Court analyzed these instruments in its decision rendered in the *Cementos Progreso* case on December 21, 2009, concluding that:

> As can be seen, consent to and/or ratification of the provisions of the multilateral documents listed above implies, in short, an international commitment by the State of Guatemala to take a definite position on the right to consultation of indigenous peoples, expressed in several components: (i)

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[155] "It can be said that article 46 of the Constitution recognizes the general principle that in the matter of rights the treaties and conventions accepted and ratified by Guatemala prevail over domestic law. In this regard, this Court has considered that the Constitution should be interpreted as a harmonious whole, in which each part is interpreted in accordance with the rest, that no provision should be considered in isolation and that the conclusion that harmonizes and not the one that puts in conflict the different precepts of the constitutional text should be preferred" Judgment of the Constitutional Court issued on May 18, 1995, case No. 199-1995, p. 6 (**R-0078**).

[156] Judgment of the Constitutional Court issued on October 31, 2000, case No. 30-2000, p. 7 (*Mining Law* Case) (**R-0079**).

[157] *See* Political Constitution of Guatemala, Art. 66 **(C-0414)**.

> its regulatory recognition per se and, therefore, its inclusion in the constitutional block as a fundamental right, by virtue of the provisions of Articles 44 and 46 of the Magna Carta; (ii) consequently, the obligation to guarantee the effectiveness of the right in all cases where it is pertinent; and (iii) the duty to make the necessary structural changes in the State apparatus - especially with regard to applicable legislation - in order to comply with this obligation in accordance with the country's current situation.[158]

89. Consequently, both the Guatemalan constitution and jurisprudence recognize the integration of the catalog of rights set forth in ILO Convention 169 within the so-called constitutionality block, since its ratification on June 5, 1996.

90. Likewise, in Guatemala there are State organs whose purpose is to ensure social peace and respect for human rights. Thus, Article 274 of the Guatemalan Constitution establishes the figure of the Human Rights Ombudsman, who "[s]hall have the power to supervise the administration; shall hold office for a period of five years, and shall submit an annual report to the Congress, with which he shall interact through the Human Rights Commission.[159]

91. On the other hand, until 2020, the Presidential Commission for the Coordination of the Executive's Human Rights Policy (COPREDEH) existed within the Republic of Guatemala, which was composed of representatives of different bodies and entities of the Guatemalan public administration. This institution was dissolved by virtue of Governmental Agreement 99-2020 of the President of the Republic, creating, consequently, the Presidential Commission for Peace and Human Rights, through Governmental Agreement 100-2020 of the President of the Republic.

92. The institution of the Human Rights Ombudsman recognizes the right of indigenous peoples to be consulted in advance and, together with the COPREDEH and the National System of Dialogue, has actively participated in mediating the social conflict between members of the communities surrounding the Tambor and Exmingua project.[160]

93. By virtue of the foregoing, it is clear that the right to consultation provided for in Article 6 of ILO Convention No. 169 is a rule of constitutional rank in the Guatemalan legal system, which has been in force since the ratification of said treaty and whose application has been recognized by Guatemalan jurisprudence and institutions concerning Human Rights.

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[158] Judgment of the Constitutional Court issued on December 21, 2009, case No. 3878-2007, pp. 12-13 (*Cementos Progreso* Case) (**R-0080**).

[159] *See* Political Constitution of Guatemala, Art. 274 **(C-0414)**.

[160] *See* Report by the Human Rights Ombudsman dated November 26, 2020 (**R-0081**).

2) Guatemalan authorities and courts are obliged to interpret and apply the law in accordance with the jurisprudence of the Inter-American Court of Human Rights

94. Another element omitted in the Claimants' analysis of domestic law is the obligation of Guatemalan courts to interpret human rights treaties in accordance with the jurisprudence of the Inter-American Court of Human Rights ("IACHR").

95. The foregoing derives from the diffuse control of compliance with human rights conventions, which has been explained by the IACHR in the following terms:

> 124. (...) when a State has ratified an international treaty such as the American Convention, its judges, as part of the State apparatus, are also subject thereto (...) In other words, the Judiciary must exercise a kind of conventionality control between the domestic legal rules that apply in specific cases and the American Convention on Human Rights. In this task, the Judiciary must take into account not only the treaty, but also the interpretation thereof by the Inter-American Court, the ultimate interpreter of the American Convention.[161]

96. The IACHR confirmed this obligation in a case precisely involving Guatemala, indicating in a particularly clear way that:

> Judges and bodies involved in the administration of justice at all levels are obliged to exercise *ex officio* a 'control of conventionality' between domestic rules and the human rights treaties to which the State is a party, evidently within the framework of their respective competencies and the corresponding procedural regulations. In this task, judges and bodies involved in the administration of justice, such as the Public Prosecutor's Office, must take into account not only the American Convention and other inter-American instruments, but also the interpretation that the Inter-American Court has made thereof.[162]

97. The IACHR has considered the issue of prior consultation with indigenous peoples in various cases. In *Saramaka v. Suriname*, a group of twelve indigenous clans submitted for consideration the granting of concessions for timber and mining exploitation within their territories. In its decision, the IACHR established that "...the State has the duty to consult, actively, with said community, in accordance with its customs and traditions... Consultations must be carried out in good faith, through culturally appropriate procedures, and must be aimed at reaching agreement".[163]

98. In *Saramayaku v. Ecuador*, the Court went even further and recognized that "...**the obligation of**

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[161] Judgment of the Interamerican Court of Human Rights issued on September 26, 2006 (*Amonacid Arellano v. Chile*) ¶ 124 (**R-0082**).

[162] Judgment of the Interamerican Court of Human Rights issued on September 4, 2012 (*Masacres de Río Negro v. Guatemala*), ¶ 262 (emphasis added) (**R-0083**).

[163] Judgment of the Interamerican Court of Human Rights issued on November 28, 2007 (*Samaraka v. Surinam*), ¶133 (**R-0084**).

consultation [provided for in ILO Convention 169], in addition to constituting a conventional rule, **is also a general principle of International Law"**.[164]

99. These conclusions were subsequently ratified by the IACHR in the cases *Garífuna Punta Piedra v. Honduras*[165] and *Garífuna Triunfo de la Cruz v. Honduras*[166], in which the IACHR insisted on the inalienable nature of the right to consultation provided for in ILO Convention 169 and on the obligation of the state to ensure that this right has been fulfilled before issuing any measure that could affect the rights of the members of the communities involved.

100. These rulings were issued prior to the filing of the application for the exploitation license corresponding to Progreso VII Derivada and/or prior to the decisions issued by the Supreme Court and the Constitutional Court of Guatemala in the cases of Exmingua/CALAS. Thus, it is clear that it is impossible to assert that the Guatemalan courts "changed the rules of the game".

3) The Constitutional Court has recognized the existence and obligatory nature of the right to prior consultation

101. The Claimants state that the Constitutional Court allegedly "changed the rules of the game" by retroactively applying a new interpretation and imposing new requirements. However, the jurisprudence of the Constitutional Court between 1995 and 2020 proves the opposite. In fact, the Constitutional Court has consistently and repeatedly -since 1995-recognized the existence of the right to prior consultation of indigenous peoples and the obligation to meet this requirement before adopting any administrative measures that could affect the rights and interests of indigenous peoples.

102. First, we have already stated that the Constitutional Court had the opportunity to confirm the compatibility of ILO Convention 169 with the Guatemalan Constitution, in the advisory opinion issued on May 18, 1995[167]. Years later, after the ratification and entry into force of ILO Convention 169, the Constitutional Court was asked to rule on the constitutionality of a popular consultation called by the authorities of the Municipality of Sipacapa (*Sipacapa* case). In this case, the members of the Municipal Council of that municipality called a "good faith consultation" with the aim of obtaining the opinion of the indigenous

[164] Judgment of the Interamerican Court of Human Rights issued on June 27, 2012 (*Sarayaku v. Ecuador*), ¶164, p. 49 (**R-0085**).

[165] Judgment of the Interamerican Court of Human Rights issued on October 08, 2015 (*Garifuna Punta Piedra v. Honduras*), 216, p. 145 (**R-0087**)**.**

[166] Judgment of the Interamerican Court of Human Rights issued on October 08, 2015 (*Garifuna Triunfo de la Cruz v. Honduras*), 160, p. 145 (**R-0204**).

[167] *Ibid*, p. 8.

peoples residing in said locality, on the development of open-pit mining activities in the area. The call to the electoral consultation conferred it binding effect, which is why the action of amparo was filed.

103. The Constitutional Court resolved the case on 8 May 2007, stating that the right of indigenous peoples to be consulted on measures likely to affect them arises from Articles 6 and 15 of ILO Convention 169, which was ratified by Guatemala and declared compatible with the fundamental law by means of advisory opinion 199-1995.[168]

104. The Constitutional Court was also faced with a very similar scenario in two actions related to a hydroelectric project in the town of Río Hondo (*Río Hondo I*[169] and *Río Hondo II*[170] cases). In these judgments, the Constitutional Court reiterated verbatim the passages of the ruling in the *Sipacapa* case, reiterating the unquestionable nature[171], its nature prior to the granting of any license[172], the obligation of the State to promote the exercise of this right through the adoption of legislative and administrative measures that will allow agreements or consensus to be reached on the proposed measures, as well as the generation of mechanisms that will promote fair compensation for the communities related to the projects.[173]

105. In the *Cementos Progreso* case, the Constitutional Court further developed the key aspects related to the validity and application of Articles 6 and 15 of ILO Convention 169. This case was decided on 21 December 2009[174] (at least two months before the start of the alleged consultations carried out by Exmingua) and concerned the request for a popular consultation carried out by members of the indigenous peoples living in the town of San Juan Sacatepéquez.

106. In this case, the Constitutional Court ratified that the regulatory basis for the right to consultation of indigenous peoples lies in (i) Articles 6 and 15 of ILO Convention 169, which was duly ratified by Guatemala and declared compatible with the fundamental law by means of advisory opinion 199-1995,[175] (ii) Article

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[168] Judgment of the Constitutional Court issued on May 8, 2007, Case No. 1179-2005, p. 13 (*Sipacapa* Case) (**C-0440**).

[169] Judgment of the Constitutional Court issued on September 7, 2007, Case No. 1408-2005, p. 8 (*Río Hondo I* Case) (**R-0088**).

[170] Judgment of the Constitutional Court issued on April 9, 2008, Case No. 2376-2007, p. 8 (*Río Hondo II* Case) (**R-0089**).

[171] *Rio Hondo I*, p.8 (**R-0088**), *Rio Hondo II*, p. 12 (**R-0089**).

[172] *Idem*.

[173] *Rio Hondo II*, p. 17 (**R-0089**).

[174] Judgment of the Constitutional Court issued on December 21, 2009, Case No. 3878-2007, pp. 12-13 (*Cementos Progreso* Case) (**R-0080**).

[175] *Ibid*, pp.10-11.

21(2)(3) of the American Convention on Human Rights [citing the previously referred IACHR judgment in the case of *Saramaka v. Suriname*].[176] (iii) the International Convention on the Elimination of All Forms of Racial Discrimination[177], and (iv) Article 32(2)(3) of the United Nations Declaration on the Rights of Indigenous Peoples.[178]

107. In this regard, the Constitutional Court reiterated that the limitations that could be found in domestic law regulations (i.e., the absence of legal rules that expressly regulate prior consultation and the applicable procedure for carrying them out) do not impede the recognition, fulfillment, and protection of the right to consultation.

108. The Constitutional Court also clarified the elements that must be included in the prior consultation in order to meet the standard set out in the rules supporting said right, as follows:

- It must be carried out before the granting of the mining license: affirming that the dynamics of the right to consultation requires that its exercise be facilitated in advance to government measures, even if they have been implemented (as long as they have not been completed) and if the measure has been completed, actions shall be promoted that aim to provide restorative and/or compensatory measures.179
- It must not be a mere informative hearing: the consultation is not exhausted with the mere information, it must constitute a genuine dialogue in a space of true exchange aimed at reaching agreements.180
- It must be in good faith: the State, the Indigenous peoples, and "even those sectors that, if involved in the measures to be implemented," are also called upon to intervene in implementing mechanisms that go beyond mere formalities [such as interviews or the publication of edicts] and to promote dialogue procedures in a climate of trust.181
- It must be adequate and through culturally appropriate means: the consultation must respect the languages and customs of the peoples to be consulted, wherefore there is no single standard consultation procedure to be applied (it will depend on each specific case and on the communities involved in the consultation process).[182]
- Be transparent: the consultation must be carried out through fairly formalized, systematic and replicable procedures, in order to avoid arbitrariness and counterproductive conflicts.183
- Non-binding in scope: the consultation does not represent a right of veto in favor of indigenous

[176] *Ibid*, p. 11.

[177] *Ibid*. pp. 11-12.

[178] *Id*.

[179] *Ibid*. p. 20.

[180] *Ibid*, p. 21.

[181] *Ibid*.

[182] *Ibid*. pp. 21-22.

[183] *Ibid*, p. 23.

communities, but rather a mechanism to promote understanding and generate consensus.184

109. As can be noted, *Cementos Progreso* was the decision that laid the final basis for what was to become the jurisprudential line chosen by the Constitutional Court in the following years, in which a constant exercise of weighting aimed at preserving the right to consultation of indigenous peoples is evident.

110. In fact, this criterion was subsequently ratified in a parallel amparo action arising from the same mining project (*Cementos Progreso II* case).[185]

111. In the same vein, the Constitutional Court maintained its position in the *Corrientes del Río* case, which concerned the construction of a hydroelectric plant in San Agustín Lanquín, without having fully exhausted the consultation process. In this case, the unquestionable nature of the right to prior consultation was confirmed[186], as well as its prior and non-binding character[187], and it added that "...the materialization of the right to consultation is within the reach of the peoples, despite the omissions of the central administration itself and the lack of regulations.[188] Finally, the Constitutional Court made a relevant clarification on the right to prior consultation in cases related to hydroelectric or energy generation projects, stating that:

> being electricity a product that, without entering into considerations on economic policies, is of national interest, the importance of construction works that tend to its production should also be weighed, since there is an interest of all the inhabitants of the nation, who, by principle of solidarity, cannot be denied access thereto.[189]

112. Only a few days later, the Constitutional Court ruled on an amparo action against the Mining Law, reiterating the recognition of the right to consultation provided for in ILO Convention 169 and indicating that:

> it is the obligation of the State of Guatemala to appropriately organize the entire governmental apparatus and, in general, all structures whereby public authority is exercised, in such a way that they are capable of legally ensuring the free and full exercise of the right to prior consultation, which must be effectively carried out in accordance with international standards on the subject, it being understood as a duly informed negotiation.[190]

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[184] *Ibid*. p. 24.

[185] Judgment of the Constitutional Court issued on May 25, 2010, Case No. 1031-2009, p. 10 (*Cementos Progreso II* Case) (**R-0090**).

[186] Judgment of the Constitutional Court issued on February 5, 2013, case No. 4419-2007, p. 7 (*Corrientes del Río* case) (**C-0537**).

[187] *Ibid*. p. 8.

[188] *Ibid*. p. 10.

[189] *Ibid*. p. 14.

[190] Judgment of the Constitutional Court issued on February 25, 2013, Case No. 1008-2012, p. 7 (*Mining Law* Case) (**R-0091**).

113. The criterion of the Constitutional Court have remained the same over the years. In 2015, the Court issued six judgments[191] confirming its decisions in *Cementos Progreso, Cementos Progreso II* and *Corrientes del Río*, reiterating that the regulatory basis of the right to consultation derives from the international human rights treaties ratified by Guatemala. One of the judgments referred to above was the judgment of November 23, 2015, which resolved the unconstitutionality of granting a mining license to the company Montana Exploradora de Guatemala without having respected the right to prior consultation of indigenous peoples. In its decision, the Constitutional Court expressly recognized the character as a general principle of international law and justiciability as a fundamental right of the right to prior consultation.[192]

114. In 2016, the Constitutional Court reaffirmed its legal doctrine in the case of the license for mining exploitation in the town of Sipacapa (*Entre Mares* case).[193] The criterion of the Constitutional Court was maintained in its most recent cases to which the Claimants have devoted their attention, i.e., *Oxec* (2017), *Minera San Rafael* (2018) and in the case of *Exmingua* (2020).

115. In *Oxec*, the Constitutional Court maintained its criterion, reaffirming that the recognition of the right to consultation stems from the ratification of the treaties on human rights that provide for consultation and their incorporation into the Guatemalan constitutional block, making express mention of the cases of *Cementos Progreso, Cementos Progreso II, Corrientes del Río, La Vega I, La Vega II* and *Montana Exploradora-San José III*.[194] In addition, it reiterated the recognition and justiciability of the right to consultation as a general principle of international law and a fundamental right, making express reference to the aforementioned decisions and to the jurisprudence of the IACHR referred to above.[195] And finally, it confirmed the elements that must be included in the prior consultation, which have been set forth in all of the aforementioned decisions,

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[191] Judgment of the Constitutional Court issued on March 25, 2015, Case No. 5710-2013 (*Transportadora de Energía de Centroamérica* Case) (**R-0092**). Judgment of the Constitutional Court issued on March 25, 2015, Cases Nos. 156-2013 and 159-2013 (*Transmisora de Energía Renovable* Case) (**R-0093**). Judgment of the Constitutional Court issued on November 23, 2015, Case No. 406-2014 (*Montana Exploradora-Centauro II* Case) (**R-0094**). Judgment of the Constitutional Court issued on September 10, 2015, Case No. 1149-2012 (*La Vega I* Case) (**R-0095**). Judgment of the Constitutional Court issued on September 14, 2015, Cases Nos. 4957-2012 and 4958-2012 (*La Vega II* Case) (**R-0096**). Judgment of the Constitutional Court issued on November 23, 2015, Case No. 5712-2013 (*Montana Exploradora-San José III* Case) (**R-0097**).

[192] *Montana Exploradora-San José III*, 9. pp. 17-18. (**R-0097**).

[193] Judgment of the Constitutional Court issued on January 12, 2016, Case No. 3753-2014 (*Entre Mares* Case) (**R-0098**).

[194] Judgment of the Constitutional Court issued on May 26, 2017, Cases Nos. 90-2017, 91-2017 and 92-2017, pp. 42-46 (*Oxec* Case) (**C-0441**).

[195] *Ibid*, pp. 46-48.

namely: (a) prior nature, (b) good faith, (c) consensual and non-binding purpose, and (d) use of culturally appropriate means.[196]

116. In *Minera San Rafael*[197], the Constitutional Court upheld the criterion expressed in the *Oxec* case and relied mainly on the reasoning given in that decision and on the applicable sources of international human rights law, in accordance with Articles 44 and 46 of the Guatemalan Constitution.

117. The same occurred in the *Exmingua* case. The Constitutional Court reiterated its recognition of the right to prior consultation, its scope and form of implementation, expressly mentioning again the cases of *Cementos Progreso, Cementos Progreso II, Corrientes del Río, La Vega I, La Vega II* and *Montana Exploradora-San José III*.[198]

118. As can be noted, the decisions made by the Supreme Court and the Constitutional Court in the *Exmingua* case were not the result of a whim or spontaneity on the part of the Guatemalan Constitutional Court. Quite on the contrary, it is simply one of the expressions of a long list of rulings that have repeatedly upheld the same precepts and have been consistently applied by both jurisdictional bodies.

B. The decisions of the Constitutional Court were issued in accordance with procedural law

119. Once the conformity of the decisions of the Constitutional Court with international human rights law and Guatemalan domestic law has been established, it is important to clarify the conformity of the actions of the Constitutional Court with the procedural rules applicable to the case.

1) The failure to comply with prior consultation in the granting of Exmingua mining licenses could be appealed through an amparo action

120. By way of introduction, it should be clarified that the mining license granted to Exmingua is not an administrative act exempt from control of constitutionality. First, from a subjective point of view, the acts and omissions of the Executive Branch (as occurred in the case of the prior consultation in the Progreso VII license) are subject to the control of constitutionality, pursuant to the provisions of Article 9 of the Amparo Law.[199] Second, from a material point of view, article 275 of the Guatemalan Amparo Law clearly states that "...there is no area that is not subject to amparo".[200]

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[196] *Ibid*. p. 61.

[197] Judgment of the Constitutional Court issued on September 03, 2018, Case No. 4785-2017 p. 40 (*San Rafael* Case) (**C-0459**).

[198] *See* Judgment of the Constitutional Court issued on June 11, 2020, Cases Nos. 3207-2016 and 3344-2016, p. 40 (**C-0145**).

[199] *See* Amparo, Personal Exhibition and Constitutionality Law, Art. 75 (**C-0416**).

[200] *Ibid*.

121. Furthermore, as already mentioned, the Constitutional Court has clearly held over the years that the violation of the right to prior consultation of indigenous peoples can be protected through an action of amparo. Thus, there is no doubt about the possibility to resort to an amparo action to re-establish constitutional order in those cases in which the right of indigenous peoples to be consulted has not been fully respected.

122. Additionally, the concept of legitimate confidence or expectation is not recognized in Guatemalan law. This is confirmed by a simple review of the sources used by the Claimants' legal expert, which are from jurisdictions other than Guatemala and are based on an extrapolation of the theory of acquired rights. In this sense, it should be made clear that the license granted to Exmingua did not constitute an acquired right, since it was subject to the control of constitutionality by way of the amparo action.

2) The amparo action filed complied with the procedural requirements set forth in the Amparo Law

123. Turning to assessing the concurrence of the procedural requirements of the amparo action, the Constitutional Court analyzed this element with perfect clarity in the judgment issued in the case of Exmingua, and consistent with the decisions rendered by said Court on the issues of the right to prior consultation of indigenous peoples and amparo in general.[201]

124. With regard to active legitimation, the Constitutional Court concluded that the petitioners, the non-governmental organization CALAS, and a group of individuals from the affected localities were entitled to file an action for amparo.

125. With respect to the finality of the contested act, the Constitutional Court concluded that said procedural requirement was met, since the petitioners in amparo were not parties to the administrative process that gave rise to the amparo action. This decision is consistent with the rulings issued by the Constitutional Court itself in the rest of the cases concerning the right to prior consultation of indigenous peoples.

126. In addition, the decision and the reasons given by the Constitutional Court on this issue prove the inaccuracy of the arguments of the Claimants regarding the need to exhaust certain administrative remedies in order to be entitled to exercise the amparo action and to justify the alleged existence of a legitimate confidence or expectation, for a simple and clear reason: the Public Administration did not appeal the act. The foregoing implies that it was impossible for the Claimants to have declared the injury (or to revoke an administrative act), much less to declare *motu proprio* the lapse or insubstantiation of an administrative act.[202]

127. With respect to the timeliness requirement, the Constitutional Court maintained its criterion regarding the inapplicability of the 30-day period provided for in the Amparo Law, since it constituted a case of continued

[201] *See* Guatemala Counter Memorial, Annex A.

[202] Richter Report, ¶ 56.

unconstitutionality. Once again, we are in the presence of a reiteration of the criteria previously upheld by the Constitutional Court throughout the development of jurisprudence on the matter of consultation with indigenous peoples.[203]

128. Thus, the action for amparo resolved by the judgment issued in the Exmingua case fully met the procedural requirements of the Amparo Law, and the decision of the Constitutional Court in this regard is consistent with its previous decisions.

3) The amparo action was resolved in accordance with the previous decisions of the Constitutional Court in similar cases

129. The Claimants state that the Constitutional Court granted differential and unfair treatment to Exmingua, basing their argument on three elements: the maintenance of the suspension of the license while the consultation of indigenous peoples is carried out, the alleged imposition of more onerous conditions for the carrying out of the prior consultation, and the undue delay in the decision of the case. As we shall see below, none of these interpretations is correct.

130. First, the Constitutional Court granted Exmingua the same treatment as other mining projects that were involved in amparo proceedings as a result of the failure to comply with prior consultation with indigenous peoples. In fact, the decision adopted is the result of a jurisprudential development that we have described and that shows the consistency with which the Constitutional Court has been acting, especially with regard to the recognition of the right to prior consultation, the impact of non-compliance therewith, and the manner in which consultation should proceed in order to preserve the mining right granted. The same situation occurs with regard to the concurrence of the procedural requirements of the amparo, which was resolved by the Constitutional Court in perfect symmetry with other cases and especially with the *Oxec* and *Minera San Rafael* cases.[204]

131. Second, the Constitutional Court applied the same standard on the subject of the right to prior consultation of indigenous peoples. As we have already explained, the Constitutional Court applied a criterion that it has consistently maintained since December 2009 (months before the alleged consultation process for the Progreso VII Derivada license began).

132. A simple review of the considerations and the text of the three relevant decisions once again shows the consistency in the criteria adopted by the Constitutional Court.

133. As a matter of fact, the only differentiating element in the set of rulings analyzed is the absence of suspension of the authorization granted to *Oxec*. The Claimants allege that this entails an unequal and unfair

[203] Richter Report, ¶¶ 83-84.

[204] *See* Annex B Guatemala Counter Memorial.

treatment towards Exmingua; however, there are reasons in fact and in law that justify the fact that said project was not suspended by the Constitutional Court. The main error in the Claimants' logic lies in fully equating the cases of *Oxec* and Exmingua, when in reality they are completely different industries, subject to different legal frameworks and to social conflicts with different nuances.

134. Therefore, it needs to be emphasized that the Oxec projects consist of hydroelectric plants, and therefore the applicable regulations are those referred to the electric sector and not to mining. In Guatemala, the electricity industry is subject to a different legal framework than mining. Pursuant to Article 129 of the Guatemalan Constitution, in accordance with Article 1 of the Law on Incentives for the Development of Renewable Energy Projects,[205] a constitutional urgency has been declared with respect to electrification, this being one of the State's main priorities.

135. As can be observed, the generation of electric energy and the provision of public electricity services could be equated to an essential mission of the State, wherefore they are subject to a legal framework granting a treatment that is different from the mining industry. In this regard, the Constitutional Court has stated that:

> being electricity a product that, without entering into considerations on economic policies, is of national interest, the importance of construction works that tend to its production should also be weighed, since there is an interest of all the inhabitants of the nation, who, by principle of solidarity, cannot be denied access thereto.[206]

136. As a corollary of the above, *Oxec* is actually comparable to other hydroelectric projects that started operations and were later subject to constitutionality control. A good example of this is the above mentioned case of *Corrientes del Río, La Vega I, La Vega II* and another much more recent case, the *RENACE* hydroelectric project.[207] These cases of hydroelectric projects were not subject to suspension, which puts them on an equal footing with *Oxec*.

137. Additionally, it should be clarified that the factual elements around the cases of Exmingua and *Oxec* from the viewpoint of social conflict and efforts to exhaust prior consultation are diametrically opposed. The case of Oxec was less socially conflictive than that of Exmingua, as a result of the exhaustion of a series of consultation processes, the execution of agreements with the authorities of the communities involved, and the effective compliance thereof by *Oxec*. Whereas, the case of Exmingua has been marked by a high level of social conflict, and on the part of the mining company, an absolute absence of approaches to the community

[205] Law of Incentives for the Development of Renewable Energy Projects, Art.1 **(RL-0304)**.

[206] Judgment of the Constitutional Court issued on February 5, 2013, Case No. 4419-2007, p. 7 (*Corrientes del Río* Case) (**C-0537).**

[207] Judgment of the Supreme Court of Justice issued on April 10, 2019, Cases Nos. 559-2017 and 565-2017, pp. 22, 44, 70-71 (**R-0100**).

involved in the opposition to the mining project.

138. In light of the above, it is clear that the actions of the Guatemalan Supreme Court and Constitutional Court are in accordance with the domestic and international legal system applicable to the case, and that the decisions issued by said courts respected the principle of equality before the law that protects Exmingua and the Claimants.

IV. THE INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO THIS DISPUTE

139. The Claimant's Memorial was filed pursuant to Article 10.16.1 (a) (i) (A)[208] of CAFTA-DR and under the ICSID Convention, pursuant to Article 10.16.3 (a)[209] of CAFTA-DR. Procedural Order No. 1 confirms that the Tribunal was constituted "in accordance with the ICSID Convention, the ICSID Arbitration Rules and the CAFTA-DR."[210] Regarding the applicable law, it is well-settled that there is a distinction between the applicable law to determine, on the one hand, whether the present claim is within the jurisdiction of this Tribunal and, on the other hand, that which applies to the resolution of the merits of this controversy. According to Professor Christoph Schreuer,

> "Just as the basis of a tribunal's jurisdiction does not determine the law it has to apply, the law applicable in a case does not determine the tribunal's jurisdiction. The law governing jurisdictional issues is independent of the law applicable to the merits of a case."[211]

140. ICSID precedent is also replete with cases that make this same distinction.[212]

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[208] Article 10.16.1 (a)(i)(A) of CAFTA-DR establishes that "1. In the event that the disputing party considers that an investment dispute cannot be resolved through consultation and negotiations: (a) the claimant, on his own behalf, may submit to arbitration, pursuant to this Section a claim (i) that the respondent has violation (A) an obligation of Section A. (**CL-0001).**

[209] Article 10.16.3 (a) of CAFTA-DR establishes that "3. Provided that six months have elapsed since the events that gave rise to the claim, a claimant may file a claim referred to in paragraph 1: (a) under the ICSID Convention and ICSID Rules of Procedure for arbitration proceedings, provided that both the Respondent and the Party of the plaintiff are parties to the ICSID Convention. " (**CL-0001**).

[210] Procedural Order No. 1 dated September 10, 2019, ¶ 2.1, p. 4

[211] Christoph Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, McGill Journal of Dispute Resolution (2014) Vol 1:1, 2 (**RL-0121)**.

[212] *Azurix Corp. v. The Argentine Republic*, Decision on Jurisdiction of December 8, 2003, 10 ICSID Rep. 416 (2006), ¶48: ("As pointed out by both parties, the relevant provision for determining the law applicable to this dispute is Article 42(1) of the Convention. However, the rules applying to the dispute under Article 42(1) address the resolution of disputes on the merits, and so will not necessarily be those which apply to the Tribunal's determination of its jurisdiction under Article 41 at this stage of the proceedings.") **(RL-0122)**; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction of 2 July 2013, ¶ 30 **(RL-0123)**: ("Regarding the law governing the determination of jurisdiction, the Tribunal adheres to the predominant opinion that this issue is to be decided according to Article 25 of the ICSID Convention, the applicable rules of the relevant treaty and the applicable rules and principles of international law, Article 42(1) of the ICSID Convention governing only the merits of the case.")

A. Applicable Law on Jurisdiction

141. In resolving jurisdictional issues, tribunals have consistently resorted to Chapter II of the ICSID Convention on the Jurisdiction of the Centre, specifically Article 25 thereof, to the treaty between the parties, and to the extent the treaty refers to it, the respondent host State's domestic law. In *Quiborax S.A., et al. v. Plurinational State of Bolivia*, the tribunal affirmed the interplay of these rules of law to assess jurisdictional issues when it held that "[b]oth Parties agree, and rightly so, that the Tribunal's jurisdiction is governed by the ICSID Convention, by the Bolivia-Chile BIT (the "Treaty" or the "BIT") and, to the extent the latter refers to it, by Bolivian law. It is equally common ground between the Parties that the interpretation of both the ICSID Convention and the Treaty is governed by customary international law as codified by the Vienna Convention on the Law of Treaties."[213]

142. In relation to this Tribunal's jurisdiction *ratione materiae*, Article 10.28 of the CAFTA-DR provides that an investment "means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." Article 10.28 enumerates a non-exhaustive list of investments which, according to *Railroad Development Corporation ("RDC") v. Republic of Guatemala*, a dispute arising under the CAFTA-DR, must confer rights that may not be contrary to Guatemalan law.[214] The *RDC* tribunal, interpreting the said provision, held that "[i]t is to be expected that investments made in a country will meet the relevant legal requirements."[215] Citing the *Salini v. Morocco* tribunal with affirmation, the *RDC* tribunal held that the reference to domestic law in the treaty "seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal."[216] In determining whether it has jurisdiction *ratione materiae*, therefore, this Tribunal must look to Guatemala's domestic law, specifically its Mining Law and Environmental Protection Law, in assessing the legality of Claimants' purported investments.

143. In relation to this Tribunal's jurisdiction *ratione temporis*, Article 10.18.1 provides that "[n]o claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims

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[213] *Quiborax S.A., et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶ 47 (**RL-0125)**.

[214] *Railroad Development Corporation v. Republic of Guatemala*, ICSID CASE NO. ARB/07/23, Second Decision on Objections to Jurisdiction of 18 May 2010, ¶ 140 (**RL-0127)**.

[215] *Id.*

[216] *Id*. at fn. 99 *citing Salini Construttori and Intalstrade v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 16 July 2001, ¶ 46 (**RL-0036)**.

brought under Article 10.16.1(b)) has incurred loss or damage."

144. As will be discussed below, Respondent objects to the jurisdiction of this Tribunal because the Claimants failed to satisfy one or more of these jurisdictional requirements.

B. The Law Applicable to the Merits

145. Inasmuch as this Tribunal has been constituted under the ICSID Convention, it should follow instruction from Article 42(1) of the ICSID Convention on the law applicable to this dispute,[217] *viz*.:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

146. The CAFTA-DR is the primary governing law between the parties. Article 10.22.1 thereof provides that "when a claim is submitted under Article 10.16.1(a)(i)(A)," as in the present case, "the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Two points are of note from Article 42(1) of the ICSID Convention and Article 10.22.1 of the CAFTA-DR. The first relates to the content of the "applicable rules of international law", and the second relates to the function of Guatemala's domestic law in the Tribunal's resolution of this dispute.

147. *First*, Article 41(2) of the ICSID Convention and Article 10.22.1 of the CAFTA-DR both make reference to "rules of international law" which, under Article 38 of the ICJ Statute, include those arising from international conventions, customary international law, and general principles of law. As the *Pope & Talbot v. Canada* tribunal pointed out in interpreting the NAFTA which uses the same expression "applicable rules of international law," "international law is a broader concept than customary international law, which is only one of its components."[218]

148. In *Eli Lilly v. Canada*, which interpreted the same phrase "applicable rules of international law" under Article 1131(1) of the NAFTA, the tribunal held that the phrase "addresses not simply, for example, rules of interpretation of treaties, such as those reflected in Articles 31 and 32 of the Vienna Convention on the Law of

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[217] *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction of 17 July 2003, ¶ 88: ("Article 42 [of the ICSID Convention] is mainly designed for the resolution of disputes on the merits ….") **(CL-0038)**; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction of 2 July 2013, ¶ 30: ("Regarding the law governing the determination of jurisdiction, the Tribunal adheres to the predominant opinion that this issue is to be decided according to Article 25 of the ICSID Convention, the applicable rules of the relevant treaty and the applicable rules and principles of international law, Article 42(1) of the ICSID Convention governing only the merits of the case.") (**RL-0123)**.

[218] *Pope & Talbot, Inc. v. Government of Canada,* Award in Respect of Damages of 31 May 2002, ¶ 46 (**CL-0028)**.

Treaties ("VCLT"), *but also any other applicable rules of international law that may be relevant to the case before it*."[219] The *Eli Lilly* tribunal went on to discuss that these other applicable rules may include, "for example, relevant and applicable rules on State responsibility, such as go to questions of attribution of conduct, as well as other relevant and applicable rules of international law that inform the interpretation and application of the provisions, *inter alia*, of [the Investment section] of NAFTA Chapter Eleven that are in issue in the proceedings."[220] Relevant rules of customary international law apply here as well as expressly provided for under Article 10.5 and 10.7, in relation to Annexes 10-B and 10-C, of the CAFTA-DR.

149. The Republic of Guatemala ratified ILO Convention No. 169 on 5 June 1996,[221] which, along with other related international instruments, informs the rights and duties of Guatemala in relation to its indigenous peoples. It bears mention that both Guatemala[222] and the United States[223] are parties to the Charter of the Organization of American States[224] which created the Inter-American Commission on Human Rights ("IACHR") and both have declared support for the American Declaration of the Rights and Duties of Man. The IACHR's "principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters."[225] In 2004, the IACHR considered in *Maya Indigenous Communities of the Toledo District v. Belize* that "the application of the American Declaration to the situation of indigenous peoples requires that indigenous peoples shall not be deprived of their right to occupation and use of their traditional lands and resources except with fully informed consent, under conditions of equality and with fair compensation."[226] What is more, the IACHR made explicit reference to the ILO Convention No. 169 even though Belize was not a party to the Convention as it deemed that "the terms of the

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[219] *Eli Lilly and Co. v. Government of Canada*, Case No. UNCT/14/2, Final Award of 16 March 207, ¶ 106 (**RL-0040)** (italics supplied).

[220] *Id.*

[221] Other State Parties to the ILO Convention No. 169 are Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Honduras, Luxembourg, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, and Venezuela. *See* Web Page of the International Labor Organization, *Ratification of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), available at:* https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 **(R-0190)**.

[222] The Republic of Guatemala ratified the Charter on March 18, 1951. *See* OAS Website, *Charter of the organization of american states (A-41), available at:* http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS_signatories.asp **(R-0191)**.

[223] *Id.* The United States of America ratified the Charter on June 15, 1951.

[224] Other State Parties to the Charter are Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, San Kitts and Nevis, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay, and Venezuela.

[225] Charter of the Organization of American States, Art. 106 **(R-0192)**.

[226] Maya indigenous community of the Toledo District v. Belize, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004), ¶ 86 **(RL-0236)**.

treaty provide evidence of contemporary international opinion concerning matters relating to indigenous peoples, and therefore that certain provisions are properly considered in interpreting and applying the articles of the American Declaration in the context of indigenous communities."[227]

150. The American Convention on Human Rights, to which Guatemala is a State Party,[228] established the Inter-American Court of Human Rights ("IACtHR").[229] The IACtHR's jurisdiction extends to "all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it."[230] The IACtHR has considered the American Convention a "living instrument", and for that reason, has adopted an evolutive or dynamic interpretation of the American Convention and "has resorted to other instruments to modernize its content."[231] In June 2012, the IACtHR rendered judgment in *Pueblo Indígena Kichwa de Sarayaku v. Ecuador*[232] and found Ecuador to have incurred international responsibility for failing to consult the Sarayaku indigenous community prior to granting oil concessions that affected ancestral lands. What bears emphasis from the *Sarayaku* decision is its monumental recognition of the right to consultation as a general principle of international law.[233]

151. Also, the ILO interprets Convention No. 169 as having "clear legal implications for private sector

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[227] *Ibid.* at footnote 123.

[228] The other State Parties to the American Convention are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay. *See* Website of the Inter-American Court of Human Rights, *Which States are part of the American Convention? available at:* https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en

[229] American Convention on Human rights, Art. 33 **(RL-0296)**.

[230] *Ibid.* at Article 62.3 **(RL-0296)**.

[231] Maria Victoria Cabrera Ormaza ("Cabrera Ormaza"), *The Requirement of Consultation with Indigenous Peoples in the ILO: Between Normative Flexibility and Institutional Rigidity*, Leiden: Brill Nihjoff, p. 170, footnote 116 **(RL-0297)**, *citing* Laurence Burgorgue-Larsen and Amaya Ubeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2011), p. 62, ¶ 3.15 (**RL-0298**).

[232] *Pueblo Indígena Kichwa de Sarayaku v. Ecuador*, Sentencia de 27 de junio de 2012 (Fondo y Reparaciones) (**R-0085**).

[233] *Id.* at para. 164, citations omitted, emphasis and italics supplied. Various member states of the Organization of the American States, through their internal regulations and through their highest courts of justice, have incorporated the mentioned standards. Thus, the internal regulations of several States in the region, for example in Argentina, Bolivia, Chile, Colombia, Mexico, Nicaragua, Paraguay, Peru, the United States and Venezuela refers to the importance of consultation or community property. In addition, several domestic courts in the region that have ratified ILO Convention 169 have referred to the right to prior consultation in accordance with the provisions thereof. In this sense, the high courts in Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Peru or Venezuela have pointed out the need to respect the rules of prior consultation and of said Agreement. Other courts in countries that have not ratified ILO Convention 169 have referred to the need for prior consultation with indigenous, native or tribal communities on any action administrative or legislative body that affects them directly, and on the exploitation of natural resources in their territory. Thus, similar jurisprudential developments are observed by high courts in countries of the region such as Canada or the United States of America, or from outside the region such as New Zealand. That is, the obligation to consult, in addition of constituting a conventional rule, is also a general principle of international law.

actors operating in ratifying countries."[234] Indeed, even Claimants admit the ILO Convention No. 169 to be relevant in resolving the present dispute as they recognize that the Convention vests indigenous peoples with "the right to be consulted: (i) "whenever consideration is being given to legislative or administrative measures which may affect them directly," and (ii) prior to the exploration or exploitation of mineral or sub-surface resources."[235] In any case, the ILO Convention No. 169 forms part of the domestic law of Guatemala pursuant to Article 46 of its Constitution and may thus be applied by this Tribunal whether from the viewpoint of applicable rules of international law—as an international convention under the ILO Convention No. 169 or as a general principle of international law following *Sarayaku*—or as part of domestic law through Guatemala's Constitution. Judicial decisions of the courts of Guatemala interpreting the ILO Convention No. 169 are also applicable here, as even Claimants themselves have repeatedly made reference to them in their Memorial.

152. The United Nations Framework[236] and the Guiding Principles on Business on Human Rights endorsed by the United Nations Human Rights Council also establishes human rights due diligence as a standard of due diligence that satisfies an investor's responsibility to respect human rights.[237] It bears mention that the United States, through its former U.S. Secretary of State Hillary Clinton, praised the Organisation for Economic Co-operation and Development ("OECD") after it incorporated the Guiding Principles in its Guidelines for Multinational Enterprises.[238]

153. Consistent with the Framework and the Guiding Principles, the International Council on Mining and Metals ("ICMM") also mirrors prevailing best practices in the mining industry in the conduct of due diligence and, more specifically, of obtaining a social license for the success of an investment. In 2015, the ICMM released a Good Practice Guide for its members who "commit in the position statement to acknowledge and respect the rights of Indigenous Peoples *even if there is no formal recognition of these rights by a host country or if there is a divergence between a country's international commitments and its domestic law*."[239] According

[234] ILO, *Handbook for Tripartite Constituents: Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169)* (2013), p. 25**. (RL-0128)**.

[235] Claimants' Memorial, ¶ 71, p. 31, *citing* Articles 6 and 15(2) of the ILO Convention No. 169.

[236] United Nations "Protect, Respect and Remedy" Framework for Business and Human Rights Background, p. 1 **(R-0148)** ("[T]he UN Framework "comprises three core principles: The State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.")

[237] United Nations Guiding Principles on Business and Human Rights, Principle 17 **(RL-0243)**

[238] OECD Guidelines for Multinational Enterprises 4 (2011) **(RL-0160)**; *See also* Hillary Rodham Clinton, *Secretary Clinton's Remarks on the Commemoration of the 50th Anniversary of the OECD Guidelines for Multinational Enterprises* **(RL-0294)**: (The OECD Guidelines helps governments "determine how supply chains can be changed so that it can begin to prevent and eliminate abuses and violence. W're going to look at new strategies that will seek to make our case to companies that due diligence, while not always easy, are absolutely essential.")

[239] ICMM, *Indigenous Peoples and Mining Good Practice Guide* (2015), p. 17 **(RL-0295)**.

to the ICMM, the social license is one of the top business risks facing a mining project.[240] All these find applicability here insofar as they contain the standard of due diligence expected of investors in general, and investors in the mining industry specifically, that in turn implicates this Tribunal's assessment of the merit in Claimants' claim of legitimate and reasonable investment-backed expectations. This is consistent as well, in the investment arbitration context, with the pronouncement of the *Urbaser v. Argentina* tribunal that "international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law."[241]

154. This Tribunal cannot likewise fully resolve this dispute without considering Chapter 17 of the CAFTA-DR on the Environment. Indeed, the State Parties have instructed this Tribunal through Article 10.2 of the CAFTA-DR that "[i]n the event of any inconsistency between this [Investment] Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency." The preamble to the CAFTA-DR likewise reveals the Parties' intention to implement the Treaty "in a manner consistent with environmental protection and conservation." Chapter 17 sets out a number of undertakings concerning the environment, including the State's obligation to "ensure that its laws and policies provide for and encourage high levels of environmental protection," and, notably, to develop mechanisms for local communities to participate in these same protections.[242]

155. Chapter 10—the basis for this arbitration—is no different. Environmental concerns permeate the Chapter, so much so that Article 10.11, titled "Investment and Environment," provides an exception to Chapter 10's investment protections, stating: "Nothing in [Chapter Ten] shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

156. Article 10.11 follows the formula adopted by Canada, Mexico, and the United States in NAFTA Article 1114(1). According to Canada, Article 1114 affirms each Party's "right to adopt and enforce environmental

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[240] ICMM Guidance on Measuring Community Support, *available at* https://www.icmm.com/website/presentations/community-support/a1-measuring-community-support---for-senior-managers.pptx **(R-0108)**.

[241] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award (December 2016), ¶ 1195 (**RL-0129)**.

[242] CAFTA-DR, Articles. 17.1 & 17.4 ¶ 1195 (**CL-0001)**.

measures, consistent with the chapter (e.g. environmental measures must be applied on a national treatment basis)."[243] The United States has taken the same position specifically with regards to Article 10.11, noting that the it "informs the interpretation of other provisions of [Chapter 10]" and shows that Chapter 10 "was not intended to undermine the ability of governments to take measures otherwise consistent with the Chapter, including measures based upon environmental concerns, *even when those measures may affect the value of an investment*."[244]

157. Chapter 17 and Article 10.11 are related in this regard. According to the United States, Article 10.2 (labelled "Relation to Other Chapters") "subordinates the provisions of Chapter Ten to the provisions in all other Chapters of the CAFTA-DR, in cases where there is an inconsistency with another Chapter."[245] In other words, the protections contained in Chapter 10 are secondary to the rights and protections found in other parts of the Treaty. A number of tribunals have agreed with this relationship. The Tribunal in *Aven v. Costa Rica*, for instance, found that "Article 10.11 essentially subordinate[s] the rights to investors under Chapter Ten to the right of [the State] to ensure that the investments are carried out 'in a matter sensitive to environmental concerns[.]'… It is not a question of 'not-applying' those provisions under Chapter Ten, but rather *giving preference to the standards of environmental protection* that were stated to be of interest to the Treaty Parties at the time it was signed."[246]

158. In this case, all of the claims against Guatemala relate to measures taken to protect the rights of the indigenous communities. **Those rights are inseparable from Guatemala's right to protect the environment.** The treaty itself confirms this relationship. Guatemala has undertaken pursuant to Chapter 17 of the Treaty to develop mechanisms for community participation in the protection of the environment.[247] The consultations that are at issue in this case are just one example of this type of community participation.

159. Guatemala's Constitutional Court has also recognized the close relationship between the indigenous communities and the environment. In the *Minera San Rafael* decision, the Court found that the survival of the indigenous peoples "is not identified with mere physical subsistence, but must be understood as the ability to

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[243] Canadian Statement on Implementation of the NAFTA Chapter 11 (January 1994) (**RL-0264**).

[244] *Aven v. Costa Rica*, ICSID Case No. UNCT/15/3, Award, ¶ 82 **(RL-0031)** (italics added); *see also Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Award, ¶ 274 (discussing the Submission by Costa Rica: "In the case of CAFTA-DR Article 10.11, the host States have the right to regulate, with a special focus on environment. As a result, this clause shows that the Contracting Parties' intention was to maintain a balance between both elements.") (**RL-0112)**.

[245] *Aven v. Costa Rica*, ICSID Case No. UNCT/15/3, Award, ¶ 82 **(RL-0031)**.

[246] *Aven v. Costa Rica*, ICSID Case No. UNCT/15/3, Award, para. 412 (emphasis and italics in original) (**RL-0031)**; *see also Al Taminmi v. Oman*, ICSID Case No. Arb/11/22, Award para. 389 ("When it comes to determining any breach of the minimum standard of treatment . . . the Tribunal must be guided by the forceful defence of environmental regulation and protection provided in the express language of the Treaty.") **(RL-0130)**.

[247] CAFTA-DR, Article 17.4 (**CL-0001**).

preserve, protect and guarantee the special relationship they have with their territory[.]"[248] In the *Exmingua* decision, the Court said: "Survival does not refer only to the obligation of the State to ensure the right to life of each member of those peoples, but also to the obligation to take all the appropriate measures to ensure the continuance of the relationship of the indigenous people with their culture and their land."[249] And finally in the *CGN* decision, the Court stated:

> Compliance with this obligation requires the adoption of the necessary measures to protect the habitat of indigenous communities from ecological deterioration as a consequence of extractive, livestock, agricultural, forestry and other economic activities, as well as the consequences of the projects of infrastructure, since such deterioration reduces their traditional capacities and strategies in terms of food, water and economic, spiritual or cultural activities. When adopting these measures, States must place "special emphasis on the protection of forests and waters, which are essential for their health and survival as communities.[250]

160. Other States recognize this close relationship as well. Chapter 24 in the new United States-Mexico-Canada Agreement ("USMCA")—labelled "Environment"—specifically refers to the "well-being of indigenous peoples" as one of its objectives: "The Parties recognize that the environment plays an important role in the economic, social, and cultural well-being of indigenous peoples and local communities, and acknowledge the importance of engaging with these groups in the long-term conservation of the environment."[251] The USMCA Parties further recognize the important role biodiversity plays in the traditional lifestyles of indigenous peoples.[252]

161. In summary, for purposes of this case, Claimants' rights under Chapter 10 are secondary to Guatemala's right to protect the environment, which includes the right to protect the indigenous communities and their close connection with the land. Since all of claims raised by Claimants concern actions taken to protect the indigenous communities, there can be no violation of any provision under Chapter 10 when read in relation to Chapter 17 of the CAFTA-DR.

162. *Second*, with regard to the applicability of domestic law, the Annulment Committee in *Wena Hotels v. Egypt* explained that "[t]he law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other

[248] **C-0459-ENG-R**, pp. 267-68.

[249] **C-0145**, p. 21.

[250] *CGN* decision, p. 265.

[251] USMCA, article 24.2(4) (**RL-0131)**.

[252] *Id.* at article 24.15(3).

ambit."[253] The Annulment Committee in *MTD v. Chile* similarly held that "[w]hether the applicable law here derived from the first or second sentence of Article 42(1) does not matter. … Both [domestic law and international law] [are] relevant."[254] The *Philip Morris v. Uruguay* tribunal, in turn, is instructive that domestic law, here Guatemalan law, is important in two respects: (1) it informs the content of the Claimants' rights and obligations within the Guatemalan legal framework, which are relevant, among others, to the resolution of the expropriation claim under Article 10.7 of the CAFTA-DR; and (2) it informs the content of commitments made by Guatemala to the Claimants that the latter alleges have been violated, that is, for example, whether Claimants indeed have legitimate, reasonable investment-backed expectations.[255]

163. This Tribunal is urged to apply both the applicable rules of international law and the domestic law of Guatemala as may be relevant on a per issue basis.[256]

V. OBJECTIONS TO JURISDICTION

A. Claims procured by illegal means and misrepresentations are inadmissible under international law

164. A Claimant is not entitled to invoke the protections of the CAFTA-DR and Foreign Investment law of Guatemala,[257] and does not have standing to present its claims, because its investments were obtained by illegal means, misrepresentation fraud in violation of international and Guatemalan law.[258] An investment procured by such means would be contrary to the obligation of good faith and fair dealing under international law and public policy, and thus it is precluded from the protections afforded under investor-state arbitration.[259]

165. Even when the applicable treaty does not provide for illegality as a *jurisdictional* bar, the investors'

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[253] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment of 28 January 2002, ¶ 40 (**RL-0132)**.

[254] *MTD v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment of 21 March 2007, ¶ 72 (**RL-0133)**.

[255] *Philip Morris Brands Sarl, et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, ¶ 177 (**RL-0124)**.

[256] *See* Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in Arbitration under International Investment Agreements, 191 at 204 (K. Yannaca-Small ed., OUP, 2010) (**RL-0265**): ("The role of international law in investment treaty arbitration is essential; recognizing this role in no way undermines that of the law of the host where it would be the proper law. Indeed, by the very nature of investment treaty arbitration, certain issues can be resolved only through the application of international law; on the other hand, certain questions can be determined only pursuant to domestic law.")

[257] Foreign investment law of the Republic of Guatemala, Decree No. 9-98, March 3, 1988 ("Foreign Investment law") **(RL-0134).**

[258] *Phoenix Action Ltd.* v. *Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 **(RL-0135)**; *Fraport AG Frankfurt Airport Services Worldwide* v. *Republic of Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014 **(RL-0150)**. *SAUR International S.A.* v. *Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction, 6 June 2012 **(CL-0048)**.

[259] *Phoenix* v. *Czech Republic*, ¶¶ 77, 100, 106 **(RL-0135)**.

corrupt or otherwise illegal conduct amounts to a violation of international public policy, and the tribunal may accordingly dismiss the claims *on a preliminary basis*.[260] As pointed out by Prof. Z. Douglas:

> if a plea of illegality to the effect that the investor has violated a ground of *international public policy* is successful, then it should result in the rejection of the claims as inadmissible.[261]

166. It is a well-established principle of international law that a tribunal constituted on the basis of an investment treaty has no jurisdiction over an investment made illegally and in violation of the international and domestic law. As the Tribunal in *Hamester v. Ghana* established, independently of specific language of a treaty:

> An investment will not be protected if it has been created in violation of *national* or *international principles of good faith*; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law.[262]

167. *Spentex v. Uzbekistán,* which cites to *World Duty Free,* analyzed the defense of illegality raised by Uzbekistan and dismissed the case due to the corrupt and illegal activities of the investor.[263] The tribunal held that an investment that was obtained through corruption went against international public policy and could not receive protection due to the claimant's "unclean hands."

1) Claimant's investment obtained by unlawful means and misrepresentation must render its claims inadmissible

168. The Claimants' misrepresentation, fraud and bad faith represent bars of admissibility to their claims claims in this arbitration. According to Prof. Z. Douglas, the conduct of an investor in acquiring the assets constituting the investment may be tainted by illegality when the investment was procured:

i. by unlawful means such as by fraudulent misrepresentation or the corruption.

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[260] *Minnotte* v. *Poland*, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014, ¶ 131 **(RL-0136)** (Although the applicable (US–Poland) BIT did not define 'investment' in terms of an explicit requirement that the investment be made in accordance with the host State's law, the tribunal noted that it is 'generally accepted that investments made on the basis of fraudulent conduct cannot benefit from BIT protection; and this is a principle that is independent of the effect of any express requirement in a BIT that the investment be made in accordance with the host State's law').

[261] Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration ICSID Review*, Vol. 29, No. 1 (2014), p. 180 **(RL-0137)**; see also Cameron A. Miles, "Corruption, Jurisdiction and Admissibility in International Investment Claims" vol. 3 (2012) J Int'l Dis Set 329, 351ff. **(RL-0138)**.

[262] *Gustav F. W. Hamester GmbH & Co. K.G. v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award of 2010, ¶¶ 123-124. **(RL-0139);** *Teinver S.A., Transportes de Cercanías S.A. & Autobuses Urbanos del Sur S.A. c. República Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction (December 21, 2012), ¶¶ 317, 324 (**CL-0012)**; *Plama Consortium Ltd. v. República de Bulgaria*, Caso CIADI No. ARB/03/24, Award (August 27, 2008), ¶138 (**RL-0140)**; *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. c. Republic of Albania*, ICSID Case. No. ARB/11/24, Award (March 30, 2015), ¶¶294, 359 (**RL-0141)**.

[263] *Spentex Netherlands, B.V. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26**(R-0109)** (the Award is not available for the public). **(R-0109).**

ii. for an unlawful purpose such as to carry out a trade of counterfeited goods.

iii. in breach of a provision of the treaty requiring approval by the authorities of the host State.[264]

169. Investment tribunals have dismissed claims in the jurisdictional phase if the investment had been procured by any of the three above unlawful ways. A number of tribunals have supported that fraud and misrepresentation by an investor may result inadmissibility of its claims. [265] In particular, the tribunals lacked jurisdiction over the claim for violation of the "legality clause" in an investment treaty,[266] on the basis of failure to prove that the claimant is a covered "investor,"[267] or because fraudulent conduct as a violation of national law and "international public policy" should result in a denial of jurisdiction.[268]

170. Several tribunals agree that fraud and misrepresentation by an investor can lead to the inadmissibility of their claims.[269] In particular, tribunals have found a lack of jurisdiction over a claim where there is a violation of the "legality clause" in an investment treaty,[270] a lack of proof that the claimant is a protected "investor",[271]

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[264] Z. Douglas, "The Plea of Illegality in Investment Treaty Arbitration", ICSID Review, Vol. 29, No. 1 (2014), p. 179. **(RL-0137)**.

[265] *Hamester* v. *Ghana* (jurisdictional objection dismissed for lack of proof of an "overall scheme of deceit" and that the State would not have entered into the agreement had it known of the deceit) **(RL-0139)**; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic,* ICSID Case No. ARB/09/1, Decision on Jurisdiction, December 21, 2012 (host State failed to demonstrate that investor committed illegalities in the process of acquiring its investment) **(CL-0012)**; *Jan de Nul N.V. amp; Dredging International N.V.* v. *Egypt,* ICSID Case No. ARB/04/13, Award, 6 November 2008 (evidence did not establish that the host State entity committed fraud upon the investor) **(RL-0143)**; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún* v. *Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 (allegations of fraudulent fabrication of evidence of investor's shareholdings not substantiated by host State) **(RL-0125)**.

[266] *Fraport AG* v. *The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, August 16, 2007, ¶ 401 **(RL-0144)**

[267] *Cementownia "NowaHuta" S.A.* v. *Republic of Turkey,* ICSID Case No. ARB(AF)/06/2, Award, September 17, 2009, ¶ 149 **(RL-0145)***; Europe Cement Investment amp; Trade S.A.* v. *Republic of Turkey,* ICSID Case No.ARB(AF)/07/2, Award, 13 August 2009, ¶¶ 170-175 (**RL-0146**).

[268] *Inceysa Vallisoletana v. Republic of El Salvador,* ICSID Case No. ARB/03/26, Award, August 2, 2006 ("*Inceysa* v. *El Salvador"*), ¶ 252. **(RL-0147).**

[269] *Hamester* v. *Ghana* (jurisdictional objection dismissed for lack of proof of an "overall scheme of deceit" and that the State would not have entered into the agreement had it known of the deceit) **(RL-0139)**; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic,* ICSID Case No. ARB/09/1, Decision on Jurisdiction, December 21, 2012 (host State failed to demonstrate that investor committed illegalities in the process of acquiring its investment) **(CL-0012)**; *Jan de Nul N.V. amp; Dredging International N.V.* v. *Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (evidence did not establish that the host State entity committed fraud upon the investor) **(RL-0143)**; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún* v. *Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 (allegations of fraudulent fabrication of evidence of investor's shareholdings not substantiated by host State) **(RL-0125)**.

[270] *Fraport AG* v. *The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, August 16, 2007, ¶ 401 **(RL-0144)**

[271] *Cementownia "NowaHuta" S.A.* v. *Republic of Turkey,* ICSID Case No. ARB(AF)/06/2, Award, September 17, 2009,

or because fraudulent conduct such as the violation of national law and "international public policy" requires a denial of jurisdiction.[272]

171. The *Inceysa v. El Salvador* and *Plama v. Bulgaria* cases demonstrated that, even where there is no legality clause contained in the relevant investment treaty, acts of fraud are still relevant, as they may violate *international public policy*, usually within the ambit of concepts such as *nemo auditur propriam turpitudinem allegans*.[273]

172. In *Inceysa v. El Salvador*, the state challenged the court's jurisdiction in the case, arguing that Inceysa's conduct in the awarding of the concession contract, which was the subject of the dispute, had been fraudulent in several respects, and that therefore the investment had not been established "in accordance with the law. The definition of "investment" in the BIT between Spain and El Salvador does not include an express requirement that investments be made "in accordance with the laws of the host State". Notwithstanding this, the tribunal took into consideration the "generally recognized rules and principles of international law" referred to in the BIT[274] and, based on the available evidence, the arbitrators held that the conduct of the claimant, which involved the intentional misrepresentation of its financial situation and its experience in the industry during the public bidding process whereby the claimant obtained the license for its investment, violated said general principles of international law.

173. Because Inceysa had falsified the facts, a lack of good faith ensued from the inception of the investment in violation of Salvadoran law, which meant that the Tribunal "[could] only declare its incompetence to hear Inceysa's complaint, since its investment cannot benefit from the protection of the BIT."[275] The tribunal concluded that the claimant's misrepresentation contravened the principle that no one should be permitted to profit from their own fraud, international public policy, the principle of good faith and the prohibition against unlawful enrichment. The tribunal in *Inceysa*:

> "affirm[ed] that the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, 'nobody can benefit from his own

¶ 149 **(RL-0145)***; Europe Cement Investment amp; Trade S.A.* v. *Republic of Turkey,* ICSID Case No.ARB(AF)/07/2, Award, 13 August 2009, ¶¶ 170-175 (**RL-0146**).

[272] *Inceysa Vallisoletana v. Republic of El Salvador,* ICSID Case No. ARB/03/26, Award, August 2, 2006 ("*Inceysa* v. *El Salvador"*), ¶ 252. **(RL-0147).**

[273] *Inceysa* v. *El Salvador,* ¶¶ 230-239 **(RL-0147)** and *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Award, 27 August 2008. ¶¶ 138-146 **(RL-0140)**.

[274] *Inceysa* v. *El Salvador,* ¶ 223-224 **(RL-0147).**

[275] *Id.* ¶ 239.

fraud."[276]

174. In *Plama v. Bulgaria*, the respondent state argued that the claimant never made any valid investment and that the court lacked jurisdiction to hear the case. The *Plama* tribunal concluded that claimant had indeed committed fraud, by having "represented to the Bulgarian Government that the investor was a consortium, which was true during the early stages of the negotiations," but then it " failed deliberately to inform the Respondent of the change in circumstances" when the investor became an individual acting on his own, without significant financial resources.

175. The owner of the claimant Plama Consortium Limited (PCL) had initially approached the respondent on behalf of Norwegian and Swiss companies interested in acquiring refinery. However, those parties ultimately withdrew prior to the execution of the sale to PCL – without the knowledge of the Bulgarian authorities.[277] Bulgaria alleged that the claimant obtained its investment through fraudulent misrepresentations.[278] In the respondent's view, this rendered the Bulgarian Privatization Agency's mandatory consent to the claimant's initial purchase of the investment null and void under Bulgarian law.[279] Therefore, it argued, the claimant never made any valid investment and the tribunal lacked jurisdiction to hear the case.[280]

176. The *Plama* tribunal concluded that the claimant had indeed engaged in fraud, having "represented to the Bulgarian Government that the investor was a consortium – which was true during the early stages of negotiations" but then "failed deliberately to inform [the] Respondent of the change in circumstances" when the investor became an individual acting alone, without significant financial resources.[281]

177. Even though ECT does not contain a provision which limits protected investments to those made in accordance with the law, it did not preclude the tribunal from analyzing the legality of the investment in assessing the admissibility of the claimant's claims in relation to that investment.[282] The Tribunal concluded that the investment had been obtained through deceptive and fraudulent misrepresentation contrary to international legal principles and that a contract obtained by wrongful means (*fraudulent misrepresentation*)

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[276] *Inceysa* v. *El Salvador*, ¶ 242 **(RL-0147).**

[277] *Plama* v. *Bulgaria*, ¶ 100 **(RL-0140)**.

[278] *Id.* at ¶ 96.

[279] *Id.* at ¶¶ 101, 105.

[280] *Id.* at ¶ 106.

[281] *Id.* at ¶ 134.

[282] *Plama v. Bulgaria*, ¶ 143 **([…]** granting the ECT's protections to Claimant's investment would be contrary to the *principle nemo auditur propriam turpitudinem allegans* invoked above. It would also be contrary to the basic notion of international public policy - that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal.) **(RL-0140)**.

should not be enforced by a tribunal.[283] In similar circumstances, a number of investment tribunals have rejected claims based on misrepresentation, fraud, illegality or bad faith.[284]

178. In another case, *Azinian v. Mexico*, the dispute arose in connection with the concession contract relating to waste collection and disposal in Mexico City, which had been entered into between local authorities and the U.S. Claimants' local entity in Mexico. Following numerous irregularities in connection with the conclusion and performance of the contract, the Respondent cancelled it.[285] The claimants initiated the NAFTA proceeding alleging a breach of Articles 1105 (minimum standard of treatment) and 1110 (expropriation) of NAFTA.[286] Mexico challenged the tribunal's jurisdiction based on the claimants' alleged misrepresentations regarding a waste collection and disposal concession, both in terms of their financial capacity and experience and of the continuing interest of an associated company that had the required expertise.[287]

179. Based on the foregoing, the Tribunal has no jurisdiction due to negligent omission on the part of Claimants to investigate the factual circumstances surrounding the realization of their investment.

2) Failure to conduct due diligence by an investor is a ground for rejecting its claim[288]

180. The tribunal in *Churchill and Planet v. Indonesia* held that claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy.[289] In *Churchill Mining*, Indonesia challenged the validity of the mining licenses at issue. The respondent raised allegations of forgery, and argued, that some of the licenses on which the claimants relied were forged by the claimants and their local partner.

181. The case of *Churchill Mining* raised the question of whether an investor can be denied access to investment arbitration based on its failure to comply with the due diligence requirement in relation to business relations with local partners. The tribunal found that that the claims were effectively "based on documents forged to implement a fraud aimed at obtaining mining rights" and that, as a consequence, all the claims were

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[283] *Id.*

[284] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶106, 145 **(RL-0135)**; *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶¶ 116, 130 **(RL-0148)**.

[285] *Robert Azinian et al v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, November 1, 1999, ¶¶ 10-16 ("*Azinizan* v. *Mexico*"), **(CL-0144)**. *Azinian* is the first NAFTA case in which a decision was reached on the merits.

[286] *Azinizan* v. *Mexico*, ¶ 75 **(CL-0144)**.

[287] *Id.* at ¶ 79 **(CL-0144)**.

[288] *Antaris Solar GmbH and Dr Michael Gode* v. *The Czech Republic*, PCA Case No. 2014-01, Award, May 2 2018, ¶¶ 395–397 and 432–440**(RL-0152).**

[289] *Churchill Mining and Planet Mining Pty Ltd* v. *Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, December 6, 2016, (*Churchill and Planet* v. *Indonesia*), ¶ 508 **(RL-0151)**.

inadmissible.[290] This case also confirmed that investors must exercise a reasonable level of due diligence, especially when investing in risky business environments; the scope of the due diligence depends on the particular circumstances of each case, such as the general business environment, and includes ensuring that a proposed investment complies with local laws, as well as investigating the reliability of a business partner and that partner's representations before deciding to invest.[291]

182. Another tribunal in *Alasdair Ross Anderson et al. v. Republic of Costa Rica*[292] rejected the claimants' claims on the basis that the investment in question did not comport with the law.[293] The tribunal concluded that because "the transaction by which the Claimants obtained ownership of their assets ... did not comply with the requirements of the [law;] ... the Claimants did not own their investment in accordance with the laws of Costa Rica," and that the tribunal was "without jurisdiction to hear and decide the Claimants' claims."[294] The tribunal also commented that "prudent investment practice requires that any investor exercise *due diligence before committing funds* to any particular investment proposal" and that "[a]n important element of such due diligence is for investors to assure themselves that their investments comply with the law," which the tribunal found was "neither overly onerous nor unreasonable."[295]

3) Guatemala's consent is limited to disputes related to "Investments" and both CAFTA-DR and the legislation of Guatemala define Investment as those investments that comply with local law

183. Guatemala expressed its consent to ICSID jurisdiction in article 10.17 of CAFTA-DR. By direct reference, consent is also subject to the ICSID Convention, especially Articles 26 and 46. Likewise, Articles 1 and 11 of the Foreign Investment Law of Guatemala also apply, which establish that:

> Article 1. Definitions
> For purposes of this Law, the following definitions shall apply:
> 1. **Investment**: any activity undertaken with a view to the production, brokerage, or transformation of assets, as well as for the delivery and intermediation of services involving any type of assets or rights, provided such activities have been carried out in accordance with the pertinent laws and regulations. Such investments shall include in particular, although not exclusively:
> a) Corporate shares and quotas, and any other form of ownership interest, in

[290] *Id.* at ¶¶ 528, 531.

[291] *Id.* at ¶¶ 506, 516-527.

[292] *Alasdair Ross Anderson et al* v. *Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, ICSID Case No. ARB(AF)/07/3, Award, May 19, 2010 ("*Anderson* v. *Costa Rica*") **(RL-0153)**.

[293] *Id.* at ¶ 46 (Canada - Costa Rica BIT defined "investment" as "any kind of asset owned or controlled either directly, or indirectly through an enterprise or natural person of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws …").

[294] *Id.* at ¶¶ 57, 59 **(RL-0153)**.

[295] *Id.* at ¶ 58 (emphasis added).

> any proportion, in companies constituted and organized under Guatemalan law;
> b) Credit rights or any other benefits having an economic value;
> c) Movable and immovable property and any other rights in them;
> d) Intellect and industrial property rights;
> e) Concessions or *similar rights granted by law* or under a contract, to engage in economic or commercial activity.

> Article 11: Settlement of Disputes
>
> If permitted under an international treaty or agreement duly signed, approved, and ratified by the Guatemalan State, any investment-related disputes that may arise between a foreign investor and the Guatemalan State, its agencies, or other state entities may be submitted to international arbitration or other alternate dispute-settlement mechanisms, as applicable, in accordance with the provisions of said treaty or convention and with applicable domestic laws.[296]

184. The tribunal in *Inceysa* established that States place limits on the definition of investment and limit the object of protection through Treaties (BITS) or through other means.[297] Likewise, the tribunal in *Inceysa* found that the legality requirement of an investment is a solid ground on which to reject ICSID jurisdiction.[298]

185. The Tribunal in *Metal-Tech v. Uzbekistan* held that whether the State's consent covers the dispute depends on the content of the applicable BIT and if the BIT requirements are not met, then the State has not consented to submit the dispute to ICSID arbitration under the terms of the ICSID Convention. The Tribunal found that, since the legality requirement had not been met, Uzbekistan had not consented to submit the dispute to arbitration. The Tribunal determined that the illegal acts that took place were sufficient to violate the law of Uzbekistan, and consequently it found that the investment had not complied with Article 1(1) of the BIT.[299]

186. Similarly, in *Fraport v. the Philippines*, the Tribunal held that where an investor violates local law in making the investment, it is excluded from BIT protection because of said illegality. The Tribunal in *Fraport v. the* Philippines decided against its jurisdiction because an essential condition for arbitration was not met.

187. Guatemala only consented to submitting to arbitration disputes that met the requirements set forth in Section 10 of the CAFTA-DR. Article 10.28 of CAFTA-DR defines investments to mean only investments conferred with local law. Accordingly, this dispute is not covered by Article 10.17 of CAFTA-DR because it does not have Guatemala's consent. This also means that this dispute does not meet the consent requirement set in Article 25(1) of the ICSID Convention. Consequently, since there is no consent of the State under the

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[296] Article 11, Foreign Investment law of Guatemala, Decree No.9-98, 1998 **(RL-0134)**.

[297] *Inceysa v. El Salvador*, ¶¶ 186-189 **(RL-0147)**.

[298] *Id.* at ¶¶ 184-185.

[299] *Metal-Tech Ltd.v Uzbekistan,* Award, ¶ 373 (**RL-0142)**.

treaty or under the ICSID Convention, this Tribunal lacks jurisdiction to hear this dispute. The provisions of the CAFTA-DR explicitly state that only investments conferred or made in accordance with the law are protected investments. In addition, the legality requirement must be considered as an implicit requirement of all investment treaties and the Guatemalan Foreign Investment Law requires compliance with applicable laws, or the need to conform to the laws of the respondent State.

4) CAFTA-DR limits its protection to investments conferred in accordance with the laws of the host State.

188. In terms of CAFTA-DR, "in accordance" clause can be found in the definition of "investment." Article 10.28 of CAFTA-DR defines "*investment"* to include:

> "Every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
> (a) ….;
>
> (g) licenses, authorizations, permits, and similar rights *conferred pursuant to domestic law*….[300]

189. Further the footnote 10 to Article 10.28(g) clarifies that:

> "[W]hether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that *the holder has under the law of the Party*. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment."[301]

190. The only tribunal that had a chance to discuss Article 10.28(g) of CAFTA-DR was *RDC v. Guatemala*.[302] The RDC Tribunal when confronted with a definition of investment in the CAFTA-DR in accordance with which domestic laws is only explicitly required for one form of investment but not for others, held that it "does not consider that it is correct to infer from this fact that rights conferred under other forms of investment may be contrary to [domestic] law." Rather, it noted, "[i]t is to be expected that investments made in a country will meet the relevant legal requirements." [303]

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[300] CAFTA-DR, Artcle 10.28 **(CL-0001)**.

[301] CAFTA-DR, Article 10.28(g), ft.10 **(CL-0001)**.

[302] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23 **(CL-0068)**.

[303] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on

191. In *Inceysa* case, even though the Spain-El Salvador BIT's definition of "investment" did not incorporate an express requirement that investments be made "in accordance with the laws of the host State," the tribunal relied on two such references in other provisions of the BIT. It only had references to compliance with domestic law within provisions on admission and protection of foreign investments. The *Inceysa* tribunal held that a legality requirement might not only be found in the definition of "investment." Rather, any references to legality in a treaty need to be considered when interpreting the parties' intentions regarding the scope of consent.

192. The legality requirement was explicitly referenced three times in CAFTA-DR's Article 10.28(g), footnote 10 and Article 10.14 (1).[304] It should be noted that compliance with the legal element is equally important for the existence of an "investment" pursuant to the investment treaty as the other elements. In other words, even if the existence of an "investment" in economic terms is undisputed, failure to comply with legal requirements leads to the conclusion that there is no "investment" pursuant to the treaty.

193. As the tribunal in *Salini v. Morocco* observed:

> In focusing on "the categories of invested assets...in accordance with the laws and regulations of the aforementioned party", *this provision refers to the validity of the investment and not to its definition*. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.[305]

194. According to the language of the CAFTA-DR and case law, it can be concluded that CAFTA-DR cannot protect investment made in breach of host states laws and regulations. Thus, failing to comply with "in accordance" clause specified in CAFTA-DR's Article 10.28(g), footnote 10 and Article 10.14 (1) will deprive a tribunal of its jurisdiction over the claims.

5) Legality requirement is also implicit in the concept of investment.

195. The requirement that only investments made in accordance with the law be protected under an investment treaty can either be explicit in an investment treaty, such as in the definition of "investment," or based on general principles of law, it can be read as an implicit obligation-each carrying a different consequence with it.

Objections to Jurisdiction, May 18, 2010, ¶ 140 **(RL-0127).**

[304] CAFTA-DR, Article 10.14(1) **(CL-0001)** (Nothing in Article 10.3 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or ***that covered investments be legally constituted under the laws or regulations of the Party***, provided that such formalities do not materially impair the protections afforded by a Party to investors of another Party and covered investments pursuant to this Chapter).

[305] *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 2001, ¶ 46. **(RL-0036)**.

196. ICSID tribunals have considered the requirement that an investment be made "in accordance with host State law" implicit in the notion of an investment under Article 25 ICSID Convention.[306] In *Fraport v. Philippines,* the tribunal stated that:

> "[…] even absent the sort of explicit legality requirement that exists here, it would still be appropriate to consider the legality of the investment. As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment."[307]

197. Some tribunals have concluded that the requirement that investments be made in accordance with host State law "is an implicit requirement, inherent in every BIT," and that it is inconceivable that a State would offer protection when the investor, to achieve that protection, engaged in unlawful activity.[308] In *South American Silver v. Bolivia,* the tribunal noted, although the treaty does not contain an in-accordance-with-law clause, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment.[309]

198. The tribunal in *Mamidoil Jetoil* also shared the widely held opinion that investments are protected by international law only when they are made in accordance with the legislation of the host State. According to the tribunal, States accept arbitration and accept to waive part of their immunity from jurisdiction to encourage and protect investments in international conventions; in doing so, they cannot be expected to have agreed to extend that mechanism to investments that violate their laws.[310]

199. In summary, even if the applicable treaty does not expressly require that the investment must be initiated and obtained according to the local law of the host State, such requirement may be imposed by the tribunal as a matter of interpretation of the jurisdictional requirements set out in the BIT,[311] or, arguably, as a

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[306] *Phoenix* v. *Czech Republic*, ¶ 101-113 **(RL-0135)**; *Hamester* v. *Ghana*, ¶ 123 **(RL-0139)**.

[307] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines,* ICSID Case No. ARB/11/12, Award, ¶ 332 **(RL-0150)**. *See also Achmea B.V. v. The Slovak Republic,* UNCITRAL, PCA Case No. 2008-13, Award, ¶ 177 (noting that "tribunals have considered whether an investment that satisfies the jurisdictional requirements *ratione materiae* of a BIT may yet be denied protection under that BIT because, for example, the investor acted in bad faith by resorting to fraud or corruption in order to make the investment.") **(CL-0268)**.

[308] Jean Engelmayer Kalicki, Dmitri Evseev and Mallory Silberman, Chapter 9: Legality of Investment, Building International Investment Law: The First 50 Years of ICSID, 2015 **(RL-0120).**

[309] South American Silver Limited v. Plurinational State of Bolivia, PCA Case No. 2013-15, Award, 30 August 2018, ¶¶ 456, 469-470 **(RL-0053).**

[310] *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, March 30, 2015, ¶¶ 294, 359 **(RL-0141)**

[311] *Phoenix* v. *Czech Republic*, ¶¶ 101, 114 **(RL-0135)**.

ground for inadmissibility.[312]

6) The investment, made in breach of Guatemalan laws, never achieve the status of protected investment under the Foreign Investment Law

200. According to the Article 20 of the Mining Law of Guatemala, persons interested in obtaining a mining exploitation must present an environmental impact study to the corresponding entity, in this case to the Ministry of Environment and Natural Resources (MARN). Article 31[313] of the Mining Law obliges the applicant for the license to submit the copy of the study approved by the MARN to the Ministry of Energy and Mines (MEM) prior to beginning the exploitation works.[314]

201. The Law for the Protection and Improvement of the Environment[315] requires the development of an evaluation impact study environmental for any project, work, industry or any other activity that may produce deterioration to the environment or modifications harmful to the landscape and cultural resources of the national heritage. The article sets fines for both officials who fails to demand the environmental impact assessment, or for individuals who do not comply with this requirement.

202. Regulation of evaluation, control and environmental monitoring of Guatemala[316], defines Environmental Impact Assessment (EIA) study as:

> Article 15
> Environmental Impact Assessment Study. It is the technical document that allows to identify and predict, with greater depth of analysis, the effects on the environment to be exerted by a project, work, industry or activity that has been considered as of high potential environmental impact in the Specific Listing (category A or megaprojects) or as of high environmental significance as a result of the Environmental Assessment process.
>
> It is an assessment instrument for decision making and planning, which provides a reproducible and interdisciplinary preventive thematic analysis of the potential effects of a proposed action and its practical alternatives on the physical, biological, cultural and socioeconomic attributes of a given geographical area. It is an instrument whose coverage, depth and type of analysis depends on the proposed project. It determines the potential environmental risks and impacts in its area of influence and identifies ways to improve its design and implementation to prevent, minimize, mitigate or compensate for adverse environmental impacts and enhance its positive

[312] Aloysius P. Llamzon, *Corruption in Investment Treaty Arbitration* (OUP 2014) 102–22. **(RL-0305);** *See also* Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer, 2004) 199, 278–88; *Metal-Tech Ltd v The Republic of Uzbekistan*, Award, 4 October 2013, ¶¶ 373, 379-380 **(RL-0142)**.

[313] Mining Law of Guatemala, Law Decree number 48-97, Article 31 **(C-0186)**.

[314] *Id.* at Article 9, Regulation of Mining law.

[315] *Id.* at Article 8, Regulation of Mining law.

[316] Article 15, Regulation of Assessment, control and monitoring environmental, Government Agreement 23-2003, Guatemala, January 27, 2003 **(RL-0300)**.

impacts.

203. The document classifies the EIA as a category "A," the highest potential environmental impact or environmental risk category.[317]According to this regulation legal entity submitting the EIA for consideration has a responsibility for *any activity* concerning project approval process:

> Proponent: Individual or legal entity from the private sector or public sector institution that proposes to carry out a project, work, industry or *any activity*, and that is *responsible* for it before the environmental authority.[318]

204. In addition to making specific promises in the EIA that they would conform to international environmental standards,[319] Exmingua authorities specifically signed a sworn statement in which they expressly committed to comply with Guatemala's environmental laws. In addition, the Claimants hired Grupo Sierra Madre ("GSM") - a consulting firm allegedly specializing in environmental and natural resource management - to prepare an EIA for the Progreso VII and Santa Margarita mining projects.[320]

205. On May 31, 2010, Exmingua submitted its EIA[321] for Progreso VII[322] to the MARN. The Claimants alleged that they prepared and submitted the EIA in strict compliance with the "Law for the Protection and Improvement of the Environment" and the "Regulations for Environmental Evaluation, Control and Monitoring".[323] On May 23, 2011, the MARN issued a notice of approval of the EIA for Progreso VII.

206. However, the problems with the EIA are evident. International specialists, who reviewed the Claimants' Environmental Impact Assessment study, unanimously concluded that all licenses granted to Exmingua should be suspended, because the EIA lacked fundamental studies of groundwater and surface water, and misrepresented the negative environmental effects of the projects.[324] The mining experts consulted by Guatemala as independent experts for this case agree with the conclusions specifically regarding the EIA.[325]

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[317] *Id.*

[318] *Id.* at Article 3.

[319] Environmental Impact Study (EIA) for Progreso VII Derivada, pp. 22, 351 **(C-0082)**.

[320] It should be noted that the authorization to act as a consultant for the Grupo Sierra Madre company seems to have expired for significant periods during the development of the EIA. *See, e.g.,* Environmental License of Consultant Company Registration No. 011 of March 16, 2010 **(R-0038)**.

[321] Environmental Impact Study (EIA) for VII Derivative **(C-0082)**.

[322] Claimant's Memorial, ¶ 33.

[323] Environmental impact assessment for Progreso VII Derived dated May 31, 2010, p. 19 **(C-0082)**.

[324] Press release, Publication of a condemnatory report on the mine in San José del Golfo, Guatemalan Commission on Human Rights (February 22, 2013) **(R-0111);** Press release, Guatemalan Rights Commission humans, El Tambor mine license should be suspended (February 15, 2013) **(R-0050)**; Moran Report, (May 22, 2014) **(R-0051);** Press release, Guatemalan Human Rights Commission.

[325] SLR Report ¶ 161 ("We agree with Moran that the EIA would not have been accepted in "developed" jurisdictions as it ignores key elements of an adequate EIA (as detailed in sections 7.2.1 and 7.2.2) including lack of consultation with communities, particularly indigenous communities ")

207. The shortcomings of the EIA are so numerous that it is impossible for us to replicate them here since they comprise several pages of the mining experts' report. Under large headings that are then divided into myriads of non-compliances, SLR concludes that the EIA lacks information, either completely or substantially regarding (1) development of stakeholder engagement, (2) baseline environmental and social information in the project area in a way that can predict the effects of the project, (3) prediction of all potential effects of the mining activity, (4) mitigation and monitoring plans.[326] Clearly enough, the audit conducted by the MARN shows that Exmingua was seriously and substantially out of compliance with the EIA and Environmental Management Plan (EMP) approvals and conditions. This lack of compliance applies even to the modifications that were made to the EIA as described in paragraph 89(f) of the SLR Report.[327]

7) The mine lacked a valid municipal construction permit

208. Claimants never obtained the necessary construction license from the municipality of San Pedro Ayampuc and carried out mining work illegally. There is a positive obligation in the Guatemalan legal system to obtain a municipal construction permit, which is separate of the exploitation authorization granted by the MEM.[328]

209. The Guatemalan Municipal Code, which regulates issues related to the formulation and execution of land use planning, requires land users to obtain municipal authorization for construction works.[329] On October 22, 2014, the assistant mayors of two of the affected communities, El Carrizal and El Guapinol, filed a lawsuit in court arguing that Exmingua did not have a construction license.[330]

210. The claim was analyzed by the Third Court of First Instance in Civil Matters of Guatemala, acting as Amparo Court. In response to the arguments of the claimants, Exmingua submitted a copy of the minutes of

[326] SLR report, sections 7.3.1 to 7.3.5.

[327] SLR Report ¶ 132.

[328] See Richter Report, ¶ 50; citing judgments of the Constitutional Court of Guatemala in cases 915-2015, 3898-2012, 1477-2013, 5520-2014, 1110-2018, 2112-2015 and 6095-2014. In the 1550-2015 case, the Constitutional Court held that: "it is pertinent to indicate that according to article 253 of the Political Constitution of the Republic of Guatemala, the municipalities are autonomous entities, and among their functions, they must attend

[329] Article 142 of the Municipal Code of Guatemala **(RL-0301)**. Formulation and execution of plans. The municipality is obliged to formulate and execute plans for the territorial organization and integral development of its municipality in the terms established by law. The subdivisions, subdivisions, urbanizations and any other form of urban or rural development that the State or its autonomous and decentralized entities or institutions intend to carry out or carry out, as well as the individual or legal persons that are qualified for it, must have the approval and authorization from the municipality in whose constituency it is located.

[330] See Filing of *Amparo* Action against the Municipal Council of the Municipality of San Pedro Ayampuc, by the Mayor of the Guapinol Village and the Second Mayor of the El Carrizal Village, both of the San Pedro Ayampuc Municipality, (October 21, 2011) **(R-0113)**. Press release, Guatemalan Human Rights Commission, *Victory for La Puya: The Guatemalan Court orders the suspension of construction operations at the El Tambor mine* (July 17, 2015) **(R-0114).**

the Municipal Secretariat of the Municipality of San Pedro Ayampuc No. 45-2011, dated November 15, 2011[331] and the receipt of payment of the license fee[332] as contribution for the construction license to the Municipality of San Pedro Ayampuc.

211. The Claimants stated in their arguments before the Guatemalan Courts that the construction license was obtained on November 15, 2011[333] and the construction of the processing facility began in mid-January 2012. However, in March 2012, the Municipal Mayor of San Pedro Ayampuc stated that the records of the Municipal Council meetings from November 4, 2011 to January 15, 2016 do not include an agreement on the approval of the infrastructure for mining operations in its communities.[334]

212. In addition, the court asked the municipality to submit a copy of minutes No. 45-2011 of the Municipal Secretariat of the Municipality of San Pedro Ayampuc to be compared with the minutes provided by Exmingua with the same number. However, the copies of the minutes submitted by the Municipality and by Exmingua did not match.[335] Upon analysis of the facts and documents presented to the court by the attorneys of Exmingua and the Municipality it was determined that Exmingua never obtained a construction license, the court ordered that construction of the mine be suspended and that residents be consulted.[336]

213. More recently, and for purposes of this Arbitration, the Municipality of San Pedro Ayampuc was officially requested to provide the file whereby the construction license was allegedly obtained, to which the Municipality responded as follows:

> In response to the official notice dated November nineteenth, two thousand twenty, from the Public Information Unit, identified as IPU Official Notice Number 116-2020, and based on the request REF. UAI/JGAL/LENR/mrmp/srs /mjfg/899-2020, signed by Mario Rene Merida Pichardo, International Affairs Legal Professional, Attorney General's Office, I hereby provide you the following information: **Within the files of the Municipal Secretariat of the Municipality of San Pedro Ayampuc, department of Guatemala, there is no record of the granting of a Construction License to Exploraciones Mineras de Guatemala, Sociedad**

[331] Minutes of the meeting of the Municipal Council of San Pedro Ayampuc dated November 15, 2011 **(C-0092).**

[332] Construction permit payments dated December 21, 2011 **(C-0093).**

[333] Judgment of the Third Civil Court of First Instance of Guatemala, issued on July 13, 2015, File 01050-2014-00871, p. 27 **(R-0064)**.

[334] Certificate issued by the Mayor of the Municipality of San Pedro Ayampuc (March 23, 2012) **(R-0115)**.

[335] Judgment of the Third Civil Court of First Instance of Guatemala, issued on July 13, 2015, Exp. 01050-2014-00871, p. 27 **(R-0064)**.

[336] *Id.* at pp. 27-28, 31-32 ("Once the present amparo was open to trial, the denounced authority was requested, among others, to present a certificate of act number forty-five - two thousand eleven (45-2011), complying with it, however, said act does not coincide on the date celebration or in the content of the simple copy presented by Exploraciones Mineras de Guatemala ... the contradiction between the related acts is more than evident and derived from it, the mining entity does not have a construction license").

Anónima.[337]

214. Therefore, not only does Exmingua lack a construction license as required by Guatemalan law, and has been operating illegally since the beginning of the investment itself, but it also used apocryphal information in Guatemalan Courts (notwithstanding, moreover, that the way in which the alleged construction permit was obtained must be investigated, which might entail incurrence in additional crimes).

8) Kappes and KCA consistently violated Guatemalan Law

215. As demonstrated in the preceding paragraphs, the Claimants consistently violated the laws of Guatemala, or at the very least showed a consistent willingness to ignore Guatemala's legal system.

216. It has been proven in previous paragraphs that: (1) as is evident from D. Kappes' statement and from SRK and Versant reports, the Claimants intended to exploit beyond the limits provided for in the EIA, concealing their true intention. This declared intention could imply incurring in the crimes of forgery of public instruments (Article 322 of the Guatemalan Criminal Code) and possibly other crimes provided for in the Guatemalan Criminal Code; however, in any case, this conduct constitutes a flagrant violation of the principle of good faith, which is a fundamental principle of international law, since the State had the expectation that Exmingua would exploit the resource within certain limits, which are compatible with the commitments made in the EIA, and with a certain level of environmental and noise pollution. To unilaterally modify this implies, at a minimum, a violation of said principle of good faith, (2) the EIA for the mine contained gaps and lack of information whose purpose was to confuse the regulatory authority and lead it to deception. As Robert Robinson conveniently argued, that EIA would not have been approved in any developed country, citing specifically the examples of the US and Canada, among others;[338] (3) the mine and its facilities lacked the necessary construction permit that has to be issued by the municipality of the place where the project is located. The Third Court ordered that the Public Prosecutor's Office be duly notified, so that it could initiate a criminal investigation for the possible forgery of a public instrument or any other crime related to the construction permit;[339] (4) Exmingua also failed to comply with the Provisional Amparo Decision issued by the Supreme Court (acting as Amparo Court), whereof Exmingua was duly notified no later than December 1, 2015 when it appeared in said judicial process. In addition, as expert Richter explains, the appeal of the decision does not affect the compliance with the amparo decision,[340] and therefore, any exploitation after December 1, 2020

[337] Report of the Municipality of San Pedro Ayampuc dated November 20, 2020 **(R-0116)**.

[338] SLR Report, ¶ 159 (The conclusion that the EIA does not conform to industry standards and the standards committed by Exmingua itself in the EIA has been determined by the experts of SLR).

[339] Judgment of the Third Civil Court of First Instance of Guatemala, issued on July 13, 2015, Exp. 01050-2014-00871, p. 32 **(R-0064)**

[340] Richter Report, ¶ 127. "Its execution must be immediate, without being affected by the appeal that may have been filed; criteria recognized, among others, in the proceedings of August 27, 2009 and July 20, 2012, in files 2987-2009 and

constitutes an illegal exploitation of natural resources;[341] (5) In short, everything shows a constant willingness of the Claimants to violate or ignore the law of Guatemala.

217. In relation to the latter issue, it is noticeable that Guatemalan legislation and jurisprudence have consolidated the principle of automatic effectiveness of provisional amparos.[342] Therefore, the suspension of activities in the mine ordered by the Supreme Court (acting as Amparo Court) should be obligatorily complied with since November 11, 2015.[343] Even accepting in good faith that Exmingua was not a part in said procedure, it was notified on December 1, 2015.[344] Therefore, all of Exmingua's illegal production does not take place after March 10, 2016, but from November 11, 2015, or - at the latest - from December 1, 2015. The Claimants knew this, or could not be unaware of it, and yet they continued to illegally produce and remove the gold they were producing.[345]

218. Likewise, they could not ignore that the municipality has competence to authorize the setting up of constructions within its jurisdiction. When the authorities of San Pedro Ayampuc wanted to notify the request for suspension that resulted from the judgment of the First Instance Civil Court of Guatemala, dated July 13, 2015, in case file 1050-2014-871, they were told that the construction had already been completed, and that therefore the measure was purposeless.[346] The same argument was made in court[347], in an open confrontation and disdain for the decisions of the Guatemalan Judiciary.

219. The attitude of ill-intentioned ignorance and violation of Guatemalan law and of the orders and

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2797-2012 ".

[341] Report of the National Civil Police of Guatemala (PNC)), Official Letter No. 164-2016 / REF / JJGD / dl (May 10, 2016. **(R-0117).** Even in the denied case that this was not the case, as indicated in the PNC report, the MEM authorities specifically determined that EXMINGUA continued to produce after the amparo judgment was issued.

[342] Richter Report, ¶¶130 and 133, citing a Judgment issued by the Constitutional Court of August 25, 2005, file 1785-2005: "[T] he must emphasize that the provisional suspension of the act, given the nature of a precautionary measure of urgency, its execution is immediate. This leads us to the result that, even when the order that grants, denies or revokes such measure, is susceptible of being combated by means of the appeal, such appeal does not have suspensive effect so the measure agreed by the court of first instance, must be executed. "

[343] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Judgment of provisional amparo of November 11, 2015 **(C-0004).**

[344] *See* Brief of EXMINGUA appearing in file 1592-2014, of December 1, 2015 **(C-0469)**.

[345] *See* Report SDCM-INF-EXT-012-2016 issued by the Mining Control Department of the General Directorate of Mining of the Ministry of Energy and Mines of Guatemala (March 31, 2016) **(R-0118)** (which was left evidence of the continuation of Exmingua's mining operations in contempt of the decision issued by the Constitutional Court on November 11, 2015. *See also* complaint filed by the Ministry of Energy and Mines against Exmingua **(C-0503)**.

[346] Judgment delivered by the Third Civil Court of First Instance of Guatemala, on July 13, 2015, File 1050-2014-871 **(R-0064)**. *See also* Dispatch of Verification of Compliance with Precautionary Measures carried out by the Justice of Peace of San Pedro Ayampuc (August 10, 2015), p. 2. **(R-0119)**.

[347] *See* Judgment issued by the Constitutional Court, File 3580-2015 (February 6, 2017), p. 11 **(R-0120)**.

decisions of the judiciary has been a consistent feature in the behavior of the Claimants in Guatemala.

B. Reservation of Rights

220. Nothing herein is intended to waive any rights or objections, and the Republic expressly reserves any and all rights to raise objections in defending the claims in any future phases of this Arbitration, including but not limited to objections to the jurisdiction of the Tribunal or the admissibility of claims, to illegalities concerned with constitution and operation of investment.

C. The Tribunal Does Not Have Jurisdiction to Hear Claimants' Full Protection and Security Claim as It Is Time Barred, Pursuant to Article 10.18.1 of CAFTA-DR

1) The Inadmissibility of the New Claim for Full Protection and Security

221. Claimants' full protection and security claim changes with every submission. During the preliminary objection stage of the proceeding, **Claimants insisted that their full protection and security claim is limited to the blockades and protests in the Santa Margarita area**. Referring to their submission during the hearing, the Tribunal summarized Claimants' full protection and security claim as follows:

> Claimants therefore insist that they are not pursuing any claim for pre-2016 events with respect to the Progreso VII project. They also insist that with respect to later events, they do not allege any separate damages as a result of subsequent protests and blockades at the Progreso VII site, since Exmingua's license was suspended in any event.[348]

222. The Memorial tells a different story. Despite their earlier representation, Claimants have now brought a full protection and security claim with respect to alleged protests and blockade at Progresso VII in 2016. [349] As discussed below, both claims are barred under Article 10.18.1 as Claimants' knew of the alleged breach and loss prior to the critical date –November 9, 2015. Furthermore, this conduct is inappropriate and the claim inadmissible for not having been presented at the appropriate time.

223. In relation to this issue, Claimants abuse the Tribunal's Preliminary Objection Decision. While previously they defended their case on the basis that they were not claiming a separate damage as a result of the subsequent protests and blockade at the Progreso VII since Exmingua's exploitation licence was suspended,[350] they now invent an argument that had it not been for the protests after the critical date they could have used the mine laboratory for other projects. This argument is unacceptable because it was never previously made. Through this conduct, Claimants are attempting to deceive Guatemala and this Tribunal because of their ever-changing story to adapt to the needs of their case.

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[348] Decision on Preliminary Objections, ¶¶ 213, 223 ((emphasis added).

[349] Claimants' Memorial, ¶¶ 260; 261; 263.

[350] Decision on Preliminary Objection, ¶ 213.

224. It must be noted that this argument in relation to the possible use of the laboratory for other mining projects runs is contrary to reality. Exmingua is a mining company, not a clinical testing company. Exmingua's corporate purpose does not allow it to act as a laboratory and to be able to act in this manner would have required Exmingua to obtain a specific license from the State, a license which was never requested or received. Likewise, the reports of the Nacional Civil Police show that the entry to the mine was not restricted at any time and that police were always stationed at the entrance of the mine.[351]

225. Even if access to the mine was denied, it should be noted that the activities in the mine were not only suspended as a result of a lack of consultation with the indigenous communities, but also due to the failure of obtaining a valid construction permit from the municipality. Therefore, even in the case that they were authorized to operate as a laboratory, they would not have been able to do so due to their lack of permission to build not only the mine, but also the facilities where the alleged laboratory would have operated.[352]

2) Article 10.18.1 Bars CAFTA Claims Filed Three Years After the Claimant Had "First Acquired" Knowledge of Breach and Loss

226. Similar to Article 1116(2) of NAFTA, Article 10.18.1 limits the time within which a claimant may bring a CAFTA claim:

> No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant **first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage**.[353]

227. A states' consent to arbitration is "expressly conditioned" on the claimant's strict adherence to the limitation period provided under Article 10.18.1.[354] It provides a 'clear and rigid' requirements that is not subject to any 'suspension,' 'prolongation,' or 'other qualification.'[355] Accordingly, a claimant must bring its

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[351] *See* Detailed Report by the Nacional Civil Police presented in Case No. 1904-2016 before the Constitutional Court (**R-0052**); *See also* Circumstantial Report of the Operations Section of the PNC, where the actions of the PNC are denoted from 2016 to date (**R-0053**);Official Letter No. 196-2015 / REF / UHGH / dl from the Chief of Sub Station 12-52 of San José del Golfo, dated May 24, 2015, where the actions of the PNC are described during 2015 (**R-0054**); Report on Specific Actions Carried out by the Guatemalan Human Rights Ombudsman in the case of Exmingua and La Puya, dated June 2019 (**R-0055**); "La Puya Conflict, Mining Project, San José del Golfo and San Pedro Ayampuc, Guatemala against the operation of a metal extraction company ", issued by the PDH on December 1, 2020. **(R-0056).** *See also,* Detailed Report of the National Civil Police of the Conflict at La Puya between 2012 and 2016, dated May 10, 2016 (**R-0206**).

[352] Decision of the Third Civil Court of First Instance of the Department of Guatemala dated July 13,2015 (**R-0064**). *See also* judgment issued by the Constitutional Court on February 6, 2017, Case No. 3580-2015 (**R-0120**).

[353] CAFTA-DR, Art. 10.19.1 (**CL-0001**) (emphasis added)

[354] *Corona Materials LLC v. Dominican Republic,* ICSID Case No. ARB(AF)/14/3, Award (May 31, 2016), ¶ 188 (**RL-0002)**.

[355] Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, NAFTA/UNCITRAL, Decision on

investment claim within three years from the date it "first acquired or should have first acquired:"i) knowledge of the measure that gave rise to the alleged breach; and ii) knowledge that it has incurred loss or damage as a result to the breach. A claim that is not raised within the three years period will be outside the jurisdiction of the tribunal.

228. Article 10.18.1 includes both actual– "what the Claimant did in fact know at a given time"[356] and constructive knowledge–"what Claimant should have known at a given time."[357] The latter refers to what "a prudent" investor would know "'by exercise of reasonable care or diligence, the person would have known of that fact.'"[358] The period of limitations runs from the date the claimant has its "first appreciation of loss or damage."[359] A claimant that choses to wait to capture the full extent of its damage does so at the risk of its claim being barred pursuant to Article 10.18.1. *As noted in Berkwoitz v. Costa Rica*:

> …the Article 10.18.1 requirement, *inter alia*, to point to the date on which the claimant first acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result. It is the first appreciation of loss or damage in consequence of a breach that starts the limitation clock ticking.[360]

229. The term "first" means "earliest in time or preceding all others."[361] It refers to the initial date on which an investor knew of the breach and the resulting loss. As noted by the United States and endorsed by several states, "such knowledge cannot first be acquired on multiple dates, nor can such knowledge first be acquired

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Objections to Jurisdiction, (July 20, 2006), ¶ 29 **(RL-0039)**. See also *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (December 16, 2002), **¶ 63 (CL-0093)**.

[356] *Corona Materials LLC v. Dominican* Republic, , ¶ 217 (**RL-0002)**.

[357] *Id*.

[358] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (July 20, 2006) ¶59 **(RL-0039).**

[359] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002), ¶ 87**(RL-0018)** ("[A] claimant knows that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear"); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, (July 20, 2006), ¶ 77 (**RL-0039)**.

[360] *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award on Jurisdiction (October 25, 2016), ¶ 213 **(RL-0156**).

[361] BLACK'S LAW DICTIONARY P (1968) **(R-0101)**.

on a recurring basis."[362] A breach arising from a continuous course of conduct does not change this principle.[363] The United States and other CAFTA member states have confirmed this.

230. A contrary interpretation would render the terms "first acquired" meaningless. It would defeat the "essential purpose" of 10.18.1, *i.e*., "to limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring."[364] Such an approach could also generate unintended consequences. If a continuous course of conduct is allowed to renew the limitation period, it "would…encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period."[365]

231. Accordingly, tribunals have strictly enforced the period of limitation even if the claim arose from a continuous action or omission. *Ansung v. China* is instructive on this point. *Ansung* addressed claims arising out of the respondent's alleged inactions in relation to claimant's investment in the construction of a golf and country club and luxury condominiums. In this case, the claimant argued that it was able to identify its loss or damages after it sold its business in December 2011, once its investment plan "was completely frustrated, owing primarily to the government's continued inaction in providing additional land for the second phase of the project."[366]

232. The tribunal dismissed the claim pursuant to article 9(5) of the BIT which bar claims filed three years after an investor acquired knowledge of the damage. It concluded that the claimant had "pleaded several…facts indicating knowledge of incurred damage" prior to the critical date. Among others, respondent "took no measures to enjoin the illegal operation of [a competing] golf course,"[367] "unheeded" claimant's "requests for police protection" when the main gate of its golf course was blockaded and its employees assaulted,[368] and forced claimant to pay a higher price for the land than originally agreed.[369] While the tribunal acknowledge that a claimant can chose to seek damages of the most recent period of the breach, it concluded that neither

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[362] *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL, U.S. Submission Made Pursuant to Article 1128 to the NAFTA (July 14, 2008), ¶ 5 (**RL-0158)**. *See also Merrill & Ring Forestry L.P. v. Canada*,UNCITRAL,) Canada's Counter-Memorial (May 31, 2008), ¶ 150(**RL-0159)**.

[363] *Berkowitz v. Republic of Costa Rica*, Interim Award on Jurisdiction (October 25, 2016), ¶ 208 ("while it may be that a continuing course of conduct constitutes a continuing breach, the Tribunal considers that such conduct cannot without more renew the limitation period.") **(RL-0156)**.

[364] *Id.*

[365] *Id.*

[366] *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award (March 9, 2017) ¶¶93-94, 107 (**RL-0103)**.

[367] *Id.* at ¶¶46, 107(d).

[368] *Id.* at ¶¶50, 107(b).

[369] *Id.* at ¶¶44, 107(d).

respondent's "continued inaction" after the critical date nor the claimant's final liquidation of its damages restarted the limitations period.[370]

233. Similarly, an investor cannot evade the period of limitation by relying on the most recent transgression in a series of related or similar actions by the host state.[371] The tribunal in *Corona v. Dominican Republic* dismissed such attempt. In this case, claimant argued that the Environmental Ministry's rejection of its application for an environmental license and the Ministry's failure to respond claimant's motion for reconsideration constitutes a separate breach of Article 10.5. [372] The tribunal was not convinced. It held that the lack of response was "an implicit confirmation of its previous decision" and therefore, could "not be considered as a separate action."[373] The tribunal agreed with the respondent in that both alleged breaches:

> "…relates to the same theory of liability, which is predicated on the notion that "the DR refused to permit Corona Materials to proceed with its mining project for reasons that are not legitimate and which are unrelated to the merits of that project," and that "[d]ue to the refusal of the Environmental License by the Respondent, the Claimant cannot enjoy any meaningful benefit from the Joama Exploitation Concession . . . ." Even the claim relating to the absence of a response to Claimant's reconsideration request rests on this theory of liability."[374]

234. The claim was barred for other reasons. The tribunal underscored that "even assuming that the DR administration's silence in reply to the Motion for Reconsideration would amount" to separate breach, claimant could not "evade the limitation period by basing its claim on the 'most recent transgression[…]" of a "series of similar and related actions by a respondent state."[375] This principle has been echoed by CAFTA member states, including the United States.[376]

235. Neither does an ongoing effect of a measure preset the limitation period. In *Mondev*, the tribunal noted that "there is a distinction between an act of a continuing character and an act, already completed, which

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[370] *Id.* at ¶¶ 109-110.

[371] *See e.g., Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (July 20, 2006) ¶ 81 (**RL-0039)**; *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award on Jurisdiction (October 25, 2016), ¶7. **(RL-0156).**

[372] *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2006), ¶¶ 201-204,209 (**RL-0002).**

[373] *Id.* at ¶ 211.

[374] *Id.* at ¶210.

[375] *Id.* at ¶¶214-215.

[376] *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission of the United States of America (March 11, 2016) ¶5 **(RL-0042)**; *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Submission of the United States of America (September 11, 2007), ¶10 (**RL-0161)**.

continues to cause loss or damage."[377] This is consistent with the ILC Article on Responsibility of States of Internationally Wrongful Acts (the "ILC Articles"). According to Article 14(1) the "ILC Articles", "[t]he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue."[378] Hence, a measure taken three years before a claimant brings its claim will be barred even if the act has an ongoing effect.

3) The Claims with Respect to Progreso VII and Santa Margarita are Time Barred

236. The full protection and security claims with respect to both Progreso VII and Santa Margarita are time barred. Claimants argue that their full protection and security claim is "based on a new wave of protests that arise in 2016."[379] Contrary to their submission during the preliminary stage, Claimants now allege in their Memorial that their claim involves damage incurred as a result to the 2016 protest in Santa Margarita and Progreso VII.

237. While Claimants prefer to seek damage of the events in 2016, this–as noted in *Ansung*–"could not change the date on which" Claimants first knew of the alleged breach.[380] In determining the application of Article 10.18.1, "a tribunal cannot rest simply on how a claimant has formulated its case;" it must assess the evidence supporting the alleged facts.[381] The Tribunal agrees. In the preliminary objection, the Tribunal has rightly concluded that "jurisdictional objections do not require a tribunal to assume as true all facts alleged in the notice of arbitration."[382] It is rather the Claimants' obligation to "prove the facts necessary to establish the Tribunal's jurisdiction."[383]

238. Claimants have not carried their burden. On the contrary, the evidence demonstrates that the claim is based on Respondent's inactions pre-2015 or effects emanating from such inactions. Even if the pre-2015 and the post-2015 events give rise to distinct claims, Claimants cannot evade the period of limitation by relying on the most recent transgression (post-2015 events) in a "series of similar and related" inactions of Respondent.

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[377] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002), ¶58 **(RL-0018)**

[378] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 55th Session (2001), Article 14(1) **(RL-0306)**

[379] Claimants' Rejoinder, ¶139.

[380] *Ansung Housing Co., Ltd. v. People's Republic of China*, Award (March 9, 2017) ¶113 (**RL-0103)**.

[381] *Berkowitz v. Republic of Costa Rica*, Interim Award on Jurisdiction (October 25, 2016), ¶226. **(RL-0156).**

[382] Decision on the Respondent's Preliminary Objection, ¶ 220.

[383] *Berkowitz v. Republic of Costa Rica*, Interim Award on Jurisdiction (October 25, 2016), ¶239 **(RL-0156)**.

a. The Evidence Proves that the Claim with Respect to Santa Margarita is Based on Events in 2012 and is Hence Time Barred

239. To acquire an exploitation license for Santa Margarita, claimant was obliged to conduct an EIA, which includes carrying out public consultations. Claimants allege that the protests and blockades in 2016 prevented them from conducting the public consultation and as a result incurred a "loss of an opportunity to obtain an exploitation license for Santa Margarita." But the evidence indicates that the claim is based on effects that emanated from events in 2012.

240. At the preliminary stage, Respondent objected to the full protection and security claim. It submitted that Claimants were aware of the alleged breach and damage prior to November 9, 2015. The Tribunal deferred this issue to the jurisdiction phase due to the "fact-intensive" nature of the objection, but noted that it would need further clarification on the following statement made by Claimants in their Notice of Arbitration: [384]

> Exmingua and its consultants…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.[385]

241. Claimants' have not provided any clarification. The Memorial rather proves that Claimants are seeking international responsibility for alleged breaches and damages that took place before the critical date: November 9, 2015. While Claimants alleges that the blockades in 2016 impeded their effort to perform consultation, there is no evidence which shows that such blockade ever happened. The expert report and Kappes statement instead shows that Claimants' full protection and security claim is based on breaches and damages incurred due to alleged blockades prior to 2015. Both Prof. Fuentes and Mr. Kappes described Exmingua's failure to conduct the public consultation as follows:

> **Mr. Kappes**: Exmingua' consultant, GSM completed the environment studies for the Santa Margarita EIA back in 2011, but the social studies were outstanding, first due to the initial 2012-2014 blockade and then because Exmingua was focused on getting its operation up and running after the nearly two-years delay, before turning back to further exploration, having its Santa Margarita EIA approved.[386]
>
> **Mr. Kappes**: Finally, on 23 May 2014, police came and evicted the protesters from the Project site. After the police accessed the gate, they erected a large command tent, which remained there for several months. A small group of 10 to 20 protesters continued to occupy their structures, but they made no further attempt to blockade the gate.
>
> Once the blockade was removed, Exmingua was finally able to continue the development of the mine. Exmingua also expected GSM to be able to conduct

[384] *Id.* at ¶ 233(3)

[385] *Id.* at ¶224.

[386] Kappes Statement, ¶141.

> the social studies for the Santa Margarita EIA, which became impractical due to the blockades because the majority of the social studies needed for the EIA would have involved public meetings in the local villages in the vicinity of Santa Margarita and, given the threatening messages coming from the protesters, it would have been impossible to hold such public meetings.
>
> **Prof. Fuentes**: Exmingua was under an obligation to prepare an EIA to obtain an exploitation mining license for the Santa Margarita area, which it started to prepare in parallel with the EIA for Progreso VII Derivada. However, to date, the EIA could not be completed because, as stated by Claimants, the development of the Progreso VII Derivada area was prioritized and, afterwards, it was physically impossible to approach the neighboring communities due to the obstruction exercised by certain groups, which prevented the completion of the required social studies for the EIA. [387]

242. Exmingua made a similar representation to MEM:

> The reason for this submission before your honorable office is, that community unrest started in the municipality of San Pedro Ayampuc, Department of Guatemala, since the year 2012 and, in this context, several social groups are opposing mining activities in said municipality and in neighboring municipalities. This situation remains to this day, and has prevented the project from being presented to the community and base line updates from being performed as appropriate, pursuant to the rules and regulations which apply to this type of studies.[388]

243. Put simply, Claimants knew since 2012 of the alleged breach–*i.e.*, Respondent's failure to disburse the protests and blockades–and the loss incurred as a result to the breach– the inability to conclude the EIA and obtain the exploitation license for Santa Margarita. Like in *Berkwoitz v. Costa Rica*, the claim must be dismissed. In *Berkwoitz*, the tribunal dismissed part of claimants' expropriation claim because "the appreciation that lie at the core of every allegation that the Claimants advance can be traced back to" events before the critical date.[389]

244. The claim would be outside the period of limitation even if Claimants' inability to conduct the EIA is seen as an effect felt in 2016; when Claimants were finally keen on conducting the social studies. As noted in Article 14 of ILC Articles and confirmed in *Mondev*, "[t]he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue." Accordingly, Claimants are considered to have known of the breach in 2012 even if their inability to conduct the EIA continued through 2016.

b. The Claim in regard to the 2016 Protest at Progresso VII lacks evidentiary support

[387] Fuentes Report ¶ 75.

[388] Letter from Exmingua to the MARN dated April 7, 2017 (**C-0015**).

[389] *Berkowitz v. Republic of Costa Rica*, Interim Award on Jurisdiction, ¶244 **(RL-0156).**

and is also time barred under Article 10.18.1

245. Claimants' full protection and security claim is a moving target. In the preliminary stage of the proceeding, Claimants repeatedly insisted that their full protection and security claim is not related to the loss or damages incurred as result to their inability to access the Progreso VII site due to the protests and blockades in 2016.[390] But in a complete turn of event, Claimants now argue that Respondent's failure to remove the 2016 protests and blockades at Progresso VII prevented Exmingua from using its laboratory facilities "to provide services to other companies in mining or other industries."[391]

246. Despite their ever-shifting claim, the evidence indicates that the breach and the consequential loss is not based on "new protests" that took place in early 2016 but on community protests and blockades that have been taking place at Progreso VII since 2012, which were always in relation to the same group "La Puya," that continuously and peacefully camped out outside Progreso VII. The following are protests and blockades described by Claimants to have happened at Progreso VII since 2012.

2012-2014	
Early March 2012	Protesters, supported by non-governmental organizations, blockaded access to the mine site. Approximately 25-30 protesters formed a human blockade preventing any new equipment from entering the site.[392]
April 10, 2012	the protesters illegally detained and assaulted several security guards from Orion, a security company hired by P&F, Exmingua's construction contractor.[393]
May 8-9, 2012	Exmingua attempted to enter the site with a convoy of twenty trucks carrying supplies, supported by 150 national police who participated with the approval of the Vice-Minister of Security. However, approximately 50 protesters stood in front of the police and machinery, denying them passage. The police spent around 45 minutes at the site and left without resolving the situation. The mining vehicles ultimately left as well.[394]
July 25, 2013	KCA issued a letter to MEM, describing the National Police's failure to "protect Exmingua's rights with respect to the Progresso VII property" as a breach of Guatemala's "obligation under Chapter Ten of the CAFTA-DR." It further stated that KCA "is incurring significant and mounting losses" because of the alleged breach.[395]
May 23, 2014	Police came and evicted the protesters from the Project site. After the police accessed the gate, they erected a large command tent, which remained there for several months. A small group of 10 to 20 protesters continued to occupy their structures, but they made no further

[390] Claimants' Rejoinder, ¶ 142.

[391] Claimants' Memorial, ¶259.

[392] Kappes Statement, ¶¶ 63-64; Claimants' Memorial ¶ 44.

[393] Kappes Statement, ¶70.

[394] *Id.* ¶ 76.

[395] Letter from the Investors to the Ministry of Energy and Mines (July 25, 2013) **(C-0114-ENG)**.

attempt to blockade the gate.[396]

2014-2015	
2014-2015	The protesters would sometimes prevent workers from leaving the site, and I recall at least three such incidents in 2014 to 2015. During one of these instances, I was on site and prevented from leaving at 8:00 pm, and had to remain on site until around 2:00 am, when the Policía Nacional came to the site with reinforcements and let us out. However, these protesters did not meaningfully impede the operation of the mine during this period.[397]
2014-2016	
March 2014-January 2016	I recall hearing that this occurred about four times during this two-year period. Sometimes, on holidays, up to a couple dozen protesters would appear; at these times, Exmingua would shut down to avoid conflicts.[398]
Early 2016 or early February 2016	The protesters at the gate refused to let equipment or personnel enter the site, and the police refused to intervene.[399]

247. The full protection and security claim with respect to Progreso VII fails for several reasons. Claimants must do more than make conclusory assertion; the Tribunal has said as much: "[u]nlike objections under Article 10.20.4, jurisdictional objections do not require a tribunal to assume as true all facts alleged" by Claimants, [400] especially when in this case jurisdiction is being addressed with the merits and the Tribunal does not have to make any *prima facie* determination.

248. Despite the Tribunal's holding, Claimants have continued to make empty allegations. Events prior to November 9, 2015 cannot give rise to claims, pursuant to Article 10.18.1. Claimants agree, but they have failed to give details of the protests in 2016 nor have they proved that the protests actually took place. The claim is not based on the four to five people protests that took place from March 2014- January 2016. Claimants do not argue otherwise. Indeed, by their own admission, the protests within these periods were "periodical[]" and shortly resolved through police assistance.[401] Their claim is rather based on the protests in "early 2016" which "prevented Claimants and Exmingua from accessing the project site."[402]

249. Claimants description of the early 2016 protests is as general, vague, and inconsistent as it was during the preliminary objection. Claimants do not explain when in 2016 the protests took place, nor do they give any

[396] Kappes Statement, ¶ 91.

[397] *Id.* at ¶ 137.

[398] *Id.* at ¶ 138.

[399] *Id.*

[400] Decision on the Respondent's Preliminary Objection, ¶ 220.

[401] *See* Transcript, 127:1-3 ("Claimants made clear that in 2014 Progreso 2 VII was in full production, not halfway production, not stalled.")

[402] Decision on the Respondent's Preliminary Objection, ¶259.

detail on the number and nature of the protests. Kappes alleges that the protest took place in early February 2016,[403] while the Memorial and their presentation describe the relevant protests as those that occurred in early 2016[404] and March 2016,[405] respectively. The Tribunal has given Claimants plenty of chance to elaborate on the events and clear the inconsistencies. Claimants have not. This alone should prompt the Tribunal to reject the claim. But this is certainly not the only deficiency of the claim.

250. Aside from Claimants' allegation, there is absolutely no evidence that shows that such protests occurred. The evidence submitted by Claimants only describe protests against Progreso VII, "in front of the headquarters of the Ministry of Energy and Mines (MEM)."[406] Respondent pointed this out during the preliminary stage but Claimants were unable to provide an adequate response. During the hearing, Claimants attempted to explain the scant evidence in respect to the events in 2016 by offering unconvincing arguments. Realizing the weakness of their claim, they argued that both the English and the Spanish version Exhibit C-0010 which they had submitted as evidence are wrong.[407] Exhibit C-0010 is a news report which notes as follows:

> Since 2 March 2012 the residents of the communities located in San Jose del Golfo, Guatemala, took action to reject the mine and blocked the entrance to the company because they installed huts on the road. This movement has generated several confrontations with the public force, which has come in protection of the entry of machinery of the company that has the license.[408]

251. Claimants argued that the date in the English version and the original article is wrong and should be read as "2 March 2016." With not much conviction, Claimants' Counsel that he "believe[s]" that the March 2012 reference is a "typo."[409] Aside from this speculation, Claimants have not submitted any evidence which

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[403] Kappes Statement, ¶138.

[404] Claimants' Memorial, ¶258.

[405] Transcript, 126:12-13.

[406] Natiana Gándara, "CIG urges the MEM to not bend over pressure," *La Prensa Libre*, (March 11, 2016) **(C-0007);** Geovani Contreras, "Locals from La Puya continue with the protests," *La Prensa Libre* (March 13, 2016 **(C-0009**) ("Anti-mining protesters use firewood to cook their food in front of the MEM"); Nelton Rivera, "The new camp at the peaceful resistance La Puya," *Prensa Comunitaria Km*. 169 (May 19, 2019) **(C-0011)** ("The neighbors of the peaceful resistance "La Puya" set up a new camp in front of the MEM, the tents were installed immediately, the kitchen, the pantry, an improvised bedroom, a bathroom, the washing area, a Mayan altar and a Catholic one were installed from 3 March 2016.")

[407] Transcript of Hearing on Preliminary Objections, pp. 131-132.

[408] Jerson Ramos and Jose Rosales, "Protesters of La Puya burn doll of the Minister of Energy," *La Prensa Libre* (March 26, 2016) **(C-0010)**. *See also* Letter from Exmingua to the MARN (April 7, 2017) **(C-0015)** ("The reason for this submission before your honorable office is, that community unrest started in the municipality of San Pedro Ayampuc, Department of Guatemala, since the year 2012 and, in this context, several social groups are opposing mining activities in said municipality and in neighboring municipalities. This situation remains to this day, and has prevented the project from being presented to the community and base line updates from being performed as appropriate, pursuant to the rules and regulations which apply to this type of studies").

[409] Transcript of Hearing on Preliminary Objections, pp 131-132.

could persuade the Tribunal to read the original exhibit any other way nor have Claimants provided additional evidence. Likewise, the clear reference to the machinery in question indicated that it is referring to the year 2012, when there was difficulty in getting machinery to the site, and not in 2016 when the activities of the mine were already suspended and there was at no point any issue reported with regards to the entry of machinery to the site.

252. Even if the early 2016 event could give rise to a distinct claim, there is no denying that the claim arose from "a series of similar and related" protests and the government's alleged inactions that took place since 2012. Hence, although Claimants chose to bring a claim against the 2016 inactions, there is no doubt that Claimants knew of the breach and the consequential loss since 2012. Similarly, even in the case that they could have used the lab to provide services to other mines and individuals, the same claim could have been made prior to 2016, and therefore it is also time-barred.

253. As noted in *Corona*, Claimants cannot evade the period of limitation by basing their claim on the "most recent transgression." The protests and the subsequent inaction in 2012-2014 are the same as the 2016 event. Among others, the protests and blockades are the same. All of the actions were taken by the communities of San Jose del Golfo, including the group involved and referred to as "La Puya," were in protest against the mine.

254. In both periods, Respondent allegedly failed to protect Exmingua from the community's protests and blockade. In its 2013 letter to MEM, Claimants complained of the Civil National Police's failure to protect Progreso VII against protests and blockades and stressed that Respondent's "refusal to act in the face of unlawful conduct" is a "breach of its obligations under Chapter Ten of the CAFTA-DR" to which "KCA is incurring significant and mounting losses as a direct consequence."[410] The same case is presented to the Tribunal. Accordingly, the Tribunal should rule that the claim in regards to the protests and blockades at Progreso VII is time-barred.

D. The Tribunal lacks jurisdiction to hear Claimants' National Treatment and MFN claims

255. Pursuant to Article 10.13 (titled "Non-conforming Measures"), the national and MFN treatment restrictions "do not apply to any measure that [Guatemala] adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II." The Spanish version uses the same language: the restrictions "no se aplican a cualquier medida que una Parte adopte o mantenga, en relación con los sectores, subsectores o actividades, tal como se indica en su Lista del Anexo II."

256. Under Annex II, Guatemala has reserved "the right to adopt or maintain any *measure* that grants rights

[410] Letter from the Investors to the Ministry of Energy and Mines (July 25, 2013) (**C-0114**), p. 3. See also Notice of Arbitration, ¶¶ 42, 74

or preferences to socially or economically disadvantaged minorities and indigenous peoples" (emphasis added). Once again, the Spanish version uses identical language: "Guatemala se reserva el derecho de adoptar o mantener cualquier medida que garantice derechos o preferencias para las Minorías y Poblaciones Indígenas, social y económicamente en Desventaja."

257. All of the reservations under Annex II are jurisdictional in nature, which means that the Tribunal has no power to address any claims that properly within their scope.[411] This reservation in particular is limited to claims of national treatment, meaning that it excludes the Tribunal's jurisdiction only in so far as Claimants allege a difference in treatment between Exmingua and other domestic investors.

258. The national treatment claims here fall squarely within this reservation. For one, all of the actions (or "treatments") complained of in Section III.3 of Claimants Memorial were taken to enforce the rights of the indigenous communities. Treatment 1 is about the suspension of Exmingua's license while the consultations take place.[412] The Court ordered the suspension to give "priority" to the "rights to life and integrity of indigenous and tribal peoples."[413] Treatment 2 is no different.[414] The Court placed conditions on Exmingua's consultations (like all the others) to ensure that—in Claimants' own words—"operations would not threaten the existence of the indigenous population in the vicinity of the mining project."[415] Treatment 3 is about the timing of the Court's decision;[416] and Treatment 4 is about the timing of the MEM's consultations.[417] In both cases, the time was spent giving "preferences to socially or economically disadvantaged minorities and indigenous peoples," in accordance with the text of the reservation.

259. What is more, each of the entities compared with Exmingua—Oxec, Minera San Rafael and CGN—is considered a domestic investor under the Treaty, meaning that all the claims qualify as national treatment.

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[411] *See Astrida Benita Carrizosa v. Colombia*, ICSID Case No. ARB/18/05, Submission of the United States of America (May 1, 2020), para. 17 **(RL-0162)** (explaining how the Tribunal "has no jurisdiction to consider" claims that fall under reservation s made by the treaty parties).

[412] Claimants argue in Section III.3 that "the Guatemalan Constitutional Court subjected Exmingua to unequal and unfavorable treatment by suspending its operations, while allowing Oxec to continue to operate until the MEM commenced and concluded consultations." *See* Claimants' Memorial, ¶ 325.

[413] Decision of the Constitutional Court in Case No. 1592-2014 issued on June 11, 2020, p. 31 **(C-0145-ENG)**.

[414] Claimants argue that the Constitutional Court set an "additional, onerous, subjective and uncertain condition on Exmingua"—not imposed on Oxec, Minera San Rafael or CGN—that "Exmingua cannot resume operations unless a determination is made that operations would not threaten the existence of the indigenous population." Claimants' Memorial, ¶ 326.

[415] Claimants' Memorial, ¶ 326.

[416] Claimants argue that the Constitutional Court prolonged the *amparo* proceedings for twice as long as Oxec, Mineral San Rafael and CGN. Claimants' Memorial, ¶ 327.

[417] Claimants argue that the MEM "completed consultations for Oxec [in] just a few months, whereas it has refused even to commence consultations for Exmingua." Claimants' Memorial, ¶ 328.

Each entity is an "enterprise of [Guatemala]," with an "investment" in the State, as defined by the Treaty *i.e.* "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law."[418] While CGN and Minera San Rafael each have a foreign owner, those foreign entities are irrelevant when it comes to classifying CGN and Minera San Rafael themselves. They are still Guatemalan entities, properly organized under the laws of Guatemala, like Oxec[419] and Exmingua. Had the Treaty Parties wanted to treat foreign-owned companies as foreign companies, they could have easily used language to that effect, like in other treaties.[420]

260. Guatemalan law agrees. Under the Foreign Investment Law, a "foreign investor" is defined as a "*foreign* individual or legal entity…lawfully organized under the laws of the country in which it was constituted."[421] Pursuant to that definition, a foreign investor cannot be organized under the laws of Guatemala. Here, Oxec, Minera San Rafael and CGN are all Guatemalan companies, with investments (project licenses) in the State. Therefore, they are Guatemalan (domestic) investors that properly fall within the reservation.

1) A separate reservation applies to the supposed MFN claims.

261. Guatemala has also reserved the right, vis-à-vis the United States (Claimants' home State), to adopt "any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement." Put another way, Guatemala has reserved the right to accord different treatment between investors from the United States and those from any country that has a pre-existing treaty with Guatemala.

262. By its very nature, this reservation is limited to MFN claims, which means that it excludes jurisdiction only insofar as Claimants allege claims of different treatment between investors from two different states. Nevertheless, Guatemala observes, as detailed below, that it is entirely unclear whether Claimants have set out any MFN claims, despite the title of Section III.3 of the Memorial. The four treatments alleged by Claimants never mention the foreign owners of Minera San Rafael and CGN—Pan American Silver (Canada) and the Soloway Group (Switzerland), respectively. Nor do Claimants discuss any similarities between those two entities and themselves, as they must do to satisfy the MFN standard. The argument here on the second reservation proceeds on the assumption that Claimants have properly particularized an MFN claim. But that is

[418] *See* CAFTA-DR art. 10.28 (defining the terms "investor of a Party" and "investment").

[419] Claimants concede that Oxec is a domestic investor. Memorial, para. 104.

[420] *See, e.g., Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, art. VII(8) (1991) **(RL-0163)** ("For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention.").

[421] Foreign investment law of the Republic of Guatemala, Decree No. 9-98, March 3, 1988, chap 1 **(RL-0134)**.

only an assumption, Guatemala does not concede that an MFN claim has been properly made.

263. With regards to the properly made reservation, there is nothing uncommon about the rights that Guatemala has reserved. The United States and many other countries have made similar reservations for purposes of MFN treatment.[422] The meaning of the text has been confirmed by the United States and others. The United States has said, speaking on an identical reservation in the U.S.-Colombia Trade Promotion Agreement, that "a tribunal has no jurisdiction to consider any more favorable treatment extended pursuant to [prior] agreements."[423] The Asia Pacific Economic Cooperation (APEC) has offered the same interpretation.[424]

According to Claimants, CGN is owned by Soloway Investment Group of Switzerland;[425] and Switzerland and Guatemala have a bilateral investment treaty that pre-dates the CAFTA.[426] So, Guatemala any claims of discrimination between Claimants and Soloway fall under this reservation, and thus may not be considered by the Tribunal.

VI. ASPECTS OF INTERNATIONAL LAW APPLICABLE TO THIS DISPUTE

A. Burden of proof

264. As the party asserting an international breach, Claimants bear the burden of establishing the jurisdiction and the merits of their claim.[427] The principle *onus probandi actori incumbit, i.e.* "who asserts must prove" has been universally accepted.[428] Therefore, the a claimant must "prove all facts necessary to establish

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[422] *See, e.g.*, United States-Colombia Trade Promotion Agreement, Annex II, p. II-US-8 (**RL-0164**) ("The United States reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement."); *Australia-United States Free Trade Agreement*, Annex II, p. US-9 ("The United States reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement."). **(RL-0165).**

[423] *Astrida Benita Carrizosa v. Colombia*, ICSID Case No. ARB/18/05, Submission of the United States of America (May 1, 2020), para. 17 **(RL-0162)**.

[424] APEC, *A Guide for Telecommunications Elements of Regional Trade Agreements and Free Trade Agreements* (August 5, 2010) **(RL-0166)** (explaining that the text reserves "the right to treat service suppliers and investors of a non-Party more favourably under a previously concluded [Regional Trade Agreement] / [Free Trade Agreement]."), *available at* https://www.apec.org/-/media/Files/Groups/TEL/2010_GuideTelecomsElementsRTAsFTAs.doc.

[425] Claimants' Memorial, ¶ 115.

[426] *Agreement between Switzerland and the Republic of Guatemala on the Promotion and Reciprocal Protection of Investments* (September 9, 2002) **(RL-0167)**.

[427] *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award on Jurisdiction, (October 25, 2016), ¶ 29 (**RL-0156)**.

[428] *Zhinvali Development Ltd. v. Republic of Georgia,* ICSID Case No. ARB/00/1, Award, (January 24, 2003, ¶ 311 **(RL-0168)** ("Hence, with regard to 'proof of individual allegations advanced by the parties in the course of proceedings, the burden of proof rests upon the party alleging the fact ...'")*; Azurix Corp. v. the Argentine Republic,* ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (September 1, 2009), ¶ 215 **(CL-0051)**

the arbitral tribunal's jurisdiction."[429] The principle also extends to the merits of a claim. As noted by Prof.Bin Cheng, "the international responsibility of the State is not to be presumed. The party alleging a violation of international law giving rise to international responsibility has the burden of proving the assertion."[430]

265. A claimant must provide the necessary evidence to establish its claim. But merely presenting an evidence is not enough.[431] A claimant must also "convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof."[432] Once it establishes a breach, a claimant must prove that it incurred damages as a result to the breach. [433]

B. Claimants Have Failed to Establish A Breach of Fair and Equitable Treatment under CAFTA-DR Article 10.5

1) The Fair and Equitable Treatment Under Article 10.5(1) Prescribes the Minimum Standard of Treatment of Aliens as Established Under Customary International Law

266. Article 10.5 of CAFTA-DR must be interpreted under specific parameters that do not exist in most investment agreements. Particularly, Article 10.5 limits the obligation to provide fair and equitable treatment to customary international law minimum standard of treatment:

> **Article 10.5:** Minimum Standard of Treatment
> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

("the Committee considers the general principle in ICSID proceedings, and in international adjudication generally, to be that "who asserts must prove", and that in order to do so, the party which asserts must itself obtain and present the necessary evidence in order to prove what it asserts."); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), International Court of Justice, Judgment (February 3, 2015) **(RL-0169)**.

[429] Frederic Gilles Sourgens, Kabir Duggal, et al., *Burden and Standard of Proof in International Investment Arbitration*, in EVIDENCE IN INTERNATIONAL INVESTMENT ARBITRATION, ¶ ¶ 2.31-2.36 **(RL-0267)**.

[430] *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (June 27, 1990), ¶56 *citing to* Ben Cheng, General Principles of Law As Applied by International Courts and Tribunals, pp.305-306 (**CL-0254)**. *See also Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, (March 16, 2017),¶ 109 ("The Tribunal shall apply the well-established principle that the party alleging a violation of international law giving rise to international responsibility has the burden of proving it.") **(RL-0040)**.

[431] Gilles, *Burden and Standard of Proof in International Investment Arbitration*, ¶ 2.10 **(RL-0267)**.

[432] *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (June 27, 1990), ¶ 549 (**CL-0254)**

[433] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (September 22, 2014), ¶ 686 (**CL-0205)**.

> (a)"fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> …
>
> 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

267. In line with the general rules of interpretation under the Vienna Convention on the Laws of Treaties, Article 10.5 must be interpreted in consideration of: the "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[434]

268. Read as a whole, Article 10.5 suggests that the term "fair and equitable treatment" should not be interpreted as an autonomous standard. While Article 10.5(1) instructs states to provide "fair and equitable treatment," Article 10.5(2) clarifies– "for greater certainty"–that this obligation does not go beyond "the customary international law minimum standard of treatment of aliens." Hence, a party claiming a violation of a right under the fair and equitable treatment must establish that such right is protected under customary international law minimum standard of treatment.

269. A review of the circumstances present during the drafting of CAFTA-DR confirms this position. As explained under Article 32 of the Vienna Convention, the "circumstance" surrounding the conclusion of a treaty could shed light into what the parties really intended when drafting the provisions of an agreement. [435] This includes "treaties on the same subject matter adopted either before or after one in question that use the same or similar terms."[436] North America Free Trade Agreement (NAFTA) is almost identical to Chapter 10 of CAFTA-DR. The historical record suggest that this was not a coincidence.

270. It is clear that CAFTA-DR is heavily influenced by the North America Free Trade Agreement (NAFTA)[437] and the lessons learned by the United States from the application of the treaty. Ten-years after the ratification of NAFTA, the United States revised its Model Bilateral Investment Treaty (BIT) in 2004 to "incorporate practical experiences gained in the" application of NAFTA.[438] Under this Model BIT, the United

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[434] Vienna Convention on the Law of Treaties, Art. 31(1) (**CL-0005)**.

[435] Anthony Aust, Modern Treaty Law and Practice, (Cambridge University Press 2013) 3rd ed., p. 217 **(RL-0170)**.

[436] *Id.* p. 220.

[437] C. O' Neal Taylor, *Of Free Trade Agreements and Models*, Indiana International & Comparative Law, Vol. 19 No. 3 (2009) pp. 591-592 (**RL-0171**) ("The drafting of Chapter 11[of NAFTA] itself was closely based on the U.S. model Bilateral Investment Treaty (BIT)").

[438] Meg Kinnear & Robin Hansen, *The Influence of NAFTA Chapter 11 in the BIT Landscape*, 12 U. C. Davis J. INT'L. & POL. 101 (2005), p.115 (**RL-0172)**.

States clarified the meaning of certain substantive provisions: minimum standard of treatment, expropriation, labor and environmental rights.[439]

271. Article 1105(1) of NAFTA obligates states to treat investments "in accordance with international law, including fair and equitable treatment…."[440] Despite the state parties' submission, tribunals paid no regard to the argument that the protections under Article 1105 are limited to the customary international law minimum standard of treatment.[441] While certain tribunals interpreted fair and equitable treatment as an "additive to the requirements of international law," others concluded that standard included the obligation to provide "transparent and predictable framework."

272. The fair and equitable treatment under Article 1105(1) of NAFTA was subject of much debate. Article 1105(1) of NAFTA is substantively similar to Article 10.5 of CAFTA-DR, except for one main difference: Article 1105(1) links the fair and equitable treatment to "international law" and not "customary international law." Until 2001, the term "international law" caused much controversy. While certain tribunals interpreted this to mean that Article 1105 only refer to minimum standard of treatment under customary international law, others held that this includes treatment beyond customary international law.[442]

273. On July 31, 2001, the Free Trade Commission (FTC) ended this debate by clarifying that the term "international aw" under Article 1105 refers to the customary international law minimum standard of treatment. In 2004, the United States incorporated this interpretation and introduced the following clarifications in its Model BIT. First, the fair and equitable treatment does not go "beyond that which is required" under "the customary international law minimum standard of treatment of aliens."[443] Second, the customary international law "results from a general and consistent practice of States that they follow from a sense of legal obligation." Third, the fair and equitable treatment includes an obligation not to deny justice.

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[439] David A. Gantz, *Settlement of Disputes Under The Central America–Dominican Republic–United States Free Trade Agreement*, TDM 4 (2009) p. 1 (**RL-0173**) ("Central America–Dominican Republic–United States Free Trade Agreement (CAFTA-DR) is one of nearly a dozen post-North American Free Trade Agreements (NAFTA) free trade agreements (FTAs) that the United States has concluded with nations in Latin America, the Middle East, and Asia since 2000. All of these newer agreements are based on NAFTA, but they differ in significant respects, particularly in the chapters relating to dispute settlement. Most significantly, the changes reflect U.S. government experience with NAFTA dispute settlement, particularly with regard to actions brought by private investors against the United States and other NAFTA governments under NAFTA's investment protection provisions (Chapter 11)").

[440] NAFTA, Article 1105(a) (**RL-0174**).

[441] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Canada's Counter Memorial (Phase Two) (October 10, 2000), ¶ ¶ 208-210 **(RL-0175)**; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Awards on the Merits of Phase 2 (April 10, 2001), ¶ 110 **(CL-0116)**.

[442] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Awards on the Merits of Phase 2 (April 10, 2001), para 110 **(CL-0116)**; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000), para 99 **(CL-0120)**.

[443] 2004 U.S. Model BIT, Article 5(2) (**RL-0011)**.

274. The United States, however, limited denial of justice to due process violations. According to Article 5(2) (a) of the Model BIT, the fair and equitable treatment refers to "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world." This addition reflected the comments of the U.S. Trade Promotion Authority's proposition. Among others, the TPA advised the United States to "establish standards for fair and equitable treatment consistent with United States legal principles and practice, including the principle of due process..." While many have interpreted denial of justice as a procedural violation, United States added this clarification in order to avoid any risk of a tribunal extending denial of justice to substantive decisions.

275. In 2005 CAFTA-DR, entered into force adopting Article 5 of the Model BIT into Article 10.5 almost in total. Indeed, so did other post-NAFTA agreements concluded by the United States.[444] Considering that Article 10.5 was drafted under this background, the Tribunal must give due attention to the United States' as well as NAFTA state parties' interpretation of customary international minimum standard of treatment.

a. A violation of the fair and equitable treatment of the customary international law minimum standard of treatment requires an egregious or a manifestly arbitrary act

276. A claimant cannot invoke article 10.5 to merely rectify an erroneous decision. The minimum standard treatment under customary international law only shields investors from serious misconducts.[445] In the often cited *Neer v. Mexico*, the tribunal held that the threshold required for violating the minimum standard is high:

> ... the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.[446]

277. *Neer v. Mexico* is a landmark case in the minimum standard of treatment. Although the case was rendered in 1926 in the context of providing physical protections to a foreigner, many tribunals have echoed that "the standard for finding a breach of the customary international law minimum standard of

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[444] Singapore-United States of America Free Trade Agreement(2004), Article 15.5 (**RL-0176)**; Chile-United States of America Free Trade Agreement (2004), Article 10.4; (**RL-0177)** Morocco- United States of America Free Trade Agreement (2004), Article 10.5 (**RL-0178)**; Australia- United States of America Free Trade Agreement (2005), Article 11.5 **(RL-0165)**; Colombia- United States of America Bilateral Investment Agreement, Article 10.5 (**RL-0164).**; Panama-United States of America Free Trade Agreement (2012), Article 10.5 (**RL-0179)**; Oman- United States of Free Trade Agreement (2009), Article 10.5 **(RL-0180).**

[445] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June, 2009, ¶ 615 (the minimum standard of treatment-as its name indicates-is only "meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.") (**RL-0041)**.

[446] *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, Judgment (October 15, 1926), pp. 61-62 (*Neer*) **(RL-0183).**

treatment…remains as stringent as it was under *Neer*."[447] Relying on the fundamentals of the *Neer* standard, the tribunal in *Thunderbird v. Mexico* held that only acts that "amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards" could breach the minimum standard of treatment. [448]

278. Similarly, in *Glamis v. USA*, the tribunal confirmed that the current standard for a breach of the minimum standard of customary international law is substantially the same as framed in *Neer,* an act must be "sufficiently egregious and shocking - a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."[449]

279. Regardless of the debate on whether *Neer* expresses the current customary international law, there is a consensus that "acts or omissions constituting a breach must be of a serious nature."[450] Notably, the alleged misconduct must fall under one of these common qualifiers: "gross denial of justice"[451] "manifest arbitrariness,"[452] "blatant unfairness,"[453] "evident discrimination," "or "complete lack of due process."[454]

280. Endorsing the interpretations in *Thunderbird* and *Glamis Gold*, State parties to the CAFTA and NAFTA have consistently stressed that a mere arbitrary act cannot violate the minimum standard of treatment.:

> **United States**: Referring to *Thunderbird,* it argued that "that mere "arbitrary" conduct by an administrative agency is insufficient to constitute a breach of Article 1105(1); rather, the regulatory action must amount to a 'gross denial of justice or manifest arbitrariness falling

[447] *Glamis Gold,* Award, ¶ 616 (**RL-0041).** *See also Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2 , ¶ 284 (**CL-0197**)("Cargill") ("The Tribunal observes a trend in previous NAFTA awards, not so much to make the holding of the *Neer* arbitration more exacting, but rather to adapt the principle underlying the holding of the *Neer* arbitration to the more complicated and varied economic positions held by foreign nationals today. Key to this adaptation is that, even as more situations are addressed, the required severity of the conduct as held in *Neer* is maintained"); *Eli Lilly and Co. v. Government of Canada,, Final Award,* ¶ 222 **(RL-0040)**; *Thunderbird International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006, ¶ 194 ("Thunderbird") **(CL-0198)**.

[448] *Thunderbird,* ¶ 194 **(CL-0198)**.

[449] *Glamis Gold,* ¶ 616 (**RL-0041)**.

[450] *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (March 17, 2015), ¶443 ("*Bilcon*") (**CL-0242)**. *See also Eli Lilly and Co. v. Government of Canada*, ¶ 222 **(RL-0040)**.

[451] *Thunderbird*, ¶ 194 (**CL-0198)**; *Glamis Gold, Ltd.*, ¶ 22 (**RL-0041)**. *See also Bilcon*, Award on Jurisdiction and Liability, ¶443 (**CL-0242)**; *Waste Management, Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3 (April 30, 2004) (describing a violation of fair and equitable treatment as a "manifest failure of nature justice") (**CL-0022)**.

[452] *Joshua Dean Nelson and Jorge Blanco v. United Mexican States*, ICSID Case No. UNCT/17/1, Award of the Tribunal (June 5, 2020), ¶¶ 323-324 **(RL-0182-ENG/ESP)**; *Thunderbird*, Award (January 26, 2006), ¶ 194 **(CL-0198)**.

[453] *Glamis Gold,* Award, ¶ 22 **(RL-0041)**. *See also Bilcon,* Award on Jurisdiction and Liability, ¶ 443 (**CL-0242)**.

[454] *Glamis Gold,* Award, ¶ 627**(RL-0041)**; *Eli Lilly and Company v. Government of Canada*, Final Award, ¶ 222 **(RL-0040)**.

below international standards' in order to breach the minimum standard of treatment."[455]

Guatemala: Citing to *Glamis Gold* and *Thunderbird*, Guatemala noted that "the international minimum standard only provides protection from gross conduct, such as conduct that is manifestly arbitrary or that flagrantly repudiates the regulatory framework."[456]

Honduras: "only actions of a shocking, excessive, outrageous character, on the part of a State, may violate the minimum standard of treatment, including fair and equitable treatment as a concept included in the minimum level of treatment…. The Republic of Honduras considers the following specific examples of conduct that may violate the minimum standard of treatment: a serious denial of justice, a manifest arbitrariness, a flagrant injustice, a complete lack of due process, a manifest discrimination, or the manifest absence of reasons for a decision."[457]

Costa Rica: "[t]he decision in *Glamis Gold* provides a clear articulation of the current state of the minimum standard of fair and equitable treatment under customary international law." Hence "in order to violate the minimum standard of treatment, a measure attributable to the State "must be sufficiently egregious and shocking–a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons - so as to fall below accepted international standards."[458]

El Salvador: "in El Salvador's view, to violate the minimum standard of treatment under customary international law included in CAFT Article 10.5, a measure attributable to the State "must be sufficiently egregious and shocking-a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons-so as to fall below accepted international standards."[459]

281. The State parties' interpretation of Article 10.5 is instructive. According to Article 31(3) (a) of the Vienna Convention on the Law of Treaties, a treaty should be interpreted "together with the context" of "any

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[455] *Glamis Gold*, United States' Counter Memorial (August 19, 2006), pp. 227-228 (**RL-0181)**. *See also Berkowitz v. Costa Rica*, Submission of the United States of America (April 17, 2015), ¶12 (**RL-0043)**.

[456] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Memorial on Objections to Jurisdiction and Admissibility and Counter-Memorial on the Merits (January 24, 2012), p. 201, 460-467 **(RL-0184)**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Guatemala's Rejoinder (September 24, 2012), ¶ 146 (**RL-0185)**.

[457] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of the Republic Honduras' submission (November 15, 2012) ¶¶ 9-10 (**RL-0186**) (emphasis added).

[458] *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Respondent's Memorial on Jurisdiction and Counter-Memorial on Merits (July 15, 2014) ¶ 199 (**RL-0157)**; *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Costa Rica's Counter-Memorial (April 8, 2016), ¶ 564 (**RL-0189)** ("As was correctly highlighted in *Glamis Gold v. USA*, for the Tribunal to hold that Costa Rica acted arbitrarily under customary international law, a 'mere appearance of arbitrariness,' or the Tribunal's mere disagreement with how an agency acted, is insufficient. Rather, Claimants would have had to demonstrate 'a level of arbitrariness that, as *International Thunderbird* put it, amounts to a 'gross denial of justice or manifest arbitrariness falling below acceptable international standards.'").

[459] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Submission of the Republic of El Salvador as a Non-Disputing Party under CAFTA Article 10.20.2 (January 1, 2012), ¶ 6 (**RL-0190)**. *See also Berkowitz v. Republic of Costa Rica*, Submission of the Republic of El Salvador (April 17, 2015), ¶ 13 (**RL-0044)**.

subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[460] State practice are significant in shading light into the actual meaning of a text. Indeed "[h]owever precise a text appears to be the way in which it is actually applied by the parties is usually a good indication of what they understand it to mean, provided the practice is consistent and is common to, or accepted, expressly or tacitly, by both or all parties."[461]

282. Guatemala and the United States–among many other of the CAFTA member states–have clearly and consistently explained what they understood Article 10.5 to mean when they signed the agreement. Claimants' interpretation of Article 10.5 does not reflect the states' intention and subsequent explanation of Article 10.5. While Claimants argue that Article 10.5 protects an investor from arbitrary treatment, both Guatemala and the United States have insisted that the customary international law of the minimum standard of treatment could be breached only in the face of manifest arbitrariness.

b. In the absence of denial of justice, a domestic judgment cannot breach the customary international law minimum standard of treatment

283. As compared to other branches of a state, domestic adjudications enjoy broad deference under international law.[462] In the words of the tribunal in *Mondev v. USA*, "[i]t is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State."[463] Many have associated this deference to the nature of adjudicative decisions. Unlike legislative actions and executive order, "adjudication is . . . a device which gives formal and institutional expression to the influence of reasoned argument in human affairs."[464] Hence, as noted in *Chattin*–a case relied by Claimants–"it is a matter of the greatest political and international delicacy for one country to dis-acknowledge the judicial decision of a court of another country."[465]

284. A judgment of a domestic court is outside the reach of an international tribunal unless denial of justice can be proven.[466] Not every judicial poor administration constitutes a denial of justice. As noted in *Chattin*, a

[460] The Vienna Convention on the Law of Treaties, Art. 31(3)(a) (**CL-0005)**

[461] Anthony Aust, Modern Treaty Law and Practice, p. 215 **(RL-0170)**.

[462] *Eli Lilly and Co. v. Government of Canada*, Final Award ¶ 204 (courts are given "a greater presumption of regularity than legislative or administrative acts.") **(RL-0040).**

[463] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002), ¶ 126 **(RL-0018)**.

[464] Zachary Douglas, International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed, 63 INT'l & COMP. L.Q. 867 (2014), p. 876 (**RL-0191).**

[465] *Chattin case (United States v. Mexico)*, Concurring Opinion by American Commissioner (July 23, 1927), p. 288 **(CL-0176)**.

[466] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, ¶ 106

finding of denial of justice requires a showing of "outrage, bad faith, willful neglect of duty, or insufficiency of action apparent to any unbiased man."[467] While several decades have passed since the decision, the ground for denial of justice has remained stringent.[468] The tribunal in *Chevron v. Ecuador*, affirmed as follows:

> the test for establishing a denial of justice sets ... a high threshold. While the standard is objective and does not require an overt showing of bad faith, it nevertheless requires the demonstration of 'a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety.'[469]

285. It is not enough that the alleged misconduct is surprising. As explained in *Mondev v.* USA,

> "the test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection." [470]

286. In short, "the modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice."[471] While Claimants do not elaborate, they agree that Article 10.5 is only implicated if a state's administration of justice is "seriously inadequate,"[472] such that it "shocks a sense of judicial propriety."[473] But Claimants skip the second requirement for a finding of a denial of justice: exhaustion of local remedy.

287. A showing of a serious and grave delinquency, while necessary, is certainly not the only requirement

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("An ICSID Tribunal will no act as an instance to review matters of domestic law in the manner of a court of higher instance. Instead, the Tribunal will accept the findings of the local courts as long as no deficiencies, in procedure or substances, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international aw, such as in the case of a denial of justice") (**RL-0192).**

[467] *Chattin*, p. 287 **(CL-0176)**. *See also Neer* ¶ 4 **(RL-0183)** ("The Commission in *Neer* held that "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.")

[468] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3, Award (June 26, 2003), ¶ 132 (**CL-0170)**; *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, I.C.J. Reports, 1989, p. 15, Judgment (July 20, 1989), ¶ 128 **(RL-0199)**.

[469] *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II)*, PCA Case No. 2009-23, Partial Award on Merits, 30 March 2010, ¶ 244 ("*Chevron*") **(CL-0175)**. *See also White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (November 30, 2011), ¶ ¶ 10.4.5-10.4.6 (**RL-0198)** *citing* to *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002), ¶ 127 **(RL-0018)**.

[470] *Mondev*, ¶ 127. **(RL-0018).**

[471] Jan Paulsson, Denial of Justice in International Law, (Cambridge Univ. Press 2005), p. 60 (**CL-0171).**

[472] *See* Claimants' Memorial, ¶ 268.

[473] *Ibid*, ¶ 269.

to establish a denial of justice. A party invoking a denial of justice must also demonstrate that it has exhausted all local remedies to rectify the maladministration of justice. As put by Professor Jan Paulson, "[n]ational responsibility for denial of justice occurs only when the system as a whole has been tested and the initial delict has remained uncorrected."[474]

288. Several tribunals have echoed this requirement, declining to find a denial of justice unless a showing is made that the entire domestic system has failed to rectify the injustice.[475] *Loewen v USA* is a testament of this rule. In *Loewen*, the tribunal found that claimant's right to fundamental due process was violated. It noted that the Mississippi trial court was manifestly unjust to claimant as it allowed several prejudicial behaviors, frequent reference of Loewen's nationality, and appeals to class-based prejudice.[476] Despite its findings, the tribunal dismissed claimant's denial of justice claim because "Loewen failed to pursue its domestic remedies, notably the Supreme Court option and that, in consequence, Loewen has not shown a violation of customary international law and a violation of NAFTA for which Respondent is responsible."[477]

289. To establish a denial of justice, Claimants must demonstrate that the Guatemalan courts committed a "serious" and "egregious conduct that shocks, or at least surprises, a sense of judicial propriety" and that they have exhausted the available remedies in Guatemala.

i. An alleged delay in judgment, without more, does not constitute a denial of justice

290. As noted earlier only a serious irregularity "that shocks, or at least surprises, a sense of judicial propriety."[478] The customary international law minimum standard of treatment does not seek to protect an investor against all procedural violations. As noted by Paulsson, "international law does not impose a duty on States to treat foreigners fairly at every step of the legal process." A denial of justice rather occurs "where a

[474] Jan Paulsson, Denial of Justice in International Law, (Cambridge Univ. Press 2005), p. 125 (**CL-0171)**.

[475] *See Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL Award (January 12, 2011), ¶ 223 (**RL-0155)**; *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award (April 23, 2012), ¶ 225 ("[D]enial of justice deals with the failure of a system not of a single court") **(RL-0195)**; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award (June 22, 2010), ¶ 279 ("[T]he Tribunal concludes that Respondent can only be held liable for denial of justice if Claimants are able to prove that the court system fundamentally failed.") (**RL-0196).**

[476] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3, Award (June 26, 2003), ¶¶ 56-67, 68-70 (**CL-0170)**.

[477] *Loewen v. United States of America*, Award, ¶ 217 (**CL-0170)**. *See also Corona Materials, LLC v. Dominican Republic*, Award (May 31, 2016), ¶ 254 (**RL-0002**).

[478] Jan Paulson, *Denial of Justice in International Law*, p.7 (**CL-0171)** ("denial of justice is always procedural."). *See also* Zachary Douglas, International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed, 63 INT'l & COMP. L.Q. 867 (2014), p.15 (**RL-0191)** ("irregularities in the conduct of the proceedings" is "the heart of the matter for denial of justice.").

national legal system fails to provide justice–not where there is a single procedural irregularity."[479]

291. Accordingly, the fact that the judgment may not have been issues in the time Kappes expected does not constitute a denial of justice. To establish a denial of justice, Claimants must demonstrate that the delay was unreasonable, and the result was so egregious that it "shocks or at least surprise, a sense of judicial propriety."[480]

292. International law does not provide a timeline as to when a national court must render a decision. As the tribunal in *Toto v Lebanon* explained, "international law has no strict standards to assess whether court delays are a denial of justice."[481] Claimants agree. They submit that in determining whether a delay is unjust, "tribunals consider, among other things the complexity of the matter, the interest at stake, and the effect of the delay."[482] Tribunals also consider other factors such as: i) the nature of the proceeding and the need for a swift resolution (whether the case is a civil or criminal matter),[483] ii) the circumstances that contributed to the delay, and iv) the development status of the country.[484]

293. Most delays in local civil proceedings do not give rise to a denial of justice. For instance, in *White Industries v. India*, the tribunal found no denial of justice although it took the Indian courts nine years to decide on claimant's enforcement action. While the case before the court was important in "the field of commercial arbitration in India," the tribunal concluded that, there was no compelling reason for celerity as it was not a

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[479] Andrew NewCombe & Luis Pardell, *Law and practice of investment treaties standards of treatment* (Kluwer Law International 2009), p. 155 (**RL-0197)**.

[480] *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (November 30, 2011), ¶¶ 10.4.6-10.4.7 **(RL-0198)**; *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II)*, PCA Case No. 2009-23, ¶ 244 **(CL-0175)** ("the test for establishing a denial of justice sets ... a high threshold. While the standard is objective and does not require an overt showing of bad faith, it nevertheless requires the demonstration of 'a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety."); *El Oro Mining Railway Company (Great Britain) v Mexico*, Decision No. 54 (June 18, 1931), ¶ 198 (**RL-0200)** ("It is obvious that such a grave reproach can only be directed against a judicial authority upon evidence of the most convincing nature.").

[481] *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (September 11, 2009) ¶ 155 (**RL-0201)**. *See also White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (November 30, 2011), ¶ 10.4.9 ("public international law does not provide fixed time limits within which certain classes of cases must be resolved."). (**RL-0198)**

[482] Claimants' Memorial, ¶ 269.

[483] *See White Industries Australia Limited*, ¶¶ 10.4.10, 10.4.14 (**RL-0198)**; Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63 INT'l & COMP. L.Q., p. 870 ("Delay in proceedings to establish the criminal responsibility of a defendant who has been remanded in custody since the indictment is not the same as delay in proceedings to establish a defendant's civil responsibility to pay damages for a breach of contract."); *id*., p.880 ("the complexity, of course, arises in the assessment of what is an 'unreasonable delay' and for that, as Freeman rightly noted, 'the substance of the litigation must be known ... to determine whether there were justifiable causes for the delays complained of."). (**RL-0191)**

[484] *See White Industries*, ¶10.4.18 (**RL-0198)**

criminal case.[485] The tribunal also considered that India "is a developing country…with a seriously overstretched judiciary."[486]

294. The tribunal in *Frontier v. Czech Republic* reached to a similar conclusion. In this case, claimants brought a denial of justice claim on the ground that the regional court of the Czech Republic took over 3 years to resolve claimant's resolution claim. The claim was dismissed. The tribunal concluded that "while an inordinate delay can amount to a violation of the fair and equitable treatment standard, the circumstances in the present case do not meet the required threshold."[487] The tribunal's decision rested on two main facts. First, at "the time in question, the Czech courts were experiencing at once a high volume of cases and a shortage of judges."[488] Second, claimant failed to establish that its investment suffered as a result to the delay.[489]

295. *Pey Casado v. Chile* is the only outlier. In *Pey Casado*, the tribunal concluded that the national court's failure to respond to claimant's request for a period of seven years to respond amounts to denial of justice. The case however offers no guidance on this issue. Unlike the cases above, the tribunal provided no analysis for its finding. It did not even evaluate what Claimants describe as factors in determining whether undue delay amounts to denial of justice: "*the complexity of the matter, the interests at stake, and the effects of the delay*."[490] Hence, the case is unavailing.

296. Claimants cite to *Chattin*, but the case is factually distinct from the present case. In *Chattin*, the claimant was detained while waiting for a judgment, and later, a decision on his appeal. Chattin was detained for more than 3 years before being brought to trial. Even after the trial commenced, the court conducted the proceeding with little to no urgency. Chattin had to wait for more than 3 months to address the charges and evidence brought against it.[491] As observed by the commission's president, the mistreatment continued at the appeal stage.[492]

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[485] *Id.* at ¶ 10.4.14.

[486] *Id.* at ¶ 10.4.18.

[487] *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award (November 12, 2010), ¶ 334 (**RL-0202)**.

[488] *Id.* ¶ 336.

[489] *Id.* ¶ 331.

[490] *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (May 8, 2008), ¶ 659 **(CL-0177).**

[491] *B.E.Chattin (United States) v. United Mexican States*, Concurring opinion by American Commissioner (July 23, 1927) ¶ 15 **(CL-0176)**.

[492] *Id.* ("whereas Chattin appealed from the decree of his formal imprisonment on July 11, 1910-an appeal which would seem to be of rather an urgent character-"the corresponding copy for the appeal" was not remitted to judgment until October 27, 1910; and though its decision was forwarded to Mazaltan on October 31, 1910, its receipt was not established until November 12, 1910.")

297. *Chattin* further confirms that establishing undue delay, without more, does not prove a denial of justice. Stressing on the board deference given to local court judgments, the tribunal in *Chattin* noted that a state will incur international responsibility if the judiciary's act amounts to "an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[493] Having considered "the whole of the proceedings," the tribunal then concluded that the proceedings against Chattin discloses the above deficiencies.[494] In addition to the undue delay, the tribunal considered the following irregularities:

> [the] absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all the charges brought against him,…, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the Court.[495]

298. Based on a similar consideration, the tribunal in *White Industries* dismissed the denial of justice claim. While the tribunal conceded that the delay was "certainly unsatisfactory in terms of efficient administration of justice," it held that the delay, in the absence of bad faith, did not reflect "a particularly serious shortcoming" or "egregious conduct that 'shocks or at least surprises, a sense of judicial proprietary.'"[496]

299. In line with the above cases, Claimants must prove that the time taken by the Constitutional Court to issue its final decision was unreasonable and that the delay amounts to "a particularly serious shortcoming" or "egregious conduct that 'shocks' or at least surprises, a sense of judicial propriety." [497]

ii. *Even though the Court applied the law correctly, a misapplication of the law does not constitute a denial of justice*

300. Article 10.5 does not bestow tribunals with an appellate jurisdiction.[498] A denial of justice claim cannot be brought so that a tribunal can rectify an erroneous interpretation and application of internal law. Many have respected this limitation. In *ECE v Czech Republic*, the tribunal unequivocally declared "that it is not the role of an international tribunal to sit on appeal against the legal correctness or substantive reasonableness of

[493] *Id.* at ¶ 10.

[494] *Id.* at ¶ 22.

[495] *Id.* at ¶ 29.

[496] *White Industries*, ¶10.4.23 (**RL-0198)**.

[497] *Id.*

[498] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award (November 1, 1999), ¶ 99(**CL-0144);** *Mondev v. USA*, Award, ¶ 126 **(RL-0018)** ("it is not the function of NAFTA tribunals to act as courts of appeal.").

individual administrative acts or the judgments of a municipal court reviewing them"[499]

301. The conclusion remains the same despite the gravity of the erroneous decision. As Prof. Jan Paulsson explains:

> [I]n modern international law there is no place for substantive denial of justice. Numerous international awards demonstrate that the most perplexing and unconvincing national judgments are upheld on the grounds that international law does not overturn determination of national judiciaries with respect to their own law.[500]

302. Denial of justice is limited to due process violation; a serious irregularity "that shocks, or at least surprises, a sense of judicial propriety."[501] To avoid a contrary reading, Article 10.5(2)(b) of CAFTA restates that states' obligation are limited to the administration of "adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[502] Considering the consistent practice of limiting denial of justice to serious due process violation and the extra clarification added in Article 10.5(2)(b), the Tribunal should dismiss any challenges against the substantive decision made by Guatemalan courts.

c. Guatemala has not discriminated against Exmingua, Kappes or any of his companies

303. The customary international law minimum standard of treatment does not prohibit a state from extending preferential treatment to nationals or foreign investors. As noted by the tribunal in *Methanex v. USA*, "in the absence of a contrary rule of international law binding on the States parties, whether of conventional or customary origin, a State may differentiate in its treatment of nationals and aliens." [503] Pursuant to Article

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[499] *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award (September 19, 2013), ¶ 4.764 (**RL-0203)**. *See also Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (January 14, 2010), ¶ 283 **(RL-0204)**; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (April 8, 2013), ¶ 441 (**CL-0126)**.

[500] Jan Paulsson, *Denial Of Justice In International Law*, (Cambridge Univ. Press 2005), p. 82 (**CL-0171**). *See also* Zachary Douglas, International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed, 63 Int'l & Comp. L.Q., p. 877 (**RL-0191)** ("An authoritative determination of a claim of right or accusation of guilt by a domestic adjudicative body cannot be disturbed by an international court or tribunal simply on the basis that a more rational set of reasons was available to that domestic adjudicative body."); *Loewen v. USA*, ¶ 242 (**CL-0170).**

[501] Jan Paulsson, *Denial Of Justice In International Law*, (Cambridge Univ. Press 2005) p.196 (**CL-0170**); Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63 INT'l & COMP. L.Q. 867 (2014) p. 877 (**RL-0191**) ((("An authoritative determination of a claim of right or accusation of guilt by a domestic adjudicative body cannot be disturbed by an international court or tribunal simply on the basis that a more rational set of reasons was available to that domestic adjudicative body. ").

[502] *See also* The "World's Leading Legal Systems" as addressed in the widely accepted Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR") similarly defines denial of justice as a procedural rule.

[503] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and

10.3 and 10.4, State parties have committed against extending less favorable treatment to foreign investors. However, a breach of these provisions does not establish a violation of the minimum standard of treatment.[504]

304. Article 10.5 rather protects against "discrimination prohibited by international human rights law."[505] In other words, Article 10.5 only appears to prohibit discrimination in the sense of "specific targeting of a foreign investor on other manifestly wrongful grounds such as gender, race or religious belief, or the types of conduct that amount to a 'deliberate conspiracy […] to destroy or the investment."[506] Claimants alleged claim of discrimination must be reviewed under this standard. Accordingly, Claimants must establish that they were specifically targeted and afforded disparate treatment.

2) Claimants Have Not Proved That the Standards They Claim to Be Breached Are Part of the Customary International Law Minimum Standard of Treatment

305. Claimants argue that the customary international law minimum standard of treatment includes broad ranges of protections. Particularly, they argue that Article 10.5 includes the obligation to "act in good faith, refrain from acting arbitrarily, provide a stable and secure legal and business environment, and respect an investors' legitimate expectations that arise from conditions that the State offered to induce the investor's investment."[507]

306. Claimants have not submitted any evidence of state practice and *opinio juris* which supports their submission. Nor could they. State parties to CAFTA and other states which have adopted a similar provision as Article 10.5 have persistently rejected the standards advocated by Claimants.

a. Claimants Carry the Burden of Demonstrating that the Standards Alleged to be Breached are Part of Customary International Law

307. State parties to CAFTA-DR have intentionally limited the protection under Article 10.5 to those covered under customary international law minimum standard of treatment of aliens. Hence, a party claiming a breach of Article 10.5 carries the burden of establishing the existence of the relevant obligation under

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Merits (August 3, 2005), ¶ 25 **(RL-0227)**. *See also* UNCTAD Series on Issues in International Investment Agreement II, Fair and Equitable Treatment, 2012, p.82 **(RL-0268)**; *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award (March 6, 2018), ¶ 7.58 ("So far as concerns the Claimant's claims of "discriminatory treatment" contrary to NAFTA Article 1105(1), the Tribunal's agrees with the non-disputing NAFTA Parties' submissions that such protections are addressed in NAFTA Articles 1102 and 1103, rather than NAFTA Article 1105(1)") **(RL-0247).**

[504] CAFTA-DR, Article 10.5(3) **(CL-0001).**

[505] UNCTAD Series on Issues in International Investment Agreement II, Fair and Equitable Treatment, 2012, p.82 (**RL-0268**).

[506] UNCTAD Series on Issues in International Investment Agreement II, Fair and Equitable Treatment, 2012, p.82 **(RL-0268)**. Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105, p.126 **(RL-0211).**

[507] Claimants' Memorial, ¶ 209.

customary international law.[508] Annex 10-B explains the state parties' "shared understanding" of customary international law as follows:

> … customary international law" generally and as specifically referenced in Article 10.5…results from a general and consistent practice of States that they follow from a sense of legal obligation.

308. The requirements under Annex 10-B has been widely recognized as essential elements of customary international law:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief, i.e. the existence of a subjective element [emphasis added], is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.[509]

309. Respondent agrees that custom can and does change overtime. But Claimants have not established a change in custom. They have not presented any evidence which indicates states' willingness to expand the minimum standard treatment to include the above alleged obligations. Nor have they demonstrated *opino juris*. Instead, Claimants attempt to find support in arbitral decisions that have interpreted "autonomous clauses" of fair and equitable treatment.[510] Many tribunals have dismissed such strategy of establishing customary international law.[511] As explained in *Glamis*:

> Ascertaining custom is necessarily a factual inquiry, looking to the actions of States and the motives for and consistency of these actions. By applying an autonomous standard, on the other hand, a tribunal may focus solely on the language and nuances of the treaty language itself and, applying the rules of treaty interpretation, require no party proof of State action or *opinio juris.* This latter practice fails to assist in the ascertainment of custom.[512]

310. Neither state practice nor the jurisprudence on the minimum standard of treatment consider the

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[508] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (June 8, 2009), ¶ 603 **(RL-0041)** ("it is necessarily Claimant's place to establish a change in custom."); *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, Judgment (August 27, 1972), p. 200 (**RL-0205)**.

[509] *North Sea Continental Shelf cases (Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands*), Judgment (February 20, 1969), ¶ 77 (**RL-0206)**. *See also Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (June 8, 2009), ¶602 **(RL-0041)**.

[510] *See* Claimants' Memorial, ¶¶213-214, 226, *referring to Tecmed v. Mexico*, Award **(CL-0122);** *id*., ¶¶ 216, 226, 234, referring to *MTD v. Chile **(CL-0208)***; *id*., ¶217 referring to *Walter Bau v. Thailand **(CL-0206)***; *id*., ¶¶218,234, referring to *Arif v. Moldova **(CL-0126)***.

[511] *See Glamis Gold, Ltd*, Award (June 8, 2009), ¶607 **(RL-0041);** *See also Cargill*, Award, ¶ 276 **(CL-0197).**

[512] *Glamis Gold, Ltd*, Award (June 8, 2009), ¶607 **(RL-0041)**. *See also See also Cargill*, Award, ¶ 278 **(CL-0197).**

obligations alleged by Claimants to be part of the customary international minimum standard of treatment.

b. The Practice Points to the Contrary: The Standards Alleged by Claimants Are Not Part of Customary International Law Minimum Standard of Treatment

311. Instead of endorsing the standards alleged by Claimants, state parties to CAFTA, NAFTA and other investment agreements which include a provision similar to Article 10.5 have consistently rejected their protection under the customary international law minimum standard of treatment.

i. *The duty to protect an investor's legitimate expectations*

312. Claimants have provided no evidence of practice of the CAFTA member states, let alone practice of other states that have adopted the minimum standard of treatment, to establish that the protection of legitimate expectations have attained the status of customary international law.

313. Claimants' submission is rather in stark contrast with the current state practice and contrary to well established case law. Four out of seven of the CAFTA member states have held that that the fair and equitable treatment under the minimum standard of treatment does not include an obligation to protect. Four out of seven of the CAFTA member states have held that that the fair and equitable treatment under the minimum standard of treatment does not include an obligation to protect legitimate expectations.[513] All three NAFTA member

[513] *See Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Submission of the Republic of El Salvador as a Non-Disputing Party under CAFTA Article 10.20.2 (January 1, 2012), ¶7 **(RL-0190)** ("the requirement to provide "Fair and Equitable Treatment" under CAFTA Article 10.5 does not include obligations of transparency, reasonableness, refraining from mere arbitrariness, or not frustrating investors' legitimate expectations."); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of the Republic of El-Salvador (October 5, 2012), ¶16 **(RL-0188)** ("the concept of "fair and equitable treatment" used in CAFTA-DR is limited to the context of denial of justice (unless a party proves otherwise) and does not include the protection of an investor's legitimate expectations or the protection against measures that are merely arbitrary, two ideas that have not been established as norms of customary international law."); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Guatemala's Counter Memorial on Merits (October 5, 2010), ¶¶ 424-438 **(RL-0269)**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of the Republic of Honduras (November 15, 2012), ¶10 **(RL-0186)**("The Republic of Honduras considers the following specific examples of conduct that may violate the minimum standard of treatment: a serious denial of justice, a manifest arbitrariness, a flagrant injustice, a complete lack of due process, a manifest discrimination, or the manifest absence of reasons for a decision. However, because the focus should be on the conduct of the State, the Republic of Honduras does not considers it valid or necessary to refer to the expectations of investors to decide if the minimum level of treatment has been violated."); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Submission of the United States of America (November 23, 2012) ¶ 6 **(RL-0187)** ("States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's "expectations" about the state of regulation in a particular sector. Regulatory action violates "fair and equitable treatment" under the minimum standard of treatment."); *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, United States of America Third Non-Disputing Party Submission (February 3, 2020), ¶ 24 (**RL-0223)** ("The concept of "legitimate expectations" is not a component element of "fair and equitable treatment" under customary international law that gives rise to an independent host State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors'

states are of the same opinion.[514]

314. The different construction of Article 10.5 and Article 10.7(Annex 10-C) further proves the state parties' intention to exclude legitimate expectations from being considered in the context of the fair and equitable treatment. Annex 10-C–explicitly includes an investor's "distinct" and "reasonable-backed expectations" as a relevant factor to determine whether there is an indirect expropriation of not. Such language is absent in Article 10. 5.

315. Neither of the NAFTA cases cited by Claimants support their contentions. First, the cases do not include analysis of state practice followed from a sense of legal obligations. Second, none of the cases have concluded that the minimum standard of treatment includes a stand-alone obligation of protecting an investor's legitimate expectations. *Waste Management II*–acclaimed by Claimants to "have established the contemporary minimum standard of treatment in the context of foreign investment"–offers the earliest example.[515] In *Waste Management II*, the tribunal noted that claimant's reasonable expectation is "relevant" in determining if the respondent's action was "arbitrary, grossly unfair, unjust or\ idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety."[516]

316. Consistent with *Waste Management II*, the tribunal in *Bilcon v Canada*, described "reasonable expectation" as a "factor to be taken into account in assessing whether the host state breached the international minimum standard of fair treatment."[517] Several scholars have also endorsed this view:

> the so-called 'obligation' to protect an investor's legitimate expectations is not a component of the customary international law minimum standard of treatment. In the present author's view, there is indeed little evidence to support the assertion that there exists under custom an obligation for host

expectations. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment…").

[514] *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Canada's Counter-Memorial (January 20, 2015) ¶ 405 (**RL-0208)** ("the mere failure to fulfil a commitment does not, without more, fall below the customary international law standard of treatment required by NAFTA Article 1105. Indeed, the Claimant has submitted no evidence of state practice or opinio juris to support its assertion that it does. There is simply no evidence of the practice of the three NAFTA Parties, let alone evidence of practice of any of the other members of the United Nations, sufficient to show that the protection of legitimate expectations has become a rule of customary international law."); *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Submission of the United States of America (July 25, 2014) ¶ 8 (**RL-0210)**; *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award (September 27, 2016) ¶ 335 (**CL-0210)** ("States may modify or amend their regulation to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's 'expectations' about the state of regulation in a particular sector.").

[515] *Waste Management II*, ¶ 204 (**CL-0022)**.

[516] *Id.* at ¶ 98.

[517] *Bilcon*, Award on Jurisdiction and Liability (March 17, 2015), ¶ 455 (**CL-0242**).

States to protect investors' legitimate expectations.[518]

317. Realizing the limited protections covered under the minimum standard of treatment of fair and equitable treatment, Claimants by-in-large depend on cases which interpreted the fair and equitable treatment as an autonomous standard.[519] But neither of the cases cited by Claimants offers any guidance on the interpretation of fair and equitable treatment under the minimum standard of treatment.

318. Unlike the present case, *Tecmed v. Mexico* involved a BIT which instruct state parties to provide fair and equitable treatment "according to International Law."[520] In this case, the tribunal interpreted the fair and equitable treatment as an "autonomous" standard, "taking into account the text of Article 4(1) of the Agreement according to its ordinary meaning (Article 31(1) of the Vienna Convention), or from international law and the good faith principle."[521] The tribunal in *MTD v. Chile*, followed the same approach.[522]

319. In *Arif v. Molodva,* the uniquely framed fair and equitable treatment in France-Moldova BIT influenced the tribunal's conclusion.[523] Unlike *Tecmed* and *MTD*, the tribunal's conclusion on legitimate expectations was not solely based on the ordinary language of "fair and equitable treatment," but the "the link of this undertaking to a hospitable investment climate and good faith..."[524]

320. No such language is included under CAFTA Article 10.5. The case of *Walter Bau v. Thailand* is similarly unhelpful to Claimants' submission. Like the above case, *Walter Bau* was concerned with a fair and equitable provision that is not associated with customary international law.[525] As previously mentioned, arbitral awards that that do not involve an analysis of fair and equitable treatment under the minimum standard of

[518]Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law On Article 1105, (Kluwer Law International 2013), p.147-148. (**RL-0211**).

[519] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 107-110 (*MTD Equity*) (**CL-0208)** (Article 2(2) of the BIT requires that "Investments of investors of either Contracting Party shall at all time be accorded fair and equitable treatment […]… The Tribunal further notes that there is no reference to customary international law in the BIT in relation to fair and equitable treatment. ")

[520] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003), ¶152. **(CL-0122).**

[521] *Id.* at ¶155.

[522] *MTD Equity* ¶ 107 **(**Article 2(2) of the BIT requires that "Investments of investors of either Contracting Party shall at all time be accorded fair and equitable treatment […] "). (**CL-0208)**

[523] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (April 8, 2013), ¶ 531(**CL-0126)**

[524] *Ibid.*

[525] Germany-Thailand BIT (2002), Article 2(3) ("Each Contracting Party shall in its territory in any case accord such investments by investors of the other Contracting Party and their returns fair and equitable treatment and full protection.").

treatment, do not prove or illustrate customary international law.[526] Accordingly, the tribunals in *Glamis, Gargill* and *Mobil* dismissed a similar approach of demonstrating that legitimate expectations are protected by a minimum standard of treatment.[527]

ii. Guatemala has not acted in an arbitrary manner

321. Claimants have similarly made no effort to establish that Article 10.5 includes an obligation to refrain from a mere arbitrary conduct. Citing to *Waste Management II*, they argue that the customary international law minimum standard of is breached if a state's "conduct is arbitrary."[528] Claimants further submit that *Waste Management II* expresses the "contemporary minimum standard of treatment" which have been "endorsed" by "numerous State Parties and tribunals."[529] Nothing could be further from truth.

322. Claimants have not presented any evidence of State practice to support the argument that a mere arbitrary conduct could breach the fair and equitable treatment under the minimum standard of treatment. Nor could it. Contrary to Claimants' submission, CAFTA State parties have adamantly insisted that the customary international law of the minimum standard of treatment can only be breached in the face of "manifest arbitrariness."[530] A similar view is shared by other States that have adopted a similar provision. This includes all NAFTA member states[531] and other states which have concluded trade and investment agreements with the United States and Canada.[532]

323. Claimants have also failed to show how its submission have secured "numerous" supports by

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[526] *Walter Bau AG v. Thailan*d, UNCITRAL, Award (July 1, 2009) ¶ 11.7 (**CL-0206)**.

[527] *Glamis Gold,* Award, ¶ 610 **(RL-0041)**; *Cargill,* Award, ¶¶ 280, 286 **(CL-0197)**; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, ¶¶113, 148-151**(RL-0219).**

[528] Claimants' Memorial, ¶ 204.

[529] *Id.* at ¶ 205.

[530] See *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, United States' Counter Memorial, (August 19, 2006), ¶¶ 227-228 (**RL-0041)**(Citing to *Thunderbird v. Mexico*, United States submitted that Article 1105(1) can only be breached if a state's action amounts to "gross denial of justice or manifest arbitrariness failing below international standards.") (CL-0198); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Submission of the United States of America (November 23, 2012) ¶ 7 (**RL-0187)**; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Submission of the Republic of El Salvador as a Non-Disputing Party under CAFTA Article 10.20.2 (January 1, 2012), ¶ 7(**RL-0190)**; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of the Republic of Honduras (November 15, 2012), ¶9-10 (**RL-0186)**; *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Costa Rica's Counter-memorial (April 8, 2016) ¶564 (**RL-0189)**.

[531] *See e.g., Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Canada's Counter Memorial (January 27, 2015), ¶213 (**RL-0212)** ("That standard, as has been overwhelmingly affirmed in NAFTA jurisprudence since 2001, protects investors against measures which "weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.").

[532] *See e.g., Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/2, Peru's Counter Memorial on the Merits and Memorial on Jurisdiction (October 6, 2015), ¶¶ 270-272 (**RL-0213)**.

investment tribunals. Tribunals have rather opined in the opposite. Many have confirmed that "a high threshold of severity and gravity is required to" find a breach of the minimum standard of treatment.[533] These tribunals have stressed that the alleged misconducts must be not just be arbitrary but manifestly arbitrary.[534]

324. A full reading of *Waste Management II* further reinforces Respondent's submission. In *Waste Management II*, the tribunal described the standard for a breach of the minimum standard of treatment of fair and equitable treatment as follows:

> the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety–as might be the case with a manifest failure of national justice in judicial proceedings or a complete lack of transparency and candor in an administrative process."[535]

325. The term "arbitrary" read in the context of this paragraph indicates that only serious misconducts can violate the fair and equitable treatment.

iii. *The obligation to act in good faith*

326. The fair and equitable treatment under Article 10.5 does not include an obligation to act in good faith. Claimants have not presented any evidence of State practice and *opino juris* to argue to the contrary. Granted, good faith is "one of the basic principles governing the creation and performance of legal obligations," but as held by the International Court of Justice "it is not in itself a source of obligation where none would otherwise exist" that, if breached, can result in State liability."[536] NAFTA and CAFTA parties have consistently expressed the same view.[537]

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[533] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/, Award, (August 25, 2014), ¶ 9.49 (**RL-0215)**. See also Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law On Article 1105* p. 232(**RL-0211)**

[534] See *Glamis Gold,* Award, ¶627**(RL-0041)**; *Eli Lilly and Co. v. Government of Canada*, Award, ¶ 222 **(RL-0040)**; *International Thunderbird*, Arbitral Award, ¶194 (**CL-0198)**; *Cargill,* Award, ¶ 284 **(CL-0197)**.

[535] *Waste Management II,* ¶471 (**CL-0022)**

[536] Patrick Dumberry The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105, (Kluwer Law International 2013) citing to *Nuclear Tests (Australia v. France),* Judgment, (20 December 1974) ICJ Rep. 1974, p.131(**RL-0211)**; *Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, (20 December 1988), ICJ, ¶ 94 (**RL-0216)**. *See also ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003, ¶ 191(**CL-0081)**.

[537] This consistent and longstanding position has been articulated in repeated submissions by the United States to NAFTA tribunals. *See, e.g., Mesa Power Group LLC v. Government of Canada,* NAFTA/UNCITRAL, PCA Case No. 2012-17, Submission of the United States of America ¶ 7 (July 25, 2014) (**RL-0210)** ("It is well established in international law that good faith is 'one of the basic principles governing the creation and performance of legal obligations,' but 'it is not

327. None of the cases referenced by Claimants' support their submission. In *Merrill & Ring v. Canada*, the tribunal noted that even if the obligation to act in good faith is not a "stand-alone obligation[] under Article 1105(1) or international law, and might not be a part of customary law either, [it is] to a large extent the expression of general principles of law and hence also a part of international law. "[538]

328. Article 10.5 is clear; the fair and equitable treatment does not require treatment beyond those afforded under the customary international law minimum standard of treatment of aliens. The question is whether a state has an obligation to act in good faith under customary international law minimum standard of treatment and not whether such obligation exists under "international law." The tribunal's conclusion in *Merrill & Ring* is therefore irrelevant to the present case.

329. In *Walter Bau*, the tribunal interpreted fair and equitable treatment as an autonomous standard.[539] Even in that instance, the tribunal did not conclude that the fair and equitable treatment includes the obligation to act in good faith.

330. In conclusion, Claimants have not presented the evidence required to show that the fair and equitable treatment under Article 10.5 obliges a state to act in good faith.

iv. The duty to provide a stable and secure legal business environment

331. Claimants have neither established that Article 10.5 affords investors right to a "stable and secure legal business environment" nor have they defined this obligation.

332. The cases cited by Claimants are unhelpful to the present case. None of the cases discussed by Claimants have concluded that the customary international law of the minimum standard of treatment includes the obligation to provide a "stable and legal business environment." This is understandable: all of the cases interpreted fair and equitable treatment as an autonomous standard. But as noted earlier, such cases do not illustrate customary international law and hence are irrelevant.[540]

333. There are more reasons why the cases are inapplicable. Even the cases cited by Claimants have not

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in itself a source of obligation where none would otherwise exist.'"); *Clayton v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Submission of the United States of America ¶ 6 (Apr. 19, 2013) **(RL-0217)** (same); *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter Memorial of Respondent United States of America, p. 94 (December 22, 2008) **(RL-0154)**; *Canfor Corp. v. United States of America*, NAFTA/UNCITRAL, Reply on Jurisdiction of Respondent United States of America, p. 29 fn.93 (August 6, 2004) (**RL-0218)**.

[538] *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award (March 31, 2010) ¶ 187 (**CL-0201)**.

[539] *Walter Bau AG v. Thailand*, UNCITRAL, Award, ¶11.1 **(CL-0206)**. *See* Germany-Thailand BIT (2002), Article 2(3) **(RL-0207)**.

[540] *Cargill*, Award, ¶ 290 **(CL-0197)**.

concluded that the autonomous fair and equitable treatment includes the obligation to provide "a stable and secure legal business environment." In *Arif v. Moldova,* the tribunal concluded that the respondent violated its obligation to provide fair and equitable treatment because it breached claimant's legitimate expectations of a secure legal framework."[541] It did not conclude that respondent had an obligation to provide a secure legal framework.

334. For similar reasons, *Walter Bau* also offers no guidance. The tribunal in *Walter Bau* did not conclude that the fair and equitable obliges states to act in a "consistent" manner.[542] While the tribunal referred to the interpretation of fair and equitable treatment in *Biwater v. Tanzania*, it only endorsed the tribunal's conclusion that the fair and equitable treatment includes protection of legitimate expectations.[543] Nor did the tribunal in *Tecmed v. Mexico* rule that an investor has a right to a "stable and secure legal environment." Rather, the tribunal merely concluded that a foreign investor expects that a state would not act arbitrarily.[544]

335. Finally, Claimants' reliance on the principle of estoppel is also misplaced. They argue that the general principle of estoppel "prohibits a party 'from changing its position after it has "made or consented to a particular statement upon which another party relies in subsequent activity to its detriment or the other's benefit.'[545] Relying on this principle, Claimants faults the Guatemalan courts' decision to suspend the exploitation license. But like all the rest of the alleged standards, Claimants fail to establish how the customary international minimum standard of treatment includes such obligation. Nor could they. Even autonomous fair and equitable treatment standard does not provide such protection. This was affimred in *Arif v. Moldova*. In *Arif*, claimant argued that respondent is "estopped from alleging that Mr. Arif had an invalid right pursuant to Moldovan law because it was Moldova itself that granted him this right."[546] The tribunal rejected claimant's submission stating that accepting such argument "would inevitably imply that Moldova can be liable at an international level for the correct application by the Moldovan courts of Moldovan law in lawsuits filed by a private competitor."[547]

336. In short, Claimants have not established that the customary international law minimum standard of

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[541] *Arif v Moldova*, Award, ¶ 547(**CL-0126)**.

[542] *See* Claimant's Memorial, ¶ 217; *Walter Bau AG v. Kingdom of Thailand*, UNCITRAL, Award, ¶ 11.5 **(CL-0206)**

[543] *Walter Bau AG v. Kingdom of Thailand*, UNCITRAL, Award, ¶ 11.7 **(CL-0206)**

[544] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003) ¶ 154 ("The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities") **(CL-0122).**

[545] Claimants' Memorial, ¶ 235

[546] *Arif v. Moldova*, Award, ¶ 419 (**CL-0126)**

[547] *Ibid*.

treatment includes the obligation to provide a stable and secure legal business environment or the principle of estoppel.

3) Guatemala has not Violated the Fair and Equitable Treatment of Customary International Law or Breached the Standards Proposed by Claimants

337. In Section III. B, Claimants argue that Respondent breached the fair and equitable treatment because it acted arbitrarily towards Exmingua. The arbitrary acts, according to Claimants, are as follows:

- The Constitutional Court's suspended Exmingua Progreso VII exploitation license by "retroactively imposing a new licensing requirement contrary to established law, *years after* Exmingua had been granted and been operating under a valid exploitation license."
- Following the Court's decision, MEM suspended Exmingua Progreso VII exploitation license and with no legal basis temporarily revoked Exmingua's exportation license.
- Respondent filed "meritless and harassing criminal actions against Exmingua employees, and arbitrarily and unlawfully impounding concentrate."
- MEM rejected Exmingua's request to suspend the EIA requirement to conduct local consultations until "there no longer is an impediment resulting in a physical and material impossibility." Instead, it directed Exmingua to file the EIA for Santa Margarita within 30 days of Exmingua' notification of the resolution.[548]

338. As further described below, the claim has no merit.

a. The threshold for finding a breach of arbitrariness is high and requires more than a showing of an illegal act

339. Even if the fair and equitable treatment of the minimum standard of treatment protects investors from arbitrary measures, Claimants have failed to demonstrate that Guatemala acted arbitrarily. A high threshold of liability is required to establish a finding of arbitrariness.[549] Arbitrariness in international law is "not so much something opposed to a rule of law, as something opposed to the rule of law."[550] In other words, "by itself, and without more, unlawfulness cannot be said to amount to arbitrariness..." To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right."[551] Rather, arbitrariness−as noted in *ELSI*−"is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[552] The definition framed in *ELSI* has been acknowledged by many as "the land mark

[548] Claimants' Memorial, ¶ 221, 243

[549] Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law On Article 1105, (Kluwer Law International 2013), p.124 (**RL-0211**); Jacob Stone, *Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment*, Leiden Journal of International Law (2012), 25, p. 99 **(RL-0270).**

[550] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy),* Judgment of 20 July 1989, [1989] ICJ Rep., ¶128 **(RL-0199).**

[551] *Id.* at ¶124.

[552] *Id.* at ¶128.

case for the definition of arbitrariness at international law."[553]

340. NAFTA tribunals tasked with interpreting fair and equitable treatment of the minimum standard of treatment have adopted the strict standard set in *ELSI*.[554] Following the standard set by the ICJ, many tribunals have consistently insisted that "something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1)."[555]

341. As explained earlier, due to the special nature of adjudication, domestic judgments enjoy more deference than other governmental institutions. Unlike other orders, adjudication "gives formal and institutional expression to the influence of reasoned argument in human affairs."[556] A national court is also better placed and equipped in interpreting the national law. Hence, as rightly put by Professor Paulsson, "the general rule is that the final word as to the meaning of national law should be left with the national judiciary."[557]

342. The "general rule" holds true even if a court retroactively applied a new rule.[558] Due to the high threshold required to establish arbitrariness, claimants rarely succeed in establishing an arbitrary measure. For instance, in *Waste Management II* the tribunal dismissed claimant's fair and equitable treatment claim, noting that there was insufficient evidence to conclude that the respondent "acted in a wholly arbitrary way or in a

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[553] Jacob Stone, *Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment*, Leiden Journal of International Law (2012), p.88 **(RL-0270).**

[554] *Thunderbird International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 26, 2006, ¶194 **(CL-0198)**; *Glamis Gold,* Award, ¶ 22 **(RL-0041)**. *See also Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (March 17, 2015), ¶ 625 **(CL-0242)**; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002), ¶ 127 **(RL-0018).**

[555] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award (January 9, 2003), ¶190 **(CL-0081)**. *See also Glamis Gold*, ¶ 625 ("arbitrariness that contravenes the rule of law, rather than a rule of law, would occasion surprise not only from investors, but also from tribunals. This is not a mere appearance of arbitrariness, however—a tribunal's determination that an agency acted in a way with which the tribunal disagrees or that a state passed legislation that the tribunal does not find curative of all of the ills presented; rather, this is a level of arbitrariness that, as International Thunderbird put it, amounts to a "gross denial of justice or manifest arbitrariness falling below acceptable international standards."") **(RL-0041)**; *International Thunderbird Gaming Corporation* ¶ 160 **(CL-0198)** "[i]t is not up to the Tribunal to determine how [the state regulatory authority] should have interpreted or responded to the [proposed business operation], as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters (which may vary from country to country)").

[556] Zachary Douglas, International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed, 63 INT'l & COMP. L.Q. 867 (2014), p. 876 **(RL-0191).**

[557] Jan Paulsson, Denial of Justice In International Law, (Cambridge Univ. Press 2005), p.73 **(CL-0171)**.

[558] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002), ¶ 137 ("It is normally for local courts to determine whether and in what circumstances to apply new decisional law retrospectively") **(RL-0018).**

way that is grossly unfair."[559] The tribunal reached its conclusion despite agreeing that the respondent: i) "inadequate[ly] enforce[d]" a city ordinance; ii) "failed in a number of respects to fulfill its contractual obligations to Claimant; and" iii) "attempted to enforce a performance bond in a "problematic" manner.

343. Claimants cite to *GAMI v. Mexico*, but the case does not help its claim. *GAMI* affirmed that applying national laws arbitrarily may result in liability. But consistent with previous decisions the tribunal insisted that a misapplication of law does not amount to an arbitrary act. The tribunal then outlined the following four implications:

> (1) The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law. (2) A failure to satisfy requirements of national law does not necessarily violate international law. (3) Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements. (4) The record as a whole - not isolated events - determines whether there has been a breach of international law. It is in this light that GAMI's allegations with respect to Article 1105 fall to be examined.[560]

344. Claimants have not alleged anything more than a violation of Guatemalan law. As described above, a violation of a national law, even if proved, cannot without more result in a breach of the minimum standard of treatment. Claimants' submission must therefore be dismissed.

b. The Guatemalan court decisions were not arbitrary, but legal, reasonable and foreseable

345. Claimants have failed to demonstrate how the Guatemalan courts decisions were arbitrary, let alone manifestly arbitrary. It is worth noting what Claimants do not allege. There is no claim that the courts "willful[ly] disregard[ed]…due process of law." Nor do Claimants allege that the courts' measures "lead to justified concerns as to the judicial property of the outcome." Claimants submission rather rests on alleged arbitrary conduct: the suspension of Exminuga's exploitation license by the Guatemalan courts through a "novel, "game-changing," and a "retroactive application" of the law.[561]

346. Tribunals have repeatedly rejected such claims. The incorrect application of the law, including the retroactive application of a new law does not amount to arbitrariness. Indeed, the tribunal in *Mondev v. USA*, rejected the type of argument that Claimants attempt here, noting that "[i]t is normally for local courts to

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[559] *Waste Management, Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award (April 30, 2004), ¶115 **(CL-0022)**

[560] *GAMI Investments Inc. v. Mexico*, UNCITRAL, Award of 15 November 2004, ¶ 97 **(CL-0036).**

[561] Claimants' Memorial, ¶¶ 229-230.

determine whether and in what circumstances to apply new decisional law retrospectively."[562] Apart from alleging that the conclusions reached by the courts was contrary to Guatemalan law, Claimants have not established any arbitrariness in the decisions of those courts. For the reasons, their claim should be rejected.

347. As was explained extensively in section III *supra*, the obligation to consult with Indigenous Peoples and tribes has been a legal requirement in Guatemala since 1996. Moreover, even before the Claimants' investment in Guatemala had been realized, there were already sufficient decisions of the Constitutional Court establishing the requirement to consult with Indigenous Peoples in a manner compatible with their culture and practices.[563] Moreover, as the mining experts point out, the EIA itself recognized that the area of the mine has more than 50% of the population identifying as Indigenous and Tribal Peoples,[564] and nevertheless, Claimants did not require that the consultations take place in an appropriate manner. The most minimum of due diligence would have informed them of the need to conduct the consultations with the surrounding communities in a manner compatible with their culture and practices.[565]

348. It is clear that the decision from the Supreme Court, which was later affirmed by the Constitutional Court was far from "novel." In fact, since 2007, the Constitutional Court has emphasized that indigenous communities have a right to be consulted before any measure is issued, including an exploitation license.[566] The Constitutional Court has also indicated that the lack of consultation guidelines does not excuse the fact that a consultation has not taken place as required under ILO Convention 169.[567]

c. The suspension of the exportation license by MEM was temporary and reasonable

349. Claimants allege that MEM arbitrarily suspended Progreso VII exportation license but makes no effort to substantiate its claim.[568] Following the Supreme Court's decision to suspend the exploitation license through the *amparo provisional*, MEM temporary suspended the exportation license for Progreso VII until the Constitutional Court issued its respective decision.[569] After Exmingua's appeal of the decision, MEM revoke

[562] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002) ¶ 137. **(RL-0018)**

[563] *See* Section III discussion of the cases of *Rio Hondo I, Rio Hondo 2* and *Cementos Progreso.* In the case of Cementos Progreso, the Constitutional Court had already plainly developed all the requirements present in any of the subsequent decisions of the courts with regards to consulting with Indigenous and Tribal Peoples. This decision predated by two months the alleged consultation carried by Exmingua and predates practically the totality of the alleged investment made.

[564] SLR Report, Section 7.5., License to Operate.

[565] This issue was also subject to consistent precedent at the Inter-American Court of Human Rights.

[566] *See Sipacapa*, Case No. 1179-2005, p. 8.4 **(C-0440**).

[567] Decision in *Cementos Progreso*, p. 18 (**R-0080**); *See also* Richter Report, ¶¶ 26, 27 and 29.

[568] Claimants' Memorial, ¶¶ 221, 231

[569] Resolution No. 146 issued by MEM dated May 3, 2016 (**C-0140**).

the suspension in the months following the appeal.[570] Any legal error that Claimants allege has been made by MEM in revoking the license was rectified by this last decision. As a result, the claim is disputable.

d. The criminal charges and the gold impoundment did not violate national law or mandatory principles of international law

350. Claimants' argument regarding the alleged criminal charges and gold impoundment are meritless. Claimants submit that the criminal charge brought against Exmingua's employees on May 9, 2016, and the subsequent impoundment of the gold concentrate were "arbitrary" and "unlawful."[571] Their claim, however, has no basis under international law.

351. International law allows a State to "organize the enforcement of laws on its own territory in such manner as it may reasonable choose."[572] Claimants have no established that the process or the seizure were illegal, arbitrary or contrary to "general principles of international law." Such unfounded allegations should be dismissed.

352. Moreover, the facts demonstrate that the allegations are absolutely unfounded, inaccurate and its clear that Claimants have voluntarily decided not to resolve these issues in order to have an argument to present here. While in their own valuation they claim that the gold concentrate has a value of USD 600,000.00, their claims of alleged violations of the standards, is in the hundreds of millions. The upside is resounding.

353. With respect to these accusations, there is much to say. First, it must be noted that it is very difficult to understand Claimants' argument because they constantly confuse, whether intentionally or not, the names of the courts, the types of measures adopted, and even the name and title of the individuals involved. And this is not simply due to the disastrous first translation they presented, which was finally transmitted to Guatemala three months after the original filing date of the brief, but there are also stark differences between the English and Spanish versions. For example, in the English version they mention the "Attorney General" as the person who carried out the investigations, while in the Spanish version the correctly identify the entity as the Prosecutor's Office (*Ministerio Público*), in other words, the original English version was incorrect.[573] They also mention the "confiscation" and "seizure of the gold concentrate," when the gold was sequestered (in custody) under the terms of articles 200, 201 and 202 of Guatemala's Code of Criminal Procedure.[574] In fact,

[570] Decision of the Constitutional Court in Case No. 1592-2014 issued on May 5, 2016 (**C-0143**); Resolution No. 5194 issued by MEM dated October 24, 2016 **(C-0142**).

[571] Claimants' Memorial, ¶¶ 237-241.

[572] Jan Paulsson, Denial of Justice in International Law, (Cambridge Univ. Press 2005), p. 174 (**CL-0171)**.

[573] The correct translation and the office in Guatemala with the powers of criminal prosecution is the "Office of the Prosecutor" or "Prosecutor's Office" (*Ministerio Público***)**.

[574] Code of Criminal Procedure No. 51-92, Arts. 200, 201 and 202 (**C-0406**).

there has been no confiscation, the gold concentrate, as well as other items held, were being held in custody as evidence. Even the administrative facilities at the mine where part of the gold concentrate is found has been sealed with a tape that reads "EVIDENCIA MINISTERIO PUBLICO."[575]

354. In the same vein, another issue of great importance is that there was no "undercover operation" to detain the employees of Exmingua who were transporting the gold concentrate. Undercover operations in Guatemala are focused on combating organized crime, while what occurred here was simply a routine traffic stop that resulted in the determination that the individuals involved were blatantly committing a crime. The State cannot defend itself effectively if Claimants, whether intentional or not, fail to accurately identify the relevant terms of the law.

355. Notwithstanding the fact that the criminal investigation is still open and is still being conducted by the competent authorities in Guatemala, there is no doubt that the exploitation of natural resources has been carried out illegally. Exmingua should have stopped production on November 11, 2015 due to the legal effects of the Provisional Amparo ordered by the Supreme Court (acting as Amparo Court). However, in the unlikely event that it was accepted that Exmingua did not receive notification on that date, it was notified on December 1, 2015 when it appeared in the case of the amparo proceeding. Neither Exmingua nor the Claimants can claim ignorance of the law. Finally, and even if for any reason the notification of the suspension of exploitation had been made only on March 16, it is absolutely clear and proven, based on the inspection made by the MEM on May 2, 2016, that they had continued the exploitation even up to the day before the inspection, May 1, 2016.[576]

356. It is also important to note that the Claimants have been invited to retrieve some of the items that were seized from them such as cell phones and machinery, which have already been assessed as evidence by the Authorities, and are therefore no longer needed as evidence, but -as explained above- they refuse to retrieve.[577] With respect to the gold concentrate, Claimants fail to mention that (a) a significant portion of such concentrate is at Exmingua's own facilities under the care of Exmingua itself, and that (b) with respect to the concentrate that was seized, it was transferred and placed under the custody of the judicial body pursuant to a resolution in

[575] Tape which was erected to seal the area where the gold concentrate is located.

[576] *See* MEM Inspection of EXMINGUA (May 2, 2016) **(R-0121)**.

[577] Decision of the Criminal Court of Fourth Instance, ordering the return of kidnapped objects by the Prosecutor's Offiec (April 27, 2018) **(R-0122)**; Writ of Request from the Prosecutor's Office requesting the issuance of a new order for the return of the evidence entered into the Warehouse of the Judicial Branch (June 4, 2018) **(R-0123)**. *See also* Summons issued by the Prosecutor's Office (December 4, 2020) **(R-0124)** (by email to Exmingua and its legal representative in order to take the pertinent measures to meet the requirement made regarding the seized assets Given Since some of these expressions were made orally, Guatemala reserves the right to present testimonial evidence in the event that these facts are denied by the Claimants.

the same case file.[578] Up to the latest information available, Exmingua had not requested the return of the gold concentrate from the Criminal Court of Fourth Instance.

e. MEM's requirement of an Environmental Impact Assessments was not arbitrary

357. Claimants argue that Guatemala violated the fair and equitable treatment because MEM: i) "[a]rbitrarily demand[ed] in December 2016 that Exmingua file the EIA for Santa Margarita, duly approved by the MARN, within 30 days," and ii) "[u]njustifiably den[ied], in April 2017, Exmingua's request to suspend the EIA requirement to conduct local consultations,…and directing Exmingua to file the EIA for Santa Margarita within 30 days of Exmingua's notification of the resolution."[579] But they provide no explanation as to why the MEM's decision was arbitrary, placing Guatemala in a situation where it is unable to engage with Claimants' submission.

358. The facts weaken Claimants' allegation. As noted by Claimants, Exmingua "was under an obligation to prepare an EIA to obtain an exploitation mining license for the Santa Margarita area."[580] This includes conducting local consultations with the public.[581] According to Professor Fuentes, it is up to the MARN to either approve or reject the EIA. In carrying out the assessment, the MARN will review "the information contained in the Environmental Assessment Instruments, the audits and the opinions issued by public entities, as well as any observations or objections from the public."[582]

359. Claimants do not attempt to explain why the MARN or MEM should abrogate this rule. On December 21, 2016, MEM issued Resolution No. 4056, instructing Exmingua to file within 30 days a duly approved EIA for the Santa Margarita site.[583] With no respect to the deadline placed by MEM, on March 22, 2017, Exmingua requested MEM to indefinitely suspend of the consultation requirement, citing Article 50 of the Judiciary Law.[584] Exmingua claimed that it was unable to conduct the consultation because "access to the project areas has been blocked and the communities opposing the project have made threats."[585] On April 5, 2017, MEM

[578] Entry in Register 359-2017 of the Evidence Warehouse Department of the Central Judicial Warehouse of the Judiciary of Guatemala (July 26, 2017) **(R-0125)**, where the transfer of the 19 bags of gold concentrate was recorded.

[579] Claimants' Memorial, ¶ 245.

[580] Fuentes Report, ¶ 75.

[581] Fuentes Report, ¶¶ 13-15.

[582] Fuentes Report, ¶ 14.

[583] Official Notification No. 497 from the MEM to Exmingua, attaching Resolution No. 4056, (December 21, 2016) (**C-0012**).

[584] Letter from Exmingua to the MEM, attaching Notary Public's Certification (March 21, 2017) **(C-0013)**.

[585] *Id.*

declined the request, explaining that "there is no legal basis in the Mining Law" to grant Exmingua's request.[586] Neither Exmingua nor Claimants have engaged with the reason provided by MEM. Nor have they explained how the MEM's decision could be seen as arbitrary.

360. Article 50 of the Judiciary Law is unhelpful to Claimants' case. First, Claimants have not shown how the Judiciary Law, which is a procedural law, can repeal a substantive law. Even if it is applicable, Article 50 requires Claimants to report and prove the existence of such impediment within three days "from the moment the impairment started."[587] Exmingua's request is time barred. It applied for the suspension of the procedure on March 22, 2017, more than 3 days from when it first knew of the impediment.[588] Second, Article 50 does not permit a complete suspension of a legal requirement, it rather suspends the deadline for complying with the requirement.[589] Accordingly, Claimants' reliance on Article 50 is misplaced.

361. In addition, there is no evidence which shows that Exmingua was prevented from conducting the necessary consultation. In its application for suspension, Exmingua claims that it was not able to conduct the EIA because it could not "access… the project area."[590] But this is irrelevant. Community consultations do not take place at the project site, hence, its inability to access the project area could not hinder it from carrying out the necessary consultation. In addition, the evidence provided to the MEM and this Tribunal only notes that there were "several scattered banners and canvases with slogans against mining" in the "urban area of San Pedro Ayampuc municipality."[591] Clearly, such postings could not prevent Exmingua from accessing the mine.

f. The Constitutional Court did not, de facto or de jure, suspend the Santa Margarita exploration license or Claimants' alleges right to continue operation

362. Finally, Claimants argue that Guatemala violated its obligation to provide fair and equitable treatment by arbitrarily and unlawfully suspending the Santa Margarita exploration license and their right to continue operation.[592] The claim is based on false premises: i) the Constitutional Court arbitrary decision *de facto*

[586] Official letter No. 5099 of the MEM, attaching Resolution No. 1191 (September 22, 2017) **(C-0014)**

[587] Judiciary Law, Article 50 **(C-0415)**.

[588] *See* **(C-0013)**, The notary public allegedly reported on the blockade (March 14, 2017).

[589] Richter Report, ¶ 146 ("It was impossible from a legal standpoint for the Ministry of Energy and Mines to exempt the petitioning entity from the requirements to obtain the exploitation license for Santa Margarita. …pursuant to the principle of legality established in Articles 152 and 154 of the Political Constitution of the Republic of Guatemala").

[590] Letter from Exmingua to the MEM, attaching Notary Public's Certification (March 21, 2017) **(C-0013)**.

[591] *Id.* at p. 2; *See also* Fuentes Report, ¶ 77 (He claims that "it was physically impossible to approach the neighboring communities due to the obstruction exercised by certain groups which prevented the completion of the required social studies for the EIA," but Exhibit C-0454, the only evidence cited by Professor Fuentes, does not corroborate his clam.); Letter from Exmingua to the MARN dated 7 Apr. 2017, at 1 [at 1 ENG] **(C-0015)**; (**C-0550**) no evidence of blockade

[592] Claimants' Memorial, ¶¶ 242-243.

suspended Exmingua's exploration license,[593] ii) the Court's decision was arbitrary and unlawful, and iii) the exploration license of Santa Margarita gave Claimants the legitimate expectations that Exmingua would be granted an exploitation license and allowed to continue operation.[594]

363. None of these premises can stand further scrutiny. First, their claim is speculative. Claimants are not alleging that because of the Constitutional Court's decision Exmingua has lost its right under the Santa Margarita exploration license. They are instead guessing that "CALAS" or another entity may bring another *amparo* action to suspend the exploration license. [595] Surely, a state cannot be held liable for an action that it has not yet taken. The simple fact is the Constitutional Court's decision had no impact on Santa Margarita exploration or exploitation license. Exmingua stopped its operation in May 2016, long before it filed its appeal to the Constitutional Court.[596] Second, Claimants have not proved that the Constitutional Court's decision was arbitrary or unlawful. Finally, Claimants cannot reasonably expect that Exmingua would receive an exploitation by the mere fact that it had an exploration license. As accepted by Professor Fuentes, an exploitation license can only be granted if an presents a duly approved EIA. Exmingua, as admitted by Claimants, failed to fulfill this requirement. Accordingly, Claimants submission has no merit.

4) Claimants have not Demonstrated that they had Legitimate Expectations nor have they Proved a Breach of duch Expectations

364. Claimants argue that the Guatemalan courts' suspension of exploitation of Progreso VII violated their legitimate expectations. Without presenting the required evidence under Annex 10-B, Claimants insist that the minimum standard of treatment under international customary law incudes the obligation to "respect an investor's legitimate expectations that arise from conditions that the State offered to induce the investor's investment.[597] The legitimate expectations that were allegedly violated include the following:

> Exmingua could continue to carry out mining operations at Progreso VII, and that the exploitation license could be suspended or revoked (if at all) only in accordance with the applicable framework under Guatemalan law.[598]

365. Even if the customary international law minimum standard treatment includes an obligation to protect legitimate expectations, the doctrine is inapplicable to domestic court decisions. A local court judgment could give rise to international state responsibility only if it commits a denial of justice. An investor can also have

[593] Claimants' Memorial, ¶ 243.

[594] *Id.* at ¶ 242.

[595] *Id* at ¶ 244.

[596] Kappes Statement, ¶ 134.

[597] Claimants Memorial, ¶ 209.

[598] *Id.* at ¶ 225.

no guarantee that a court will interpret a case in a certain manner.

366. In addition, Claimants' expectations were not legitimate, even tested under their own definition of the standard. Tribunals who have interpreted fair and equitable treatment under the minimum standard of treatment have narrowly defined legitimate expectations. For an expectation to be "legitimate," and protected under Article 10.5: i) the expectation must be based on a "definitive, unambiguous, and repeated" representation made by the state to induce the investment (i.e, it must have been made before the investment was made); and[599] iii) the expectation must be objective and reasonable. Neither of the elements exist in the present case.

a. The principle of "legitimate expectations" does not extend to national adjudications

367. A domestic judgment cannot trigger state responsibility in the absence of a denial of justice. Claimants cannot sidestep this rule and attack a well-reasoned decision under the disguise of a breach of legitimate expectation. In fact, such an approach was rejected in *Jan del Nul v. Egypt,* where the claimant requested that the tribunal assess the conduct of the local judiciary under a standard of fair and equitable treatment rather than under a standard of denial of justice.[600]

368. The inapplicability of the doctrine to local courts also derives from the recognition that in a democratic State no one is assured that a court will decide in their favor. To the contrary, an investor, as indicated in *Eli Lily v. Canada*, should assume that the "law would change over time as a function of judicial decision-making."[601]

b. At the time of investment, Claimants had not received specific assurance that indigenous communities need not be consulted prior the issuance of an exploitation license

369. Even if the doctrine extends to local courts' decisions, Claimants were not assured that the Guatemalan courts would not suspend the license as a result of applying the ILO Convention 169. To the contrary, an informed investor who claims to have making an investment whose current valuation is greater that USD 300 million, should have performed a due diligence in accordance with the complexity demanded by the project.

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[599] *Grand River Enterprises Six Nations, Ltd., et al. v. USA*, UNCITRAL, Award (June 12, 2011), ¶ 141 **(RL-0155);** *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB (AF) / 99/1, Award (December 16, 2002) ¶ 148-149 (Decmber 16, 2002) (the tribunal rejected Feldman's claim of legitimate expectation because, Unlike the Metalclad v. Mexico case, the representation was not "definitive, unequivocal and repeated.") **(CL-0093)**; *Glamis Gold*, ¶620 **(RL-0041)**; Andrew Newcombe and Luis Pardell, Law And Practice Of Investment Treaties: Standard Of Treatment (Kluwer Law International 2009), p. 170 ("IIA The jurisprudence emphasizes that, to create legitimate expectations, the conduct of the State must be specific and unequivocal.") **(RL-0197)**; *White Industries*, ¶10.3.7 ("Encouraging comments from government officials do not in themselves raise legitimate expectations. There must be an 'unequivocal assertion' or a 'definitive, unequivocal, and repeated warranty") **(RL-0198)**

[600] *Jan de Nul N.V. and Dredging International N.V. c. Republic of Egypt,* ICSID Case No. ARB/04/13, Award(November 6, 2008), ¶ 178, 190-191 **(RL-0143).**

[601] *Eli Lilly and Company v. The Government of Canada*, Final Award, ¶ 385 (**RL-0040).**

Had it been done, this due diligence would have revealed the existence of a duty to consult with the indigenous communities in the area of influence of the mine, which the EIA recognizes to be more than 50% of the local population.

370. There is a *jurisprudence constante* pointing towards a restrictive interpretation of legitimate expectation. To create legitimate expectations, a state must have provided an "individualized" and a "definitive, unambiguous, and repeated assurance" to an investor in order to "induce [its] investment." [602] On the other hand, statements merely promising a conducive investment environment, and commitments under national legislations and policies which extends to the public do not give rise to reasonable expectations. [603] This is especially true in the case of fair and equitable treatments tied to customary international law minimum standard of treatment. Moreover, if the legitimate expectation derived from the exploitation license, this is an act of the executive power subject to constitutional control. Claimants could not have legitimately expected hat they will be exempt from the laws of the place of investment. As the doctrine states, no one can have a legitimate expectation of having a different right to the one under which it made the investment. Regarding this issue, McLachlan, Shore and Weineger observe that "in the absence of some specific breach of international law, the investor must take the law of the host State as it finds it."[604]

371. Under such a standard, an investor is not protected against changes of legislation, unless the changes are manifestly arbitrary or grossly unfair.[605] Nor could an investor have legitimate expectation of a constant

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[602] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (January 12, 2011), ¶ 141 ("The "conduct" of the United States pointed to by the Claimants as giving rise to reasonable expectations of immunity from MSA measures is U.S. federal Indian law and the Jay Treaty. Ordinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly or implicitly by a state party.") **(RL-0155)**; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 (also known as Marvin Feldman v. Mexico), Award (December 16, 2002) ¶ 148-149 (Dec. 16, 2002) (the tribunal declined Feldman's claim of legitimate expectation because, unlike in the case of *Metalclad v. Mexico*, the representation was not "definitive, unambiguous and repeated.") **(CL-0093)**; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (June 8, 2009), ¶620 **(RL-0041)**; *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (November 30, 2011), para 10.3.7 ("Encouraging remarks from government officials do not of themselves give rise to legitimate expectations. There must be an 'unambiguous affirmation' or a 'definitive, unambiguous and repeated assurances.") **(RL-0198).**

[603] *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (November 30, 2011), ¶ 10.3.2 (the tribunal held that India's general representation that "*it was safe* […] *to invest in India and that the Indian legal system was, to all intents and purposes, the same as the Australian legal system*" could not give rise to legitimate expectations. The tribunal noted that the statement is "vague and general.") **(RL-0198).**

[604] Mclachlan, Shore, Weineger, INTERNATIONAL INVESTMENT ARBITRATION. SUBSTANTIVE PRINCIPLES, (2d. ed), pp. 328-329**(RL-0271)** (The authors also argue, which is very illustrative for our case: a final category of cases where courts have declared that the standard was not violated, is in those where the conduct itself of the investor has contributed to some extent to their loss).

[605] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012 ¶ 153 (**RL-0219**)(As noted in *Mobil v. Canada*, the customary international law minimum standard treatment is not, and was never intended to amount to, a guarantee against regulatory

interpretation of a law. This was affirmed in *Glamis v USA*. In this case, claimant's mining project was first approved by the US Department of the Interior's Bureau of Land Management (BLM) but its approval was later withdrawn by the Department of the Interior based on a legal opinion (the "M-Opinion").[606] The tribunal recognized that the M-Opinion "changed a decades-old rule and century-old regime upon which Claimant had based reasonable expectation."[607] But found no violation of the fair and equitable treatment. The tribunal formulated the issues as follows: "The issue presented to the Tribunal therefore is whether a lengthy, reasoned legal opinion violates customary international law because it changes, in an arguably dramatic way, a previous law or prior legal interpretation upon which an investor has based its reasonable, investment-backed expectations."[608]

372. The tribunal then concluded in the negative: "A violation of Article 1105 based on the unsettling of reasonable, investment backed expectation requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment."[609]

373. The same is true with respect to judicial decisions. An investor cannot reasonably expect that a court will not apply the law as it deems fit. A contrary argument has been rejected in *White Industries v. India.* In *White Industries*, claimant argued that India violated its legitimate expectations because its courts refused to enforce the award although it has ratified the New York Convention.[610] Similar to Claimants, White Industries argued that it had a legitimate expectation that "India, as a party to the New York Convention, would apply the Convention properly and in accordance with international standards."[611] The tribunal rejected the claim having found that India has not made any 'unambiguous affirmation' or a 'definitive unambiguous and repeated assurances' that the award will be enforced.[612]

374. *Bilcon v. Canada* is the only outlier. Among other, the tribunal in *Bilcon*, ignored the long-standing

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change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. Governments change, policies changes and rules change. These are facts of life with which investors and all legal and natural persons have to live with. What the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment. Those standards are set, as we have noted above, at a level which protects against egregious behavior").

[606] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (June 8, 2009), ¶¶ 87, 97, 152 **(RL-0041).**

[607] *Id.* at ¶ 761

[608] *Id.*

[609] *Id.* at ¶ 766

[610] *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (November 30, 2011), ¶10.3.1 **(RL-0198)**

[611] *Id. at* ¶ 10.3.1.

[612] *Id. at* ¶¶ 10.3.1, 10.3.7.

requirement of specific representation and, hence, the case is inapplicable. In *Bilcon*, an arbitration was initiated against Canada after the state rejected claimants' project to operate a quarry (the "White Point Project") in Nova Scotia. Following a widespread concern over the project's potential adverse environmental effect, the project was transferred to a federal-provincial joint review panel (JRP) which eventually recommended a cancelation of the project.[613] The tribunal held that the JRP's conclusion violated claimants' reasonable expectations because it has encouraged claimant to invest in White Scotia.[614] The conclusion is irrelevant. In his dissenting opinion, Professor Donald McRae, explained irrationality in the decision as follows:

> Assurances or encouragement by provincial officials have nothing to do with the expectation that an investor will have Canadian law applied properly to it. That is an expectation that an investor would have independently of any assurances or encouragement. Thus, the long excursus by the majority into the actions of provincial officials, apart from creating an aura of mistreatment of the Claimant, simply has no bearing on the alleged violation of Article 1105.[615]

375. The rest of the cases cited by Claimants are similarly irrelevant. Stretched to find any support under cases that have interpreted legitimate expectation under the minimum standard of treatment, Claimants rely on cases that offers no guidance to this Tribunal. All–*Tecmed, MTD,* and *Arif*– involve fair and equitable treatment under the autonomous standards.[616] Contrary to the consistent practice described above, the tribunals in these cases held that an investor's expectation could be based on existing national legislation. For instance, the tribunal in *Tecmed* simply concluded that the fair and equitable requires a State "to provide to international investment treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[617]

376. *Tecmed* has been criticized by many for being overly "broad in its application."[618] As noted by Professor Douglas and endorsed by several tribunals: "it is actually not a standard at all; it is rather a description of a perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever

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[613] *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award, ¶¶ 20-21 **(CL-0242).**

[614] *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award, ¶¶ 453-454 **(CL-0242).**

[615] *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae (March 17, 2015), ¶ 5. **(CL-0244)**.

[616] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003), ¶ 152 **(CL-0122)**; M*TD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004), ¶ 107 **(CL-0208)**; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (April 8, 2013), ¶¶ 526, 531 **(CL-0126)**.

[617] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States,* ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003), ¶ 154. **(CL-0122)**.

[618] *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (November 30,2011), ¶ 10.3.6 **(RL-0198).**

attain."[619]

377. The decisions even go against the approach taken by tribunals in cases that involved the interpretation of autonomous fair and equitable treatment provisions. For instance, in *EDF v. Romania*, the tribunal dismissed the approach taken in cases like *Tecmed*, preferring the narrow interpretation of legitimate expectations:

> The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would neither be legitimate nor reasonable.[620]

378. In this case, Claimants were not given specific assurance at the time of investment regarding the interpretation and application of ILO Convention 169. In particular, Guatemala did not tell Claimants that the exploitation license could not be suspended by the judiciary under Article 6 of Convention 169. On the contrary, as clearly emerges from the section of applicable Guatemalan law to the dispute, Claimants should have reasonably expected a consultation process would have to take place given that it had already become an affirmative obligation at the time of investment, and which had been repeatedly confirmed by the Constitutional Court.

c. Claimants' expectations were not objective or reasonable

379. Even if expectations could arise without a specific and unambiguous representation by Guatemala, Claimants could not have reasonably expected that a license granted without consultation of indigenous communities could not be suspended. Had Claimants done their due diligence on Guatemalan law and the socioeconomic, cultural and historical dynamics of the State, they would have easily anticipated the courts' decisions.

380. An investor cannot solely rely on the representations made by the host state, it must also conduct the

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[619] Zachary Douglas, Nothing If Not Critical For Investment Treaty Arbitration: *Occidental, Eureko and Methanex*, (2006) 22 Arbitration International, p. 28 **(RL-0272)**; *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (March 17, 2006), ¶¶ 303-304 **(CL-0154)**.

[620] *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award (October 8, 2009), ¶ 217-218 **(RL-0220)**. *See also id*., ¶ 218 ("the tribunal also noted that "the FET obligation cannot serve the same purpose as stabilization clauses specifically granted to foreign investors."); *Parkerings-Companiet AS v. Lithuania*, ICSID Case No. ARB/05/08, Award (September 11, 2007), ¶ 332 ("It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.") **(RL-0221)**.

necessary due diligence "particularly when investing abroad in an unfamiliar environment."[621] Primarily, "investors [must] assure themselves that their investments comply with the law. Such due diligence obligation is neither overly onerous nor unreasonable."[622] An investor must also be well acquainted with the overall regulatory framework of the host state and assess the possibility of a regulatory amendment.[623] A host state cannot be held internationally responsible for violating an expectation that is not supported by due diligence. In *Stadtwerke c. Spain*, the tribunal concluded that claimants could have predicted the changes to the renewable energy regimes had they reviewed previous judgments of the Spanish supreme court:

> This Supreme Court Judgment was a matter of public record at the time that the Claimants invested in Spain. A reasonable and prudent investor would have known of this decision, understood it implications for a contemplated investment, and adjusted expectations accordingly.[624]

381. Due diligence is not limited to understanding the regulatory framework. As noted in *Duke v Ecuador*, the investor must be aware of "all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic cultural and historical conditions prevailing in the host State."[625]

382. The type and level of investigation depends on the area of investment.[626] An investment that could potentially affect the rights of the nearby communities deserve a special due diligence.[627] Many institutions have emphasized on the importance of such exercise. For instance, for the Guiding Principles on Business and Human Rights instructs companies to respect human rights and avoid a potential infringement. Particularly,

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[621] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004), ¶ 164 **(CL-0208).**

[622] *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award (May 19, 2010), ¶ 58 **(RL-0153)**. See also *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (December 6, 2016), ¶ 506 **(RL-0151)**("the scope of the due diligence depends on the particular circumstances of each case, such as the general business environment, and includes ensuring that a proposed investment complies with local laws, as well as investigating the reliability of a business partner and that partner's representations before deciding to invest").

[623] Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law On Article 1105, (Kluwer Law International 2013), p.112 (an investor "takes the law of the host State as it finds it and cannot subsequently complain about the application of that law to its investment.") **(RL-0211)**.

[624] *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award (December 2, 2019) ¶ 278 **(RL-0273)**.

[625] *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, ICSID Case No. ARB/04/19 Award, (August 18, 2008), ¶ 340 **(CL-0202)**. *See also* ILO Convention 169 and the Private Sector Questions and Answers for IFC Clients, March 2007, p.1 ("Private sector companies need to be aware of the various legal, reputational, and business risks they may run when implementing projects with potential impacts on indigenous and tribal peoples and, at the same time, of the opportunities of forming partnerships with these peoples and delivering development benefits to them") **(RL-0302)**; *LG&EE Energy Corp v. Argentina*, Decision on Liability, (October 3, 2006), ¶ 130 ("the investor's fair expectations cannot consider parameters such as business risk or industry's regular patterns") **(CL-0161)**.

[626] *Churchill*, ¶ 506 (**RL-0151**) ("Investment tribunals also held that investors must exercise a reasonable level of due diligence, especially when investing in risky business environments")

[627] *Id.*

Principle 15(b) and Principle 18 require companies to take the following actions:

> Principle 15: identify, prevent, mitigate and account for how they address their impact on human rights and [628]
>
> Principle 18: assess **any actual or potential** adverse human rights impact with which they may be involved either through their own activities or as a result of their business relationships.[629]

383. According to the commentary of Principle 18, this includes identifying the "relevant human rights standards and issues; and projecting how the proposed activity…could have adverse human rights impacts on those identified."[630] The danger of failing to implement the above recommendation has been explained by the IFC in its 2007 Report, with an example of the Marlin project; a mining investment in Guatemala.[631]

384. Here, there is no evidence that Claimants did any due diligence as to Guatemalan law or the prevailing condition in Guatemala prior to making an investment. Had it done so, it would been fully apprised of requirement of consulting the indigenous communities.

i. *Claimants should have been aware of the consultation requirement under the ILO Convention at the time of its investment and prior to the issuance of the exploitation license*

385. Claimants recognize Guatemala's obligation under the ILO Convention 169 to "conduct consultations before issuing exploitation licenses."[632] Nonetheless, Claimants–albeit vaguely–describe their legitimate expectations and as follow :

> An exploitation license can only be revoked or suspended through Article 51 of the Mining Law or declaration of *Lesividad*.[633]

386. Claimants alleged that Guatemala, "at the time Exmingua's license was granted,…had not enacted any laws or regulations implementing the Government-led consultations envisioned by the Convention, beyond the requirement for license applicant-led consultations at the EIA stage, with which Exmingua complied in full."[634] Hence, "the requirement of public consultations under the ILO Convention 169 was satisfied by the

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[628] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy Framework, 2011 Principle 15(b) **(RL-0274)**.

[629] *Id.* at Principle 18.

[630] *Id.* at Principle 18, Commentary.

[631] ILO Convention 169 and the Private Sector, Questions and Answers for Clients (March 2007) (The failure of a government either to fulfill its obligation to implement the Convention, or to comply with its responsibilities under national legislation, can have consequences for a private sector project. For example, if a State fails to comply with obligations on prior consultation on a project, a private company may find that the licenses that have been granted are subject to legal challenge) (**RL-0302)**.

[632] Claimant's Memorial, ¶ 174.

[633] *Id.* at ¶ 229. See also Fuentes Report, ¶ 24.

[634] Claimant's Memorial, ¶¶ 79, 230, 224.

consultations made in connection with the granting of mining licenses set forth in the Mining Law and the Environmental Assessment, Control and Monitoring Regulations.[635]

387. While Claimants describe the Courts' decision, as "novel" and 'game-changing,'[636] a brief review of Guatemalan law and the jurisprudence indicates that the Courts' finding was anything but "novel." Unlike common law countries, in Guatemala ratified conventions automatically becomes part of the Constitution of Guatemala without any implementing legislation.[637] It has also been recognized since 1995 that ratified human right conventions take precedence over any domestic law, pursuant to the Article 46 of Guatemalan Constitution.[638] Accordingly, ILO Convention 169 is hierarchically superior than the Mining Law and takes precedence in case of conflict.

388. Guatemalan courts have consistently recognized the indigenous' right to consultation enshrined in these instruments. The Marlin Project is a good example. In 2002, Glamis Gold acquired the Marlin Mine located in the municipalities of Sipacapa and San Miguel de Ixtahuacán.[639] The following year it received an exploitation license, and its environmental impact assessment was approved by the MARN.[640] Indigenous communities and human right organizations protested against the mine as the license was granted without consulting indigenous communities.[641] *Sipicapa* confirmed the existence and requirement of prior consultation in mining projects. [642]

389. Claimants are aware of the *Sipicapa* case.[643] Indeed, Professor Fuentes, relies on this case in his expert report. In *Sipicapa*, the Constitutional Court held that indigenous' right to consultation under ILO Convention 169 is "unquestionable" and stressed that such consultation "must be complied with prior to the issuance of any license or any other measure."[644] In consecutive decisions, the Constitutional Court reiterated this right, always emphasizing that consultation must be conducted prior to taking measures that would affect the rights

[635] Fuentes Report, ¶ 51.

[636] Claimant's Memorial, ¶ 230. *See also* ¶ 229

[637] Constitution of Guatemala, Article 46 **(C-0414).**

[638] Advisory Opinion on Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO), Case 199-95 (May 18, 1995) **(R-0127)**.

[639] ILO Convention 169 and the Private Sector, Questions and Answers for IFC Clients, March 2007, p. 10 **(RL-0302)**

[640] *Id.*

[641] *Sipacapa*, p. 8 **(C-0440)**

[642] *Id.*

[643] *See* Fuentes Report, ¶ 50.

[644] *Sipacapa*, p. 8 (**C-0440**).

of indigenous communities.[645]

390. Referring to the above human right instruments, in December 2009 the Constitutional Court in the case of *Cementos Progresso* explained that these ratifications indicate Guatemala's clear commitment "to take a definite position on the indigenous people's right to consultation."[646] The Court then made the following conclusions: "a) consultations must be conducted in advance; (b) consultations are not completed by merely providing information; (c) consultations are to be conducted in good faith, as part of a procedure that creates trust between the parties; (d) consultations must be adequate and conducted through indigenous representative institutions."[647] More importantly, the Court unequivocally held that a lack of an implementing procedure does not absolve a failure to conduct consultation.

391. Indeed, CALAS' *amparo* is not unique to Guatemala. It is known that "indigenous groups elsewhere in the Americas have relied on the [ILO] [C]onvention [169] in their legal battles in national courts against extractive industry development projects."[648]

392. Nor is the obligation to consult limited to states that have ratified the ILO No. 169 Convention. The Inter-American Court of Human Rights have similarly recognized the indigenous' "right to be consulted and where appropriate, the obligation to obtain consent."[649] Considering the "close relationship" that indigenous communities have with their land, the court in *Yakye Axa Indigenous Community v. Paraguay*, noted that "States must respect "the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship […]."[650] In *Kichwa Indigenous Peoples of Sarayaku v Ecuador*, the court also held that Ecuador violated its international obligation "by failing to consult the Sarayaku People on the execution of a project that would have a direct impact on their territory."[651]

393. In conclusion, had Claimants exercised the necessary due diligence they would have easily known that:

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[645] *Rio Hondo I*, p 8,1-2 **(R-0088)**. *See also Rio Hondo II*, p. 12 (**R-0089**).

[646] *Cementos Progreso*, p. 12 (**R-0080**).

[647] *Id*. pp. 20-24.

[648] Amanda M. Fulmer, Angelina Snodgrass Godoy and Philip Neff, *Indigenous Rights, Resistance, and the Law: Lessons from a Guatemalan Mine*, LATIN AMERICAN POLITICS AND SOCIETY, VOL. 50, NO. 4 (2008), p.102 (**R-0128**).

[649] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting amparo definitivo, p 9 **(C-0144**), citing *Saramaka c. Suriname*, IACHR, Judgment (November 28, 2007) p.44 (**RL-0237**).

[650] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting amparo definitivo, p 11 **(C-0144),** citing *Axa Indigenous Community v. Paraguay*, IACHR, Judgment (June 27, 2005) ¶136 **(RL-0275).**

[651] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting amparo definitivo, p 11 **(C-0144),** citing *Pueblo Indigena Kichwa Indigenous Peoples of Sarayaku v Ecuador*, IACHR, Judgment (June 27, 2012), ¶232 **(R-0085).**

- The ILO Convention No. 169 and the other human right conventions ratified by Guatemala takes precedence over any domestic law, including the Mining Law.

- Pursuant to Article 6 of the Convention and the above human right instruments, the State is required to conduct consultation prior to issuing an exploitation license.

- Courts could suspend an exploitation license issued without the consultation of indigenous communities.

394. Hence, Claimants' claim of legitimate expectations must be dismissed.

ii. *The socioeconomic, cultural and historical conditions prevailing in the Tambor mining area, and generally in Guatemala should have cautioned Claimants against investing without consulting the indigenous communities*

395. The majority of the Guatemalan population is indigenous. Following the end of the civil war of 1996, the government of Guatemala concluded a peace agreement through which it committed to improve the conditions of indigenous communities . As noted by Wittman & Saldivar-Tanaka:

> [t]he 1996 peace accords recognized that both the historical social exclusion of Guatemala's indigenous and campesino rural populations and the unequal distribution of land were not only root causes of the civil conflict, but also primary obstacles to long-term national development and a lasting peace.[652]

396. Historically, investments made without the consultation of indigenous communities have subject to resistance. The Marlin Project is a common example. In 2002, Glamis Gold acquired the Marlin Mine located in the municipalities of Sipacapa and San Miguel de Ixtahuacán. The following year it received a 10-year exploitation license,[653] and its environmental impact assessment was approved by the MARN.[654] But the government's failure to consult the indigenous communities prior to the issuance of the license caused a huge uproar amongst the Sipicapa community. This is not limited Guatemala. Investments in Colombia and Peru have been stagnated due to the failure to consult indigenous communities. The Tribunal need not go far to understand the risk that were known to Claimants. In August 2012, Radius Gold transferred 49% of its share in the projects, describing the sell as a strategy to "dives problematic assets."[655] It is easy to speculate the

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[652] Luis Willems, *Mining and Indigenous Peoples in Guatemala: The Local Relevance of Human Rights* (2009) (Master Thesis, Universiteit Gent), p 31. **(R-0129).**

[653] *Id.*, pp. 41-43 **(R-0129)**.

[654] ILO Convention 169 and the Private Sector, Questions and Answers for IFC Clients, March 2007, p. 10 (Like CAPAS, "The NGOs claimed that the mining concession and the exploration and exploitation licenses were not valid because the Government had granted them without consulting with the indigenous peoples impacted by the project, as mandated by Convention 169 of the ILO, which was ratified by Guatemala in 1996.") **(RL-0302)**.

[655] Luis Solano, Ellen Moore, and Jen Moore, *Mining Injustice Through International Arbitration: Countering Kappes, Cassiday & Associates' claims over a gold-mining project in Guatemala*, EARTHWORKS (August 24, 2020), p.10 **(R-0130)**

reason behind Radius' reservation. From 2007-2010, several communities have been critical against mining projects. In June 2005, the residents of Sipacapa voted overwhelmingly against the operation of a gold mine in Sipacapa, San Marcos.[656] On May 13, 2007, an overwhelming number of communities voted against a mining project owned by Cementos Progresso. On June 23, 2007 the communities in Barillas voted against a mining project set to operate in the area. [657]

d. Even if Claimants' expectations were reasonable, Respondent has not breached these expectations

397. Claimants' legitimate expectations have not been breached. They submit that their only expectation was that the "exploitation license could be suspended or revoked (if at all) only with the applicable framework under Guatemalan law."[658] As described below, the Courts' action are consistent with their expectation. Like other democratic nations, the executive branch of the Guatemalan government is subject to checks and balances. Hence, a measure taken by the executive government can be challenged before a court, including mining licenses granted by the MEM. The exploitation license granted to Exmingua does not enjoy a special protection. The exploitation license was suspended pursuant to Guatemalan law. The Supreme Court and the Constitutional Court decision to suspend the exploitation license of Progreso VII followed the same analysis employed in 2009, in the case of *Cementos Progresso*.

398. Following a systematic interpretation of the Constitution, the Supreme Court analyzed the rights of indigenous peoples in Guatemala. The Constitution provides lands of indigenous communities "special protection from the State."[659] It further affords ratified human right conventions precedence above any law, including the Mining Law.[660] Claimants do not dispute this. Indeed, Professor Fuentes rely on a Constitutional Court decision which affirms this hierarchy.[661]

399. Consistent with the pervious decisions passed by the Constitutional Court, the Supreme Court concluded that "consultation within indigenous peoples in connection with mining exploitation and exploration

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[656] J. P. Laplante, *La Voz del Pueblo: Maya Consultas and the Challenge of Self-Determination for Socially Responsible Investment in the Mining Sector* (2004) (Master Thesis, University of Guelph), p. 2; *See also* J. P. Laplante & Catherine Nolin, *Consultas and Socially Responsible Investing in Guatemala: A Case Study Examining Maya Perspectives on the Indigenous Right to Free, Prior, and Informed Consent*, Society & Natural Resources International Journal, 27:3 (February 5, 2014), pp. 231-248, 239 **(R-0131)**.

[657] Laplante, p. 28.

[658] Claimant's Memorial, ¶ 225.

[659] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting amparo definitivo, p. 6 **(C-0144).**

[660] Constitutional Court of Guatemala, Case No. 3207-2016 and 3344-2016, June 22, 2020, p. 8 ("Thus, in the view of the Constitutional Court, Section 46 of the Constitution establishes that treaties are included in the corpus of constitutional law that is to be conformed to by all other elements in the legal system, with lower-ranking provisions thus being required to adapt to the contents of such instruments.") **(C-0145).**

[661] Fuentes Report, ¶ 50.

initiatives is a mandatory requirement"[662] and must take place prior to the issuance of a license or any administrative measure.[663] As a result, the Supreme Court suspended the license.[664] Subsequently, the Constitutional Court affirmed the decision, applying Guatemalan law and past precedent.

400. Given that the only expectations of Claimants were that Respondent regulate its license in conformity with Guatemalan law and given that the Constitutional Court suspended the license having correctly applied Guatemalan law, Respondent has not violated Article 10.5

5) Claimants have not made a case for denial of justice

401. In Section III.D, Claimants accuse the Guatemalan courts' of denying justice, but fail to establish the elements for such breach. By their own admission, the threshold for finding a denial of justice is high. Claimants agree that a denial of justice could only occur if a a court "administers justice in a seriously inadequate manner"[665] that it "shocks a sense of judicial propriety."[666] They further concede that a misapplication of law could amount to a denial of justice only if it is "clear" and done in bad faith.[667] As explained earlier, it is not the only requirement to establish denial of justice. In addition to demonstrating a serious violation of a fundamental rule of procedure, Claimants must also establish that they have given the judiciary as a whole the opportunity to fix the alleged violation by exhausting the available remedies

402. Claimants have not established a serious due process violation that meets the above described standard. Nor have they demonstrated that Guatemalan courts misapplied the law with the intention of harming Exmingua. In addition, they have not described how the existing judicial system as a whole failed to remedy the alleged serious maladministration of justice.

a. Claimants have not identified a serious or egregious violation of due process

403. Most of Claimants' denial of justice claim is concerned with the courts' application of national law. The only due process violations alleged by Claimants' are that: i) Exmingua was not served notice of CALAS' amparo action until after the supreme court rule on the *amparo provisional*;[668] ii) the Constitutional Court "took almost four years to reach its final decision in the amparo case brought by CALAS;"[669] and iii)

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[662] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting amparo definitivo, p 10 **(C-0144).**

[663] *Id.* at p. 11 **(C-0144)**.

[664] *Id.*at p. 18 **(C-0144)**.

[665] Claimants' Memorial, ¶ 268.

[666] *Id.* at ¶ 269.

[667] *Id.*

[668] *Id.* at ¶ 281.

[669] *Id.* at ¶ 292.

Guatemalan courts' treated "Exmingua less favorably than Oxec, Minera San Rafael and CGN."[670]

404. Claimants' submission fails for the reasons described below.

i. Exmingua's "right to be Heard" was not violated

405. Claimants argue that Exmingua's "right to be heard" was violated because it was notified of the amparo action filed by CALAS after the Supreme Court issued the amparo provisional.[671] Neither the facts or the laws support Claimants' conclusion.

406. First, the Amparo Law allows *ex parte* provisional amparos.[672] Even if the argument they make were true, Exmingua was not prejudiced as a result of joining the proceeding after the issuance of the provisional amparo.

407. On August 28, 2014, CALAS brought an amparo against MEM before the Supreme Court, seeking the suspension of Exmingua's license.[673] In response, MEM requested the Supreme Court to dismiss the amparo. Particularly, MEM argued that: i) the amparo was filed contrary to Section 20 of the Amparo which requires amparo petitions to be made within 30 days after being aware of the complained act;[674] ii) CALAS lacks standing to bring the action and;[675] iii) CALAS had not exhausted available administrative remedies.[676] The Supreme Court granted MEM's request and rejected the amparo.[677] On December 3, 2014, CALAS appealed the decision to the Constitutional Court which subsequently revoked the decision and remanded the decision to the Supreme Court.[678] Following the reversal of its decision, the Supreme Court issued an *amparo provisional* against the MEM on November 11, 2015 through which it suspended the Progreso VII exploitation license.[679]

408. But the decision was not final. Article 30 of the Amparo Law permits a court to "revoke the provisional

[670] *Id.* at ¶ 308.

[671] *Id.* at ¶¶ 277-279.

[672] Law of Amparo, Personal Exhibition and Constitutionality, article 37 **(C-0416)**.

[673] CALAS request for new amparo, dated August 29, 2014 **(C-0137)**.

[674] Response of the Minister of Energy and Mines to CALAS' request for a new amparo dated September 5, 2014, p.3 **(C-0465)**.

[675] *Id.* p.5 **(C-0465)**.

[676] *Id.*

[677] Judgment of the Supreme Court of Justice dated September 5, 2014 **(C-0466)**.

[678] CALAS's Appeal, December 3, 2014 **(C-0467)**.

[679] Supreme Court of Justice, Amparo granted to CALAS, November 11, 2015 **(C-0004)**.

suspension" upon its own motion or the request of a party.[680] Exmingua exercised this right. While Claimants allege that Exmingua was not "served with the notice of the amparo action" until February 22, 2016, they admit that Exmingua joined the proceeding on December 1, 2015, not long after the *amparo provisional*.[681] Once it joined the proceeding, Exmingua challenged the *amparo provisional* with much force, reiterating the objections made by MEM in 2014.[682] It also appealed the *amparo provisional* to the Constitutional Court based on the same argument that Claimants present to this Tribunal.[683]

409. Given that Exmingua had and did exercise its right to challenge the amparo, Exmingua's entrance into the amparo proceeding after the issuance of the amparo provisional does not constitute a "serious" and "egregious" conduct that "shocks a sense of judicial propriety." Even if Exmingua's "right to be heard" was violated, the misconduct does not constitute a denial of justice. A party alleging denial of justice must not only establish a serious violation of due process, but it must also demonstrate that it has given the national judicial system the chance to rectify the maladministration of justice. Exmingua made no attempt to rectify the alleged violation of its "right to be heard" by objecting to the Supreme Court once it joined the proceeding nor did it bring this alleged violation before the Constitutional Court.

ii. The four years taken by the Constitutional Court to issue the final decision was not unreasonable

410. Claimants argue that the Constitutional Court committed a denial of justice by taking four years to issue the final decision, specifically arguing that "years passed without any activity from the Constitutional Court in Exmingua's case."[684] Their submission rests on two inaccurate premises: i) a "delay of four years constitutes excessive delay,"[685] and ii) the delay was "politically motivated and based on nationality bias."[686] They also maintain that the decision was intentionally issued at the time they had to file their Memorial and that the suspension of the license was issued "without having served, heard or exhausted the respective administrative procedures."

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[680] Law of Amparo, Personal Exhibition and Constitutionality, article 37 **(C-0416)**.

[681] Brief from Exmingua appearing in file 1592-2014, dated December 1, 2015 **(C-0469)**.

[682] *See* Supreme Court of Justice, File No. 1592-2014, Exmingua Appeal against the decision granting provisional protection dated February 23, 2016 **(C-0005)**; Supreme Court of Justice, File No. 1592-2014, Judgment granting definitive amparo dated June 28, 2016 **(C-0144)**.

[683] Supreme Court of Justice, File No. 1592-2014, Exmingua Appeal against the decision granting provisional protection dated February 23, 2016, p. 1-2 **(C-0005)**; Claimant's Memorial, ¶¶ 282-290.

[684] Claimants' Memorial, ¶ 293.

[685] *Id.* at ¶292.

[686] *Id.* ¶ 293.

411. International law does not provide a strict timeline as to when a national court must render a decision to avoid international responsibility. In assessing whether a delay is unreasonable, tribunals rather assess: i) the nature of the proceeding and the need for urgent resolution ii) the complexity of the matter iii) circumstances that contributed to the delay iv) the development status of the country, and v) behavior of the courts; and vi) the effect of the delay.

412. Because the case in question is a civil case, the need for a prompt decision is less pressing. As explained by Prof. Douglas and confirmed by several practitioners: "[d]elay in proceedings to establish the criminal responsibility of a defendant who has been remanded in custody since the indictment is not the same as delay in proceedings to establish a defendant's civil responsibility to pay damages for a breach of contract."[687] Accordingly, the tribunal in *White Industries* held that the "need for swiftness in the resolution" of the enforcement proceeding before Indian courts is "less compelling." [688] The same is true here because (a) the Constitutional Court had case precedent on the issue, (b) had already ruled in that manner by confirming the decision of the Supreme Court with regards to the provisional *amparo*, and (c) before the issuance of the decision in the Exmingua case, had already rule in the same manner in other preceding decisions, including the case of Minera San Rafael, which was much more dramatic that the case of Exmingua because there were communities in favor and against the mining activity.[689]

413. Several factors contributed to the delay in the decision, but this does not mean that there was an *unjustified* delay or *intentionality* in the Court's decision. By that time, it had decided over 20,000 cases during the years 2016, 2017, 2018, and 2019, in addition to all of the orders and resolutions on administrative matters that we have referred to above.[690] Likewise, in no way has there been an *intentionality* in delaying this case, for any reason whatsoever, but even less so by reason of the nationality of Exmingua. First, because Exmingua is a Guatemalan company, as are also the other comparable companies, as has been stated in the section on jurisdictional objections. Second, Minera San Rafael and the other mining companies that were required by the Constitutional Court to hold consultations with indigenous peoples as a requirement for lifting the suspension of the mining license also have foreign shareholders. There is no doubt, and there can be no doubt, that the Constitutional Court established a doctrine for the treatment of all cases related to the consultation of Indigenous Peoples for mining companies and has applied thT same doctrine to all cases.

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[687] Zachary Douglas, International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed, 63 INT'l & COMP. L.Q. 867 (2014), p. 870. **(RL-0191).** *See also*, *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (November 30, 2011), ¶¶ 10.4.10, 10.4.14 **(RL-0198)**.

[688] *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (November 30, 2011), ¶ 10.4.14. **(RL-0198)**.

[689] Article referring to disputes between communities in the case of Minera San Rafael

[690] *See* Report of the Constitutional Court **(R-0074)**.

414. The Exmingua case is not the only one before the Court. Quite on the contrary, as the Constitutional Court explains, during this period the Court was faced with some of the most transcendental and disturbing events in the history of the Court. For instance, during this period it had to deal with situations such as the cases derived from the La Línea case, originating from the acts of corruption that led to the imprisonment of the President of the Nation and the Vice President, as well as other officials of the Perez Molina administration, for corruption.[691] In addition, during this period the Court had to review the case files that arose after the CICIG -a United Nations body that played an important role in the administration of justice in Guatemala- left Guatemala.[692]

415. Like in *White Industries*, the progress of the Constitutional Court's decision was affected by the appeal filed by Exmingua and other parallel proceedings related to Exmingua's exploitation license for Progreso VII, such as the aforementioned case related to the lack of consultation by Exmingua and the absence of a construction permit, as well as the amparo action filed by the Kakchiquel Community. For instance, among others

> **August 11, 2015**: Exmingua filed an appeal, challenging the suspension of the construction license for failure to carry out the public consultation process and lack of construction license.[693]
>
> **February 9, 2017**: Exmingua's employees filed an *amparo* action due to the lack of execution of the *amparo definitivo* granted in the Exmingua-CALAS case (requiring prior consultation to reactivate the license.[694]
>
> **June 30, 2016**: Exmingua and MEM appealed the Supreme Court's grant of *amparo definitivo* to CALAS.[695]
>
> **July 19, 2016**: representatives of the Kakchiquel indigenous communities filed an amparo against the MEM, challenging the Progreso VII exploitation license.[696]
>
> **August 2016**: the Constitutional Court held a public hearing on Exmingua's appeal of the Supreme Court's *amparo definitivo* .[697]
>
> **November 24, 2016**: Exmingua appealed to the Constitutional Court, challenging the

[691] *See* Report of the Constitutional Court, p. 10 **(R-0074)**.

[692] *Id.*

[693] *See* Appeal presented by Exmingua before the Constitutional Court on August 11, 2015; *See also,* Decision of Constitutional Court, Case No. 3580-2015, dated February 6, 2017, p. 10 (**R-0120**).

[694] *See* Appeal filed in *amparo* action and presented by Mario Morales dated February 9, 2017 (**R-0132**). This case was effectively suspended by the Constitutional Court in the Decision issued on August 21, 2017 in Case No. 3252-2017, pp. 10-11 (**R-0133**).

[695] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Appeal by Exmingua against the Ruling granting amparo definitivo dated 30 June 2016 **(C-0475)**.

[696] Kakchiquel Indigenous community *amparo* Case No. 1246-2016 [at 4-6 ENG] **(C-0476-SPA/ENG)** (including *Amparo* application).

[697] Claimants' Memorial, ¶ 96.

amparo provisional granted to the Kakchiquel indigenous communities.[698]

March 18, 2016: Exmingua file for relief against MEM's suspension of the license. The Court dismissed the request on February 9, 2018.[699]

June 22, 2020: the Court issued a guideline for conducting the consultation[700].

416. It is noteworthy that the Claimants do not mention case file 3580/2015 in which the Constitutional Court imposed the suspension of the license until consultations were held with the affected communities, a case that also reached the Constitutional Court as a result of the appeal filed by Exmingua of an Amparo granted by the Third Court of First Instance in Civil Matters of Guatemala acting as Amparo Court.[701] Here again, the Constitutional Court ordered the suspension of the license until the consultations with the affected communities were carried out. This decision was quickly resolved in 2017, imposing the same solution, which once again shows that the argument of the time elapsed in case file 3207-2016,[702] is a mere excuse.

417. Finally, Claimants have not shown how they suffered harm as a result to the delay. Exmingua suspended its operation "save for essential environmental maintenance work" on May 6, 2016; a month before it appealed the amparo *defintivo* to the Constitutional Court.[703] Like in the case of *Frontier v. Czech Republic*,[704] Claimants have not established how an earlier decision from the Constitutional Court would have had any positive effect on their investment. Hence, their challenge must be dismissed.

iii. Claimants have not presented any evidence which proves that Constitutional Court discriminated against Exmingua

418. Citing to *Loewen*, Claimants submit that "a decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law."[705] A claimant, however, must do more than allege discrimination. It must show that it was "willfully target[ed] and the "discrimination must be evident."[706] Claimants have not carried this burden. Claimants argue that

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[698] Exmingua Appeal against the *amparo provisional* dated 24 November 2016 **(C-0478-SPA/ENG**). This appeal was ultimately resolved by the Constitutional Court through a ruling issued on August 27, 2020, Case 588-2018 **(R-0134)**

[699] *See Amparo* submission presented by Exmingua dated March 18, 2016 in Case No. 6095-2017 (**R-0135**). *See also*, Constitutional Court's decision of February 19, 2018, confirming the suspension effect of the *Amparo* (**R-0136**)

[700] Constitutional Court of Guatemala, File No. 1592-2014, Judgment confirming definitive amparo dated June 11, 2020 (**C-0145).**

[701] Judgment issued by the Constitutional Court on February 6, 2017, file 3580-2015, p. 11 **(R-0120)**

[702] *Id*.

[703] Claimants' Memorial, ¶ 100; Kappes Statement, ¶ 134.

[704] *Frontier Petroleum Services Ltd*, Final Award, ¶ 331. **(RL-0202)**

[705] Claimant's Memorial, ¶ 311

[706] *Cargill v. México,* **(CL-0197),** ¶ 2*; Eli Lily v. Canadá*, Final Award ¶ 222 **(RL-0040)**; *Glamis Gold v. United States*, ¶ 627. **(RL- 0144)**

Exmingua was a victim of discrimination. They insist that Exmingua was "singled-out" and afforded disparate treatment, seemingly for being "US-owned."[707] But there is no evidence to corroborate this grave allegation.

419. Once more, Claimants' submission rests on their dissatisfaction with the Constitutional Court's decisions in other cases. They argue that the Guatemalan courts discriminated against Exmingua because: i) the Constitutional Court allowed Oxec to operate while MEM conduct the consultation;[708]ii) the Court "imposed a new condition"—not imposed on Oxec, Minera San Rafael or CGN—that "Exmingua cannot resume operations unless a determination is made that operations would not threaten the existence of the indigenous population."[709]

420. This is inaccurate and legally flawed. First, Exmingua and *Oxec* are not in like circumstances for reasons previously explained.[710] Second, the argument confuses the protections offered under Article 10.5 versus those provided under the Most Favored Nation and National Treatment clauses. To breach Article 10.5, a state must have intentionally discriminated an investor. On the other hand, Article 10.3 and Article 10.4 could be breached if a state unintentionally treated investors that are in like circumstances differently. Claimants have not shown a discriminatory treatment let alone an intentional discrimination. Third, the same CAFTA-DR provides that Article 10.5 is not breached by the violation of other articles of the Treaty (which, however, have not been violated either).

421. Finally and more importantly, the claim is a disguise. It is nothing but a failing attempt to drag this Tribunal into a role that many have refused to take: "sit on appeal against the legal correctness or substantive reasonableness of . . . judgments of a municipal court."[711] Guatemalan courts, like any national courts, are bestowed with the power to assess the facts and apply the law to those facts.

b. By admitting CALAS' action and suspending the exploitation license, the Constitutional Court did not commit a denial of justice

i. <u>The Constitutional Courts' substantive decisions are outside the purview of the Tribunal</u>

422. Claimants' denial of justice claim heavily falls on their disagreement with the Constitutional Courts' substantive decisions. Notably, they argue Respondent denied them justice because the Guatemalan courts: i)

[707] Claimants' Memorial, ¶ 311.

[708] *Id.* at ¶ 308.

[709] *Id.* at ¶ 326.

[710] Oxec is a hydroelectric project for the production of electricity for the benefit of the entire population of Guatemala. The Constitution of Guatemala includes an exemption. These circumstances are not the same as those of mining companies.

[711] *ECE Projektmanagement v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award (September 29, 2013), ¶4.764. **(RL-0203).**

accepted CALAS' amparo action in "disregard" of the Amparo Law and ii) suspended Progreso VII exploitation contrary to "established legal framework." [712] A denial of justice is not concerned with a substantive denial of justice. National judgments, no matter how imperfect, do not give rise to a state responsibility under customary international law of the minimum standard of treatment: "the general rules is that the final word as to the meaning of national law should be left with the national judiciary."[713]

423. Dissatisfied with the Supreme Courts' decision to admit CALAS' amparo action, Claimants describe the decision as a serious violation of Exmingua's fundamental due process. They assert that the "Courts' decisions…were fundamentally flawed in that they violated Exmingua's procedural due process rights in a way that undermine the constitutional principles of legal certainty."[714] But this is not true. The decision of the Constitutional Court in the case of Exmingua did not vary from its jurisprudence interpreting the requirements of an *amparo* action, which had already been established under Guatemalan law and in the constant jurisprudence of the Constitutional Court.

424. CALAS's *amparo* action was filed in accordance with Guatemalan law. This was confirmed not only by the Supreme Court but also by the Constitutional Court–the highest court of Guatemala. Nonetheless, Claimants insist that the Guatemalan courts errored in: i) accepting CALAS' *amparo* action filed 30 days after MEM issued public notice of the Progreso VII EIA;[715] ii) admitting CALAS' action despite the fact that it had not "first exhausted administrative remedies against the issuance of the exploitation license; "[716] iii) allowing CALAS to proceed with its action despite the fact that it lacked standing; and [717] iv) permitting CALAS' action against the MEM.[718]

425. Claimants submission fails for the following reason. First, Article 20 was inapplicable. Article 20 of the Amparo Law is concerned with a challenge of a certain administrative act and not an omission. A thorough review of the amparo petition indicates that CALAS was challenging MEM's failure to conduct consultation under the ILO Convention No. 169. The time limitation under Article 20 does not apply to such petitions. The Constitutional Court came into the same conclusion, noting that the "Court has held in numerous rulings that an omission or failure to act causes continuous harm over time, and that for such reason, such omission to act

[712] Claimants' Memorial, ¶¶ 281, 287-290.

[713] Jan Paulson, Denial of Justice in International Law, (Cambridge Uni. Press July 2009), p.73. **(CL-0171)**

[714] Claimants' Memorial, ¶286.

[715] *Id.* at ¶ 281.

[716] *Id.* at ¶ 287.

[717] *Id.* at ¶ 288.

[718] *Id.* at ¶ 290.

may be the subject of a claim that is not subject to the statutory filing." [719]

426. Second, the principle of exhaustion of remedy under Article 19 does not apply to CALAS. An amparo petitioner that "was not a party to an administrative proceeding that preceded the issue of the challenged act" is not required to abide by Article 19.[720] In addition, aside from filing an amparo, "there are no ordinary remedies to adequately" challenge a violation of ILO Convention No. 169. This has been reiterated in several previous decisions.[721]

427. Third, CALAS had standing to file an amparo on behalf of the indigenous communities of the municipalities of San Pedro Ayampuc and San Jose del Golfo. Civil associations constituted with a mission of protecting Guatemala's natural heritage and environmental systems have the right to pursue their protection through an amparo. Fourth, whether or not CALAS could sue MEM is immaterial. Such objection can and was made by MEM before the Constitutional Court. In addition, Claimants cannot use this forum to speak on behalf of MEM.

ii. The suspension of the exploitation license was consistent with Guatemalan law

428. Pursuant to Article 46 of the Constitution, human right conventions ratified by Guatemala are above any domestic laws, including Mining Law. ILO Convention 169 was approved by the Guatemalan Congress in 1996 and entered into force in 1997. [722] Article 6 of the Convention, requires states to consult indigenous communities: "i) whenever consideration is being given to legislative or administrative measures which may affect them directly," and (ii) prior to the exploration or exploitation of mineral or sub-surface resources."[723] Guatemala has also ratified other human right conventions which protects the rights of indigenous communities.

429. As far back as May 2007, the Constitutional Court has emphasized that the indigenous' right to consultation under the ILO Convention is "unquestionable" and noted that such consultation must be complied with prior to the issuance of any license or any other measure."[724] Claimant is aware of this case. Indeed,

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[719] Constitutional Court of Guatemala, Case No. 3207-2016 and 3344-2016, June 22, 2020 p.16 **(C-0145).** (referring to the decision of September 3, 2018, May 26, 2017, January 26, 2017 and July 7, 2016.

[720] Decision of the Supreme Court, Case No. 3207-2016, p.5 (**C-0145**).

[721] Constitutional Court of Guatemala, Case No. 3207-2016 and 3344-2016, June 11, 2020 p.18 (**R-0137**).

[722] Advisory Opinion on Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO), Case 199-95 (May 18, 1995) (**R-0127**). Richter Report, ¶ 25" (According to the text of ILO Convention 169 itself, it came into force in Guatemala one year after its ratification, which occurred on June fifth, nineteen ninety-seven (06/05/1997). Since that date, the Convention has been part of the Guatemalan legal system and, as a result, it is a current and applicable rule").

[723] Claimants' Memorial, ¶ 71, citing to articles 6 and 15 of the ILO Convention 169.

[724] *Sipicapa*, File No. 1179-2005, p 8.4 (**C-0440**).

Professor Fuentes quotes to a section of this decision which notes that "community consultations are an important mechanism to express the people's will that give effect to several rights enshrined in the Constitution."[725] Despite the language under the ILO Convention and the Constitutional Courts' decision that consultation must be made prior to the issuance of an exploitation license, Professor Fuentes, justify the lack of consultation, noting that:

> "[g]iven [the] lack of regulation, the current understanding of Guatemala was that the requirement of public consultations under the ILO Convention 169 was satisfied by the consultations made in connection with the granting of mining licenses set forth in the Mining Law and the Environmental Assessment, Control and Monitoring Regulations.[726]

430. Professor Fuentes' report is contrary to the decision by the Constitutional Court in the case of *Cementos Progreso*. In that case, the Constitutional Court clearly established that the lack of guidelines does not excuse the failure to consult as is required under ILO Convention 169. The decision of the Constitutional Court in *Cementos Progreso* is the evolution of the jurisprudence that had been developing over the preceding years and which was confirmed in subsequent decisions, including in the decision of the case at hand. In any event, the case law has always been the same, and even from early on, the Constitutional Court recognized the obligation of prior consultation with Indigenous communities.

C. Claimants Have Not Established a Breach of the Full Protection and Security under Article 10.5 of CAFTA-DR

1) The obligation to provide full protection and security under Article 10.5(2) is limited to the duty to provide protection from physical damages

431. Like the fair and equitable treatment, the full protection and security clause is limited to rights provided under the minimum standard of treatment:

> Article 10.5: **Minimum Standard of Treatment** (Article 10.5 shall be interpreted in accordance with Annex 10-B)
> 1. Article 10.5: Minimum Standard of Treatment (Article 10.5 shall be interpreted in accordance with Annex 10-B) 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
> …

[725] Fuentes Report, ¶ 50.

[726] Fuentes Report, ¶ 51.

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

432. Unlike other investment agreements,[727] Article 10.5(2)(b) expressly limit the protection to "police protection required under customary international law."[728] The United States is the main driver of this approach. Through the 2004 U.S. Model BIT and other investment agreements, the "Untied States has long maintained that the customary international law obligation to accord "full protection and security" requires that each Party provide the level of police protection required under customary international law."[729] Such clarification is also included in the United States-Mexico-Canada-Agreement (USMCA).[730]

433. Claimants try to allude that Article 10.5(2)(b) includes protections of "economic rights" but provide no supporting evidence of state practice and *opinion juris*.[731] The lack of evidence of is not surprising. Contrary to Claimants' submission, states have insisted that full protection and security under customary international law does not "require States to prevent economic injury inflicted by third parties; provide for legal protection; or require States to guarantee that aliens or their investments are not harmed under any circumstances."[732] Claimants' argument also renders the unequivocal limitation (to "police protection") included in Article 10.5(2)(b) meaningless.

434. The existing case law is not in favor of Claimants' submission. Majority of the tribunals have found a breach of full protection and security under the customary international law only where a state failed to provide police protection against physical invasion of property or person.[733] Indeed, even in instances where the term

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[727] *See* Argentine-Germany BIT (1991) **(RL-0222).**

[728] CAFTA-DR, Article 10.5(2)(b) **(CL-0001).**

[729] *See Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, United States of America Third Non-Disputing Party Submission, ¶ 22 **(RL-0223)**, which cites the Model BIT for the US of 2004, art. 5(2)(b). *See also* United States of America -Uruguay (2005), Article 5(2)(b) (**RL-0224**); United States of America-Panama Trade Promotion Agreement, Article 10.5 (2)(b) (**RL-0179**); United States of America -Rwanda BIT (**RL-0225**); The United States of America-Mexico-Canada Agreement (USMCA), Article 14.6 (2)(b) **RL-0131)**.

[730] The United States of America-Mexico-Canada Agreement (USMCA), Article 14.6 (2)(b) **RL-0131)**.

[731] Claimants' Memorial, ¶ 251.

[732] *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, United States of America Third Non-Disputing Party Submission, ¶ 23 **(RL-0223)**; *See also Methanex Corporation v. United States of America*, UNCITRAL, US Reply Memorial on Jurisdiction (April 12, 2001) ¶¶ 38-39 ("Indeed, if the full protection and security requirement were to extend to an obligation to 'protect foreign investments from economic harm inflicted by third parties,' . . . Article 1105(1) would constitute a very substantial enlargement of that requirement as it has been recognized under customary international law.") **(RL-0226)**

[733] *BG Group Plc. v. The Republic of Argentina*, UNICTRAL, Final Award (December 24, 2007) ¶ 324 **(CL-0050)**; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (December 7, 2011) ¶ 320 **(CL-0174)**; *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award (March 17, 2006), ¶ 305 **(CL-0154)**; Zachary Douglas, Property, Investment and the Scope of Investment Protection Obligations, p. 379 ("The obligation to accord full protection and security, like its counterpart in customary international law, creates a special regime of liability for the acts of the state and for third parties that compromise the physical security of the assets of the investor") (**RL-0068**).

"protection and security" is not limited to "police protections," or associated with customary international law, tribunals–as acknowledged by Claimants– generally limit the obligation to police protection.[734] Several scholars have affirmed as follows:

> Full protection and security is typically concerned not with the process of decision-making by the organs of the State. Rather, it is concerned with failures by the State to protect the investor's property from actual damages caused by either miscreant State officials, or by the actions of others, where the State has failed to exercise due diligence. It is thus principally concerned with the exercise of police power.[735]

2) The Full Protection and Security Standard Under the Minim Standard Treatment is a Non-absolute Obligation, Only Requiring a State to Exercise Due Diligence

435. Claimants agree, as they must, that the duty to provide full protection and security is a non-absolute protection. [736] As noted in *ELSI*, the clause does not serve as a "warranty that property shall never in any circumstances be occupied or disturbed."[737] The cases cited by Claimants also affirms that the full protection and security clause does not impose strict liability.[738] As noted by Claimants, a state is rather required to exercise "due diligence" in protecting an investment from physical damage.[739]

436. Under this standard, the State is merely required to take reasonable measures of prevention.[740] The measure is assessed in light of the several interests that a state must protect, and certainly under "the parameters

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[734] *See* Andrew NewCombe & Luis Pardell, Law And Practice Of Investment Treaties Standards Of Treatment (Kluwer Law International 2009), p. 182(**RL-0197)**. ("IIA awards have consistently found that protection and security obligations in IIAs impose on the host state an obligation of due diligence or vigilance with respect to the physical protection of foreign investment."); *See also Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (October 12, 2005), ¶164 (**RL-0229**).

[735] McLahlan QC, Campbell et al, International Investment Arbitration. Oxford University Press, New York, USA (2007)., p. 347, para 7.242 (**RL-0276)**. *See also* Andrew NewCombe & Luis Pardell, Law And Practice Of Investment Treaties Standards Of Treatment (Kluwer Law International 2009), p 182 (**RL-0197)** ("Due diligence in the physical protection of aliens and their property is required under the minimum standard of treatment.")

[736] Claimants' Memorial, ¶ 252.

[737] *Elettronica Sicula S.p.A. (Elsi) (United States v. Italy)*, Judgment (July 20, 1989), I.C.J. Reports 1989, ¶108 **(RL-0199)**. *See also Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (October 12, 2005), ¶164 **(RL-0229)** ([I]t seems doubtful whether that provision [full protection and security] can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens. The latter is not a strict standard, but one requiring due diligence to be exercised by the State").

[738] *See e.g.*, *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award (March 15, 2016), ¶ 6.81 (the tribunal affirmed that "[u]nder the FPS standard, the obligation of the host State does not attract strict liability but imposes a lesser duty more akin to the exercise of due diligence.") **(CL-0138)**; *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009), ¶ 447 ("The standard of protection expected of a host state is not absolute."). **(CL-0167).**

[739] *See* Claimant's Memorial, ¶ 252.

[740] *See Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (July 28, 2015), ¶ 596 **(CL-0260).**

inherent in a democratic state."[741] As noted in *Copper Mesa v. Ecuador*, a tribunal must evaluate the state's obligation, "weighing the legitimate interests of the foreign investor with the legitimate interests of the host State and others, including (especially) its own citizens and local resident."[742]

437. The situation of the host state has also weight in determining the parameters of "reasonable measure." As noted in *British Claims in the Spanish Zone of Morocco*, a state is "obliged to exercise only that degree of vigilance which corresponds to the means at its disposal" and that the "vigilance which from the point of view of international law a state is obliged to exercise, may be characterized as *diligentia quam in suis.*"[743] This has been supported by various academics and recognized in various cases.[744] For example, Newcombe and Pardell recognized that:

> Although the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circum-stances and with the resources of the state in question. This suggests that due diligence is a modified objective standard.[745]

438. Accordingly, a tribunal must consider, *inter alia*, "the state's level of development and stability."[746] After all, a foreign investor invests knowing the benefits as well as the constraints of investing in a certain state. As put by Newcombe and Pardell: "An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo."[747]

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[741] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2), Award (May 29, 2003), ¶ 177 **(CL-0122).**

[742] *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award (March 15, 2016), ¶6.81. **(CL-0138).**

[743] Andrew Newcombe and Luis Pardell, *Law and Practice of Investment Treaties: Standard of Treatment* (Kluwer Law International 2009), p.182, referring to Bing Cheng, General Principles Of Law As Applied By International Courts And Tribunals (1953) **(RL-0197)**;

[744] *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Final Award (September, 11 2018), ¶¶382-383 ("In general, tribunals should be wary of second-guessing these judgment calls, except where the evidence suggests bad faith, improper intent, or a serious lack of due diligence in response to a reasonably foreseeable and otherwise manageable threat. Nonetheless, in appropriate cases, tribunals must wade into the delicate assessment of this due diligence question") **(RL-0230);** Douglas, *Property, Investment and the Scope of Investment Protection Obligations*, in Z. Douglas, J. Pauwelyn, J. Vinuales, The Foundations Of International Investment Law: Bringing Theory Into Practice, p. 379 ("Imposes an obligation of due diligence that needs to adapt to the resources available to the host State") **(RL-0068)**

[745] Andrew Newcombe and Luis Pardell, *Law And Practice Of Investment Treaties: Standard Of Treatment* (Kluwer Law International 2009), p. 182-183 **(RL-0197)**.

[746] *Id.; see also, Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (July 30, 2009), ¶ 81 (**RL-0025**).

[747] Andrew Newcombe and Luis Pardell, Law and Practice of Investment Treaties: Standard Of Treatment (Kluwer Law International 2009), p. 183. **(RL-0197).**

3) Respondent Has Not Breached Its Obligation to Exercise Due Diligence

439. Claimants describe Guatemala's breach of Article 10.5(2)(b) as follows:

> - Guatemala refused to take reasonable measures to remove the blockade at the Project site that commenced in early 2016, after the Supreme Court's *amparo* ruling and the MEM's initial refusal to suspend the exploitation license for Progreso VII.[748]
> - the Constitutional Court failed to protect Claimants' rights by refusing to grant Exmingua an *amparo* ordering the National Civil Police to remove the blockade on the grounds that Exmingua's Progreso VII exploitation license had been suspended.[749]
> - the MEM made the situation worse in December 2016 by imposing a 30-day deadline on Exmingua to submit a completed and approved EIA for Santa Margarita (including the results of the consultations with the local communities), and subsequently denying Exmingua's request to suspend that requirement in light…[750]

440. Claimants' submissions fail for several reasons. *First*, article 10.5(2)(b) only obliges state parties to provide police protections. Therefore, Claimants cannot seek redress against the decision of the Constitutional Court and the MEM through article 10.5(2)(b). *Second*, even if they come under the scope of full protection and security, Claimants have not demonstrated how these entities have failed to take reasonable measure to protect Claimants' investment.

441. The claim against the National Police's alleged failure to provide protection is similarly baseless. While Claimant points to alleged blockade in 2016, the facts, as recognized by Claimants as well, shows that different organs of the government– from the National Police to the President– have actively aided Claimants in resolving numerous protests against its investment since 2012, and that they themselves created the reason for them.[751]

442. In any case, the State of Guatemala has provided the level of protection required under international law , and even more. Few cases show a constant police presence and permanent intervention by State bodies to prevent violence, including annual meetings with the President of the Nation, constant participation of a human rights protection body (rights that include the owners, executives and employees of Exmingua) that at the same time acted as a mediator, other bodies that also protect peace and social coexistence (COPREDEH) and a constant presence of the National Civil Police that came to establish a permanent station in front of the

[748] Claimants' Memorial, ¶ 258.

[749] *Id.* at ¶ 261.

[750] *Id.* at ¶ 263.

[751] SLR Report, ¶ 144. *See also* Kappes Statement, ¶¶ 76, 78, 80, 87.

mining project.[752]

a. Guatemala exercised due diligence in protecting the investment from damages

Site 1: Progreso VII

443. Despite their insistence during the preliminary phase of objection,[753] Claimants now argue that their full protection and security claim extends to Respondent's alleged failure "to remove the blockade at Project site." As explained above, this claim is time barred. But the problem with the clam does not end there.

444. Even if the claim is not time barred, Claimants have not shown that there was a continuous obstruction to the project site in 2016. The full protection and security claim with regards to Progreso VII entirely relies on Mr. Kappes' vague and uncorroborated statement. Referring to Kappes statement, Claimants allege that the blockade and protests in "early 2016" "prevented Exmingua from entering the Project site."[754] But the few details presented by Kappes, demonstrate that the alleged protests were minimal, intermittent, and certainly not enough to prevent access to the site. Kappes notes that there were only 5-10 protests over the range of March 2014-January 2016.[755] He also admits that these protests were "periodical" and resolved through police action.[756] Moreover, even before 2016, Claimants not only entered the mine site, but also produced and sold the product exploited from the mine, and that was possible precisely because of the active participation of the State and the intervention of the National Civil Police.[757] As the record clearly suggests, not only was the entry of the machinery allowed after the intervention of the police, but also that the Nacional Civil Police established a permanent dispatch in front of the mine with shifting guards.[758]

445. With respect to events that took place after 2016, the National Civil Police report states that the events

[752] Report of the Office of the Human Rights Ombudsman of Guatemala **(R-0056)**; Report of the General Directorate of the National Civil Police **(R-0052)**; MEM Detailed Report (October 11, 2012) **(R-0208)**.

[753] *See* Tr Hearing, 216:14-217:14, Decision on preliminary objection, ¶ 213. (The Tribunal referring to Claimants' submission noted that "Claimants are not seeking full protection and security damages in relation to Progreso VII, because Exmingua was already prohibited from engaging in mining activities there as a result of the Supreme Court's amparo ruling and the MEM's suspension order. Claimants thus did not suffer any additional or distinct loss or damage as consequence of Respondent's full protection and security breach in connection with Progreso VII project."

[754] Claimants' Memorial, ¶ 258.

[755] Kappes Statement, ¶ 137.

[756] *Id.*

[757] Report of the National Civil Police **(R-0052)**

[758] For example, in the Report of the National Civil Police (PNC) dated January 5, 2016, it can be read that the relay is made at the fixed point in the Aldea La Puya. Report of the National Civil Police **(R-00052)**; The constant presence of the Guatemalan Human Rights Ombudsman should also be noted **(R-0056).**

that required police intervention read as follows:[759]

a. **January 5, 2016**. Notification to Exmingua of minutes 29-2015 executed on 07/23/2015 of the Municipality of San Pedro Ayampuc whereby it was ordered to stop the construction of the mine. The NCP provided assistance to the authorities in charge of the notification. There were no incidents with La Puya. In addition, this report notes the participation of the local Justice of the Peace who intervened to allow the exit of the workers who were working at the time the measure was executed.

b. **January 6, 2016**. Altercation between the residents of La Puya and the employees of the mining project. The former maintain that the project is suspended, and the latter say that what is suspended is the construction of the project.[760] It can be read here that the intervention of the delegate of the Human Rights Ombudsman ("PDH"), Mr. Erik Geovani Guzmán Serén, in dialogue with both parties, succeeded in pacifying the situation.

c. **January 7, 2016**. At 2:30 in the morning, Exmingua workers removed the tapes that had been placed by officials from the Municipality of San Pedro Ayampuc, and entered the mine twice with vehicles despite the fact that access was prohibited. Again, a large group of police, the PDH and the Justice of the Peace with jurisdiction over the village intervened.

d. **April 28, 2016**. The MEM performs an inspection to find out if the mine was in operation, which generates concern in the community of La Puya. The report highlights that MEM officials **"found evidence that the mine is still working, disobeying the resolution issued by the Constitutional Court**.[761]

446. Likewise, the report ends by saying that "**It is informed that from 04/29/2016 to the present date, no inconvenience or conflict has arisen in the aforementioned place**.[762]

447. In determining a breach of international law, a tribunal must look at "the record as a whole, not isolated events."[763] Taken as whole, the record shows that Respondent provided substantial and continuous protections to Exmingua since 2012 and to date.

448. The protection continued through 2016.[764] In April 2016, Exmingua filed an *amparo* against the

[759] Report of the National Civil Police **(R-0052)**.

[760] It should be noted that as of that date the Provisional Amparo had already been issued and it had already accrued as executive. Also, Exmingua had been notified of the Provisional Amparo, for which those employees who intended to enter the mine would engage in activities that would later be classified as illegal exploitation of natural resources.

[761] Report of the National Civil Police **(R-0052).**

[762] *Id.*

[763] *Gami Investments Inc. v. Mexico*, UNCITRAL, November 5, 2014, Final Award, ¶ 97 **(CL-0036).**

[764] *See* Jerson Ramos et. al, *Protesters at La Puya burn doll of Ministry of Energy*" PRENSA LIBRE dated March 26, 2016 (**C-0010).** Claimants indicate that March 2, 2012 should be read as March 2, 2016 in Exhibit C-0010. *See* Transcript, pp 31-132; Constitutional Court, Case No. 1904- 2016 dated March 2 2017, p. 6 **(C-0147)** (the Court considered the "Plan

President of the Republic of Guatemala, the Minister of the Interior, and the General Director of the National Civil Police.[765] Like in the present case, Exmingua argued that the authorities violated its right under the Constitution by failing to remove protests and blockades in "areas close to Progreso VII."[766] The Constitutional Court rejected Exmingua's claim having, *inter alia*, found that the National Civil Police had taken "all measures necessary to safeguard public order in the Progreso VII Derivada mining project facilities and in areas adjacent thereto." [767] Among others, it considered well-documented reports of police protection in the area from 2012-2016.[768]

Site 2: Santa Margarita

449. Claimants' submission with respect to access to Santa Margarita is similarly flawed. They contend that Respondent failed to take reasonable measures to remove blockades and protests in areas close to Santa Margarita– "despite Claimants' and Exmingua's entreaties and petition."[769] But Claimants provide no evidence to support their claims. The only petition cited by Claimants is the *amparo* filed by Exmingua in April 2016 with regards to the alleged blockade on the Progreso VII site. But a blockade at Progreso VII could not hinder Exmingua from accessing Santa Margarita. Different routes lead to these sites.[770]

450. In December 2016, the MEM through Resolution No. 4056 instructed Exmingua to file the EIA for Santa Margarita.[771] Three months later, Exmingua requested MEM to be relieved from its obligation to conduct the EIA because "access to the area was blocked and consultations for the EIA social studies could not be conducted due to threats by the opposing communities."[772] Along with its request, Exmingua attached a notarized witness statement of events on the "road to the Santa Margarita Mining Exploration" site.[773] But the

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of Operations No. 82-2012 – "Progreso VII Plan of Control of Mining Project and Mission of Segurity Order No. 01-2016 to ensure public order at the site known as La Puya in the Municipality of San José del Golfo, Department of Guatemala).

[765] Constitutional Court of Guatemala, Case No. 1904-2016, dated March 2, 2017 **(C-0147-SPA)**

[766] *Id.* p.1

[767] *Id.* p. 6.

[768] *Id.* (the Court considered "Operations Plan No. 82-2012, "*Progreso VII Project Mining Conflict Control Plan* and Security Mission-type Order No. 01-2016 to Guarantee Public Order in the place known as La Puya, in the Municipality of San José del Golfo, Department of Guatemala".) The police also provided assistance in 2015.

[769] Claimants' Memorial, ¶ 260.

[770] EIA, p. 59 **(C-0082)**; Environmental Impact Assessment for Santa Margarita presented by Exmingua **(C-0081)**, p.26.

[771] Official Notification No. 497 from the MEM to Exmingua, attaching Resolution No. 4056 dated 21 Dec. 2016 **(C-0012-SPA/ENG).**

[772] *See* Claimants' Memorial, ¶ 120, referring to Letter from Exmingua to the MEM, attaching Notary Public's Certification dated 21 Mar. 2012, p. 1 **(C-0013-SPA/ENG)**

[773] *See* Claimants' Memorial, ¶ 120, referring to Letter from Exmingua to the MEM, attaching Notary Public's

statement did not describe a blockade or even a protest. Moreover, from the notarial certification it appears that its describing Progreso VII and not Santa Margarita.[774] Nothing prevented Claimants' access to Santa Margarita. Indeed, they themselves confess that they did not develop Santa Margarita between 2014 and 2016 because they were focused on exploiting the mine. Their own confession is sufficient to support Guatemala's argument that what they claim with regards to Santa Margarita is fraudulent and irresponsible.

451. Likewise, and in the event that access to Santa Margarita was denied, which we reiterate, nothing was preventing Exmingua from accessing Santa Margarita, clearly the MEM could not dispense Exmingua from a requirement that is in the applicable legislation and which requires the existence of an EIA in order to grant the exploitation permit. Once again, this demonstrates Exmingua's willingness, under the direction of the Claimants, to fail to comply with Guatemalan law.

b. Neither the MEM Resolution No. 4056 nor the Constitutional Court' dismissal of Exmingua's amparo can be challenged through Article 10.5(2)(b)

452. As described above, State parties to CAFTA have limited the protection under Article 10.5(2)(b) to "police protection required under customary international law." Accordingly, Claimants challenge of the Constitutional Court's decision of April 2016 and the MEM Resolution 4056 should be dismissed.

453. Article 10.5 only protects the lack of physical protection, and while that was not the case, it does not include "legal certainty." First, a judiciary's act cannot trigger state responsibility unless a denial of justice is proven.[775] Second, Claimants have not shown how the Constitutional Court, or the MEM failed in protecting their investment. Aside from alleging that the Court's decision is contrary to a prior decision, Claimants do not engage with the Court's decision. Nor do they claim that Exmingua was denied access to court or any allegation that Exmingua's due process was violated. The same is true with MEM's resolution. There is no evidence that Claimants were physically impeded from conducting social studies for the EIA of Santa Margarita. In addition, the Mining Law does not relieve an investor from presenting a complete EIA because of a protest.

4) Even if Respondent breached Article 10.5(2)(b), Claimants Have Not Demonstrated That They Had Incurred loss or damage

454. A breach of full protection and security will not give rise to an international responsibility unless the investor was prejudiced as a result to the breach. To succeed in its claim, an investor must establish that: i) it

Certification dated 21 Mar. 2012, pp. 2-4 **(C-0013-SPA/ENG)**

[774] *See* Claimants' Memorial, ¶ 120, referring to Letter from Exmingua to the MEM, attaching Notary Public's Certification dated 21 Mar. 2012, p. 2 **(C-0013-SPA/ENG)**

[775] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (November 6, 2008), ¶192 ("the relevant standard to trigger state responsibility for the [judicial proceedings] are the standards of denial of justice…holding otherwise would allow to circumvent the standards of denial of justice."). **(RL-0143)**

suffered damage as a result to the state's failure to exercise due diligence and that ii) the damage could have been prevented had the host state exercised due diligence.[776] Tribunals have rejected claims that do not prove the above elements. For instance, in *Noble Ventures v. Romania*, the tribunal rejected Noble Ventures' claim of breach of the full protection and security provision under the BIT because:

> even if one concluded that there was a certain failure on the side of the Respondent sufficiently grave to regard it as a violation, it has not been established that non-compliance with the obligation prejudiced the Claimant, to a material degree. The Claimant has failed to prove that its alleged injuries and losses could have been prevented had the Respondent exercised due diligence in this regard, nor has it established any specific value of the losses.[777]

455. The present case leads to the same conclusion. Claimants have not established any of the required elements. First, Claimants have not shown that they suffered due to this alleged protests and blockade. To the contrary, they admit that Progreso VII would not have operated regardless of the blockade. Indeed, they have unequivocally informed the Tribunal that they do not and cannot have full protection claim with respect to Progreso VII:

> Claimants are not seeking full protection and security damages in relation to Progreso VII, because Exmingua was already prohibited from engaging in mining activities there as a result of the Supreme Court's amparo ruling and the MEM's suspension order. Claimants thus did not suffer any additional or distinct loss or damage as consequence of Respondent's full protection and security breach in connection with Progreso VII project.[778]

456. The full protection and security claim as to Santa Margarita also fails as Claimants never intended to conduct the EIA. In their preliminary objection proceeding, Claimants described the damage for the alleged blockade in Santa Margarita as "the loss of an opportunity to obtain an exploitation license for Santa Margarita."[779] This is an inaccurate representation of the fact. Even by their own admission, Claimants did not plan to conduct the EIA. Like Progreso VII, Claimants have already concluded that "Exmingua's Santa Margarita exploitation license has been *de facto* suspended" as a result of the Constitutional Courts' decision, requiring consultation before the issuance of an exploitation license.

457. Claimants have also failed to show how they were physically obstructed from conducting the social study needed for Santa Margarita. Nor is there anything to explain why they did not carry out the study while they did the same for Progreso VII back in 2011 or why they were unable to do so in the intervening years of 2014 and 2016.

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[776] *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶ 166 **(RL-0229).**

[777] *Id.*

[778] See Tr Hearing, 216:14-217:14; *see also* Decision on preliminary objection, ¶ 213.

[779] Decision on Preliminary Objection, ¶ 213.

D. Guatemala did not Breach Article 10.7 of the CAFTA-DR

458. Claimants come before this Tribunal seeking damages against Guatemala for acts that they allege constitute indirect expropriation under Article 10.7 of the CAFTA-DR. They contend that "Guatemala has rendered Exmingua worthless and has destroyed Claimants' investments" "[i]n particular, by unlawfully, arbitrarily, and indefinitely suspending Exmingua's Progreso VII exploitation license; by unlawfully seizing Exmingua's concentrate; by *de facto* suspending Exmingua's Santa Margarita exploration license; and by arbitrarily and indefinitely preventing Exmingua from obtaining an exploitation license for Santa Margarita."[780] Guatemala fundamentally disagrees. Guatemala did not in any way expropriate Claimants' investments. The reasons set forth below will show that Claimants failed to establish any and all of the elements of indirect expropriation in order to hold Guatemala liable for a breach of the CAFTA-DR, meriting the dismissal of this claim.

459. Article 10.7.1 of the CAFTA-DR provides that "[n]o Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization, except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and (d) in accordance with due process of law and Article 10.5." The third footnote of Chapter 10 of the CAFTA-DR further states that Article 10.7 shall be interpreted in accordance with its Annexes 10-B and 10-C. Annex 10-C.1 states that "Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation." Annex 10-B, in relevant part, articulates the Parties' "shared understanding that "customary international law" generally and as specifically referenced in … Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation."

460. According to Annex 10-C.2, "[t]he Parties confirm their shared understanding that … [a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment." Further, under Annex 10-C.3, "[t]he Parties confirm their shared understanding that … Article 10.7.1 addresses two situations." The first situation "is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure." On the other hand, "[t]he second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure." Claimants do not allege a case of direct expropriation in their submissions before this Tribunal. Rather, they argue that "Guatemala's acts and omissions, taken by the MEM, the President, the national police, and the courts, have had the effect of depriving Claimants of all or

[780] Claimants' Memorial, ¶ 144.

substantially all of the value of their investment, and, therefore, *constitute an indirect expropriation*."[781] This Tribunal should thus limit its inquiry to whether Guatemala's conduct, as Claimants allege, constitute indirect expropriation.

461. Annex 10-C.4 provides that "[t]he determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry." This inquiry "considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action." Annex 10-C.4(b) of the CAFTA-DR, however, provides that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations." In addition to interpreting Article 10.7 of the CAFTA-DR with Annex 10-C, Article 10.22 of the CAFTA-DR also provides that "when a claim is submitted under Article 10.16.1(a)(i)(A)," which is the case here, "the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

462. At this juncture, it bears emphasizing that this Tribunal should observe Articles 31 and 32 of the Vienna Convention on the Law of Treaties in interpreting the CAFTA-DR not least because it is a treaty within the definition of Articles 1[782] and 2.1(a)[783] of the Vienna Convention. The text of CAFTA-DR, of course, is the starting point.[784] In addition to the text of the treaty, the tribunal in *Fireman's Fund Insurance Company v. Government of Mexico*, in interpreting the NAFTA, followed the rules of interpretation set out at Articles 31 and 32 of the Vienna Convention.[785] In the context of the CAFTA-DR, the tribunal in *Aven v. Costa Rica* likewise resorted to Article 31 of the Vienna Convention in interpreting the CAFTA-DR, specifically Article 31(3)(c) thereof which provides that "any relevant rules of international law applicable in the relations between

[781] Claimants' Memorial, ¶ 164 (emphasis added).

[782] "Article 1. SCOPE OF THE PRESENT CONVENTION. The present Convention applies to treaties between States" (**C-0001**).

[783] "For the purposes of the present Convention: (a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instru ment or in two or more related instruments and whatever its particular designation."

[784] *Methanex*, Final Award, ¶ 37. (**RL-0227)**

[785] *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award of 17 July 2006, ¶¶135 to 136. (**RL-0231)**

the Parties" must be taken into account, together with the context, in interpreting treaty texts."[786] According to the *Aven* tribunal, "[t]his section thus provides an additional ground for treaty interpreters, such as the Tribunal, to take into account not only other provisions of the CAFTA-DR, general principles of law, but also custom, in construing in context the proper meaning of CAFTA-DR provisions, such as Articles 10.5 and 10.7."[787]

463. With regard to supplementary means of interpretation, Article 32 of the Vienna Convention instructs treaty interpreters to consider the circumstances of the treaty's conclusion. On this score, Guatemala invites the Tribunal's attention to U.S. legal principles and practices in expropriation. While it is true as a general postulate that the practice of one State party is not conclusive as to the meaning of the text of the treaty, it is not irrelevant.[788] The WTO Appellate Body also enumerated in *EC — Chicken Cuts* certain objective factors that may be considered in treaty interpretation under Article 31 of the Vienna Convention, which include: "the type of event, document, or instrument and its legal nature; temporal relation of the circumstance to the conclusion of the treaty; actual knowledge or mere access to a published act or instrument; subject matter of the document, instrument, or event in relation to the treaty provision to be interpreted; and whether or how it was used or influenced the negotiations of the treaty."[789] The historical background against which the treaty was negotiated should be examined.[790]

464. The Bipartisan Trade Promotion Authority Act of 2002, a published governmental act that was readily available to all the State Parties of the CAFTA-DR, instructs that the United States government must, among its principal trade negotiating objectives, "[seek] to establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice."[791] The formal launch of negotiations for what would later be the CAFTA-DR took place on January 8, 2003 and concluded on May 28, 2004.[792] On

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[786] *Aven v. Costa Rica*, ICSID Case No. UNCT/15/3, ¶ 411 **(RL-0031)**. Composition of the Tribunal: Eduardo Siqueiros T. as Presiding Arbitrator, and C. Mark Baker and Arbitrator Pedro Nikken as Arbitrators.

[787] *Id.*

[788] ("The purpose of treaty interpretation is to establish the common intention of the parties to the treaty. To establish this intention, the prior practice of only one of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance. However, the Panel was mistaken in finding that the classification practice of the United States was not relevant.") EC — Computer Equipment, WT/DS62/AB/R WT/DS67/AB/R WT/DS68/AB/R (5 June 1998), ¶ 93.

[789] EC — Chicken Cuts, WT/DS269/AB/R WT/DS286/AB/R (12 September 2005)¶¶ 290–291.

[790] ("... the reference in Article 32 of the Convention to the circumstances of the conclusion of a treaty may have some value in emphasising the need for the interpreter to bear constantly in mind the historical background against which the treaty has been negotiated.") Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., (Manchester University Press, 1984), p. 141.

[791] Trade negotiating objectives, 19 U.S.C § 3802 **(RL-0232)**.

[792] USTR Final Environmental Review of the CAFTA-DR (June 2005), p. 1, **(R-0140)** ("Negotiations with the Dominican Republic were successfully concluded on August 5, 2004.)

August 5, 2004, the CAFTA-DR was signed and at which occasion, the United States Representative exclaimed that "we are here today only because the U.S. Congress passed Trade Promotion Authority in 2002."[793] The Senate approved the CAFTA-DR in June 2005,[794] and the House of Representatives followed suit a month later.[795] The Congress would not have passed the CAFTA-DR if it found the Agreement in violation of its own instruction in the Bipartisan Trade Promotion Authority Act of 2002 for the government "[seek] to establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice"[796] when negotiating with the other State Parties. Indeed, the United States Trade Representative confirmed as much in his June 2005 Final Environmental Review of the CAFTA-DR that "[t]he expropriation provisions have been clarified in an annex to ensure that they are consistent with U.S. legal principles and practice."[797] Clearly, then, this Tribunal has sufficient basis to consider U.S. legal principles and practice in interpreting the provisions of the CAFTA-DR.

465. Having laid down the relevant text of the CAFTA-DR and the rules of interpretation that this Tribunal must observe in interpreting the Agreement, this Tribunal should next consider the allegations that Claimants should have pleaded and, during the course of the proceedings, must be able to prove in order to hold Guatemala liable for breach of Article 10.7 of the CAFTA-DR. Annex 10-C.2 of the CAFTA-DR provides that "[a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment." Annex 10-C.2 of the CAFTA-DR, thus, imposes upon the Claimants the burden of pleading and proving that: (1) they have a tangible or intangible property right or property interest in an investment, and (2) that Guatemala's action or series of actions interferes with that property right or property interest in an investment. According to the UNCTAD, "it is important to correctly identify the investment at issue."[798]

466. Here, it must be recalled that Claimants have identified in their Notice of Arbitration that their shares in Exmingua are the investment at issue.[799] And again, in their Counter-Memorial to Respondent's Preliminary Objections, Claimants were emphatic that they "are seeking to recover damages *they* have incurred … More specifically, the value of Claimants' investment (Exmingua) and, therefore, the value of Claimants' shares in

[793] USTR Zoellick Statement at Signing of U.S.-D.R.-CAFTA (August 5, 2004) **(R-0141)**.

[794] U.S. Trade Representative Rob Portman Statement Regarding Dominican Republic's Passage of CAFTA-DR (September 6, 2005) **(R-0142)**.

[795] Statement of USTR Rob Portman On House Passage of CAFTA-DR (August 27, 2005) (**R-0143**).

[796] Trade negotiating objectives, 19 U.S.C § 3802 **(RL-0232)**.

[797] USTR Final Environmental Review, p. 30 **(R-0140)**.

[798] UNCTAD, *Expropriation: A Sequel*, UNCTAD Series on International Investment Agreements II, p. 104 **(RL-0266)**.

[799] ("The Investors' investment in Exmingua, moreover, qualifies as an "investment" under the CAFTA-DR, as it is in the form of shares.") Claimants' Notice of Arbitration 9 November 2018, ¶ 20.

Exmingua were diminished as a result of the measures Guatemala took against Exmingua. This constitutes a loss to Claimants, who indirectly own Exmingua through their equity investments."[800] In its Decision on Respondent's Preliminary Objections, this Tribunal highlighted that the "Claimants state that they have submitted claims for losses that they themselves suffered. Specifically, Claimants state that they seek damages for the diminution in the value of their shares in Exmingua as a result of the measures taken by Guatemala in breach of CAFTA-DR."[801] The Tribunal should thus restrict its analysis of whether Guatemala breached Article 10.7 of the CAFTA-DR on the basis of interference that Guatemala purportedly committed against Claimants' shares in Exmingua.

467. The next step is to determine whether the alleged interference is attributable to the State of Guatemala.[802] This finds basis in Article 2 of the Articles on Responsibility of States for Internationally Wrongful Acts which provides that "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State." Here, the Claimants' case is that "Guatemala's acts and omissions, taken by the *MEM*, the *President*, the *national police*, and the *courts*, have had the effect of depriving Claimants of all or substantially all of the value of their investment, and, therefore, constitute an indirect expropriation."[803] Claimants assert that "Guatemala has rendered Exmingua worthless and has destroyed Claimants' investments" "[i]n particular, by unlawfully, arbitrarily, and indefinitely suspending Exmingua's Progreso VII exploitation license; by unlawfully seizing Exmingua's concentrate; by *de facto* suspending Exmingua's Santa Margarita exploration license; and by arbitrarily and indefinitely preventing Exmingua from obtaining an exploitation license for Santa Margarita."[804]

468. As to the suspension of Exmingua's Progreso VII exploitation license and the resulting suspension of Exmingua's operations, as well as the order in *Minera San Rafael* suspending the issuance of new exploitation licenses,[805] it must be stressed that these cases were brought about not by any action ordered, instructed, or instigated by the MEM, but as Claimants admit, in compliance with a lawful judicial order from the courts of

[800] Counter-Memorial to Respondent's Preliminary Objections, ¶ 57.

[801] Decision on Respondent's Preliminary Objections, ¶ 98.

[802] ("[O]ne needs to establish whether the measure is attributable to the respondent State and if so, whether the latter acted in its sovereign capacity.") UNCTAD, *Expropriation: A Sequel*, UNCTAD Series on International Investment Agreements II, p. 104 **(RL-0266)**.

[803] Claimants' Memorial, ¶ 164 (emphasis added).

[804] *Id.* at ¶ 144.

[805] Decision dated 3 September 2018, issued in Case No. 4785-2017 by the Constitutional Court (Minera San Rafael case), p. 33 **(C-0459)**.

Guatemala.[806] Similarly, Claimants admit that the impoundment of Exmingua's gold concentrate was "pursuant to an order of the Criminal Court."[807] Guatemala stresses these facts now because, as will be further discussed below, the actions of the courts of Guatemala cannot be attributed to the State of Guatemala absent a finding of denial of justice and collusion. U.S. legal principles and practice echo this sentiment.[808] On the other hand, Claimants themselves concede that they, on their own volition, suspended their exploration of the Santa Margarita area out of fear, an unfounded one at that, that they will be "faced with another claim by CALAS seeking an *amparo* suspending the Santa Margarita exploration license, in line with the Constitutional Court's decision in the *Minera San Rafael* case."[809] Following the *Minera San Rafael* case, a case in which they were not involved, Claimants suspended their exploration works in the Santa Margarita area. The issue of State attribution does not even come into play here as the suspension of the works was self-inflicted.

469. Assuming that Claimants hurdle the requirement of State attribution, the third step is to assess the factors for indirect expropriation under Annex 10-C.4 of the CAFTA-DR. This Tribunal should, however, proceed to the third step if, and only if, Claimants have successfully hurdled the first two steps. Guatemala is not splitting hairs here. The term "expropriation" appears in Annex 10.C-2 without qualification as to whether the claim before this Tribunal is one for direct expropriation under Annex 10-C.3 or indirect expropriation under Annex 10-C.3. If this Tribunal were to assess the economic impact and character of the assailed government action and the existence of any alleged reasonable investment-backed expectations without first being satisfied of the constitutive elements under Annex 10-C.2 of the treaty, Annex 10.C-2 would be reduced to a mere superfluity to Annex 10-C.4(a) of the CAFTA-DR.[810]

470. As this Tribunal weighs the factors in Annex 10-C.4(a), it is urged to bear in mind that "not every

[806] ("Following the ruling of the Constitutional Court confirming the *amparo provisional*, on 6 May 2016, and the MEM's Resolution of 3 May 2016, Exmingua suspended its operations, save for essential environmental maintenance work that was required by the MARN.") Claimants' Memorial, ¶ 100.

[807] Claimants' Memorial, ¶ 237.

[808] *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Submission of United States, dated 18 March 2016 ("Separately, decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants do not give rise to a claim for expropriation under [NAFTA] Article 1110(1). It is therefore not surprising that commentators have acknowledged the particular "dearth" of international precedents on whether judicial acts may be expropriatory. Moreover, the United States has not recognized the concept of "judicial takings" as a matter of domestic law."). (**RL-0040**).

[809] Claimants' Memorial, ¶ 170.

[810] Edward Gordon, *The World Court and the Interpretation of Constitutive Treaties: Some Observations on the Development of an International Constitutional Law*, The American Journal of International Law, Oct., 1965, Vol. 59, No. 4 (Oct., 1965), pp. 794-833, at p. 814 **(RL-0277)** ("A twin-forked rule of interpretation constantly mentioned by the Court is (a) that a treaty must be read as a whole to give effect to all of its terms and avoid inconsistency, and (b) that no word or provision may be treated as or rendered superfluous.")

taking amounts to an expropriation."[811] Indeed, unlike many other international investment agreements, the CAFTA-DR took pains to enumerate the factors upon which a finding of indirect expropriation should rest. The first time that these factors were ever articulated in the text of treaties was in 2004, when Canada and the United States included them in the Annexes of their Model BITs.[812] In fact, Annex 10-C of the CAFTA-DR is an exact copy of Annex B of the 2004 US Model BIT.[813] That the text of Annex 10-C of the CAFTA-DR and the 2004 US Model BIT are one and the same is, again, not a matter of sheer coincidence: "[t]he annex directs tribunals to examine several factors, which derive from the analysis of the U.S. Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)."[814] Another U.S. Supreme Court decision of relevance to this dispute insofar as the factors of indirect expropriation are concerned is *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002) which was decided prior to the conclusion of the CAFTA-DR. Guatemala will make reference to these cases as the discussion ensues. Suffice it to state for the moment that these cases, consistent with the weight of authority in investment arbitration, impose a heavier burden on the Claimants to establish indirect expropriation under the CAFTA-DR relative to other treaties where these factors are not articulated.

471. Finally, inasmuch as the Claimants, as pointed out above, have lodged an indirect expropriation claim against Guatemala, this Tribunal is urged to bear in mind Annex 10-C.4 which demands that "[t]he determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry." What this means is that "[t]here is no mechanical formula to determine when measures attributable to the Host State breach the dividing line between legitimate regulation and compensable indirect expropriation."[815] Investment tribunals must be mindful that "states must be in a position to make rational and informed decisions in the public interest concerning measures that might have an impact on foreign investment activity and their ability to do so would be severely undermined if the circumstances giving rise to expropriation defied any generalization."[816] The preamble of the CAFTA-DR reflects this goal when the State Parties resolved to "PRESERVE their flexibility to safeguard the public welfare." Annex 10-C.4(b) reinforces this fundamental policy animating the CAFTA-DR when it

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[811] *Id.*

[812] UNCTAD, *Expropriation: A Sequel*, UNCTAD Series on International Investment Agreements II, p. 58 **(RL-0266)**.

[813] *See* Annex B Expropriation of the 2004 U.S. Model BIT (**RL-0011**).

[814] USTR Final Environmental Review, p. 30 **(R-0140)**.

[815] Jan Paulsson and Zachary Douglas, *Indirect Expropriation in Investment Treaty Arbitrations*, in Norbert Horn and Stefan Michael Kroll (eds), Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, Studies in Transnational Economic Law, Volume 19 (© Kluwer Law International; Kluwer Law International 2004) pp. 145-158, 145 **(RL-0278).**

[816] *Id*. at 146.

provides that: "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

472. To summarize, the Tribunal's decision calculus in assessing Claimant's indirect expropriation involves, *first*, identifying the property rights or interests in the investment and whether the government's actions or series of actions interfere with these rights or interests; *second*, determining whether the alleged actions or series of actions are attributable to Guatemala; *third*, assessing whether the interference rises to the level of expropriation by reference to the treaty's standards, specifically, weighing the economic impact and the character of the assailed government actions or series of actions, and the existence of reasonable investment-backed expectations; and *finally*, in relation to the character of the government action, ascertaining whether the challenged government actions or series of actions constitute nondiscriminatory regulatory actions designed and applied to protect legitimate public welfare objectives. The subsequent discussion will go through this analysis to establish that Guatemala did not breach Article 10.7 of the CAFTA-DR.

1) Claimants failed to allege, as they cannot allege, that there was any interference with their shares in Exmingua or that Exmingua as a whole has been taken.

473. It has already been pointed out above that Claimants have identified in their Notice of Arbitration that their shares in Exmingua are the investment in issue.[817] And again, in their Counter-Memorial to Respondent's Preliminary Objections, Claimants were emphatic that they "are seeking to recover damages *they* have incurred … More specifically, **the value of Claimants' investment (Exmingua) and, therefore, the value of Claimants' shares in Exmingua were diminished as a result of the measures Guatemala took against Exmingua**. **This constitutes a loss to Claimants, who indirectly own Exmingua through their equity investments**."[818] Then, this Tribunal's Decision on Respondent's Preliminary Objections noted that the "Claimants state that they have submitted claims for losses that they themselves suffered"[819] which this Tribunal emphasized takes the form of "**damages for the diminution in the value of their shares in Exmingua** as a result of the measures taken by Guatemala in breach of CAFTA-DR."[820] According to this Tribunal, "[t]here appears to be no dispute in this case that Claimants hold **a covered investment, by virtue of their collective ownership (directly and indirectly) of the shares of a local enterprise (Exmingua)**."[821]

[817] Claimants' Notice of Arbitration 9 November 2018, ¶ 20 ("The Investors' investment in Exmingua, moreover, qualifies as an "investment" under the CAFTA-DR, as it is in the form of shares.")

[818] Counter-Memorial to Respondent's Preliminary Objections, ¶ 57 (emphasis added).

[819] Decision on Respondent's Preliminary Objections, ¶ 98 (emphasis added).

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

[821] *Id.*, at ¶ 127 (emphasis added).

474. Guatemala notes that this Tribunal, in its Decision on Respondent's Preliminary Objections, drew a distinction between, on the one hand, "loss of share *value*", and on the other, "deprivation of share *ownership* or interference with shareholder *rights*."[822] With regard to the loss of share value, which is what Claimants assert in their prior submissions before this Tribunal, this Tribunal stressed that the "claimant itself must have "incurred" harm; it would not be sufficient for a claimant to demonstrate only that a local enterprise in which it has an interest has incurred harm. The burden is on the claimant to allege (and eventually to prove) its own injury."[823] To achieve this, Claimants must show that they "incurred harm through a *chain of events* starting with State conduct towards a company in which it holds shares."[824]

475. A careful review of Claimants' Memorial will show that they pleaded no facts that would show, if at all, that there was a diminution in the value of their shares. The facts pleaded in their Expropriation section all related to the suspension of their mining operations at the Progreso VII and Santa Margarita areas and the impoundment of the gold concentrate extracted from the mines,[825] and the absence of any allegation relating to interference with their shares is further confirmed when their claims for damages centered on lost cash flow from the operating mine and interest thereon; value of impounded concentrate and interest thereon; lost value of impounded concentrate; and lost value from Tambor's known exploration potential; and lost value from Tambor's exploration opportunity.[826] Claimants did not, in short, establish any chain of events, *i.e.*, how, if at all, the alleged interference with Exmingua's business activities further resulted in interference with Claimant's shares through alleged diminution in their value. Lacking in any proof on whether, and much less, to what extent, the value of Claimants' shares in Exmingua has been diminished, the Tribunal's analysis, in reality, should already stop at this point.

476. Yet, even if this Tribunal were to examine "deprivation of share *ownership* or interference with shareholder *rights*,"[827] as opposed to the Claimants' original claim of "loss of share *value*," the conclusion would still be the same. Claimants do not argue, as they have no basis to argue, that Guatemala has taken over their investment through corporate acts. Indeed, Exmingua retains control of its management decisions and its day-to-day operations. The seminal NAFTA case on this point is *Pope & Talbot v. The Government of Canada* involving, as in the present case, an expropriation claim involving a U.S. foreign investor's wholly owned

[822] *Id.*

[823] *Id.*, at ¶ 129.

[824] *Id.*, at ¶ 130.

[825] *See* Claimants' Memorial, ¶ 144.

[826] Claimants' Memorial, Summary of Claimants' Damages, p. 185.

[827] Decision on Respondent's Preliminary Objections, ¶ 127.

subsidiary in Canada.[828] In said case, the Tribunal determined whether there was interference with the U.S. foreign investors' shareholdings and, finding that the U.S. foreign investor was still exercising the abovesaid corporate rights that flow from those shares,[829] found the expropriation claim without merit.

477. The standards in *Pope & Talbot, Inc. v. Canada,* including whether the investor remains in control of the investment and directs its day-to-day operations, or whether the State has taken over such management and control, were applied by later tribunals. It was ruled in *Enron Corporation and Ponderosa Assets LP v. Argentina* that "[t]he list of measures considered in the *Pope & Talbot* case as tantamount to expropriation, which the Respondent has invoked among other authorities, is in the Tribunal's view *representative of the legal standard required to make a finding of indirect expropriation*."[830] Upon finding that "[n]othing of the sort has happened in the case of TGS or CIESA or any of the related companies," the Tribunal proceeded to dismiss the expropriation claim.

478. In *CMS Gas Transmission Company v. Argentina,* the Claimant CMS invested in the purchase of shares in Transportadora de Gas del Norte, a company created in Argentina after the privatization of the gas sector in the country. In that case, CMS, as in the Claimant herein, was asking for damages for diminution of the value of its shares after it showed that "the value of its shares in TGN has dropped by 92%."[831] In assessing whether the investment had been expropriated, what the tribunal considered relevant was whether "the investor is in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment."[832] Finding that CMS retained enjoyment of these rights, the tribunal ruled that there was no expropriation.[833]

479. In sum, whether viewed from the perspective of "loss of share *value*" or "deprivation of share *ownership* or interference with shareholder *rights*,"[834] the facts of this case belie any interference with Claimants' shares in Exmingua, the investment subject of this dispute.

480. Guatemala likewise invites the Tribunal's attention to *GAMI Investments v. The United Mexican*

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[828] Pope & Talbot Inc. v. Canada, NAFTA (UNCITRAL) Arbitration Proceeding, Interim Award of June 26, 2000, ¶ 2 **(CL-0129)**.

[829] *Id.*, at ¶ 100.

[830] *Enron Corporation and Ponderosa Assets LP v. Argentina*, ICSID Case No. ARB/01/3, Award, IIC 292 (2007), 15 May 2007, ¶ 245 (emphasis added) **(CL-0259).**

[831] *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, IIC 65 (2005), 25 April 2005, dispatched 12 May 2005, ¶ 69 (**CL-0062)**.

[832] *Id.*, ¶ 263.

[833] *Id.* ¶ 264.

[834] Decision on Respondent's Preliminary Objections, ¶ 127.

States.[835] In that case, the U.S. investor GAMI held shares in a Mexican-incorporated company, Grupo Azucarero México SA de CV ("GAM"). GAMI argued, in its NAFTA Article 1110 expropriation claim, that Mexico's conduct impaired the value of its shareholding to such an extent that it must be deemed tantamount to expropriation.[836] The challenged act of government interference involved Mexico's Expropriation Law and the Expropriation Decree which expropriated GAM's five sugar mills. Like the case before this Tribunal, "GAMI's shareholding was never expropriated as such. GAMI contends that Mexico's conduct impaired the value of its shareholding to such an extent that it must be deemed tantamount to expropriation."[837]

481. In the award, the tribunal explained that "[t]he distinction between the alleged *de facto* expropriation of GAMI's shares in GAM and the *de jure* expropriation of GAM's five mills is critical."[838] The *GAMI* tribunal even drove the point further when it explained that, assuming even just one sugar mill was expropriated, "GAM's property rights in that single mill would have been "taken" because GAM was formally dispossessed of those rights."[839] The *GAMI* tribunal laid down the rule that there must exist "*objective findings* justified by evidence that GAM's value as an enterprise had been destroyed or impaired."[840]

482. The same relevant facts in *GAMI v. Mexico* are present in this case. Claimants assert that there has been a diminution in the value of their shares in Exmingua when Guatemala allegedly expropriated their opportunity to develop and operate mines at the Tambor project. But, as in *GAMI*, Claimants have not established by objective evidence how and to what extent their shares have been taken by the suspension of the mining operations in Tambor, even hypothetically admitting that the suspension was caused by Guatemala.

483. Perhaps aware of the tenuous ground upon which they have framed their claim in their prior submissions before this Tribunal, the Claimant now seeks to pursue an "alternative theory" of direct injury on the basis of what they claim is a "lost opportunity to develop the Tambor project."[841] Even if this Tribunal were to allow this belated and inappropriate amendment of their claim to proceed, this Tribunal would find that the alternative theory is still bereft of merit. Annex 10-C.2 of the CAFTA-DR, in its plain and ordinary meaning, requires the Claimants to establish that a "property right or property interest" in their "investment" has been

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[835] *GAMI Investments Inc. v. Mexico*, UNCITRAL, Award of 15 November 2004 **(CL-0036).**

[836] *Id.*, at ¶ 23 ("A fundamental feature of GAMI's claims is that they are derivative. GAMI does not claim that Mexican governmental measures were directed against its shareholding in GAM. Its grievance is that the value of its shareholding was adversely affected by measures which caused GAM's business to suffer").

[837] *Id.* at ¶ 35.

[838] *Id.*

[839] *Id.* at ¶ 127.

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

[841] Claimants' Memorial, ¶ 161.

interfered with. It bears repeating that the investment subject of this dispute consists of Claimants' shares in Exmingua. In short, for Claimants' alternative theory of expropriation to fly, Claimants must establish that their so-called "opportunity to develop the Tambor project" is a "property right or interest" that flows from their "investment", *i.e.*, the shares in Exmingua.

484. It is well-settled that "[a] property right, in order to qualify for the protection of the international law rules must be an actual legal right, as distinct from a mere economic or other benefit, such as a situation created by the law of a State in favour of some person or persons who are therefore interested in its continuance."[842] Measured by this standard, the relevant question is whether the law of Guatemala grants the Claimants an actual legal right or, in Claimants' words, "opportunity" to develop the Tambor project. The answer is no.

485. As to the exploitation of the Progreso VII area, *Bayview Irrigation District et al. v. United Mexican States* stands for the proposition that there are no property rights where, among other things, exploitation or use of the natural resources requires the grant of a concession under domestic law, and such concession does not guarantee the existence or permanence of the natural resources.[843] The Mining Law of Guatemala is similarly bereft of any such guarantee. In fact, in Radius Gold's Annual Report for the fiscal year 2011 filed before the Securities and Exchange Commission, it made a categorical caveat that "U.S. Investors are cautioned not to assume that any part or all of mineral deposits in these categories will ever be converted into reserves"[844] and "U.S. investors are cautioned not to assume that part or all of an inferred resource exists, or is economically or legally mineable."[845]

486. Claimants then refer this Tribunal to *Bear Creek Mining v. Peru*[846] and *Tethyan Copper v. Pakistan*[847] to support their claim that, insofar as future exploitation in the Santa Margarita area is concerned, that they already possess some property right or interest that may be the subject of expropriation, and insofar as an exploitation license for the Santa Margarita area is concerned, that they have a reasonable expectation that one will be issued in their favor. Claimants argue that in *Bear Creek* "the tribunal found an expropriation claimant did not yet have an exploitation license, but held an approved option to acquire mining rights pursuant to a

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[842] Gillian White, *Nationalisation of Foreign Property* 49 (1961) **(RL-0279)**.

[843] *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, ¶ 118 **(RL-0233)**.

[844] Radius 20-F Report to the U.S. Securities and Exchange Commission (2012), p. 3 **(R-0102)**.

[845] *Id.*

[846] Claimants' Memorial, ¶¶ 154 and 178 *citing Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award dated 30 Nov. 2017 ¶¶ 415-416 and 376, respectively **(CL-0139)**.

[847] *See* Claimants' Memorial, ¶ 178 *citing Tethyan Copper Co. Ltd. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability dated 10 Nov. 2017 ¶ 930 **(CL-0229)**.

government decree."[848] They further cite *Bear Creek* and *Tethyan* in support of their contention that, in the extractive industries, there is a reasonable expectation that an exploitation license will be granted. Claimants rely on the following passage in the *Bear Creek* award where the tribunal said that "[w]ithout these authorizations [to conduct mining activities], Claimant could not have been expected to invest the amounts it undisputedly invested . . . .",[849] and on the passage in *Tethyan* where the tribunal stated that mining investors require "comfort" "in order to invest considerable amounts of money in exploration before being granted the mining license that would secure their right to ultimately benefit from the findings they had made through their expenditures."[850]

487. The *Bear Creek* and *Tethyan* awards are inapposite to resolving the present case. In *Tethyan*, the investor asserted two property rights and interests: (1) the foreign investor TCCA's interest in the Joint Venture Agreement ("JVA") and the Joint Venture with the government, including in particular the right under Clause 11.8.2 of the JVA; and (2) its interest in TCCP, the local subsidiary established for the exclusive purpose of carrying out Claimant's activities in Pakistan.[851] TCCA argued that it had the right to convert its exploration license into a mining lease based on Clause 11.8.2 of the JVA which states that:

> "[w]here the Joint Venture or, pursuant to sub-clause 11.3.2, a Participating Party elects to develop a mine then, subject only to compliance with routine Government requirements, it *shall be entitled* to convert the relevant [Exploration] Licence(s) held by it into Mining [Leases] so as to give secure title over the required Mining Area."

488. Aside from this contractual provision, the foreign investor likewise relied on *several express and specific assurances, i.e.*, "representations made through the federal and the provincial regulatory framework" "specific assurances made by both Governments at "critical junctures","[852] all of which were held by the tribunal to have fostered a *legitimate expectation* that the mining application would be granted. The tribunal first resolved the issue of whether the contractual clause gave rise to a property right or interest and included that "Claimant's investment did include the right to convert Exploration License EL-5 into a mining lease upon submission of an application that met all routine regulatory requirements."[853] Only after concluding that the

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[848] Claimants' Memorial, ¶ 154.

[849] *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award dated 30 Nov. 2017 ¶ 376 **(CL-0139)**.

[850] *Tethyan Copper Co. Ltd. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability dated 10 Nov. 2017 ¶ 930 **(CL-0229)**.

[851] *Id.* at ¶ 1321.

[852] *Id.* at ¶ 816. *See also* ¶ 682 ("[C]ontrary to Respondent's allegation, Claimant does not base its claims exclusively on Clause 11.8.2 of the CHEJVA but also on rule 48 of the 2002 BM Rules and the assurances that it claims to have received from Government officials.")

[853] *Id.* at ¶ 1323.

investor TCC enjoyed a right to convert its exploration into a mining lease did the tribunal explain the implications of the denial of the mining lease application to its interest in TCCP.[854]

489. In *Bear Creek,* the foreign investor acquired mining concessions for a silver mining project from a Peruvian national *after* the government in 2007 declared the mining project a public necessity and guaranteed that the mining authority "*shall grant authorizations*" to the foreign investor to acquire the concessions from the Peruvian national.[855] From that time on, the foreign investor invested a total of US$ 18,237,592 until the government in 2011 *revoked* the declaration and authorizations. This led the *Bear Creek* tribunal to rule that "Claimant relied on the express governmental authorizations" and that "[w]ithout these authorizations, Claimant could not have been expected to invest the amounts it undisputedly invested between 2007 and 2011."[856] And even then, the foreign investor's property right or interest was not based on an "opportunity to invest" but on the money it had actually invested, which ultimately was the amount awarded by the tribunal.

490. In the present case, all that Claimants say is that "[i]n the extractive industries, in particular, there is no benefit to obtaining an exploration license without a reasonable expectation that an exploitation license will be granted in accordance with existing laws and regulations if the exploration yields positive results."[857] Unlike *Bear Creek* and *Tethyan*, there is nothing in the Guatemalan Mining Law or in the exploration license issued for the Santa Margarita area that assures either Claimants or Exmingua of the issuance of an exploitation license as a matter of right or entitlement. Nor do the Claimants allege that that the government officials of Guatemala gave them any assurance, express or otherwise, to that effect as, indeed, none was made.

491. In any case, it is well-settled that lost opportunities, if at all, such as the one Claimant now asserts, implicate only the valuation of damages, not the determination of whether there was a breach of the treaty. It will be recalled that the alternative theory of a lost "opportunity to invest" in *William Ralph Clayton, & Bilcon of Delaware Inc. et al. v. Government of Canada*[858] came about *only* in the Award on Damages, not on the Award on Jurisdiction of Liability. This is consistent as well with the tribunal's finding in *Methanex Corp. v. United States of America*, which involved a NAFTA Article 1110 expropriation claim, where the tribunal held that "items such as goodwill and market share may … figure in valuation. But it is difficult to see how they

[854] *Id.* at ¶ 1328.

[855] *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award dated 30 Nov. 2017 ¶ 373 **(CL-0139)**.

[856] *Id.* at ¶ 376.

[857] Claimants' Memorial, ¶ 178 *citing* Fuentes Report, ¶ 81; Kappes Statement, ¶ 146.

[858] *William Ralph Clayton and others v. Government of Canada*, NAFTA, UNCITRAL, Award on Jurisdiction and Liability dated 17 March 2015 **(CL-0088)**.

might stand alone."[859]

492. To conclude, Claimants' supposed property right or interest in developing the Tambor mining project, through their shareholdings in Exmingua, rests on shaky ground. The only property rights or interests they have here are the value of their shares, their share ownership, and shareholder rights, all of which remain intact and have not been the subject of any government interference.

2) Lacking any governmental act that could be perceived as interference with their shares in Exmingua, Claimants now claim to have been deprived of the "opportunity to develop and operate mining projects at Tambor". Regardless of how Claimants characterize their property rights or interests, Claimants failed to attribute any act of interference to the State of Guatemala.

493. In their Memorial, Claimants plead the decisions of the Supreme Court and the Constitutional Court suspending the exploitation license for Progreso VII, the court order allowing the seizure of gold concentrate,[860] as well as the order in *Minera San Rafael* suspending the issuance of new exploitation licenses,[861] as acts attributable to the State of Guatemala. They treat these judicial acts just "[l]ike any emanation of the State" that "also may constitute an expropriation."[862] Judge Tanaka rejected this simplistic approach to judicial acts in his Separate Opinion in the *Barcelona Traction* case.

494. *Barcelona Traction* involved acts and omissions of Spanish judges and courts alleged by the Belgian Government to have constituted denials of justice. Judge Tanaka cautioned that "whether a State incurs responsibility or not depends on the concrete circumstances of each case; in particular, the characteristics of the three kinds of State activities—legislative, administrative and judicial—must be taken into consideration."[863] He rejected a "[m]echanical, uniform treatment"[864] of these State activities. Judge Tanaka draws a distinction between judicial acts, on the one hand, and non-judicial acts, on the other, on "the fact that in modern civilized countries they are almost entirely independent of their government."[865] Judge Tanaka was emphatic that "[u]nlike internationally injurious acts committed by administrative officials, a State is, in principle, ***not*** responsible for those acts committed by judicial functionaries (mainly judges) in their officia1

[859] *Methanex Corporation v. United States of America*, UNCITRAL Final Award of the Tribunal on Jurisdiction and Merits, August 3, 2005, ¶ 17 **(RL-0227)**.

[860] *See* Claimants' Memorial, ¶ 237 (Claimants admit that the impoundment of Exmingua's gold concentrate was "pursuant to an order of the Criminal Court," i.e., Fourth Criminal Court order dated 5 June 2016, p. 2**)**. *See* **(C-0149)**.

[861] Decision dated 3 September 2018, issued in Case No. 4785-2017 by the Constitutional Court (Minera San Rafael case), p. 33 **(C-0459)**.

[862] Claimants' Memorial, ¶148.

[863] Barcelona Traction, Judge Tanaka Separate Opinion, p. 153 **(RL-0307)**.

[864] *Id.*

[865] *Id.*, at p. 155.

capacity."[866] He points out that "[a]lthough judges possess the status of civil servants, they do not belong to the ordinary hierarchy of government officials with superior-subordinate relationships."[867] He even goes on to say that "[t]he independence of the judiciary … may be admitted to be a 'general principle of law recognized by civilized nations' (Article 38, paragraph 1(c), of the Statute)."[868] Judge Tanaka then concludes that "a State by reason of the independence of the judiciary, in principle, is immune from responsibility concerning the activities of judicial organs."[869] He does recognize that this immunity "is not of an absolute nature," but limits responsibility only "*in cases where grave circumstances exist*."[870] These grave circumstances, according to Judge Tanaka, must constitute denial of justice.[871]

495. That a State cannot be held liable for the acts of its judiciary absent a finding of denial of justice has been repeatedly affirmed in investment law jurisprudence. An enunciation of this rule appeared early in NAFTA jurisprudence through the award in *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*.[872] The dispute involved an indirect expropriation claim under NAFTA Article 1110 after three levels of Mexican courts affirmed the Ayuntamiento of Naucalpan's annulment of a concession contract for waste management that the claimants executed with the local government. Even Claimants refer to *Azinian* in their Memorial to support their argument that "expropriation also may be committed through the State's judiciary,"[873] but what they fail to mention is that there was no finding of judicial expropriation in that case because the claimants did not allege, much less prove, the existence of denial of justice.

496. It is true that, unlike Judge Tanaka, the *Azinian* tribunal did not ground its holding on the independence of the judiciary from the other branches of government to explain why denial of justice is a precondition to a finding of judicial expropriation.[874] Be that as it may, the tribunal cautioned that the "possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. *What must be shown is that the court decision itself constitutes a violation of the treaty*." What then constitutes a violation of the treaty to hold the

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

[867] *Id.* at p. 154.

[868] *Id.* at p. 155

[869] *Id.* at pp. 155-56

[870] *Id.* at p. 156 (emphasis added).

[871] *Id.*

[872] *Azinian v. Mexico,* ICSID Case No. ARB(AF)/97/2, Award dated 1 Nov. 1999 **(CL-0144)**.

[873] Claimants' Memorial, 157.

[874] *Azinian v. Mexico,* ICSID Case No. ARB(AF)/97/2, Award dated 1 Nov. 1999, ¶ 98 **(CL-0144)**.

State liable for an act of its judicial organs? The *Azinian* tribunal supplied the answer, *viz.*:

> Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. *More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end*.[875]

497. Another NAFTA dispute was resolved four years after *Azinian.* In *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*,[876] the claimants challenged a Mississippi court's verdict for $500,000,000 and the decisions refusing to relax the bonding requirements and attributed this judicial act to the United States as "measures adopted or maintained" by it. The claimants argued that the trial court admitted "anti-Canadian and pro-American testimony and prejudicial counsel comment" in violation of the national treatment standard under NAFTA Article 1102, that the conduct of the trial, the court's excessive verdict, and arbitrary application of bonding requirements violated the minimum standard of treatment under NAFTA Article 1105, and that these actions, along with the denial of claimant's right to appeal and a coerced settlement, violated Article 1110 of NAFTA which bars the uncompensated appropriation of investments of foreign investors.[877] In resolving the expropriation claim, the tribunal unanimously held that "a claim alleging an appropriation in violation of Article 1110 can succeed *only* if Loewen establishes a denial of justice under Article 1105."[878]

498. The award in *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*[879] provides more clarity as to what acts can constitute denial of justice as a predicate for an expropriation claim. The claimant in *Swisslion* alleged four breaches of the 1996 Macedonia-Switzerland BIT, the first breach being a judicial expropriation claim of the investor's second tranche of shares in Agroplod occasioned by the Macedonian courts' termination of a Share Sale Agreement and the Business Plan.[880] As herein Claimants adverted to,[881] the *Swisslion* tribunal did find it an "uncontroversial point that a State is responsible for an expropriation effected by any of its organs, including its judiciary."[882] It must be recalled, however, that "[b]efore analysing

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[875] *Id.* at ¶ 99.

[876] *Loewen Group, Inc. y Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003 (**CL-0170)**.

[877] *Id.* ¶ 39.

[878] *Id.* ¶ 141, *emphasis supplied*.

[879] *Swisslion v. Macedonia*, ICSID Case No. ARB/09/16, Award (July 6, 2012), (**CL-0119**).

[880] *Id.* ¶ 259.

[881] Claimants' Memorial, fn 366, pp. 65-66.

[882] *Swisslion v. Macedonia*, Award, ¶ 310 (**CL-0119**).

the first claim,"[883] the tribunal "address[ed] at the outset an important juridical fact that affects the consideration of the claims generally, namely, the decisions of the Macedonian courts interpreting and applying the contract between Swisslion and the Ministry of Economy."[884] In the tribunal's view, "the question is whether or not in taking their decision the Macedonian courts acted contrary to international law and in particular whether there has been denial of justice in the present case."[885] The tribunal resolved the question in this wise:

> "The internationally lawful termination of a contract between a State entity and an investor cannot be equated to an expropriation of contractual rights simply because the investor's rights have been terminated; otherwise, a State could not exercise the ordinary right of a contractual party to allege that its counterparty breached the contract without the State's being found to be in breach of its international obligations. *Since there was no illegality on the part of the courts, the first element of the Claimant's expropriation claim is not established*.[886]

499. In 2013, an ICSID tribunal resolved an expropriation claim under the 1997 France-Moldova BIT in *Mr. Franck Charles Arif v. Republic of Moldova*.[887] Claimant Mr. Arif contended that his investment was taken on the basis of the alleged misapplication of Moldovan laws by the organs of the State that granted him these rights. He argued that "complete expropriation of [his] investment in the border stores took place on November 24, 2010, when the Supreme Court of Justice irrevocably cancelled the Tender results and the July 1, 2008 Agreement."[888] Mr. Arif asserted that "there was collusion between the local parties in interest" and "Moldova's judiciary, as well as a close coordination between the different instances within Moldova's judiciary."[889] In analyzing Mr. Arif's expropriation claim, the tribunal considered Claimant's position to be "in essence … that the actual misapplication of Moldovan law by the courts amounts to expropriation."[890]

500. Notwithstanding the tribunal's statement, which herein Claimants again cite,[891] that "as a matter of principle, in accordance with Article 4 of the ILC Articles on State Responsibility, court decisions can engage a State's responsibility, including for unlawful expropriation,"[892] the tribunal still rejected the claim because it

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[883] *Id.* at ¶ 260.

[884] *Id.*

[885] *Id.* at ¶ 265.

[886] *Id.* at ¶ 314 (emphasis added).

[887] *Franck Charles Arif v. Republic of Moldova,* ICSID Case No. ARB/11/23, Award (**CL-0126**).

[888] *Id.* at ¶ 189.

[889] *Id.* at ¶ 214.

[890] *Id.* at ¶ 415.

[891] Claimants' Memorial, fn. 366, p. 66.

[892] *Arif v. Moldova*, at ¶ 347 (**CL-0126**).

found that "these agreements have been declared invalid under Moldovan law by the whole of the Moldovan judicial system, including the Supreme Court. The Tribunal is not persuaded that there has been collusion between the courts."[893] The tribunal continued that "there is no evidence in the record that persuades the Tribunal to conclude that the Moldovan judiciary has not applied Moldovan law legitimately and in good faith in the proceedings commenced by Claimant's competitors."[894] More importantly, the tribunal refused the expropriation claim but it was unconvinced "that the Moldovan courts have acted in denial of justice in any way."[895]

501. Of more recent vintage is *MNSS BV and Recupero Credito Acciaio NV v. Montenegro*[896] decided in 2016. In that case, the tribunal examined, among others, a claim for breach of Article 6(1) of the Netherlands-Federal Republic of Yugoslavia BIT that prohibits expropriation except under the conditions set forth in the BIT. Claimants MNSS and Recupero Credito made investments in the form of equity and loans in Zeljezara Niksic AD Niksic ("ZN").[897] The assailed measures were the Podgorica Commercial Court's dismissal of ZN's Reorganization Plan in bankruptcy proceedings and the Montenegrin Court of Appeal's subsequent affirmation of that dismissal which, according to the claimants, resulted in expropriation of their investments. Dismissing the expropriation claim, the tribunal ruled that a "court decision cannot be considered a direct expropriation *unless* a denial of justice is found."[898]

502. For their part, Claimants submit that a prior finding of denial of justice is not required before a State may be held liable for judicial expropriation. To buttress this view, Claimants point this Tribunal to the Award in *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan.*[899] The claimants' investments in *Rumeli* consisted of shareholdings in Kar-Tel, a joint venture mobile telecommunications service company in Kazakhstan, covered by an Investment Contract with the State Committee on Investment ("Investment Committee"). On February 21, 2002, the Investment Committee terminated the Investment Contract, and through court proceedings for compulsory redemption of claimants' shares in Kar-Tel initiated by another shareholder, Telcom Invest, the company Kar-Tel was able to redeem the shares to the exclusion of the claimants. Based on the allegations in the written submissions and the

[893] *Id.* ¶ 415.

[894] *Id.*

[895] *Id.*

[896] *MNSS BV and Recupero Credito Acciaio NV v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (May 4, 2016, Members of the Tribunal: Andrés Rigo Sureda (President), Emmanuel Gaillard, and Brigitte Stern **(CL-0015)**.

[897] *Id.* ¶ 5.

[898] *Id.* ¶ b370.

[899] *Rumeli v. Kazakhstan*, ICSID Case No. ARB/05/16, Award (July 29, 2008) (**CL-0147-ENG**).

evidence presented during the hearings, the *Rumeli* tribunal found that the expropriation was "instigated by the decision of the Investment Committee",[900] a State organ, and not by a private party as herein Claimants contend. Worse still, the Investment Committee was found to have "collusively and improperly communicated to Telcom Invest and its shareholders before Claimants were made aware of [the termination of the Investment Contract], and which proceeded via a series of court decisions, culminating in the final decision of the Presidium of the Supreme Court."[901] This led the tribunal to conclude that "the court process which resulted in the expropriation of Claimants' shares was brought about through improper collusion between the State, acting through the Investment Committee, and Telcom Invest."[902] "[I]t is relevant", according to the *Rumeli* tribunal, "that the court process which culminated in the expropriation was instigated by the decision of the State, acting through the Investment Committee, to terminate the Investment Contract."[903] In other words, the Investment Committee—an executive State organ—used the court proceedings as a conduit for its expropriatory taking of the claimants' investments in Kar-Tel.

503. Claimants next rely on the Award in *Standard Chartered Bank (Hong Kong) Ltd. v. United Republic of Tanzania*[904] to argue that "[w]hile denial of justice could in some case result in expropriation, it does not follow that judicial expropriation could only occur if there is denial of justice."[905] Again, Claimants failed to situate the *Standard Chartered* Award in its factual context. Despite the tribunal's blanket statement, the tribunal did, in fact, find in *Standard Chartered* that the challenged judicial decision, the Utamwa J Order, "had gone beyond merely being a wrong judicial decision, rather it is an egregious error amounting to abject failure of justice." The nature of the order as a "thoughtless and reckless act" had "the immediate effect of imperilling SCB HK's economic rights and control over the Facility and assets assigned to it by IPTL," according to the tribunal.[906]

504. Claimants likewise refer to *Saipem S.p.A. v. The People's Republic of Bangladesh*[907] in asserting that "actions of the judiciary constituted an indirect expropriation, without requiring that such actions amount to a

[900] *Id.*

[901] *Id.*

[902] *Id.*

[903] *Id.*

[904] *Standard Chartered Bank (Hong Kong) Ltd. v. United Republic of Tanzania* ICSID Case No. ARB/15/41, Award (October 11, 2019) ¶ 279 (**CL-0278-ENG**).

[905] Claimants' Memorial, fns. 398-99, pp. 71-72.

[906] *Standard Chartered v. Tanzania,* ICSID Case No. ARB/15/41, Award (October 11, 2019) ¶ 352 (emphasis added) (**CL-0278)**.

[907] *Saipem S.p.A. c. The People's Republic of Bangladesh,* ICSID Case No. ARB/05/07, Award (June 30, 2009) (**CL-0145)**.

denial of justice."[908] What makes *Saipem* unique is that Article 9.1 of the Italy-Bangladesh BIT allows claims only for "compensation for expropriation, nationalization, requisition or similar measures," without mention of compensation for violations of the fair and equitable treatment standard or, more specifically, for denial of justice. When the tribunal asked claimant Saipem as to what its cause of action was, it admitted that "the misconduct of the domestic courts *did also amount to a denial of justice*."[909] Saipem explained, however, that the Italy-Bangladesh BIT "does not confer to your Tribunal jurisdiction over a claim based on denial of justice, and restricts your jurisdiction to a claim for expropriation. *This is why we did not bring a claim on the ground of denial of justice before you*."[910]

505. Three things are of note in *Saipem*. First, the claimant Saipem conceded that, had the BIT vested the tribunal with the authority to hear and resolve claims based on denial of justice, it would have brought a claim based on that ground. This proves that even the claimant was cognizant of the need to establish denial of justice for a claim of judicial expropriation to prosper. Second, even though the *Saipem* tribunal did not use the term 'denial of justice' to characterize the Bangladeshi courts' declaration of the ICC Award as a nullity, it must be pointed out, as the tribunal emphasized, that "both parties consider that the actions of (or the actions attributable to) Bangladesh must be "illegal" in order to give rise to a claim of expropriation."[911] In other words, it was not enough to show that the challenged measure was an act of the Bangladeshi judiciary as "Saipem's claim does not deal with the courts' regular exercise of their power to rule over annulment or setting aside proceedings of an award rendered within their jurisdiction."[912] Rather, the tribunal stressed that "[i]t deals with the court's alleged wrongful interference."[913] Third, having been satisfied that the court's intervention "was contrary to international law, in particular to the principle of abuse of rights and the New York Convention," the tribunal refused to close its eyes to the violation all because the Italy-Bangladesh BIT failed to include recourse to the tribunal in cases of denial of justice. Mavluda Sattorova captured the dilemma best when she noted that "[h]ad the *Saipem* tribunal described the conduct of the Bangladeshi courts as a denial of justice and not as an expropriation, the investor would have been deprived of the opportunity to have its grievance heard by an investment treaty tribunal."[914]

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[908] Claimants' Memorial, fn. 398, p. 71.

[909] *Saipem S.p.A. v. Bangladesh* ¶ 121 (**CL-0145)**.

[910] *Id.*

[911] *Id.* ¶ 134

[912] *Id.* ¶ 155

[913] *Id.* ¶ 155

[914] Mavluda Sattorova, Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct, ICLQ vol 61, January 2012 pp, 223–246, p. 244 (**RL-0280**).

506. The *Eli Lilly & Co. v. Government of Canada*[915] award adds nothing to herein Claimants' case because, while the tribunal posed the issue of "whether conduct that does not constitute a denial of justice may nonetheless be capable of qualifying as a violation of NAFTA Articles 1105 or 1110 [on expropriation],"[916] it did not reach a definitive response thereon because the claimants were unable to establish the factual predicate for its unlawful expropriation claim anyway.[917] If anything, *Eli Lilly* all the more lends credence to Judge Tanaka's special treatment of judicial acts in the *Barcelona Traction* case when the *Eli Lilly* tribunal recalled—not just once, but three times—in its award, the "controlling appreciation that a NAFTA Chapter Eleven tribunal is not an appellate tier with a mandate to review the decisions of the national judiciary."[918]

507. All told, the weight of jurisprudence in international investment arbitration demands, consistent with the independent character of the judiciary in the scheme of government and the non-appellate nature of the jurisdiction of an investment tribunal, that there be a showing of denial of justice before liability can be attributed to the State for an alleged expropriatory judicial conduct. If no denial of justice is convincingly established, then the courts' decision cannot be in any way considered a taking, much less an expropriation.

a. Absent a finding of denial of justice and collusion, the independent Supreme Court's and Constitutional Court's suspension of the Progreso VII exploitation license and the suspension of the issuance of new licenses pursuant to the Minera San Rafael case cannot be attributed to the State of Guatemala.

508. The Political Constitution of the Republic of Guatemala incorporates and affirms the general principle of international law of judicial independence by mandating that "[t]he magistrates and judges are independent in the exercise of their functions and are subjected solely to the Constitution of the Republic and to the laws."[919] To ensure that this mandate of independence is more than just empty rhetoric, the Political Constitution of the Republic of Guatemala vests the judiciary with features of functional independence, financial independence, non-removability of the magistrates and judges of the first instance, except in the cases established by the law, and independence in the selection of its personnel.[920] The magistrates of the Supreme Court of Justice and the other magistrates and judges take an oath to "apply prompt and impartial justice"[921] as a requirement to be a magistrate or judge. In the same vein, the Constitutional Court "acts as a collegiate tribunal with independence

[915] *Eli Lilly and Company v. The Government of Canada*, ICSID Case No. UNCT/14/2, Final Award (**RL-0040**).

[916] *Id.* ¶ 219.

[917] *Id.* ¶ 226.

[918] *Id.* ¶¶ 221, 224, and 225.

[919] Political Constitution of the Republic of Guatemala, Art. 203 (**C-0414**).

[920] *Id.* Art. 205.

[921] *Id.* Art. 207.

from the other organs of the State," and its "essential function" is the "defense of the constitutional order."[922]

509. Claimants allege that "Guatemala – through its executive and judicial branches – took […] measures in the form of acts and omissions which have deprived Claimants of the opportunity to mine Tambor and have rendered their investment in Exmingua worthless."[923] Claimants, however, make no claim, as they cannot claim, that the Supreme Court and the Constitutional Court of Guatemala, at any stage of the proceedings before them, acted in cahoots with the MEM, the MARN, or any other government agency when they ordered both the suspension of Exmingua's Progreso VII license and the issuance of new exploitation licenses in the *Minera San Rafael* case. Though Claimants did mention that the courts were "driven by … political interference,"[924] the Memorial presents not a single fact to substantiate this malicious charge against the integrity of the Guatemalan judiciary. This Tribunal is urged to disregard such an empty accusation as nothing more than Claimants' vicious attempt to add color to their otherwise dull case against the Respondent. It has also not been asserted that the MEM, the MARN, or any other government agency colluded with CALAS to institute the *amparo* proceedings that ultimately led to the suspension of Exmingua's Progeso VII license and the suspension of the issuance of new licenses in *Minera San Rafael*. Finally, Claimants do not allege, as they cannot allege, that the Supreme Court and the Constitutional Court conspired to reach the same conclusion.

510. The instant case, thus, is unlike *Rumeli v. Kazakhstan* where the tribunal held Kazakhstan liable for expropriation after it found that "the court process which resulted in the expropriation of Claimants' shares was brought about through improper collusion between the State, acting through the Investment Committee, and Telcom Invest."[925] The Claimants' case here is that the Supreme Court's and the Constitutional Court's decisions were "manifestly wrong."[926] The present claim hews more closely to *Arif v. Moldova*.[927] After the tribunal in *Arif* found no evidence of collusion either between the parties in interest and the Moldovan courts or among the different levels of the Moldovan judiciary, the tribunal proceeded to inquire whether the judiciary "applied Moldovan law legitimately and in good faith in the proceedings"[928] and whether "the Moldovan courts have acted in denial of justice in any way."[929]

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[922] *Id.* Art. 268.

[923] Claimants' Memorial, ¶ 165.

[924] *Id.* ¶ 133.

[925] *Rumeli v. Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008, ¶ 707 (**CL-0147**).

[926] Claimants' Memorial, ¶ 74 ("As Professor Fuentes explains, the Supreme Court's decision to grant the amparo provisional was manifestly wrong, both procedurally and substantively."); *Id.* ¶ 137 ("The Consitutional Court's ruling dated 11 June 2020 was manifestly wrong on all these counts.)

[927] *Arif v. Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013) (**CL-0126**).

[928] *Id.* ¶ 415.

[929] *Id.*

511. At this stage of the analysis, the Tribunal must bear in mind three things. *First*, even if the Guatemalan courts were wrong in suspending Exmingua's Progreso VII exploitation license and in ordering the suspension of the issuance of new licenses in the *Minera San Rafael* case, such error would not be conclusive as to a violation of Article 10.7 of CAFTA-DR, consistent with the ruling in *Azinian*. *Second*, the burden imposed on Claimants is an extremely high bar that constitutes nothing short of denial of justice, again as the *Azinian* tribunal instructs, or abject failure of justice, as *Standard Chartered* framed the term. Consistent with this onerous burden, even if the Supreme Court's and Constitutional Court's decisions resulted in the termination of rights, which, as will be explained below, did not occur here, still there can be no finding of unlawful expropriation, following *Swisslion*. *Third*, this Tribunal does not possess appellate jurisdiction over the Guatemalan judiciary and must accord considerable deference to the conduct and decisions of the courts in line with *Azinian* and *Eli Lilly*. Following *Arif*, for as long as the Guatemalan courts applied the law legitimately and in good faith in the proceedings, the suspension cannot constitute an illegal, expropriatory act.

512. In a previous section of this Counter-Memorial, Guatemala has tendered the standard that this Tribunal must apply to determine the existence of denial of justice and how Claimants' allegations failed to meet this standard. Those arguments are maintained in this Section. Further, Guatemala maintains that its courts legitimately applied Guatemalan law when they caused the suspension of Exmingua's Progreso VII exploitation license and the suspension of the issuance of new licenses in the *Minera San Rafael* case.

b. The courts of Guatemala interpreted and applied the laws of Guatemala legitimately, in good faith, and with a rational basis, negating any finding of denial of justice

513. To the Claimants, the consultation requirement that the courts of Guatemala ordered the MEM to conduct is one that did not exist at the time the exploitation license was granted in 2011.[930] Citing their expert witness Professor Fuentes, Claimants want this Tribunal to believe that the "decisions in the other cases previously discussed where the Constitutional Court ruled that the MEM needed to conduct consultations … were filed with the Court after Exmingua's appeal."[931] Claimants likewise assail the suspension of Exmingua's Progreso VII exploitation license pending MEM's compliance with the order to conduct consultations with indigenous people as required by the ILO Convention 169. They argue that such suspension "changed all the rules of the game."[932] This is not true.

514. Before addressing the Claimants' misinterpretation of Guatemala's domestic law, Guatemala exhorts this Tribunal to remember that its job is to decide the claim in accordance with the CAFTA-DR and applicable

[930] Claimants' Memorial, ¶ 175, p. 81.

[931] *Id.* ¶ 289 *citing* Fuentes Report ¶ 141-142.

[932] *Id.* ¶ 297 *citing* Fuentes Report ¶ 168.

rules of international law, not to determine the correctness of the Guatemalan courts' application of its own domestic law.[933] The function of domestic law, if at all, is only to shed light on the issues in dispute.[934] And to sustain a finding of violation of international law, not even "mere arbitrariness"[935] will suffice; the Claimants' burden is to establish the courts' decisions "surprising, shocking, or exhibits a manifest lack of reasoning."[936] In other words, for as long as the Courts' decisions rest on some rational basis in law,[937] the Tribunal must stay

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[933] *Loewen*, ¶ 51 ("The Tribunal cannot under the guise of a NAFTA claim entertain what is in substance an appeal from a domestic judgment.") (**CL-0170).**

[934] *Id.* ("The claim before the Tribunal is a claim under international law for violations of NAFTA. It is for the Tribunal to decide the issues in dispute in accordance with NAFTA and applicable rules of international law. NAFTA Article 1131.1. The Tribunal is concerned with domestic law only to the extent that it throws light on the issues in dispute and provides domestic avenues of redress for matters of which Claimants complain.")

[935] *Glamis Gold Ltd. v. United States of America* (UNCITRAL Case) Award, 8 June 2009, ¶¶ 616-617, 762, 779 (**RL-0041)**; *Azinian v. Mexico,* Award, ¶ 99 **(CL-0144)** ("Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.")

[936] *Glamis Gold Ltd*., Award, ¶¶ 616-617, 762, 779. (**RL-0041)**.

[937] *See* RUDOLF DOLZER AND CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, (Oxford: Oxford University Press), 2012, p. 181(**CL-0131**) ("Concerning the outcome of a case before a local court, it is clear that an investment Tribunal will not act as an appeals mechanism and will not decide whether the court was in error or whether one view of the law or the other would be preferable. Nevertheless, a line will have to be drawn between an ordinary error and a gross miscarriage of justice, which may no longer be considered as an exercise of the rule of law. This line will be crossed especially when it is impossible for a third party to recognize how an impartial judge could have reached the result in question.") See also, CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES*, (Oxford Univeristy Press 2007), p. 229 (**RL-0276**) ("An attack on the substantive outcome of the national court decision can only succeed if it is clear that there has been judicial impropriety, rather than merely a mistake of law."); *Mondev* Award, ¶ 127 ("The test is not whether a particular result is surprising, but whether the shock or surprise to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome…[i]n the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.") (emphasis added) (**RL-0018**); *Loewen Group and Another v. United States of America*, Opinion of Christopher Greenwood Q.C, 26 March 2001, ¶ 64 (**RL-0194**) ("The international tribunal is not a court of appeal from the national court (as Loewen accepts), nor is its task to review the findings of the national court. In the absence of clear evidence of bad faith on the part of the relevant court…the claimant must demonstrate that either it was the victim of discrimination on account of its nationality or that the administration of justice was scandalously irregular. Defects in procedure or a judgment which is open to criticism on the basis of either rulings of law or findings of fact are not enough."); JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW*, (Cambridge: 2005), pp. 73-81 (**CL-0171**); CHRISTOPHER GREENWOOD, State Responsibility for the Decisions of National Courts, in *ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS*, Fitzmaurice and Sarooshi (eds.) (Oxford: 2004), p. 61 ("it is well established that a mistake on the part of the court or an irregularity in procedure is not in itself sufficient to amount to a violation of international law; there must be a denial of justice.") (RL-0234); Zachary Douglas, International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed, International and Comparative Law Quarterly (ICLQ) **(RL-0191);** J.L. BRIERLY, *THE LAW OF NATIONS* (Oxford: 1963), pp. 286-287 (defining denial of justice as "an injury involving the responsibility of the State committed by a court of justice" and stating that "no merely erroneous or even unjust judgment of a court will constitute a denial of justice…the misconduct must be extremely gross.") (**RL-0281**); G.G. FITZMAURICE, *THE MEANING OF THE TERM 'DENIAL OF JUSTICE*, 13 Brit. Y.B Int'l L. 93 (1932), pp. 93-114 (**RL-0282**); A.V. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (Longmans: 1970) p. 319

its hand to preserve the integrity not only of the domestic judicial system but also the viability of CAFTA-DR itself.[938]

515. As the following discussion will show, the Guatemalan courts' decisions rest on sound, rational basis both as to the mandate to conduct consultations with indigenous peoples and the suspension of Exmingua's Progreso VII exploitation license pending compliance with the order to conduct consultations. The courts' orders, too, do not change the rules of the game, as Claimants want to make it appear, but simply implement a long-standing policy in Guatemala and in the inter-American human rights system, and breathe life to a pre-existing international obligation owed to the indigenous peoples of Guatemala.

516. The Republic of Guatemala ratified ILO Convention 169 on 5 June 1996.[939] They also admit that ILO Convention 169 vests indigenous peoples with "the right to be consulted: (i) "whenever consideration is being given to legislative or administrative measures which may affect them directly," and (ii) prior to the exploration or exploitation of mineral or sub-surface resources."[940] Claimants admit that "Guatemala was entitled to enact new laws or regulations to implement the ILO Convention and require the State to conduct consultations" but argue that these laws or regulations should have been enacted "*before* issuing exploitation licenses."[941] They thus make it appear that the consultation requirement that the Guatemala courts ordered the MEM to conduct as a precondition to the continued operation of the exploitation license for the Progreso VII is one that did not exist at the time Claimants made their purported investment in Exmingua.

517. On 2 June 2008, Claimant KCA executed a Letter of Intent with Radius "to develop the high-grade Tambor gold deposit located in central Guatemala."[942] In this "binding and enforceable"[943] Letter, Radius

("In a word, no domestic judgment may be attacked merely because it is unsound in the light of applicable principles of local law and justice."); *Azinian* Award, ¶¶ 102-103 (**CL-0144**); Thunderbird Award, ¶ 120 ("it is not the Tribunal's function to act as a court of appeal or review in relation to the Mexican judicial system regarding the subject matter of the present claims…")(**CL-0198**); *ADF* Award, ¶ 190 (endorsing the position of the Azinian Tribunal and stating that a NAFTA Tribunal "does not sit as a court with appellate jurisdiction with respect to the United States measures" and whether they have legal validity under United States domestic law) (**CL-0081**); *Loewen* Award, ¶ 134 ("a NAFTA claim cannot be converted into an appeal against the decisions of municipal courts.") (**CL-0170**). See also, *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, Judgment of 5 February 1970, Separate Opinion of Judge Tanaka, p. 158 ("If an international tribunal were to take up these issues and examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a "cour de cassation", the highest court in the municipal law system…the incorrectness of a judgment of a municipal court does not have an international character.") (**RL-0307**).

[938] *Loewen*, Award ¶ 242 **(CL-0170)**.

[939] Claimants' Memorial, ¶ 71, p. 31.

[940] *Id. citing* Articles 6 and 15(2) of the ILO Convention No. 169.

[941] *Id.* ¶ 174, p. 80 (emphasis added).

[942] Press Release, *Radius Signs Agreement to Develop its Tambor Gold Deposit* (June 2, 2008).

[943] Letter of Intent dated 2 June 2008, Kappes and Radius (Exhibit 99.4) filed with the U.S. Securities and Exchange Commission, ¶ 1, **(C-0063)**.

committed to transfer to KCA Subco, a wholly-owned subsidiary of KCA, "51% of the issued and outstanding shares of Radius' Guatemalan subsidiary EXMINGUA that holds a 100% interest in the [Tambor] Project."[944] The shares so committed would be transferred to KCA Subco as soon as it has "expended a minimum of US$6.5 million on exploration and development on the Project" or if it has "expended a minimum of US$6.5 million on exploration and development on the Project", within four years after execution of the Agreement in either case.[945] Despite KCA and Radius' earlier agreement for the transfer of only 51% of the issued and outstanding shares of Exmingua four years from the signing of the Letter of Intent, Claimants instead acquired 100% of Radius' shares in Exmingua as of August 2012.[946]

518. In June 2009, Exmingua hired GSM to prepare an EIA for the Progreso VII and Santa Margarita mining projects.[947] From January 2010 to April 2011, Claimants allege to have conducted community consultations and published the details of the project, as part of the EIA submitted to the MARN in accordance with Guatemala's Environmental Protection Law, insofar as it relates to the Mining Law. The MARN approved the Claimants' EIA on 23 May 2011.[948] To summarize Claimants' allegation, they claim that the Environmental Protection Law was the only law then in place to require a consultation process, that their compliance with such law and the approval of their exploitation license application gave rise to a reasonably expected benefit "that Exmingua would be able to continue operating in accordance with its validly issued Progreso VII exploitation license", and that the Guatemala courts' imposition of further consultation requirement under ILO Convention 169 is "akin to retroactively applying a new law in violation of Exmingua's acquired rights."

519. The relevant question then is whether the Guatemala courts did, as Claimants argue, retroactively impose a new law requiring the MEM to conduct further consultations for the continued operation of the exploitation license for Exmingua. To address this question, it becomes necessary to trace the state of laws in Guatemala as of the date it purportedly began conducting public consultations pursuant to EIA for the Progreso VII mining project in January 2010. On 21 December 2009, the Constitutional Court in *Cementos Progreso S.A.*, an *amparo* action, was unambiguous in its recognition that the right to be consulted is a collective right of indigenous peoples and the consultations must be "practiced by culturally appropriate means, in accordance with the characteristics of each nation, with participation and dialogue, aimed at achieving agreements on the

[944] *Id.*, clause 1.

[945] Guatemala is without knowledge or information sufficient to form a belief that KCA Subco had expended the amount of US$6.5 million as stated in the Letter of Intent or if any amount was even expended.

[946] Radius Press Release, Radius Gold Sells Interest in Guatemala Gold Property **(C-0223)**; *See also* Claimants' Memorial, ¶¶ 26-27.

[947] Claimants' Memorial, ¶ 29.

[948] Claimants' Memorial, ¶ 37; Resolution No. 1010-2011 of the Ministry of Environment and Natural Resources approving the Environmental Impact Assessment for Progreso VII dated May 23, 2011, ¶3 (**C-0212**).

measures to be taken." These very same standards articulated in *Cementos Progreso* served as the basis for the Constitutional Court's ruling as regards Exmingua's exploitation license for Progreso VII. It is, thus, not at all surprising that the Constitutional Court, in suspending Exmingua's Progreso VII license, made repeated references to its earlier decision in *Cementos Progreso*. Contrary to Claimants' assertion that the Constitutional Court retroactively applied a new law when it ordered the MEM to conduct further consultations pursuant to ILO Convention 169, the Court in Exmingua's case was merely iterating the standards in the *amparo* ruling that it had previously laid down in *Cementos Progreso* in December 2009, more than a month before Exmingua conducted its consultations in January 2010.

520. Claimants might argue that the relevant reckoning point should be the time it made an investment in Exmingua in June 2008 through the Letter of Intent that Claimant KCA signed with Radius. Yet, even if this Tribunal were to go back further in time into Guatemalan law and the annals of jurisprudence in Guatemala and the Inter-American Human Rights system, it would reach the same inescapable conclusion that ILO Convention 169 contained a self-executing right of consultation in favor of indigenous peoples, a right that Claimants turned a blind eye to when they invested in Exmingua, and by the date of the issuance of the decision in *Cementos Progreso* the obligation had already existed in Guatemala's law since 1997 and was sufficiently cemented in the Constitutional Court's case precedent. Twice in 2007 and once in April 2008, the Court held in the separate cases of *Sipacapa*, *Rio Hondo I*, and *Rio Hondo II* that the existence of the right of consultation of indigenous peoples was "beyond question". This understanding mirrors the direct incorporation of ILO Convention 169 into Guatemalan domestic law.

521. Similarly, the Inter-American System of Human Rights has provided guidance prior to June 2008 on the scope of the consultation right under ILO Convention 169 and related international instruments. In December 2002, the Inter-American Commission on Human Rights, of which Guatemala is a part, declared that:

> Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. **This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives**.[949] (emphasis added)

522. The IACHR affirmed this pronouncement in October 2004 concerning the Mayan Indigenous

[949] IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States*), December 27, 2002, ¶ 140 **(RL-0235**).

Communities of the Toledo District in Belize.[950] In November 2007, the Inter-American Court of Human Rights held even more categorically in *Saramaka v. Suriname* that "environmental and social impact assessments [must be conducted] by independent and technically competent entities, prior to awarding a concession for any development or investment project within traditional Saramaka territory, and implement adequate safeguards and mechanisms in order to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Saramaka people."[951]

523. Considering all these premises, there is absolutely no merit to the Claimants' insistence that a new law had been applied to them when the Constitutional Court required the conduct of consultations with indigenous peoples pursuant to ILO Convention 169. Whether from the eyes of Guatemala's domestic law or international law applicable to the present dispute, the consultation requirement imposed by the Constitutional Court is one that had long existed prior to the time they invested in Exmingua and their conduct of the EIA. The Constitutional Court did nothing more than to legitimately apply the law of Guatemala consistent with its duty to defend the constitutional order[952] in the State.

c. Absent a finding of denial of justice and collusion, the independent Criminal Court's order to impound the gold concentrate extracted from El Tambor mine cannot be attributed to the State of Guatemala.

524. Claimants concede that the seizure of Exmingua's gold concentrate was pursuant to an order of the 4th First Instance Court in Criminal Matters, Drug Dealing and Environmental Crimes on June 5, 2016.[953]

525. Further, it is not correct as Professor Fuentes claims, that the Criminal Court of First Instance and the Appellate Court "acquitted the four Exmingua workers."[954] Acquittal implies a full-blown trial on the merits and a finding that the prosecution was not able to establish the guilt of the accused beyond reasonable doubt. That was not the case here. The Appellate Court had only issued a *Auto de Falta de Mérito* (writ dismissing the case without prejudice), which means that the investigation is still ongoing.[955] What is more, the Court of Appeals, on appeal, was categorical that "although it is true that the Court's decision to dismiss the case without

[950] IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, ¶ 142 (**RL-0236**).

[951] IACHR., Case of the *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, ¶ 194(e) **RL-0237**).

[952] Political Constitution of the Republic of Guatemala, Art. 268. (**C-0414**).

[953] Decision of the Criminal Court dated 11 May 2018, p. 10 **(C-0505 ENG)**, p. 8. ("Section 24 of our Code of Criminal Procedure describes the filing of Criminal Complaints, firstly as a "PUBLIC" duty, thus granting the Public Prosecutor's Office the power to conduct investigations, prosecute criminal cases and set the jurisdictional authority in motion for such prosecution.")

[954] Fuentes Report, ¶¶ 188-189.

[955] Decision of the Criminal Court of First Instance on Drug Trafficking and Crimes against the Environment issues on May 11, 2018, p. 7 **(C-0505 ENG)**.

prejudice favors the defendants, it is also true that the appealed ruling does not result in the irrevocable closure of the proceeding, which means that the Public Prosecutor's Office **is still able to continue investigating the matter** in depth."[956] The Court proceeded to say that "[t]his enables the Public Prosecutor's Office to **improve its investigation** of the events and of any allegedly responsible persons, and to **incorporate all the means of evidence and necessary documents** to establish that Exmingua no longer had a license or authorization to develop the PROGRESO VII DERIVADA mining project as of 9 May 2016, i.e. the date on which the defendants supposedly performed the actions in question."[957]

526. In this regard, Article 198 of the Guatemala Criminal Procedure Code authorizes that "items and documents related to the crime or that **may be relevant to the investigation** … be deposited and kept in the best possible manner."[958] Further, when the Criminal Court of First Instance dismissed the criminal case against the four Exmingua workers, the Court order the Public Prosecutor's Office "to return the cell phones seized from each defendant and the seized vehicle,"[959] but there was no similar order to return the gold concentrate precisely because they were relevant to a continuing investigation by the public prosecutor. Moreover, as established above, Exmingua has not requested the return, at least in regards to the concentrate which remains held by the judicial organ.

d. Guatemala did not in any way interfere with Exmingua's exploration of the Santa Margarita area. Exmingua suspended its exploration of Santa Margarita area on its own volition.

527. Claimants next argue that Guatemala's actions deprived them of the opportunity to develop the Tambor mining project "by *de facto* suspending Exmingua's Santa Margarita exploration license; and by arbitrarily and indefinitely preventing Exmingua from obtaining an exploitation license for Santa Margarita."[960] The reasons for why this is inaccurate have already been explained. Moreover, the issue of State attribution does not even come into play here considering the absence of state conduct as required under Article 2 of the Articles on Responsibility of States for Internationally Wrongful Conduct and Annex 10-C.2 of the CAFTA-DR. Without any government-ordered suspension of Exmingua's exploration works, there exists no rhyme or reason for Exmingua to suspend its own operations. The exploration license remains operative. The suspension of the exploration operations was purely of their own volition.

528. In any case, Guatemala has no control on whether or not CALAS, or any other entity at that, would

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

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

[958] Art. 198, Guatemalan Criminal Procedure Code (**C-0506 ENG**) (emphasis added).

[959] Decision of the Criminal Court dated 11 May 2018, p. 7 (**C-0505 ENG**)

[960] Claimants' Memorial, ¶ 144.

institute legal proceedings against Exmingua. Surely, any prudent investor must know that "investment always entails risk."[961] Thus, in the context of the NAFTA, the *Waste Management Inc. v. Mexico* tribunal reminded investors that "it is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor."[962] If Claimants truly are experienced investors as they claim to be, they should know that potential legal suits are to be anticipated in any business venture. Even if the Claimants' fear arises from the Guatemalan courts' suspension of the exportation certificate in *Minera San Rafael*, that is not enough to constitute indirect expropriation. According to the *Generation Ukraine Inc v. Ukraine* tribunal, "[n]or is it sufficient for the disappointed investor to point to some government initiative, or inaction, which might have contributed to his ill fortune."[963]

529. As to their claim that Exmingua has been *de facto* prevented from obtaining an exploitation license for Santa Margarita, Claimants contend that "Exmingua also derived its value from the expectation that it would be able to exploit the Santa Margarita project area."[964] To argue that this value has been rendered worthless, Claimants allege that the MEM has not responded to its request for recommendations to complete consultations for the Santa Margarita EIA.[965] But, with regard to this supposed inaction, Claimants have not shown that they have asked the courts of justice of Guatemala to compel the MEM to make such recommendations. This ties back to Guatemala's point that, for an expropriation claim to prosper, it must first establish denial of justice by the judiciary. As held by the tribunal in *Generation Ukraine Inc v. Ukraine*:

> [I]t is not enough for an investor to seize upon, no matter how low the level of the relevant governmental authority, to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the theory that there had been an uncompensated virtual expropriation. In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of exhaustion of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable—not necessarily exhaustive—effort by the investor to obtain correction.[966]

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[961] *Generation Ukraine Inc v. Ukraine*, Award, 16 September 2003, ¶ 20.30 **(RL-0100)**. *See also Telenor Mobile Communications AS v. Hungary*, ICSID Case No. ARB/ 04/15, Award of 13 September 2006, ¶ 64 **(CL-0130)** ("Any investor entering into a concession agreement must be aware that investment involves risks.")

[962] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004, ¶ 177 (**CL-0022**).

[963] *Generation Ukraine Inc v. Ukraine*, Award, 16 September 2003, ¶ 20.30 **(RL-0100)**.

[964] Claimants' Memorial, ¶ 169.

[965] Claimants' Memorial, p. 75 *citing* Letter from Exmingua to the Ministry of Environment and Natural Resources dated 7 Apr. 2017 (**C-0015-ENG/SPA**) and Exmingua's letter to the Ministry of Energy and Mines dated 7 Apr. 2017 (**C-0016-SPA/ENG**).

[966] *Generation Ukraine Inc v. Ukraine*, Award, 16 September 2003, ¶ 20.30 **(RL-0100).**

3) Even assuming that there were acts of interference with Claimant's property rights or interests, whatever those may be, that are attribute to Guatemala, such interference does not rise to the level of indirect expropriation according to the standards set forth in Annex 10-C.4 of the CAFTA-DR.

530. It has already been established above, based on the text of Annex 10-C of the CAFTA-DR and under international law, that that "not every taking amounts to an expropriation."[967] Jan Paulsson and Zachary Douglas further elucidate the point, *viz.*:

> Investment treaty awards sometimes appear to confuse two distinct analytical steps for a finding of expropriation by conflating the questions as to whether there has been a taking attributable to the Host State and whether the Host State is under an obligation to compensate that taking. The first stage of the analysis should focus on the nature or magnitude of the interference to the investor's property interests in its investment caused by measures attributable to the Host State to determine whether those acts amount to a taking. The second stage should determine whether this taking of interference rises to the level of an expropriation by reference to the relevant treaty standard. If this second stage results in a finding of expropriation, it remains for consideration whether it is nonetheless lawful because it is for a public purpose, on a non-discriminatory basis, in accordance with due process of law and on payment of fair compensation.[968]

531. The tribunal in *Pope & Talbot Inc. v. Canada*, again the landmark NAFTA case on the standards of indirect expropriation, made a similar ruling by holding that even if the alleged interference did diminish the value of the claimant's investment in the softwood lumber business, which was not the case, the interference did not rise to the level of an expropriation, that is, that there was no "substantial deprivation" suffered by the investor.[969] Since *Pope & Talbot*, several investment tribunals have interpreted the "substantial deprivation" test to assess the presence of indirect expropriation.[970] In *Telenor Mobile Communications AS v. The Republic*

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[967] Jan Paulsson and Zachary Douglas, *Indirect Expropriation in Investment Treaty Arbitrations*, in Norbert Horn and Stefan Michael Kroll (eds), Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, Studies in Transnational Economic Law, Volume 19 (Kluwer Law International; Kluwer Law International 2004) pp. 145-158, 148 **(RL-0278).**

[968] *Id.*

[969] *Pope & Talbot Inc. v. Canada*, NAFTA (UNCITRAL) Arbitration Proceeding, Interim Award of June 26, 2000, ¶ 102 ("Even accepting (for the purpose of this analysis) the allegations of the Investor concerning diminished profits. the Tribunal concludes that the degree of interference with the Investment's operations due to the Export Control Regime does not rise to an expropriation (creeping or otherwise) within the meaning of Article 1110. While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been "taken" from the owner. Thus, the Harvard Draft defines the standard as requiring interference that would "justify an inference that the owner * * * will not be able to use, enjoy. or dispose of the property ... "') (**CL-0129)**.

[970] *Glamis Gold Ltd*, Award, ¶ 536 (**RL-0041)** (The tribunal considered "whether the claimant's investment 'had been so radically deprived of its economic value' so as to constitute an expropriation, and in doing so, assessed the economic impact of the measures complained of on the value of the project."). *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, IIC 304 (2007) (18 September 2007) ¶ 285 **(CL-0258)** ("A finding of indirect expropriation

of Hungary, the tribunal noted that "[t]here has been a substantial volume of case law, both under the Washington Convention and in general public international law, as to the magnitude of the interference with the investor's property or economic rights necessary to constitute expropriation. Though different tribunals have formulated the test in different ways, they are all agreed that the interference with the investor's rights must be such as substantially to deprive the investor of the economic value, use, or enjoyment of the investment."[971]

532. It is true that there is no mechanical formula to determine whether an interference is of such a degree that rises to the level of substantial deprivation. Rather, the determination is made on a case-by-case basis. However, Annex 10-C.4 of the CAFTA-DR, unlike many other international investment agreements, enumerates, albeit not exclusively, certain factors that this Tribunal should apply in assessing the presence of indirect expropriation. Too, it must be recalled, as explained above, that Annex 10-C was negotiated by the U.S. Government to be consistent with its legal principles and practices, specifically those embodied in the U.S. Supreme Court's decisions in *Penn State* and *Tahoe,* and is a textual replica of the U.S. Model BIT Treaty. This Tribunal is obligated to recognize and breath life into the intention in accordance to the Vienna Convention on the Law of Treaties.

533. To illustrate this point, many awards on which Claimants rely[972] pivot on the so-called "sole effects" doctrine, that is, the tribunal's solely on the investor's loss, regardless of the government's gain, and ignoring the intent behind and the public purpose underlying the government action. The Iran-US *Tippetts* tribunal, for instance held that "[t]he intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."[973] The *Siemens A.G. v Argentine Republic* echoed this rule and held that "intent is not decisive or essential for a finding of discrimination"; rather, "the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment."[974] In *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, the tribunal held that "there will be violation of [the expropriation provision in] the Treaty, even if the measures might be for a public purpose

requires more than adverse effects: "it would require that the investor no longer be in control of its business operation, or that the value of the business has been virtually annihilated.").

[971] *Telenor v. Hungary*, ICSID Case No. ARB/ 04/15, Award of 13 September 2006, ¶ 65 **(CL-0130)**.

[972] Claimants' Memorial, pp. 87-88.

[973] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA,* Award No. 141-7-2 dated 29 June 1984, reprinted in 6 IRAN-U.S. CL. TRIB. REP. 219, 226 ¶ 22 (1986) (**CL-0148**).

[974] *Siemens A.G. v. Republic of Argentina*, ICSID Case No. ARB/02/8, Award (6 February 2007) ¶ 321 (**CL-0159**)

and non-discriminatory."[975] Annex 10-C.4(a), in contrast, enjoins this Tribunal to consider the character of the government action involved which includes, among others, assessing whether the State or a private party benefitted from the alleged interference. The *S.D. Myers v. Canada* tribunal, for instance, found it conclusive that "the Interim Order and the Final Order were designed to, and did, curb SDMI's initiative, but only for a time. CANADA realized no benefit from the measure. The evidence does not support a transfer of property or benefit directly to others. An opportunity was delayed."[976]

534. Further, Annex 10-C.4(b) of the CAFTA-DR provides that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, *do* ***not*** *constitute indirect expropriations*."[977] This is a textual commitment in the CAFTA-DR to reject *Vivendi* and similar cases, and is an explicit recognition of the State Parties' regulatory powers. These fundamental principles undergird the CAFTA-DR and this Tribunal is exhorted to observe them in its analysis of the indirect expropriation claim before it.

a. The alleged governmental interference does not satisfy the threshold of substantial deprivation to be considered in breach of Article 10.17 of CAFTA-DR.

535. The first factor in the three-prong test in Annex 10-C.4(a) of the CAFTA-DR is "the economic impact of the government action." This concept has been understood in two senses under U.S. expropriation jurisprudence existing at the time the CAFTA-DR was being negotiated. The first sense of the concept is that the "diminution in property value, *standing alone*, can[not] establish a taking."[978] The implication of this principle is that, unless a property owner has been deprived of any and all beneficial use of the property, then there will be no expropriation based solely on this factor of the three-prong test.[979] The rationale behind it is that the remaining components of the property not subject of interference retain some economic value.[980] These principles are similarly applied in the international investment regime.

536. Thus, in *Al-Warraq v. Indonesia*, a claim arising under the Organisation of Islamic Cooperation Agreement, the measures were found not to amount to an expropriation because the investor had not been totally deprived of his shares, and his ownership of the shares in Bank Century, his basic rights in the exercise

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[975] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Republic of Argentina*, ICSID Case No. ARB/97/3, Award (20 August 2007) ¶ 7.5.21 (**CL-0142**).

[976] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, (13 November 2000) ¶ 287 (**CL-0104).**

[977] Emphasis added.

[978] *Penn Central Transportation Co. c. New York City*, 438 U.S. 104, 131 (1978) **(RL-0238).**

[979] *Id.*

[980] *Id.*

of his ownership of the shares, and his actual control over the shares remained intact.[981] As previously discussed, the same considerations involving the issue of shareholdings in a company were applied by the *Pope & Talbot*, *Enron*, and *CMS* tribunals.

537. In the present dispute, both Claimants retain control to the full extent over their business operations in Exmingua, and Guatemala has not stepped in, whether directly or indirectly, to take over the economic rights, including, among others, their voting rights and dividend rights, that come with their shareholdings. In fact, the license is suspended, not revoked. Claimants did not make any allegation to the contrary. To be sure, the *CMS* tribunal ruled that even if "the value of [the investor's] shares in TGN has dropped by 92%,"[982] the determining factor, still, was the fact that the investor had full control over its shares and the business operations of TGN, the domestic company in Argentina. Again, the reason behind these rulings is that, for as long as the company retains some property rights or interests in their investments, no finding of expropriation can be found. Thus, even if the Claimants are able to belatedly prove that the value of their shares in Exmingua have been diminished, the existence of their corporate control over Exmingua and its business will defeat a finding of expropriation.

538. The second sense of "the economic impact of the government action" factor in Annex 10-C.4 of the CAFTA-DR involves a temporal element. In U.S. expropriation jurisprudence, this aspect was discussed in *Tahoe* where the U.S. Supreme Court considered that a temporary moratorium without more cannot partake the nature of expropriation.[983] The most basic implication of this was enunciated in *Fireman's Fund Insurance Company v. Mexico*, where the tribunal held that "the taking must be permanent, and not ephemeral or temporary."[984]

539. In *SD Myers v. Canada*, the tribunal was asked to assess whether an export ban on PCB waste and the closure of the Canadian border for approximately sixteen months resulted in expropriation.[985] Measured against the rule that "[a]n expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights,"[986] the tribunal held that a temporary measure does not constitute expropriation.[987] In

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[981] *Al-Warraq v. Indonesia*, Ad Hoc Tribunal (UNCITRAL), Final Award, IIC 718 (2014), (15 December 2014), ¶ 524 **(CL-0273).**

[982] *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, IIC 65 (2005), 25 April 2005, dispatched 12 May 2005, ¶ 69 (**CL-0062)**.

[983] *Tahoe-Sierra Preservation Council, Inc. c. Tahoe Regional Planning Agency,* 535 U.S. 302, 321 (2002) **(RL-0239).**

[984] *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award of 17 July 2006, ¶ 176(D) **(RL-0231).**

[985] *SD Myers v. Canada*, UNCITRAL, First Partial Award of 13 November 2000 **(CL-0104**).

[986] *Id.* at ¶ 283.

[987] *Id.* at ¶ 287.

Tecnicas Medioambientales Tecmed SA v. Mexico, the tribunal considered the temporary nature of deprivation as one that negates the presence of indirect expropriation.[988] According to the tribunal, "the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation *if they are irreversible and permanent*."[989] Similarly, the *Plama Consortium Ltd (Cyprus) v. Bulgaria* tribunal considered "the *irreversibility and performance* of the contested measures" a decisive element in evaluating whether a measure results in indirect expropriation.[990]

540. In some cases, the tribunals combined the principles in *Penn Central* and *Tahoe* in U.S. jurisprudence. Thus, in *LG&E v. Argentina*, the tribunal ruled that "generally, the expropriation must be permanent, that is to say, it cannot have a temporary nature, unless the investment's successful development depends on the realization of certain activities at specific moments that may not endure variations. [991] Note that the language of the tribunal, by using the word "unless", shifts the burden on the Claimants to establish that its investment's success depends on truncated components. The Claimants do not make any such claim. Truth to tell, the Guatemalan Mining Law does not recognize, much less require, any specific periodic milestones that a license-holder must achieve to continuously enjoy the mining rights conferred therein.

541. Claimants also cite *Wena Hotels v. Egypt*[992] where the tribunal held that "to seize and illegally possess the hotels for nearly a year is more than an ephemeral interference 'in the use of that property or with the enjoyment of its benefits.'"[993] Claimants, however, failed to mention the determinative factor in the *Wena* tribunal's analysis. In *Wena*, the hotel was in the possession of Egyptian Hotels Company ("EHC"), "a company of the Egyptian Public Sector affiliated to the General Public Sector Authority for Tourism."[994] Ruling in favor of the investor, the *Wena* tribunal held that "allowing an entity (over which Egypt could exert effective control) to seize and illegally possess the hotels for nearly a year is more than an ephemeral

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[988] *Técnicas Medioambientales Tecmed, SA v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), ¶ 116 **(CL-0122)** ("Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary.")

[989] *Id.* ¶ 166 (emphasis added).

[990] *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), ¶ 193 (**RL-0140).**

[991] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc.v. Argentine Republic*, Decision on Liability (3 October 2006), ¶ 193 **(RL-0240).**

[992] *Wena Hotels Ltd v. Egypt*, ICSID Case No. ARB/98/4, Award, (2004) 6 ICSID Rep. 89, (2002) 41 ILM 896, IIC 273 (2000) (8 December 2000) (**CL-0151)**.

[993] *Id.* ¶ 99.

[994] *Id.* ¶ 17.

interference "in the use of that property or with the enjoyment of its benefits.""[995] The controlling factor, therefore, was not so much that Wena did not have any beneficial use of the property for one year, but that the government, through EHC, had possession of the property. Herein Claimants grossly omitted that controlling factor in their Memorial.

542. The ensuing discussion will apply these standards set forth in U.S. takings and investment law jurisprudence. At this point, Guatemala maintains that the only property rights or interests that Claimants have are their shares in Exmingua. As earlier emphasized, Claimants are belatedly and erroneously pursuing an alternate theory of deprivation of "opportunity to develop the Tambor mining project," one that does not partake the nature of a legal right under Guatemalan law. But even if this Tribunal were to indulge the Claimants, the facts and applicable law considered, this Tribunal will find that the economic impact, if at all, on the Claimants' purported property rights or interests do not reach the level of indirect expropriation.

i. The suspension of the exploitation license for Progreso VII mining area is a temporary measure.

543. The MEM's suspension of Exmingua's Progreso VII exploitation license through Resolution No. 1202[996] was done in compliance with the Supreme Court's (acting as Amparo Court) November 11, 2015 decision declaring that "the granting of the mining license for the exploitation of gold and silver in the municipalities of San Pedro Ayampuc and San José del Golfo, Department of Guatemala, known as "PROGRESO VII DERIVADA," issued by the challenged authority in Case No. SEXT-054-08, is hereby suspended."[997] Article 85 of the Mining Law states that "[m]ining products destined for export must originate from licenses of exploitation."

544. The language of the Constitutional Court's decision admits of no other interpretation: the mining license is only suspended, and not revoked. Surely, not even Claimants can contend that a suspension has a meaning other than its ordinary connotation, that is, "to cause to stop *temporarily*; to set aside or make *temporarily* inoperative; or to defer to a later time on specified conditions."[998] The stoppage of the mining operations on the Progreso VII area is not permanent or irreversible. On the strength of *SD Myers*, *Tecnicas*, and *Plama*, this Tribunal no longer needs to inquire any further.

545. Claimants, however, lament that "Guatemala *indefinitely* suspended Exmingua's Progreso VII

[995] *Id.* ¶ 99.

[996] *See* MEM Resolution No. 1202, pp. 1-2 (**C-0139 ENG**) ("[T]his Ministry hereby resolves as follows (1) to suspend the exclusive right to mine and exploit gold and silver, as well as the power granted under such right to sell locally, transfer or exploit such products …")

[997] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting amparo provisional, p. 2. (**C-004 ENG**)

[998] MERRIAM WEBSTER DICTIONARY, *available at* https://www.merriam-webster.com/dictionary/suspend (**R-0205**).

exploitation license."[999] This is an exaggeration and it is incorrect. Far from being indefinite, the Court's decision explicitly contemplates the "resumption of the works" for the Progreso VII area upon satisfaction of the conditions set forth in the order, proving further that the order is only a temporary stoppage of the mining license. More importantly, the Constitutional Court's decision establishes a timeline within which the MEM should comply with the order to conduct consultations, to wit:

a. The Ministry of Energy and Mines shall discharge the preceding obligations within a term of **twelve months as from the date in which this decision becomes final**. During such term, the Ministry of Energy and Mines shall submit detailed quarterly reports describing the advances in the consultation process.[1000] (emphasis added).

b. Upon expiration of the twelve-month term, the Ministry of Energy and Mines shall submit a complete and exhaustive report on the process to the Amparo Court of first instance, which shall, after hearing all of the parties to the consultation process, verify the fulfillment of the applicable orders for the purpose of ensuring the enforcement of this decision.[1001]

c. If the consultation process is completed within a term shorter than the one herein provided for, and the results of the consultation show that it is feasible to reactivate the project, then the project may be reactivated following the implementation of all such measures as may be required under the agreements reached throughout the consultation process, where applicable.[1002]

d. Should it be decided, as a result of the consultation process with the indigenous people living in the area of influence of the project authorized by the "Progreso VII Derivada" license, that the applicable works do not affect the existence of the said peoples, mining activities under said license may be resumed provided the following conditions have been met: upon completion of the consultation process, the Ministry of Energy and Mines shall, **within 15 (fifteen) days**, issue all such resolutions as may be necessary to ensure the effective enforcement of the agreements reached by the parties as a result of the aforementioned consultation process, an provide for the adjustment of all license conditions to reflect the adequate fulfillment of said agreements. The decisions in said resolutions may affect the conditions of the license. Once the aforementioned resolutions have been issued, the mining company may immediately resume its activities.[1003]

546. Aside from imposing reglementary periods, the Constitutional Court stated that "[i]n the event the consultation process cannot be completed for reasons attributable to the (willful or negligent) conduct of the State, either party may request the adoption of measures to ensure the completion of the consultation process."[1004] Not only that. The Constitutional Court directs the Amparo Court to "issue all applicable orders

[999] Claimants' Memorial, ¶ 167.

[1000] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming amparo definitive (Decision dated 11 June 2020, issued in Consolidated Cases No. 3207-2016 and 3344-2016 by the Constitutional Court) **(C-0145)**, pp. 42-43.

[1001] *Id.* p. 43.

[1002] *Id.*

[1003] *Id.* p. 45.

[1004] *Id.* p. 43.

as may be necessary to allocate civil, criminal and administrative liability among the Ministry of Energy and Mines and any other public officer responsible for the failure to conduct the consultation process."[1005] Given all these, it is difficult to see how the Court's decision is nothing more than a temporary interference that, under international law, does not amount to an expropriation.

547. It is true that the Constitutional Court has required that the Amparo Court make a prior determination that the MEM's consultation with indigenous peoples complies with the standards laid down in the order before resumption of works may be allowed.[1006] Be that as it may, neither the Claimants nor their expert Professor Fuentes argues that these standards are impossible to satisfy. That the resumption of the works is subject to a suspensive condition does not make it any less ephemeral; international law demands that the taking be permanent and irreversible in nature.

548. Viewed from any perspective, the suspension of Exmingua's exploitation license is not permanent or irreversible, but subject only to suspensive conditions that have not been established to be impossible to fulfill. Being in the nature of a temporary measure that does not render Exmingua's exploitation license worthless, Guatemala cannot be held liable for indirect expropriation.

ii. *Even if the suspension of the exploration work for the Santa Margarita area were attributable to the State, such suspension is a temporary measure.*

549. Claimants have two complaints about the Santa Margarita area, namely, that the exploration works therein have been *de facto* suspended, and that Guatemala has suspended the issuance of new exploitation licenses without complying with the consultation requirement under ILO Convention 169.[1007] They contend that it would not be feasible for Exmingua to continue exploration under the license without any hope of obtaining an exploitation license because of the Constitutional Court's decision in the *Minera San Rafael* case. Once more, Claimants exaggerate their situation.

550. Guatemala maintains that the suspension of the exploration works over the Santa Margarita area, absent government action, is one that the Claimants inflicted upon themselves and for which Guatemala should not be held responsible. Also, Guatemala maintains that, without proof of denial of justice, it is not responsible for the Constitutional Court's order suspending the issuance of new exploitation licenses. Yet, even assuming that the suspension of the exploration works on and the issuance of an exploitation license for the Santa Margarita area is attributable to the State of Guatemala, and setting aside the Claimants' embellished language, this Tribunal would find that both measures are, like the suspension of Exmingua's exploitation license for the

[1005] *Id.*

[1006] *Id.*

[1007] Claimants' Memorial, ¶ 169.

Progreso VII, ephemeral in nature.

551. With regard to the suspension of the issuance of new exploitation licenses, its basis finds in the Constitutional Court's decision in the *Minera San Rafael* case where the Court held that:

> **Following notice of this judgment, the Ministry of Energy and Mines** may not grant any other license for the execution of natural resource exploitation projects **until it determines** whether there are any indigenous peoples in the region where the projects are to be executed; if the existence of indigenous peoples is determined, **in compliance with international commitments, the Ministry of Energy and Mines shall consult them before issuing any licenses requested**.[1008]

552. Just like the Constitutional Court's suspension of the exploitation license for Progreso VII, the Court's order in *Minera San Rafael* unambiguously provides just a suspensive condition before the MEM may issue exploitation licenses. The suspension, therefore, is not, as Claimants assail, an indefinite suspension that will prevent Exmingua from having "any hope" of ever securing an exploitation license for the Santa Margarita area. On the strength of *SD Myers*, the exploitation would result in nothing more than a delayed opportunity, but that, in itself, does not rise to the level of expropriation in violation of Article 10.7 of the CAFTA-DR. Measured against the *Tecnicas* and *Plama* awards, the suspension of the issuance of new exploitation licenses is not permanent and irreversible.

iii. *The gold concentrate is being held for evidentiary purposes in a criminal investigation and is subject to restoration to Exmingua*

553. Claimants do admit that the impoundment of Exmingua's gold concentrate was "pursuant to an order of the Criminal Court,"[1009] *i.e.*, the order of the 4th First Instance Court In Criminal Matters, Drug Dealing And Environmental Crimes on June 5, 2016. Although the Criminal Court of First Instance and the Court of Appeals dismissed the criminal action against the four Exmingua workers who were arrested while in possession of the gold concentrate, the dismissal was "without prejudice" to the Prosecutor's Office "continu[ing] [its] investigate[on] [of] the matter in depth."[1010] Additionally, Article 198 of the Guatemala Criminal Procedure Code authorizes that "items and documents related to the crime or that may be relevant to the investigation … be deposited and kept in the best possible manner."[1011] Article 202 of the same Code, in turn, provides that "[a]ll items and documents seized that are not subject to confiscation, restitution or attachment shall be restored as soon as practicable to their lawful holder or to the person from whom such items or documents were

[1008] Decision dated 3 September 2018, issued in Case No. 4785-2017 by the Constitutional Court, p. 33 (Minera San Rafael case) (**C-0459**).

[1009] Claimants' Memorial, ¶ 237.

[1010] *Id.* (emphasis added).

[1011] Guatemala Criminal Procedure Code, Art. 198 (**C-0506 ENG**) (emphasis added).

obtained." In short, Guatemala is not impounding the gold concentrate so that it may itself benefit from its sale but is instead being held for the lawful purpose of investigating a criminal act. Surely, Claimants cannot argue that if the Public Prosecutor finds after investigation that the gold concentrate were indeed the proceeds of a crime, Guatemala should still be made to pay damages for expropriating the gold concentrate. If, on the other hand, the Public Prosecutor finds that there is no basis to file another criminal action against the four Exmingua workers, then the gold concentrate shall be restored to Exmingua's possession.

554. In any event, the value of the gold concentrate according to the Claimants is USD 645,121.[1012] Even if this Tribunal rules that Guatemala is unlawfully holding the gold concentrate, that amount constitutes just 5.38% of the USD 12 million total gold sales of Exmingua from 2014 until the company shut down its operations in 2016.[1013] The economic impact of the deprivation, if at all, is too small to even approach the substantial deprivation standard in international law.

555. On the basis of the first prong in the three-part test, Claimants failed to prove that Guatemala breached Article 10.7 of the CAFTA-DR.

b. Claimants do not possess any distinct, reasonable investment-backed expectations.

556. Annex 10-C.4(a) of the CAFTA-DR commands this tribunal to assess whether the Claimants possess "reasonable, investment-backed expectations." The language of the treaty itself offers some guidance as to the nature of the expectations, namely, that they must be both reasonable and investment-backed. The assessment of the presence of these two elements, like the other factors under Annex 10-C.4(a) of the CAFTA-DR, involves a fact-based inquiry. The general acceptation of the word "reasonable" requires something that is not whimsical or arbitrary, but rather something "[j]ust, rational, appropriate, ordinary, or usual *in the circumstances*."[1014] The term "investment-backed", on the other hand, connotes a relationship between the expectation and the investment.

557. Here, Claimants argue that they had distinct, reasonable, investment-backed expectations that Exmingua would be able to continue operating in accordance with its validly-issued Progreso VII exploitation license; that its concentrate would not be unlawfully seized and held, and that it would not be prohibited from continuing to export concentrate; and that it would be able to obtain an exploitation license for the Santa Margarita area in accordance with the rules and regulations set forth in Guatemalan law.

[1012] Claimants' Memorial, ¶ 378.

[1013] *Id.* ¶ 66.

[1014] Cornell University Law School website, Definition of the Word *"Reasonable"*, available at https://www.law.cornell.edu/wex/reasonable **(R-0145)**.

558. The matter of reasonable investment-backed expectations as a factor in assessing indirect expropriation, like the other factors in the three-prong test, has been the subject of U.S. takings expropriation jurisprudence. According to the U.S. Supreme Court, the determination of whether there exist investment-backed expectations that a certain regulatory framework would remain the same hinges on the ability of the claimant to show that it acquired an investment "in reliance on the non-existence of the challenged regulation,"[1015] and the extent to which further regulation was foreseeable.[1016] The inquiry into an investor's expectations is an objective one, and the claimant's "subjective expectations are irrelevant to the reasonableness of the expectations."[1017]

559. On the issue of foreseeability, investment tribunals have considered events at the time the investment was made. In *Methanex v. United States*, the tribunal found the following circumstances relevant: "Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, nongovernmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons. Indeed, the very market for MTBE in the United States was the result of precisely this regulatory process."[1018] The *Methanex* tribunal also found it relevant that the investor deployed lobbyists, and that an employee of the company presented himself as a government relations officer of the company.[1019] In *Glamis Gold v. United States*, the tribunal held that there was no inducement to invest when "Claimant was operating in a climate that was becoming more and more sensitive to the environmental consequences of open-pit mining."[1020]

560. As to the source and nature of the expectations, the tribunal in *Glamis Gold v. United States*[1021] held that "the unsettling of reasonable, investment-backed expectation requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment."[1022] Consistently, the *Glamis* tribunal noted that the government "did not

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[1015] *Good v. United States*, 189 F.3d 1355, 1360 (Fed. Cir. 1999) (citations omitted) **(RL-0283).**

[1016] *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) **(RL-0284).**

[1017] *Id.*

[1018] Methanex Corporation v. United States of America, UNCITRAL, Final Award (August 3, 2005), Part IV, Ch. D, ¶ 9 (**RL-0227**).

[1019] *Id.*

[1020] Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award (June 8, 2009), ¶ 767 (**RL-0041)**.

[1021] *Id.* ¶ 766.

[1022] *Id.*

guarantee Claimant approval of its claims, nor did it offer Claimant any benefits to pursuing such claims *beyond the customary chance* to exploit federal land for possible profit."[1023] In other words, the expectation, to be protected under international law, must be something more than what is ordinarily expected of any investment.

561. The first defect in Claimants' assertion of any of their supposed expectations is that they did not even establish, as *Glamis* requires,[1024] that Guatemala had purposely and specifically induced their investment in Exmingua. In fact, Claimants came into the picture only "on 2 June 2008, [when] KCA signed a letter of intent with Radius and, on 3 June 2008, Radius announced that it had signed an agreement with KCA to develop the Tambor gold deposit."[1025] "At the time," as Claimants themselves admit, Exmingua already held "exploration licenses for the Progreso VII area and the Santa Margarita area."[1026] Claimants have not identified any document, event, or circumstance that would even remotely suggest that Guatemala invited, much less induced, them into making an investment in Exmingua. Rather, Claimants concede that "[b]ased on the promising results from the exploration campaign, together with a site visit and discussions with Radius, Claimants concluded that the Tambor Project had great potential and could be profitably developed by KCA."[1027] These explicit admissions alone suffice to negate any of the so-called expectations that the Claimants have alleged.

562. It is true that Guatemala, to date, has not enacted any statute or issued any executive regulation implementing the ILO Convention 169. That does not help Claimants' case in any way. Quite the opposite, it weakens their claim of reasonable expectations even more. A prudent investor, under the circumstances obtaining in the legal and socio-political climate of Guatemala, should have exercised enough due diligence to obtain a specific assurance or representation that, *first*, the consultation requirement under ILO Convention 169 is indeed not required for the issuance of an exploitation license, and *second*, that Guatemala's executive, legislative, and judicial agencies would not ever require prior consultations to be conducted. In *SolEs Badajoz GmbH v. Kingdom of Spain*, the tribunal held "that a formal due diligence process is not a precondition to a successful claim of legitimate expectations." [1028] Still, according to the tribunal, "an investor cannot benefit from gaps in its subjective knowledge of the regulatory environment because, under an objective standard, the investor's legitimate expectations are measured with reference to the knowledge that a hypothetical prudent investor is deemed to have had as of the date of the investment. The extent of inquiry that is incumbent on a

[1023] *Id.* ¶ 767.

[1024] *Id.* ¶ 766.

[1025] Claimants' Memorial, ¶ 24.

[1026] *Id.* at ¶ 25.

[1027] *Id.* at ¶ 24.

[1028] *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award (31 July 2019), ¶ 331 **(RL-0241).**

prudent investor depends on the particular circumstances of the case."[1029]

563. It should also not escape this Tribunal's attention that Radius, Claimants' predecessor-in-interest, hired Chlumsky, Ambrust and Meyer ("CAM"), a company that prides itself as offering "environmental and social due diligence reviews; and technical support to the project finance and legal communities."[1030] Yet, their report does not include any environmental, social, and legal due diligence review.[1031] Absent such diligence reviews in the CAM Report, Claimants should have conducted those reviews themselves before making investments in Exmingua, especially so when Radius' own President, Ralph Rushton, admitted that the company sold their interest in the Tambor mining project as "part of [their] corporate strategy to divest **problematic assets**, allowing the Company to concentrate capital and expertise on **areas less conflicted** regarding development in the region."[1032]

564. Claimants do argue that Guatemala "had publicly taken the official position already in 2010 that the public participation process under the Mining Law and the Environmental Protection Law satisfied the consultation requirements under Article 15 of ILO Convention 169."[1033] First, it is not true that Guatemala made this position public. It was, as Claimants cited, a submission in a case before the Inter-American Commission of Human Rights which was resolved only on April 3, 2014. Second, as the statement was made in relation to a proceeding, it was not directed or communicated to the Claimants and, thus, do not constitute inducements to invest as understood in *Glamis*.

565. The Claimants' supposition that it had a legitimate expectation that its exploitation license for the Santa Margarita area would be granted as a matter of course has already been addressed above. At the expense of being repetitive, Guatemala submits that there is nothing in the Guatemalan Mining Law or in the exploration license issued for the Santa Margarita area that assures either Claimants or Exmingua of the issuance of an exploitation license as a matter of right or entitlement. Nor do the Claimants allege that that the government officials of Guatemala gave them any assurance, express or otherwise, to that effect as, indeed, none was made. Moreover, as previously explained, the failure to complete the EIA for Santa Margarita is totally and only imputable to Claimants.

566. In the present case, all that Claimants say is that "[i]n the extractive industries, in particular, there is no benefit to obtaining an exploration license without a reasonable expectation that an exploitation license will

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[1029] *Id.*

[1030] Claimants' Memorial, p. 10, fn. 39.

[1031] CAM Technical Report (**C-0039**).

[1032] Radius Press Release, Radius Gold Sells Interest in Guatemala Gold Property **(C-0223).**

[1033] Claimants' Memorial, ¶ 80.

be granted in accordance with existing laws and regulations if the exploration yields positive results."[1034] As the *Glamis* tribunal noted,[1035] "the unsettling of reasonable, investment-backed expectation requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment."[1036] There must have been, in a sense, a *quid pro quo, i.e.*, that if the issuance of an exploitation license is guaranteed, then Claimants would invest. Based on this standard, it is not hard to understand why the *Bear Creek* and *Tethyan* tribunals, after combing through laws, testimonies, and contracts that assured the issuance of an exploitation license, held that the investors therein had a legitimate expectation not only that they would be granted an exploitation license, but that their exploration licenses would not be revoked. Nothing of that sort happened here. Claimants conducted two site visits, one in 2008 and another in 2012,[1037] but at no point did they ask the MEM for any specific assurances or representations.

567. Considering these premises, Claimants failed to demonstrate the existence of any of the reasonable, investment-backed expectations they claim to possess.

c. Even assuming that there were acts of interference with Claimants' property rights or interests, whatever those may be, that are attributable to the State of Guatemala, such interference was the result of a non-discriminatory regulatory action designed and applied to protect the legitimate public welfare objective of protecting the rights of indigenous peoples in Guatemala. The state has a margin of discretion to determine public welfare objectives.

568. Annex 10-C.4(a) includes the "character of the government action" as the third prong of the three-part analysis of indirect expropriation. In investment treaty arbitration, *SD Myers v. Canada* held that to determine whether "an expropriation or conduct tantamount to an expropriation has occurred," the tribunal "must look at the real interests involved and the purpose and effect of the government measure."[1038] In U.S. "takings" jurisprudence, the character of the government action requires a balancing of two competing interests in determining whether a governmental regulation amounts to a compensable taking,[1039] namely the property rights of the owner on the one hand, and on the other, "[g]overnment's need to protect the public interest through the imposition of the [regulation]."[1040] Annex 10-C.4(b) encapsulates this balancing act by providing

[1034] Claimants' Memorial, ¶ 178 *citing* Fuentes, ¶ 81; Kappes Statement, ¶ 146.

[1035] *Glamis Gold, Ltd.*, Award (8 June 2009) (**RL-0041)**.

[1036] *Id.* ¶ 766.

[1037] Claimants' Memorial, ¶¶ 24 and 45.

[1038] *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award (13 November 2000), ¶ 285 (**CL-0104**).

[1039] 26 AM. JUR. 2d Eminent Domain § 14 (2005) (**RL-0285**) (citing *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) (**RL-0286**).

[1040] *Cienega Gardens*, 331 F.3d 1319, 1338 (citing Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1176 (Fed.

that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

569. A point of contention that arises in interpreting this provision is, upon showing that the nondiscriminatory regulatory action is designed and applied to protect legitimate public welfare objectives, whether the investor is entitled to damages. The answer is no. Annex 10-C recognizes only two situations of expropriation that may result in damages in favor of the investor, *i.e.*, direct and indirect expropriation. Annex 10-C.4(b) could not have been intended by the State Parties to the CAFTA-DR to mean that the regulations falling thereunder constitute direct expropriation. The clause appears under Annex 10-C.4 which speaks of the factors to determine indirect expropriation, not direct expropriation which, by definition, is a situation "where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure." If the CAFTA-DR contemplates only two situations that entitle the investor to claim damages, and the regulatory actions under Annex 10-C.4 fall under neither situation, then the only logical conclusion is that Annex 10-C.4 does not entitle the investor to claim damages.

570. If the text of Annex 10-C.4(b) is not clear enough, Annex 10-C.1 also instructs this Tribunal to resort to "customary international law concerning the obligation of States with respect to expropriation." As early as 1962, it has already been opined that "[t]he existence of generally recognised considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no 'taking'."[1041] According to the OECD, "[i]t is an accepted principle of customary international law that where economic injury results from a bona fide non-discriminatory regulation within the police power of the State, compensation is not required."[1042]

571. In investment arbitration practice, the tribunal in *Saluka v. Czech Republic* was categorical that "[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed to the general welfare."[1043] The *Saluka* tribunal further recalled that "in an accompanying note to the 1967 OECD Draft Convention on the Protection of Foreign Property, it is provided that measures taken in the pursuit of a State's "political, social or economic ends" do not constitute

Cir. 1994)) (**RL-0286)**

[1041] George Christie, "*What Constitutes a Taking of Property under International Law?*" British Yearbook of Int'l Law, 1962 pp. 307-338 (**RL-0287**).

[1042] OECD, "*Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, OECD Working Papers on International Investment, 2004/4 (Sept. 2004), p. 5 (**RL-0242**).

[1043] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, March 17, 2006, ¶ 255 (**CL-0154**).

compensable expropriation."[1044] More recently, the tribunal in *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* held that "the position under general international law"[1045] that "measures [that] are taken for the public benefit as established by law, on a non-discriminatory basis" do not entitle the investor to damages.[1046]

572. It should be noted as well that, in *Philip Morris*, the tribunal interpreted Article 5(1) of the Switzerland-Uruguay BIT which provides in relevant part that:

> "Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments belonging to investors of the other Contracting Party, unless the measures are taken for the public benefit as established by law, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation."

The provision does not say that "measures … taken for the public benefit as established by law, on a non-discriminatory basis" do not constitute indirect expropriation, unlike the categorical wording in Annex 10-C.4(b) of the CAFTA-DR, and nevertheless, the tribunal had no difficulty declaring that such measures are not compensable under international law.

573. To better understand why Annex 10-C.4(b) does not entitle the investor to claim damages, it is best to recall *SD Myers* where the tribunal assessed whether a regulatory ban on polychlorinated biphenyl on environmental grounds constituted indirect expropriation under Article 1110 of the NAFTA. The tribunal laid down its premise that "[e]xpropriations tend to involve the deprivation of ownership rights; regulations a lesser interference."[1047] The tribunal further considered that "CANADA realized no benefit from the measure" and that there was no "transfer of property or benefit directly to others."[1048] In all, the tribunal found that there was no indirect expropriation, and Canada was not made to pay damages on that ground.

574. Guatemala urges this Tribunal to apply this line of precedent and hold that, should the measures assailed here involve nondiscriminatory regulations that are designed and applied to protect legitimate public welfare objectives, the Claimants are not entitled to compensation.

575. Dissecting Annex 10-C.4(b) of the CAFTA-DR, it requires proof of two cumulative elements that: (1) the regulation is designed and applied to protect legitimate public welfare objectives, and (2) the regulation be

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[1044] *Id.* ¶ 259.

[1045] *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016), ¶ 301 (**RL-0124)**.

[1046] *Id.* at ¶ 182; *citing* the OECD Working Papers and *Saluka*.

[1047] *S.D. Myers, Inc. v. Canada*, UNCITRAL, November 13, 2000 Partial Award, ¶ 282 (**CL-0104**).

[1048] *Id.* ¶ 287.

nondiscriminatory. The rest of this section will address the first element. The second element will be addressed in the next section on the National Treatment and Most-Favored Nation standards. The term "nondiscriminatory" is not defined in the CAFTA-DR, but it is so defined in international investment agreements to which the U.S. is a party as the better of national treatment or most favored nation treatment.[1049] Considering that Annex 10-C of the CAFTA-DR reflects U.S. legal principles and practice, Guatemala takes the term "nondiscriminatory" based on that understanding.

576. Guatemala notes that Annex 10-C.4(b) provides for a non-exhaustive list of legitimate public welfare objectives inasmuch as the text uses the words "such as". The CAFTA-DR enumerates public health, safety, and the environment as examples of legitimate public welfare objectives, but the State Parties did not intend to limit that list. The measures in this case all root from the consultation requirement that the courts of Guatemala derived from Article 6 of the ILO Convention 169. The next question then is, is there a legitimate public welfare objective behind the consultation requirement under the Convention?

577. To understand the normative character of these provisions, it is important to trace the history of ILO Convention 169. The predecessor of the ILO Convention 169 is the 1957 ILO Indigenous and Tribal Peoples Convention ("ILO Convention No. 107").[1050] As of that time, there was already a consensus among the members of the International Labour Conference that "special attention must be given to the particular social and economic necessities of indigenous populations and the pursuit of their full integration."[1051] The idea of full integration which animated ILO Convention 169 viewed indigenous and tribal populations as subjects "whose social and economic conditions are at a less advanced stage than the stage reached by other sections of the national community."[1052] Because of the status of indigenous peoples as "less advanced", ILO Convention No. 107 established that "[g]overnments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries." However, the integrationist approach under ILO Convention No. 107 "was perceived as leading to the extinction of indigenous peoples' cultural identity" what with their depiction as 'less advanced' groups.[1053] In 1977, the NGO Conference on Discrimination against Indigenous Peoples in the Americas found that land-grabbing of indigenous lands for commercial interests was

[1049] U.S. Congressional Research Service, *International Investment Agreements (IIAs): Frequently Asked Questions*, p. 11.

[1050] Maria Victoria Cabrera Ormaza, *The Requirement of Consultation with Indigenous Peoples in the ILO: Between Normative Flexibility and Institutional Rigidity*, Leiden: Brill Nihjoff, p. 33 **(RL-0297).**

[1051] *Id.*

[1052] ILO Convention No. 107, Art. 1, ¶ 1(a).

[1053] Maria Victoria Cabrera Ormaza, p. 38 *citing* Swepston, A. A new Step in the International Law on Indigenous and Tribal Peoples, 682 **(RL-0297).**

often justified under the integrationist approach of ILO Convention No. 107, "destroying indigenous traditional values and ways of life" in the process.[1054]

578. A Meeting of Experts was held to discuss the need to introduce changes to the Convention which ultimately recommended that "the conception of new standards be based on the recognition of the right of indigenous populations to enjoy as much control as possible over their economic, social and cultural development."[1055] The Meeting of Experts likewise "called for the recognition of indigenous peoples to effectively participate in decision-processes affecting them."[1056]

579. Thus, when the ILO Convention 169 was adopted, "the whole idea of integration was explicitly rejected in the preamble of the new instrument."[1057] The preamble establishes that "in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded." Thus, abandoning the integrationist approach under ILO Convention 107, the Preamble of ILO Convention 169 now recognizes "the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they lives." The Meeting of Experts concluded that consultations with indigenous peoples would realize these aspirations.[1058] Hence, Article 6 of the ILO Convention 169 came to be. Read together, the consultation right under these provisions "contributes to the protection of the cultural integrity of indigenous peoples by ensuring that these communities take part in assessing measures with the potential to impact their cultural relationship with their land and natural resources."[1059]

580. Article 15.2 of ILO Convention 169 is even more specific inasmuch as it imposes upon the government a duty to "establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands." Article 15.2 of ILO Convention 169 applies in Guatemala because Article 121(e) of its Constitution provides that "[t]he

[1054] *Id.* p. 65-66 *citing* Report of the NGO Conference on Discrimination against Indigenous Peoples in the Americas (1977).

[1055] *Id.* pp. 38-39

[1056] *Id.* p. 47 *citing* Extracts from the report of the Meeting of Experts on the Revision of the Indigenous and Tribal Peoples Convention, 1957 (No. 107) (Chapter 1 n 161), ¶ 49,

[1057] *Id.* p. 39.

[1058] *Id.* p. 47.

[1059] *Id.* p. 63.

subsoil, the deposits of hydrocarbons and minerals, as well as any other organic or inorganic substances of the subsoil" are assets of the State. Not only that. Article 67 of the Political Constitution of the Republic of Guatemala states that "[t]he lands of the cooperatives, the indigenous communities, and any other forms of communal or collective possession of agrarian ownership, as well as the family patrimony and low-cost housing shall enjoy special protection by the State, and preferential credit and technical assistance that guarantee their possession and development, in order to assure an improved quality of life for all inhabitants. The indigenous communities and others who hold lands that historically belong to them and which they have traditionally administered in special form, shall maintain that system."

581. The unique relationship that indigenous peoples have with their land, culture, and traditions undergirds the consultation requirement under ILO Convention 169. The courts of Guatemala, specifically the Constitutional Court, in suspending exploitation works and the issuance of new exploitation licenses until the MEM has conducted consultations with indigenous peoples to the satisfaction of the Amparo Court, was only protecting this unique relationship. Thus, for instance, the Constitutional Court referred to the Inter-American Commission on Human Rights' findings "that extractive concessions in indigenous territories, in having the potential of causing ecological damage, endanger the economic interests, survival, and cultural integrity of the indigenous communities and their members, in addition to affecting the exercise of their property rights over lands and natural resources."[1060]

582. In the particular case involving the Progreso VII area, the Constitutional Court, on the basis of documentary evidence submitted before the amparo proceedings, "noted that several serious conflicts have emerged throughout the region in which the Progreso VII Derivada exploitation project is being carried out."[1061] Hence, the Court saw it fit, and only rightly so, to suspend the exploitation works over the mining area while the consultations with indigenous peoples are being conducted.[1062] It is not hard to imagine that, if the works were to be allowed to continue during the consultations, the serious conflicts hounding the mining project would only frustrate the purpose for which the consultations were being conducted.

583. Clearly, then, the Constitutional Court's requirement to conduct consultations with indigenous peoples is animated not by bad faith or ill motive against the Claimants or Exmingua. Nor is it for political interference or commercial gain for the State or any other private party. Rather, public welfare, more particularly, the recognition, promotion, and protection of the rights of the indigenous peoples of Guatemala, served as the Constitutional Court's north star.

[1060] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming *amparo definitivo*, Decision dated 11 June 2020, issued in Consolidated Cases No. 3207-2016 and 3344-2016, p. 41 (**C-0145 ENG**)

[1061] *Id.* at p. 38.

[1062] *Id.*

584. The remaining question to be resolved is whether this public welfare objective is legitimate in the eyes of international law. The answer is obvious. The obligation to consult under ILO Convention 169 is demanded not only by Guatemala's domestic law, but is a duty expected of it by the community of nations. The international community has, by adopting ILO Convention 169, already accepted the legitimacy of the public welfare objectives contained in the convention. But even if this Tribunal were to reject this formalistic approach, this Tribunal should recognize Guatemala's margin of appreciation to identify for itself which public welfare objectives it wants to pursue and to determine whether these are legitimate.

585. In *Glamis Gold, Ltd. v. United States of America*, the tribunal held that "[t]he sole inquiry for the Tribunal… is whether or not there was a manifest lack of reasons for the legislation."[1063] Guatemala has set forth the reasons for the Constitutional Court's decision above. In *Frontier Petroleum v. Czech Republic*, the tribunal held that States enjoy a certain margin of appreciation in determining what their own conception of international public policy is.[1064] As a consequence, the tribunal found it unnecessary to inquire into whether the findings of the Czech courts met the standard of public policy under Article V(2)(b) of the New York Convention, nor did the tribunal consider it appropriate for it to determine the precise contours of that standard.[1065] The tribunal inquired only whether the purpose was "reasonably tenable and made in good faith."[1066] Finally, in *Saluka v. Czech Republic*, the tribunal assessed the compliance of Czech Republic's regulatory action, *i.e.*, placing the bank under state administration, with the Czech-Netherlands BIT expropriation standard.[1067] Like *Frontier Petroleum*, the tribunal in *Saluka* extended Czech Republic a "margin of discretion" and charged the investor with the burden to show, based on "clear and compelling evidence that the [Czech government] erred or acted otherwise improperly in reaching its decision."[1068]

586. To summarize, current investment practice affords States a wide margin of appreciation when they determine the legitimate public welfare objectives they want to pursue. In this case, the courts of Guatemala have grounded their orders not only on the enforcement of the right to consultation of indigenous peoples, but also on the facts surrounding Claimant's investments in Exmingua. Absent a showing of bad faith, ill motive, and commercial benefit redounding to the State or any other party, this Tribunal should find, on the basis of Annex 10-C.4(b) of the CAFTA-DR, that there was, in this case, no indirect expropriation. Consequently,

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[1063] *Glamis Gold, Ltd. v United States of America*, Award, ¶ 805 **(RL-0041)**.

[1064] *Frontier Petroleum Servs. Ltd. v. Czech Republic*, UNCITRAL, Final Award (12 November 2010), UNCITRAL, ¶ 29 **(RL-0202).**

[1065] *Id.* ¶ 527.

[1066] *Id.* (emphasis in original).

[1067] *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006), ¶ 272 (**CL-0154**).

[1068] *Id.* ¶ 273.

Claimants are not entitled to any damages.

E. Claimants failed to Conduct a Human Rights Due Diligence, Defeating their Claim of Legitimate Expectations and Reasonable Investment-Backed Expectations

587. The requirement to conduct consultations with indigenous peoples under Article 6 of the ILO Convention 169 is at the heart of Claimants' grievance against the suspension of Exmingua's Progreso VII exploitation license, the suspension of its exportation certificate, the suspension of explorations works and issuance of an exploitation license over the Santa Margarita area, and the impoundment of Exmingua's gold concentrate. Stripped to its core, Claimants assail the requirement to conduct consultations because, to them, no such requirement existed at the time they made their investment in Exmingua and that they had a legitimate and reasonable, investment-backed expectation that such requirement would never be imposed.

588. Claimants knew, or at least they ought to have known, that the ILO Convention 169 has been part of the legal framework of Guatemala since its ratification in 1996. Article 46 of the Political Constitution of the Republic of Guatemala makes all treaties to which Guatemala is a party, especially those dealing with human rights, directly applicable in the State without need of further executive or legislative action; treaties even have preeminence over domestic law. Too, judicial decisions in Guatemala, twice in 2007 and once in April 2008, held in the separate cases of *Sipacapa, Rio Hondo I,* and *Rio Hondo II* that the existence of the right of consultation of indigenous peoples under this Convention was "beyond question". At around the same time, the right of consultation with indigenous peoples had already taken root in the Inter-American Human Rights system.[1069] Article 6.1(a) of ILO Convention 169 is categorical that "**governments shall consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly**."

589. At minimum, the lack of consultations with indigenous peoples in the MARN's and MEM's EIA approval processes should have prompted the Claimants to wonder and inquire with these executive agencies

[1069] IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, ¶ 140 **(RL-0235).** ("Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives."); [1069] IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, ¶ 142 **(RL-0236)**; and I/A Court H.R., *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, ¶ 194(e) **(RL-0237)** ("[E]nvironmental and social impact assessments [must be conducted] by independent and technically competent entities, prior to awarding a concession for any development or investment project within traditional Saramaka territory, and implement adequate safeguards and mechanisms in order to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Saramaka people.").

why consultations with indigenous peoples were not being required in accordance with the ILO Convention 169. In *SolEs Badajoz GmbH v. Kingdom of Spain*, the tribunal held that "an investor cannot benefit from gaps in its subjective knowledge of the regulatory environment because, under an objective standard, the investor's legitimate expectations are measured with reference to the knowledge that a hypothetical prudent investor is deemed to have had as of the date of the investment. The extent of inquiry that is incumbent on a prudent investor depends on the particular circumstances of the case."[1070]

590. What is the extent of inquiry that Claimants should have exerted in order for them to develop a legitimate and reasonable investment-backed expectation that the consultation requirement under the ILO Convention 169 does not apply to Exmingua's applications for an exploitation license? Guatemala submits that Claimants should have performed nothing less than human rights due diligence, but even simple due diligence by a prudent investor was not sufficiently done to determine the need for consultation with indigenous peoples in a manner compatible with their culture and practices.

591. The concept of human rights due diligence emerged as a response to the lacuna of norms governing the responsibilities of business in relation to human rights. According to the United Nations, the debate to establish such norms "became prominent in the 1990s, as oil, gas, and mining companies expanded into increasingly difficult areas."[1071] In 2004, a "Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" was presented to the United Nations Human Rights Council (then known as the Commission on Human Rights) which distinguished between the States' "primary" human rights duties, and companies' "secondary" human rights responsibilities.[1072] The UN Human Rights Council declined to adopt the Draft Norms due in part to vehement opposition from the business sector.[1073] Nonetheless, the Council tasked the UN Secretary General "to appoint a Special Representative with the goal of moving beyond the stalemate and clarifying the roles and responsibilities of states, companies and other social actors in the business and human rights sphere."[1074] In 2005, Harvard Professor John Ruggie was appointed as Special Rapporteur who reports annually to the UN Human Rights Council and the UN General Assembly.[1075]

592. "[A]fter three years of extensive research and consultations with governments, business and civil society on five continents," Prof. Ruggie presented to the Council his "Protect, Respect and Remedy: a

[1070] *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award (31 July 2019), ¶ 331 **(RL-0241).**

[1071] *The UN "Protect, Respect and Remedy" Framework for Business and Human Rights Background,* p. 1 **(R-0148).**

[1072] *Id.*

[1073] *Id.*

[1074] *Id.*

[1075] *Id.*

Framework for Business and Human Rights," to be later known as the UN Framework.[1076] The UN Framework changed the landscape of business and human rights. The Framework abandoned "the slippery distinction between "primary" State and "secondary" corporate obligations"[1077] and instead adopted the view that "corporate responsibility to respect exists independently of States' duties."[1078] This integrated approach was preferred over the hierarchical attitude in the Draft Norms to deter "endless strategic gaming on the ground about who is responsible for what."[1079] Consequently, the UN Framework "comprises three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies."[1080] The Human Rights Council unanimously welcomed the UN Framework, and Prof. Ruggie was further tasked to submit a set of Guiding Principles to implement the Framework.[1081]

593. This watershed moment led to the development of the UN Guiding Principles on Business and Human Rights with Prof. Ruggie as its architect. The UN Human Rights Council endorsed the UN General Principles on 16 June 2011.[1082] Principle 17 of the UN General Principles provides that:

HUMAN RIGHTS DUE DILIGENCE

> 17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:
>
> a. Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
>
> b. Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
>
> c. Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context

[1076] *Id.*

[1077] John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (hereafter, "UN Framework"), A/HRC/8/5 (April 7, 2008), p. 55 **(R-0149)**.

[1078] *Id*.

[1079] *Id.*

[1080] *Id*. at p. 1.

[1081] *Id*. at pp. 1-2.

[1082] UN Human Rights Council Resolution No. 17/4, A/HRC/RES/17/4 (adopted 16 June 2011) (**RL-0303)**.

evolve.

594. According to the UN Framework, "[t]o discharge the responsibility to respect requires due diligence."[1083] Due diligence is "a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it."[1084] For its substantive content, "companies should look, at a minimum, to the international bill of human rights and the core conventions of the ILO, because the principles they embody comprise the benchmarks against which other social actors judge the human rights impacts of companies."[1085]

595. In his 2010 Report to the UN Human Rights Council, Prof. Ruggie posed the following question: "Why should companies be concerned with them if they don't impose legal obligations on companies directly?"[1086] In response, he said, "[t]he confusion is easily resolved: companies can and do infringe on the enjoyment of the rights that these instruments recognize."[1087] What is more, Prof. Ruggie expanded the scope of the international human rights treaties that companies should include in their human rights due diligence. According to him, "[d]epending on circumstances, companies may need to consider additional standards: for instance, they should also take into account … standards specific to "at-risk" or vulnerable groups (for example, indigenous peoples or children) in projects affecting them."[1088]

596. The ILO has endorsed the application of the UN Framework in relation to the ILO Convention 169 in its Handbook for ILO Tripartite Constituents.[1089] The ILO said that, "[a]lthough international law generally does not directly impose obligations on companies, the corporate responsibility to respect is a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility."[1090] The ILO interprets Convention 169 as having "clear legal implications for private sector actors operating in ratifying countries."[1091] The ILO even foresaw the possibility "that private sector actors risk being caught between the standards of a legally-binding instrument" and "the practice of a given State, which

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[1083] *Id.* ¶ 56.

[1084] *Id.* ¶ 25.

[1085] *Id.* ¶ 58.

[1086] John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and human rights: further steps toward the operationalization of the "protect, respect and remedy" framework*, April 9, 2010 (hereafter "Prof. Ruggie Report (2010)"), ¶ 60 **(R-0151).**

[1087] *Id.*

[1088] *Id.* (emphasis added).

[1089] ILO, *Handbook for Tripartite Constituents: Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169),* 2013, (**RL-0128**).

[1090] *Id*. p. 26.

[1091] *Id.* p. 25.

has not taken the necessary measures to effectively implement the Convention."[1092] For the ILO, this scenario makes the corporate responsibility to respect human rights even more imperative. Businesses "have a direct interest in acting in accordance with the principles of the Convention, for issues of legal security, legitimacy, partnerships and sustainability."[1093]

597. Claimants once again refer this Tribunal to the doctrine in *SolEs Badajoz* that "the extent of inquiry that is incumbent on a prudent investor depends on the particular circumstances of the case."[1094] Guatemala submits that the particular circumstances obtaining prior to and contemporaneous with the Claimants' investment in Exmingua required the Claimants to be more circumspect in acting on its decision to invest by conducting human rights due diligence. Guatemala has already established above that the Guatemalan Constitution directly incorporates the ILO Convention 169 into domestic law, and has also shown the wealth of jurisprudence in Guatemala and the Inter-American Human Rights System impressing the self-enforcing character of the ILO Convention 169. Consistent with the UN Framework, Prof. Ruggie's Reports, and the ILO Handbook, Claimants, at minimum, should have inquired as to the legal implications of the consultation requirement under the ILO Convention 169 and whether it is applicable to the issuance of an exploitation license.

598. In his Witness Statement, Mr. Kappes admitted that it was Radius, through Chlumsky, Ambrust and Meyer ("CAM"), which concluded that "the exploration work carried out by Gold Fields followed internationally accepted practices."[1095] He then said that he "reviewed the data gathered by Gold Fields and Radius, and were satisfied that the deposits were viable and could be commercially developed. We also were motivated by the findings included in several reports made available to us."[1096] In an effort to boost the credibility of CAM's findings, Mr. Kappes described CAM as "a Denver-based firm focusing on … environmental and social due diligence reviews; and technical support to the project finance and legal communities."[1097] Despite this self-serving description of CAM, however, the CAM Report made an unconditional disclaimer that it "**has not conducted a <u>legal review</u> of ownership or property boundaries**."[1098] In truth, all that Radius tasked CAM to do was to "[conduct] a technical review and [prepare]

[1092] *Id.*

[1093] *Id.*

[1094] *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award (31 July 2019), ¶ 331. (**RL-0241)**

[1095] Kappes Statement, ¶ 33.

[1096] *Id.* at ¶ 37.

[1097] *Id.* at ¶ 33.

[1098] CAM Technical Report, p. 3.1 **(C-0039)**.

a mineral resource estimate for the Tambor Gold Project."[1099] Not surprisingly, the CAM Report made no mention at all of the ILO Convention 169, Guatemala's Constitution, and any of the judicial decisions of the Guatemalan courts or the pronouncements of the relevant bodies of the Inter-American Human Rights system.

599. Mr. Kappes does claim that "[a]s part of the investment process, KCA carried out due diligence, advised by Guatemalan lawyers, in order to understand and comply with the necessary requirements to be able to acquire the rights and carry out mining activities in Guatemala."[1100] Claimants do not attach any document that contains the results of that due diligence, if it is any different from the CAM Report that was rendered four years before Claimants decided to invest in Exmingua. Mr. Kappes also did not bother to identify who these Guatemalan lawyers are and what they said. But even if he did, and his private counsel assured him that the ILO Convention 169 did not form part of the legal framework of Guatemala, the *ADF Group Inc. v. United States of America* tribunal opined that legal advice received from private counsel does not give rise to legitimate expectations unless these were representations made by authorized officials of the host State.[1101]

600. Aside from the CAM Report and Mr. Kappes' unsubstantiated claim that he sought legal advice from Guatemalan lawyers, Claimants likewise insist that Guatemala made representations that ILO Convention 169 consultations with indigenous peoples are not required for the issuance of an exploitation license. They rely on the following facts:

1. that in 2010, Guatemala took what Claimants deem to be Guatemala's official public position "that the public participation process under the Mining Law and the Environmental Protection Law satisfied the consultation requirements under Article 15 of ILO Convention 169";[1102]
2. that in April 2011, Exmingua "resubmitted its public participation plan together with supporting documents" to the MARN in April 2011, and that "[a]t that point in time, the MARN could have requested additional information if needed";[1103]
3. that in May 2011, "the MARN issued an approval notice for the EIA for Progreso VII, in which it stated that public consultations had been "carried out in accordance with the terms of reference" provided by the MARN";[1104] and

[1099] *Id.* at p. 1.1.

[1100] Kappes Statement, ¶ 40.

[1101] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1 (NAFTA) (January 9, 2003), ¶ 189 (**CL-0081).**

[1102] *Id.* ¶ 175 *citing* Inter-American Commission of Human Rights, Petition 1566-07, *Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán*, Admissibility Report No. 20/14 dated 3 Apr. 2014, at 5 **(CL-0225).**

[1103] *Id.* at ¶ 36.

[1104] *Id.* at ¶ 37.

4. that in September 2011, the MEM granted Exmingua's application for an exploitation license for Progreso VII.

601. In *Glamis Gold v. United States*, the tribunal held that "the unsettling of reasonable, investment-backed expectation requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment."[1105] Claimants concede that this is the applicable legal standard for they, too, say that Guatemala has the obligation to "respect an investor's legitimate expectations that arise from conditions that the State offered to induce the investor' investment."[1106]

602. On its face, it is easy to see a fundamental flaw in Claimants' assertion of legitimate expectation under the fair and equitable standard and of reasonable investment-backed expectations under the non-expropriation standard. Common sense dictates that an inducement, to partake of that nature, must have been made before Claimants invested in Guatemala. Here, all of the so-called representations that Claimants purport to have relied on, if they are even to be considered as representations, were all made ***after*** Claimants decided to make an investment in Exmingua, which was on 2 June 2008, when "KCA signed a letter of intent with Radius" to develop the Tambor gold deposit.[1107] Claimants acted upon that decision to invest "[i]n particular, on 22 January 2009, [when] Claimants acquired Minerales KC Guatemala, Ltda. ("Minerales KC") which they established to conduct the business of KCA with respect to Exmingua."[1108] On this ground alone, there is no basis for this Tribunal to believe that Claimants had a legitimate, and reasonable investment-backed expectation that the requirement under ILO Convention 169 to consult indigenous peoples does not apply for the issuance of exploitation licenses.

603. Guatemala likewise invites this Tribunal's attention to Claimants' own categorical admission that "[b]ased on the promising results from the exploration campaign, together with a site visit and discussions with Radius, Claimants concluded that the Tambor Project had great potential and could be profitably developed by KCA. **Accordingly**, on 2 June 2008, KCA signed a letter of intent with Radius."[1109] This categorical admission forecloses any doubt as to what truly induced the Claimants to invest in Guatemala.

604. Another essential component of human rights due diligence is to "cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly

[1105] *Id.*

[1106] Claimants' Memorial, ¶ 209

[1107] *Id.* at ¶ 24.

[1108] *Id.* at ¶ 26.

[1109] *Id.* at ¶ 24.

linked to its operations."[1110] Prof. Ruggie urges businesses to pay special attention to vulnerable groups, particularly identifying indigenous peoples.[1111]

605. In this case, Mr. Kappes claims that he was "surprised that [a] blockade occurred [in early March 2012], because up until that moment we felt that we had the support of the local community."[1112] However, on June 23, 2008, a mere twenty-one days after Claimants signed a letter of intent with Radius to invest in the Tambor mining project, the President of Guatemala declared a state of alert in the Municipality of San Juan Sacatepéquez—not more than 70 kilometers away from San José del Golfo where the Progreso VII mining area is located—in response to protests that broke out in opposition to the mining projects in the municipality.[1113] Still, Claimants proceeded to acquire Minerales in January 2009 with nary any human rights impact assessment conducted beforehand. The Guatemala Human Rights Commission-USA[1114] also reports that "[s]ince 2010, the communities of San Jose del Golfo and San Pedro Ayampuc, just outside of Guatemala City, have denounced the imposition of a gold mine without community consent."[1115] This also coincides with the detailed reports of the Civil National Police and the Human Rights Ombudsman.[1116] Again, Claimants went ahead and acquired Exmingua.

606. That there was opposition to the mining project before Claimants' full acquisition of Exmingua is further confirmed by the confession of Radius' own president that the company was selling its shares as "part of [their] corporate strategy to divest **problematic assets**, allowing the Company to concentrate capital and expertise on **areas less conflicted** regarding development in the region."[1117] Mr. Kappes is either less than candid to this Tribunal or was less than thorough in his assessment of the adverse human rights impact of the Tambor mining project.

607. It is well-established in investment jurisprudence that the conduct of investor due diligence should not

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[1110] UN Guiding Principles, Principle 17(a) (**RL-0243**).

[1111] Prof. Ruggie Report (2010), p. 60 **(R-0151).**

[1112] Kappes Statement, ¶ 63.

[1113] The Observatory for the Protection of Human Rights Defenders, *Guatemala – "Smaller than David: The Struggle of Human Rights Defenders"* (February 2015), p. 22, fn. 93 **(R-0152).**

[1114] GHRC-USA Website, https://www.ghrc-usa.org/about/mission/ ("The Guatemala Human Rights Commission/USA (GHRC) is a nonprofit, grassroots, solidarity organization dedicated to promoting human rights in Guatemala and supporting communities and activists who face threats and violence. GHRC documents and denounces abuses, educates the international community, and advocates for policies that foster peace and justice.")

[1115] Guatemala Human Rights Commission (USA), *The Peaceful Environmental Justice Movement at La Puya: Violence, Repression and Resistance at the El Tambor gold mine in Guatemala*, November 2014 **(R-0150).**

[1116] Detailed Report by the Nacional Civil Police presented in Case No. 1904-2016 before the Constitutional Court (**R-0052**)

[1117] Radius Press Release, Radius Gold Sells Interest in Guatemala Gold Property **(C-0223).**

be limited to just the "local community"[1118] where the investment is located. As earlier pointed out, the tribunal in *Methanex v. United States* considered the political economy of the entire host State and the public attention on chemical compounds and their environmental impact in assessing whether the investor properly demonstrated reliance on supposed legitimate expectations of a stable legal framework.[1119] Even broader was the scope of analysis in *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. the Republic of Estonia*[1120] where the tribunal considered it "imperative to recall the particular context in which the dispute arose, namely, that of a renascent independent state."[1121] Principle 17(b) of the UN Guiding Principles echoes these cases by requiring that a business entity's human rights due diligence "vary in complexity with … the nature and context of its operations."

608. From 2005 to 2007, prior to Claimants' letter of intent to acquire Radius, several communities in Guatemala thumbed down mining projects from being operated in their backyard.[1122] And in 2010, that is, two years immediately prior to Claimants' full acquisition of Exmingua's shares from Radius, two other municipalities voted against mining.[1123] It is difficult to believe that Mr. Kappes was unaware of these events considering that, as he testifies, he and KCA "had some previous experience in Guatemala" prior to the Tambor mining project.[1124] He attests to have provided "several cost evaluation studies for the Glamis Cerro Blanco project, a gold mining underground development, starting in 2000."[1125]

609. In 2005 and 2008, the International Council on Mining and Metals ("ICMM") convened two roundtables to discuss Mining and Indigenous Peoples issues.[1126] In 2005, the issues included "Free, Prior, Informed Consent (FPIC), land rights, capacity building, Indigenous development, institutions and roles, and

[1118] Kappes Statement, ¶ 63.

[1119] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of August 3, 2005, Part IV, Ch. D, ¶ 9 **(RL-0227).**

[1120] *Genin v. Estonia*, Case No. ARB/99/2 (25 June 2001), ¶ 348 **(CL-0057).**

[1121] *Id.*

[1122] J. P. Laplante & Catherine Nolin (2014) *Consultas and Socially Responsible Investing in Guatemala: A Case Study Examining Maya Perspectives on the Indigenous Right to Free, Prior, and Informed Consent*, Society & Natural Resources International Journal, 27:3, 231-248, p. 239 (**R-0131**), and The Observatory for the Protection of Human Rights Defenders, *Guatemala – "Smaller than David: The Struggle of Human Rights Defenders"* (February 2015), pp. 22, 28, fn. 93 **(R-0152)**.

[1123] J. P. Laplante & Catherine Nolin (2014), p. 239 (**R-0131**).

[1124] Kappes Statement, ¶ 36.

[1125] *Id.*

[1126] Report by the International Council on Mining and Metals on Activities Related to Indigenous Peoples (January 31, 2011), p. 3 **(R-0153)**.

legal frameworks."[1127] "[I]ssues relating to consultation" were among those explored in 2008.[1128] That same year, the ICMM released its Position Statement on Indigenous Peoples Issues which acknowledged "the historical disadvantage of Indigenous Peoples and the potentially significant impacts that mining can have on Indigenous Peoples and the wider community (both positive and negative); the special connection between Indigenous Peoples and land and their environment; the interests of Indigenous Peoples in relation to mining and metals projects; the importance of broad community support for successful mining and metals projects; and the importance of governments and the legal context in determining the interactions between Indigenous Peoples and mining companies."[1129]

610. The ICMM is a CEO-led organization that began in 2001 with the aim of "catalys[ing] change for the mining and metals industry."[1130] By 2011, eighteen of the largest mining, minerals and metals companies in the world became members of the ICMM.[1131] That number has since grown to its current membership of "27 mining and metals company members and over 35 national, regional and commodities association members."[1132] In 2013, the ICMM amended its Position Statement on Indigenous Peoples to include guidance on consultations and the indigenous peoples' right to free, prior, and informed consent.[1133] In 2015, the ICMM released a Good Practice Guide for its members who "commit in the position statement to acknowledge and respect the rights of Indigenous Peoples even if there is no formal recognition of these rights by a host country or if there is a divergence between a country's international commitments and its domestic law."[1134] Claimant KCA is not a member of the ICMM, but the ICMM's actions do evince prevailing industry standards expected of a prudent mining company investing and operating in lands traditionally owned or occupied by indigenous peoples. It bears to mention that Claimants' predecessor-in-interest, Gold Fields, became a member of the ICMM in June 2007 and by December of the same year, "Gold Fields obtained … shares in Radius, thus retaining some interest in the Tambor Project."[1135]

611. Considering all these premises, there were realities in Guatemala and in the mining industry at large

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[1127] *Id.*

[1128] *Id.*

[1129] *Id.* pp. 3-4.

[1130] Web Page of ICMM, *Our History*, *available at* https://www.icmm.com/en-gb/about-us/annual-reviews/our-history (**R-0163)**.

[1131] Report by the International Council on Mining and Metals on Activities Related to Indigenous Peoples (January 31, 2011), p. 1 (**R-0153**).

[1132] ICMM, *About Us*, https://www.icmm.com/en-gb/about-us (**R-0154**).

[1133] ICMM, *Indigenous Peoples and Mining: Position Statement* (May 2013), p. 1 **(R-0155).**

[1134] ICMM, *Indigenous Peoples and Mining Good Practice Guide* (2015), p. 17. **(RL-0295).**

[1135] Claimants Memorial, fn. 34, p. 8.

that Claimants miserably failed to take into account when they made investments in Exmingua. Indigenous peoples comprise a majority of Guatemala's population, there was growing opposition to mining projects expressed through both municipal referenda and protests, binding judicial pronouncements were being rendered on the self-enforcing nature of the ILO Convention 169 both in the domestic and Inter-American Human Rights spheres, and industry standards were being developed to recognize the significance of consultations to minimize business risks. Claimants brushed all these aside. They did not conduct human rights due diligence prior to making an investment in Exmingua. As a mere afterthought, they now misdirect this Tribunal to events that transpired after they had fully acquired ownership and control of Exmingua to ground their claim of a legitimate, and reasonable investment-backed expectation that the ILO Convention 169 would not ever be applied to them. The lack of merit in Claimants' arguments is clear as day. Guatemala instead urges this Tribunal to dismiss Claimants' request for damages on the same basis as *Eudoro Armando Olguín v. Republic of Paraguay, viz.*:

> It seem obvious to this Tribunal that there are serious shortcomings in the Paraguayan legal system and in the functioning of various State agencies. This Tribunal is not seeking to determine whether this situation is more severe in Paraguay than in other nations. What is evident is that Mr. Olguín, an accomplished businessman, with a track record as an entrepreneur going back many years and experience acquired in the business world in various countries, was not unaware of the situation in Paraguay. He had his reasons (which this Tribunal makes no attempt to judge) for investing in that country, but it is not reasonable for him to seek compensation for the losses he suffered on making a speculative, or at best, a not very prudent, investment.[1136]

612. In *Parkerings-Compagniet AS v. Republic of Lithuania*, the tribunal held that:

> By deciding to invest notwithstanding this possible instability, the Claimant took the business risk to be faced with changes of laws possibly or even likely to be detrimental to its investment. The Claimant could (and with hindsight should) have sought to protect its legitimate expectations by introducing into the investment agreement **a stabilisation clause or some other provision protecting it against unexpected and unwelcome changes**.[1137]

613. The people of Guatemala should not now be asked to pick up the tab for Claimants, if at all that they suffered any business losses. Otherwise, this Tribunal would be rewarding an imprudent investor at the expense of causing doubt on the fairness of the investor-state dispute settlement system.

[1136] *Olguin v. Paraguay,* ICSID Case No. ARB/98/5, Award (26 July 2001), ¶ 65(b) **(RL-0244)** (emphasis added).

[1137] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, ¶ 336 **(RL-0084).**

F. Guatemala Afforded Claimants the Same Treatment as Other Nationals and Foreign Investors

614. In Section III.3, Claimants accuse Guatemala of failing to accord national and most-favored-nation (MFN) treatment, as required by Articles 10.3 and 10.4 of the Treaty. National treatment and MFN are relative standards. They are intended to ensure that foreign investors and their investments are treated no less favorably than other domestic investors/investments or those from third-party countries.[1138]

615. Claimants identify four Guatemalan entities that allegedly received better treatment than Exmingua: (i) Oxec, S.A., (ii) Oxec II, S.A. (collectively "Oxec"), (iii) Minera San Rafael, S.A. and (iv) CGN.[1139] They also identify two foreign entities that are allegedly in like circumstances with Claimants: (i) Pan American Silver (from Canada) ("PSA") and (ii) Solway Investment Group (from Switzerland) ("Solway")[1140]—the respective owners of Minera San Rafael and CGN.[1141]

616. They then offer four ways in which Exmingua was treated less favorably by the Guatemalan courts and the MEM.

- *First*, "the Guatemalan Constitutional Court subjected Exmingua to unequal and unfavorable treatment by suspending its operations, while allowing Oxec to continue to operate until the MEM commenced and concluded consultations."[1142]
- *Second*, the Constitutional Court set an "additional, onerous, subjective and uncertain condition on Exmingua"—not imposed on Oxec, Minera San Rafael or CGN—that "Exmingua cannot resume operations unless a determination is made that operations would not threaten the existence of the indigenous population."[1143]
- *Third*, the Constitutional Court prolonged the *amparo* proceedings for twice as long as Oxec, Mineral San Rafael and CGN.[1144]
- And *fourth*, the MEM "completed consultations for Oxec [in] just a few months, whereas it has refused even to commence consultations for Exmingua."[1145]

617. Note that Claimants do not set out any MFN claims specifically. While they claim to be in like

[1138] CAFTA-DR, Articles 10.3 and 10.4 **(CL-0001)**; *see also* Claimants' Memorial, ¶ 314.

[1139] Claimants' Memorial, ¶ 324.

[1140] *Id.*

[1141] *Id.* at ¶ 111 ("The Minera San Rafael case concerns a large silver mine operated and developed by Minera San Rafael, S.A. ("Minera San Rafael"), the Guatemalan subsidiary of Tahoe Resources (of Canada) (now owned by Pan American Silver Corp. of Canada)."); Memorial, ¶ 115 ("For its part, the CGN case concerns a large nickel mine developed and operated by Compañía Guatemalteca de Niquel ("CGN"), a Guatemalan subsidiary of the Swiss-owned Soloway Investment Group, GmbH.").

[1142] Claimants' Memorial, ¶ 325.

[1143] *Id.* at ¶ 326.

[1144] *Id.* at ¶ 327.

[1145] *Id.* at ¶ 328.

circumstances with PSA and Solway, those entities are not mentioned in any of the treatments above. Only the Guatemalan entities are referenced. In light of their domestic character, Respondent will assume that all of the treatments fall under Article 10.3 (national treatment), and will analyze them as such. Out of an abundance of caution however, Guatemala will also address any possible claims being made under Article 10.4 (MFN), should they exist. It must be noted that Claimants' failure to particularize its MFN claims is sufficient reason to deny them.[1146]

618. At the threshold, Guatemala reiterates an argument made above about the Court's inability to violate the Treaty protections absent a denial of justice. National and MFN treatment are relative standards, meaning that a comparison between investors and their investments is inherent in the analysis. Here, the Tribunal is asked to compare Exmingua and the comparators as participants in different cases before the national courts. These types of comparisons cannot be made however because national courts are independent from their legislative and administrative counterparts, and their ability to incur international liability for the state is strictly limited *i.e.* absent a denial of justice.[1147] Courts must be free to decide each case on the facts before it. Otherwise, their judicial function would be unnecessarily stifled.

619. The United States made this argument in *Loewen Group v. United States*, a NAFTA case that involved allegations of discrimination by the U.S. courts. There, the United States rightfully argued that the circumstances of each case naturally vary, sometimes to a large degree; and it would be inappropriate to compare one case to another in light of these variances.[1148] Unfortunately the tribunal never reached the question because the national treatment claims were dismissed on other grounds.

620. Here, Claimants fail to identify any case in which a breach of a national treatment obligation was founded upon the actions of the national courts. Guatemala is equally unaware of any such case. The lack of authority here is notable. It suggests that the courts of a State must be treated differently than other agencies or persons exercising government functions, not only in the expropriation context, but in the national treatment /MFN treatment context as well. Courts must assess the facts and legal issues as they are presented before them

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[1146] In prior cases, this lack of specificity has proved fatal to Claimants' MFN claims. *See United Parcel Service of America Inc. v. Canada*, UNCITRAL, Award (May 24, 2007), ¶¶ 183-84 **(CL-0037)** ("[I]n the absence of any further specification of the claimed breaches of article 1103 (and 1104) [NAFTA's MFN provision] this claim must fail."); *William Ralph Clayton et al. v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (March 15, 2015), ¶¶ 728-30 **(CL-0088)**.

[1147] *See* Section VI.D, *supra* (discussing *Barcelona Traction* and others).

[1148] *The Loewen Group Inc. et al v. United States*, ICSID Case No. ARB(AF)/98/3, Counter-Memorial of the United States (March 3, 2001), p. 120 **(RL-0193)** ("Indeed, in such a situation, the appropriate basis for comparison under Article 1102 may be particularly difficult to specify. For example, many of the circumstances facing the litigants in a civil jury trial – the facts underlying the dispute, the parties' counsel, their strategic approaches and tactical choices, the demeanor of the witnesses, the members of the jury, etc. – will vary at least to some extent (and, in many respects, to a great extent) from case to case.").

without fear that their decisions will incur international responsibility for the State unless they act with manifest arbitrariness.

1) The text and purpose of Article 10.3 and 10.4

621. The standard for national and MFN treatment is the same.[1149] Both have three elements: (i) Claimants or Exmingua must have received a certain treatment from the State; (ii) other investors or their investments (the "comparators") must have been in like circumstances with Claimants or Exmingua; and (iii) Claimants or Exmingua must have been treated less favorably than the comparators in like circumstances.[1150] The burden to prove each element rests squarely with the Claimants,[1151] but as explained below, Claimants never satisfy that burden.

622. In addition, the evidence presented by Claimants must demonstrate, or at least suggest, "nationality-based discrimination" on the part of the State. Like all other treaty provisions, Articles 10.3 and 10.4 must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[1152] The purpose of national and MFN treatment, as many tribunals and treaty parties have unanimously affirmed, is to prevent "nationality-based discrimination."[1153] If the evidence does not suggest such discrimination, or on the other hand, if the State can

[1149] *See* Memorial, ¶ 313 (making no distinction between the standard under Article 10.3 and 10.4).

[1150] *See, e.g.*, *United Parcel Service*, UNCITRAL, Award (May 24, 2007), ¶ 83 **(CL-0037)**.

[1151] *United Parcel Service of America Inc. v. Canada*, UNCITRAL, Award (May 24, 2007), ¶ 84 **(CL-0037)** ("Failure by the investor to establish one of those three elements will be fatal to its case. This is a legal burden that rests squarely with the Claimant. That burden never shifts…").

[1152] Vienna Convention on the Law of Treaties, art. 31 **(CL-0005)**.

[1153] *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002); ¶ 181 **(CL-0093)** ("It is clear that the concept of national treatment as embodied in NAFTA and similar agreements are designed to prevent discrimination on the basis of nationality, or 'by reason of nationality.'"); *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award (September 18, 2009), ¶ 220 **(CL-0197)** ("Moreover, the Tribunal also concludes that the discrimination was based on nationality both in intent and effect."); *GAMI Investments Inc. v. Mexico*, UNCITRAL, Final Award (Nov. 15, 2004), ¶ 115 **(CL-0036)** ("It is not conceivable that a Mexican corporation becomes entitled to the anti-discrimination protections of international law by virtue of the sole fact that a foreigner buys a share of it."); *The Loewen Group Inc. et al v. United States*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), ¶139 **(CL-0170)** ("Article 1102 [national treatment] is directed only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality[.]"); *Michael Ballantine et al. v. the Dominican Republic*, PCA Case No. 2016-17, Submission of the United States (July 6, 2008), ¶ 12 **(RL-0245)** ("This obligation thus prohibits nationality-based discrimination between domestic and foreign investors (or investments of foreign and domestic investors) that are 'in like circumstances.'"); *Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Submission of the United States (May 8, 2015), ¶ 10 **(CL-0173)** ("[NAFTA Articles 1102 and 1103] are intended to prevent discrimination on the basis of nationality. They are not intended to prohibit all differential treatment among investors or investments. Rather, they are designed to ensure that nationality is not the basis for differential treatment, in accordance with the provisions of the NAFTA.") (collecting cases); *Mercer International*, Submission of Mexico Pursuant to Article 1128 of NAFTA (May 8, 2015), ¶ 11 **(RL-0246)** ("the national treatment obligation is intended to prevent discrimination against investors of the other Parties (and their investments) on the basis of nationality[.]"); *Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award (March 6, 2018), ¶ 7.7 **(RL-0247)**

connect its conduct to rational and non-discriminatory government policies, then the claims will fail.[1154] As further explained towards the end of this Section, all of Guatemala's actions were carried out pursuant to rational and non-discriminatory policies in favor of Indigenous Peoples that inhabit its territory.

2) None of the four treatments satisfy the national treatment standard

a. Treatment 1 fails because Exmingua and Oxec are not in "like circumstances" and because the Constitutional Court accorded the same treatment to both

623. Treatment 1 targets the Constitutional Court. Claimants argue that the Court "subjected Exmingua to unequal and unfavorable treatment by suspending its operations, while allowing Oxec to continue to operate until the MEM commenced and concluded consultations."[1155] But the claim fails because: (1) Oxec and Exmingua are not in "like circumstances;" and (2) there was no difference in treatment, much less unfavorable treatment.

i. Oxec and Exmingua are not in "like circumstances

624. National treatment only arises where "those who are in all material respects the same are treated differently."[1156] In the NAFTA context, the United States and at least one tribunal have opined that the "like circumstances" analysis must account for differences in the "the regulatory framework and policy objectives" of the State.[1157] The tribunal in *Apotex v. United States* set out a list of factors to consider, namely whether the comparators (i) are in the same economic or business sector (ii) have investment in or are businesses that compete with the investor or its investments in terms of goods or services (iii) are subject to a comparable legal regime or regulatory requirements.[1158]

625. Here, Exmingua and the Oxec companies are not in like circumstances because they are not in the

("accept[ing]" the positions of the United States and Mexico that the National Treatment and Most-Favored Nations obligations are intended to prevent discrimination on the basis of nationality); Andrea Menaker, *Standards of Treatment: National Treatment, Most Favored Nation Treatment & Minimum Standards of Treatment*, APEC Workshop on Bilateral and Regional Investment Rules/Agreements, p. 107 **(RL-0288)** ("As you all know, a national treatment provision in an investment agreement provides protection against the latter type of discrimination, that is, discrimination against investors on the basis of nationality.").

[1154] *Pope & Talbot v. Canada*, UNCITAL, Award on the Merits of Phase 2 (April 10, 2001); ¶ 78 **(CL-0116)**; *Marvin Feldman*, Award (Dec. 16, 2002); ¶ 181 **(CL-0093)**.

[1155] Memorial, ¶ 325.

[1156] *Olin Hldgs. Ltd. v. State of Libya,* ICC Case No. 20355/MCP, Final Award (May 25, 2018), ¶ 202 **(CL-0150)**.

[1157] *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award (September 27, 2016), ¶¶ 404, 414 **(CL-0210)**; *Vento Motorcycles Inc. v. Mexico*, ICSID Case No. ARB(AF)/17/3, Submission of the United States (August 23, 2019), ¶ 6 **(RL-0248)** ("The United States understands the term "circumstances" to denote conditions or facts that accompany treatment as opposed to the treatment itself. Thus, identifying appropriate comparators for purposes of the 'like circumstances' analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other relevant characteristics").

[1158] *Apotex v. United States*, ICSID Case No. ARB(AF)/12/1, Award (August 25, 2014), ¶ 8.15 **(RL-0215)**.

same business sector or the same regulatory framework. Exmingua is a mining company. Its purpose is to explore and/or exploit the natural resources in an area in the hopes of selling the resources it finds.[1159] The Oxec projects are different. They are public work projects, more specifically hydroelectric infrastructures (dams), designed to increase Guatemala's renewable energy capacity. The goal is not to discover minerals and sell them for profit, but rather to generate electricity (not money) for the Guatemalan people. Exmingua and Oxec cannot be called competitors in any way.

626. The regulatory frameworks are different as well. The power sector is governed by the Electricity Law (Decree 93-96), and guided by the Energy Policy 2013-2027. Electricity has been declared a matter of national urgency, same as national literacy.[1160] It is "one of the most important challenges for the Guatemalan Government."[1161] Guatemala is striving to meet the national electricity demand, particularly in the remotest areas, like where the Oxec dams are located.[1162] Renewable energy *i.e.* hydroelectric energy, is also of national importance for the State, which accords with multilateral efforts to combat climate change.[1163] In the long term, Guatemala hopes to achieve 80% electrical output by means of renewable resources, including hydropower.[1164] Mining is completely different. It is not a matter of national urgency or public need like electricity. It is only considered a public good under the Political Constitution on the same level as museums.[1165] The business on mining is regulated by the Mining Law (Decree No. 48-97). There are no long-term policy objectives related to mining, internal or regional.

627. This distinction is very relevant to this case because the rights of the indigenous people are not the only interests at stake. As the Court recognized in a number of *amparo* decisions, including the *Exmingua* decision, the State's need to develop and use its natural resources is also at issue. "On the one hand," the Court said, "it is necessary to identify and consequently, respect and properly safeguard the lawful interests of the affected or potentially affected parties; and, on the other hand, to prevent unreasonable objections to financially sound projects that may be developed by the Nation."[1166] What this means is that the analysis (or, in this case,

[1159] Kappes Statement, ¶¶ 11-13.

[1160] Political Constitution, articles 75 & 129 **(C-0414)**.

[1161] Energy Policy (2013-2027), p. 10 **(R-0158)**.

[1162] *Id.* at p. 17; *see also* map on page 12.

[1163] *Id.* at p. 28 ("Since the State of Guatemala has ratified a number of international commitments, the Energy Policy 2013-2027 considers as priority a sustainable development approach, understood as the process of sustained and equitable improvement in living standards for Guatemalan people, based on appropriate conservation and protection actions for environment, without compromising the expectations of future generations.").

[1164] *Id.* at p. 30.

[1165] Political Constitution, arts. 71, 121 & 135 **(C-0414)**.

[1166] Decision of the Constitutional Court in Case No. 1592-2014, issued on June 11, 2020, p. 22 **(C-0145-ENG)**.

the treatment), either by the Court or the MEM, may be different based on the needs of the State versus the rights of the indigenous peoples. As a result, the different policy goals of the state (the sale of mineral resources versus the development of sustainable energy projects) must be taken into account.

628. Claimants would overlook this distinction, and group Exmingua and Oxec together because simply because each was subject to an *amparo* proceeding filed by an NGO on account of the MEM's failure to hold consultations. But such a broad and sweeping category of comparators has never been applied in the national treatment or MFN context, certainly not in any of the cases cited by Claimants. In *Clayton v. Canada*—Claimants' leading case—the tribunal limited its analysis to three comparators, all of which were mining or quarry projects accompanied by exports that involve sea routes and marine terminals.[1167] Unlike here, all of the projects themselves were admittedly similar to one another.[1168] In *Olin v. Libya*,[1169] the claimant and the comparators operated in the same dairy industry and the same location.[1170] These factors were very relevant to the national treatment comparison since the treatment involved expropriation of the claimant's factory and business. Claimants here make no mention of Exmingua's business versus Oxec's business. In *Feldman v. Mexico*, another case cited by Claimants, the comparison was limited to the small group of firms "in the business of purchasing Mexican cigarettes for export."[1171] Mexican producers of cigarettes were not included because of the State's rational policy bases for treating producers and re-sellers differently ("*e.g.*, better control over tax revenues, discourage smuggling, protect intellectual property rights, and prohibit gray market sales").[1172] Similar policy bases exist here.

629. It could be said that *Occidental v. Ecuador* arguably had the broadest category of comparators. The claimant in that case was an oil exporter that claimed to be entitled to VAT reimbursements similar to other exporters of goods. The Tribunal agreed, ruling that a denial of those reimbursements violated national treatment. Here however, Claimants are not *entitled* to the same decisions as other litigants before the Constitutional Court. *Amparo* actions, according to Claimants' expert Mr. Fuentes "are regarded, under Guatemalan law, as a procedural remedy specifically devised to protect the rights of individuals as enshrined in the Constitution and ordinary legislation."[1173] The *Amparo* Law authorizes the courts to exercise a degree

[1167] *William Ralph Clayton et al. v. Canada*, Award, ¶¶ 696 *et seq* **(CL-0088)**.

[1168] *Id.* at ¶ 697 ("An official of Canada itself noted that the Whites Point Quarry and Belleoram Projects were 'very similar.'") (CL-0088); *id*. ¶ 699 ("Tiverton involved the construction of a new harbour facility, which was 'just down the road' from the Whites Point Quarry location.").

[1169] *See* Memorial, ¶ 322.

[1170] *Olin Hldgs.*, Final Award (May 25, 2018), ¶¶ 205-207 **(CL-0150)**.

[1171] *Marvin Feldman*, Award, ¶¶ 171-72 **(CL-0093)**.

[1172] *Id.* at ¶ 170. **(CL-0093)**.

[1173] Fuentes Report, ¶ 83.

of discretion over the parties before it. This discretion was not present in the *Occidental* case.

630. Under the circumstances, Oxec and Exmingua are not in like circumstances. They are in different industries; they pursue different policy goals for the State; and the State and its courts are authorized to approach them differently based on the different circumstances of each case. As a result, Claimants argument must fail.

ii. There was no difference in treatment because the Constitutional Court applied the same standard for the suspension

631. Even if Exmingua and Oxec were in "like circumstances," the Court treated them equally by applying the same discretion to the suspension issue. Claimants argue that the Court subjected Exmingua to a more "onerous standard,"[1174] but in fact the standard was the same. Only the result was different—suspension (in the case of Exmingua) versus no suspension (in the case of Oxec). Different outcomes flowing from the same standard do not amount to national treatment under the Treaty.[1175]

632. In *William Ralph Clayton v. Canada*—the case cited by Kappes—the claimants argued that its quarry project received less favorable treatment in the environmental assessment process. The tribunal ultimately found that the claimants' project was subjected to a more onerous standard of review.[1176] The decisive issue however was "not whether the outcome of the review was different," but whether the "mode of review and the evaluative standard" were less favorable to claimants.[1177] Notably, to rise to the level of national treatment, claimants had to have been subjected to a different standard of assessment.[1178]

633. Here, the Constitutional Court applied the same standard. Article 27 of the Amparo Law authorizes the *amparo* court to order a suspension when, in its own judgment, the circumstances make it advisable.[1179] The Constitutional Court has the same authority.[1180] The Court exercised this discretion in both cases. First, in

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[1174] Memorial, ¶ 325.

[1175] *See William Ralph Clayton*, Award, ¶ 697 **(CL-0088)** ("The Tribunal emphasizes again that it does not preclude the possibility that different outcomes could still have been reasonably obtained…if the same standard had been applied. What is of critical importance here is that the…project did not receive the expected and legally mandated application…of the essential evaluative standard[.]").

[1176] *Id.* ("What is of critical importance here is that the Whites Point project did not receive the expected and legally mandated application, for the purposes of federal Canada environmental assessment, of the essential evaluative standard under the CEAA.").

[1177] *Id.* at ¶ 687.

[1178] *Id.* at ¶ 708 ("It is not the particular outcome on the facts, however, that is the basis for a finding in this Award of less favorable treatment for Bilcon's project; it is the fact that the Rabaska JRP followed the legally required standard in carrying out and reporting its assessment.").

[1179] *See* Amparo Law, art. 27 **(C-0416)**.

[1180] *See id.* at Article 61 ("Decisions against which an appeal may be lodged. Appeals may be lodged against: sentences

Oxec, the parties had argued that the suspension created an obstacle for the state to realize its energy goals, which are a matter of national urgency, as already explained above.[1181] After having considered all the factors, the Court decided, in its discretion, that hydroelectric projects could continue while the consultations were carried out.[1182] The same decision was made in a different *amparo* regarding a hydroelectric project.[1183]

634. Later, in the Exmingua case (and other mining cases like CGN),[1184] the Court articulated this discretion, saying:

> The economic, cultural, historical and ecological reality of the State of Guatemala demands from its authorities the permanent search for balance and harmonization between elements such as the rational use of its natural resources; the promotion of investment projects aimed at sustainable development, in a climate of legal security and social peace; the adequate fulfillment of its international obligations; and the inescapable duty to respect and protect the fundamental rights of its citizens.[1185]

635. In the CGN decision, the Court found that the EIA did not assess the project's impact on the vast majority of the surrounding areas, leading the Court, in its discretion, to suspend CGN's license until consultations were held. Likewise, in the Exmingua case, the Court took note of the serious conflicts emerging in the area that "have endangered the lives and security of the inhabitants of the applicable municipalities," and, in its discretion, maintained the suspension until the consultations were complete.[1186]

636. The results between the Oxec and Exmingua cases may have been different, but the assessment was the same. The difference stemmed from the different circumstances of each case, not to mention the fact that the projects had different goals (exploitation of natural resources versus sustainable development). This discretion issue parallels the fact that Exmingua and Oxec were not in like circumstances. So, for all these

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of protection; orders denying, granting or revoking provisional protection; orders settling costs and damages; and orders ending the process."); *see also* Constitutional Court Resolution issued on February 17, 2017, regarding the appeal against Revocation of the Provisional Amparo of April 22, 2016 **(C-0558)**.

[1181] Decision of the Constitutional Court in Case Nos. 90-2017, 91-2017 and 92-2017, issued on May 26, 2017, p. 23 **(C-0441-ENG-R)** (*Oxec* case); *see also supra* (describing the Oxec project in general).

[1182] Decision of the Constitutional Court in Case Nos. 90-2017, 91-2017 and 92-2017, issued on May 26, 2017, p. 23 **(C-0441-ENG-R)** (*Oxec* case).

[1183] Decision of the Constitutional Court in Case Nos 4957-2012 and 4958-2012, issued on September 14, 2015 (*La Vega* case) **(R-0096)**.

[1184] As noted above, mining and electricity are regulated differently.

[1185] Decision of the Constitutional Court in Case No. 697-2019, issued on June 18, 2020, p. 173 **(C-0496-ENG-R)** (*CGN* case) (emphasis added); Decision of the Constitutional Court in Case No. 1592-2014, issued on June 11, 2020, p. 22 **(C-0145-ENG)**.

[1186] Decision of the Constitutional Court in Case No. 1592-2014, issued on June 11, 2020, p. 38 **(C-0145-ENG)** ("An assessment of the situation inclines this Court towards ordering that the project developed under the aforementioned mining license remain suspended as ordered by the Amparo Court of first instance upon granting provisional protection in its decision of 11 November 2015.").

related reasons, Treatment 1 therefore fails.

b. MEM is following the same procedures for both Oxec and Exmingua in accordance with the Constitutional Court's instructions

637. Claimants allege that the MEM "completed consultations for Oxec [in] just a few months, whereas it has refused even to commence consultations for Exmingua."[1187] As Guatemala has already explained however, Oxec and Exmingua were not in "like circumstances," so the claim is a non-starter. In any event, there is no notable difference between the MEM's consultations for the Oxec projects and those for Exmingua. The consultations that are currently being developed for Exmingua are based on the same systematic consultation process carried out for Oxec, which was developed pursuant to the Constitutional Court's instructions.[1188]

638. Claimants take issue with the timing of each consultation, claiming that Oxec's consultations began within two months of the Court's ruling, while Exmingua's consultations were stalled for "over four years."[1189] But that accusation is patently false. The Court's decision for Exmingua was issued six months ago, on June 11, 2020,[1190] but it is still not binding. To the contrary of Claimants' position, even though the decision is not yet binding MEM has nonetheless begun to take steps to implement the consultation process, for example consulting and investigating the communities in the area of Progreso VII Derivada with the objective of investigating and understanding the form of organization for the Kachiquel community in the area, in accordance with its culture, practices and ancestry.

639. The confusion stems from Claimants' attempt to "start the clock" at different points for Oxec and Exmingua. For Oxec, Claimants' clock starts on the date of the Court's final ruling, *i.e.* the date the *amparo definitivo* was affirmed on appeal; for Exmingua however, Claimants' clock begins on the date the *amparo provisional* was affirmed on appeal, or alternatively, the date that the *amparo definitivo* was first issued by the Supreme Court, prior to any appeal.[1191] This only proves that even for Claimants the decision on the *amparo provisional* was binding and any delay argument, is an argument of convenience to create an alleged international violation through an inexistent denial of justice.

640. Claimants' reliance on *Feldman v. Mexico* here is misplaced, as it is not entirely clear how the two cases compare. In *Feldman,* a majority of the tribunal found discrimination where the State gave certain tax rebates to a Mexican-owned company, but withheld those same rebates from a foreign-owned company.

[1187] Claimants' Memorial, ¶ 328.

[1188] Witness Statement of Ing. Oscar Pérez, Vice-Minister of Social Development of the Ministry of Energy and Mines, ¶ 16.

[1189] Claimants' Memorial, ¶ 328.

[1190] Decision of the Constitutional Court in Case No. 1592-2014, issued on June 11, 2020 **(C-0145-ENG)**.

[1191] Claimants' Memorial, ¶ 328 & n. 805.

Notably, the two different decisions were final at the time of the arbitration. Here, Exmingua and Oxec are subject to the same type of decision, which directs the MEM to carry out the same consultation process. The only difference is that the Exmingua case is not yet over.

641. Under the circumstances, this claim is premature, much like the claims in to *Enkev Beheer v. Poland*. In that case, the claimant Enkev alleged expropriation based on Poland's plan to expropriate its property, but the Tribunal held that no expropriation had taken place because the property in question had yet to be expropriated.[1192] In a separate but similar case, *Achmea v. Slovakia (II)*, the tribunal ruled that the treaty had yet to be violated because the expropriatory legislation had not yet been passed by the legislature.[1193]

c. The Constitutional Court did not impose any additional condition on Exmingua

i. Exmingua is not in like circumstances with either Minera San Rafael or CGN

642. Exmingua is not in like circumstances with Minera San Rafael or CGN because the size and impact of each mine is dramatically different. Size and impact are important when it comes to like circumstances. In *Renee Rose v. Peru*, the claimant tried to place its small, privately held, *Banco Nuevo Mundo* (BNM) in the same category as the largest banks in Peru—Banco de Crédito del Perú (BCP) and Banco Wiese—arguing that the banks were in the same financial sector.[1194] However, the tribunal rejected that comparison as overly general,[1195] opting instead to consider "the segment and the number of individuals affected [by each bank], its market share, and other similar factors."[1196] The national treatment claims were ultimately rejected.[1197]

643. Here Exmingua's Progresso VII mining license was limited to 150 tons of raw material per day (tpd). The project employed 94 employees and made limited contributions to the community.[1198] By contrast, the Escobal Mine (Minera San Rafael) was thirty times larger than Progresso VII, processing 4,500 tons of raw

[1192] *Enkev Beheer BV v. Poland*, PCA Case No. 2013-01, First Partial Award (April 29, 2014), ¶ 339 **(RL-0249)**.

[1193] *Achmea B.V. v. Slovakia*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (May 20, 2014), ¶ 236 **(RL-0250)** (finding that the "line of cases is unanimous in holding that an expropriation claim is too hypothetical, and thus premature as long as no taking has occurred.").

[1194] *Renee Rose v. Peru*, ICSID Case No. ARB/10/17, Award (February 26, 2014), ¶¶ 398-99 **(RL-0251)**.

[1195] *Id.* at ¶ 400.

[1196] *Id.* at ¶ 397.

[1197] Specifically, the tribunal found that "BCP was the first- and Banco Wiese the second-largest bank in Peru up to November 2000 and together they accounted for 44 percent of the loans in this country and 51 percent of deposits. In contrast, BNM had 4 percent of loans and 2 percent of deposits up to November 2000. … Peru has also stated that Banco Latino did not differ so much from BNM in terms of size but in terms of its far-reaching network of individual depositors, which was not the case of BNM, whose clientele mainly comprised companies, other banks, and State-owned enterprises." These elements were convincing to the Tribunal. *Renee Rose v. Peru*, ¶ 398 **(RL-0251)**.

[1198] EIA p. 23 (**C-0082**).

material per day, and employing over 7,600 people, ninety-nine percent of which are from Guatemala.[1199]

644. The Fenix nickel mine (CGN) was equally as large. In 2007, the mine planned to process 1.464 million tons of raw material annually, or approximately 4,010 tones per day. CGN moreover invested millions of dollars in community support projects in the areas of education and employment, healthcare, infrastructure and the environment.[1200] Some of the most notable projects included adult literacy centers, an employment policy paying local workers above minimum wage, free medical clinics, nature reserves and road upgrades.[1201]

645. Exmingua was not nearly as involved in the local community as Minera San Rafael or CGN. While CGN invested hundreds of millions in medical clinics and literacy centers, Exmingua invested a couple thousand dollars in "limited and unique opportunities" like raffle prizes and food giveaways.[1202] The communities surrounding the Escobal and Fenix mines were far more dependent on the benefits provided by Minera San Rafael and CGN than the communities around Progresso VII. The stakes were much higher in the cases of Escobal and Fenix, and the Court in the CGN case recognized what was at stake.

ii. The Court applies the same standard to each project

646. Treatment 2 also fails because there was no difference in treatment between Exmingua and the other three projects. The Court applied the same standard to each, and there was no "additional, onerous, subjective and uncertain condition" placed on Exmingua. The purpose of the consultations across all the projects is to protect the indigenous peoples, their land and their culture. Each of the four decisions from the Court makes this abundantly clear. In the *Oxec* decision, the Court said:

> governments should consult the peoples concerned, through appropriate procedures, in good faith and through its institutions representative, whenever legislative or administrative measures are foreseen likely to affect them directly, in order to reach an agreement or obtain their consent [article 6, numerals 1 and 2]; especially when they deal with projects for the exploitation of natural resources [Article 15]."[1203]

647. In the *Minera San Rafael* decision the Court continued:

> The [Inter-American] Commission has been emphatic in stating that the provision that the States comply with consulting indigenous peoples, when measures that may affect them are envisaged, tends to preserve the survival of the indigenous or tribal people, in accordance with their ancestral ways of lifetime. The Inter-American Court of Human Rights defined that the survival of indigenous peoples is not identified with mere physical subsistence, but

[1199] *Escobal*, Pan Amerian Silver **(C-0210)**.

[1200] *Hudbay*, The Facts: CGN and Hudbay in Guatemala (undated), p. 8 (**R-0159**).

[1201] *Id.* at pp. 9-10.

[1202] SLR Report, ¶ 142.

[1203] Decision of the Constitutional Court in Case Nos. 90-2017, 91-2017 and 92-2017, issued on May 26, 2017, p. 43 **(C-0441)** (*Oxec* case).

> must be understood as the ability to preserve, protect and guarantee the special relationship they have with their territory, in such a way that they can continue to live their traditional way of life and that their cultural identity, social structure, economic system, customs, beliefs and distinctive traditions are respected, guaranteed and protected.
> The Commission, in a similar sense, describes that the term survival does not refer only to the obligation of the State to guarantee the right to life of each of the members of those peoples, but also to the obligation to adopt all appropriate measures to guarantee the continuous relationship of the indigenous people with their culture and territory.[1204]

648. The same point was made in the *Exmingua* decision:

> the safeguards requiring States to consult with indigenous peoples whenever they expect to adopt measures that may affect such peoples are intended to ensure their survival as indigenous or tribal peoples, in accordance with their ancestral ways of life. Such decision also mentioned that, according to the Inter-American Court of Human Rights, the survival of indigenous peoples is not merely related to their physical survival, but should rather be understood as the ability to preserve, protect and guarantee the special relationship that they have with their territory, so that they may continue living their traditional way of life and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected. Survival does not refer only to the obligation of the State to ensure the right to life of each member of those peoples, but also to the obligation to take all the appropriate measures to ensure the continuance of the relationship of the indigenous people with their culture and their land.[1205]

649. Finally, in the *CGN* decision, the Court said:

> Compliance with this obligation requires the adoption of the necessary measures to protect the habitat of indigenous communities from ecological deterioration as a consequence of extractive, livestock, agricultural, forestry and other economic activities, as well as the consequences of the projects of infrastructure, since such deterioration reduces their traditional capacities and strategies in terms of food, water and economic, spiritual or cultural activities. When adopting these measures, States must place "special emphasis on the protection of forests and waters, which are essential for their health and survival as communities."[1206]

650. The purpose of the consultations addressed in the cases above is for the State and the indigenous communities to reach an agreement and to adopt measures necessary to protect the survival of the local communities. The additional condition that Exmingua complains about—"a determination is made that operations would not threaten the existence of the indigenous population"—has always been a necessary

[1204] Decision of the Constitutional Court in Case No. 4758-2017, issued on September 3, 2018, pp. 267-68 **(C-0459-ENG-R)** (*Minera San Rafael* case).

[1205] Decision of the Constitutional Court in Case No. 1592-2014, issued on June 11, 2020, p. 21 **(C-0145-ENG)**.

[1206] Decision of the Constitutional Court in Case No. 697-2019, issued on June 18, 2020, p. 265 **(C-0496-ENG)** (*CGN* case).

outcome of each consultation. The Court did not add anything new in Exmingua's case. Since the condition has been present in each decision (general application), Claimants have failed to prove that they were treated unfavorably.

d. Treatment 3 fails for lack of like circumstances and because the Court decided the cases in an efficient non-discriminatory manner

651. Claimants allege that the courts prolonged Exmingua's *amparo* proceedings for much longer than Oxec, Mineral San Rafael and CGN. Once again, Oxec is not a proper comparator because Exmingua and Oxec are not in the same business or regulatory sector. Minera San Rafael and CGN are not proper comparators due to the dramatic difference in the projects' size and impact. Nonetheless, the treatment is addressed below.

652. At the outset, it should be noted that the Constitutional Court is not under any obligation to address appeals on a first come first serve basis. Nothing like this exists under Guatemalan law. Nor does any such protection exist under international law. As explained above, national courts, as extensions of the state, are only required to ensure that justice is not denied. Courts are free to administer that justice in the order that they see fit. They certainly can pick and choose which cases to decide first, especially when the purpose of each proceeding is to protect the rights of third parties, *i.e.* the indigenous peoples, and administer justice according to the demands of the rule of law.[1207]

653. In light of the above, Claimants have not satisfied the standard for national treatment. As the Tribunal will recall, Claimants must show some type of unfavorable treatment by the State. In *Clayton v. Canada*, the standard of assessment was found to be unfavorable compared to other quarry/marine projects. In *Feldman*, the withholding of tax rebates was deemed unfavorable compared with other resellers. In *Occidental* the withholding of VAT refunds was found to be unfavorable compared with other exporters. And in *Olin*, the threat of expropriation was found to be unfavorable compared with other factories.

654. Here, Exmingua's case was decided, just like all the other comparators. And just like all the other mining comparators (Minera San Rafael and CGN), Exmingua can continue its operations once the consultations have taken place. The fact that the Court chose to address one case before the other—first, Minera San Rafael's case in a 500+ page decision, followed by CGN's case in a 250+ page decision, and then Exmingua's case in a 90+ page decision—does not mean that Exmingua was treated unfavorably. It suggests rather that the Court administered justice in an efficient (and non-discriminatory) manner. Also as the Constitutional Court explained in the case of *Minera San Rafael*, two communities there were in conflict, one if favor of the mining project the other against, and the fight move to the heart of Guatemala City, in front of the Constitutional Court, putting at risk the peace and social harmony, as well as the well-being of the protestors

[1207] Fuentes Report, ¶ 83.

and citizens in general. Both groups camped out for more than eight months in front of the Court's building. This situation created a crisis and an emergency that by itself required some urgency in resolving the social conflict that affected both locals and outsiders.

655. What is more, Exmingua's own actions may have very well led to the delays in its own case. Unlike the other comparators, Exmingua was very active in the courts, filing different *amparos* against different state and local actors, all of which had their own unique procedural history, and all of which surely had an impact on the timing of the final decision. For instance, a group of Exmingua workers initiated an *amparo* proceeding against the MEM for its alleged failure to carry out the consultations pursuant to the Supreme Court's original order in the first proceeding initiated by CALAS. The Supreme Court suspended the proceeding after, which Exmingua appealed the ruling to the Constitutional Court (in parallel to its appeal of the original amparo proceeding). The Constitutional Court affirmed the suspension while the first appeal was pending.[1208] Exmingua initiated another *amparo* against the MEM for suspending Exmingua exploitation license. Once again, the Supreme Court suspended the proceeding, prompting Exmingua to once again appeal the suspension in parallel to the other appeals. Once again, the Constitutional Court affirmed the suspension.[1209]

3) Claimants have not established any claims for MFN treatment

656. As mentioned in the introductory part of this Section, Claimants do not articulate any specific claims for MFN treatment. They claim, in only two sentences, to be in like circumstances with PSA and Soloway, the alleged parent companies of Minera San Rafael and CGN.[1210] But the claim ends there. Claimants do not articulate any treatments against PSA or Soloway specifically; they make no comparisons between Claimants' shareholding in Exmingua (the investment) and the types of investments made by PSA or Soloway; they do not even provide evidence that PSA is the parent companies of Minera San Rafael.[1211]

657. These failures prove fatal because the burden is on Claimants to demonstrate like circumstances and nationality-based discrimination. The tribunal in *William Ralph Clayton v. Canada* came to this very conclusion. Claimants had argued both national treatment and MFN treatment, and even identified comparators

[1208] Decision of the Constitutional Court in Case No. 3252-2017, issued on August 21, 2017 **(R-0133)**.

[1209] Decision of the Constitutional Court in Case No. 6095-2017, issued on February 19, 2018 **(R-0135)**

[1210] Memorial, ¶ 323 ("For these same reasons, Claimants also are in "like circumstances" with the investors who own or control each of these projects. As also noted above, the Oxec projects are owned or controlled by Guatemalan nationals, whereas the Minera San Rafael and CGN projects are owned or controlled by nationals of third parties, namely, Canada and Switzerland, respectively.").

[1211] *See* Claimants' Memorial, ¶ 111 ("The Minera San Rafael case concerns a large silver mine operated and developed by Minera San Rafael, S.A., the Guatemalan subsidiary of Tahoe Resources (of Canada) (now owned by Pan American Silver Corp. of Canada).) (no evidence provided).

for both claims, but, like here, it devoted very little part of its submissions to the MFN claim.[1212] "In view of the limited information provided," among other reasons, the Tribunal dismissed the MFN claims.[1213] The same result should occur here.

658. In any event, the unparticularized claims would fail for the reasons already explained. *First*, Guatemala has reserved the right, pursuant to Annex II of the Treaty, to treat Swiss investors (Solway) differently than U.S. investors (Claimants).[1214] Thus, any comparisons between Claimants (as shareholders of Exmingua) and Solway (as the alleged shareholder of CGN) do not violate the Treaty.

4) There is no evidence of nationality based discrimination against Claimants

659. Each of treatments above target Exmingua specifically; not Claimants. The distinction is important because any unfavorable treatment must demonstrate (or at least infer) nationality-based discrimination.[1215] This is crucial part of the standard overlooked in Claimants' Memorial. National treatment and MFN are grounded in international law's proscription against discrimination based on nationality.[1216] So, there must be some indicia of that type of discrimination by the State, even if it is inferred.[1217]

660. Here, the treatments alleged only target Guatemalan entities; and there no evidence that the Court or the MEM intended to discriminate against Claimants (or the other foreign shareholders). While intent may not be determinative, it is still relevant;[1218] and the fact that Claimants were not the target of any treatment from Guatemala, coupled with the fact that Exmingua and the other entities share the same nationality, suggests that

[1212] *William Ralph Clayton*, Award, ¶¶ 728-29 **(CL-0088)**.

[1213] *Id.* ¶ 730.

[1214] *See* Section V.D.1, *supra*. Pursuant to Annex II, Guatemala has reserved the right, vis-à-vis the United States, to adopt "any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement."

[1215] Andrea K. Bjorklund, *The National Treatment Obligation in* Arbitration Under International Investment Agreements: A Guide to the Key Issues (2d 2018), p. 549 **(RL-0289)**.

[1216] *National Treatment*, UNCTAD Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11 (Vol. IV) (1999), p. 6 **(RL-0290)** ("[T] the standard represents one of the competing international law doctrines for the treatment of the person and property of aliens which has come to be known as the "Calvo doctrine". Under this doctrine, which was supported especially by Latin American countries, aliens and their property are entitled only to the same treatment accorded to nationals of the host country under its national laws.").

[1217] *National Treatment*, UNCTAD Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11 (Vol. IV) (1999), p. 8 **(RL-0290)** ("no government measure should unduly favour domestic investors"); *Mercer International*, Award, ¶ 7.7 **(RL-0247)** ("accept[ing]" the positions of the United States and Mexico that the National Treatment and Most-Favored Nations obligations are intended to prevent discrimination on the basis of nationality); *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award (November 25, 2015), ¶ 7.163 **(RL-0253)** (denying the national treatment claims because "[t]here [was] no factual evidence that any relevant conduct by MVM, HEO or the Hungarian Government (including its ministers) was ever motivated by national or other discrimination[.]")

[1218] *S.D. Myers Inc v. Canada*, UNCITRAL, Partial Award (Nov. 13, 2000), ¶ 254 **(CL-0104)**; *The Loewen Group*, Award, ¶ 139 **(CL-0170)** ("Article 1102 [national treatment] is directed only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality[.]").

there was no nationality-based discrimination.

661. The tribunal in *GAMI v. Mexico* reached this same conclusion. The issue was whether Mexico discriminated against the claimant's (U.S. shareholders in Mexican companies) by expropriating the companies' sugar mills, while some other sugar mills were not expropriated. The tribunal dismissed the idea that differential treatment alone violated the national treatment standard.[1219] Mexico had expropriated the claimant's mills because they were operating at a loss, a measure that was "plausibly connected to a legitimate goal of policy" and showed no sign of discriminatory treatment.[1220]

662. Here, like in *GAMI*, Claimants are shareholders in a Guatemalan entity. The Court and the MEM treated Exmingua as a Guatemalan entity, the same way it treated Oxec, Minera San Rafael and CGN as Guatemalan entities. While those treatments may have varied at the margins (discussed in greater detail below), none of the treatments were motivated by the nationality of each entity's shareholder. To borrow a phrase from the *GAMI* decision: "It is not conceivable that a [Guatemalan] corporation becomes entitled to the anti-discrimination protections of international law by virtue of the sole fact that a foreigner buys a share of it."[1221]

5) Nor is there any basis to infer or presume nationality-based discrimination because all of the treatments alleged were based on "rational government policies"

663. Absent evidence of nationality-based discrimination, tribunals may still infer or presumed nationality-based discrimination when the treatments alleged have no nexus to rational and non-discriminatory government policies.[1222] Put a different way, the State may defend its actions—assuming the national treatment/ MFN standard is met—by connecting them to rational and non-discriminatory government policies. The *Pope & Talbot v. Canada* tribunal described this presumption in the context of NAFTA:

> Differences in treatment will presumptively violate Article 1102(2), unless

[1219] *GAMI Investments*, Final Award, ¶ 114 **(CL-0036)**.

[1220] *GAMI Investments*, Final Award ¶ 115 ("It is not conceivable that a Mexican corporation becomes entitled to the anti-discrimination protections of international law by virtue of the sole fact that a foreigner buys a share of it.") **(CL-0036)**; *see also United Parcel Service*, Award, ¶¶ 175, 177 **(CL-0037)** (finding that Canada's use of a Canada-based mail carrier to ensure the widest possible distribution to Canadians did not "comprise any nationality-based discrimination"); *South American Silver Limited (Bermuda) v. Bolivia*, PCA Case No. 2013-15, Award (Nov. 22, 2018), ¶ 721 **(RL-0053)** ("In any case, and as noted above, it has not been established that the Reversion was due, even in part, to the fact that it concerned the property of a foreign or transnational company, or that officials of Bolivia had antagonized the Company for this reason.").

[1221] *GAMI Investments*, Final Award, ¶ 115 **(CL-0036)**.

[1222] *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, ¶ 78 **(CL-0116)**; *Marvin Feldman*, Award, ¶ 181 **(CL-0093)** ("For practical as well as legal reasons, the Tribunal is prepared to assume that the differential treatment is a result of the Claimant's nationality, at least in the absence of any evidence to the contrary."); Andrea K. Bjorklund, *The National Treatment Obligation in* Arbitration Under International Investment Agreements: A Guide to the Key Issues (2d 2018), p. 532-33 **(RL-0289)** ("In the absence of a legitimate rationale for the discrimination between investors in like circumstances, the tribunal will presume—or at least infer—that the differential treatment was a result of the claimant's nationality.").

> they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.

664. In this case however, every treatment alleged is directly connected with Guatemala's attempt to protect the rights of its own indigenous people. *Treatment 1* is about the suspension of Exmingua's license while the consultations take place. The Court ordered the suspension to give "priority" to the "rights to life and integrity of indigenous and tribal peoples."[1223] *Treatment 2* is no different. The conditions placed on Exmingua's consultations were intended, in Claimants own words, the ensure that "operations would not threaten the existence of the indigenous population in the vicinity of the mining project."[1224] *Treatment 3* is about the timing of the Court's decision; and *Treatment 4* is about the timing of the MEM's consultations. In both cases, the time was spent ensuring that the rights of indigenous peoples were fully protected, either by a well-developed court decision, which sets out instructions for the MEM to follow, or by the MEM following those instructions.

665. Furthermore, this policy of protecting the rights of indigenous peoples does not distinguish between foreign-owned or domestic companies, either on its face or *de facto*. Nor does it undermine the "investment liberalizing objectives" of the Treaty. Therefore, even if (i) the Tribunal were to conclude that the reservations above do not apply, and even if (ii) the Tribunal were to conclude that Claimants have satisfied the national treatment and MFN standards, the claims would still fail because all of Guatemala's actions were carried out in furtherance of rational and non-discriminatory government policies.

VII. ANALYSIS OF THE MINING PROJECTS AT PROGRESO VII AND SANTA MARGARITA

666. In this section, Guatemala analyses certain aspects considered essential by the international mining community, and which are main issues to be examined with regard to Exmingua's project. We start with the lack of social license, the tensions cause by Claimants and aggravated by their actions since 2012, followed by an analysis of Exmingua's misrepresentations and omissions in the EIA and non-compliance with the law, followed by the proposed life of mine plan ("LOM Plan") which is deficient from its premises to its conclusion, and conclude with the supposed exploration opportunity and its theory of value, which is disconnected from any reasonable valuation.

A. Any value attributed to the investment must be reduced as a result of the existing conflict between the Claimants and the communities affected by the Project

667. Guatemala is still in the process of recovering from its civil war that marked its history in the last four decades of the last century, but this has not been an obstacle to private investment. The mining sector has

[1223] Decision of the Constitutional Court in Case No. 1592-2014, issued on June 11, 2020, p. 31 **(C-0145-ENG)**.

[1224] Memorial, ¶ 326.

grown and expanded, and despite limited circumstances, private investors have achieved a positive relationship with affected communities. This is not something particular to Guatemala. In various countries of the world, serious miners have developed mutually beneficial relationships with their neighbors, following world best practices. Claimants never had that intention and therefore lost the opportunity to obtain and maintain a social license.

668. Claimants maintain that they obtained a social license for the project because they consulted the affected communities between January and February 2010 and there was no objection filed during the prescribed period[1225] But that consultation process was defective, and Claimants did not put in place the basic elements to ensure the effectiveness of the consultations. Social license is one of the most fundamental aspects of a successful mining project, and where mining companies underestimate communities or try to bowl them over, the result is intransigent opposition, often so strong as to halt the project, regardless of the promised benefits. In this section, Guatemala describes the meaning of social license and details the methods to obtain and maintain it, showing that Claimants neither acquired social license nor did they attempt to mitigate the conflict once that arose once mining began at Progreso VII.

1) The importance of social license for mining projects

669. The major prescription for avoiding social conflict is to gain social license by engaging with the affected persons and communities surrounding a project.[1226] Where a company cannot achieve social acceptance, significant financial and reputational consequences may render a project unfeasible.

670. "Social License" and its risks has been defined by the Minerals Council of Australia as,

> [A]n unwritten social contract. Unless a company earns the licence, and maintains it on the basis of good performance on the ground and community trust, there will undoubtedly be negative implications. Communities may seek to block project developments; employees may choose to work for a company that is a better corporate citizen; and projects may be subject to ongoing legal challenges, even after regulatory permits have been obtained, potentially halting project development.[1227]

671. Achieving social license has been characterized by companies' "attempts to secure the acceptance of mining activities by local communities and stakeholders, in order to build public trust

[1225] Request for Arbitration, ¶ 5.

[1226] Business for Social Responsibility, *The Social License to Operate* (2003) (**R-0160**).

[1227] *Enduring Value, The Australian Minerals Industry Framework for Sustainable Development (Guidance for Implementation)*, Minerals Council of Australia, 2005, p. 2 (**R-0161**).

in their activities and prevent social conflict."[1228] There are financial incentives for achieving a social license and reputational risks of failing to do so. The financial incentives "largely revolve around the costs incurred as a result of social conflict arising out of poor or unsuccessful community engagement, including lost production and impacts on publicly traded companies' share prices."[1229]

672. The mining industry has recognized the importance of social license, coining the term as the "social license to operate," "SLO," or simply "social license."[1230] By the mid to late 1990s, the industry recognized that it was facing a crisis as growing community unrest and broader public opposition threatened the viability of the industry.[1231] A small group of mining and metals company CEOs started the Global Mining Initiative, seeking among other things, to institute "internal reform."[1232] This eventually gave rise to the creation of the International Council on Mining & Metals ("ICMM") in 2001.[1233]

673. The ICMM adopted 10 guiding principles for reform, and over the years ICMM has published position statements to further develop and strengthen these core principles, which include social and environmental performance expectations.[1234] ICMM Members, which include some of the biggest mining companies and commodity association members, commit through their membership to implement the ICMM Sustainable Development Frameworks.[1235] This includes a commitment to implement the 10 sustained development principles.[1236] In order to carry out these principles, ICMM has developed a number of Position Statements to further elaborate the approach ICMM members should approach to particular issues.[1237] The Position Statements are binding on ICMM members which obliges them to incorporate them into their operational practices.[1238]

674. Through the social performance principle, the ICMM has specifically emphasized the pursuit of

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[1228] *Free, Prior and Informed Consent: Addressing Political Realities to Improve Impact,* Columbia Center on Sustainable Development (October 2020) p. 18 (**R-0162)**.

[1229] *Id.*

[1230] Mihaela-Maria Barnes, *The Social License to Operate: An Emerging Concept in the Practice of International Investment Tribunals,* Journal of International Dispute Settlement (2019) (**R-0072**).

[1231] Web Page of ICMM, *Our History, available at* https://www.icmm.com/en-gb/about-us/annual-reviews/our-history (visited December 4, 2020) (**R-0163**).

[1232] *Id.*

[1233] *Id.*

[1234] SLR Report, ¶ 96.

[1235] *Id.*

[1236] *See, e.g.*, ICMM, *Position Statement: Mining and Indigenous People* (2008), p. 1 (**R-0156**).

[1237] *Id.* p. 2.

[1238] *Id.*

adequate local stakeholder engagement as well as support of community development and local economic opportunities. In 2008, the ICMM recognized the importance of a constructive relationship between the mining industry and Indigenous Peoples and issued a Position Statement to further elaborate on its social performance principles.[1239] As addressed in the 2008 position statement, "ICMM members believe that successful mining and metal projects require the broad support of the communities in which they operate, including of Indigenous Peoples, from exploration through to closure."[1240] Among other commitments ICCM members undertake the obligation of "[e]ngaging and consulting with Indigenous Peoples in a fair, timely and cultural appropriate way throughout the project cycle" and "seeking agreement with Indigenous Peoples and other affected communities on programs to generate net benefits…."[1241]

675. The ICMM has recognized social license as one of the top business risks facing a mining project.[1242] A lack of community may cause work stoppages, delayed production, and complications in the legal permitting process (including environmental authorizations), all of which affect the ease with which a mining operation is able to establish and operate.[1243]

676. These are not theoretical concerns. In practice, problems with social license have caused many significant mining projects, particularly in Latin America, to halt operations or abandon mining projects altogether. Newmont Mining Company was forced to ultimately abandon its Conga Mine, an allegedly $5 billion dollar copper and gold project located in northern Peru, following violent protests and social unrest, which began in November 2011.[1244] Almost a decade earlier, Newmont faced similar challenges with regard to the Cerro Quilish project in the same region. After strong social opposition, Newmont withdrew its exploration activities in that area.[1245]

677. The rest of the world has not been immune to the risk of mining project failures as a result of social

[1239] ICMM, *Position Statement: Mining and Indigenous People* (2008) **(R-0156)**. This position statement was updated in 2013. *See* ICMM, *Mining and Indigenous People: Position Statement* (2013) (**R-0155**).

[1240] ICMM, *Position Statement: Mining and Indigenous People* (2008), p. 1 (**R-0156**).

[1241] *Id.* p. 3.

[1242] ICMM Presentation, *ICMM Guidance on Measuring Community Support,* Slide 5 (**R-0165)**. In 2020, the license to operate continues to be the number one risk facing a mining project for a second year in a row according to Ernst & Young Chart Top Ten Business Risks and Opportunities-2020. *See* "Ernst & Young Report", *available at* https://www.ey.com/en_gl/mining-metals/10-business-risks-facing-mining-and-metals

[1243] Business for Social Responsibility, *The Social License to Operate* (2003), p. 5 (**R-0160**).

[1244] *Opposition Forces Newmont to Abandon Conga Project in Peru,* MINING.COM (April 18, 2016) (**R-0166)**.

[1245] *Newmont's Yanacocha Gives Up on Peru's Quilish*, MAC: MINING AND COMMUNITIES (November 5, 2004) (**R-0167**).

conflict. The development of mining projects from Papua New Guinea[1246] to Ecuador[1247] to Panama have been affected by social conflict, leading in many cases to withdrawal of government authorizations, abandonment by mining companies or years of litigation causing delay in any development. In Peru, considered a mining friendly jurisdiction, projects worth USD 21 billion were delayed due to social conflict.[1248] A list of examples of mining projects negatively impacted by social conflict are included in Annex C.

678. Today, social license has moved up in the top ten rankings to the number one risk facing a mining project.[1249] Without it, a project risks delay, interrupted operations, or complete shutdown.

679. While the ICMM has laid out international standards,[1250] they are other sources of best practices that align closely with the policies adopted by ICMM.[1251] Another mine in Guatemala, called Marlin (described below), went through a period of intense social conflict. The mining company retained a series of experts, who made a number of recommendations, all of which sound in the ICMM principles. Some of these include: (i) establish greater transparency with regard to environmental impacts,[1252] (ii) establish an effective and credible grievance mechanism,[1253]and (iii) ensure extensive consultation and participation as part of the development of the new sustainable development.[1254]

2) Since 2004, mining in Guatemala meant social conflict

680. As noted by many observers, junior mining companies started to take over the vast majority of mining

[1246] Web page of Barrick Gold, Operations: Porgera, *available at* https://www.barrick.com/English/operations/porgera/default.aspx (Last Visited Dec. 4, 2020)(**R-0168**) (Citing environmental and social concerns, the Government of Papua New Guinea had initially decided not to renew Barrick's mining lease at the Porgera mine). *See* Press Release, *Barrick to Remain Papua New Guinea's Porgera Gold Mine Operator*, MINING TECHNOLOGY (October 16, 2020) (**R-0169**) (A recent agreement shows that the government negotiated a stake in the project while allowing Barrick's JV to continue operations).

[1247] Copper Mesa's Junin project was ultimately shut down by the Ecuadorean government due to social unrest. *See Ecuador: It's all over for Copper Mesa Mining Corporation in Intag – Copper Mesa Pierde concesión clave en Intag*, MAC: MINING AND COMMUNITIES (November 13, 2008).

[1248] *Over $21 bn worth of mining projects delayed in Peru due to Social Conflict*, MINING.COM (April 18, 2016) (**R-0170**).

[1249] *See* Ernst & Young Report, Chart Top Ten Business Risks and Opportunities, https://www.ey.com/en_gl/mining-metals/10-business-risks-facing-mining-and-metals.

[1250] SLR Report, ¶ 96.

[1251] SLR Report, ¶ 96-98 (referring to the IFC Stakeholder Engagement Handbook) (2007).

[1252] Human Rights Assessment of Goldcorp's Marlin Mine, prepared by On Common Ground Consultants, Inc. (May 2010) p. 83 (**R-0037**)

[1253] *Id.* p. 181

[1254] *Id.* p. 205.

projects in the early 2000's, routinely favoring a dismissive approach to local communities.[1255] By the time KCA had entered the project in 2008,[1256] there were already several ongoing conflicts with other mining projects, which resulted in several legal decisions that dealt with the lack of public consultations as addressed above in Section III.

681. The most prominent example of social conflict involved the Marlin mine, located in San Marcos department, Guatemala.[1257] The mine was built in 2004 and began operating in 2005, but it faced increasing opposition from the surrounding communities. This opposition led to violent clashes and in 2010, the Inter-American Human Rights Court issued precautionary measures to 18 indigenous communities impacted by the mine and requested that Guatemala suspend the mining operations until the IHRC could decide the lawsuit.[1258]

682. In relation to Progreso VII, this was not an abstract notion. A few kilometers from Exmingua's Progreso VII, another mine, "El Sastre", suffered from social conflict. Starting mid-March 2011, the residents of San José del Golfo protested against construction works that were being performed prior to the issuance of the exploitation license.[1259] At that time, El Sastre was being operated by a Guatemalan firm after Argonaut Gold sold its interest in the project in 2010.[1260]

683. Social conflict in mining projects was nothing new in Guatemala. This is an element that Claimants knew or should have known prior to their initial decision to participate in the project with Radius. And when Claimants decided to acquire the remainder of Radius' share in the project in August 2012, the social opposition was a key driver in the transaction.[1261] By then, the social opposition to Exmingua's Progreso VII mine was well underway, and had already reached a climactic moment, when one of the protestors, Yolanda Oquelí, was shot, causing a public outcry, nationally and internationally, in June 2012.[1262]

684. Radius quickly distanced itself from the event, citing KCA as the current operator and Radius having

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[1255] *See* Michael L. Dougherty, *Entanglements of Firm Size and Country of Origin with Mining Company Reputational Risk in Guatemala* (2017), p. 1 ("Dougherty") (**R-0172**).

[1256] Press Release, Radius, *Radius Signs Agreement to Develop Tambor Gold Deposit* (June 3, 2008) (**C-0064**).

[1257] *Goldcorp's Marlin Mine: A Decade of Operations and Controversy in Guatemala*, MINING.COM (May 3, 2015) (**R-0173**).

[1258] Exmingua's Production Report -2013 dated March 31, 2014, p. 53 (**R-0174-SPA**)

[1259] Press Release, *Locals Reject Construction of Mine El Sastre,* NO A LA MINA (June 17, 2011) (**R-0175**). *See also* Press Release, *Police Break-Up Protest Against Guatemalan Mine,* LATIN AMERICAN HERALD TRIBUNE (June 17, 2011) (**R-0176**).

[1260] Press Release, *Police Break-Up Protest Against Guatemalan Mine,* LATIN AMERICAN HERALD TRIBUNE (June 17, 2011) (**R-0176**).

[1261] Press Release, Radius, *Radius Gold Sells its Interest in Guatemala Gold Project* (August 31, 2012) (**C-0223**).

[1262] Exmingua's Production Report -2013 dated March 31, 2014, p. 53 (**R-0174-SPA**); *see* Letter from Ombusdman dated December 20, 2012 (**R-0027**).

no day-to-day control of operations.[1263] After the shooting of Ms. Oquelí, Radius promptly exited the project citing the project as "problematic" and one subject to conflict.[1264] This particular event not only prompted the intervention of the Ombudsman in Guatemala but also the issuance of precautionary measures by the Inter-American Commission on human rights to ensure the safety of Ms. Oquelí since she and her family had been subjected to threats and acts of intimidation because of her opposition to the project.[1265]

685. Despite the ongoing protests over the previous six months, Kappes decided to push forward with the mine and buy-out Radius's share in the project on August 31, 2012.[1266] As was shown above and in the section that follows, Claimants had no plan to deal with the social conflict and they did little to prevent it from happening in the first place.

686. In this context, Claimants implemented or continued social engagement initiatives that eschewed best practices and international standards,[1267] choosing to try and force their way through, putting the obligation to obtain and maintain an SLO on the State and engaging in a never-ending blame game to excuse their own malpractice.

3) Claimant's social development initiatives destroyed their ability to obtain and maintain social license

687. While there is no one-size-fits-all approach with regards to social license, certain general key elements have been identified as a result of case studies, the ICMM principles, and the IFC Stakeholder Engagement Handbook[1268] which serve as guide posts in developing methodologies for good performance in addressing social license issues. While Exmingua represents in its EIA that the project is designed to meet international standards,[1269] Claimants did not follow international standards, or even minimal best practices.[1270] Below, Guatemala outlines some of the key elements widely recognized as instrumental to obtain and maintain an SLO, and contrasting those standards with Exmingua's activities.

a. Exmingua had no plan for comprehensive stakeholder engagement

688. One of the key elements to obtain and maintain social license is to implement a methodology for

[1263] Press Release, Radius, *Radius Gold Sells its Interest in Guatemala Gold Project* (August 31, 2012) (**C-0223**).

[1264] *Id.*

[1265] Preventive Measures, No. 207-12, Organization of American States, Inter-American Court of Human Rights, *accessible via* http://www.oas.org/en/iachr/decisions/precautionary.asp (**R-0179**).

[1266] Press Release, Radius, *Radius Gold Sells its Interest in Guatemala Gold Project* (August 31, 2012) (**C-0223**).

[1267] SLR Report, ¶¶ 105-107.

[1268] SLR Report, ¶¶ 96,98 and 100.

[1269] EIA, p. 22 (**C-0082**).

[1270] SLR Report, ¶¶ 105-107.

comprehensive stakeholder engagement. The mining company must have real engagement with all affected stakeholders.[1271] Where a mining company has "rather tried to 'sell' the benefits of the project to certain groups while systematically excluding others, social license was not obtained."[1272] This is especially the case where the mining company did not engage with groups most opposed to the project or failed to answer difficult questions regarding the impact of the project.[1273]

689. As the ICMM identifies in its community development toolkit, it is important to identify every group or individual that may have an interest in the project, paying particular attention to including vulnerable or marginalized groups, for example, women, children or the elderly."[1274] It is also equally important to identify and understand the interests and perspective of those stakeholders regarding a project and its potential impacts.[1275] The ICMM emphasizes stakeholder identification and stakeholder analysis, the latter of which analyzes the level of interest or position with regards to the project and how to proceed to engage each stakeholder identified.[1276]

690. Within stakeholder engagement is the particular task of connecting with Indigenous Peoples. In 2008, the ICMM lays out certain commitments with respect to Indigenous Peoples.[1277] Among those, it imposes requires the mining company to "clearly" identify and "fully" understand the interests and perspectives of Indigenous Peoples regarding a project and its potential impacts, while also requiring engagement and consultation with Indigenous Peoples in a "fair, timely and culturally appropriate way throughout the project cycle."[1278]

691. With regards to Progreso VII, there was no attempt or any plan to engage all relevant stakeholders. Claimants failed to engage with the community through an early consultation process at the beginning of the EIA process.[1279] Even in the consultations held, Exmingua had no clear plan for engaging the wider affected community. Exmingua instead only held a series of meetings at the end of the EIA process and only with select

[1271] SLR Report, ¶ 99.

[1272] Business for Social Responsibility, *The Social License to Operate* (2003), p. 7(**R-0160**) (citing to issues faced by the Manhattan Minerals, Tambo Grande project in northern Peru).

[1273] *Id.*

[1274] ICMM, Community Development Toolkit (2012), p. 48 (**R-0180**).

[1275] *Id.* p. 53.

[1276] *Id.* p. 43, Tool 1 and 2.

[1277] Informe SLR, ¶ 97.

[1278] ICMM, *Position Statement: Mining and Indigenous People* (2008), Commitment 2 and 3, p. 3. (**R-0156**).

[1279] SLR Report, ¶ 107.

individuals from the community, which largely focused on getting buy-in from the politicians.[1280] As the EIA acknowledges, the meetings that were held were mostly with men,[1281] and only with a handful of selected individuals from the communities.[1282] There is no indication of any intent to identify or consult with indigenous groups,[1283] although the EIA recognizes that a significant part, at least of San Pedro Ayampuc is comprised of Indigenous Peoples.[1284] Exmingua did not even try to build consensus within the community by actively listening to the community and addressing their concerns before beginning operations.[1285]

692. Predictably, the protests exemplified the failure to fully engage with all stakeholders.[1286] The protestors blocking the entrance of the mine included women and children from the nearby communities.[1287] The blockade was started by a woman from the nearby village of El Carrizal, which Exmingua excluded from any of the presentations it made in early 2010.[1288] These individuals maintained, correctly, that they were not consulted and were unaware that a mining project was planned until they began to see machinery move into the area.[1289] Exmingua simply excluded a large portion of the affected population because it failed to create and implement a plan for comprehensive stakeholder engagement, and this absence of a plan created the perception, knowing or not, that Claimants thought they could achieve buy-in by speaking with a limited group of men—precisely the wrong approach.

b. Exmingua did not present information in a transparent manner nor did it have a plan to deal with the community's grievances

693. In addressing stakeholders, case studies underscore the importance of transparency of information in both communication and conflict resolution.[1290] In this regard, it is important the company be transparent in information sharing early on to build trust with the community.[1291] This is also reflected in the commitments listed in ICMM Position Statement 2008 on Indigenous Peoples, which emphasize that it is important that

[1280] *See, e.g.,* Email from Mr. S. Morales to Mr. Kappes and others dated March 14, 2012 (**C-0101**).

[1281] *See* EIA, Section 7.5.2.3 "Conclusions and Recommendations," p. 302 (**C-0082**).

[1282] EIA, Annex 15, pp. 843-868 (**C-0082**-SPA).

[1283] SLR Report, ¶ 30.

[1284] EIA, p. 31 (**C-0082**).

[1285] SLR Report, ¶¶ 105-107.

[1286] SLR Report, ¶ 105.

[1287] Web Page: *'La Puya' Environmental Movement,* Guatemalan Human Rights Commission, *available at https://www.ghrc-usa.org/our-work/current-cases/lapuya/* (**R-0086**).

[1288] EIA, Annex 15, pp. 843-868 (**C-0082**-SPA).

[1289] O. Hernández y J. Ochoa, *Gold so Close to the Capital,* PLAZA PÚBLICA (June 22, 2012) (**R-0039**).

[1290] Business for Social Responsibility, *The Social License to Operate* (2003), p.10 *et seq.* (**R-0160**)

[1291] SLR Report, ¶¶ 134, 136.

"engagement [..] be based on honest and open provision of information, and in a form that is accessible to Indigenous Peoples."[1292]

694. In the same vein, the ICMM recognizes that a mining company needs a transparent process for addressing grievances and a process for making decisions and reaching resolution should a conflict arise.[1293] Further, the ICMM requires providing "a clear channel of communication with company managers if [communities] have complaints about mining operations and transparent processes through which to pursue concerns."[1294] This creates a means for the community to register and resolve their concerns, whether real or perceived, helping to resolve those concerns before they escalate.[1295]

695. Exmingua lacked a communications plan or a grievance plan, but Claimants made the situation worse.[1296] Even before the Project, Exmingua was misrepresenting its activities to the community. Some landowners sold their land to Exmingua on the promise that it would be used for agricultural purposes.[1297] Only later, they discovered in 2010 that a mine was planned for the area.[1298] This is precisely the type of behavior that creates resentment.

696. Exmingua's approach to communicating with the local populations also created mistrust.[1299] Instead of engaging in meaningful two-way dialogue with the protesting community, Exmingua employed methods akin to an invading force, spreading propaganda through pro-mining leaflets dropped in the surrounding communities via helicopter.[1300] One can only imagine the antagonism this creates. Instead of speaking with the people, Claimants preferred to drop paper from the air and fly away.

697. As Exmingua ratcheted up its activities, the communities also felt unsafe, reporting acts of intimidation and threats.[1301] Claimants deny any such acts, but the community could certainly point to contrary examples.

[1292] ICMM, *Position Statement: Mining and Indigenous People* (2008), Commitment 3, p. 3 (**R-0156**).

[1293] SLR Report, ¶ 100, Annex RPA-016; *See also,* ICMM Community Development Toolkit, p. 73 (**R-0180**); Business for Social Responsibility, *The Social License to Operate* (2003), p. 14 (**R-0160**)

[1294] ICMM, *Position Statement: Mining and Indigenous People* (2008), Commitment 8, p. 4 (**R-0156**).

[1295] *See, e.g,* ICMM Community Development Toolkit, Tool 5, Relationship Tools, p. 43 (**R-0180**).

[1296] SLR Report, ¶ 105, 134.

[1297] O. Hernández y J. Ochoa, *Gold so Close to the Capital,* PLAZA PÚBLICA (June 22, 2012) (**R-0039**).

[1298] *Id.*

[1299] SLR Report, ¶ 136.

[1300] O. Hernández y J. Ochoa, *Gold so Close to the Capital,* PLAZA PÚBLICA (June 22, 2012) (**R-0039**).

[1301] Press Release, *Increase Threats and Intimidations Against Peaceful Resistance La Puya,* Peace Brigades International USA (2015) (**R-0099**).

Claimants hired ex-military leaders to carry out their social outreach once the mining operations began.[1302] Acts of violence against protesters increased as the protests continued, targeting protest leaders. Connected to Exmingua or not, violence and insecurity came with opposition, hardening attitudes against Exmingua.

698. Even in the consultations that allegedly took place in early 2010, Exmingua failed to be transparent with regards to the impacts of the project.[1303] It was unable to have a meaningful conversation about project, because its EIA was missing key information that would have been necessary to properly evaluate the impacts.[1304] This failure was detrimental to establishing trust early on with the local community.[1305]

c. Exmingua's social outreach activities were not part of a greater plan developed with the community's needs and concerns in mind

699. Lastly, promoting sustainable community development by engaging the community in the design, implementation, and management of resources tends to lead to community development that is welcomed rather than forced from the outside.[1306] The ICMM recognizes this element in its community development tools, stating that one of its objectives is to "facilitate community empowerment through participatory development processes."[1307] This assists in developing local relationships with partners that are involved in regional, community development programs. This element is important to understand the priorities of the community and how best to provide social development programs that are truly needed and wanted. To give a simplistic example, outsiders can unknowingly give benefits to corrupt individuals or despised members of the community, flood the local market with cheap goods that drive local businesses into bankruptcy, or provide benefits to one group over another, exacerbating local tensions or ruining years of community organizing. Merely intending to do some good does not equal a positive outcome. In the case of Claimants, they actively worked to create division and sow discord through their outreach initiatives.

700. With regards Progresso VII, there is no apparent social management plan nor any indication that the social programs carried out were in response to the concerns raised by the local stakeholders.[1308] In terms of social development programs, there is little discussion in the EIA as to any specific plans with regards to social development. After operations commenced, Claimants appear to adopt an *ad hoc* method of social programs.

[1302] *See, e.g.*, Exmingua's Production Report (2013), p. 53 (**R-0103)**; MARN Monitoring Report (November 2013), p. 2 (**R-0104**-SPA).

[1303] SLR Report, ¶ 103

[1304] SLR Report, ¶ 137.

[1305] SLR Report, ¶ 110. There is also no agreement for the community to participate in the monitoring of the proyect impacts, another key element for the social development aspect of the proyect. *See* SLR Report, ¶¶ 100, 153.

[1306] Business for Social Responsibility, *The Social License to Operate* (2003), p. 23 (**R-0160**).

[1307] *See, e.g,* ICMM Community Development Toolkit, Tool 5, Relationship Tools, p. 35 (**R-0180**).

[1308] SLR Report, ¶ 142.

There are vague mentions of health and education programs that were instituted by SMCA and for which SMCA or contractors hired by SMCA were paid USD 380,000 just in 2012.[1309] But no specifics are provided as to how much (if any) of that amount ended up being directly invested in the community.[1310]

701. While there is mention that Exmingua provided "medical clinical rooms" in San Jose del Golfo, there is no metric provided to understand the impact (*i.e.* whether to what extent these clinic rooms were utilized by the population).[1311] In fact, MARN noted in its 2015 inspection the lack of data regarding the medical consults.[1312] In 2015, Claimants allege to have invested approximately USD 5,000 in today's terms on medical costs for the community in San Pedro Ayampuc and approximately USD 25,000 in today's terms on social outreach programs, much which involved 17 unspecified training courses, visits to the mine and general unspecified meetings between Exmingua and Community Council leaders. The rest of the activities involved raffle prizes, food giveaways, roof sheets, drinking water, and some health services. The type and scope of these activities appear limited, one-off opportunities, and not part of a sustainable development community program.[1313] Exmingua itself observed that these giveaways were viewed by the community as a tool to create divisions within the community rather than to create bridges between the mining company and the local population.[1314]

702. Claimants also allege that they provided an ambulance, metal sheets for house roofing, and built a drainage system and a football field.[1315] These benefits, however, appear isolated and not part of a comprehensive plan developed after consulting with the communities. For instance, the metal sheets were donated to apparently 22 villages, most of which are not the villages listed in the EIA as being in the Project's area of influence or involved in any of the consultation process that took place.[1316] The drainage systems appears to have been implemented in Aldea Prados de San Pedro La Laguinilla, a village that it not mentioned in the EIA as being in the direct area of influence nor part of any of the villages consulted.[1317] It is therefore difficult to gauge the impact of these isolated giveaways, without any evidence of a comprehensive plan or

[1309] Report by KCA-Progreso VII – Summary of Work Activities 2012 (January 27, 2012) (**C-0521**).

[1310] *Id. See also,* Claimants' Memorial, ¶¶ 40, 68.

[1311] *See, e.g.,* Consolidated Report of Activities – Field Work 2015 (**C-0524**), which only provides details on the health services provided to San Pedro de Ayampuc.

[1312] MARN Technical Report dated February 23-27, 2015, p. 13 (**R-0105**).

[1313] SLR Report, ¶ 142.

[1314] Exmingua Production Report (2013), p. 53 (**R-0103**-SPA).

[1315] Claimants' Memorial, ¶ 68.

[1316] Consolidated Report of Social Responsibility -Exmingua (**C-0527**).

[1317] *See e.g.,* EIA, pp. 30-31 (**C-0082**).

even a plan that was tailored to the needs of the community on the basis of stakeholder engagement.[1318]

703. Exmingua not only failed to adopt any best practices with regard to social management [1319]but it failed to even attempt to come up with a plan or reform existing practices to attempt to alleviate the conflict. Their plan to "get rid of the blockade" was to consider paying the protestors a sum of money that would be taken away from any social development programs.[1320] This is mean and short-sighted. Such a "plan" would create resentment within the community while also rewarding protest. If a future group wanted money, it need only protest and therefore get ahead of others in a search for scarce resources. There was no transparency in the manner in which issues would be resolved and no identifiable grievance mechanism set up that would provide the community some assurance that their concerns were being heard and addressed.[1321]

4) Claimants knew the potential for social conflict and made little effort to mitigate the risk, exacerbating the existing social issues

a. Claimants failed to consult with the affected communities

704. Instead of following any international standards or best practices, Claimants pursued their own path, with ruinous consequences. Claimants allege that "[d]espite local communities' support for the mine, protests and blockades disrupted claimants' mining projects."[1322] They allege that protestors were not representative of the local communities and that they continued to enjoy local support for the project despite the protesters blockade.[1323] But there is little evidence of local support. To the contrary, as mentioned by Claimants' contractor, there was a high level of distrust and rejection of the project.[1324]

705. Claimants acknowledge they had a duty to consult the affected communities and allege that they did so through a series of presentations and interviews that took place in the months of January and February of 2010.[1325] There is no evidence presented that any further consultation work was carried out at the beginning of the EIA process or before operations began beyond reaching out to the individuals that participated in these

[1318] Consolidated Report of Social Responsibility -Exmingua (**C-0527**) (While there is evidenced of a summary of the activities and social outreach performed in 2014, there are no specific details as to which communities these alleged community leaders represented or any minutes of the specific meetings that would allow a third person to understand what was discussed at the meetings and the level of engagement from the community).

[1319] SLR Report, ¶ 143

[1320] Email from Mr. Kappes to Mr. Selvyn Antonio Morales (**C-0099**).

[1321] SLR Report, ¶¶ 135, 140.

[1322] Claimants' Memorial, ¶ 17.

[1323] Claimants' Memorial, ¶¶ 41-42.

[1324] Consolidated Report of Activities – Field Work (2015) p. 5 (**C-0524**).

[1325] Claimants' Memorial, ¶ 30.

presentations once more in 2011.[1326]

706. The project describes its geographical location as 1.2km from the Village of La Choleña.[1327] The project's northern boundary abuts private property in the Village of El Guapinol, on the east the Village of La Choleña, to the west private property of the Village of El Carrizal and on the south the road that leads from San José del Golfo to the Village of El Carrizal.[1328]

707. Over a period of a week and half, Claimants allege that the communities were consulted through eight presentations.[1329] Of those eight presentations, only three presumably involved members of the nearby communities of El Guapinol, La Choleña and Los Achiotes.[1330] No consultations at the village of El Carrizal are reported in the EIA. The other five meetings appeared to have been geared towards meeting with municipal leaders and other local institutions.[1331] In determining who to meet with, Exmingua justified its plan by noting in the EIA that, "… the municipal authorities become an important ally given the authority they exert over the populations and the political power before them."[1332]

708. The presentations/consultations involved only select individuals in three of the adjacent villages. Claimants focused only on three adjacent villages that it identified as its area of direct influence (ADI).[1333] There was no attempt to include the broader populations of those three villages or to reach other communities that felt impacted by the mining activities. There was no attempt to include the broader community of those three villages or other nearby communities that felt affected by the mining activity. The attendance sheets show that only a few individuals from the community participated.[1334] For example, at the meeting held at the village of La Cholena, only seven people participated, all men and no women.[1335] For the meeting held at the village of El Guapinol, there is no attendance sheet available, although Exmingua claims 21 people were present. With regard to the Village of Achiotes, no attendance sheet is provided, but Exmingua claims in the EIA that 12 people attended.[1336]

[1326] Follow up meeting with the same groups allegedly occurred in 2011. *See* Amendments to EIA, pp. 3-5 (**C-0089**).

[1327] EIA. P. 54 (**C-0082**).

[1328] EIA, p. 54 (**C-0082**). *See also* SLR Report, Figure 4.

[1329] Claimants' Memorial, ¶ 31.

[1330] *Id.*

[1331] EIA, Annex 15, pp. 843-868 (**C-0082**-SPA).

[1332] *Id.,* Section 13.4, p. 439 (**C-0082**-SPA).

[1333] EIA, Figure 2, p. 58 (**C-0082**-SPA).

[1334] EIA, Annex 15, pp. 852-858 (**C-0082**-SPA).

[1335] *Id.* p. 857.

[1336] EIA, p. 300 (**C-0082**-SPA).

709. To put these numbers in context, the EIA claims the following population in each of the relevant villages: La Choleña: 1,637; El Guapinol: 353; and Los Achiotes: 178.[1337] The total population for the area of indirect influence (including these three villages) was identified in the EIA as 12,051.[1338] In the municipality of San Pedro Ayampuc, the EIA reports at least 66.5% indigenous population in the urban area, while in San Jose del Golfo only about 1% of the population identifies themselves as indigenous.[1339]

710. There is no indication in the documents reflecting the alleged consultation process that Exmingua attempted to reach out to the indigenous communities in San Pedro Ayampuc or San José del Golfo nor that even a representative, in keeping with Claimants' sparse efforts, from those communities was in attendance at the meetings that were held in January and February 2010.[1340] There is no discussion in the EIA about how to conduct consultations in a culturally sensitive manner. This is partly because most of meetings took place in form of presentations rather than an open dialogue with the community, and in most cases, the presentations did not involve the community at large, but rather politicians and institutional leaders.[1341]

711. Even before construction began, Exmingua faced opposition. As early as October 2011, at least 75 community members from El Guapinol in San Pedro Ayampuc gathered in opposition to Exmingua's efforts to gather signatures and videos in an effort to open the mine.[1342] This was the same village that Exmingua had reported in its EIA as being supportive of the project, with only 21 people at the presentation given by Exmingua on February 8, 2010. [1343]

712. Shortly after construction began on the mine in early 2012, residents from San Pedro Ayampuc and San José del Golfo began a blockade at the entrance of the mine.[1344] They cited environmental concerns, with the highest concern being to ensure that the mining activities would not contaminate their water.[1345]

[1337] EIA, Table 61, p. 269 (**C-0082**-SPA).

[1338] *Id.* p. 269.

[1339] EIA, Table 63, p. 272 (**C-0082**-SPA).

[1340] SLR Report, ¶¶ 30, 123.

[1341] *See* Annex 15, EIA, pp. 852-855(presentation of the Progreso VII mine project to the Mayor and Vice-Mayor of San José de Golfo on 28 January 2010; interviews with municipal representatives and health officials on 3 February 2010; presentation of the Progreso VII mine project before the Municipal Development Council ("COMUDE") of San José de Golfo on 3 February 2010)

[1342] Report No. 164-2016 issued by the Nacional Civil Police dated May 10, 2016, p. 2 (**R-0117**).

[1343] EIA, p. 299 (**C-0082**-SPA).

[1344] Report from the Office of Ombusdman in reference to Specific Actions taken by Ombudsman in the Case of Exmingua and the Pacific Resistance La Puya (**R-0055**).

[1345] SLR Report, ¶ 136. *See also* Documentary Video "Pacific Resistance La Puya" available via https://www.youtube.com/watch?v=eUFfJKVyyMA (**R-0110**) (last accessed on Dec. 4, 2020).

713. Exmingua did not meaningfully engage with these concerns. While Exmingua pointed to its EIA as proof that it was doing all it could to minimize any environmental impact, independent consultants that reviewed the EIA in 2012/2013 only validated the community's concerns.[1346] Exmingua's EIA not only failed to address important issues as outlined below, but Exmingua's own operations and lack of proper measures failed to comply with the law, as found by an inspection conducted by MARN in 2015, only served as additional evidence that Exmingua was not taking its promises and obligations seriously.[1347] Exmingua was concerned only with continuing mining activities.

714. While Claimants allege that the protesters were not part of the affected communities and that they still enjoyed local support despite the protests, these allegations are contradicted by contemporaneous reports and Claimants' own allegations.[1348] None of the media articles or the reports from government agencies indicate that outsiders incited or participated in the protests. To the contrary, the media and the reports from the Ombudsman[1349] and well as police reports[1350] that document the protest activity continuously refer to the protesters as residents of the nearby villages in San Pedro Ayampuc and San Jose del Golfo. Even Claimants must recognize the widespread opposition—they claim that community opposition kept the consultation process for Santa Margarita from taking place.[1351]

b. Claimants did little to address the community concerns

715. The general objective in the EIA for the consultation process is described as an exercise to gauge the perceptions of the local community,[1352] rather than a process by which to address any community concerns. By failing to address stakeholder worries, Claimants guaranteed that they would not provide the right information or lower tensions.[1353]

716. In the consultations that did take place, Claimants provided vague responses or incomplete responses to any concerns raised. The consultations appeared to be presentations mainly geared to address the positive aspects of the project, while generally avoiding any meaningful discussion of any negative effects or

[1346] SLR Report, Section 7.6.

[1347] MARN Technical Report dated February 23 -27 2015 (**R-0105**).

[1348] *Protestors of La Puya Burn Doll of Ministry of Energy*, PRENSA LIBRE (March 26, 2016) (**C-0010**) ("Since 2 March 2012 the residents of the communities located in San Jose del Golfo, Guatemala, took action to reject the mine and blocked the entrance to the company because they installed huts on the road").

[1349] Report of the Office of Ombudsman in Guatemala (PDH) (December. 7, 2012) (**R-0112**).

[1350] Report No. 164-2016 issued by the Nacional Civil Police dated May 10, 2016, p. 2 (**R-0117**).

[1351] Letter from Exmingua to MEM, dated March 22, 2017 (**C-0013**).

[1352] EIA, p. 844 (**C-0082**)

[1353] SLR Report, ¶ 136

community concerns.[1354] For example, in response to environmental concerns, Exmingua simply stated that its project design "considers safety measures [sic] environmental and industrial tending to eliminate negative impacts."[1355] There were no specifics provided. In response to water usage, Exmingua simply represented that the project "only requires 154 cubic meters which will be covered with a [sic] own well."[1356] There is no indication from the summary of the meeting in the EIA that the community was informed that this was 154 cubic meters per day, not total.[1357] In any event, since Exmingua "never made the efforts to fully predict and analyze the potential environmental and social effects" it was therefore "not in a position to have a fact-based discussion" with the community with regards to the potential impacts.[1358]

717. While Claimants did not present meeting minutes for each of the consultations they cite, they did submit meeting minutes for two meetings held with the municipalities of San Jose del Golfo and San Pedro Ayampuc. But these meetings were not consultations with the communities.[1359] The minutes for these last two meetings reference the presentation given by Exmingua and its update on the consultation process with the communities.[1360] No further details are provided. It is clear from the minutes that at least these two meetings were to seek council approval and were not, in fact, part of the community consultation process, referenced as a separate process.[1361]

718. Claimants allege to have responded to queries at these meetings, but the aim appears mainly to present the alleged benefits of the project "through tax revenues and support for community projects…."[1362] There is no apparent grievance mechanism discussed or any follow up provided, even when a follow up meeting with greater participation from the community had been requested.[1363] It is therefore "unclear how and if [Exmingua] allowed the public to provide comments or concerns and if and how they would have been followed up on."[1364]

[1354] SLR Report, ¶ 103.

[1355] EIA, p. 294 (**C-0082**)

[1356] *Id.* p. 291.

[1357] *Id.* p. 294.

[1358] SLR Report, Section 7.3.3.

[1359] *See* Claimants' Memorial, ¶. 31, Presentations given on February 8 and 9, 2010.

[1360] Certificate of the Minutes of the Meeting with Municipality of San José del Golfo (**C-0516**); Certificate of Minutes from Meeting with San Pedro Ayampuc (**C-0517**).

[1361] *Id.*

[1362] Claimants' Memorial, ¶ 32.

[1363] EIA, p. 302 (**C-0082**).

[1364]SLR Report, ¶¶ 135, 140.

719. Based on the evidence, Exmingua did not have a comprehensive consultation plan, did not engage with the wider community, and did not attempt to address any differences or concerns prior to starting the project, nor did it have in place any grievance mechanism to address concerns once the project begun.[1365] As a result, there is no basis for Exmingua to have believed that the community had accepted the project. Exmingua only presented the project to a select number of individuals, excluding any Indigenous People, individuals from affected communities, people besides male politicians and a smattering of others. There was no invitation to the community at-large, no dialogue, and no process to address grievances.[1366]

c. Faced with community demands, Claimants' presentation method exacerbated existing tensions

720. Claimants' selective process of making presentations made even less sense once problems began. Claimants put Servicios Mineros del Centro de América, S.A. ("SMCA"), in charge of their social development programs, which was headed by retired colonel José Vicente Arias Méndez.[1367] The result was subpar, to say the least. The protesters complained about the project's impact on their water sources and homes, including the possibility that one of the underground tunnels would pass under their village (La Choleña).[1368] Yet SMCA handed out information focused on the jobs and other alleged benefits the project would bring, rather than addressing the concerns raised.[1369]

721. For example, Mr. Kappes's initial plan to get rid of the blockade involved potentially bribing the protesters.[1370] Instead of meeting directly with those protesting, Exmingua participated in a meeting that allegedly included community leaders.[1371] These community leaders insisted in holding a referendum or vote on the project. Yet, the only recommendation from Exmingua was to continue mining and to strengthen the relationship with MARN and MEM as well congressman Mejia. There was no intent or recommendation of further outreach to the communities or an intent to address their concerns.[1372] Instead, Claimants banked on having influence on the local authorities to exert pressure on the community opposition.[1373]

[1365] SLR Report, ¶¶ 105-107.

[1366] SLR Report, ¶¶ 30, 134.

[1367] Claimants' Memorial, ¶ 40; MARN Monitoring Report (November 2013), p. 2 (**R-0104**).

[1368] MARN Monitoring Report (November 2013), p. 2 (**R-0104**).

[1369] *Id.*

[1370] Email from Mr. Kappes to Mr. S. Morales and others dated March 11, 2012 (**C-0099**).

[1371] Email from Mr. S. Morales to Mr. Kappes and others dated March 14, 2012 (**C-0101**).

[1372] *Id.*

[1373] *See* EIA, Annex 15, pp. 852-855 (**C-0082-SPA) (**presentation of the Progreso VII mine project to the Mayor and Vice-Mayor of San José de Golfo on 28 January 2010; interviews with municipal representatives and health officials on 3 February 2010; presentation of the Progreso VII mine project before the Municipal Development Council ("COMUDE") of San José de Golfo on 3 February 2010

722. In the meeting held shortly after the blockade started, the focus continued to be on forging a stronger relationship with the authorities, presuming they could exert power over the community opposition to the project. There was little effort to engage directly with the protestors, as Exmingua was preferring to rely on the State to resolve the conflict.[1374]

723. Exmingua also employed force, acts of intimidation, and threats to attempt to quash the opposition. During the course of the blockade from March 2012 until May 2014, there were a number of violent encounters between the community and Exmingua.[1375]

724. Many of these encounters were caught on camera or were otherwise documented by journalists who were present during those events. Two of Exmingua's employees, Juan José Reyes Carrera and retired Lieutenant Pablo Silas Orozco Cifuentes, were sentenced to two years of jail for acts of coercion and threats against independent journalists outside the mine site. [1376] The evidence of their acts was so abundant that both could do nothing more than admit the facts alleged against them.[1377] Exmingua's employees used language to incite violence, using gay slurs and other insults and violent threats against those at the site.[1378]

725. While the community continued its resistance, Exmingua put pressure on politicians and diplomats to assist. It attempted at various points to break through the blockade with the assistance of the National Police ("PNC") without much success.[1379] Exmingua was eventually successful in removing the blockade in a forceful and violent eviction of the community opposition in late May 2014, which resulted in over 20 seriously injured people, some critically injured.[1380] Surely, this did little to win community support. The violent eviction instead raised concerns internationally with the UN Office of the High Commissioner of Human Rights urging talks with the community to resolve the conflict.[1381] There is little evidence that Exmingua made any attempt to open a dialogue with the community thereafter. In any event, that eviction was short lived. While the blockade was eliminated the community continued in peaceful opposition to the project, which continues to this day.[1382] As

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[1374] SLR Report, ¶ 136.

[1375] *See, e.g.*, Report by the Office of the Ombudsman dated December 7, 2012, p. 1 (**R- 0112)**.

[1376] Q. De León, *Former Military Man Convicted: Worker of a Mining Company for Threatening Journalist (contains video)* (October 17, 2013) (**R-0043**)

[1377] *Id.*

[1378] Video: *Exmingua Personnel Threaten Journalist at La Puya* **(R-0144)**, *available at* https://www.youtube.com/watch?v=0nYwlTR9vog

[1379] *See* Report by the Office of the Human Rights Ombudsman dated December 7, 2012, p. 1 (**R- 0112)**.

[1380] *UN Urges Talks Following Violent Guatemala Mining Protest*, MINING.COM (June 2, 2014) (**R-0146**).

[1381] *Id.*

[1382] Resolution No. 37-2019, issued by Governorship of the Department of Guatemala (February 1, 2019) (**R-0147**); *See also* Report No. 698-2017 issued by the PCN (June 30, 2017) (**R-0181**). *See also* **Exhibit (C-0009**); Documentary

SLR concludes, the "lack of ongoing and meaningful stakeholder management led to the social issues that plagued the Project and ultimately led to its current status."[1383]

726. This result was not inevitable. Claimants should have known this would happen. In its EIA, Exmingua emphasized the lack of participation of other stakeholders, particularly women in the consultation process, and the importance of including them in the process. The EIA also highlighted the importance of identifying other benefits that can accrue to the community such as through indirect employment opportunities. There is no indication from Claimant that this was analyzed once operations commenced. It is also unclear what strategy, if any, Claimants employed to communicate with the community, including the protestors. The EIA suggested implementation of such a strategy, but the Claimants make no mention of the existence of such a strategy other than the hiring of SMAC to handle social outreach once operations commenced. The lack of a communication strategy and proper consultation prior to the start of operations is evidenced by SMAC own's poll, which showed that in 2014 the credibility of the project "stood at just 6%."[1384] SMAC further reported that in meetings held over the course of two months, "residents voiced their dissatisfaction and sense of abandonment which, due to the lack of infrastructure work, led to the across-the-board rejections and threatening attitudes…"[1385] After failing to follow international standards, best practices, and even its own, flawed, EIA, Exmingua brought this result on itself.[1386]

727. Things did not have to reach this point. Guatemala is not some intractable country opposed to all foreign investment, and any such insinuation is insulting. Indeed, by following international standards and best practices, responsible mining is possible. Other mining projects in Guatemala were able to continue operating despite social conflict because they decide to reform their plans and invest in community development. For example, Goldcorp hired independent consultants to create a human rights assessment of the impact of the Marlin Mine on the surrounding communities and then "committed to responding to the assessment recommendations, including issuing a published response and action plan."[1387] In other words, Goldcorp learned from its mistakes and sought a path to reform its social engagement in order to ensure the viability of the project. In contrast, Claimants have done nothing.

Video "Peaceful Resistance La Puya", available at https://www.youtube.com/watch?v=eUFfJKVyyMA (**R-0110**) (Last Accessed on December 4, 2020).

[1383] SLR Report, ¶¶ 30, 134.

[1384] Consolidated Report of Social Responsibility – Exmingua, p. 5 (**C-0527**).

[1385] *Id.*

[1386] SLR Report, ¶ 115.

[1387] Human Rights Assessment of Golcorp's Marlin Mine, prepared by On Common Ground Consultants, Inc. (May 2010) p. 83 (**R-0037**)

B. In order to obtain their exploitation license, Exmingua misrepresented or omitted key information in their EIA and then failed to live up its promises

728. The environmental permitting process goes hand-in-hand with gaining stakeholder support for a project, also known as "social license" or "sustainable license to operate." Here, Claimants mishandled the process from beginning to end, allowing community resentment to fester then fomenting further division.

729. When local communities began to protest and blockade entrance to the mine, they reacted in a social context where protests were common throughout the country. They also responded to the need to protect their livelihoods in a culture of subsistence farming, one where a year or two of reduced water can lead to complete ruin.[1388] They responded just as much to concerns regarding water and the lack of transparency in the permitting process.[1389] Eventually, when the protesters finally gained access to the EIA, their fears were confirmed.[1390] Claimants showed little care for their impacts caused by the project, even though it could release toxic chemicals into the water.[1391]

730. The EIA is more than a document that forms the basis for an environmental permit.[1392] It is also part of the foundation of a mining company's relationship with affected communities. It is a public document, and when concerned citizens have questions, they will look to the EIA. Done appropriately, an EIA fills other roles. The plans and studies help to establish a baseline from which the mining company, regulators, and the community can judge future impacts, heading off problems before they arise and building a relationship of trust with stakeholders.[1393]

731. Exmingua's EIA, prepared under Claimants' direction, failed in these key tasks. To get the environmental permit, the EIA promised a 150 tons per day project that met "international standards,"[1394] raising the bar and expectations of its readers. But then Claimants failed to make the EIA readily available, omitted important information, and failed to comply with the standards it invoked. The first two sections address these issues.

732. Once the community read and analyzed the EIA, the situation only worsened. As a tool to acquire and maintain a social license, the EIA fell woefully short. There were no baseline studies or plans to mitigate

[1388] O. Hernández y J. Ochoa, *Gold so Close to the Capital*, PLAZA PÚBLICA (June 22, 2012) (**R-0039**).

[1389] MARN Monitoring Report (November 2013), p. 2 (**R-0104**).

[1390] SLR Report, Section 7.6.

[1391] SLR Report, ¶ 147.

[1392] SLR Report, ¶ 53.

[1393] SLR Report, ¶¶ 92, 95 and 134.

[1394] The EIA does not identify which specific international standards it complied with.

potential problems or study viable alternatives. But more than anything, the EIA admitted the existence of arsenic and other toxic metals without providing for a way to understand the specifics of the mining area and its impact on the communities. The last two sections speak to these issues.

733. Coupled with Claimants' aggressive, heavy handed tactics, they could not expect to obtain and maintain a social license, finance their project with any serious mining financier, or even fulfill the LOM Plan offered by SRK. At its core, Claimants' failures underscored their lack of experience, poor management, and lack of any sound reason to receive a windfall of millions of dollars through this arbitration.

1. Claimants' EIA omitted or misrepresented key information

734. In the EIA, Exmingua represented that the project was committed to complying with all local environmental laws, regulations, and recommendations from MARN. It also specifically stated that,

> The Project is designed according to international standards and the commitment is to implement the best and most appropriate environmental management practices in order to minimize adverse environmental impacts and comply with regulations of the Republic of Guatemala, and the environmental policies of EXMINGUA.[1395]

735. Exmingua emphasized in its EIA that its activities "will be planned and executed with the most [sic] high standards of environmental and social management," and that it will strive to develop the project "in a responsible way both in the environmental and social field…"[1396] Even a cursory review of the EIA shows that it failed to even meaningfully engage with the standards it purported to invoke.

a. Exmingua presented a mine plan in the EIA that it did not intend to follow

736. Before analyzing the EIA's failures to meet international standards, best practices, or local law, the starting point must be the misleading nature of the EIA. Claimants made clear to regulators that they envisioned a mine operating at 150 tons per day. They discussed the mine's impacts and mitigation measures under this assumption. In reality, Claimants had no intent to operate at this level. During operations, Claimants claim they operated at 225 tons per day, and sometimes in excess of 250 tons per day.[1397] Now, they submit an LOM Plan for 250 tons per day, or 166% the size of the proposed operation. All of the social and environmental impacts were off by over 66%, and the process derived from a misrepresentation that ran from top to bottom of the application.

737. In addition, any analysis of Claimants' proposed LOM Plan is purely hypothetical. Exmingua did not follow the mine plan it represented in its application for the mining license. On this basis alone, the EIA and

[1395] EIA, p. 22 (**C-0082**).

[1396] EIA, Section 12.3, p. 437 (**C-0082**)

[1397] Kappes Statement, ¶ 109.

environmental permit cannot support the LOM Plan created by SRK or any damages alleged by Claimants.

2) The EIA does not comply with International Standards

738. At the time Claimants prepared the EIA, the international standards generally followed by mining companies were those outlined by the IFC Performance Standards (the "IFC PS")[1398] and Equator Principles (the "EP").[1399] With regard to the social aspects, best practices had been established by the International Council on Mining & Minerals ("ICMM"), a group helmed by the world's most responsible mining companies who voluntarily commit to certain best practices and the IFC.[1400] Despite Exmingua representing that it had developed the project in conformance with international standards and best practices,[1401] the EIA's deficiencies reveal the opposite.

739. The IFC PS and EP are a voluntary framework used by international lending institutions to determine, assess, and manage the environmental and social risks associated with their investments. To keep its word to the government and local stakeholders, Claimants would have to follow the IFC PS and EP, and if Claimants were to seek project financing, as its valuation model suggests,[1402] they would have to adhere to these international standards.

740. The IFC Performance Standards address the following areas: PS 1 – Assessment and Management of Environmental and Social Risks and Impacts; PS 2 – Labor and Working Conditions; PS 3 – Resource Efficiency and Pollution Prevention; PS 4 – Community Health, Safety, and Security; PS 5 – Land Acquisition and Involuntary Resettlement; PS 6 – Biodiversity Conservation and Sustainable Management of Living Natural Resources; PS 7 – Indigenous Peoples; and PS 8 – Cultural Heritage.[1403]

741. The Equator Principles are a risk management framework adopted by financial institutions to ensure that financed projects are developed in a manner that is socially responsible and reflect sounds environmental management practices. Projects that do not comply with the EPs are not able to obtain financing from Equator Principles Financial Institutions (EPFIs).[1404]

[1398] The IFC Performance Standards on Social and Environmental Sustainability were first published in 2006 ("IFC PS") (**R-0182**) and updated in January 2012 (**RPA-021**).

[1399] SLR Report, ¶ 97.

[1400] SLR Report, ¶ 96.

[1401] EIA, pp. 22, 45 (**C-0082**).

[1402] Rosen Report, ¶ 249e.

[1403] These norms remain relatively the same to those adopted in 2006. *See* IFC PS (R-0182) and IFC PS (2012) (RPA-021).

[1404] The main Equator Principles include (1) review and categorization; (2) Social and environmental assessment; (3) Applicable Social and Environmental Standards (4) Action Plan and Management System (5) Consultation and Disclosure; (6) Grievance Mechanism; (7) Independent Review, (8) Covenants and (9) Independent Monitoring and

742. Most mining projects are classified as Category A projects,[1405] based on the high social and environmental risks perceived in the development of a mining project. This is particularly true in cases where a project will have potential impacts on the nearby indigenous populations. The EPs require Category A projects to undertake an ESIA, produce an ESIA report, develop an Environmental and Social Management Plan, and establish and maintain an Environmental and Social Management System as well as undertake effective stakeholder engagement.[1406] Compliance with the IFC PS means to incorporate the standards set into the EIA and related documents.

743. In order to seek an environmental license, the mining company must present an EIA that comprises an integrated assessment of physical, biological, and social environments potentially affected by the project. It usually involves the following components: a fulsome description of project activities; the establishment of an environmental and social baseline in the project area; the prediction of all potential project effects (positive and negative) – this step usually includes predictive modelling for noise, air quality, surface water quality and hydrogeology; a determination of significance of each project effect; and if an effect is considered to have led to significant impacts, the establishment of suitable mitigation measures; and monitoring plans to verity the predicted effects and associated mitigation measures.[1407] But everything starts with the baseline studies. More than a cut and paste job, baseline studies provide extensive information on the specific environmental and social setting of a project as it exists prior to the project commencing. These baselines therefore provide a reference point against which any future impacts can be assessed or monitored.

744. The EIA then involves an impact assessment to identify and define potential issues and determine their significance on the people or environment. These impacts are usually measured through modelling studies, if possible. Where social or environmental impacts are anticipated, the EIA includes a social and environmental management system to manage and mitigate these risks.[1408] Stakeholder engagement is also an integral part of the EIA and usually requires going beyond the EIA process.[1409]

745. For the reasons that follow, Exmingua's EIA was not in compliance with international standards and best practices.

746. From a basic level, the EIA is completely devoid of a management plan for mitigating the risks and

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Reporting. *See* Equator Principles (2006) ("Equator Principles") (**R-0183**).

[1405] Progreso VII is classified as an "A" project under Guatemalan law. *See* EIA, p. 135 (**C-0082**).

[1406] Equator Principles, p. 2-3 (**R-0183**).

[1407] SLR Report, ¶ 93.

[1408] IFC, Performance Standard 1 (**R-0182**).

[1409] IFC Performance Standards, p. 4 (**R-0182**).

impacts of the Project and only includes vague plans for monitoring and mitigating the environmental impacts. As first noted by Mr. Robinson and later confirmed by SLR, monitoring allows for early detection of any issues and correction which can be implemented by using detailed mitigation plans.[1410] Without detailed mitigation plans, if a problem does occur, then there is no specific plan of action in place to quickly address the issue. Instead of specific plans, the EIA simply describes that it is the intent of Exmingua to monitor and mitigate, but without the plans there is no specific indication as whether the proper measures will be in place to monitor and correct any adverse impacts. This omission in the EIA falls far below international standards, including Performance Standard 1 and Equator Principle 4.

747. In addition, the EIA engaged in little discussion of cumulative impacts.[1411] This is especially concerning as Claimants cite the potential development of nearby deposits, including Santa Margarita, which Claimants allege would have already begun operations had it not been for the existence of social conflict. Cumulative impacts take account the overall size of the project and what it can mean when viewed within future expansions, and stakeholders need to know what can happen over time. Perhaps the initial project is small, but the absence of an analysis of cumulative impacts provokes concern in communities. They begin to fear that allowing one project will open the floodgates to others, and without knowing the cumulative effects, this fear justifiably grows.

748. The EIA also fails to adhere to international standards because there is an inadequate analysis of alternatives, which fails to adhere to the requirements under IFC Performance Standard 1 and Equator Principle 2. The EIA is required to thoroughly analyze the full range of feasible alternatives for pursuing a certain course of action in the project. The alternatives listed in Section 8 of the EIA seem to defy objective justification as they appear to have been selected on the basis of the project's preference, rather than on objective rationale. Specifically, the project recommends the use of multiple tailing landfills, which increases the risk of failure. There is no adequate justification presented for this alternative. Similarly, the EIA fails to evaluate other potential alternatives such as filtered tailing.

749. In terms of the social aspects of the project, the IFC PS and the EP place heavy emphasis on stakeholder engagement, not only in the consultation process but also with regard to setting up a grievance mechanism.[1412] Stakeholder engagement, including consultation and disclosure, is recommended to commence well before start up.[1413] In order to "ensure that consultation, disclosure and community engagement continues throughout

[1410] Robinson Report, p. 8 (**R-0049**); SLR Report, Section 7.3.5.

[1411] SLR Report, ¶ 162.

[1412] Equator Principles, 5, 6 (**R-0183**); IFC Performance Standard 1, 4 (**R-0182**).

[1413] SLR Report, ¶¶ 105, 135; IFC Performance Standard 1, p. 5 (**R-0182**).

construction and operation of the project, the borrower will, scaled to the risks and adverse impacts of the project, establish a grievance mechanism as part of the management system."[1414]

750. The consultation process carried out by Exmingua does not meet international standards.[1415] Not only was the socio-economic baseline was insufficient, but there was no acceptable methodology applied in identifying and engaging with stakeholders. Exmingua decided to only meet with certain individuals in villages it had self-identified as part of the area of direct impact. At the same time, Exmingua inexplicably excluded adjacent communities and included only a little more than a handful of people in their meetings. As far as disclosure of project information, which the IFC PS emphasize,[1416] it was unclear from the EIA how accessible the information was to the communities prior to the start of operations, and whether the information was provided in manner that was culturally accessible to those affected or perceived to be affected. The EIA that was available for public review was not even completely legible, as reported by Mr. Robinson, who was engaged by the community to review the EIA.[1417] There was no community engagement plan or grievance mechanism which are required by EP and IFC PS.

751. The IFC PS also place separate emphasis on Indigenous People, recognizing them as distinct stakeholder in the process.[1418] Particularly, the IFC PS emphasize that the risks and impacts that affect Indigenous People are unique due to many factors, including their historic vulnerability, unique culture, and nature-based livelihoods.[1419] With regard to the consultation process, the IFC outlines specific requirements including:

- Involving Indigenous Peoples' representative bodies (for example, councils of elders or village councils, among others).
- Being inclusive of both women and men and of various age groups in a culturally appropriate manner.
- Providing sufficient time for Indigenous Peoples' collective decision-making processes.
- Facilitating Indigenous Peoples' expression of their views, concerns, and proposals in the language of their choice, without external manipulation, interference, or coercion, and without intimidation.
- Ensure that the grievance mechanism established for the project, as described in Performance Standard

[1414] Principle 6, Equator Principles (**R-0183**).

[1415] SLR Report, ¶ 30, Section 7.3.1.

[1416] IFC Performance Standard 1, p. 4 (**R-0182**).

[1417] Robinson Report, p. 11 (**R-0049**).

[1418] IFC Performance Standard 7 (**R-0182**).

[1419] IFC Performance Standard 1, p. 28 (**R-0182**).

1, paragraph 23, is culturally appropriate and accessible for Indigenous Peoples.[1420]

752. Despite the known presence of Indigenous Peoples in both San Jose del Golfo and San Pedro de Ayampuc, there is no mention of any attempt by Exmingua to engage them as stakeholders in the Project.[1421] There is no indication in the meetings held at la Choleña, El Guapinol or Los Achiotes that there was any attempt to identify any indigenous members in those communities. This failure to engage with this key stakeholder group failed to adhere to international standards and best practices. Exmingua applied none of the ICMM guidelines outlined in the Position Paper on Indigenous Peoples. There is no discussion or analysis as to the potential impact the Project might have on this segment of the population. The EIA does not allow a reader to conclude that Exmingua considered this group in its consultation process.

753. In sum, the Exmingua EIA fell far short of the IFC PS, the EP, and ICMM guidelines. As detailed above, these failures had a direct impact. Not only did Exmingua fall short of its promise of an EIA and a project that met "international standards," but the omissions fueled opposition to the mine. The substandard EIA also meant that no lender would have touched the project. By 2016, almost the entire mining finance industry required adherence to the IFC PS and EP, and Claimants' complete failure to satisfy basic levels of compliance would have shut the doors to any serious financier.

3) <u>The EIA's other deficiencies only further inflamed the protests and destroyed any hope of gaining a social license</u>

754. There are a number of omissions and misrepresentations in the EIA that call into question whether Exmingua was committed to minimizing the environmental impact that the communities were so concerned with. These omissions and misrepresentations mislead a reader into thinking that the Project does not have negative impacts and provides only meaningful benefits.[1422] For the most part, these flaws are present in a manner that is only apparent to experts in EIAs as they arise from a failure to adopt scientifically sounds processes.

755. The EIA fails to include a proper baseline to adequately assess the impacts of the Project, uses a methodology that is unclear and not transparent, which makes it nearly impossible to confirm the true nature of the impacts.[1423] These components are important in developing accurate and adequate mitigation and monitoring plans.[1424] Without a baseline and predictive effects, the mitigation and monitoring of a projects'

[1420] IFC Performance Standard 7, p. 29.

[1421] SLR Report, ¶ 123.

[1422] SLR Report, ¶ 28.

[1423] SLR Report, ¶¶ 118-120.

[1424] SLR Report, ¶¶ 111-116.

impacts is rendered meaningless.[1425] These issues were also identified and elaborated on by independent reviewers, Robert H. Robinson and Robert Moran, in separate reports prepared in 2012 and 2014, respectively.[1426] SLR agrees with the key findings in those reports.[1427] These issues are addressed in further detail below.

a. Exmingua's EIA did not accurately represent the impact on local water resources

756. The Progreso VII mine was a high-risk project from an environmental perspective due to the naturally occurring arsenic that was present in the area,[1428] and Claimants did very little to understand and prevent or mitigate any environmental problems.[1429] At a basic level, Claimants did little to understand the risks—there was no baseline study of the geology or the hydrology.[1430] Without this study, there was no reference point against which to judge and monitor any future changes or impacts from the Project.[1431] Even if Claimants wanted to claim their project was safe, it had no basis to prove it other than conjecture.

757. The impacts on water quality broke down into two issues: geology (the kinds of rock) and hydrology (how the water would behave). In terms of geology, the EIA did not include detailed chemical composition of the rocks to be mined.[1432] There was no information and examination of rock types, alterations, location and dimensions of oxidized and unoxidized zones, as well as primary and secondary mineralogy, geochemical testing, whole rock analysis and microscopic thin-section analysis. There was therefore no mapping of the spatial distribution of toxic minerals in the rock.[1433] While the EIA acknowledged the mining would cause fractures, there was little analysis of how these fractures might contribute to run-off water contamination or how the mining would affect the level of already existing arsenic in the community.[1434] The EIA implied that the rock waste would be sterile and the tailings geochemically inert, but there was no long-term kinetic testing provided that support this in the EIA. This therefore understated the potential release of toxins into the environment from the waste rock.[1435]

[1425] SLR Report, ¶ 126-127.

[1426] Moran Report, 2014 (**R-0051**); Robinson Report, 2012 (**R-0049**)

[1427] SLR Report, Section 7.6.

[1428] SLR Report, ¶¶ 52, 147.

[1429] SLR Report, ¶ 103.

[1430] SLR Report, Section 7.32; *see also* ¶ 149.

[1431] SLR Report, ¶ 125-127.

[1432] SLR Report, ¶ 166.

[1433] SLR Report, ¶ 148.

[1434] SLR Report, ¶ 147.

[1435] SLR Report, ¶ 147, 152.

758. In relation to hydrology, and without a proper baseline study, Claimants could not measure the impact of their activity on local surface or ground water. [1436] But the EIA did even less to assuage the community's concerns. The EIA focused on the water needs of the project rather than the impact of the mining project on the community's water sources. The water data made it almost impossible to evaluate the volume of water presently available in and around the project area.[1437] The data did not allow for an evaluation of the existing pre-mining water quality for both surface water and groundwater.[1438] There were also no adequate measurements or testing of the actual surface water flow or existing aquifers that would allow for sufficient determination of the characteristics of both.[1439] Similarly, the water quality testing is unreliable considering that there is no description of the methods used for sample collection nor was there any testing to evaluate seasonal variability in quality, level and yield.[1440] This is precisely the kind of lack of analysis that creates concern for local communities.[1441]

759. In addition, the EIA does not make clear the interconnection between surface waters and groundwater flows, and thus understates the impacts that mining operations will have on water availability in local wells or springs.[1442] This is especially concerning considering since the area is generally arid, and the local population depends on local water sources for their water supply.

760. In any event, the EIA was not clear that the monitoring that it intended to carry out would be sufficient to provide accurate results of the impact. There was no commitment to undertake surface water monitoring, not only at the discharge points at the project boundaries, but also downstream from the project.[1443] Similarly, the method proposed leaves in doubt whether any impact could be measured with any accuracy.[1444]

761. As a result of the lack of baseline and improper modelling, the true impact of the mining activities on the community's water could not be understood or known, making it difficult to mitigate the effects during the life of the project and the impacts on local water sources. As a result, the impacts are underestimated in the EIA.

[1436] SLR Report, ¶¶ 149, 164.

[1437] SLR Report, ¶¶ 167, 170 and 171.

[1438] SLR Report, ¶ 164.

[1439] SLR Report, ¶¶ 167, 170.

[1440] SLR Report, ¶ 165.

[1441] SLR Report, ¶ 164.

[1442] SLR Report, ¶ 170.

[1443] SLR Report, ¶ 153, 165, 169.

[1444] SLR Report, ¶ 169.

b. Exmingua's mitigation and contingency plans are inadequate and are missing key information

762. The problems with geology and hydrology continued in other parts of the EIA. The EIA provided little detail as to mitigation or contingency plans with regards to spills, stormwater, and process water management. Most concerning is that the EIA did not include a contingency plan in the event that acid mine drainage occurred.[1445]

763. The absence of plans can only lead to one reasonable conclusion: Claimants had no idea what to do or how to respond to any problems or emergencies. Again, this undermines the community's confidence in the project, since anything out of the ordinary can lead to problems that Claimants had no idea how to remedy.[1446] These are serious omissions that reinforce an overall deficient approach to the EIA.

c. Exmingua's social assessment in the EIA is inadequate and misleading

764. For Claimants to ever hope to understand the local communities and win their trust, they would have to know those people and the issues they face. But similar to the hydrology issues, Exmingua failed to conduct a proper baseline of the existing social conditions.[1447] The consultation process is flawed and deficient as previously discussed: key stakeholders were ignored. There was no effort made to consult with indigenous populations,[1448] despite recognizing their existence in the area.[1449] The focus of this portion of the EIA is premised on presenting the benefits of the project rather than reviewing and analyzing the potential negative impacts.[1450] The EIA therefore misrepresented the support the project enjoyed because it failed to consult beyond a handful of individuals in three of the adjoining villages.[1451]

765. This is not the kind of behavior of a serious mining company or one that envisioned a lasting relationship with the community. It is no wonder that Claimants responds to the protests with threats and intimidation, urging violence instead of a peaceful resolution.

4) Claimants failed to comply with Guatemalan law

766. After an approach to the EIA that relied on a false mining plan, neglected international standards and best practices, and routinely ignored important issues, it is no small wonder that Exmingua failed to comply with Guatemalan law after it started mining.

[1445] SLR Report, ¶ 154

[1446] SLR Report, Section 7.3.5

[1447] SLR Report, ¶ 110; Exmingua's Production Report (2013), p. 53 (**R-0174**).

[1448] SLR Report, ¶¶ 30, 123.

[1449] EIA Section 7.1 – Characteristics of the Population (**C-0082**).

[1450] SLR Report, ¶ 103.

[1451] SLR Report, ¶ 144.

767. Exmingua expressly undertook "to comply with the following clauses before the Ministry of Environment and Natural Resources:

- Faithfully comply with all mitigation measures, environmental management plans, commitments environmental control and monitoring and any others described in the Environmental Assessment, as well as with the recommendations or indications issued by [MARN], regarding the Project under their responsibility from the moment that these are duly notified.
- To make effective the mitigation measures, safety plan and environmental management, plan of contingency, management plan and final disposal of waste and environmental monitoring plan proposed in the Environmental Assessment for the operation of the evaluated Project; and
- Fulfill faithfully and in the time stipulated for this purpose, the environmental commitments that are issued and required by this Ministry [MARN].[1452]

768. But this was not the case in practice. As demonstrated by MARN's inspection report in 2015, Exmingua did not comply with its obligations or Guatemalan law. Exmingua failed with approximately 50% of its environmental mitigation measures, including the following:[1453]

- Does not comply with the monitoring of the physical and chemical characteristics of the waters in the ponds generated by the activities of the project, and that may generate work accidents and / or work-related diseases. It does not comply with soil monitoring.
- There is no adequate place for the temporary storage of hazardous waste, company does not have protective equipment against spills of hazardous materials. They do not carry out any sorting process for solid waste.
- Does not comply with the implementation of hydraulic structures (sedimentation pits, drainage channels, etc); it does not comply with the construction of sediment traps to collect those that bring drag water, which is conducted through the ditches. They only have a natural sedimentation box in a dump. They do not have drains or energy dissipators for the management of runoff water.
- Does not comply with the obligation to establish slopes in the areas where the exploitation was completed, as there is no treatment of surface waters. In the dumps that are being used, there is still no surface water management.
- Does not comply with the construction of sedimentation areas to prevent sediment from reaching surface water sources. They have a sedimentation box made of rocks, in a surface water stream, however, it is only for a dump. They do not have runoff water separation on all exploitation fronts.
- Does not comply with the neutralization of oxides or acids present in sediments of the sedimentation piles. Only flocculants are used to bind solids. It does not comply with the creation, development, implementation and monitoring of an environmental program. No documentary evidence of the environment program of the Progreso Derivada VII project was presented.
- There is no mesh fence in the area of the tailings to prevent the entry of wildlife species, nor

[1452] EIA, p. 5 (**C-0082**).

[1453] MARN Technical Report, dated February 23-27, 2015 (**R-0105**).

were measures taken to prevent birds from landing in this area.

- Does not comply with the registry of toxic or dangerous materials where it includes: type of waste, area in which it was produced, quantity or volume, date, final destination or supplier to whom to deliver. The fire extinguishers were unlabeled, and they did not have smoke detectors.
- There is no signage and labeling of hazardous materials. In the warehouse area, this symbology was not used to identify chemical substances.
- Does not comply with industrial safety training. Likewise, Exmingua did not comply with the personal protection equipment generated by the project activities, which can generate work accidents and occupational diseases. The vehicles did not have audible alarms for reversing, they did not have first aid equipment or a fire extinguisher.
- Does not comply with the implementation of a permanent health clinic within its facilities. Nor does it comply with the obligation to maintain first aid kits. According to one interviewee, when an unwanted event occurs, it is not documented.
- Does have audible alarms for emergency warnings, or signaling of evacuation routes and meeting points. At the time of the inspection, no evacuation routes, assembly points, or spill containment equipment were observed in all areas that needed them. There was only one API pit in the fuel storage area located in the process plant.[1454]

769. The above list is not exhaustive.[1455] On this basis, Claimants cannot argue that they were in compliance with all the requirements, law and permits that Guatemala requires. This report alone demonstrates that this was not the case. Art. 51 (c) of the Mining Law in Guatemala permits the suspension of a mining license for failure to adhere to environmental regulations. In other words, MEM would have been legally justified to suspend Exmingua license based upon the finding from the inspection reports issued by MARN.[1456] Indeed, MARN commenced administrative proceedings against Exmingua in 2016 as a result of the lack of compliance with environmental obligations.[1457] As the experts observe, Exmingua failed to comply with the EIA and the promises it made at the time it requested environmental approval.[1458]

C. The Valuation of Progreso VII and Santa Margarita has no Basis in Sound Mining Principles

770. Mining is one of the most technically challenging professions, demanding advanced knowledge in many disciplines. Unlike other industries, mining is inherently uncertain. Fewer than 1 in 10,000 mineral showings becomes a mine.[1459] The result is a sector that relies on thorough, precise planning before mining starts.

[1454] *Id.*

[1455] *Id.*

[1456] ART 51 (c), Mining Law (**C-0186**).

[1457] MARN Notification No. 475-2016/DCL/EOGP/mirf dated February 24, 2016 (**R-0187**).

[1458] SLR Report, ¶ 31.

[1459] SLR Report, ¶ 230.

771. Claimants and their experts have abandoned the careful nature of documentation and planning. In some areas, the work is sloppy, such as assuming an LOM Plan and income-based valuation for a deposit with no defined Mineral Reserves. In others, the inputs are baseless, relying on resource estimates at least 17 years old and riddled with missing information. And then there are the flights of fancy, assuming exorbitant values using invented methodologies that lack any connection to El Tambor or best practices in mining valuation. In sum, for a highly technical field, Claimants have offered a mishmash of information, lacking even the basic components to generate anything more than negligible value.

1) The LOM Plan is Unreliable, Lacking Basic, Contemporaneous Documentation

772. A tribunal with this much experience will surely grasp the significance of Claimants' lack of documents. At a minimum, Claimants should be relying on the plans they presented to Guatemala when Exmingua requested its exploitation and environmental licenses. Exmingua had to provide plans for mining as a commitment from Claimants to Guatemala, who had every reason to rely on those plans. Incredibly, Claimants are not relying on those plans, a bait-and-switch, turning instead to SRK, the experts hired for this arbitration, to drum up new plans, never before presented to Guatemala.

773. The timing of the SRK plans are even more suspicious considering Claimants' approach to the mine. As early as 2013, Claimants contemplated bringing an investment claim against Guatemala, retaining their current lawyers for precisely this task.[1460] Every member of the Tribunal knows that the existence and quality of a claimant's plans is an integral component for inflating damages claims. Even then, Claimants have provided nothing, even for the operational part of El Tambor. There is no scoping study (or preliminary economic assessment), pre-feasibility study, or feasibility study, even though these studies are standard practice for any mining project that goes to production.[1461]

774. Instead of documents from 2011 to 2016, during the time when Claimants had to provide mining plans, Claimants turned to SRK to create a "life of mine" plan ("LOM Plan") solely for purposes of this case, based on unverifiable assumptions made after mining started. The SRK Report says, implausibly, that Claimants were in "the process of developing" production forecasts when the mine shut down in 2016.[1462] But this statement is just another unsupported allegation, like so many of the other points made by SRK. There are no documents to show these forecasts or their process, much less the underlying documents that show the basis for the forecasts. At its core, this is a fundamentally unserious approach to mining, especially when Exmingua supposedly had plans when it requested its permits.

[1460] Letter from White and Case dated July 25, 2013 **(C-0114)**.

[1461] SLR Report, ¶ 301.

[1462] SRK Report, ¶ 30.

775. Eschewing documents, SRK admittedly based the LOM Plan on "assumptions,"[1463] largely drawn from Mr. Kappes' witness statement where he gave his "opinion" on how things would have proceeded,[1464] and an impossible-to-verify Excel spreadsheet that purports to record the daily amount of ore processed while the mine was in operation.[1465] The spreadsheet is missing weeks of production data, it changes methodology without reason (dropping the A and B shifts), and it features wildly divergent numbers for tonnage and grade. Using only these two documents, and a 2003 memorandum of the area's "exploration potential" (hereinafter referred to as the Gold Fields Estimate),[1466] SRK claims that it can predict the mine's output until 2026.

776. SRK is not only wrong, but its approach lacks any serious indicia of reliability. As explained further below, the LOM plan is completely inadequate for purposes of valuation. Its very foundation—the Gold Fields Estimate—did not offer any conclusive proof as the size of the resource; nor was that its intention. The Gold Fields Estimate rather offered four different possible estimates of the resource's size, each with dramatically different results. SRK just picked one of the four, with no explanation whatsoever.

777. From there, SRK builds on the plan with assumption after assumption until all of the necessary variables (*i.e.* processing rate, operating costs, etc.) are in place. It then puts all these assumptions in a professional-looking chart and calls it a Life of Mine Plan.[1467] This is the kind of process that should create skepticism, not confidence, and as shown below, the LOM Plan is full of flaws that make it useless for the purposes of this arbitration.

2) Exmingua had no exploitation permit for the largest deposit in the LOM

778. The most obvious error is glaring. The LOM plan essentially predicts how much gold would be mined at three deposits—Guapinol South, Poza del Coyote and Laguna Norte—through the year 2026, including costs.[1468] Those predictions are then incorporated into Claimants' valuation model.

779. The first thing to note is that the largest deposit in SRK's plan is not located within the Progresso VII license area. Laguna Norte is located in the Santa Margarita area, completely separate from the two others.[1469]

780. The location of Laguna North voids nearly half of SRK's plan since Exmingua did not have an

[1463] SRK Report, ¶ 34.

[1464] Claimants' Memorial, ¶ 374.

[1465] *See* Daily Plant Summary Data for October 2014 – May 2016 **(C-0125-ENG)**.

[1466] Maynard, S.R., 2003, Tambor Joint Venture – Summary of Exploration Potential ("Maynard Memo"), dated November 18, 2003 **(C-0046-ENG)**.

[1467] SRK Report, Appendix 1.

[1468] Memorial, ¶ 368.

[1469] *See* Claimants' Memorial, map ¶ 21.

exploitation license to mine Santa Margarita. Exmingua did not even complete an EIA for the Santa Margarita operation. Instead, Exmingua voluntary suspended its exploration, and its shareholders now seek the profits of that abandoned effort.

781. According to the Gold Fields Estimate, the only source relied on by SRK to determine the size of the resource, the Laguna North deposit represents 47 percent of the entire mine plan.[1470] Consequently, the figures must be reduced accordingly.

3) There is no support for the duration of the LOM

782. The LOM Plan projects that the operating mine would run through 2026, roughly 10.5 years beyond its shutdown in May 2016. The projection is not based on any technical analysis of the mine's operation, as one would expect. It is based rather on a grade-school calculation: divide how much raw material needs to be mined (one assumption) by how much raw material can be mined in one year (another assumption). The result equals the number of years needed to mine the three deposits.

a. There is no basis for the size of the resource in SRK's Plan

783. The problem with SRK's equation is that the two variables have no basis in fact. To reach a duration of 10.5 years, SRK assumes that 900,000 tons of raw material would be processed at a rate of 87,500 tons per year (tpa). [900,000 / 87,500 = 10.5].[1471] It is not entirely clear however how or why SRK reaches that 900,000 figure. SRK cites to Mr. Kappes' Witness Statement, who appears to base his assumption on the Gold Fields Estimate.[1472] But, as noted by Guatemala's mining expert SLR, that assumption is too large. It presumes that 100 percent of the resource would be readily mineable.[1473] Such a self-serving and unrealistic assumption by the Claimants—not the expert—cannot possibly form the basis for Claimants own valuation.

784. In addition, the Gold Fields Estimate is not a reliable projection of the ore to be mined. The entire Gold Fields Estimate offers 4 different possible projections on the amount of gold available from the three deposits, each with dramatically different results.[1474] SRK simply picked one of the four available options, without any apparent explanation, or evidence, even though the estimates vary from 720,271 tonnes to 2,050,369 tonnes, a

[1470] Laguna Norte contains 338,000 tons of the 720,0000 tons of ore estimated by Gold Fields and SRK. SRK Report, table 3-1.

[1471] SRK Report, ¶ 37.

[1472] SRK Report, ¶ 37; Kappes Statement, ¶ 117.

[1473] SLR Report, ¶ 60 ("SRK assumes that all of the resources would have been economically mineable without providing any mine plans to support this claim.").

[1474] SLR Report, ¶ 48 ("Another source of uncertainty lies in the large differences that were found between the two estimation methods used (Cross-sectional versus GEMS 3D Block Model) for the 2003 Mineral Resource Estimate. The resource estimated using the GEMS 3D block Model (disregarded by SRK) results in a 26% decrease in contained ounces of gold. This discrepancy remains unexplained."); Maynard, S.R., 2003, Tambor Joint Venture – Summary of Exploration Potential ("Maynard Memo"), dated November 18, 2003, Table 1 **(C-0046-ENG)**.

swing of almost 300%.[1475] The estimates are below; SRK chose the top left option.

		Cross-Sectional			Gems (3D block model)		
High Grade Cut-offs	**COG (g/t)**	**Tonnes (t)**	**Grade (g/t Au)**	**Contained Gold (oz)**	**Tonnes (t)**	**Grade (g/t Au)**	**Contained Gold (oz)**
Guapinol South	2.0	194,300	13.164	82,237	155,054	15.295	76,246
Poza del Coyote	2.0	187,971	8.458	51,115	90,000	10.160	30,000
Laguna North (HG zone)	1.0	338,000	10.214	111,000	193,000	11.990	74,466
Total		**720,271**	**10.552**	**244,352**	**438,054**	**12.831**	**180,712**
Low Grade Cut-offs	**(g/t)**	**(t)**	**(g/t Au)**	**(oz)**	**(t)**	**(g/t Au)**	**(oz)**
Guapinol South	0.3	748,795	4.020	96,790	919,517	4.221	124,777
Poza del Coyote	0.3	438,137	4.012	56,511	380,000	3.570	40,000
Laguna North (HG and LG Zone)	1.0	723,000	5.930	138,000	750,852	5.010	122,818
Total		**1,909,932**	**4.744**	**291,301**	**2,050,369**	**4.363**	**287,595**

785. Even if this one projection were superior to the others, which it is not, it would still not be reliable enough for SRK's plan. The Gold Fields Estimate is not a resource estimate recognized by industry standards.[1476] It is nothing more than a "preliminary resource estimate," outlining the area's exploration potential.[1477] There is little to no underlying data upon which to verify the projections; nor was the estimate reviewed by an independent Qualified Person, a requirement under international reporting standards.[1478]

786. Even more striking is the Gold Fields Estimate's lack of confidence classifications, which are mandated under the CIM Best Practice Guidelines.[1479] Resources like the Tambor Project are always classified based on the level of geologic knowledge, which basically means how much is known about the materials in the ground. "Inferred Resources," carry less confidence than "Indicated Resources," which in turn carry less confidence than "Measured Resources."[1480] The Gold Fields Estimate offers none of these confidence

[1475] *See* SRK Report, ¶ 19.

[1476] SLR Report, ¶ 44.

[1477] Maynard, S.R., 2003, Tambor Joint Venture – Summary of Exploration Potential ("Maynard Memo"), dated November 18, 2003, page 2 **(C-0046-ENG)**.

[1478] SLR Report, ¶ 49.

[1479] SLR Report, ¶¶ 52-53.

[1480] SLR Report, ¶ 291.

classifications.

787. Notably, this information was available to SRK, even though it chose to ignore it. The CAM Report,[1481] a later estimate of the same three locations, offers the confidence classifications that are missing from the Gold Fields Estimate. According to the CAM Report, 85% of the total resource is "inferred," meaning the lowest level of confidence, while 15% are "indicated," meaning the middle level of confidence.[1482] Nothing is at the highest level of confidence.

	COG (g/t Au)	Tonnes (t)	Grade (g/t Au)	Contained Au (oz)
Indicated				
Guapinol South - Cliff Zone	0.3	336,000	3.910	42,200
Poza del Coyote	0.3	120,000	4.024	15,500
Total Indicated		456,000	3.940	57,800
Inferred				
Guapinol South - Cliff Zone	0.3	368,000	5.325	63,000
Poza del Coyote	0.3	228,000	4.219	31,000
Laguna North	0.3	1,951,000	1.950	122,200
Total Inferred		2,547,000	2.641	216,200

788. This is highly relevant information. Under industry guidelines, inferred resources cannot form the basis for valuation estimates because of their "substantially higher risk of uncertainty."[1483] And yet, 85% of the Tambor Project lacks the necessary level of confidence to accurately estimate its value.

789. SRK does not seem to care. It discusses the CAM Report,[1484] but then completely ignores the information it contains, relying exclusively on the Gold Fields Estimate because it better reflects the LOM Plan—circular reasoning at best.[1485] But even then, SRK *could have* incorporated CAM's confidence levels into the Gold Fields Estimate. It simply chose not to do so.

b. Exmingua's processing capacity is overstated as well.

790. Aside from overstating the size of the resource, SRK also overstates Exmingua's processing capability or "feed capacity." SRK projects the mine's annual feed capacity at 87,500 tpa based on a chart of the mine's daily processing log, which appears to have been created for purposes of this case. The chart, titled Daily Plant

[1481] CAM Technical Report, dated January 7, 2004 **(C-0039-ENG)**.

[1482] *Id.* at p. 1.4.

[1483] SLR Report, ¶ 60.

[1484] SRK Report, ¶ 21.

[1485] SRK Report, ¶ 25.

Summary Data for October 2014 – May 2016,[1486] is just an untitled five-column spreadsheet listing the days of the year (split into two shifts), how much raw material was processed for each shift and the amount of gold contained in the raw material. Many of the days do not even record how much raw material was processed, and the shifts appear then disappear.

791. The veracity of the chart is not its only problem. Most importantly, the chart does not demonstrate that Exmingua could process 87,500 tons per year, neither in 2014 when the operation began, nor in 2016, when the operation shut down. Not even close, in fact. The 87,500 tpa figure equals out to roughly 250 tons per day (tpd). But on average, the mine was processing at around 200 tpd, or about 70,000 tons per year.[1487]

792. SRK acknowledges this reality, even though it, yet again, chooses to ignore it. While SRK recognizes that the higher rate was rarely achieved, *i.e.* "at times" over the last two months of operation,[1488] it nonetheless assumes that this rate would have been achieved every single day thereafter for the next 10.5 years. To support this stretch of an assumption, SRK points to certain "modifications and updates" made to the plant, citing Mr. Kappes' own self-serving Witness Statement.[1489] But once again, neither SRK nor Mr. Kappes offer any proof of those modifications, contemporaneous or others.[1490] It is not even clear whether such "modifications or updates" were made, whether the equipment was purchased, or the modifications found to be successful.

793. In addition, Exmingua was not even authorized to operate at the rate assumed in the LOM plan. Exmingua's mining license for Progreso VII was based on a plan, submitted to MEM and MARN, to operate at 150 tpd, or roughly 55,000 tons per year.[1491] The EIA also limited Exmingua's operation to 150 tpd as well.[1492] Oddly these points are never raised by Mr. Kappes or SRK. In all 52-pages of Mr. Kappes' Statement, he never mentions the 150 tpd rate even once. In any event, the LOM Plan projects well beyond the rates that Exmingua was to process and must be adjusted accordingly.

4) The recovery rate is overstated

794. One of the other major components to SRK's plan is the assumed metallurgical recovery or "recoverability rate" of 82%. The "recoverability rate" refers to the amount of gold that could be extracted from a certain amount of raw material. This figure, when combined with the "payability rate" *i.e.* how much

[1486] Daily Plant Summary Data for October 2014 – May 2016 **(C-0125-ENG)**.

[1487] *See* SLR Report, ¶ 60; Daily Plant Summary Data **(C-0125)**.

[1488] SRK Report, ¶ 35.

[1489] SRK Report, ¶ 35.

[1490] *See* Kappes Statement, ¶¶ 109-114.

[1491] Exmingua Mining License Application, p. 92 **(R-0188-SPA)**.

[1492] EIA, p. 82 **(C-0082-ENG/SPA)**,

of the gold is payable after deducting smelting, refining and transportation costs, help project how much revenue will have been generated from these three deposits, minus costs.

795. Like the other assumptions in SRK's plan, there is no basis for the 82% recoverability rate. SRK makes this assumption based on the same excel spreadsheet offered for its other assumptions.[1493] The average rate of recovery reported on that spreadsheet between October 2014 and May 2016 however was 62%[1494]—twenty percent lower than the 82% assumed in the LOM plan. While SRK concedes that certain improvements would need to be made before the higher rate could be achieved, these improvements were never made. And SRK fails, once again, to offer any evidence that they would have been made or would have been effective.

796. To summarize the LOM's shortcomings thus far: (i) half of the LOM plan is based on a deposit that Exmingua was not authorized to mine; (ii) the assumed size of the resource is based on an out-of-date estimate, 85% of which is too unknown for purposes of valuation; (iii) the assumed rate at which the mine would process material (consistently for 10.5 years) was rarely achieved in practice, and is nonetheless above the limit at which Exmingua could operate; and (iv) the assumed recovery rate is 40 percentage points higher than the rate achieved in reality.

5) <u>The assumed operating and capital costs are cursory and understated</u>

797. The assumed operating and capital costs presented in the LOM Plan are just as baseless as the other variables. SRK does not estimate the costs itself, but merely comments on the estimates provided my Mr. Kappes, referring to all of them as "reasonable" without giving any objective basis for this conclusion.[1495]

798. There is no reason to take Mr. Kappes at his word. KCA does not operate mines. It is not a major mining company (neither would provide a back-of-the-envelope estimate). If SRK were truly independent, it would at least undertake an exercise to judge the reasonableness of its client's thoughts. This is missing from the record. Unsurprisingly, the estimates that Mr. Kappes provides, and SRK did nothing to confirm, suffer the same lack of substantiation as all the other assumptions in the LOM Plan.[1496]

799. As far as the capital costs, which are estimated at USD 24.6 million over 10.5 years,[1497] there is simply no evidence to demonstrate such a low level of costs. No contemporaneous cost plans are attached to Mr. Kappes's Witness Statement, and there are no supplier quotes or receipts to verify the accuracy of the estimate.

[1493] *See* SRK Report, ¶ 41; Daily Plant Summary Data **(C-0125)**.

[1494] SLR Report, Table 3.

[1495] SRK Report, ¶¶ 49-57.

[1496] *See* SLR Report, ¶¶ 78-79.

[1497] SRK Report, ¶ 78.

At best, the estimate provided by Mr. Kappes is a Class 5 estimate,[1498] the most cursory type of estimate in the industry.[1499] Likely, the actual costs will be some 50% higher.[1500]

800. As for the operating costs, Claimants only offer 2.5 months' worth of expenditures (Oct. – Dec. 2015), when the mine was in operation.[1501] From that limited snapshot, Claimants generate an "income statement" for all of 2015, which appears to be just an estimate rather than a statement.[1502] This is extraordinary. Claimants should provide financials prepared in 2015-2016, not extrapolate preferred numbers. From there, SRK offers a rudimentary breakdown of operating costs per ton of ore processed, which only serves to complicate the analysis rather than support it. Ultimately the cost figures in Appendix 1 of the SRK Report have no apparent connection with any of the documents/estimates provided by Claimants.

6) Guatemala offers a revised LOM plan that more accurately reflects the mineral resource and the costs of the operation.

801. The LOM plan offered by Claimants and SRK is far too cursory and unsupported to value the operating mine. So as an alternative, Guatemala's expert, SLR, has provided a more appropriate plan that incorporates more reasonable variables.[1503] In doing so, SLR does not construct a completely new LOM Plan. There is far too little information on the record about Exmingua's operations to construct a supportable LOM Plan for use in valuation. Instead, SLR simply restates the SRK model (with adjusted variables) without endorsing it.

- Regarding the size of the resource, SLR conservatively starts with the same estimate used by SRK—the Gold Fields Estimate—but with the confidence factors offered in the CAM Report. The inferred resources captured in the CAM Report are reduced by 50% to account for the lower confidence level, resulting in a resource estimate of 494,000 tons of material.[1504]
- Based on the smaller size of the estimate, the mines duration drops from 10.5 years to eight years.
- The recovery rate is adjusted to 50% to more accurately reflect the recoveries achieved during

[1498] SLR Report, ¶ 191.

[1499] SLR Report, Table A5-2.

[1500] SLR Report, ¶ 82.

[1501] Tambor Cash Flow data **(C-0136-ENG)** and Exmingua Weekly Cash Flow Position for the period between October 2 2015 and December 4 2015 **(C-158-ENG)**.

[1502] *See* Kappes Statement, n. 162 (noting that the "Income Statement" is "based on the actual Accounts Payable for a 2.5 month period when the plan was operating").

[1503] SLR Report, ¶¶ 173 *et seq.*

[1504] SLR Report, ¶ 179.

the mine's operation.[1505] The figure represents an average of two different (contradictory) recovery rates sourced from Claimants' data.[1506]

- The processing rate is adjusted to 70,000 tpa (down from 87,500 tpa) to, once again, more accurately reflect the rates achieved when the mine was in operation.[1507]
- As a result, the amount of recovered gold drops from 186,000 oz to 65,000 oz. Exmingua's Net Revenue accordingly drops from USD 236.1 million to USD 70 million.[1508]
- On costs, SRL has added a contingency of 40% (approximately USD million) to account for the rudimentary manner in which SRK approached costs.[1509]

802. RPA's restated mine plan is presented in Table 9 of their report.[1510]

D. The Exploration Targets and Lost Exploration Opportunities: Claimants enter the realm of clairvoyants and psychics

803. In an indictment of their unserious approach, Claimants have applied unknown or wholly unacceptable valuation methodologies to speculate as to the value of deposits numerous mining companies have chosen to bypass. As detailed in the SLR Report, there is no scientific or industry basis to value the Exploration Targets and Lost Exploration Opportunities as proposed by SRK and Versant, especially by projecting development from 2016 to 2020, a "purely speculative" approach that "is the realm of clairvoyants and psychics and has no place in responsible mineral property valuations."[1511]

1) The Exploration Targets are too Unknown to be Valued by Industry Standards

804. Separate from the three deposits in the LOM plan, Claimants, with the help of SRK and Versant, attempt to value other unexplored areas of the Progresso VII and Santa Margarita concessions. SRK identifies three hard-rock targets—Guapinol North, Rio Quixal and JNL—that "may host" gold for exploitation.[1512] In addition, SRK hand selects a number of other targets that it "assumed" would "provide sufficient material" to support mining operations, and groups the latter (assumed) targets into a single target, or what it calls the

[1505] SLR Report, ¶ 179.

[1506] See SLR Report, ¶ 184 (referring to Email from J. Hernandez (Exmingua) to A. Vaides (Exmingua), dated May 13, 2016 **(C-0157-ENG)** and Daily Plant Summary Data for October 2014 – May 2016 **(C-0125-ENG)**).

[1507] SLR Report, Table 9.

[1508] SLR Report, Table 9.

[1509] SLR Report, ¶ 191, 193.

[1510] SLR Report, Table 9.

[1511] SLR Report, ¶ 219.

[1512] SRK Report, ¶ 71; Claimants' Memorial, ¶ 380

"saprolite target."[1513]

805. From there, SRK estimates the "potential" size of each target in terms of gold resources—750,000 ounces for the hard-rock targets and 1.5 million ounces for the saprolite target(s)—and the "potential value" of these targets using a DCF approach.[1514] The estimates are based, once again, on the assumption that Claimants would have decided to mine these targets in the first place.[1515]

806. From the outset, however, there is no evidence that Claimants had any real intention to mine these targets. The targets are not mentioned anywhere in Claimants' Memorial other than for purposes of valuation. None of Claimants' exploitation applications or environmental documents make any reference to the targets. And as Claimants' own expert concedes, additional exploration was required before a decision to pursue mining in the areas would even be made.[1516]

807. Capacity is another issue. As discussed in the previous section, Exmingua was not authorized to mine in excess of 150 tpd. It was already exceeding that rate with other targets. What is more, Exmingua could not even achieve the 250 tpd processing rate that it projects in the LOM plan above. Adding additional tonnage from these other sites would have been impossible, not to mention, illegal. These are only the beginning of the problems.

a. The Exploration Targets are not Mineral Resources

808. Aside from these glaring contradictions between reality and Claimants' hypothetical future plan, the exploration targets identified by SRK are "conceptual in nature and do not in any way constitute Mineral Resources or Mineral Reserves," as defined by industry standards.[1517] This is important to consider. The mining industry has labored for decades to develop and maintain standards that convey the level of certainty a mining company can claim. These standards are reflected in the definitions that compose Mineral Resources or Mineral Reserves, and they define every resource estimate reported on stock markets the world over. SRK has abandoned generally accepted standards for its own—a shocking step for any reputable expert.

809. As it moves into flights of fancy, the assumptions made by SRK are, according to SLR, are "purely speculative" and "a totally improper and unacceptable derivation of value."[1518] All of the leading international standards for valuing mineral properties (CIMVAL 2019, SAMVAL 2018 and VALMIN 2015) restrict the use

[1513] SRK Report, ¶ 72; Claimants' Memorial, ¶ 380

[1514] SRK Report, ¶¶ 76-86.

[1515] SRK Report, ¶ 86.

[1516] *Id.*

[1517] SLR Report, ¶ 214

[1518] SLR Report, ¶ 213

of a DCF approach for exploration properties, like the ones identified here.[1519] But SRK pays no attention to those restrictions. It would have this Tribunal completely abandon every standard accepted in the sector.

810. Instead, SRK relies on a number of alternative approaches to project valuation (called the "Exploration Status Approach" and the "Geological Probabilistic Approach") that allegedly account for the lack of knowledge around each target.[1520] SLR has many critiques of these two approaches, one of which appears to have been the fact that SRK created the approaches but the industry has not recognized it. The most important critique however is that these approaches are not intended to value exploration projects. At best, these approaches are used to help companies decide whether to continue with the exploration.[1521]

811. The SRK approaches also defy common sense. Radius, a company whose executives had years of experience in Central America, never pursued the Exploration Targets, and Gold Fields, a major company, bypassed the chance. Radius claimed to share the drilling data with numerous other companies, none of whom wanted to move forward, and then Claimants arrived and decided to focus on a different part of El Tambor. No approach, scientific or not, can make up for the fact that the deposits were not seen by anyone as lucrative.

2) The Lost Exploration Opportunity is "not worthy of serious discussion"[1522]

812. Aside from the undocumented mine plan and the overly-speculative exploration targets, Claimants seek additional damages for seven other targets that Exmingua "could have potentially discovered" after the mine shut down in 2016.[1523] SRK's approach here is admittedly based on "comparisons to other districts with similar geology."[1524] Like the Exploration Targets, the assessment is not based on any verifiable, industry-recognized understanding of the concession area.

813. According to SLR, the approach here is akin to the one used by governments and international agencies to "assess the so-called undiscovered mineral endowment of a country" for purposes of long term-planning and mineral policy.[1525] The approach may be acceptable for planning an exploration program, but it is not a proper way to value specific targets.

814. The approach itself is also flawed for numerous reasons. Primarily, SRK defines each target in terms of ounces (as if they were Mineral Reserve properties) rather than a conceptual, net present value. SRK does

[1519] SLR Report, ¶ 228

[1520] SRK Report, §§ 4.5 and 4.6.

[1521] SLR Report, ¶ 229.

[1522] SLR Report, ¶ 238.

[1523] SRK Report, ¶ 117.

[1524] SRK Report, ¶ 120.

[1525] SLR Report, ¶ 240.

not work backward from the conceptual net present value to the exploration stage, as the approach requires. Instead, SRK works forward, applying a probability factor to the entire amount of projected gold to deduce how much gold could potentially be discovered by 2020.[1526] Claimants' valuation expert Versant then treats this entire exploration potential as a confirmed Mineral Resource for purposes of valuation. RPA "totally rejects" this valuation method.[1527]

815. These properties, probably not even "discoveries," cannot receive a valuation that assumes the gold is a Mineral Reserve, the highest level of certainty. Only 1 in 10,000 mineral showings results in an operating mine, and for good reason: the presence of a few studies does not equal an operating mine. The Lost Exploration Opportunities do not merit any serious discussion, and the Tribunal should reject them out of hand.

VIII. DAMAGES

816. Claimants claim the absurd amount of between USD 403 and USD 450 million for the measures that they allege constitute violations by Guatemala to CAFTA-DR.[1528] Even if all of Guatemala's jurisdictional objections were to be rejected, and - additionally - all of Guatemala's defenses on the merits were to be dismissed by the Tribunal - which is in itself a highly unlikely scenario, given the number, magnitude and relevance of Guatemala's arguments in this proceeding - the damages claimed by Claimants should still be entirely rejected by the Tribunal.

817. Claimants are severely inaccurate in their analysis of the legal framework applicable to the determination of the compensation standard,[1529] in the selection and application of the valuation method under which they make their damages claim,[1530] and in the compilation and use of the few data and the many assumptions they invoke to support their quantification of damages.[1531]

818. Claimants' claim is equivalent, in Claimants' own words, to the value Exmingua would have had on the valuation date if the measures that are the subject of the claim had not taken place.[1532] However, it is

[1526] SLR Report, ¶ 242.

[1527] SLR Report, ¶ 243.

[1528] Memorial, ¶399.

[1529] *See* § VIII.A *infra*

[1530] *See* § VIII.D *infra*.

[1531] *See* § VIII.D.2) *infra*.

[1532] Memorial, ¶363 ("Versant—Claimants' quantum expert—has calculated Claimants' damages by valuing Exmingua in the scenario where Respondent had not breached its Treaty obligations as compared with Exmingua's current value. […] As explained above, Eximgua's current value is nil [. …] Because Exmingua had no outstanding debt as of the valuation date, and because Claimants together own 100% of Exmingua, Claimants' damages are equivalent to the value Exmingua would have had absent Guatemala's breaches") (internal citations omitted).

impossible to reconcile such premise with the detail of the damages claimed by Claimants, which we transcribe below:[1533]

Loss of cash flow from the Operating Mine from May 2016 to March 31, 2020	$ 23.6 million
Interest on Lost Cash Flow from Operating Mine at the U.S. Prime Rate plus 2% compounded annually	$ 3.4 million
Value of Confiscated Concentrate, with interest from the date of seizure through March 31, 2020	$ 645,121
Loss in Value of Operating Mine as of March 31, 2020	$ 42.9 million
Loss in Value of Known Exploration Potential of Tambor	$ 89 million
Loss in Value of Exploration Opportunity of Tambor	$ 244 – 291 million
Total Nominal Damage	**$ 403 – 450 million**

819. In short, it is impossible to argue that, under any applicable legal standard, applying any acceptable valuation method, the fair market value of Exmingua that a willing buyer and seller would agree to in a market situation[1534] would consist of the adding up of such cornucopia of exaggerated values, randomly designed and aggregated to result in the largest possible amount.

820. As discussed in the following pages, the quantification of damages submitted by Claimants incurs an inappropriate magnification of the value of their alleged investments as of the date of valuation, resulting in a claim that they are unable to prove, and which must be rejected by the Court.

A. Claimants Apply and Incorrect Compensation Standard

1) The Applicable Compensation Standard is set forth in CAFTA-DR

821. Article 10.7.2 of CAFTA-DR sets forth the compensation standard applicable in case of expropriation, and provides that "[t]he compensation shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('the date of expropriation'); (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realizable and freely transferable."

822. Claimants reject this compensation standard, arguing that, according to them, "CAFTA-DR provides only a formula for compensation for lawful expropriation, but does not set out a standard of compensation or specify any other form of reparation for unlawful expropriation or for violations of other investment protections".[1535] Starting from that mistaken premise, Claimants argue, invoking certain decisions rendered

[1533] Memorial, ¶399.

[1534] *See* Versant Report, ¶19 ("The standard of value we apply is fair market value. The fair market value of the Tambor Project reflects the price that a willing buyer and seller would agree on in an open market.")

[1535] Memorial, ¶329.

under other treaties,[1536] that their claim corresponds to an "illegal expropriation" under which "Claimants, therefore, are entitled to compensation in an amount that reflects the value of their expropriated investment as of the date of the Tribunal's award.".[1537]

823. The compensation standard sought by Claimants is not applicable under CAFTA-DR to the claim they are submitting. Contrary to what the Claimants intend to argue, the contracting States under CAFTA-DR, agreed that the compensation standard applicable under Article 10.7.2 regulates the compensation due under any form of expropriation protected under the treaty.

824. Footnote 3 to Article 10.7 of CAFTA-DR provides that "[A]rticle 10.7 shall be interpreted in accordance with Annexes 10-B and 10-C". Annex 10-C, in turn, states that "Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure. […] The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.[1538]

825. Consequently, as evidenced by the simple reading of CAFTA-DR, the provisions on the compensation standard provided on Article 10.7.2 apply to both direct and indirect expropriations.[1539] Claimants argue that Guatemala's measures "constitute an indirect expropriation".[1540] Thus, it is incorrect to argue that CAFTA-DR does not contain a compensation standard regulating the compensation claimed by them, when the applicable law and the statements of Claimants themselves make it clear that such standard is the one arising from Article 10.7.2 of CAFTA-DR, which expressly provides that the date of valuation is the date of expropriation.

826. As has been argued "in the absence of clear language to the contrary", the standard contained in the respective treaty is applicable to all cases of expropriation, legal or illegal, since "it is unlikely that the Contracting Parties to the ECT (or BIT) have negotiated and provided for the standard of compensation to be paid when the host state expropriates a protected investment, but that said standard only applies to situations where the required conduct has been fully adopted, but that all other situations are governed instead by customary international law".[1541]

[1536] Memorial, ¶331-336.

[1537] *Id.* ¶337.

[1538] CAFTA-DR, Annexes 10-C, ¶¶3 and 4 (CL-0001).

[1539] We must note that, even if under CAFTA-DR we could distinguish between legal and illegal expropriations – which Claimants cannot articulate or prove – ever indirect expropriation would necessarily need to be "illegal".

[1540] Memorial, ¶164.

[1541] *See British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18, Award (December 19, 2014), ¶261 **(RL-0308)**

827. Claimants invoke a minority of decisions rendered under treaties other than the CAFTA-DR in an attempt to escape the provisions of the treaty they invoke,[1542] despite the fact that the very decisions they invoke are based on the premise -inapplicable in the context of Claimants' claim- that the applicable treaty did not contain specific provisions applicable to the claimed expropriation.[1543]

828. However, even if the decisions cited by Claimants were applicable to the specific circumstances of the case -*quod non*- they represent an "ultra-minority position"[1544] and not persuasive as to the correct way to interpret investment treaties on expropriation, " adopting the date of the award and ex post data, compared to the hundreds of cases relying on the date of expropriation and what was foreseeable on that date, in other words, the hundreds of awards which have granted, in case of expropriation, both lawful and unlawful, the fair market value of the expropriated property, evaluated at the date of the expropriation, with the knowledge at that time".[1545]

829. The CAFTA-DR does not contain any provision that allows for the application of a different framework to legal or illegal expropriations, and the interpretation proposed by Claimants deprives the provisions of CAFTA-DR related to the regulation of indirect expropriations on which the Claimants' own case rests of any *effet utile*, and therefore the interpretation they seek should be rejected.

830. If, by way of hypothesis, Claimants' argument that Guatemala's conduct is an expropriation not regulated by CAFTA-DR Article 10.7 -which they themselves contradict in ¶9 of their Memorial- were to be accepted, the Tribunal would lack jurisdiction under CAFTA-DR to resolve their claim, since it is a condition of its jurisdiction that the Claimants allege that Guatemala has violated any provision of Section A of Chapter 10 of CAFTA-DR.[1546]

831. Accordingly, in order to accept that the Tribunal has jurisdiction over an expropriation claim filed by Claimants in this proceeding, such claim must be governed by Article 10.7 of CAFTA-DR, including the compensation standard set forth in Article 10.7.2, which regulates, *inter alia*, the appropriate date of valuation, establishing that this shall be the date of expropriation.

832. Finally, Guatemala notes that Claimants have only submitted expropriation valuation calculations, *i.e.*, a valuation that only considers the case in which the alleged investments have been expropriated

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[1542] *See, for example*, Memorial, ¶333.

[1543] *ADC Affiliate Ltd. y ADC & ADMC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, (October 2, 2006) ¶¶ 483-484 (CL-0162), cited on Memorial, n.817).

[1544] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Partially Dissenting Opinion, 7 September 2015, ¶44. (RL-0126)

[1545] *Id.*, ¶43 (RL-0126).

[1546] CAFTA-DR, Art. 10.16.1(a) (**CL-0001**).

pursuant to CAFTA-DR.[1547] Therefore, if their expropriation claim were to be rejected by the Tribunal and any of their other individually considered claims (e.g. fair and equitable treatment, full security and protection, most favored nation or national treatment) were to be upheld, the Tribunal will not be able to award Claimants any compensation as the only calculation of alleged damages caused and proven would be for the allegedly contested expropriation measures.

B. Claimants Adopt an Incorrect Valuation Date

833. Despite recognizing that the alleged expropriation measures for which they are claiming took place between 2012 and May 3, 2016,[1548] and despite the fact that CAFTA-DR clearly and expressly establishes that the valuation date with respect to which the compensation claimed should be calculated is the date on which the alleged direct or indirect expropriation would have taken place,[1549] the Claimants artificially attempt to increase the amount of their claims by using a later and undetermined date.[1550]

834. The valuation date to be set in this case is May 5, 2016 ("Valuation Date"),[1551] the date on which the Constitutional Court issued the resolution confirming the provisional amparo decision issued by the Supreme

[1547] *See* Informe Versant ¶ 18 ("Versant has been asked to determine the damages to Claimants in a scenario where the Tambor Project would have advanced to present day, as anticipated before the effect of the Measures. This includes advancement of the exploration as well as the production elements of the project from 2016. As Claimants have been deprived of 100% of the benefits of the Tambor Project, the damages are equal to the current value of the entire project. The quantum of damages is intended to wipe out the economic consequences of the Measures, including deprivation of the time and ability to advance the Project. Our valuation exercise will therefore focus on determining the value of the Tambor Project but-for the Measures as of a date close to the current date. Therefore, in this report, we value the Tambor Project as of 31 March 2020 ("Valuation Date")"); ¶ 72 ("As discussed in Section I above, Claimants contend that Respondent's actions have resulted in loss of their investments in Guatemala. Thus, the calculation of Claimants' loss primarily entails quantifying the value of Claimants' ownership of the Tambor Project.")

[1548] Informe Versant, ¶17 ("The Tambor Project in Guatemala was discovered by Radius in 2000. It is located 1.2 km southeast of Guapinol Village, within the mineralized regional belt called Tambor. In early 2012, Exmingua began construction on the Progreso VII site. Shortly thereafter, the gate to the Progreso VII area was blocked. Exmingua re-gained access to Progreso VII again in 2014. By October 2014, Claimants produced the first gold from the mining operation. However, by 3 May 2016, there were new blockades, Exmingua's exploitation license for Progreso VII was suspended and it ceased operations, and its gold concentrate had been impounded. Consequently, Exmingua could not produce gold or advance the Tambor Project."); Memorial, ¶ 168 ("The economic effect of having indefinitely suspended Exmingua's exploitation license and seizing its concentrate has been to deprive Exmingua of substantially all of its value, thus clearly rendering these acts expropriatory.")

[1549] CAFTA-DR, ¶ 10.7.3 **(CL-0001)** ("If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment."). *See also* ¶ VIII.A. *supra*, were are discussed the reasons by which these articles of CAFTA-DR are the only applicable to determine the valuation date.

[1550] Memorial, ¶365 ("Versant chose 31 March 2020 as the valuation date, and will move that date into the future with its next report").

[1551] Corte de Constitucionalidad Judgment of May 5, 2016, Docket 1592-2014 (**C-0193**).

Court on November 11, 2015.[1552]

1) The correct valuation date would result in significantly less damages

835. The date of expropriation chosen by Claimants -May 5, 2016-[1553] is intended to cover a series of spurious claims ranging from artificially increasing their claims[1554] to presenting an apparent legality of the conduct they engaged in after their license was suspended in November 2015[1555] by continuing to extract minerals without proper authorization, even after the MEM issued Resolution No. 1202 suspending Exmingua's right to explore for and dispose of gold and silver under the license it had been granted.[1556] The choice of date is not innocent, as it serves to justify or attempt to conceal the consequences of the illegal actions of the Claimants and their companies since November 11, 2015 when the Supreme Court suspended their license.

836. If we were to use November 11, 2015, the date on which the Supreme Court issued its decision granting the provisional amparo, the valuation would be impacted and reduced. The Rosen Report shows that, even though the date is only 6 months prior to the Valuation Date, the market price of gold increased by 17% and the market for smaller gold companies increased by 63% in that 6-month period.[1557]

837. In section E below, Guatemala presents a valuation and explanation of the correct methodology to be used in the circumstances of the case as of the Valuation Date, i.e., May 5, 2016. However, the Rosen Report states that if the valuation date were November 11, 2015, the valuation would decrease by 43%, valuing the Project between US$1.9 million and US$4.5 million.[1558] Additionally, if a discounted cash flow ("DCF") valuation were to be presented, given the low gold and futures market price at that date, the value would continue to be zero.[1559]

[1552] Corte Suprema de Justicia de Guatemala Judgment of November 11, 2015, Docket 1592-2014 (**C-0004**)

[1553] Memorial, ¶ 168 ("The economic effect of having indefinitely suspended Exmingua's exploitation license and seizing its concentrate has been to deprive Exmingua of substantially all of its value, thus clearly rendering these acts expropriatory.")

[1554] Claimants submit a claim for impounded concentrate for USD 645,121.00. *See* Versant Report, ¶166.

[1555] Claimants' license was suspended by Corte Suprema de Justicia through an order of immediate execution. *See* Corte Suprema de Justicia Judgment or November 11, 2015, Docket 1592-2014, p. 1, no. III) (**C-0004**). ("[…] in compliance with such decision, an amparo provisional is hereby granted, as such relief is warranted by the circumstances of the case. As a result, the granting of the mining license for the exploitation of gold and silver in the municipalities of San Pedro Ayampuc and San José del Golfo, Department of Guatemala, known as "PROGRESO VII DERIVADA," issued by the challenged authority […])".

[1556] MEM's Resolution Nro. 1202 of March 10, 2016 (**C-0139**).

[1557] Rosen Report, ¶144.

[1558] Rosen Report, ¶145-147.

[1559] Rosen Report, ¶147.

2) The valuation date used should also result in significantly less damages

838. Notwithstanding the discussion in the preceding subsection and the criticisms to the methodology and valuation presented by Claimants addressed in Section VIII.D (below), the use of the information available as of March 2020 would require Claimants to take into account the losses in value resulting from the economic and industrial consequences of the COVID-19 pandemic, which are not considered either in their valuation.

839. As of March 31, 2020, the World Health Organization had declared COVID-19 a global pandemic, the United States had declared a national emergency, and several countries, including Guatemala, had issued stay-at-home orders and closed their borders to foreigners. Global markets collapsed due to the existing uncertainty.[1560]

840. As of March 31, 2020, in the absence of the alleged violations, Covid-19 would have negatively impacted the fair market value of the El Tambor Project, largely because it would have interfered with mining and processing operations as well as exploration activities, but also because of general market uncertainty. As of March 2020, the market price of gold showed volatility with a decrease of 12%, followed by an increase of 8%. Likewise, the economic market index for small gold companies ("Junior Gold Index") showed a decrease of 21% in March 2020.[1561]

841. Accordingly, if we were to apply the valuation date claimed by Claimants, which is incorrect and contrary to CAFTA-DR, the valuation would be reduced by factors not considered by Claimants' valuators, such as Covid-19.

C. Claimants Fail to Prove the Necessary Causation between the Alleged Violations and the Damages Claimed

842. The indirect nature of the damages claimed by Claimants has important effects on their ability to claim and prove the existence of compensation owed by Guatemala for their alleged damages. As the Court has already held, " there can be significant hurdles, as a matter of causation and proof, to demonstrating upstream injury in consequence of downstream harm. Reflective loss claims can be quite difficult to prove at the damages stage."[1562] The Claimants' allegation fails here as resoundingly as in the other issues discussed *passim* in this proceeding and therefore, shall be dismissed.

843. Various international tribunals and courts have refused to award compensation for damages where the claimant fails to properly argue and prove the causal link between the specific measures challenged and the

[1560] Rosen Report, ¶273. c. iv.

[1561] *Id.*

[1562] Decision on Preliminary Objections, ¶148.

specific amounts claimed.[1563] This Tribunal should reach the same conclusion.

844. Under Article 10.16.1(a) of CAFTA-DR, as a precondition for obtaining any form of compensation in this proceeding, Claimants must prove not only that Guatemala has breached an obligation set forth in Section A of Chapter 10 of CAFTA-DR, but also that "the Claimant[s] ha[ve] suffered loss or damage ***by reason of, or arising out of, that breach***.[1564]

845. Public international law peacefully recognizes that the claimant has the burden of properly alleging and proving the nexus between the specific measures challenged and the specific amounts claimed. In its decision in *Costa Rica v. Nicaragua (Certain Activities Carried Out by Nicaragua in the Border Area)*, the International Court of Justice examined the nexus between the reduction of the flow of the Colorado River between January 2011 and October 2014 and Nicaragua's dredging program. This was one of several lines of claim that Costa Rica had filed against Nicaragua, and the Court ruled that "[…] a causal link between this reduction and Nicaragua's dredging programme has not been established. As Costa Rica admits, other factors may be relevant to the decrease in flow, most notably the relatively small amount of rainfall in the relevant period."[1565] Finally, the Court understood that "the available evidence does not show that Nicaragua breached its obligations by engaging in dredging activities in the Lower San Juan River".[1566] Three years later, the Court issued its judgment regarding compensation due for the claims that had been accepted as proven, to which end the Court stated that "in order to award compensation, the Court will ascertain whether, and to what extent, each of the various heads of damage claimed by the Applicant can be established and whether they are the consequence of wrongful conduct by the Respondent" which would require determining "whether there is a sufficiently direct and certain causal nexus between the wrongful act … and the injury suffered by the Applicant."[1567] By application of this rule, the Court rejected several specific economic claims, holding that the causality between the proven international wrongful act and the specific damages claimed had not been adequately proven.[1568]

846. This rule has also been applied in the specific context of investment arbitrations under the ICSID Convention. For example, in *Biwater Gauff v. Tanzania*, the tribunal held that "to succeed in its claim for

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[1563] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award dated 24 July 2008*, ¶ 805 (**CL-0085**) *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013) ¶ 288 (**CL-0211**); *Certain Activities Carried Out by Nicaragua in the Border Area*, *Costa Rica v. Nicaragua*, International Court of Justice, judgment (February 2, 2018), ¶ 32 (**R-0189**)

[1564] CAFTA-DR, Article 10.16.1(a)(ii) (**CL-0001**) (emphasis added)

[1565] *Costa Rica v. Nicaragua*, International Court of Justice, Judgment of December 16, 2015, ¶ 119 (**RL-0254**).

[1566] *Costa Rica v. Nicaragua*, International Court of Justice, Judgment of December 16, 2015, ¶ 120 (**RL-0254**)

[1567] *Costa Rica v. Nicaragua*, ¶ 32 **(R-0189)**

[1568] *See Costa Rica v. Nicaragua*, ¶96, 121, 127, 129 (**R-0189**)

compensation, [the claimant] must prove that the value of its investment has been reduced or eliminated, and that the aggrieved actions were the actual and direct cause of such value reduction or elimination.[1569] The decision in *Biwater* demonstrates that causation of damage is an element which, individually considered, must be proven along with the existence of the international wrongful act, if any, and of the damage suffered, if any. When Article 31 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts refers to "injury caused by the internationally wrongful act," this "necessarily refers to more than simply the wrongful act itself [...] since otherwise the element of causation should be assumed to be proven in all cases, rather than constituting an additional issue to be proved."[1570]

847. Following this reasoning, the *Biwater* tribunal ruled that, despite the fact that the claimant's investment had been expropriated by Tanzania, there was not a sufficient causal link between the breach of the treaty and the damages proven by the claimant, since "by the time the expropriation had taken place, [...] the damages for which [the claimant] claims[ed] in the arbitration had already been caused (by other factors)".[1571]

848. This position had already been taken by the court in *Lauder v. Czech Republic*,[1572] which rejected the Claimant's compensation claims despite accepting that the Czech Republic had violated the treaty invoked, on the grounds that the Claimant had failed to prove a sufficient causal link between the treaty violation and the specific damages claimed. In the words of said court, the breach of the treaty "was too remote a cause to constitute a sufficient relevant cause of the damage suffered. A decision ordering the Respondent to pay those damages to the Claimant would therefore be inappropriate.[1573]

849. Recently, the court in *Spółdzielnia Pracy Muszynianka v. Slovakia*[1574] confirmed the validity of these requirements, ruling that it "must investigate the element of causation, which is a requirement for an award of damages".[1575] As that tribunal stated, "the most convenient way to establish the causal link is by analyzing the counterfactual scenario, i.e., the situation where the violating conduct is removed from the analysis of the facts".[1576]

[1569] *Biwater*, ¶ 787 (CL-0085) ("in order to succeed in its claims for compensation, [the claimants] has to prove that the value of its investment was diminished or eliminated, and that the actions [the claimant] complains of were the actual and proximate cause of such diminution in, or elimination of, value").

[1570] *Id.* ¶ 803 (**CL-0085**) ("it] must mean more than simply the wrongful act itself . . ., otherwise the element of causation would have to be taken as present in every case, rather than being a separate enquiry")

[1571] *Id.* ¶ 485 (**CL-0085**) ("by the time that this expropriation took place, . . . the losses and damage for which BGT claims in [the arbitral] proceedings had already been (separately) caused")

[1572] *Lauder v. The Czech Republic*, Award dated 3 September 2001, ¶¶234, 235 (**CL-0186**)

[1573] *Id.* ¶ 235 (**CL-0186**).

[1574] *Spółdzielnia Pracy Muszynianka v. Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020 (**RL-0255**).

[1575] *Id.*, ¶ 617 ("[the Tribunal] must inquire into the element of causation, which is a requirement for damages to be payable."). (**RL-0255**)

[1576] *Id.*, ¶618 ("Causation is conveniently assessed by looking at a counterfactual or but-for scenario, i.e., by removing from the facts the violative conduct."). (**RL-0255**)

850. In the facts of said case, as in this one, the "investor had no right or legitimate expectation to obtain an Exploitation Permit".[1577] In other words, even in the absence of the measures alleged as violating the treaty, the investor would not have obtained an exploitation permit, which led the *Muszynianka's* tribunal to reject that Claimant's claim for damages, since any damages suffered, if any were ultimately proven, would not have been the result of the government measures challenged by the claimant. The same could be said, word by word, of Exmingua's situation, which in this case is aggravated by the reflective nature of the Claimants' claim as Exmingua's shareholders.

851. The decisions discussed above confirm the rule, contained in customary international law and in CAFTA-DR, that any claim by Claimants must surpass the high threshold of proving the existence of direct and sufficient causation between the contested measures and the damage claimed.

852. The Claimants' case does not allege - much less prove - the existence of such direct and sufficient causal link, and, quite on the contrary, the facts show that their investments not only never had the value they are assigned, but that there is no legally relevant, direct and sufficient connection between the challenged measures and the alleged loss of such supposed value. For the reasons discussed in greater detail in §§VIII.D.2), regardless of the government measures that, in the theory of the Claimants, constitute the alleged violations of CAFTA-DR, the Claimants never had the capacity or real intentions to develop the Tambor mining project in the way they intend to present it in this arbitration, and, in particular, none of those measures can be considered as the direct and sufficient cause for them to have experienced losses of between USD 403 and 450 million.

853. Therefore, in the absence of causal link, this Court must deny the Claimants' request for damages, as has been decided by other courts in the same circumstances.

1) <u>The indirect damages claimed by Claimants are subject to specific causal and evidentiary requirements</u>

854. In the Preliminary Decision and the dissent of Arbitrator Douglas, a series of principles and precepts were established that should guide the extent of any claim for indirect or reflective damages in this arbitration, in clear and restrictive terms. In their treatment of damages in the Claimants' Memorial and the accompanying valuation report, the Claimants disregarded said principles and precepts, claiming damages that contradict the decisions already made by the Tribunal.

855. The CAFTA-DR establishes strict requirements in terms of proof of damages suffered, and particularly a high threshold of proof in terms of causality between the contested measures and the damage suffered by a claimant who, like the Claimants, is only a shareholder of the entity that has allegedly been directly impacted thereby. In the words of the Tribunal itself:

[1577] *Id.*, ¶620 ("[Investor] had no entitlement nor legitimate expectation to the Exploitation Permit."). (**RL-0255**).

> […] the requirement is that the claimant itself must have "incurred" harm; it would not be sufficient for a claimant to demonstrate only that a local enterprise in which it has an interest has incurred harm. The burden is on the claimant to allege (and eventually to prove) its own injury. Second, the claimant bears the burden of proving causation, i.e., that its own injury was suffered "by reason of, or arising out of" the challenged State conduct. The more tenuous the connection between the challenged conduct and the alleged injury to a claimant, the heavier this burden may be.[1578]

856. This issue was central to the Tribunal's analysis of whether the Claimants' claim was made under Article 10.16.1(a) of the CAFTA-DR - i.e., claiming for Claimants' own damages - or under its Article 10.16.1(b) - i.e., claiming for damages suffered by the entity in which Claimants have an interest, Exmingua. When the claim is made, as in this case, under Article 10.16.1(a), the Claimant "should prove how and to what extent he could have incurred harm as a result of the company's damage (e.g., as a result of non-payment of expected dividends or decrease in the market value of the shares)".[1579] As the Court made clear, "if claimant files a claim only 'on its own account', then any compensation could only be to the extent of its own proven losses, which may be more difficult to prove and of lesser amount than the company's own direct losses."[1580] As the Tribunal in *Nykomb v. Latvia* held:

> that the reduced flow of income into [the investor company] obviously does not cause an identical loss for [its shareholder] as an investor. […] The money would have been subject to [local] taxes etc., would have been used to cover [investor's] costs […] etc., and disbursements to the shareholder would be subject to restrictions in [local] law on payment of dividends. An assessment of the Claimant's loss on or damage to its investment based directly on the reduced income flow into [investor] is unfounded and must be rejected.[1581]

857. However, despite the fact that the Tribunal, analyzing the Parties' submissions regarding the Preliminary Objections of Guatemala, found that "the Claimants [...] expressly accept that Exmingua's losses cannot simply be equated with its own losses. They recognize that proof of their losses would require additional demonstrations of causation, as well as potentially more complex quantification, including the accounting of any claims of Exmingua's creditors,"[1582] the damages claimed by Claimants retrace such earlier recognition, as discussed below.

858. Finally, and subsidiarily, Claimants' contributory negligence or fault would absolve Guatemala of any liability, or at least reduce the damages claimed by Claimants significantly by breaking the causal link for

[1578] Decision on Preliminary Objections, ¶ 129.

[1579] Decision on Preliminary Objections, ¶132.

[1580] Decision on Preliminary Objections, n. 142.

[1581] *Nykomb Synergetics Technology Holding AB, Stockholm v. Republic of Latvia*, SCC Case, Award dated 16 December 2003 p. 39 (**CL-0073**)

[1582] Decision on Preliminary Objections, ¶118 (internal citations omitted).

Claimants' conduct.

859. According to Article 39 of the Articles on State Responsibility, "In determining reparation, account shall be taken of the contribution to the injury resulting from the act or omission, whether intentional or negligent, of the injured State or any person or entity in relation to whom reparation is sought."[1583] In *Abengoa v. Mexico*, the Tribunal noted that the contributory fault of an investor could result in either the host State being exonerated from liability or, at least, in a reduction of damages.[1584] In the present case, the Claimants' conscious or negligent actions contributed to their own alleged damage.

860. The Commentaries to the Articles on State Responsibility set out the applicable standard of negligence "where it is clear that the victim of the breach has failed to exercise due diligence in relation to his or her property or rights"[1585] and emphasize that the standard of negligence "is not qualified, for example, by requiring that the negligence has been 'gross', the entitlement of any negligence to reparation will depend on the extent to which it has contributed to the harm as well as on the other circumstances of the case."[1586] Investment arbitration precedents are abundant on this subject, illustrating which acts or omissions constitute negligence and in turn lead to contributory negligence on the part of the investor.

861. In *Occidental v. Ecuador*, the majority of the tribunal decided that the investors would have been "negligent" in failing to obtain a legally required authorization prior to the transfer of their concession.[1587] In the case at issue, ILO Convention 169 became effective on June 5, 1996, notwithstanding which, Claimants did not bother to elaborate on and determine its application in Guatemala and the legal effect it would have on the project.

862. In *MTD v. Chile*, the claimants made investments in real estate development projects in the host state under the assumption that the development permits would be granted. However, the investors failed to obtain the contractual protections and the court found that there had been a lack of due diligence and indicated that "BITs are not an insurance against business risk".[1588] In addition, the tribunal stated that the investors "had

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[1583] Articles on State Responsibility, Art. 38 (**RL-0291**).

[1584] *Abengoa, SA y COFIDES SA c. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award (April 18, 2013), ¶ 670 (**CL-0165-ENG-R**) ("For the international responsibility of the State to be excluded or diminished based on an omission or fault of the investor, it is necessary not only that said omission or fault be proven, but also that the causal link between it and the damage suffered is established ")

[1585] Articles on State Responsibility, Art. 38, Comment 5 (**RL-0291**).

[1586] *Id.*

[1587] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012), ¶ 662 (**RL-0256)**.

[1588] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 , Award (May 25, 2004), ¶ 178 (**CL-0208)**. *Véase también Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award

made decisions that had increased their risks in the transaction and for which they have responsibility, regardless of the treatment given by Chile."[1589] The Court stated that the investors had contributory negligence liability.[1590]

863. The same is true in this case. As developed above, the Claimants failed to exercise the required due diligence. They made no effort to carry out any human rights due diligence to determine not only the applicability of Convention 169 in Guatemala, but also the business and socio-political climate in the area affected by the project and with respect to the protests that were occurring at the time of the investment.[1591] They also failed to obtain a social license from the indigenous communities affected by the project - as established by the UN's Guiding Principles on Business and Human Rights and the CIMM standards - prior to making the investment in Guatemala. Worse still, they assumed that, without any guarantee from Guatemala, consultations with indigenous peoples would never be required to continue exploration and exploitation of the mine in the areas covered by their licenses.

864. Accordingly, should the Tribunal find a more appropriate reduction under the circumstances of the case, Guatemala requests that the Claimants' damages be reduced by no less than 50% taking into account that "the investor's responsibilities are no less than those of the government".[1592]

2) The damages claimed contradict the decisions previously adopted by the Tribunal

865. In the Decision on Preliminary Objections, the Tribunal analyzed the interpretation of Article 10.16.1(a) and the possibility that the Claimants could file a claim for damages for reflective or indirect losses, and while it dismissed Guatemala's preliminary objection, the Tribunal and the reasoned vote of arbitrator Prof. Douglas, made a number of statements that should be taken into account when analyzing the Claimants' claim

(March 15, 2016), ¶¶. 6.99–6.102 (**CL-0138)** (The Tribunal declared that the investor was responsible for contributive fault because the situation worsen by "recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands."); *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands, 30 November 2017. ¶ 6 (**RL-0214)** ("in my view this evidence clearly shows that the Claimant's acts and omissions […] contributed in material ways to the events that unfolded and then let to the Project collapse. In particular, the Project collapsed because of the investor's inability to obtain a "social license" […]"); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004), ¶ 243 (**CL-0208)**.

[1589] *Ibid.*, ¶ 242.

[1590] *Ibid.*, ¶ 243.

[1591] *See* Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy Framework, 2011, Principle 17 (**RL-0243**).

[1592] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands, 30 November 2017, ¶ 39 (**RL-0214)**. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador*, ICSID Case No. ARB/06/11, Dissention Opinion of Brigitte Stern, ¶¶ 7-8 (R**L-0257**) (When the parties acted "imprudently and illegally", a 50 por cent in the deduction of damages is "fair and reasonable apportionment of responsibility").

for damages, which imply that their claim cannot be absolute or unlimited.

866. The Tribunal recognized that it is important to be mindful of the distinction between damages directly incurred by a company in the host country and alleged damages indirectly incurred by an investor who is its shareholder, including the possibility that not all of the former may be equated with the latter. That is, it must be proven that the loss or damage was caused to its interests and that it was causally connected to the claimed violation.[1593]

867. In this sense, the Tribunal continues to assert that:

> […] the majority has made clear that a proper causation and quantum analysis would have to factor in creditor claims, which take priority, before there can be any determination of net losses (if any) that actually were incurred by shareholders. Because shareholders in these circumstances do not recover any proceeds that properly were due to creditors, there is thus no issue of the shareholders themselves (much less a tribunal) "avoid[ing] satisfying" creditor claims. Creditors of the local enterprise retain all rights and remedies they otherwise had against local enterprise.[1594]

868. Following the Court's reasoning, the claim for damages ignores the expenses and taxes that would have been paid by Exmingua prior to any distribution to Claimants. For instance, Versant did not apply any corporate tax or tax withholding to past earnings, which is incorrect. In the absence of the alleged investment violations, if the operating mine had generated positive cash flows from May 2016 to March 2020, they would have been subject to income taxes in Guatemala, and if they had been paid to the Claimants, an additional 5% would have been withheld.[1595]

869. Additionally, in accordance with the burden of proof and causation established by the Court regarding shareholder damages, the Rosen Report notes that Exmingua did not pay any dividends to any of the Claimants during the 1.5 years in which it operated and generated income. This shows that Claimants had not received any return on their investment in Exmingua from 2008 onwards. Although Mr. Kappes' statement indicated that the plan was to reinvest the cash flows generated from the mine's operation in future exploration and expansion, it is unclear when this would have occurred and whether the Claimants would ever have received any return on their investment. There are no contemporary business and development plans or forecasts provided by the Claimants that could support their claim.[1596] Their claims are merely speculative.

870. The Court was clear in establishing the burden of proof and causation with respect to the indirect

[1593] Decision on Preliminary Objections, ¶ 159.

[1594] Decision on Preliminary Objections, n. 176.

[1595] Rosen Report, ¶ 250.

[1596] Rosen Report, ¶ 264.

damages that Claimants could claim, which Claimants have failed to demonstrate. Consequently, any indirect damages that Claimants intend to claim must be rejected because they do not comply with the precepts already issued by the Court in its Decision on Preliminary Objections and, in general, with the law applicable to the claimed damages.

D. Claimants apply an incorrect method

1) The valuation methodology invoked does not apply to speculative entrepreneurship such as Claimants'

871. The manner and stage of development of Claimants' purported investment in Guatemala makes a valuation based on future income forecasts of the type proposed by Claimants unacceptable. The project's unresolved uncertainties at the time of the valuation date regarding the project's actual revenue generating capacity and the accurate extent of expenses and risks that would be incurred to generate such revenue would make it impossible to maintain, as Claimants contend, that the fair market value of their investment in Guatemala were to be established on the basis of such future projections.

872. One of the consequences of using Claimants' proposed method is that the magnitude of damages claimed is unjustifiably greater than the negligible magnitude of any investment made by Claimants. This disproportion could only be explained if the Claimants misled the sellers of those assets, or if they are actually trying to mislead the court.

873. The Rosen Report confirms that Versant's analysis and findings are flawed in a number of respects, and therefore concludes that Claimants' experts do not provide reliable measures for the determination of Claimants' damages in the present case.[1597] The damages claimed by Claimants are summarized as follows and based on the following categories: (a) "Operating Mine" for USD 71 million; (b) "Known Exploration Potential" for USD 89 million; and (c) "Exploration Opportunity" for USD 244-291 million, totaling USD 404-451 million.[1598]

874. In general, the conceptual framework on damages adopted by Versant is not consistent for the following reasons: (a) the calculation of estimated past losses was made on a pre-tax basis; (b) Versant did not make adjustments to the estimates of past losses based on the applicable risks; (c) the lack of deductions applicable to the investment such as royalties, taxes and tax withholdings; and (d) for the specific case, it is necessary to apply an *'ex post'* rather than an *'ex ante'* methodology, which was the methodology used by Versant.[1599]

[1597] Rosen Report, ¶ 38.

[1598] Rosen Report, ¶ 220 (Figura 12-1).

[1599] Rosen Report, ¶ 40.

875. Furthermore, the Rosen Report concludes that the damages claimed by Claimants are unreliable for the following reasons:

- With respect to damages for the "Operating Mine", Versant employs a discounted cash flow ("DCF") simulation based on Indicated Resources and Inferred Resources[1600] (the two lowest levels of certainty based on the CIM rating), which does not conform to international mineral valuation codes and does not consider or reflect the high level of uncertainty inherent in including resources with low certainty in a DCF simulation. Versant bases its analysis on the SRK report's life of mine ("LOM") model, which, based on the RPA-SLR report, is not reliable.[1601] Primarily, such a model is unreliable because there is insufficient technical information available regarding the resources of the Operating Mine; the SRK LOM model is not based on a mine plan; SRK did not apply risk factor adjustments to the Inferred Resources; SRK's assumption that 250 tons per day ("tpd") would be mined is unfounded as this exceeded the maximum anticipated amount of 150 tpd; SRK's estimated operating costs were not given the required importance as they were based on a stripping ratio rate that was very low; and the estimated capital costs were unfounded and too rudimentary to use in a DCF valuation. Finally, Versant's report does not reflect the risks of Covid-19 or the historical social licensing issues of the El Tambor Project.[1602]
- With respect to the alleged "Known Exploration Potential", Versant inadequately applied market comparables when calculating a company value per ounce of Resources for the set of comparables and attempting to apply it to the Known Exploration Potential for which there were no defined Resources. Also, the comparables Versant identified are significantly more advanced than the Known Exploration Potential and could not provide any appropriate value benchmarks for prior stage exploration objectives.[1603]
- Finally, with respect to the "Loss of Exploration Opportunity", Versant applies the same methodology used for the Known Exploration Potential for its calculation of the Loss of Exploration Opportunity, and in fact, uses the same set of comparables. Therefore, this analysis is not reliable and suffers from the same flaws as the previous analysis.[1604]

876. Additionally, Versant uses a discounted cash flow ("DCF") methodology to value the operating mine, which is not consistent with international valuation standards and guidelines for the following reasons:[1605]

- Versant performed a DCF simulation on project without reserves where the inferred resources were the greatest part the project resources;
- The reason why inferred resources were used in the DCF simulation was not explained and no adjustment was made to the valuation to reflect the increased risk of using only inferred resources, which could have been done through some probability adjustment or a higher discount rate;

[1600] According to the Canadian Institute of Mining ("CIM"), Mineral Resources are sub-divided, in order of increasing geological confidence, into Inferred, Indicated and Measured Categories. An Inferred Mineral Resource has a lower level of confidence than that applied to an Indicated Mineral Resource. An Indicated Mineral Resource has a higher level of confidence than an Inferred Mineral Resource but has a lower level of confidence than a Measured Mineral Resource. *See* Rosen Report, ¶ 132.

[1601] *See supra* §§VII.C.

[1602] Rosen Report, ¶ 42-44.

[1603] Rosen Report, ¶ 45-49.

[1604] Rosen Report, ¶ 50-51.

[1605] Rosen Report, ¶ 257.

- Versant did not consider whether other valuation methods would have been more appropriate given that inferred resources were the greatest part of the project's total resources;
- No relevant statements were included regarding the level of assurance of the technical and economic parameters relating to the pre-feasibility or feasibility study;
- Versant's valuation uses 2004 resource estimates, which are not current and without any explanation of the reliability implications of using outdated estimates; and
- Versant did not use different valuation methodologies to value each component of its analysis.

877. Basically, in the valuation of any early stage business in any industry, the decision as to whether the DCF methodology is reliable for a valuation should be made based on whether or not there is sufficient reliable information to accurately forecast future cash flows that such a business may generate in the future. A mining project is generally undertaken after sufficient exploration work and the finding of evidence to declare a reserve and after economic studies have been conducted to show that the project is economically viable.[1606]

878. In the case of the El Tambor mine, although the mine had been operating for 1.5 years and the infrastructure and processing plant had already been built, the drilling, sampling and other work required to search for resources and to increase the degree of certainty for the identification of proven or probable reserves had not been performed, which is an important element for the elaboration of a DCF simulation.[1607]

879. Accordingly, Rosen concludes that a) the DCF prepared by Versant does not meet international mineral valuation standards and did not reflect the relevant uncertainty in applying the method; b) some of the considerations used in preparing SRK's DCF are erroneous; and c) Versant did not adequately reflect project specific risks in cash flows or the discount rate, including mineral, operating, social license and permit risks.[1608]

880. With respect to the alleged seized concentrate, Rosen explains that Versant relies on an internal KCA email setting out the alleged concentrate inventory as of March 30, 2017. It would be expected that such information be corroborated with production, accounting reports, and Exmingua reports received by Guatemalan authorities. Versant does not state that it has conducted any due diligence to corroborate the information contained in that single email.[1609] Furthermore, a review of the email indicates that a substantial portion of the amount claimed in Versant's report may not have been seized by Guatemala.[1610] Moreover, Versant uses the price of gold as of March 31, 2020 to calculate damages. Notwithstanding the above, in the absence of the alleged violations, the price at which the concentrate would have been

[1606] Rosen Report, ¶ 258.

[1607] Rosen Report, ¶ 259.

[1608] Rosen Report, ¶ 261.

[1609] Rosen Report, ¶ 281

[1610] *Ibid*.

the price as of May 2016, therefore the date is inappropriate.[1611]

881. Consequently, and based on the adjustments made by Rosen, the damages with respect to the seized concentrate would be reduced from USD 645,121.00 to USD 158,504.00, which is a 75% reduction.[1612]

2) Claimants rely on incorrect date or assumptions

882. In valuing the operating mine, Claimants' appraisers have relied on a number of data and assumptions related to the operating costs, capital expenditures and production capacity of the mine in order to forecast the project's cash flows,[1613] assumptions which show the poor reliability in the outcome of such valuation.

883. Claimants also err in the determination of the risk-free rate used in their calculations. Versant bases its analysis on the result of averaging a 10-year rate for U.S. Treasury bonds through the valuation date, resulting in a rate of 2.35%. Versant mentions that, up to the valuation date, the rate resulting from a 10-year calculation of U.S. Treasury bond rates was subject to "extraordinary market factors that led to low rates to date".[1614]

884. When carrying out a DCF simulation, the term of the risk-free interest bond must coincide with the term of the discounted cash flows. For the discounted cash flows from Versant's DCF analysis for the period March 2020 through December 2026, a term of approximately 6 years, a risk-free rate for the same term should have been applied.[1615]

885. With respect to the beta factor,[1616] Versant's report uses a publication by Aswath Damodaran, a corporate finance expert, as a basis for the beta factor estimate at an operating mine. Versant relies on a January 2020 publication that lists the beta of the "metals and mining" industry in emerging markets at a value of 0.88. Upon reviewing the companies included, it is concluded that several of them focus on aluminum, copper, lithium and other base metals mining. The risks applicable to such companies do not necessarily apply to Claimants' investment, which is focused exclusively on gold mining and processing.[1617]

886. With respect to the project-specific risk premium, which has not been included by Versant, it is important to note that it should have been applied. This premium involves an adjustment to cash flows and constitutes a subjective analysis that includes many factors such as resource risk, social license risk, and permit-

[1611] Rosen Report, ¶ 282.

[1612] Rosen Report, ¶ 281, Appendix 6.

[1613] Rosen Report, ¶ 266-267

[1614] Rosen Report, ¶ 261

[1615] *Ibid.*

[1616] Beta is a measure of a subject company's volatility and risk relative to the general equity market. *See* Rosen Report, ¶ 273.b; Appendix 8, ¶ A.89-A.92

[1617] *Id.*

related risk, among others.[1618]

887. With regard to the cost of debt (which is the second component of WACC), Versant indicates that Exmingua had no outstanding debts and therefore it could not rely on the company's financial obligations to determine its cost of debt. In this regard, Versant relied on an industry estimate from a Damodaran publication and the cost of debt of five companies "with similar profiles. This value was estimated at 8.95% at the date of valuation.[1619]

888. After analyzing the information, Rosen identified a number of issues with respect to the estimated value. First, with respect to the information obtained, Versant is again using data from the "metals and mining" industry rather than using more appropriate information from the "precious metals" industry. The cost of debt for this industry is 4.47%. Second, the information they rely on includes a number of companies that do not have profiles similar to Claimants' investments. Third, at least some of the companies listed would have conducted feasibility studies and tested gold reserves, which Claimants have not done.[1620]

889. Additionally, Versant applies a 25% rate to the assumption of the cost of debt based on the fact that income tax in Guatemala is 25%. However, in Versant's DCF analysis, the calculated income tax is based on an alternative regime which is calculated based on the percentage of income. Consequently, Versant did not properly reflect the taxes in its WACC, due to Exmingua's apparent choice of an income-based rather than profit-based tax regime, where interest on debt would not provide a tax shield.[1621]

890. Regarding capital structure (the third component of WACC), Versant has also based its analysis on a Damodaran publication to estimate its capital structure. It has relied on a debt ratio for emerging "metals and mining" markets of 58.64% which translates into 37% debt and 63% equity. Therefore, Versant has calculated a WACC that implicitly assumes debt financing, even though the Claimants did not have third-party financing. Again, Versant has relied on information from a "metals and mining" industry rather than using more ad hoc industry information (precious metals).[1622]

891. It is unreasonable for Versant to assume that Exmingua would have had access to financing as no financing study had been conducted and the project still had significant risks that would have dissuaded financiers from granting credit.[1623]

[1618] Rosen Report, ¶ 273.c.

[1619] Rosen Report, ¶ 273.d.

[1620] Rosen Report, Appendix 7, ¶ A.100.

[1621] Rosen Report, Appendix 7 ¶ A.104-A.105.

[1622] Rosen Report, ¶ 273.e

[1623] Rosen Report, Appendix 7 ¶ A.108.

892. Finally, with respect to project specific risks, the discount rate used is insufficient to reflect such risks at the Valuation Date. These include resource risk, which was highly uncertain; social license risk, which was evident from years-long social opposition that was likely to continue (this risk may lead to operational disruption and complete mine shutdown); permit risk, specifically the assumption that the Claimants would have been able to obtain EIA approval for the Santa Margarita license, specifically because of the existing conflict and climate.[1624]

893. Accordingly, the discount rate used by Versant based on all of these assumptions could be reasonable for another, larger mine project located in Guatemala that would have conducted pre-feasibility studies, defined mineral reserves and a mine plan ("LOM"), but not for the El Tambor project.[1625]

E. The Correct Valuation of the Damages Claimed

894. In this section, Guatemala formulates an appropriate fair market value appraisal of Claimants' investments allegedly affected by the claims filed thereby, performed by applying the valuation methods appropriate to a venture such as Claimants' given its stage of development, and the information available as of the correct Valuation Date, i.e., May 5, 2016.

895. To such effect, Rosen contends that the correct valuation method for a project such as the one in dispute is that of comparable transactions using a free market approach.[1626] Valuation techniques using a free-market methodology have been recognized as valid for mineral resource projects at any stage of development in instruments such as the CIMVAL Code and other internationally recognized mineral valuation codes such as VALMIN, SAMVAL and IMVAL.[1627]

896. Upon making the corresponding calculations with the applied valuation methodology, damages, in the event that the Court should decide to award them, would amount to a sum between USD 3.3 million and 7.9 million with a median of USD 4.7 million.[1628]

[1624] Rosen Report, ¶ 273.c.

[1625] Rosen Report, ¶ 274. In addition to Rosen's conclusions, Claimants have not proven with certainty the ownership of the titles that justify the damages claimed. The docket does not have enough information with respect to the effective ownership of the titles that allegedly justifies the claim submitted by Claimants, and – in partiular – regarding the conditions and process of such acquisition. There is not enough proof, with special enphasis on the impact that the moment in which the assets seem to have been effectively acquired have on the claims submitted. It seems from the documents and arguments submitted, that the acquisition was performed through stages, at moments in which some of the damages seem to have already been suffered, and in exchange of the commitment to make limited investments in the project, which contradicts the narrative that Claimants try to impose in the quantification of their alleged losses.

[1626] Rosen Report, ¶ 30, 144, 150.

[1627] Rosen Report, ¶ 153.

[1628] Rosen Report, ¶ 32.

897. The valuation of comparable transactions was performed, as related, applying a market approach to value the fair market price of the Operating Mine as well as the Exploration Objectives contained in the El Tambor Project. This is because the transaction prices paid to acquire the comparables would include both the defined resources and any potential exploration of the projects as negotiated by the buyers and sellers in such transactions.[1629]

898. When performing a valuation of comparable transactions, it is important to understand and analyze the characteristics of each potential comparable transaction identified to determine the level of comparability with the project in the specific case, in this case, the El Tambor Project. All projects are unique and therefore transactions do not have to be "perfectly" comparable or match all key project attributes to obtain a relevant and comparable valuation. Notwithstanding the foregoing, the level of comparability and the variability in the range of values obtained will dictate the level of reliability that can be placed on the results of the methodology of comparable transactions in the mining sector.[1630]

899. For the calculation of damages, the Rosen Report has used the fair market price of Claimants' investment as of May 5, 2016 ("Valuation Date"), in the event that Claimants would not have been deprived of their investment, plus interest prior to the date of the award projected to the tentative date thereof.[1631] For this purpose, the valuators have defined the fair market value as:

> The price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.[1632]

900. Because Exmingua had no third-party financing and allegedly Claimants collectively owned 100% of the shares in Exmingua, the appropriate measure to determine damages is the enterprise value ("EV") of Exmingua.[1633] Such value should take into account the withholding of taxes and the term in which Claimants would get a return from and on their investment.

901. The comparable transactions analysis consisted of a review of completed gold projects from a list of owners compiled from an S&P Global Market Intelligence ("S&P Global") database to identify transactions that Rosen deemed appropriate and relevant to compare to the el Tambor Project as of the Valuation Date.[1634]

[1629] Rosen Report, ¶ 154.

[1630] Rosen Report, ¶ 155.

[1631] Rosen Report, ¶ 28.

[1632] Rosen Report, ¶ 118.

[1633] Rosen Report, ¶ 120.

[1634] Rosen Report, ¶ 157.

902. The complete analysis is shown in Exhibit 4 to the Rosen Report and the following is a summary of the outcome of the comparable transactions for the El Tambor Project:[1635]

Target	Buyer	Transaction Close Date	Enterprise Value	Total Resources	EV/Resources	Adjustment	Adjusted EV/Resources
Oro Silver Resources Ltd.	Canarc Resource Corporation	10/30/2015	$ 1,205	151,053	8.0	65%	13.2
Alta Floresta Gold Ltd.	Equitas Resources Corp.	4/27/2016	6,325	496,000	12.8	11%	14.1
Animas Resources Ltd.	GoGold Resources Inc.	2/28/2014	14,302	557,000	25.7	-9%	23.3
CB Gold Inc.	Red Eagle Mining Corporation	10/8/2015	8,329	426,927	19.5	60%	31.3

903. In order to obtain a comparable value range for the El Tambor Project as of the Valuation Date, the Rosen Report multiplies the amount of equivalent gold resource in the El Tambor Project as of the Valuation Date by the range of multiple transactions derived from the comparable transactions identified in the above table. A summary of such calculations is presented below:[1636]

	Multiple	Exmingua Resources	Implied Value
Low:	13.2	253,000	**$ 3,330,525**
Median:	18.7	253,000	**$ 4,727,824**
High:	31.3	253,000	**$ 7,920,472**

904. Accordingly, and as mentioned above, the analysis concludes that, for the Operating Mine, using a market valuation, the value would range from US$3.3 million to US$7.9 million, with a median of US$4.7 million.

905. Valuation through comparable transactions with a market methodology is the appropriate methodology to value the El Tambor Project in the circumstances of the case. Notwithstanding the foregoing, the Rosen Report presents an analysis using an income-based or DCF methodology and an analysis based on a cost methodology. As described in the following paragraphs, the results show that the $400-450 million values alleged by Claimants are simply unreasonable and manufactured with uncertain and erroneous assumptions.

906. With respect to the analysis using a revenue-based or DCF methodology,[1637] Rosen contends that, due to insufficient information available to prepare a reliable cash flow projection as of the Valuation Date, it has not presented a DCF-based valuation as its primary analysis, but rather a presentation of calculations for illustrative purposes to show the net present value ("NPV") based on Versant's model as of the Valuation Date.[1638]

[1635] Rosen Report, ¶ 161.

[1636] Rosen Report, ¶ 164.

[1637] Rosen Report, ¶ 174-178.

[1638] Rosen Report, ¶ 175.

907. In calculating the NPV of the after-taxes cash flows from the Operating Mine at the Valuation Date, Rosen took into consideration gold futures market prices, the corresponding royalties payable by Exmingua, inflation, taxes that a domestic buyer would pay, depreciation and amortization, working capital and a risk adjusted rate.[1639]

908. After calculations based on economic adjustments made to conform to the reality of the Valuation Date, the NPV, in the absence of the alleged violations, would have a value of zero.[1640] This proves that the Operating Mine on the Valuation Date would not have been an economically viable venture even in the absence of the alleged violations.[1641] It is relevant to mention that adjustments to cash flows or respective discounts for specific project risks such as social license risks, permit risks, among others, were not made.[1642] If these were included, the results would be further reduced.

909. Finally, Rosen also presents a general and illustrative analysis of what a valuation using a cost methodology could be. As noted in the DCF analysis described above, the limited information available also precludes a full cost based valuation given that exploration cost information by date and area is not available.[1643] In particular, most of the exploration costs were incurred in 2001 to 2003 and may no longer have value at the Valuation Date due to the time lag.[1644] Notwithstanding the foregoing, the available information regarding the investment, financial statements and transactions on the ownership of the El Tambor project allow certain reasonable conclusions to be made.

910. Based on the available information of the investment in the project from 2000 to 2016 by Gold Field, Fortuna and Radius, the value at the Valuation Date, in the absence of the alleged violations, would be approximately a maximum amount of USD 7.5 million and the value of Exmingua's total assets would be no more than USD 13 million. This, according to Rosen, also demonstrates that Versant's conclusion that the fair market value of the El Tambor project is $400 million as of March 2020 is not reasonable.[1645]

911. The Rosen Report shows that, even using three different methodologies and approaches, i.e., comparable transactions with a free market approach (mainly adopted methodology), a revenue or DCF methodology and a cost methodology, the Claimants' valuation in the amount of USD 400-450 million is

[1639] Rosen Report, ¶ 185-186. *See, also,* Appendix 5, Rosen Report.

[1640] Rosen Report, ¶ 172, 187.

[1641] The NPV calculations were from a low of negative USD 9.8 million to a high of negative USD 9.6 million. *Véase* Rosen Report, ¶ 187-188, n. 143.

[1642] Rosen Report, ¶ 187-190.

[1643] Rosen Report, ¶ 148.

[1644] Rosen Report, ¶ 149.

[1645] Rosen Report, ¶ 195.

unreasonable and far from reality. For the valuation of the Operating Mine, using comparable transactions, the value would range from $3.3 million to $7.9 million, with a median of $4.7 million. If the Court were to find any violation of CAFTA-DR, it should not award any larger amount, and in any case should reduce such amount on account of the contributory negligence of the Claimants.

F. The Award of Interest, if applicable, Should be Calculated at a Simple Rate No Higher than the Risk-Free Interest Rate

1) Interest must accrue at a risk-free rate

912. Claimants argue that "an award of interest is an integral element of the principle of full reparation in international law"[1646] and that "the interest rate should be set at the level necessary to ensure full reparation under the circumstances and, as such, requires a specific assessment of the case."[1647] They also indicate that "Since the CAFTA-DR requires that compensation include interest at a commercially reasonable rate until the date of payment in case of legal expropriation, any compensation award in this case for illegal expropriation or other violations of the Treaty should be accompanied by interest at least at that level."[1648] Finally, they claim to be entitled to interest on the amounts awarded in the award at the same compound interest rate requested for the pre-award interest.[1649] As discussed in this section, the only rate the Tribunal can recognize and apply is a simple, risk-free interest rate such as the annual rate on U.S. government treasury bonds.[1650] This applies to both pre- and post-award interest, since CAFTA-DR is clear and does not differentiate between interest rates.

913. Claimants insist on applying an incorrect compensation standard. Guatemala argues and reiterates that the parties to CAFTA-DR intended and agreed not to make any distinction between a legal and an illegal expropriation, wherefore any distinction that Claimants make regarding the applicable interest rate for legal or illegal expropriations is irrelevant.[1651] Under the CAFTA-DR, any expropriation, except for those that meet the conditions set out in Article 10.7.1 or those non-discriminatory measures that fall under Annex 10-C.4, constitutes a breach of the CAFTA-DR. Accordingly, the valuation principles contained in Articles 10.7.2 through 10.7.4 are the only principles applicable to expropriations that are in violation of CAFTA-DR.

914. With respect to the payment of interest, Article 10.7.3 of the CAFTA-DR provides that "the compensation paid shall not be less than the fair market value on the date of expropriation, plus interest at a **commercially reasonable** rate for that currency," (emphasis added). Claimants' experts calculate pre-award

[1646] Memorial, ¶ 356.

[1647] Memorial, ¶ 357.

[1648] Memorial, ¶ 359.

[1649] Memorial, ¶ 400.

[1650] Rosen Report, ¶ 210.

[1651] *See* CAFTA-DR, Article. 10.7.3; Annex 10-C.4 (**CL-0001**).

or pre-adjudication interest as follows:

> […] we have calculated pre-award interest using the U.S. Prime rate plus 2 percent. The Prime rate of interest is a borrowing rate that is only available to the most creditworthy borrowers, typically large corporate customers. It is reasonable to consider a premium above the prime rate to reflect a commercial rate that is widely available to market participants, not just the most creditworthy borrowers.[1652]

915. While it is true that the interests prior to the award must be assigned on a case-by-case basis, it is also true that the treaty applicable to the dispute already establishes the parameters for setting them, in this case, a "commercially reasonable rate". Claimants do not explain why the "higher U.S. interest rate plus 2 percent" can be considered a "commercially reasonable" rate". Versant merely states that "it is a borrowing rate that is only available to the most creditworthy borrowers, typically large corporate clients,"[1653] and Claimants conclude in three paragraphs that "[t]he interest rate should be set at the level necessary to ensure full relief under the circumstances […]"[1654] Claimants have the obligation to prove and sustain their claim, which is not the case here.

916. On the contrary, Guatemala contends that the applicable rate should be a risk-free rate, such as the annual rate for U.S. government treasury bonds,[1655] which has been defined as the return on a security or a portfolio of securities that has no risk of default or risk of reinvestment. In this regard, Mark Kantor explains that:

> Historic earnings must be "brought forward" to the valuation date by means of an interest rate, while future earnings are discounted back to the valuation date by means of a discount rate. The interest rate used for bringing historical amounts forward will clearly not contain the same risk factors as the discount rate used to present value future amounts. As a practical matter, the interest rate used for the historical amount is often a "risk-free" rate (such as the rate for US Treasuries) or a statutory rate for pre-judgment interest."[1656]

917. In the same vein, Franklin Fisher and R. Craig Romaine assert that an investor is not entitled to compensation for risks he did not undertake:

> The plaintiff's opportunity cost of capital includes a return that compensates the plaintiff for the average risk it bears. But, in depriving the plaintiff of an asset worth Y at time 0, the defendant also relieved it of the risks associated with investment in that asset. The plaintiff is thus entitled to interest compensating it for the time value of money, but it is not also entitled to

[1652] Versant Report, ¶ 282.
[1653] *Id.*

[1654] Memorial, ¶ 358.

[1655] Rosen Report, ¶ 210.

[1656] Mark Kantor, Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence (2008), p. 49 **(CL-0269).**

> compensation for the risks it did not bear. Hence prejudgment interest should be awarded at the risk-free interest rate […].[1657]

918. Considering that the Claimants claim that they were deprived of the opportunity to develop the El Tambor mine in 2016, if this were proven, it would imply that the Claimants did not assume the risk associated with the investment from the time they stopped exploring and exploiting the operations in Progreso VII and Santa Margarita.

919. In this regard, several international investment tribunals confirm that a risk-free rate such as the interest rate on U.S. Treasury bonds should be applied to amounts payable in dollars.[1658] Especially investment tribunals constituted under the North American Free Trade Agreement ("NAFTA") regime, which contains the same formula for the payment of interest,[1659] have applied a risk-free rate. For example, the court in *ADM v. Mexico* decided that:

> The interest shall be calculated for each month of the period (December 31,2005 until payment is made) at a rate equivalent to the yield for the month, at the interest rate which is more closely connected with the currency of account in which the award of compensation is made (See S.D Myers v. the Government of Canada, Second Partial Award, para. 304). As compensation in the present arbitration is to be awarded in US. Dollars, the simple interest rate for US. Treasury bills is appropriate.[1660]

920. As the court at *Siag & Vecchi* decided in reference to the *Chorzów Factory* case, "even in cases of illegal expropriation, the reparation to be awarded to the claimant must be merely compensatory".[1661]

[1657] Franklin M. Fisher and R. Craig Romaine, *Janis Joplin's Yearbook and the Theory of Damages*, JOURNAL OF ACCOUNTING AUDITING & FINANCE, Vol. 5, Nos. 1-2, 145, 146 **(RL-0292).**

[1658] *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, IIC 65 (2005), 25 April 2005, ¶ 471 (**CL-0062)** ("The Tribunal is of the opinion that the U.S. Treasury Bills rate is under the circumstances"); *BG Group Plc. v. The Republic of Argentina*, UNICTRAL, Final Award (December 24, 2007), ¶ 455 (**CL-0050)**; Marion Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award, 16 May 2012, ¶ 324 (**RL-0258**) ("the appropriate financial instrument is the 5-year Treasury Bill of the United States"); *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/1, Award dated 27 November 2013, ¶ 258 (**CL-0063**) ("The use of a risk-free rate in respect of all principal amounts is justified in any case, by the legal nature of the claim as recognized and enshrined in the Award and is supported by the particular nature of the present Award under international law."); *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of (December 30, 2016), ¶ 880 (**RL-0259)** ("Taking up the concerns raised by Respondent and its experts regarding the integrity of the LIBOR rate as a reliable benchmark for interest rates, the Tribunal will instead refer to the US Treasury bill rate, which both Parties' experts have relied on in various aspects of their valuations")

[1659] The North American Free Trade Agreement Art 1110.5 (**RL-0174**) ("If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, **and interest had accrued at a commercially reasonable rate** for that G7 currency from the date of expropriation until the date of payment.")

[1660] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. c. Mexico*, ICSID Case No. ARB (AF)/04/5, Award (November 21, 2007), ¶ 300 (emphasis added) (**CL-0195**).

[1661] *Waguih Elie George Siag & Clorinda Vecchi v. Egipto*, ICSID Case No. ARB/05/15, Award (June 1, 2009), ¶ 545 (**CL-0167**) (The tribunal also noted that "the majority opinión in the Iran-United States Claims Tribunal seems to have been that punitive damages are not available").

921. Consequently, the interest prior to the award should only reflect the value of the money over time. This is best determined by using a risk-free interest, i.e., an interest rate applicable to credits to a borrower with zero (or nearly zero) risk of default. In most circumstances, the interest rate on U.S. Treasury bonds is used as a risk-free interest rate because U.S. government loans are considered risk-free loans.

2) Only simple interest should be accrued

922. As to whether the applicable interest rate should be simple or compound, Claimants contend that there is an "overwhelming majority" of investment tribunals that have ruled compound interest to pre-award amounts.[1662] Furthermore, Versant's valuation experts assert that "[c]ompound interest is economically appropriate because of its widespread application in the commercial world -nearly all modern forms of commercial finance involve compound interest".[1663]

923. In short, a simple interest rate is one calculated solely on the principal amount, which remains constant over time and which means that interest accrued over a given period of time does not become part of the principal amount used to calculate interest for the next term. On the other hand, a compound interest rate is calculated on the principal amount, including accrued interest from previous periods.[1664]

924. Contrary to Claimants' claims, investment tribunals have repeatedly refused to award more than simple interest for reasons of compelling legal interpretation.[1665] Indeed, the international law position on compound interest is reflected in the International Law Commission's commentaries, in article 38 of the Articles on State Responsibility:

> An aspect of the question of interest is the possible award of compound interest. The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example, the Iran-United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim. In R.J. Reynolds Tobacco Co. v. The Government of the Islamic Republic of Iran, the tribunal failed to find: any special reasons for departing from international precedents which normally do not allow the awarding of compound interest […]

[1662] Memorial, ¶ 360.

[1663] Informe Versant, ¶ 281.

[1664] *See generally*, MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW, (2da. Ed.) (2017), ¶ 6.222 **(CL-0247**).

[1665] *See, for example*, *CME Czech Republic BV c. La República Checa*, CNUDMI, Laudo Final (14 de marzo de 2003), (rejecting the award of compound interest because, under the aplicable law in the Czech Republic, compound interest was appropiate only if an agreement with respect those interests was made, and there was not such agreement) (**RL-0260**); *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003,¶ (**RL-0261**) (dismissing Claimant's request to apply compound interest in absence of an express agreement between the parties under Venezuelan law)

> [...] The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the British Claims in the Spanish Zone of Morocco case: the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other … is unanimous … in disallowing compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest.[1666]

925. In this sense, the practice of investment arbitration supports the award of simple interests, with only exceptional circumstances for the opposite case. This has been decided, among others, in the following decisions: *Astaldi v. Honduras*,[1667] *AUCOVEN v. Venezuela*[1668],[1669] *Elsamex v. Honduras*,[1670] *SGS Société Générale de Surveillance S.A. v. Paraguay*,[1671] *Tza Yap Shum v. Peru* [1672] and *Wena Hotels Limited v. Egypt*.[1673]

926. Within said exceptional circumstances, Gotanda mentions that compound interest should only be awarded if the Claimant had to bear financing costs that have entailed compound interest.[1674] In *CME v. Czech Republic*, the court rejected the award of compound interest because the Claimant "did not prove that it had borrowed money from a bank and paid compound interest".[1675] In the present case, the Claimants have not proven that they had third-party financing,[1676] wherefore this exceptional situation does not apply either.

927. Additionally, under Guatemalan law, the application of compound interest is prohibited in civil obligations and must be agreed upon in commercial obligations in order to be effective.[1677] Any interpretation of the CAFTA-DR that overrides and contradicts such prohibition would contradict the object and purpose of

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[1666] Articles on State Responsibility, Art. 38, commentary 8 (internal citations ommitted) (**RL-0291**).

[1667] *Astaldi S.p.A. v. Republic de Honduras*, ICSID Case No. ARB/07/32, Award (September 17, 2010), ¶ 80 **RL-0293**).

[1668]*Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003, ¶ 426 (**RL-0261**).

[1669] *Id.*

[1670] *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Award 16 November 2012, ¶ 866 **(RL-0262).**

[1671] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012, ¶ 183 **(RL-0263)**

[1672]Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6 (Award of 7 July 2011), ¶ 303 **(CL-0143)**

[1673] *Wena Hotels Ltd. v. Egipt*, ICSID Case No. ARB/98/4, Award, ¶129 **(CL-0151-ENG).**

[1674] IRMGARD MARBOE, ¶ 6.234 **(CL-0247**).

[1675] *CME v Czech Republic*, Caso CNUDMI, Laudo Final de Daños (14 de marzo de 2003), ¶ 646 **(RL-0260)**

[1676] Rosen Report, ¶ A.108

[1677]Civil Code, Decree Law No. 106, Art. 1949 **(C-0418)** ("It is prohibited the capitalization of interests. Banking institutions are excluded and are subject to what it is stipulated by the Monetary Board; Commerce Code, Decreto Ley Nro. 2-70, Art. 691 **(C-0417)** ("Capitalization of interests. In the commercial obligations, the capitalization of interests can be agreed, as long as the interest rate is not higher than the weighted average interest rate applied by the banks in their active operations, in the relevant period.")

the treaty and should therefore be disregarded.[1678] In this sense, the courts in *Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador*[1679] and *Desert Line Projects LLC v. Republic of Yemen*[1680] dismissed claims regarding compound interest based on the fact that such form of calculation was prohibited under local law.

928. Unlike the Claimants' argument, Marboe explains that while there are courts that have awarded compound interest, their reluctance to award them for various reasons demonstrates that compound interest as a component of compensation for damages is not unanimously recognized in international practice.[1681]

929. For the reasons set out above, if the Tribunal were to find that Claimants are entitled to payment of interest, it should (i) apply a risk-free interest rate and (ii) award simple interest.

IX. GUATEMALA'S COUNTERCLAIM: Environmental Remediation

A. The Tribunal has jurisdiction to resolve this Counterclaim under the ICSID Convention and CAFTA-DR

930. Article 46 of the ICSID Convention states that the Arbitral Tribunal shall determine counterclaims directly related to the dispute, "provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre". In this case, the consent of the parties and the jurisdiction of ICSID are established in the CAFTA-DR, as recently affirmed by the tribunal in *David Aven v. Costa Rica*.[1682]

931. Said tribunal stated that "Section A [of Article 10 of the CAFTA-DR] also set forth (...) some obligations for the investor, particularly with respect to the environmental legislation of the host State,"[1683] referring to Articles 10.9.3.c and 10.11 of the CAFTA-DR. On the one hand, Article 10.9.3.c states that nothing in the treaty prevents a Party from adopting or maintaining measures, including those of an environmental nature "(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement; (ii) necessary to protect human, animal, or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources.[1684] Article 10.11, on the other hand, states that: "nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure (...)

[1678] *Cf.* Vienna Convention on the Law of Treaties, art. **(CL-0005)**.

[1679] *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, ICSID Case No. ARB/04/19 Award, (August 18, 2008), ¶457. **(CL-0202).**

[1680] *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award dated 6 February 2008, ¶295-298 (**CL-0216**).

[1681] Irmgard Marboe, ¶ 6.258. **(CL-0247).**

[1682] *See David Aven and others v. Costa Rica*, ICSID Case No. UNCT/15/3, UNCITRAL case, Final Award, ¶¶ 719-742 (**RL-0031**).

[1683] *Id*. at ¶ 732.

[1684] CAFTA-DR, Article. 10.9.3.c (**CL-0001**).

that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."[1685]

932. The same tribunal later added that a logical effect of the aforementioned Article 10.11 of the CAFTA-DR is that the measures adopted by the host state for the protection of the environment should be considered obligatory for foreign investors. Therefore, the tribunal added, under CAFTA-DR, foreign investors have the obligation "to observe and comply with environmental laws and regulations (...). No investor may ignore or fail to comply with these measures, and failure to do so constitutes a violation of both domestic and international law, wherefore the perpetrator cannot be exempted from liability for the damages caused".[1686] Finally, the tribunal concluded that "[n]o substantive grounds exist for exempting foreign investors from the effect of claims for breach of obligations under Section A of Article 10 of the CAFTA-DR, in particular in the area of environmental law".[1687]

933. In line with the above, Article 10.20.7 of the CAFTA-DR also states that "a respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract".[1688] *Contrario sensu*, except for counterclaims based on the aforementioned exceptions of Article 10.20.7, the CAFTA-DR provides for the right of Guatemala to file a counterclaim, which shall then be subject to the jurisdiction of this Arbitral Tribunal.

934. The foregoing is consistent with the ruling of the *Urbaser v. Argentina* tribunal, which, based on the ICSID Convention and international law, concluded that it "has[d] jurisdiction to hear the Respondent's Counterclaim pursuant to Articles 25 and 46 of the ICSID Convention (...)".[1689] A similar conclusion was reached by the *Goetz v. Burundi* [1690] tribunal which, in turn, cited the dissenting opinion of Professor Michael Reisman in *Roussalis v. Romania*, who noted that "when States Parties to a BIT contingently consent, *inter alia*, to the jurisdiction of ICSID, the consent component [to counterclaims] of Article 46 of the Washington Convention is *ipso facto* imported into any ICSID arbitration that an investor decides to pursue".[1691] In the

[1685] *Id.* at Article 10.11.

[1686] *David Aven and others v. Costa Rica*, ¶ 734 (**RL-0031**).

[1687] *Id*. at ¶739.

[1688] CAFTA-DR, Article 10.20.7 (**CL-0001**).

[1689] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016), ¶ 1155 (**RL-0129)**.

[1690] *Antoine Goetz & Consorts et S.A. Affinage des Metaux c. República de Burundi*, ICSID Case No. ARB/01/2. Laudo (21 de junio de 2012), ¶¶ 278-279 (**CL-0136**).

[1691] *Spyridon Roussalis v. Rumania*, ICSID Case No. ARB/06/1. Profesor Michael Reisman Declration (28 November 2011) **(RL-0228)**.

same vein, various authors have also expressed their views, emphasizing, *inter alia*, the reasons why State counterclaims should be permitted (including reasons of efficiency and to avoid inconsistent results in different forums),[1692] or commenting that "if a general principle can be found (...), that is the principle according to which the jurisdiction *ratione materiae* of an international tribunal extends to counterclaims, unless the constituent instrument expressly excludes it".[1693]

935. In conclusion, both the ICSID Convention and the CAFTA-DR establish the jurisdiction of this Arbitral Tribunal to admit this counterclaim by Guatemala.

B. Exmingua failed to comply with Guatemalan law causing it damage

936. Small mining companies, like the Claimants, usually do not have a strong commitment to local communities. As Dougherty argues in his article on mining in Guatemala, the sector has operated in a different way than in other jurisdictions. Typically, junior mining companies locate deposits and sell the project to a major mining company. In contrast, in Guatemala, the major mining companies began to leave in 2008, selling their projects to the junior mining companies.[1694] The new mining companies were less transparent and had concealed shareholders, as was the case with Exmingua, which was owned by a Panamanian company and Minerales KC. Junior mining companies do not care about their reputation either. There is an invisibility premium that allows them to operate in a less responsible manner. Dougherty specifically points to one of the Claimants, KCA, for its lack of experience and one of the unscrupulous companies that entered in 2008,[1695] and cites interviews with people with knowledge of the area who describe the work at El Tambor as "a total mess" and that KCA was the worst of the foreign mining companies (which also included Goldcorp and Tahoe).[1696]

937. The Claimants deserve this reputation. Exmingua misrepresented and omitted key information in its EIA and failed to comply with Guatemalan law. In general, the EIA submitted by Exmingua does not include an adequate baseline to appropriately assess the impacts of the Project and does not include the predictive

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[1692] *Véase* Jean Kalicky, Counterclaims by States in Investment Arbitration, International Institute for Sustainable Development (14 de enero de 2013), p. 2 ("First, what are the reasons to allow counterclaims by States? There are several. It may lead to efficiency, to the centralization of inquiry and the avoidance of duplication, all factors that Professor Reisman emphasized in his Roussalis dissent, where he argued that these are "the sorts of transaction costs which counterclaim and set-off procedures work to avoid." It may avoid inconsistent results in different fora that can engender confusion for the parties and create threats to the legitimacy of the system. It can avoid the sort of impasses that result from anti-suit injunctions and anti-anti-suit injunctions against parallel proceedings, such as have plagued (for example) the many chapters of Chevron v. Ecuador") (**CL-0175)**

[1693] Zachary Douglas, *The International Law of Investment Claims* (CUP, 2009), pp. 255, 256 (**RL-0007**).

[1694] Dougherty, p. 8 (**R-0172**).

[1695] *Id.*

[1696] *Id.* at p. 10.

effects or the significance of the impact assessment. Also, the EIA does not have the information necessary to implement a mine closure and remediation plan. Worse still, as abundantly seen in previous sections, Exmingua blatantly failed to meet its environmental commitments.

938. The truth is that, in several scenarios, but especially in the very likely scenario that the Tribunal accepts the objections and defenses raised by Guatemala, one certain possibility is that Claimants will abandon the mining project. There is very little connection with the communities -by way of example, company employees were criminally convicted for their violent actions and aggressive treatment of independent journalists during one of the community protests-. Exmingua inflamed local tensions and sought to create division among the community members. Neither do Claimants have the technical or financial capacity to return to work. Their arbitration claim is being financed by an investment fund that has no interest whatsoever in exploiting the mine, whatever the outcome of the dispute.

939. All of the foregoing presents a very unfair scenario for the State, the affected communities, and the environment. The State should not be left in the position of not only having to pay the costs of this arbitration proceeding, but also to remedy the environmental damage caused by Claimants. Therefore, Guatemala requests that in any case, including in the denied situation in which the Tribunal should decide that there has been an expropriation, the Arbitral Tribunal order the Claimants to pay the amount established in the EIA, updated according to the criteria of the mining experts of the Claimants themselves, i.e., the amount of USD 2 million,[1697] which will be allocated to the payment of the costs of remediation and restitution of the situation of the area affected by Claimants' activities.

X. COSTS

940. With respect to costs, Claimants request in their conclusion section a claim for "[c]osts associated with these proceedings, including arbitration costs, professional fees, attorneys' fees, and disbursements".[1698]

941. The Tribunal, in its Decision on Respondent's Preliminary Objections, stated that it "reserves decision on the Parties' respective requests for costs, for determination in conjunction with subsequent requests at the close of this proceeding." This would describe Guatemala's claim for costs and expenses and reject Claimants' claim for costs and expenses.[1699]

942. Accordingly, Guatemala simply requests that Claimants be ordered to pay all costs of the proceeding, attorneys' fees, and other expenses that Guatemala has incurred in connection with this proceeding including the preliminary phase; and reserves the right to present its arguments and evidence in support of its request, at

[1697] Informe SLR, ¶ 81 ("Claimants estimate…. a closing cost of USD 2 million").

[1698] Memorial, ¶ 401 (iii).

[1699] Decision on Respondent's Preliminary Objections, ¶ 233(4).

the time the Court may so request.

XI. RELIEF

943. For the above reasons, Guatemala respectfully requests the Tribunal:

(1) Accept the jurisdictional objections finding that this Tribunal lacks jurisdiction to hear the case;

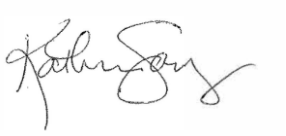
(2) Find merit in the defenses raised, rejecting Claimants' claim in all its parts;

(3) Accept the counterclaim presented, imposing the sum of USD 2,000,000.00 against Claimants for damages caused; and

(4) Impose an award of fees and costs against Claimants.

Statement regarding translation:

Being fluent in both English and Spanish, I certify that I have read both language versions of this Memorial and that the translation if reasonably faithful to the original.



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