INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

DANIEL W. KAPPES

AND

KAPPES, CASSIDAY & ASSOCIATES

Claimants

V.

REPUBLIC OF GUATEMALA

Respondent

ICSID Case No. ARB/18/43

CLAIMANTS' MEMORIAL

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20 July 2020

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I. INTRODUCTION

1. Pursuant to Procedural Order No. 1 dated 10 September 2019, as amended,[1] Mr. Daniel W. Kappes and Kappes, Cassiday & Associates ("KCA," and jointly with Mr. Kappes, "Claimants") hereby submit this Memorial in support of their claims against the Republic of Guatemala ("Guatemala" or "Respondent") under the Dominican Republic-Central America-United States Free Trade Agreement (the "DR-CAFTA" or the "Treaty").

2. This case concerns Guatemala's destruction of Claimants' investment, which they developed into a profitable and promising gold mining project in Guatemala. Claimants have significant experience in the mining industry, and a particular expertise in gold mining. Mr. Kappes, the sole owner, President and Chief Executive Officer of KCA, has nearly 50 years of industry experience, and has grown KCA to become a successful and respected mining engineering, testing, and project management company. The Regional Gold Belt that runs through part of Guatemala and where Tambor, Claimants' project, is located, hosts several successful gold mining operations that are in development or production.

3. Prior to Claimants' investment, Tambor had been the subject of extensive exploration, which confirmed the presence of gold deposits and the area's huge potential. After Claimants purchased Exmingua, the Guatemalan company that held mineral rights to two license areas on Tambor—Progreso VII and Santa Margarita—Claimants diligently began preparing environmental impact assessments and continued exploration pursuant to valid exploration licenses. Exmingua completed the environmental impact assessment for Progreso VII, which entailed conducting community consultations via an independent, specialized consultancy to prepare social studies. After more than a year-long review by the relevant Guatemalan governmental authorities, during which time public participation was sought and no objections were made, Exmingua was issued a 25-year exploitation license for Progreso VII in 2011, with the Government proclaiming that the mine was in the country's interest.

4. After a two-year delay, caused by protests and blockades that began against the mine soon after the exploitation license was issued, the Government ended the blockade, and, in 2014,

[1] *See* Letter from ICSID to the Parties dated 6 July 2020.

Exmingua began operations. For nearly two years, Claimants through Exmingua successfully and profitably mined ore, processed the ore into gold concentrate in a plant that Claimants had designed, built and assembled, and exported that concentrate through a broker with which they had a long-term contract. This all abruptly came to a halt when the courts and the Ministry of Energy and Mines ("MEM") suspended Exmingua's Progreso VII exploitation license and *de facto* suspended its Santa Margarita exploration license, after an NGO sued the Government, claiming that the exploitation license had been improperly issued *three years* earlier because the State had not led consultations with the indigenous communities in accordance with ILO Convention 169.

5. The court cases that ensued were a travesty of justice. Exmingua was not even notified of the suit until *after* the Supreme Court had issued a provisional *amparo* ordering the MEM to suspend Exmingua's license. In accepting the claim, the courts disregarded each and every threshold requirement for the admissibility of an *amparo*, given that the claim was clearly out of time, the petitioner had failed to exhaust administrative remedies and lacked standing, and the MEM was not the responsible party. Ignoring these basic shortcomings which should have resulted in the claim's dismissal, the courts then violated Exmingua's acquired rights, by retroactively applying new legal standards to its previously, lawfully-issued license. The courts ruled that the license could only "regain effectiveness" once the MEM conducted consultations, which it ordered it to do. As if this were not bad enough, the MEM refused *for years* to conduct consultations, while Exmingua's license remained suspended—despite the fact that the courts allowed another project to continue operating while the MEM conducted consultations, which it quickly completed.

6. Exmingua, however, was not accorded that same treatment and had to shut down its operations and lay off its employees, while protests and blockades erupted once again, preventing Claimants and Exmingua from even accessing the mining site and its facilities, or completing the consultations for the social studies that were necessary for it to obtain the exploitation license for the Santa Margarita area.

7. Meanwhile, Guatemala brought spurious criminal charges against Exmingua employees who were transporting concentrate for export. Although the workers were acquitted the very

next day for lack of evidence of any crime, Guatemala continued to harass Exmingua for the next several years by continuously appealing the acquittals. It also seized and impounded the gold concentrate that the employees were transporting, and sequestered other concentrate in Exmingua's warehouses. Notwithstanding the repeated and final acquittals, Guatemala refuses to release the gold concentrate.

8. Guatemala's pervasive bad faith throughout this ordeal is further manifested by the fact that its Constitutional Court delayed ruling on Exmingua's appeal of the suspension of its Progreso VII license for nearly *four years*, while ruling on appeals in other cases that were filed after Exmingua's and which raised the same legal issue. Indeed, the politically-driven nature of the Constitutional Court's decision-making is revealed not only in its rulings in Exmingua's case, but by its issuance of an order to the MEM—*one day* before this Memorial was scheduled to be filed—requesting a report on the steps taken to comply with its order rendered more than *four years* earlier. On the heels of that order, the Constitutional Court finally rendered a decision on Exmingua's appeal, not only denying it and keeping in place the suspension, but imposing the additional condition that the outcome of those elusive State-led consultations must show that the project does not threaten the indigenous communities before the suspension can be lifted, which condition has not been imposed on any other project.

9. Guatemala's unlawful, arbitrary, and discriminatory actions and omissions have resulted in the indefinite suspension of Exmingua's Progreso VII exploitation license; the indefinite *de facto* suspension of Exmingua's Santa Margarita exploration license; the unlawful seizure of Exmingua's gold concentrate; and Exmingua's inability to obtain a Santa Margarita exploitation license, in line with the Government's announced *de facto* moratorium on mining. Accordingly, as detailed herein, Guatemala has breached its obligations under the DR-CAFTA not to unlawfully expropriate investments (*Article 10.7*), to accord fair and equitable treatment (*Article 10.5*), including full protection and security and not to deny justice, and to accord national and most-favored-nation treatment (*Articles 10.3 and 10.4*).

10. The impact of Guatemala's Treaty breaches has been devastating and has destroyed all value of Claimants' investments. Exmingua has ceased operations, its concentrate remains impounded, and it has no access to its laboratory or other facilities. As a consequence of

Guatemala's breaches, Exmingua has been rendered worthless and, so too, have Claimants' investments in Guatemala. As explained below, as a consequence of Guatemala's Treaty breaches, Claimants have suffered damages in the amount of more than US$ 400 million, as Exmingua has now been rendered worthless, whereas it should have been continuing to profitably mine and process gold, sell its gold concentrate, mine additional known gold targets on Tambor, and explore additional gold resources throughout Tambor.

11. Together with the substantial documentary evidence referenced herein, Claimants' Memorial is supported by the following witness statements and expert reports:

- *Daniel W. Kappes*: Claimant and one of the founders and the sole owner, as well as the President and Chief Executive Officer of, KCA.[2]
- *Dr. Mike Armitage, BSc, MIMMM, FGS, CEng, CGeol and Dr. James Siddorn, BSc, MSc, FGS, PGeo*: Mining Experts; Consultants (Resource and Structural Geology) at SRK Consulting (UK) Ltd.;[3]
- *Prof. Mario Fuentes Destarac*: Expert on Guatemalan law; Professor of Civil Procedural Law and Constitutional Law at the Faculty of Legal and Social Sciences of the Rafael Landívar University and Partner at Destarac Law;[4]
- *Garrett Rush*: Valuation and Damages Expert; Founding Partner of Versant Partners, LLC.[5]

II. FACTUAL BACKGROUND

A. Claimants Invested In A Promising Gold Mining Project In Guatemala

12. In 2003, Claimants learned about a precious metals mining project in Guatemala called Tambor, which was owned by Radius Gold Inc. ("Radius") at the time.[6] Tambor is located in south-central Guatemala and forms a part of the Regional Gold Belt where a number of gold mining operations have been successfully discovered and are in development or production. The Tambor gold deposit is hosted by a high-grade, orogenic-gold system that occurs within and immediately to the south of the Montague Suture Zone, which separates the Maya Block (to the

[2] Witness Statement of Mr. Daniel Kappes, dated 19 July 2020 (hereinafter "Kappes").
[3] Expert Report of Dr. Mike Armitage and Dr. James Siddorn, dated 20 July 2020 (hereinafter "SRK").
[4] Expert Report of Prof. Mario Fuentes Destarac, dated 20 July 2020 (hereinafter "Fuentes").
[5] Expert Report of Mr. Garrett Rush, dated 20 July 2020 (hereinafter "Versant").
[6] Kappes ¶ 29.

north) from the Chortis Block (to the south).[7] The El Tambor Formation extends 20 km to the south and 50 km to the north of the Motagua Suture Zone.[8]

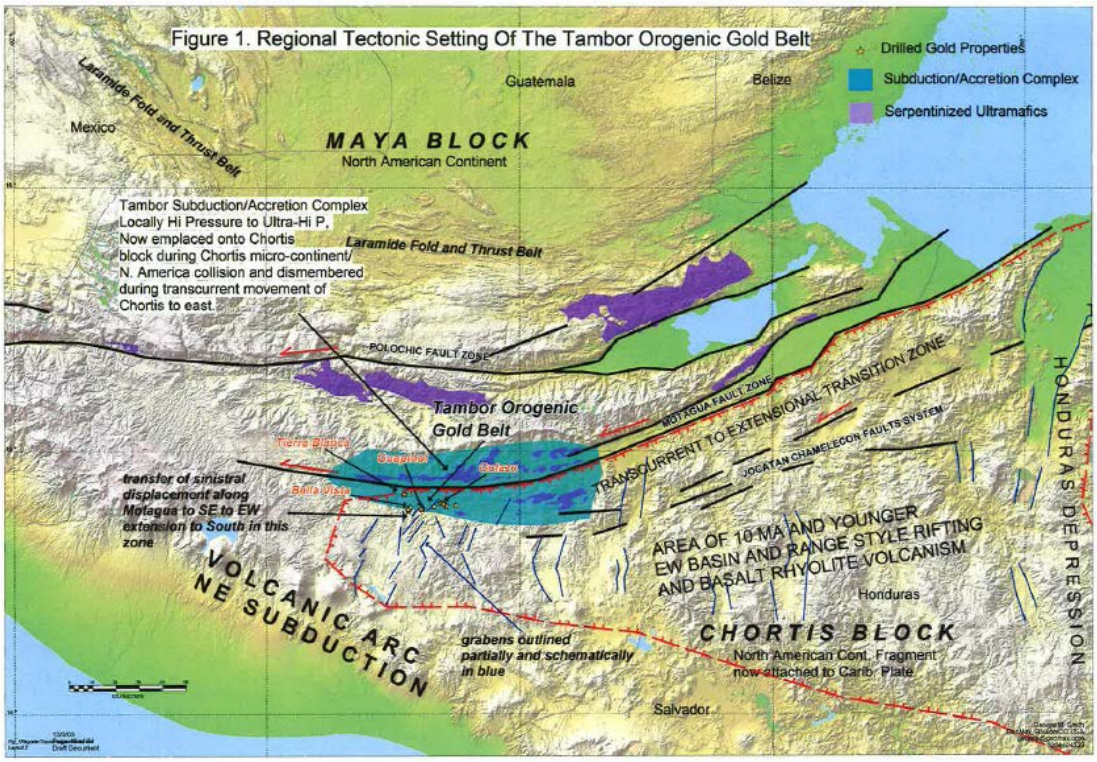

Figure 1 Map locating Tambor in Guatemala[9]

13. Tambor has been the subject of significant mineral exploration.[10] Of relevance here are two adjacent areas at Tambor, denominated Progreso VII and Santa Margarita, which together cover a terrain of approximately 40 square kilometers (20 square kilometers each).[11] Progreso VII contains gold and silver and is located in the municipalities of San José del Golfo and San Pedro Ayampuc, and covers, among others, deposits in the areas of Guapinol South and Poza del Coyote.[12] Santa Margarita, which also contains gold and silver, is adjacent to Progreso VII, and

[7] SRK ¶ 121; Chlumsky, Ambrust and Meyer Technical Report, dated 7 Jan. 2004, at 7.1, Section 7.1 (C-0039-ENG).

[8] SRK ¶ 129.

[9] George M. Smith, Tectonic Setting and Controls on Gold Mineralization, Tambor Orogenic Gold Belt, Guatemala dated 12 Jan. 2003, at 10, Figure 1 (C-0047-ENG).

[10] SRK ¶ 63.

[11] Kappes ¶ 20.

[12] *Id*.

is located in the municipality of San Pedro Ayampuc.[13] It covers, among others, deposits in the areas of Laguna Norte and JNL.[14]

14. In pursuit of their business plan to become a significant junior mining company with a consulting arm, and after having sold another successful project in which they had invested, Claimants were ready to make another investement.[15] Claimants had considered Tambor an attractive target since first learning about it, and began actively to pursue acquiring it around this time.[16] To that end, on 4 April 2008, Mr. Kappes reached out to Radius to discuss his and KCA's potential investment in Tambor.[17] Shortly thereafter, Radius provided Claimants with access to a substantial data room containing documents about the Tambor Project, including reports prepared by Gold Fields, a large South African mining company and Radius's joint venture partner on the Tambor Project from 2001 to 2003.[18]

15. The preliminary exploration and drilling results indicated that Tambor had viable deposits, which Claimants concluded could be commercially developed.[19] In addition to reviewing the data, on 29 April 2008, Mr. Kappes and David Croas, an independent mining engineer employed to be the field project manager, visited the site, collected and tested over 700kg of rock chip samples, and met with the local team.[20] After testing, the samples confirmed the data provided in the initial reports regarding the high grade of ore.[21]

16. Claimants were keen to invest in the Tambor Project because of its promising geology and data, and they believed they had the relevant experience and expertise to mine the area

[13] *Id*.
[14] *Id*.
[15] *Id*. ¶ 36.
[16] *Id*. ¶¶ 36-40.
[17] Email from D. Kappes to D. Cass dated 4 Apr. 2008 (C-0060-ENG); Kappes ¶ 37.
[18] Kappes ¶¶ 27 and 37.
[19] *Id*. ¶ 37.
[20] *Id*. ¶ 38.
[21] *Id*. ¶ 40; *see also* Email dated 2 May 2008 (listing samples taken from Guapinol South, Poza del Coyote, and Laguna Norte) (C-0512-ENG); Tambor – Summary of tests (undated) (C-0065-ENG); Email dated 16 Oct. 2008 (attaching Sample descriptions, gold and silver assays) (C-0066-ENG); Email dated 3 Sept. 2008 (C-0067-ENG); Email dated 16 Oct. 2008 (C-0068-ENG).

successfully and profitably.[22] Mr. Kappes is a Registered Professional Mining and Metallurgical Engineer and has nearly 50 years of industry experience in the evaluation and design of mineral recovery projects, specializing in heap leaching of precious metals, in particular gold and silver.[23] He has provided engineering and design work on numerous projects and has substantial experience in strategic planning, project evaluation, and project management.[24]

17. Claimants' experience is borne out by their extensive involvement in the industry. In 1972, Mr. Kappes co-founded a partnership for the purpose of acquiring and processing zinc oxide deposits and consulting on cyanide heap leaching, the latter of which soon became the company's main business focus.[25] Following a decade of growth, in 1982, the partnership (at the time named Kappes, Cassiday & Associates) was converted into a company under the laws of the State of Nevada, United States.[26] Mr. Kappes was a driving force behind this company, and in 2006, Mr. Kappes became the sole owner of KCA.[27]

18. KCA has grown significantly since its foundation and it now has a staff of nearly 100 employees working on more than 50 projects across many jurisdictions, offering services in four key areas: project management, mining engineering, laboratory testing, and plants and equipment.[28] Through its work on numerous service projects relating to precious metals, including in Latin America,[29] KCA developed a particular expertise in gold mining.[30] In

[22] *Id*. ¶ 37.

[23] *Id*. ¶¶ 3-4.

[24] *Id*. ¶¶ 3-4.

[25] *Id*. ¶ 5.

[26] KCA's Articles of Incorporation dated 13 May 1982 (C-0020-ENG)**;** KCA Business entity information from Nevada Secretary of State online registry (C-0021-ENG); Kappes ¶ 6.

[27] Purchase and Sale Agreement executed by and between Michael W. Cassiday, as seller, and Mr. Kappes, as buyer, dated 29 Dec. 2006 (C-0022-ENG); Kappes ¶ 6.

[28] KCA's Statement, *Introduction, available at* https://www.kcareno.com/qualifications-product-brochures (C-0019-ENG); Kappes ¶¶ 7-10.

[29] *See* KCA's website, sections on *"Projects" and "Plants and Equipment"*, www.kcareno.com (C-0028-ENG); KCA's Statement, *Representative Project Descriptions, available at* https://www.kcareno.com/qualifications-product-brochures (C-0513-ENG); Kappes ¶ 11.

[30] KCA's Statement, *Introduction, available at* https://www.kcareno.com/qualifications-product-brochures (C-0019-ENG); Kappes ¶ 11.

addition to service projects, KCA has successfully invested in joint venture mining projects in Peru and Ghana.[31]

19. As noted, the initial exploration work on the Tambor Project was carried out by Radius and Gold Fields, prior to Claimants' acquisition of the Tambor Project. Radius had initiated the process in 2000 by acquiring rights to various areas forming the Tambor Project, working with and through Exploraciones Mineras de Guatemala, S.A. ("Exmingua"), its Guatemalan affiliate incorporated on 25 July 1996.[32]

20. As part of its initial exploration of the Tambor area, during 2000 and 2001, Radius conducted widespread rock, soil, and stream sediment sampling and trenching of anomalies in the most promising west-central part of the Gold Belt, followed by initial drilling.[33] In November 2001, Radius formed a joint venture with Gold Fields dedicated to exploring the Tambor area (the "Tambor Joint Venture").[34] Between November 2001 and late 2003, Gold Fields carried out extensive exploration activities in the Tambor area, in particular to the deposits in the Santa Margarita and the Progreso VII areas.[35]

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[31] Kappes ¶¶ 12-13.

[32] Public Deed 397059 dated 25 July 1996, at 1 (C-0038-ENG/SPA); Kappes ¶ 19.

[33] SRK ¶ 63, Table 4-1 (setting out the exploration carried out by Radius); Chlumsky, Ambrust and Meyer Technical Report, dated 7 Jan. 2004, at 6.1, Section 6.0 (C-0039-ENG).; Gregory F. Smith, Radius Explorations Ltd.: Technical Report on the Guatemalan Properties – Gold Fields Joint Venture, Marimba Joint Venture, Eastern Guatemala Projects dated 11 Jan. 2003, at 11 (C-0040-ENG); Kappes ¶¶ 18-22. Anomalies are geologic features that differ from the surrounding area in some characteristics of interest to the exploration team. At Tambor, for instance, because gold and silica were introduced together into the rocks at about the same time, a surface silicified zone might indicate gold at depth.

[34] Chlumsky, Ambrust and Meyer Technical Report, dated 7 Jan. 2004, at 1.1-1.2, Section 1.3 (C-0039-ENG); Stephen R. Maynard, Tambor Joint Venture – Summary of Exploration Potential, dated 18 Nov. 2003, at 2 (C-0046-ENG); Kappes ¶ 23. When Radius bought out Gold Fields's interest in the Tambor Joint Venture, Gold Fields obtained in exchange, among other things, shares in Radius, thus retaining some interest in the Tambor Project. *See* Goldcorp Royalty Assignment Agreement between Goldcorp Inc. and International Royalty Corp. dated 12 Dec. 2007 (C-0050-ENG); *see also id*. Exhibit B (Transfer and Royalty Agreement between Glamis Gold Ltd. Entre Mares de Guatemala S.A., Radius Gold Inc., Weltern Resources Corp., and Exmingua dated 26 June 2006; Assignment Agreement between Radius, Exmingua, Minerales KC, KCA and International Royalty Corp. dated 7 Feb. 2013 (effective 29 Aug. 2012) (C-0051-ENG).

[35] SRK ¶¶ 16-20 (setting out the exploration in 2001-2003) and ¶¶ 135-137 (setting out fourteen targets identified across Tambor by 2003); Stephen R. Maynard, Tambor Joint Venture – Summary of Exploration Potential, 18 Nov. 2003, at 2 (C-0046-ENG); *see* Conditional Assignment of Mining Rights (Cesion Condicional Derechos Mineros) dated 21 Nov. 2000 (C-0041-ENG/SPA). Amendment to the Conditional Assignment of Mining Rights (Cesion Condicional Derechos Mineros) dated 4 Oct. 2001 (C-0042-ENG/SPA); Official Communication No. 016 issued by the MEM dated 1 Feb. 2005 (C-0043-ENG/SPA); Official Communication No. 079 dated 1 Feb. 2005 (C-0528-

21. The key result of Gold Fields's exploration activities was a preliminary resource estimate of 244,000 ounces in three zones (Laguna Norte, Guapinol South, and Poza del Coyote).[36] This resource estimate was reflected by Stephen R. Maynard, a certified professional geologist, in his 18 November 2003 report based on data gathered by Gold Fields and assessing the results of exploration under the licenses controlled by the Tambor Joint Venture (the "Maynard Report").[37]

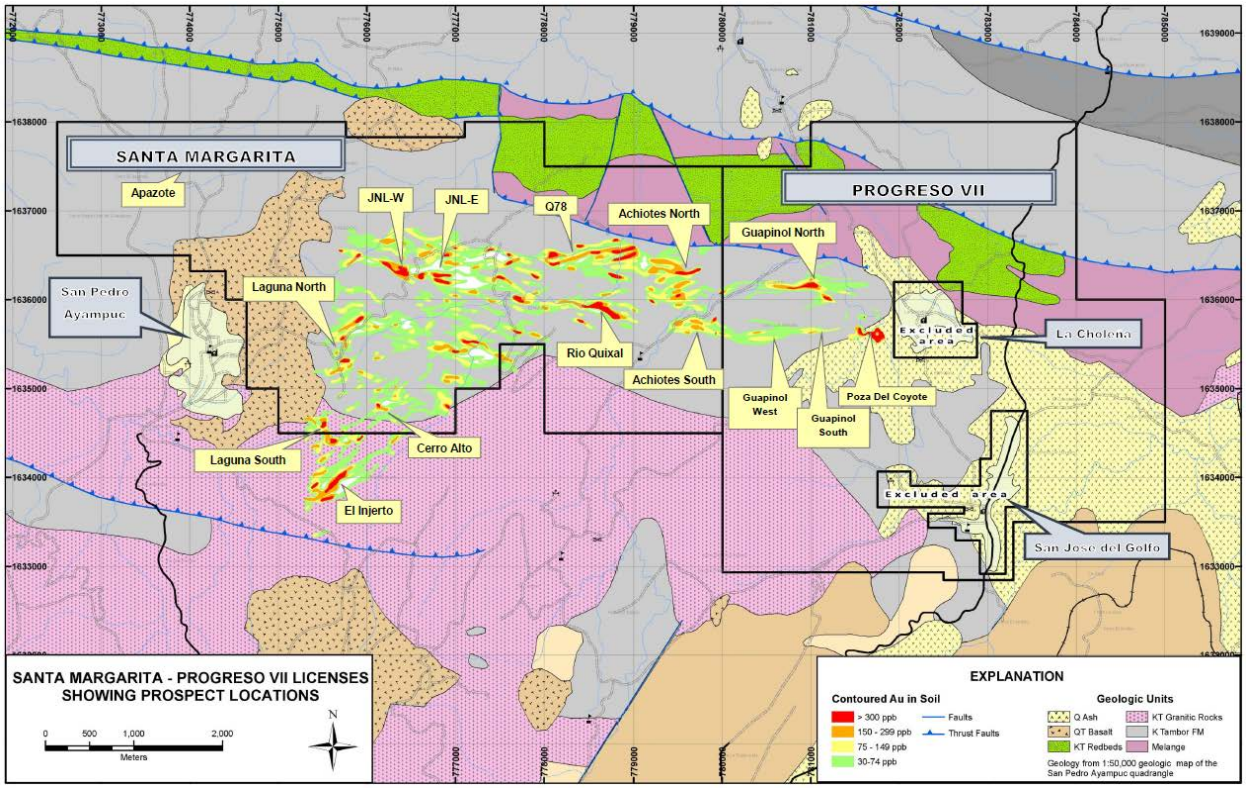

Figure 1 Map of the Santa Margarita and Progreso VII license areas with deposits shown[38]

22. Radius also engaged Chlumsky, Ambrust and Mayer ("CAM") – an international mineral resources consulting and engineering firm – to conduct a technical review and prepare a mineral

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ENG/SPA); Decision to extend the area of the Santa Margarita Licence dated 22 Feb. 2008 (Resolucion 065) (C-0044-ENG/SPA); Kappes ¶¶ 21-25.

[36] Stephen R. Maynard, Tambor Joint Venture – Summary of Exploration Potential, dated 18 Nov. 2003, at 4 (Table 1. Summary of preliminary resources at Laguna North, Guapinol South, and Poza del Coyote – High-Grade Cut offs) (C-0046-ENG); SRK ¶¶ 16-18; Kappes ¶ 32.

[37] Stephen R. Maynard, Tambor Joint Venture – Summary of Exploration Potential, dated 18 Nov. 2003, at 2 (C-0046-ENG).

[38] Map of the Santa Margarita and Progreso VII licenses with deposits (prepared by KCA, using Figure 2 from Stephen R. Maynard, Tambor Joint Venture – Summary of Exploration Potential dated 18 Nov. 2003, at 6) (C-0049-ENG).

resource estimate. On 7 January 2004, CAM issued a technical report (the "CAM Technical Report"),[39] which concluded that gold mineralization at Tambor was a classic example of orogenic lode gold deposits spanning over 13 gold-bearing mineral zones, with indicated and inferred resources on several deposits.[40]

23. In October 2007, Radius announced that the results obtained from drilling an underground exploration tunnel at Guapinol South, which confirmed the continuity of the mineralisation at depth.[41] Moreover, after further testing, the bulk rock in the area of the drill hole showed the same mineralization as the drill hole, which increased the certainty of the geological conclusions and showed that the mineralization was not just a surface phenomenon.[42]

24. Based 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.[43] Accordingly, on 2 June 2008, 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.[44]

25. At the time, Exmingua's rights included the exploration licenses for the Progreso VII area and the Santa Margarita area. Exmingua also had applied for exploitation licenses for the

[39] Chlumsky, Ambrust and Meyer Technical Report, dated 7 Jan. 2004, at 1.1, Section 1 (C-0039-ENG). CAM is a Denver-based firm focusing on exploration programs, audits, and program design; resource and reserve estimation and audits; due diligence reviews of and preparation of feasibility studies; closure planning and reclamation; environmental and social due diligence reviews; and technical support to the project finance and legal communities. It also acts as an Independent Engineer and Independent Environmental and Social Consultant; CAM's website, About, https://cam-llc.com/about/ (C-0053-ENG).

[40] Chlumsky, Ambrust and Meyer Technical Report, dated 7 Jan. 2004, at 1.1-1.2, Sections 1.2-1.4 (C-0039-ENG).

[41] SRK ¶ 24; Radius Gold Inc., "Radius's Tambor Exploration Adit Returns Additional Intercept of 65.6g/t Gold Over 4.45m," dated 22 Oct. 2007, *available at* http://www.radiusgold.com/s/NewsReleases.asp?ReportID=413885&_Type=News-Releases&_Title=Radiuss-Tambor-Exploration-Adit-Returns-Additional-Intercept-of-65.6gt-Gold (C-0056-ENG); Kappes ¶ 35.

[42] Kappes ¶ 35.

[43] *Id*. ¶¶ 37-38.

[44] Letter of Intent between KCA and Radius dated 2 June 2008 (C-0063-ENG); Kappes ¶ 39; Radius, News Release, "Radius Signs Agreement to Develop its Tambor Gold Deposit," dated 3 June 2008 (C-0064-ENG).

Progreso VII and the Santa Margarita areas on 22 October 2008 and 19 January 2009, respectively,[45] which automatically extended the exploration licenses for both areas.[46]

26. To secure all legal and beneficial rights, title, and interest in the Tambor Project in Guatemala, Claimants acquired Exmingua as the operating company for the Tambor Project.[47] In particular, on 22 January 2009, Claimants acquired Minerales KC Guatemala, Ltda. ("Minerales KC") which they established to conduct the business of KCA with respect to Exmingua.[48] Mr. Kappes held (and continues to hold) 10% of the shares in Minerales KC, and KCA held (and continues to hold) the remaining 90%.[49] Subsequently, on 19 June 2009, Minerales KC acquired 88 shares (51% of the shares) in Exmingua from a company in the Radius group.[50] To acquire full ownership of Exmingua, on 29 August 2012, Minerales KC acquired a further 41 shares of Exmingua, and, subsequently, on 4 September 2012, Mr. Kappes acquired the remaining 43 shares of Exmingua.[51]

27. As a result of the 2009 and 2012 transactions, Mr. Kappes directly owns 25% of Exmingua, and indirectly owns 7.5% through Minerales KC, which owns the remaining 75% of Exmingua. For its part, KCA indirectly owns 67.50%, through Minerales KC, as shown in the diagram below.[52]

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[45] Exploitation license application form for Progreso VII Derivada dated 22 Oct. 2008 (C-0069-SPA/ENG); Kappes ¶ 41; Exploitation license application form for Santa Margarita dated 19 Jan. 2009 (C-0070-SPA/ENG).

[46] Fuentes ¶ 75; Mining Law, Art. 25 (C-0186-SPA/ENG) (noting that "the exploration license shall be extended until the exploitation license is granted").

[47] Kappes ¶ 43.

[48] *Id*. ¶ 42; Public deed 448242 dated 22 Jan. 2009 (C-0071-ENG/SPA).

[49] Public deed 448242 dated 22 Jan. 2009 (C-0071- ENG/SPA); Kappes ¶ 42.

[50] Exmingua Shares Registry, Certificate no. 3 (C-0072-ENG/SPA); Kappes ¶ 44.

[51] Purchase Agreement executed by and among Radius (Cayman) Inc., Minerales KC and KCA dated 29 Aug. 2012 (C-0073-ENG); Exmingua Shares Registry, Certificates no. 2 and 4. (C-0074-ENG/SPA) (on 4 September 2012, Radius Cayman Inc. endorsed 41 shares of Exmingua to Minerales KC and Pedro Rafael García Varela endorsed 1 share of Exmingua to Mr. Kappes); Exmingua Shares Registry, Certificate no. 1 (C-0075-SPA/ENG) (on 4 September 2012, Radius Cayman Inc. endorsed 42 shares of Exmingua to Mr. Kappes); Kappes ¶ 44.

[52] In other words, Mr. Kappes directly owns 43 shares in Exmingua, while Minerales KC directly owns 129 shares in Exmingua, out of the total of 172 shares (*see* Exmingua Shares Registry, Certificates no. 2 and 4. (C-0074-ENG/SPA); Exmingua Shares Registry, Certificate no. 1. (C-0075-ENG/SPA); Exmingua Shares Registry, Certificate no. 3 (C-0072-ENG/SPA). KCA directly owns 90% of Minerales KC, and thus indirectly holds 116.1 shares in Exmingua (of 129 Minerales KC's shares in Exmingua, and of 172 total shares in Exmingua). *See* Public deed 448242 dated 22 Jan. 2009 (C-0071-ENG/SPA); Kappes ¶ 44.

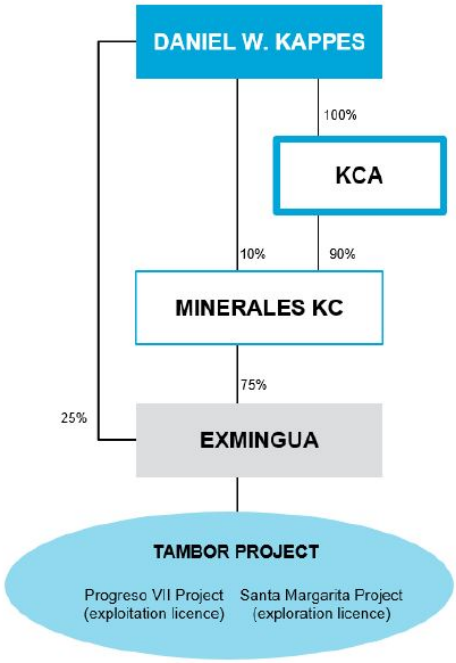

Figure 3 Ownership structure of Exmingua[53]

Radius still holds a royalty option in the Tambor Project.[54]

28. As discussed further below, following Claimants' acquisition, Exmingua gradually expanded its operations, acquiring several properties and sophisticated mining equipment and facilities, before its work at Tambor was brought to an abrupt halt in 2016 by Guatemala's unlawful actions and omissions.

B. After Thorough Studies, Exmingua Obtained Approval For Its Progreso VII EIA And An Exploitation License

29. Having secured the mining rights and the assigned exploration licenses, Claimants began work on the Environmental Impact Assessment ("EIA") for both the Progreso VII and Santa Margarita development areas, a condition under Guatemalan law for obtaining a mining exploitation license.[55] Among other things, the EIA requires an environmental assessment as well as social studies to assess the impact of the project on the local communities. To that end,

[53] Ownership structure of Exmingua (C-0514-ENG).

[54] Letter from Radius to D. Kappes and KCA dated 29 Aug. 2012 (C-0076-ENG); Royalty Agreement between Radius, Minerales KC, D. Kappes, and Exmingua dated 12 Nov. 2015 (C-0077-ENG); Kappes ¶ 44.

[55] Fuentes ¶ 20.

in June 2009, Exmingua hired Grupo Sierra Madre ("GSM") – a consulting firm specialized in environmental and natural resources management duly registered with the Ministry of Environment and Natural Resources ("MARN") in Guatemala – to prepare an EIA for the Progreso VII and Santa Margarita mining projects.[56] GSM worked on both EIAs in parallel, save for the social studies for Santa Margarita, which were initially put on hold to focus on the Progreso VII EIA.[57]

30. From January to February 2010, Exmingua – in collaboration with GSM – carried out consultations with communities located in the vicinity of the Progreso VII mine's direct area of influence ("DAI"), which encompasses the Municipalities of San Pedro Ayampuc and San José de Golfo.[58] The population centers in the Project's DAI include urban areas in the two Municipalities, the villages of Los Achiotes and El Guapinol in San Pedro Ayampuc, and the village of La Choleña in San José de Golfo.

31. Exmingua and GSM carried out the following activities as part of the social studies:[59]

- 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")[60] of San José de Golfo on 3 February 2010;
- presentation of the Progreso VII mine project and meeting in the village of La Cholena (San José de Golfo) on 4 February 2010;
- presentation of the Progreso VII mine project in the village of El Guapinol on 8 February 2010 (*see* photo below);

[56] Kappes ¶ 48.

[57] *Id*. ¶¶ 48-49.

[58] Environmental Impact Assessment for Progreso VII Project dated 31 May 2010, at 271 Table 63 (C-0082-SPA/ENG).

[59] *Id*. at 289 Table 78.

[60] A COMUDE is a municipal level representative body, which includes the municipal mayor who acts as coordinator, council members, COCODE representatives, public agency representatives who are in the municipality, and representatives from local entities. *See* Law of Rural and Urban Development Councils - Decree 52-87, Article 11 (C-0515-SPA/ENG).

Figure 4 Presentation of the Progreso VII mine project in the village of El Guapinol.[61]

- presentation of the Progreso VII mine project in the village of Los Achiotes (San Pedro Ayampuc) on 9 February 2010;
- presentation of the Progreso VII mine project before the Municipal Council (COCODE)[62] and the representatives of the different institutions of the San José del Golfo Municipality;[63] and
- presentation of the Progreso VII mine project before the Municipal Council in San Pedro Ayampuc on 9 February 2010.[64]

32. During these consultations, Exmingua provided details of the planned mine to the participants – including information on how the mining would proceed, the benefits the mine would bring to the local communities through tax revenue and support for community projects,

[61] Environmental Impact Assessment for Progreso VII Project dated 31 May 2010, at 301 [at301 ENG] photograph 41 (C-0082-SPA/ENG).

[62] A COCODE is a community-level representative body for citizen participation through which community members promote coordination between public and private entities and participate in community development planning. *See,* Law of Rural and Urban Development Councils - Decree 52-87, Articles 13-14 (C-0515-SPA/ENG).

[63] Certificate of the Minutes of the meeting with the Municipality of San José del Golfo dated 12 July 2010 (C-0516-SPA/ENG).

[64] *See* Environmental Impact Assessment for Progreso VII Project dated 31 May 2010, at 439 [at 439 ENG] (C-0082-SPA/ENG); *see also* Certificate of the Minutes of the meeting with the Municipality of San Pedro Ayampuc dated 23 June 2010 (C-0517-SPA/ENG).

and responded to the queries of the participants.[65] Overall, the participants' perception of the mine and the consultation process was very positive.[66]

33. After spending a year conducting exhaustive environmental and social studies, on 31 May 2010, Exmingua filed with the MARN its EIA for Progreso VII, which included its public participation plan (*i.e.*, the intervention strategy plan that Exmingua had used when preparing the EIA to understand the local communities' perception of the mining project).[67] As required by Guatemalan law,[68] Exmingua published a public edict (in a form standardized by the MARN) in a local newspaper of large circulation, informing the public that the EIA would be available for comment for 20 days.[69] No objections or complaints were received by the MARN during this period.[70] As explained by Mr. Mario Fuentes Descartes – a prominent Guatemalan lawyer and professor of civil procedural law and constitutional law at the Faculty of Legal and Social Sciences of the Rafael Landívar University, by not objecting within the prescribed period, any person or entity that could have opposed or commented on the approval of the EIA or the granting of the exploitation license for Progreso VII lost their right to do so.[71]

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[65] Environmental Impact Assessment for Progreso VII Project dated 31 May 2010, § 7.5.1.2, at 294-296, 299, and 299 (C-0082-SPA/ENG); Certificate of the Minutes of the meeting with Municipality of San Jose del Golfo dated 12 July 2010 (C-0516-SPA/ENG); *see also* Exmingua's request to the Supreme Court for an order to produce additional evidence dated 1 June 2016 (C-0518-SPA/ENG) (enclosing details of the different projects already completed and agreed to by and between Exmingua and the communities in San Pedro Ayampuc and San José del Golfo, including, three emergency housing projects, a ballasting project, assistance in building a soccer field, a drainage system and platforms for new land plots).

[66] *See, e.g.*, Environmental Impact Assessment for Progreso VII Project dated 31 May 2010 at 293 § 7.5.1.1 [at 293 ENG] (C-0082-SPA/ENG) ("[C]omments were received from the participants, on the positive perception they have of the project for having initiated an open dialogue with the community, which should continue and the necessary information to clarify any doubts you may have about the subject of mining."); *id.* section 7.5.1.2 ("After overcoming the doubts, most of those present expressed their interest in the presence of the project and good pleasure to get to generate employment and other positive actions municipality."); *id.* section 7.5.2.2 ("The attendees stated that the project is welcome within the community"); Certificate of the Minutes from the meeting with the Municipality of San José de Golfo dated 12 July 2010 (C-0516-SPA/ENG) ("[T]he Municipality supports the mining project given the economic benefits and the opportunities it offers to this community […]"); Certificate of the Minutes from meeting with the Municipality of San Pedro Ayampuc dated 23 June 2010 (C-0517-SPA/ENG) ("The people attending the presentation consented to the mining project in question given the economic benefits and the opportunities that it offers to this community.").

[67] *Id.* Annex 15

[68] Fuentes ¶ 12; Mining Law dated 1997, Arts. 45, 46 (C-0186-ENG/SPA).

[69] Public Notice for EIA, published in Siglo XXI and Al Día dated 27 May 2010 (C-0083-SPA/ENG); *see also* Fuentes fn. 18.

[70] Fuentes ¶ 15.

[71] *Id.*

34. In the course of reviewing the EIA, the MARN informally requested clarifications ("*ampliaciones*") from Exmingua in December 2010, including, *inter alia*, details of "the Public Participation process," together with supporting documents evidencing the activities carried out throughout that process.[72] This request was formally notified to Exmingua by letter dated 22 March 2011,[73] by which stage work on the additional requests was well advanced.

35. During this time, Exmingua also held follow up meetings with the Municipal Councils of San Pedro Ayampuc and San José del Golfo in order to update them on the status of the approval process for the EIA.[74] It was agreed at the meetings that good communications would be maintained between Exmingua and the different entities and institutions in the Municipalities after commencement of mining in order to keep the communities apprised of the development status of the mine.[75]

36. Exmingua addressed MARN's additional requests in an amendment to the EIA ("EIA Amendment"), which it filed on 12 April 2011.[76] In particular, Exmingua expanded on the information regarding the social studies provided in the EIA, updated the MARN on the activities that it had carried out with the local communities since the date of submission of the EIA, indicated that no objections had been received during the public notification period, and resubmitted its public participation plan together with supporting documents.[77] At that point in time, the MARN could have requested additional information if needed.

37. On 23 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

[72] *See* Letter from the Ministry of Environment and Natural Resources to Exmingua dated 14 Dec. 2010 (unsigned) ¶¶ 8 and 12 (C-0086-SPA/ENG).

[73] Request for amendments to the Environmental Impact Assessment for Progreso VII Project from the MARN dated 22 Mar. 2011 (C-0087-SPA/ENG).

[74] Certificate of the Minutes from meeting with the Municipality of San Pedro Ayampuc dated 2 Mar. 2011 (C-0519-SPA/ENG); *see also* Certificate of the Minutes from meeting with the Municipality of San Jose del Golfo dated 28 Feb. 2011 (C-0520-SPA/ENG).

[75] Certificate of the Minutes from meeting with the Municipality of San Pedro Ayampuc dated 2 Mar. 2011 (C-0519-SPA/ENG); *see also* Certificate of the Minutes from meeting with the Municipality of San Jose del Golfo dated 28 Feb. 2011 (C-0520-SPA/ENG).

[76] Amendment to the Environmental Impact Assessment for Progreso VII Project dated 1 Apr. 2011 (C-0089-SPA/ENG).

[77] *Id*. ¶ § 13 and Annex7

reference" provided by the MARN.[78] It further noted that, as evidenced in the supporting documents annexed to the EIA, the public participants had in general expressed their agreement with the mining project.[79]

38. Subsequently, on 22 June 2011, the MEM's General Mining Office published a notice in the Official Gazette, which informed the public about Exmingua's pending exploitation license application and the license area, and contained a financial statement of Exmingua.[80] On 4 July 2011, the MEM Legal Advisory Unit issued a favorable opinion on Exmingua's exploitation license application, with the approval of the Attorney General, stating that the Progreso VII mine was "in the interest of the country."[81] Shortly thereafter, the MEM granted Exmingua a 25-year exploitation license for Progreso VII.[82]

39. Exmingua then obtained a construction license for the Progreso VII mine,[83] and construction of the processing facility began in mid-January 2012.

C. Despite Local Communities' Support for the Mine, Protests and Blockades Disrupted Claimants' Mining Projects

40. Exmingua continued to engage with the local communities after obtaining its exploitation license for Progreso VII and, to that end, hired *Servicios Mineros de Centro de America* ("SMCA") to manage its social development program. SMCA established a local presence in the Project area by renting a building in San José del Golfo, which it converted into medical clinic rooms, an office, and a meeting room containing various charts and models about mining, the Progreso VII mine, and the larger Project.[84]

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[78] Resolution No. 1010-2011 of the Ministry of Environment and Natural Resources approving the Environmental Impact Assessment for Progreso VII dated 23 May 2011, at 3 (C-0212-SPA/ENG).

[79] *Id*.

[80] *See* Letter from Exmingua to the MEM dated 22 June 2011 (attaching excerpt of the Official Gazette dated 22 June 2011, at 25) (C-0546-SPA/ENG); *see also* Fuentes ¶¶ 17-18.

[81] Environmental Impact License issued by MARN dated 26 May 2011 (C-0084-SPA/ENG).

[82] Resolution No. 03394 of the Ministry of Energy and Mines dated 30 Sept. 2011 (C-0090-SPA/ENG).

[83] Construction permit - Minutes of the San Pedro Ayampuc Municipal Council meeting dated 15 Nov. 2011 (C-0092-SPA/ENG) (confirming that the construction permit was issued at the San Pedro Ayampuc Municipal Council meeting held on 15 Nov. 2011).

[84] KCA report "Progreso VII – Resume of Work Performed during 2012" dated 27 Jan. 2013 (C-0521-ENG).

41. Notwithstanding the local community's support and the approval of the EIA without any objection, a small protest against the mine began shortly after construction started in January 2012.[85] The protest was supported by two organizations – *Madreselva* (an environmental organization) and *Frente Nacional de Lucha* (a self-described revolutionary group), and was later backed by the *Centro de Acción Legal, Ambiental y Social de Guatemala* ("CALAS"), a Guatemalan non-governmental organization.[86]

42. The protest was also initially supported by Congressman Carlos Mejía of the URNG party. On 15 February 2012, Congressman Mejía and a group of people who had come by bus from communities outside the Project's DAI arrived unannounced at the office of SMCA in San José del Golfo demanding that they be given access to the mining site in order to inspect the work being carried out. After consulting with Exmingua, a representative from SMCA informed the group that Exmingua was willing to coordinate small group visits to the site with a maximum of ten persons at a time. The protesters refused that offer and left by bus without any visits taking place.[87] The protest reportedly did not have much support from inhabitants in the DAI.[88]

43. A couple of weeks later, however, in early March 2012, approximately 25 to 30 people formed a human blockade preventing entry of equipment and materials into the Progreso VII site.[89] In the following days, the protesters set up a camp along the road leading to the site entrance (including partially on Exmingua's private property bordering the north side of the road), where they stayed day and night.[90]

44. As a result of the blockade, Exmingua was forced to increase security on site to protect its workers and equipment.[91] Moreover, several of Exmingua's employees had to move into rental accommodation in San José del Golfo during the workweek, as the protesters had blocked

[85] Executive Summary, Protest in San Jose del Golfo, prepared by Selvyn Morales dated 15 Feb. 2012 (C-0522-ENG).
[86] Kappes ¶ 63.
[87] Executive Summary, Protest in San Jose del Golfo, prepared by Selvyn Morales dated 15 Feb. 2012 (C-0522-ENG).
[88] *Id*.
[89] Kappes ¶ 64.
[90] *Id*.
[91] *Id*. ¶ 65.

their route from their homes in San Pedro Ayampuc to the site.[92] Eventually, Exmingua was forced to suspend the construction of the processing facility on 15 March 2012, as it could not advance any further without bringing in equipment by road.[93]

45. On 12 March 2012, a guided site visit of the mining site took place, which was attended by the Vice-Minister of the MARN, six environmental technicians from the MARN, delegates from the MEM, Congressman Mejía with three advisers, five leaders of the protesters, 14 community leaders from San Pedro Ayampuc, and Mr. Morales of SMCA.[94] During the visit, Mr. Morales gave a presentation about the Project and, together with the MARN technicians, dispelled some of the misconceptions held by community members.[95] In particular, they explained the mining processes and that the water used by people in the neighboring areas would not be polluted because the mine had a separate water source.[96] At the end of the visit, Congressman Mejía explained to protesters outside the gate that activities at the mine were being conducted lawfully.[97] Exmingua felt that the communities' concerns had been adequately addressed during the visit and, in the following days, the number of protesters decreased.[98]

46. Despite their dwindling support, some protesters – fueled by an ideological opposition to natural resource projects – continued to blockade the gate and, at times, they turned violent. Exmingua's employees were often harassed when entering the site[99] and, in early April 2012, a number of protesters illegally detained and assaulted three security guards hired by one of Exmingua's contractors.[100]

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[92] *Id*.

[93] KCA report "Progreso VII – Resume of Work Performed during 2012" dated 27 Jan. 2013 (C-0521-ENG).

[94] Letter from MEM to Congressman C. Mejia dated 5 Mar. 2012 (C-100-ENG/SPA); Email from S. Morales to D. Croas, D. Kappes *et al*. dated 14 Mar. 2012 (C-101-ENG).

[95] Omar Sandoval "Neighbours and authorities visit mine" *El Sol de San Pedro Ayampuc* dated 17 Mar. 2012 (C-0523-ENG/SPA).

[96] Omar Sandoval "Neighbours and authorities visit mine" *El Sol de San Pedro Ayampuc* dated 17 Mar. 2012 (C-0523-ENG/SPA); *see also* Notice from the MEM dated 7 Dec. 2012 (C-0530-ENG/SPA) (noting that "some of the community leaders' concerns over pollution were distorted.").

[97] Email from S. Morales to D. Croas, D. Kappes *et al*. dated 14 Mar. 2012 (C-101-ENG).

[98] *Id*.

[99] Kappes ¶ 70.

[100] Email from J. R. Pinetta to D. Kappes, R. Adams *et al*. dated 10 Apr. 2012 (C-0098-ENG).

47. The protesters were not representative of the local communities, which continued to express their support for the Project and denounce the blockade. For example, in May 2012, a group of residents, together with the COCODE and the Catholic Church of San Antonio, El Ángel, sent a letter to the President of Guatemala voicing their support for the Progreso VII mine and requesting the Government to take action "to resolve the conflict generated by a few neighbors supported by people and organizations foreign to the region" in order to preserve the economic benefits of the mine.[101]

48. The limited work on site that had been ongoing since March came to a standstill in mid-May 2012 because the blockade was impeding routine access to the site.[102] Consequently, Exmingua was forced to dismiss a large number of its employees to reduce costs.[103]

49. With no assistance forthcoming from the State, the following month, on 3 September 2012, Exmingua filed an *amparo* action against the General Director of the National Police for failure to intervene and ensure safe access to the site for workers and machinery.[104] Although Exmingua's *amparo* application was opposed by Guatemala, on 19 October 2012, the Second Judicial Court of Appeals granted the *amparo*, ordering the National Police and the Attorney General to make submissions to the Court regarding the viability of evicting people who were blocking access to the mining site.[105] This decision was later revoked by the Constitutional Court of Guatemala ("Constitutional Court") on procedural grounds, following an appeal from the Minister of the Interior.[106]

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[101] Letter from the local communities to the President of the Republic of Guatemala dated 25 May 2012 (C-105-ENG/SPA).

[102] Kappes ¶ 73.

[103] *Id*. ¶ 134.

[104] Resolution by the Guatemalan Constitutional Court dated 20 Mar. 2013 (C-109-ENG/SPA); *Amparo* decision of the 2nd Division of the Court of Appeals in Criminal Matters, Drug Dealing and Environmental Matters dated 19 Oct. 2012, at 1 (C-0111-ENG/SPA). An *amparo* action is a remedy under Guatemalan law for the protection of individual rights enshrined in the Constitution and ordinary laws. The court exercising *amparo* jurisdiction can remedy a violation by (i) suspending the infringing law, regulation, resolution or contested acts and, where appropriate, restoring the applicant to its original position; (ii) ordering the infringing party to take action to remedy a delay within a prescribed period; or (iii) ordering that any omission be remedied. Fuentes ¶¶ 82, 84.

[105] *See* Resolution by the Guatemalan Constitutional Court dated 20 Mar. 2013 (C-0109-ENG/SPA); *Amparo* decision of the 2nd Division of the Court of Appeals in Criminal Matters, Drug Dealing and Environmental Matters dated 19 Oct. 2012 at 1 (C-0111-ENG/SPA).

[106] Resolution by the Guatemalan Constitutional Court dated 20 Mar. 2013 (C-0109-ENG/SPA).

50. On 20 November 2012, about 70 people from local communities, including Exmingua employees, demonstrated peacefully in support of the Tambor Project and their right to work.[107] The protesters against the Project, however, were intransigent and refused to engage in dialogue.[108] In early 2013, after yet another unsuccessful attempt by the police to evict the protesters at the end of the prior year, Exmingua renewed its efforts to resolve the conflict by hiring *Centro para el Desarrollo Rural* ("CEDER"), a social advisory group. Between February and May 2013, CEDER held meetings with various stakeholders, including local mayors, community leaders, and leaders of the opposition, with a view to establishing an open dialogue and finding a peaceful way forward.

51. In parallel, Exmingua continued to request government assistance to remove the blockade and had several meetings with government officials.[109] Frustratingly, the government failed to take any action. In fact, on 9 July 2013, the President stated, during a press conference, that there ought to be a two-year moratorium on the issuance of new mining licenses in order for "congress to focus on revisions to the mining law."[110] This policy had been previously proposed by the President in 2012 and had led to an immediate and significant drop in the number of mining licenses being granted by the MEM.[111] In line with the President's announcement, which although not formally enacted amounts to a *de facto* moratorium, the number of exploitation licenses granted by the MEM markedly decreased.[112]

52. As the blockade dragged on throughout 2013, Exmingua continued to incur costs. In particular, it had to pay its earthworks contactor, P&F Contratistas, S.A. ("P&F"), a standby fee

[107] Email from S. Morales to D. Kappes and R. Adams attaching a report describing the blue hat brigade demonstration dated 20 Nov. 2012 (C-0112-ENG).

[108] Notice from the MEM dated 7 Dec. 2012 (C-0530-ENG/SPA).

[109] Kappes ¶¶ 84-87.

[110] "Guatemala Proposes Temporary Moratorium on New Mining Licenses," *Market Wired* dated 10 July 2013 (C-0116-ENG); *see also* MEM's 2013 Mining Statistical Yearbook, at 8 [at 1 ENG] (C-0458-ENG).

[111] Ministry of Energy and Mines, Mining Statistical Yearbook 2013, at 8 [at 1 ENG] (C-0458-SPA/ENG) (stating that "[i]n 2012 an acceptable number of applications (approximately 700 in total), but as mentioned above, the small number of licenses granted is due to the moratorium that has been imposed on the grant, until a new Mining Law is approved in Congress.").

[112] MEM's Mining Statistical Yearbook 2013 (C-0458-SPA/ENG); MEM's Mining Statistical Yearbook 2014 (C-0531-SPA); MEM's Mining Statistical Yearbook 2015 (C-0532-SPA); MEM's Mining Statistical Yearbook 2016 (C-0533-SPA); MEM's Mining Statistical Yearbook 2017 (C-0534-SPA).

for the equipment that was stuck on site, until P&F finally reached an agreement with the protesters in February 2014 to allow it to enter the site to remove its equipment.[113]

53. Finally, on 23 May 2014, the police evicted protesters from the mining site, and the blockade was lifted.[114]

D. After The Blockade Was Lifted, Exmingua Completed Construction And Commenced Mining Operations At Tambor

54. Following a delay of more than two years (from March 2012 to May 2014), Exmingua regained access to the mine site and resumed planned construction and exploitation activities, following which it proceeded with production and shipping of gold concentrate, all the while investing in social projects to benefit the area.

1. Exmingua Resumed Preparation Of The Site In Accordance With Its Approved EIA

55. Before turning to mining gold ore at the site, Claimants and Exmingua needed first to design, build, and install a processing plant to produce concentrate from the ore. The modular, flotation processing plant and laboratory was designed and constructed by a team at KCA headed by Mr. Kappes in Reno, Nevada between 2008 and 2010, transported in pieces to Guatemala in 2011, stored in Guatemala City during the 2012-2014 blockade, and moved to the site once the blockade was lifted.[115] The plant was composed of thousands of parts, some of which Exmingua purchased from local suppliers, while other items were purchased by KCA in the U.S. and shipped to Guatemala.[116] After Exmingua's mining contractor, Logística de Transportes España (LTE), completed the earthworks for the plant site in late June 2014, Exmingua installed the plant by November 2014.[117] Once the plant was in use, the plant was improved and expanded.[118]

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[113] Emails from G. Medina to D. Kappes, R. Adams, J. Ward and Ricardo Pinnetta dated 25 Feb. 2014 (C-0115-ENG).

[114] Email from R. Adams to B. Miller dated 24 May 2014 (C-0117-ENG).

[115] Kappes ¶¶ 59-60, 97.

[116] *Id*. ¶ 97.

[117] Kappes ¶ 97.

[118] *Id*. ¶¶ 97, 111.

Figure 5 Tambor flotation plant[119]

The plant was situated on the site near the laboratory, concentrate blending building, warehouse, and office, among other structures.

Figure 6 Tambor plant area[120]

[119] Photo of Tambor plant dated 20 May 2016 (C-0120).

56. Exmingua planned to begin mining the deposits in the Guapinol and Poza del Coyote zones with three open pits, before moving to underground mining in the those areas, and extending the operation to open-pit and underground mining at Laguna Norte in the Santa Margarita area.[121]

57. The by-product of mining, such as rock and sand, was stored in waste dumps, as indicated in the EIA, and approved and continually inspected and monitored by the National Forestry Institute (INAB) and the MEM to ensure that Exmingua was not damaging the environment.[122]

58. Exmingua also constructed four tailings ponds, designed by KCA and a geotechnical consultant, used to store the waste generated from separating the valuable fraction from the uneconomic fraction of an ore.[123] Exmingua planned to reprocess the tailings to recover ore from them in a separate tailings reprocessing plant designed by Claimants in January 2016, so the ponds were situated nearby the plant site to be easily accessible.[124] The ponds were excavated, the earth liner was compacted, and a two-millimeter thick high-density polyethylene liner was installed, which was more precautionary than the usual practice for flotation ponds, which are typically unlined, since the reagents used are all environmentally benign.[125]

59. The total disturbed area for the plant, pits, waste dumps, and tailings ponds was small, totalling about 50 hectares (100 acres), all of which was located on land owned by Exmingua and had been outlined and approved in the EIA.[126]

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[120] Photo of Tambor plant dated 3 Nov. 2014 (C-0119) (taken by D. Kappes from a helicopter while transporting concentrate to an off-site staging area). The three green-roofed buildings are: (i) the lab on the left, (ii) the concentrate processing (blending) building in the center (for mixing the concentrate prior to placing it bulk bags for shipping), and (iii) the office/ workshop on the right.

[121] Kappes ¶¶ 103-105 and 119.

[122] *Id*. ¶ 99.

[123] Environmental Impact Assessment for Progreso VII dated 31 May 2010, at 73-74, 103 and Annex 3 at 558 (C-0082-ENG/SPA); *see also* Amendments to the EIA for Progreso VII dated 1 Apr. 2011 (C-0089-ENG/SPA), Report on Tailings Disposal Facilities dated Mar. 2010, at 325 *et seq*. (C-0089-ENG/SPA) (prepared by Dorey & Associates LLC); Kappes ¶¶ 61, 100.

[124] Kappes ¶ 112; Email from V. Olivas (KCA) to D. Kappes dated 22 Jan. 2016 (C-0132-ENG).

[125] Environmental Impact Assessment for Progreso VII dated 31 May 2010, § 2.8 (C-0082-ENG/SPA); Kappes ¶ 100.

[126] Kappes ¶ 101.

2. Exmingua Commenced Mining and Began to Process And Ship Concentrate

60. In October 2014, Exmingua started its open-pit mining operations by excavating the Guapinol South east pit, followed by the Guapinol South west pit in May 2015, and the Poza del Coyote pit in August 2015.[127] It expected that open-pit mining in these areas would continue until 2018, when Exmingua would start producing ore from underground mining in the same areas. Then, Claimants planned to commence exploitation at Laguna Norte, starting with open-pit mining, followed by a transition to underground mining.[128]

61. Exmingua based its first field work on the drill-hole data gathered during the exploration of Tambor by Radius and the Tambor Joint Venture, resulting in the prelimnary resource estimate for Guapinol South, Poza del Coyote, and Laguna Norte.[129] A few weeks before mining began, Exmingua hired laboratory personnel and trained them to assay the ore, so that it had real-time assays to guide the equipment as it began excavations.[130] The two Guapinol South pits were about 50 meters wide at the top, about 200 meters long.[131] These pits were located on the ridge above the processing plant, so the ore was hauled by small trucks to the ore stockpile.[132] The third pit, Poza del Coyote, was started in November 2015, and was about 200 meters by 150 meters.[133]

[127] Daily Plant Summary Data for October 2014 – May 2016 (C-0125-ENG/SPA); Mining data for Guapinol South for the period between Nov. 2014 and Oct. 2015 (C-0123-ENG/SPA); Mining dated for Poza Del Coyote for the period between Aug. 2015 and Apr. 2016 (C-0124-ENG/SPA); Kappes ¶ 102-104; SRK ¶ 26-27.

[128] Kappes ¶ 114; SRK ¶ 36.

[129] *See supra* ¶¶ 5, 7, 11-15; Kappes ¶ 102; SRK ¶¶ 18-21.

[130] Kappes ¶ 102.

[131] *Id*. ¶ 103.

[132] *Id*.

[133] *Id*. ¶ 104.

Figure 7 Guapinol South pits[134]

Figure 8 Guapinol South (the east pit)[135]

[134] Photograph of Guapinol South pits dated 1 May 2016 (C-0539) (taken by KCA and showing the Guapinol South – east pit on the left and the Guapinol South – west pit on the right).

[135] Photograph of Guapinol South (the east pit) dated 10 Feb. 2015 (C-0540) (taken by KCA).

Figure 9 Guapinol South (the west pit)[136]

Figure 10 Poza del Coyote pit[137]

[136] Photograph of Guapinol South (the west pit) dated 7 Feb. 2015 (C-0541) (taken by KCA).

[137] Photograph of Poza del Coyote pit dated 15 July 2015 (C-0542) (taken by KCA).

62. Exmingua operated in the pits only during daylight hours for safety purposes and so that the noise would not disturb people in the nearest village of San Jose del Golfo.[138] The processing plant was run 24 hours per day.[139]

63. The mining sequence was designed by Mr. Kappes and KCA's geologists team with the goal of recovering as much of the resource as possible.[140] The deposits at Tambor were of a high grade, although there also was lower-grade, near-surface deposits that Exmingua planned on mining at a later stage.[141] Accordingly, Exmingua's goal (which was usually achieved) was to send ore assaying eight grams gold per ton to the plant, while also maximizing the recovery of ore.[142] As Exmingua progressed with the mining operations, one of its engineers was creating, on an ongoing basis, a mine model in MicroMine, a mining software, which was used to create a history of the mine and plan for the future.[143] The exploitation at the Guapinol South pits comported with Exmingua's expectations, and the exploitation on the Poza del Coyote pit proved even more successful than Claimants expected. Exmignua was therefore able to obtain eight grams gold per ton from all open pits to feed to the plant for processing.[144]

64. The Tambor plant uses the flotation process for gold recovery, whereby the gold attaches to air bubbles, which is then scraped off the surface of the flotation cells.[145] Exmingua would routinely analyze the resulting concentrate and tails (waste), and adjust the chemicals and air flow so as to maintain the desired concentrate grade while minimizing the loss of gold to the tailings.[146] Claimants and Exmingua' engineers continuously supervised and modified the plant

[138] Kappes ¶ 104.

[139] *Id*.

[140] *Id*. ¶ 105.

[141] *Id*. ¶ 95; *see also* SRK ¶ 65 (indicating that Tambor includes "steep dipping quartz vein hosted high-grade gold mineralisation, such as that being mined and processed by the current operation"); *id*. ¶ 115 ("The Tambor gold deposit is hosted by a high-grade, orogenic-gold system"); Versant, Table 12 (comparing Tambor with 8.1 grams per ton against other comparable operating mines, many showing a lower ore grade of ore than Tambor's); *id.* Table 18 (same, including in the Higher Grade Gold Projects category).

[142] Kappes ¶¶ 106-112; SRK ¶¶ 27, 38; Daily Plant Summary Data for Oct. 2014 to May 2016 (C-0125-ENG).

[143] Kappes ¶ 105.

[144] *Id*. ¶ 106; SRK ¶¶ 27, 38; Daily Plant Summary Data for Oct. 2014 to May 2016 (C-0125-ENG); Mining data for Guapinol South for the period between Nov. 2014 and Oct. 2015 (C-0123-ENG/SPA); Mining data for Poza Del Coyote for Aug. 2015 to Apr. 2016 (C-0124-ENG/SPA).

[145] Kappes ¶ 107.

[146] *Id*.

to improve the gold recovery rate.[147] By December 2015, the plant achieved a recovery rate of 80%, and on occasions during 2016 this had reached 90%.[148]

65. Exmingua entered into a marketing agreement with Traxys North America LLC, an established international broker for mine concentrates, granting Traxys the exclusive right to purchase, market, distribute, and resell the concentrate.[149] Traxys arranged the sale of Exmingua's concentrate to Aurubis AG, a large international company with several smelters worldwide, which ordered approximately 1,440 wet metric tons of concentrate to be delivered to its copper smelter in Bulgaria.[150] Exmingua was shipping its concentrate to Traxys under one-year, renewable certificates of exportation granted by the MEM.[151] These certificates were generally routinely renewed on an annual basis, with the last one granted to Exmingua on 25 September 2015.[152]

66. Exmingua's first concentrate shipment was made on 12 December 2014.[153] From that date until its operations were shut down, Exmingua continuously produced and sold concentrate, having made 67 shipments of approximately 20 tons each, earning approximately US$ 12 million from the sale of gold during this time-period.[154] The proceeds from those sales went directly into Exmingua's Guatemalan bank accounts and, after taxes were paid, were used in Guatemala to cover the costs of mining and production.[155]

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[147] *Id*. ¶¶ 111-112.

[148] Email from Laboratorio Tambor KCA to D. Kappes & Tambor dated 7 May 2016 (C-0131-ENG) (attaching attaching lab results dated 6 May 2016 indicating 92 percent recovery); Daily list of plant feed and tails grade for Oct. 2014 to May 2016 (indicating that, based on the recovered grade (i.e., feed grade less tailings grade) divided by feed grade, 80% recovery was being approached in March-April 2016) (C-0125-ENG).

[149] Marketing Agreement between Exmingua and Traxys North America LLC dated 30 Apr. 2012 (C-0103-ENG); Kappes ¶ 72.

[150] Order of concentrate from Aurubis AG dated 30 Apr. 2012 (C-0104-ENG); Kappes ¶ 72.

[151] Certificate of exportation dated 8 Oct. 2014 (C-0121-ENG/SPA); DKW_001_1_00000052 Certificate of exportation dated 25 Sept. 2015 (C-0122-ENG/SPA); Kappes ¶ 98.

[152] Certificate of exportation dated 25 Sept. 2015 (C-0122-ENG/SPA); Kappes ¶ 98.

[153] Settlement sheets for shipments 1-67 (C-0130-ENG); Kappes ¶ 120; SRK ¶ 26.

[154] SRK ¶ 27; Settlement sheets for shipments 1-67 (C-0130-ENG); Kappes ¶ 120.

[155] Kappes ¶ 120.

67. Exmingua's operations at Tambor brought significant benefits to the neighboring communities and the region in general.[156] In particular, in terms of employment, Exmingua hired a large number of workers to carry out the works and maintain the site. The vast majority of Exmingua's employees were residents of San Jose del Golfo and San Pedro Ayampuc, making Exmingua one of the largest employers in these communities.[157]

68. Exmingua also executed a number of social projects spanning across the areas of infrastructure, health, and education. These included, for example: (i) building a medical clinic and providing an ambulance; (ii) providing metal sheets for house roofing; (ii) building a drainage system; and (iii) building a football field.[158]

E. Guatemala destroyed Claimants' investments at Tambor

69. After Claimants invested substantial time, effort, and money to acquire Exmingua, obtain an exploitation license for the Progreso VII area, commence mining and processing of gold, and arrange for the sale of its gold concentrate, after a year and a half of mining and while Exmingua was preparing to enter its next phase of underground mining and undertaking further exploration, Guatemala unlawfully shut down Exmingua's operations by suspending its exploitation license. In early 2016, moreover, the Court's decision sparked a new wave of protests, which prevented Exmingua from bringing supplies onto the site and precluded Exmingua's consultants from conducting the social studies required for the EIA to obtain an exploitation license for the Santa Margarita area. Guatemala then baselessly charged Exmingua and its employees with crimes and impounded its concentrate. To date, Guatemala has failed to conduct the consultations that the Courts have held are required for Exmingua's exploitation license to be restored, thus rendering the Progreso VII license useless and foreclosing any possibility that Exmingua can obtain an exploitation license for the Santa Margarita area.

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[156] *Id*. ¶ 94. *See also* Exmingua Report "Consolidado de las actividades 2015" (C-0524-SPA/ENG).

[157] *See* Letter from Exmingua supporters to the President of Guatemala dated 15 Apr. 2016 (C-0525-ENG) (referring to over 200 families that depended on the Tambor Mine).

[158] *See* Exmingua Report "Entrega de lámina en las comunidades de San Pedro Ayampuc 2015" (C-0526-SPA); *see also* Exmingua Report "Consolidado de las actividades 2015" (C-0524-ENG/SPA); Exmingua Consolidated Report on Social Responsibility (July-December 2014) (C-0527-SPA/ENG).

1. The Guatemalan Courts Issued *Amparos* Ordering The Suspension Of Exmingua's Exploitation License

70. On 28 August 2014 – three years after the MEM granted Exmingua an exploitation license for Progreso VII (without any objection) and a few months after the lifting of the blockade – the non-governmental organization CALAS filed an application for an *amparo* in the Supreme Court of Justice of Guatemala ("Supreme Court") against the MEM, seeking the suspension of Exmingua's exploitation license.[159] In its *amparo* application, CALAS alleged that Exmingua's license had been wrongfully granted, on the basis that the MEM had failed to carry out consultations with the indigenous communities in violation of their rights under the Guatemalan Constitution and international treaties ratified by Guatemala, in particular, the Indigenous and Tribal Peoples Convention, 1989 (No. 169) ("ILO Convention 169").[160]

71. ILO Convention 169 – ratified by Guatemala on 5 June 1996[161] – provides a number of rights to "tribal peoples" and "peoples . . . who are regarded as indigenous."[162] In particular, indigenous peoples have a right to be consulted (i) "whenever consideration is being given to legislative or administrative measures which may affect them directly,"[163] and (ii) prior to the exploration or exploitation of mineral or sub-surface resources.[164] CALAS asserted that these rights had not been honored because the State had not held consultations with the indigenous population in the region of the mine before granting Exmingua its Progreso VII exploitation license.[165]

72. In response to CALAS's *amparo* application, the MEM filed a report with the Supreme Court on 5 September 2014, asserting that CALAS's application should be rejected because (i) it was untimely – being filed over two years after the license was granted and the relevant parties

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[159] Application by CALAS for *amparo nuevo* dated 29 Aug. 2014 (C-0137-SPA/ENG).

[160] *Id.* ¶ 3-4 [at 3 ENG]; *see also* ILO Convention 169, Art. 6 (CL-0152-ENG); UN Declaration on the Rights of Indigenous Peoples 2007 (the "UNDRIP"), Art. 19 (CL-0221-ENG).

[161] NORMLEX, Information System on the International Labour Standards, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO. It has been ratified by a total of twenty-three countries (CL-0222-ENG).

[162] ILO Convention 169, Art. 1. (CL-0220-ENG).

[163] *Id.* Art. 6.

[164] *Id.* Art. 15(2).

[165] Application by CALAS for *amparo nuevo* dated 29 Aug. 2014 (C-0137-SPA/ENG).

notified; (ii) CALAS had not suffered any "personal and direct damage" as a result of the challenged act; and (iii) CALAS lacked standing to sue.[166] The MEM also added that it does not "have power to hold a consultation" with indigenous communities, but that it *does* have an obligation to consider and approve or reject license applications, and emphasized that it had complied with all applicable laws and regulations in force when it granted Exmingua its license.[167]

73. On the same day, the Supreme Court suspended the *amparo* proceedings, holding that CALAS had not exhausted available ordinary remedies – the administrative proceeding before the MEM pursuant to the Mining Law – a condition for admitting an *amparo* action.[168] CALAS appealed this decision, arguing that because it was not a party to the administrative proceeding, it did not "ha[ve] legal standing to file an administrative action."[169] The Supreme Court's decision was subsequently revoked by the Constitutional Court on 3 November 2015 on the basis that CALAS's *amparo* action could fall within one of the exceptions to the exhaustion requirement, namely, "where the challenged act affects the rights of third parties who are not parties to a proceeding or action."[170]

74. Thereafter, and notwithstanding its earlier decision, on 11 November 2015, the Supreme Court issued a ruling, devoid of any analysis or discussion of the MEM's arguments, granting an *amparo provisional* against the MEM and suspending Exmingua's Progreso VII exploitation license, without any provision for compensation.[171] The ruling came as a complete surprise to Claimants given that Exmingua had been operating pursuant to a validly-issued license and, in order to obtain that license, Exmingua, together with its independent consultant GSM, had carried out consultations with the local communities, which were approved by the MARN, and

[166] Response by the Ministry of Energy and Mines to CALAS' application for *amparo nuevo* dated 5 Sept. 2014, at 3-7 [at 2-5 ENG] (C-0465-SPA/ENG).

[167] *Id*. at 5-6 [at 4 ENG].

[168] Supreme Court Ruling dated 5 Sept. 2014 (C-0466-SPA/ENG).

[169] CALAS appeal dated 3 Dec. 2014, at 1-3 [pp 1-2 ENG] (C-0467-SPA/ENG).

[170] Constitutional Court Ruling dated 3 Nov. 2015, at 1-2 [at 1 ENG] (C-0468-SPA/ENG).

[171] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo provisional* dated 11 Nov. 2015, at III (C-0004-SPA/ENG).

no objections to the granting of the license had been received at the time.[172] As Professor Fuentes explains, the Supreme Court's decision to grant the *amparo provisional* was manifestly wrong, both procedurally and substantively.[173] The Supreme Court grossly erred in granting the amparo because the procedural requirements had not been satisfied by CALAS, in particular because its claim was time-barred, it had not exhausted remedies, it lacked standing, and the MEM was not the entity liable to be sued.[174]

75. The Supreme Court, however, disregarded CALAS's failure to exhaust available remedies, as required by the Amparo, Habeas Corpus and Constitutionality Law (the "Amparo Law"), despite having earlier suspended the *amparo* procedings on this very basis.[175] As Professor Fuentes highlights, an *amparo* is "extraordinary" in nature and must be resorted to "[o]nly when the relevant remedies have been exhausted and the threat, restriction or violation of a right persists."[176] Similarly, the Constiutional Court—when it acceped CALAS's appeal against the Supreme Court's initial suspension of the proceeding—was wrong to hold that CALAS's situation fell within an exception to the exhaustion of remedies requirement, because it ignored the fact that CALAS had the posssibility of participating in the administrative proceeding that granted Exmingua's exploitation license.[177]

76. Moreover, the Supreme Court ignored the fact that CALAS's amparo application was not filed within the prescribed time period stipulated in the Amparo Law, *i.e.*, "within thirty days from the latest notice given to the aggrieved party or from the date on which such party became aware of the act which, in its opinion, is harmful."[178] It thus disregarded the fact that CALAS had forfeited its right to object, having failed to submit an objection pursuant to the prescribed objection procedure in the Mining Law and by not objecting to the EIA notices published by

[172] Kappes ¶ 129.

[173] Fuentes ¶ 117.

[174] *Id*.

[175] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo provisional* dated 11 Nov. 2015, at III (C-0004-SPA/ENG); Supreme Court Ruling dated 5 Sept. 2014 (C-0466-ENG/SPA).

[176] Fuentes ¶ 125.

[177] *Id*. ¶ 130; Constitutional Court Resolution dated 3 Nov. 2015, at 4 [at 1 ENG] (C-0468-ENG/SPA).

[178] Amparo Law, Article 20 (C-0416-ENG/SPA).

Exmingua and the State.[179] As Professor Fuentes notes, in doing so, the Supreme Court "disregard[ed] the Constitutional safeguard of legal certainty."[180]

77. Additionally, the Supreme Court failed to consider the standing requirement generally and the specific argument raised by the MEM, *i.e.*, that CALAS lacked standing to file the *amparo* because it had no "personal and direct interest in the matter."[181] Similarly, the Court did not consider the MEM's objection that it could not be sued, because it was not empowered to conduct consultations with the indigenous communities, which is the State's obligation.[182]

78. The Supreme Court failed to consider the MEM's arguments as to CALAS's failure to meet these three threshold requirements for an *amparo* action, which it would have been obligated to consider even had the MEM not raised them.[183]

79. The Supreme Court also manifestly failed to apply the substantive law when it granted the *amparo*. Specifically, at the time Exmingua's license was granted (and to date – *i.e.*, over two decades after ILO Convention 169 entered into force in Guatemala), Guatemala had not enacted any laws or regulations implementing the Government-led consultation process envisioned by the Convention, beyond the requirement for licence applicant-led consultations at the EIA stage, with which Exmingua complied in full.[184] The Constitutional Court has recognized this failure of the State in a number of rulings, ordering Congress to enact appropriate

[179] Fuentes ¶ 118.

[180] *Id*.

[181] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo provisional* dated 11 Nov. 2015, at III (C-0004-SPA/ENG); Response by the Ministry of Energy and Mines to CALAS' application for amparo nuevo dated 5 Sept. 2014, at 7 [at 5 ENG] (C-0465-SPA/ENG).

[182] Response by the Ministry of Energy and Mines to CALAS' application for amparo nuevo dated 5 Sept. 2014 (C-0465-SPA/ENG); Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo provisional* dated 11 Nov. 2015, at III (C-0004-SPA/ENG).

[183] Fuentes ¶ 152.

[184] *See* Report on ILO Convention 169 and its implementation in four Latin American countries: Colombia, Costa Rica, Guatemala, Chile, ILO Publications (2016) (CL-0223-SPA/ENG); Inter-American Commission on Human Rights, Country Report: Situation of Human Rights in Guatemala dated 31 Dec. 2017 (CL-0231 ENG/SPA). ILO Convention 169, Arts. 2(1), 33 (CL-0220-ENG); *see also Community Development Councils of the Community of El Pilar I and II and others v. Municipal Council of San Juan Sacatepéquez* dated 21 Dec. 2009, Constitutional Court of Guatemala, Case No. 3878-2007 at 12 (C-0529-ENG/SPA) (holding that the ratification of the ILO Convention 169 has a number of implications for the State, including, inter alia, "the duty to carry out all the structural modifications required within the state apparatus – above all, in the legislation in force – to ensure compliance with this duty in accordance with this country's circumstances".)

regulations to govern State-led consultations and providing guidelines in the interim for the MEM to conduct such consultations in the absence of any law or regulation.[185] To date, however, Guatemala has failed to enact any such regulations.[186]

80. Nevertheless, as noted, the permitting process under Guatemalan law *does* require consultations to be carried out with the communities living in the Project's DAI, and the results of those consultations need to be presented in the EIA.[187] Guatemalan law, in this regard, tasks project proponents with the responsibility of carrying out those consultations.[188]

81. In fact, Guatemala has publicly and officially taken the position that these project-proponent led consultations that are a requirement for approval of an EIA satisfy its international obligations under ILO Convention 169. Thus, in a statement made to the Inter-American Commission on Human Rights ("IACHR"), in response to a complaint filed in 2014 (*i.e.*, more than three years after it granted Exmingua its license) concerning a different mining project, Guatemala represented:

> [A]ccording to the [Guatemalan] Constitution, 'the … exploitation of non-renewable natural resources is a matter of public utility….'… [A]ccordingly, once the administrative procedure was completed and the technical and legal certificates obtained, the mining license was granted…. [O]nce the results of the EIA were obtained, it issued public announcements through edicts…. [A]lthough any party concerned could object, neither the petitioners nor anyone else did so. As for the consultation process, [Guatemala] contends that 'the right of the indigenous people to be consulted is unquestionable', in accordance with the treaties ratified by Guatemala and the jurisprudence of the Constitutional Court. [However,] *the MARN informed the company that it was mandatory to conduct a public participation process…, which was carried out in full*. [Guatemala] points out that, *although it is not called a 'consultation', 'it is indeed a prior process' in which 'notification was given that a mining project would be executed*.'[189]

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[185] Fuentes ¶¶ 50-51.

[186] *Id*. ¶ 51.

[187] *Id*. ¶¶ 11, 13; Environmental Assessment, Control and Monitoring Regulations, Arts 11, 39 (C-0413-SPA/ENG).

[188] Fuentes ¶¶ 11, 13, 52; *see also* Admissibility Report No. 20/14, Petition 1566-07, Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán, Inter-American Commission of Human Rights, dated 3 Apr. 2014, at 5 (CL-0225-ENG/SPA).

[189] *See* Admissibility Report No. 20/14, Petition 1566-07, Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán, Inter-American Commission of Human Rights, dated 3 April 2014, at 5 ¶ 19 (CL-0225-ENG/SPA).

82. The Supreme Court decision that Guatemala's obligations under ILO Convention 169 had not been complied with because it is the Government's responsibility for ensuring that appropriate consultations are undertaken,[190] thus contradicted Guatemala's own representations to the international community and its judicial organs. It also ignored the fact that Guatemala ensured that consultations were undertaken in Exmingua's case: by reviewing and verifying Exmingua's consultations, the MARN exercised oversight over the consultations and confirmed their adequacy and compliance with Guatemalan law, despite not having itself conducted those consultations. Indeed, after receiving Exmingua's EIA, the MARN sought *ampliaciones* from Exmingua about the consultations that it had carried out before approving the EIA.[191]

83. Furthermore, while the objective of the ILO-mandated consultations is to "achieve agreement or consent" to proposed legislative or administrative measures,[192] the Constitutional Court – along with other States in Latin America[193] – has confirmed that ILO Convention 169 consultations do not amount to a veto power for indigenous peoples against projects.[194] In the case of extractive projects, the specific purpose of consultations is to determine "whether and to

[190] *See* CEACR Observation on Bolivia 2005, 95th Session, at ¶ 3 (". . . the obligation to ensure that consultations are held in a manner consistent with the requirements established in the Convention is an obligation to be discharged by governments, not by private individuals or companies.") (CL-0230-ENG).

[191] Letter from the Ministry of Environment and Natural Resources to Exmingua (unsigned) undated but received 14 Dec. 2010 (C-0086-ENG/SPA).

[192] ILO Convention 169, Art. 6(2) (CL-0220-ENG).

[193] *See e.g.* Chile, Regulation on the Indigenous Consultation Procedure under Article 6 of the ILO Convention No. 169 dated 15 Nov. 2013 (Supreme Decree No. 66), Art. 3 (C-0535-SPA/ENG) (providing that "[t]he responsible body must make the necessary efforts to reach agreement or obtain the consent of the affected peoples, and must comply with the principles of consultation through the procedure established in this regulation. Under these conditions, the duty of consultation shall be considered fulfilled, even when it is not possible to achieve that goal."); *see also* Peru, Regulations on Citizen Participation in the Mining Subsector (Supreme Decree No. 028) and implementing Ministerial Resolution 304), Art. 4 (C-0536-SPA/ENG) (stating that "[t]he consultation does not grant the populations the right to veto the mining activities of the authority's decision").

[194] *See Community Development Councils of the Community of El Pilar I and II and others v. Municipal Council of San Juan Sacatepéquez*, Constitutional Court of Guatemala, Case no. 3878-2007 dated 21 Dec. 2009, at 27 [at 27 ENG] (C-0529-SPA/ENG) (holding that the right to consultation under the ILO Convention 169 "is not equivalent to a veto prerogative on actions taken within the legal sphere of powers that fall to government agencies - including those responsible for the authorisation and supervision of exploration projects and mining exploitation."); *see also Community Development Committee of the Community of Chicanchiu Chipap and others v. Ministry of Energy and Mining*, Constitutional Court of Guatemala, Case No. 4419-2011 dated 5 Feb. 2013, (C-0537-SPA/ENG) at 7-8 [at 7-8 ENG] (indicating that "[I]t should also be noted that the International Labour Organization itself has pointed out that the right enshrined in Article 6(2) of Convention No. 169 should not be interpreted as a veto right for indigenous and tribal peoples.."); *see also* Commentary of Experts on the Application of Conventions and Recommendations, International Labour Conference, 100th Session (2011) General Observation, Indigenous and Tribal Peoples, at 10. (CL-0232-ENG).

what degree [indigenous peoples'] interests would be prejudiced" by such activities.[195] This objective was achieved through the consultations conducted by Exmingua and GSM in preparing the Progreso VII EIA. As discussed above, the participants in the EIA consultations expressed their support for the mining project, questions regarding water, air pollution and deforestation were addressed,[196] and *no objections* were received from the local communities following a 20-day period during which the finalized EIA was made available to the public for comment.[197] Thus, Exmingua's EIA consultations were compatible with the objective of ILO Convention 169 and, in accordance with Guatemala's own position before the IACHR, fulfilled the Convention's purpose.

84. As Professor Fuentes notes, it is "not consistent that, years after the Progreso VII Derivada license was granted, the Constitutional Court changed all the rules of the game," thus depriving Exmingua of its right to legal certainty.[198]

85. In addition, the Supreme Court's ruling did not account for Claimants' and Exmingua's absence of fault in the matter, and did not make any provision for compensation to them as innocent parties. As Professor Fuentes notes, it is Guatemala – and not the project operator – that should be penalized.[199] In this case, however, the Courts decided to penalize Exmingua for Guatemala's purported failure to conduct consultations – by suspending Exmingua's operations during the pendency of the proceedings, without any compensation, and pending completion of the consultations by the MEM. Notably, this treatment differed from the treatment given by the Guatemalan courts to other similar projects subject to *amparo* proceedings.[200]

[195] ILO Convention 169, Art. 15(2) (CL-0220-ENG).

[196] *See* Environmental Impact Assessment for Progreso VII Project dated 31 May 2010, § 7.5, 9.3.1 (C-0082-SPA/ENG).

[197] *See* ¶ 33 above.

[198] Fuentes ¶ 168.

[199] *Id*. ¶ 171.

[200] *See* § II.E.4.

86. The Supreme Court failed to take any of these points into account, and simply granted the *amparo provisional*, stating in a conclusory manner that it was "warranted by the circumstances of the case."[201]

87. As of this time, moreover, Exmingua had not even been served notice of the *amparo* proceedings, notwithstanding the requirement under Guatemalan law that parties whose rights could be effected by an *amparo* application must be notified of the filing of the same, and that no decision may affect a third party who had not been summoned before and had no opportunity to defend itself.[202] As Professor Fuentes observes, this was a clear violation of Guatemalan law and Exmingua's due process rights.[203]

88. Having heard through informal means, including the media, about the *amparo*, on 1 December 2015, Exmingua joined the action as an interested third party,[204] and, on 23 February 2016 (having finally been served with notice of the *amparo* proceedings and the various filings), it appealed the Supreme Court's *amparo provisional* ruling to the Constitutional Court, arguing that (i) CALAS lacked legal standing to bring the *amparo* action, and (ii) the exploitation license had been granted to Exmingua in compliance with all applicable legal requirements, making it a "consummated act" which could not be undone.[205] In addition, Exmingua explained that the requirement to carry out consultations had been met and, in any event, the "consultations do not constitute a veto against the granting of mining exploitation licenses."[206] The MEM also filed an appeal against the Supreme Court's ruling on the same day, arguing that the act complained of should be the responsibility of the Government of Guatemala, and not the MEM.[207] It also argued that the complaint was against the issuance of the license, and not the license itself;

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[201] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo provisional* dated 11 Nov. 2015, at III (C-0004-SPA/ENG).

[202] Fuentes ¶¶ 94, 183; *Amparo* Law, Arts 5, 34-35 (C-0416-SPA/ENG); Judiciary Law, Art. 152 (C-0415-SPA/ENG).

[203] Fuentes ¶ 183.

[204] Exmingua's Request to appear in *Amparo* proceedings dated 1 Dec. 2015 (C-0469/ENG/SPA).

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

[206] *Id*., at § E(e).

[207] *Id*..

therefore, the MEM stated, Exmingua's license should not have been suspended, and the requirements for *amparo* protection had not been established.[208]

89. On 5 May 2016, the Constitutional Court dismissed the appeals filed by Exmingua and the MEM, and confirmed the *amparo provisional* granted by the Supreme Court.[209] In doing so, the Court held, in a decision bereft of explanation and analysis, that the conditions warranting the grant of the interim protection requested, including the conditions specified by the Amparo Law had been met.[210] The Constitutional Court further held that Exmingua would be able to regain the use of its license only after the State, acting through the MEM, conducted consultations with the local communities.[211]

90. With good cause, the day after the Constitutional Court rendered its decision, Exmingua filed a request with the Court seeking clarification. Specifically, Exmingua requested clarity as to exactly when Exmingua would regain the use of its license.[212] The Constitutional Court denied Exmingua's request.[213]

91. Less than two months later, on 28 June 2016, the Supreme Court granted an *amparo definitivo* to CALAS, holding that *the State – not* Exmingua – had violated the right of consultation of the affected communities.[214] Exmingua's exploitation license was suspended and the MEM was ordered to determine the procedure to carry out community consultations.[215] In so ruling, the Supreme Court invoked exceptions to each of the well-established, threshold legal requirements that had been disregarded by CALAS in filing its *amparo* petition, thus dismissing the arguments made by the MEM, Exmingua and the Attorney General's Office showing that

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[208] *Id*.

[209] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming *amparo provisional* dated 5 May 2016 (C-0143-SPA/ENG).

[210] *Id*.

[211] *Id*.

[212] Constitutional Court of Guatemala, Case No. 1592-2014, Request by Exmingua for clarification dated 6 May 2016 (C-0538-SPA/ENG).

[213] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling on request for clarification dated 9 May 2016 (C-0554-SPA/ENG).

[214] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo definitive* dated 28 June 2016 (C-0144-SPA/ENG).

[215] *Id*. ¶ 23-24 [at 18 ENG].

none of the *amparo* admissibility requirements had been satisfied.[216] Specifically, the Court held that: (i) the prescribed time-period for filing an *amparo* (*i.e.*, 30 days) did not apply because the challenged act related to an "omission," the effects of which were "continuing"; (ii) the requirement to exhaust remedies did not apply because CALAS "was not a party to the administrative proceeding" (*i.e.*, the granting of the exploitation license to Exmingua), and there were "no ordinary remedies to adequately deal with the situation" involving a failure to conduct consultations; and (iii) CALAS had standing because it was representing a "collective of people who are genuinely grouped into an association, a community organization, a traditional or other similar institution," and that, as a matter of public international law, the MEM was the correct entity to be sued.[217]

92. As Professor Fuentes explains, the Supreme Court manifestly departed from well-established principles of Guatemalan law in holding that the *amparo* petition was admissible. Specifically, regarding the timeliness argument, the Supreme Court failed to address the arguments raised by the MEM, the Attorney General, and Exmingua, and erroneously relied on an exception that has no basis in the Amparo Law.[218] As to the requirement to exhaust available remedies, the Supreme Court grossly erred in failing to recognize that there were ordinary remedies available, namely, an objection procedure,[219] and failing that, an action for reconsideration,[220] and then a contentious-administrative proceeding under the Contentious Administrative Law.[221] Similarly, by finding an exception to the standing requirement, the Supreme Court violated the Amparo Law and departed from established court practice.[222]

93. Exmingua appealed the Supreme Court's *amparo definitivo* ruling on 30 June 2016, arguing that the Court had clearly erred in disregarding all of the procedural requirements for admitting an *amparo*, and that the action was being used as an "alternate procedure" to challenge

[216] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo definitivo* dated 28 June 2016, at § VII (C-0144-SPA/ENG).
[217] *Id*.
[218] Fuentes ¶¶ 107-123.
[219] Mining Law, art. 47 (C-0186-ENG/SPA); *see also* Fuentes ¶ 133.
[220] Contentious Administrative Law, Arts 9, 17 (C-0424-ENG/SPA); *see also* Fuentes ¶ 133.
[221] Contentious Administrative Law, Art. 19 (C-0424-ENG/SPA); *see also* Fuentes ¶ 133.
[222] Fuentes ¶ 133.

an administrative resolution in violation of the provisions of the Amparo Law.[223] Exmingua asserted that (i) the *amparo* action was clearly time-barred and the Supreme Court had improperly derogated from the 30-day filing deadline; (ii) the finding as to exhaustion of administrative remedies was wrong, because CALAS and / or the community members never challenged the administrative resolution granting the license, despite having had an opportunity and available recourse to do so; and (iii) the exception to the standing requirement did not apply because CALAS "is not composed of members of the communities that have allegedly not been consulted, and it does not represent, either, through legal representation mechanisms, such communities."[224]

94. The MEM also appealed the *amparo definitivo*, asserting that (i) the Supreme Court failed to provide reasoning for its decision, leaving the MEM in a state of "defenselessness"; (ii) the MEM was not responsible for carrying out consultations, as it lacked a statutory or regulatory norm empowering it to do so; (iii) the Supreme Court failed to impose on the MEM a clear obligation (by ordering it to "*rule according to law and pursuant to this decision, observing the rights and guarantees of those represented by the petitioner*"); (iv) the Supreme Court ordered the MEM and purported to vest it with powers which the MEM does not have to carry out a procedure that lacks a legal basis; (v) the term provided for complying with the Supreme Court's order was unreasonable and "literally unfeasible"; and (vi) the MEM already complied with the *amparo provisional* by issuing resolutions suspending Exmingua's license.[225] Less than one month after the Supreme Court granted the *amparo definitivo* to CALAS, representatives of the Kakchiquel indigenous community filed an *amparo* against the MEM, arguing that Exmingua's Progreso VII exploitation license had been improperly granted for the same reasons pleaded by CALAS (and accepted by the Court).[226] As it had in connection with the CALAS *amparo* proceeding, the MEM presented a report to the Supreme Court stating that Exmingua's license

[223] 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-SPA/ENG).

[224] *Id*. [at 3 ENG].

[225] Constitutional Court of Guatemala, Case No. 1592-2014, Notification of 11 June 2020 ruling, 23 June 2020, at 8 (C-0495-SPA/ENG).

[226] Indigenous community *amparo* file 1246-2016 at 5-7 [at 4-6 ENG] (C-0476-SPA/ENG) (including *Amparo* application).

was granted in compliance with existing law.[227] One day later, on 5 August 2016, CALAS joined this action as an interested third party.[228] On the same day, the Supreme Court granted an *amparo provisional* ordering the suspension of the Progreso VII exploitation license, in the same way and on the same basis as it had in the *amparo* action initiated by CALAS.[229] On 24 November 2016, Exmingua joined this *amparo* action as interested third party, having been notified only a day earlier of the proceeding, in breach of the Amparo Law.[230] Exmingua filed an appeal, asserting that the Supreme Court had already suspended the license, so the circumstances of the case did not call for issuing an *amparo provisional,* rendering it manifestly arbitrary and illegal, and that the indigenous community was not entitled to an *amparo*, in any event, as it had not opposed the mining project in accordance with the process established in the Mining Law.[231]

95. The Constitutional Court denied Exmingua's appeal on 30 May 2017, merely stating that "the conditions warranting the grant of the interim protection requested are met," and noting that the MEM could restore the validity of the license by carrying out the public consultations.[232] A few months later, on 12 September 2017, Exmingua requested that the Supreme Court revoke the *amparo* provisional, given that there was no national legislation, regulations, or guidelines addressing the consultation process under ILO Convention 169.[233] The Supreme Court denied this request and confirmed the *amparo provisional* on 31 October 2017.[234] However, on 6 December 2017, the Supreme Court revoked the *amparo provisional* on the grounds that the subject matter was the same as the *amparo* request that had been filed by and granted to

[227] *Id*. at 5-7 at 30-34 [at 20-23 ENG] (including MEM's report dated 4 Aug. 2016).

[228] *See id*. at 45 [at 28 ENG].

[229] *Id*.

[230] Fuentes ¶ 102; Exmingua Appeal against the *amparo provisional* dated 24 Nov. 2016 (C-0478-SPA/ENG).

[231] Exmingua Appeal against the *amparo provisional* dated 24 Nov. 2016 (C-0478-SPA/ENG).

[232] Decision of the Constitutional Court affirming the *amparo provisional* dated 30 May 2017, at 6-7 [at 1-2 ENG] (C-0482-SPA/ENG).

[233] Exmingua's request to revoke *amparo* provisional dated 12 Sept. 2017, at 5-14 [at 1-6 ENG] (C-0483-SPA/ENG).

[234] Supreme Court Resolution dated 31 Oct. 2017 (C-0484-SPA/ENG).

CALAS.[235] On 12 December 2017, the indigenous communities, through CALAS, requested that the Supreme Court revoke this ruling.[236] That request remains pending.

96. Meanwhile, a public hearing on Exmingua's appeal of the Supreme Court's *amparo definitivo* issued to CALAS took place on 4 August 2016.[237] Under Guatemalan law, the Constitutional Court is obliged to render a decision in *amparo* proceedings within five calendar days after a public hearing.[238] Although, in practice, this deadline is rarely complied with, *amparo* decisions are expected to be ruled on expeditiously, in furtherance of the objective reflected in the five-day rule.[239] Yet, it would turn out that Exmingua had to wait four years for the Consitutional Court to rule on its appeal, while in the meantime, the MEM proceeded with suspending Exmingua's license and the Constitutional Court issued rulings in a number of similar cases that were filed after Exmingua's appeal.[240]

2. The MEM Suspended Exmingua's Exploitation License and Exportation Certificate

97. Initially, the MEM did not issue an order suspending Exmingua's license after the Supreme Court's ruling on 11 November 2015 granting CALAS the *amparo provisional*, because, it asserted, the ruling "was groundless"[241] as the exploitation license had been granted *almost four years earlier*, in 2011, and had not been challenged at that time.[242] Responding to a request from the Supreme Court dated 2 March 2016 to submit a report on the steps taken to comply with the *amparo provisional*, the MEM explained that it was "impossible" to comply

[235] Supreme Court Resolution dated 6 Dec. 2017 (C-0485-SPA/ENG).

[236] Indigenous People Appeal dated 12 Dec. 2017 (C-0486-SPA/ENG).

[237] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Appeal by Exmingua against the Ruling granting *amparo definitive* dated 28 June 2016 (C-0144-SPA/ENG); *see also* Exmingua's request to the Constitutional Court to render a decision on the appeal of the amparo definitive dated 4 Apr. 2018 (C-0544-SPA/ENG).

[238] *See* Fuentes ¶ 154; *see also* Amparo, Habeas Corpus and Constitutionality Law, Art. 66 (C-0416-SPA/ENG).

[239] *See* Fuentes ¶ 154.

[240] *See infra* §§ II.E.2-3, 6.

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

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

with the ruling, because the MEM had already granted a license to Exmingua.[243] Indeed, as Professor Fuentes confirms, the granting of the exploitation license without any challenge generated acquired rights for Exmingua, which could only be revoked or suspended in accordance with the specific mechanisms provided for under Guatemalan law, none of which were invoked or applicable here.[244]

98. The MEM, however, subsequently reversed course and, on 10 March 2016, issued Resolution No. 1202 suspending Exmingua's right to exploit gold and silver and to sell locally or transform any such material.[245] This Resolution was notified to Exmingua a week later, on 18 March 2016.[246] The MEM further stated in Resolution No. 1202 that Exmingua nevertheless remained obligated to comply with all financial, legal, and technical requirements in connection with its now-suspended exploitation license.[247] Shortly before the Constitutional Court ruled on Exmingua's appeal, the MEM, by notice dated 3 May 2016, ratified the immediate suspension of mining operations at Progreso VII pursuant to Resolution No. 1202.[248]

99. On the same day, the MEM issued Resolution No. 146, suspending Exmingua's Certificate of Exportation, which was valid until 23 October 2016 and subject to automatic, annual extensions.[249] On 6 May 2016, Exmingua requested that the MEM revoke this Resolution, as even the Supreme Court's *amparo provisional* did not have any connection with Exmingua's exporting activities.[250] The MEM, however, failed to act for more than five months, after which time, on 24 October 2016, the MEM finally revoked Resolution No. 146.[251] The MEM's bad faith in this regard is apparent, because by the time it finally revoked its

[243] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ministry of Energy and Mines' submission in relation to compliance with *amparo provisional*, 10 Mar. 2016, at 2 (C-0008-SPA/ENG).

[244] *See* Fuentes ¶ 48; *see supra* § II.E.1.

[245] Resolution No. 1202 of the Ministry of Energy and Mines dated 10 Mar. 2016 (C-0139-SPA/ENG)

[246] *Id*.

[247] *Id*.

[248] MEM Resolution No. 1516 dated 3 May 2016 (C-0443-SPA/ENG).

[249] Resolution No. 146 of the Ministry of Energy and Mines dated 3 May 2016 (C-0140-SPA/ENG).

[250] MEM Resolution No. 5194 dated 24 Oct. 2016, at 3 (C-0142-SPA/ENG).

[251] MEM Resolution No. 5194 dated 24 Oct. 2016 (C-0142-SPA/ENG).

unwarranted Resolution, Exmingua's Certificate of Exportation already had expired – and it was not until January 2017 that Exminuga was notified of the decision.[252]

100. 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.[253] When Exmingua shut down operations, the open-pit mining phase at Guapinol and Poza del Coyote was nearing the end and Exmingua was preparing to commence underground mining in these areas.[254] To prepare for that, Exmingua spent approximately US$ 800,000 on the purchase and installation of the first set of the relevant underground equipment, including, for example, a load-haul-dump unit (an underground front-end loader); a two-boom drill jumbo for drilling and breaking the rock; an underground diamond drill, which would be used to drill the walls of the tunnels to delineate the ore and explore for parallel ore lenses; a ventilation fan and vent tubing; and a power substation at the tunnel entrance.[255] Exmingua also undertook preparatory works, including installing underground drain pipes, clearing debris, and redirecting rainwater.[256] Claimants also expected that Exmingua would obtain the Santa Margarita exploitation license (which it had applied for in Janaury 2009) and commence mining operations at Laguna Norte, first in open pits, followed by an underground phase.[257]

101. Instead, however, Exmingua was forced to shut down its operations. It returned certain equipment to its contractors, and had to store off-site or lease to other companies some of the other equipment that could no longer be used.[258] The process of decommissioning the site took several months.[259] With no source of income, Exmingua was forced to dismiss almost all of its 100 employees prematurely and – despite the suspension of its license on account of alleged wrongdoing by the *State* – was legally required to provide statutory severance pay. Only a few

[252] *Id*. (including a notification of the Resolution to Exmingua dated 7 Jan. 2017).
[253] Kappes ¶ 134.
[254] *Id*. ¶ 122; SRK ¶ 36.
[255] Kappes ¶¶ 113, 122.
[256] *Id*. ¶ 122.
[257] *Id*. ¶ 122; SRK ¶ 36.
[258] Kappes ¶ 135.
[259] *Id*. ¶ 135.

of Exmingua's terminated employees accepted the statutory entitlement, however, and the remainder demanded more than that, which led to litigation in the local courts. In order to avoid the costs of protracted litigation, Exmingua entered into settlement agreements with nearly all of the employees.[260]

102. Exmingua had hoped to make these severance/settlement payments using proceeds from the sale of its concentrate (having no other source of income given that its operations were shut down by Guatemala).[261] However, it has been unable to do so as a result of Guatemala's unlawful and arbitrary seizure and impoundment of its gold concentrate, as discussed below. Further, given the MEM's suspension of Exmingua's Certificate of Exportation, which had expired by the time the MEM revoked its suspension, Exmingua is unable to ship and sell the gold concentrate that it had mined and processed before it was forced to stop its operations.[262]

3. The Constitutional Court And The MEM Favored Other Projects Over Exmingua's

103. While Exmingua shut down its operations, the Consitutional Court continued to refuse to decide on Exmingua's pending appeal despite the fact that it received—and expeditiously ruled on—several appeals raising the same legal issues. The Court continued to ignore Exmingua's case, however, even after Exmingua urged the Court to issue a decision and specifically invoked developments in other cases before the Court.

104. Thus, on 8 June 2017, Exmingua applied to revoke the Constitutional Court's ruling dated 5 May 2016 affirming the *amparo provisional*, citing to changed circumstances given the Court's ruling dated 26 May 2017 in a similar case, *Oxec*.[263] The *Oxec* case arose from an

[260] *Id*. ¶ 134

[261] Kappes ¶ 140.

[262] Email from Dan Kappes to Ryan Adams dated 31 Mar. 2017 (C-0151- ENG) (listing gold concentrate following the shutdown totaling 15,388 grams of gold across: shipment no. 68 (4,163 grams of gold located off site); shipment no. 69 (3,349 grams of gold across 13 bags located in San Jose and since moved to the site warehouse, and 1,803 grams of gold across seven bags located in the plant warehouse); daily bags from the period of 17 Apr. 2016 to 9 May 2016 (4,920 grams of gold across 23 bags located in the plant container); shipment no. 70 (394 grams of gold across 35 bags located in the plant warehouse); remaining bags for shipments nos. 65-68 (759 grams of gold across four bags located in the plant warehouse)); Email from Dan Kappes to M. Hernandez dated 26 July 2017 (C-0551-ENG) (including a blending list for shipment no. 70, including 35 bags scheduled to leave the site in Aug. 2017 with gold grade aimed at 225 grams per ton).

[263] Request of Exmingua to the Constitutional Court dated 8 June 2017 (C-0555-SPA/ENG).

application for an *amparo provisional* against the MEM filed with the Supreme Court on 11 December 2015, regarding the construction of two hydroelectric projects owned by Oxec, S.A. and Oxec II, S.A, two investments indirectly owned by Guatemalan nationals.[264] The application was brought by an individual activist (Bernardo Call Xól) purporting to act on behalf of the Q'Eqchi indigenous community, and Colectivo Madreselva (an environmental organization) joined as an interested third party.[265] As in Exmingua's case, the petitioner argued that the construction licenses for these projects had been wrongfully granted by the MEM, due to its failure to conduct consultations with the local communities in accordance with ILO Convention 169, and requested the suspension of the licenses.[266]

105. On 29 January 2016, the Supreme Court granted an *amparo provisional* suspending the activities of the hydroelectric plants Oxec I and II.[267] As in Exmingua's case, the Supreme Court held that the MEM had failed to consult with the local communities, as required by ILO Convention 169, and the licenses therefore were suspended.[268] The Supreme Court, however, reversed this decision less than three months later, on 22 April 2016, allowing operations to resume.[269] The petitioner then appealed this ruling to the Constitutional Court.[270]

106. On 4 January 2017, the Supreme Court granted an *amparo definitivo* against the MEM, ordering the suspension of the licenses.[271] The following month, on 17 February 2017, the Constitutional Court overturned, in part, the Supreme Court's earlier ruling dated 22 April 2016,

[264] *Amparo* application 2826-2015 against the MEM dated 11 Dec. 2015 (C-0556-SPA/ENG).

[265] *Id*.

[266] *Id*.

[267] Ministry of Energy and Mines appeal against the provisional *Amparo* issued against 29 Jan. 2017 dated 22 Apr. 2017 (C-0552-SPA/ENG).

[268] Diario La Hora, "MEM will check if there are operations in mine," *La Hora La Puya* dated 28 Apr. 2016 (C-0557-SPA/ENG).

[269] Supreme Court Resolution revoking the *provisional amparo* of 29 January 2016, dated 22 Apr. 2016 (C-0583-SPA/ENG). Consequently, on 10 May 2016, Oxec and the MEM withdrew their appeal.

[270] Appeal against the Revocation Order of the Provisional Amparo 2826-2015 dated 7 May 2016 (C-0584-SPA/ENG).

[271] Guatemalan Supreme Court ruling dated 4 Jan. 2017 at 32 (C-0587-SPA/ENG).

and reinstated the *amparo provisional*, subject to the completion of the *amparo* proceedings in the Constitutional Court.[272]

107. On 26 May 2017, the Constitutional Court issued a final ruling in the *Oxec* case, upholding the 4 January 2017 *amparo definitivo*, lifting the suspension and also reversing the *amparo provisional* that had been reinstated on 17 February 2017.[273] The Court granted Oxec permission to continue operating, on the condition that the MEM carry out consultations within a period of 12 months.[274] The Court also explained that, if the consultations were not carried out within the prescribed period due to the State's willful misconduct or negligence, the parties would be entitled to seek an extension to the period for completing the consultations.[275] Alternatively, if the failure to conduct or complete the consultations within the prescribed period was attributable to the indigenous communities, the project could continue operating and the Court, upon receiving notice, would adopt appropriate measures.[276]

108. In the absence of any legislative, regulatory, or administrative guidance as to how to conduct consultations with indigenous communities, the Court issued guidelines, which it directed the MEM to follow in the *Oxec* case *and in any other similar cases*.[277] The MEM took immediate action, informing the Supreme Court on 26 June 2017 (*i.e.*, only one month after the Constitutional Court ruling) that it had executed a consultation plan in relation to the Oxec projects.[278] The MEM duly completed consultations with the 11 communities in the project's

[272] Constitutional Court Resolution regarding the appeal against Revocation of the Provisional Amparo of 22 Apr. 2016, dated 17 Feb. 2017 (C-0558-SPA/ENG); Constitutional Court decision, Case Nos. 90-2017, 91-2017 and 92-2017 dated 26 May 2017 at 101 (C-0441-SPA/ENG).

[273] Constitutional Court decision, Case Nos. 90-2017, 91-2017 and 92-2017 dated 26 May 2017 (*Oxec case*) (C-0441-SPA/ENG).

[274] *Id*.

[275] *Id*.

[276] *Id*.

[277] *Id*.

[278] *See* Corrective Consultation Plan dated July 2016 (C-0559-SPA/ENG); Memorial of First Quarterly Report of Public Consultations by the MEM dated 29 June 2017 (C-0560-SPA/ENG).

area of influence on 11 December 2017 (*i.e.*, just over six months after the Constitutional Court ruling ordering it to do so). [279]

109. In total, Oxec's *amparo* proceedings lasted 18 months and ended with the MEM speedily performing consultations within seven months of the Constitutional Court ordering it to do so. Moreover, but for brief periods of a few months when the Courts ordered the Oxec projects to suspend operations, the projects were *permitted to continue operating* during the pendency of the *amparo* proceedings *and* while the MEM conducted the consultations.

110. Exmingua's request to the Constitutional Court for reconsideration of its ruling suspending Exmingua's license, on the basis of the *Oxec* ruling, however, was unreasonably denied by the Court on 5 October 2017, on the basis that "there remain circumstances which make it advisable to maintain this provisional protection," but without providing any explanation. [280]

111. Apart from the *Oxec* case, the Court also has acted expeditiously in the *Minera San Rafael* and *CGN* cases, even though those cases were filed significantly later than Exmingua's case. 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). This project was suspended on 22 June 2017, after the Supreme Court granted an *amparo provisional* to CALAS (which brought the case against the MEM, on behalf of the Xinca indigenous people on 17 May 2017), [281] on the grounds that the MEM had violated the Xinca people's right of consultation by

[279] Memorial of Final Report of Public Consultations by the MEM dated 11 Dec. 2017 (C-0561-SPA/ENG); Maria Rosa Bolaños, "MEM completes consultations with 11 communities for Oxec case," *La Prensa Libre* dated 12 Dec. 2017 (C-0562-SPA/ENG).

[280] Constitutional Court Case No. 1592-2014, ruling denying Exmingua's request for reconsideration of the amparo dated 5 Oct. 2017, at 1 [at 1 ENG] (C-0563-SPA/ENG).

[281] CALAS amparo request against the Escobal and Juan Bosco mining license dated 17 May 2017 (C-0564-SPA/ENG); *see also*: Tahoe Resources Press Release, "Guatemalan Lower Court Issues Ruling on Tahoe's Mining License" dated 5 July 2017 (C-0564-SPA/ENG).

not carrying out consultations in advance of granting the Minera San Rafael mining licenses (Juan Bosco and Escobal).[282]

112. On 6 July 2017, Minera San Rafael requested that the Supreme Court revoke the *amparo provisional*[283] and likewise asked the Constitutional Court to overturn the Supreme Court's *amparo provisional*, arguing that it was wrongfully granted because the ruling was signed by substitute magistrates without any explanation.[284] On 24 August 2017, the Constitutional Court upheld the suspension.[285] A couple of weeks later, however, on 8 September 2017, the Supreme Court granted an *amparo definitivo*, revoked the *amparo provisional*, and reinstated the Minera San Rafael mining license, allowing operations to continue for a period of 12 months until consultations were completed by the MEM.[286] On 11 September 2017, CALAS appealed the ruling, requesting that the *amparo provisional* (precluding Minera San Rafael from operating) be reinstated.[287] On its part, on 19 September 2017, Minera San Rafael requested the Supreme Court to order the MEM to comply with the Court's reinstating of the mining license and, in particular, to direct the MEM to grant Minera San Rafael a new exportation certificate so that Minera San Rafael could continue its operations.[288] On the very next day, the Supreme Court rejected the request, stating that the appeals against its 8 September 2017 decision must be first

[282] Supreme Court Case No. 1076-2017, ruling granting an amparo provisional dated 22 June 2017 (C-0569-SPA/ENG); *see also* Tahoe Resources Press Release, "Guatemalan Lower Court Issues Ruling on Tahoe's Mining License" dated 5 July 2017 (C-0565-SPA/ENG).

[283] Minera San Rafael request to overturn the amparo provisional dated 6 July 2017 (C-0566-SPA/ENG).

[284] Minera San Rafael request for a procedural amendment dated 18 Aug. 2017 (C-00567-SPA/ENG).

[285] Constitutional Court Case No. 3265-2017 resolution dated 24 Aug. 2017 (C-0568-SPA/ENG).

[286] Supreme Court Ruling, Amparo 1076-2017 dated 8 Sept. 2017 (C-0570-SPA/ENG).

[287] CALAS appeal to Supreme Court ruling granting an amaparo definitivo dated 11 Sept. 2017 (C-0571-SPA/ENG).

[288] With the information and documentation previously available to Claimants, Claimants had believed that Minera San Rafael had been prohibited from operating during the pendency of its *amparo* proceedings, for all but one month's time, and until the MEM completed consultations. *See* Claimants' Notice of Arbitration dated 9 Nov. 2018 ¶¶ 63, 68; Claimants' Rejoinder on Preliminary Objections dated 22 Nov. 2019 ¶ 97. With the additional information Claimants now have obtained, however, it appears that, unlike in Exmingua's case, Minera San Rafael, like Oxec, was permitted to operate. However, it appears that Minera San Rafael was unable to do so, because the MEM suspended and then failed to renew its exportation certificate. Claimants thus understand that Minera San Rafael shut down during the pendency of its *amparo* proceedings and remains shut down.

resolved.[289] Minera San Rafael therefore filed an appeal against this ruling, seeking the reversal of the *amparo definitivo*.[290]

113. On 3 September 2018, the Constitutional Court issued its final ruling, finding that the MEM had failed to consult the Xinca people before granting the Escobal mining license.[291] The Court ordered the MEM to carry out consultations with the Xinca communities immediately and ordered the suspension of operations until the MEM completed these consultations.[292]

114. The Constitutional Court's final ruling in the *Minera San Rafael* case was rendered one year and nine months earlier than the final ruling in Exmingua's case, even though Minera San Rafael's appeal was filed 15 months *after* Exmingua filed its appeal with the Constitutional Court.[293] Moreover, the delay in the *Minera San Rafael* case was partly attributable to requests for additional information from the Constitutional Court in March 2018, including an anthropological study of the surrounding communities, a third-party review of the Escobal EIA, and a third-party review of the original MEM consultation process.[294] No such requests have been made in Exmingua's case, which remained unresolved far longer than the *Minera San Rafael* case.

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

[289] *See* Supreme Court Resolution dated 20 Sept. 2017 (C-0572-SPA/ENG).

[290] *See* CALAS appeal to Supreme Court ruling granting an *amaparo definitivo* dated 11 Sept. 2017 (C-0571-SPA/ENG); Minera San Rafael appeal to Supreme Court, ruling granting an *amparo definitivo* dated 26 Sept. 2017 (C-0573-SPA/ENG).

[291] Constitutional Court Ruling, Case No. 4785-2017 dated 3 Sept. 2018 (C-0459-SPA/ENG); *see also* Tahoe Resources Press Release, "Guatemalan Constitutional Court Reverses Supreme Court Ruling to Reinstate Escobal Mining License" dated 3 Sept. 2018 (C-0574-ENG).

[292] Constitutional Court Ruling, Case No. 4785-2017 dated 3 Sept. 2018 (C-0459-SPA/ENG); *see also* Tahoe Resources Press Release, "Guatemalan Constitutional Court Reverses Supreme Court Ruling to Reinstate Escobal Mining License" dated 3 Sept. 2018 (C-0574-ENG).

[293] *See supra* ¶ 93.

[294] Press release from Tahoe Resources, "Guatemalan Constitutional Court Requests Additional Information" dated 8 Mar. 2018 (C-0575-ENG). On 15 November 2018, the MEM announced that the consultation process in relation to the Escobal mine had been initiated (*see* Rosa María Bolaños, "Minera San Rafael has been shut down for 2 years and doubts arise as to the future of the mining industry in Guatemala," *La Prensa Libre* dated 5 July 2017 (C-0576-ENG/SPA). Almost a year later, the President of Guatemala announced that the consultations would be completed before the end of his term in January 2020 (*see* Andrea Orozco, "Jimmy Morales promises to 'finish everything' at the end of his term," *La Prensa Libre* dated 4 Oct. 2019 (C-0577-ENG), but to Claimants' knowledge, to date, they have still not been completed.

Soloway Investment Group, GmbH.[295] On 22 February 2018, a group of individuals brought an *amparo* action against the MEM challenging the extension of the mining license in 2016 on the grounds that the indigenous communities had not been consulted.[296] The Supreme Court granted an *amparo provisional* on 7 March 2018, suspending the mining license.[297] On 9 January 2019, the Supreme Court granted an *amparo definitivo*, but lifted the suspension on operations.[298] However, six months later, on 18 June 2019, the Constitutional Court on appeal ordered the suspension of operations until a final resolution on the *amparo* was issued.[299] Just over two years after the filing of the initial *amparo* action, on 18 June 2020, the Constitutional Court issued a final ruling, directing the MEM to carry out ILO-related consultations within 18 months of the ruling and maintaining the suspension,[300] notwithstanding that the case was filed after Exmingua's and, yet, decided well before Exmingua's.

4. Guatemala Hampered Exmingua's Ability to Secure An Exploitation License For Santa Margarita

116. Guatemala's actions with respect to Exmingua's Progreso VII exploitation license had severe repercussions for Exmingua's rights under its Santa Margarita exploration license and its pending application for the Santa Margarita exploitation license.

117. The ruling of the Supreme Court granting the *amparo provisional* and the MEM's initial refusal to suspend Exmingua's license sparked a new wave of protests in early 2016, which spread to the MEM's office in Guatemala City.[301] The protesters demanded that the MEM

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[295] *See* Solway's website available at https://solwaygroup.com/our-business/fenix-project-guatemala/.

[296] Decision dated 18 June 2020, issued in Case No. 697-2019 by the Constitutional Court (*CGN case*), at 2 [at 1 ENG] (C-0496-ENG/SPA).

[297] *Id*. at 5 [at 1 ENG]; *see also* Brenda Jiguan, "CC temporarily suspended the Fénixmine operations," *Diario de Centro America* dated 29 July 2019 (C-0578-ENG/SPA) (indicating that the *amparo provisional* was issued on 7 March 2018).

[298] Decision dated 18 June 2020, issued in Case No. 697-2019 by the Constitutional Court (*CGN case*), at 1 (C-0496-ENG/SPA).

[299] *Id*. at 87.

[300] *Id*. at. 267-268, 274.

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

suspend Exmingua's Progreso VII license and close operations at the Project site.[302] The director of the MEM's Unit of Legal Assistance, Mr. Rogelio Zarceño, however, publicly proclaimed that the *amparo provisional* granted to CALAS was "groundless," as it was filed three years after the license was granted, and it did not "order or authorize the MEM to suspend" operations at the mining site.[303] The Guatemalan Chamber of Industry ("CIG") publicly supported the MEM's position at a press conference, and urged the MEM not to "yield to the de facto measures of demonstrators who violate the free movement of access of officials to their workplace."[304]

118. On 22 April 2016, Exmingua filed an *amparo* action against the President of Guatemala, the Ministry of Interior and the Director General of the National Civil Police for failing to remove the blockade, which was preventing entry to and from the site.[305] The Constitutional Court denied this application on 3 March 2017, ruling that Exmingua had not satisfied the requirement under the *Amparo* Law to show that the threat is "certain and imminent" because operations at the site had been suspended.[306] Thus, Guatemala failed to clear the gate protestors and allow Exmingua free access to the site located on the land Exmingua owns and where it maintains a fully functional laboratory and other facilities.[307] Due to the lack of routine access to the site, to date Exmingua remains unable to use these facilities.[308]

119. On 21 December 2016, the MEM issued Resolution No. 4056 directing Exmingua to file the EIA for the Santa Margarita license, duly approved by the MARN within 30 days.[309] The MEM, however, failed to acknowledge the fact that Exmingua had filed an *amparo* action—

[302] Geovani Contreras, "Locals from La Puya continue with the protests," *La Prensa Libre* dated 13 Mar. 2016 (C-0009-SPA/ENG).

[303] Maria Rosa Bolaños, "The MEM will not suspend the project," *La Prensa Libre* dated 1 Mar. 2016, at 1 [at 1-2 ENG] (C-0006 SPA/ENG).

[304] Natiana Gándara, "CIG urges the MEM to not bend over pressure," *La Prensa Libre* dated 11 Mar. 2016, at 5 [at 2 ENG] (C-0007-SPA/ENG).

[305] Constitutional Court of Guatemala, Case No. 1904-2016, Ruling denying Exmingua's request for an *amparo* against the President, the Ministry of Interior, and the Director General of the National Civil Police dated 2 Mar. 2017 (C-0147-SPA/ENG).

[306] *Id*.

[307] Kappes ¶ 145.

[308] *Id*.

[309] Official Notification No. 497 from the MEM to Exmingua, attaching Resolution No. 4056 dated 21 Dec. 2016 (C-0012-SPA/ENG).

which was pending at the time—seeking the State's assistance in granting and ensuring it access to its own mining site. Nor did the MEM state whether it even was still possible to obtain an exploitation license following the President of Guatemala's announcement proposing a *de facto* moratorium on issuing new mining licenses.[310]

120. By letter dated 22 March 2017, Exmingua explained to the MEM that it had not been possible to conclude the EIA for Santa Margarita 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.[311] Accordingly, Exmingua requested the MEM to suspend the requirement to submit an EIA until "there no longer is an impediment resulting in a physical and material impossibility to comply."[312] The suspension request was in line with Guatemalan law (applicable in administrative proceedings such as Exmingua's exploitation license application proceeding), stipulating that "statutory terms shall be barred in the event of a legitimate verified or notorious impediment."[313] In support of its request, Exmingua attached a certificate from a notary public, who had visited the area around the Santa Margarita site a few days earlier, certifying the resistance to the Project at the entrance to the site in the Municipality of San Pedro Ayampuc.[314]

121. In the meantime, on 7 April 2017, Exmingua submitted its EIA for Santa Margarita to the MARN (copying the MEM) *without* the section on the social studies. Exmingua's consultant, GSM, had prepared the EIA for Santa Margarita in 2011 when doing the same for the Progreso VII EIA, but had not conducted the social studies for the Santa Margarita application at that time because Exmingua intended to first commence activities on the Progreso VII portion of Tambor. Given the proximity of the Progreso VII and Santa Margarita license areas, the EIAs prepared by

[310] B. Barreto and G. Contreras, "Executive body proposes mining moratorium," *La Prensa Libre* dated 10 July 2013 (C-0455-SPA/ENG).

[311] Letter from Exmingua to the MEM, attaching Notary Public's Certification dated 21 Mar. 2012 (C-0013-SPA/ENG).

[312] *Id*.

[313] Fuentes ¶ 78; Guatemala Judiciary Law (Legislative Decree No. 2-80 of the Guatemalan Congress, as amended), Arts. 23, 50 (C-0415-SPA/ENG).

[314] Letter from Exmingua to the MEM, attaching Notary Public's Certification dated 22 Mar. 2017, at 3 [at 2 ENG] (C-0013-SPA/ENG) (indicating that at the entrance of the Municipality of San Pedro de Ayampuc, he "saw several scattered banners and canvases with slogans against mining" and one of them reads "this municipality does not want mining") (emphasis removed).

GSM were very similar, the biggest difference being the technical details explaining how Exmingua planned to mine the orebodies on the respective license areas.[315] In its cover letter to the MARN, Exmingua explained that it had not been able to complete the social studies because of "community unrest" in the municipality of San Pedro Ayampuc and blockades at the entrance to the Project site.[316] As such, Exmingua requested the MARN to issue "guidelines" and "recommendations" to complete the community consultations for the Santa Margarita EIA.[317] Exmingua, however, did not even receive a response from the MARN.

122. On 21 September 2017, Exmingua received notification of MEM's Resolution No. 1191 dated 5 April 2017, denying 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.[318] Exmingua filed an administrative appeal before the MEM challenging this Resolution on 26 September 2017, arguing that Guatemala's mining laws do not permit the MEM to impose a 30-day deadline for submission of an approved EIA, to no avail. On 7 November 2017, Exmingua again wrote to the MEM informing it that it was still unable to complete the consultations because of the blockade, and repeated its request for a suspension of this EIA requirement until the impediment ceased.[319]

123. On 20 November 2019, the MEM notified Exmingua of another resolution directing it to "regularize" its application for an exploitation license for Santa Margarita within 30 days, including by providing the requisite environmental approvals.[320] For the reasons discussed above, Exmingua was unable to comply with this request, which resulted in its license application being archived.

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[315] *See* Environmental Impact Assessment for Progreso VII Project dated 31 May 2010, (C-0082-SPA/ENG); *see also* Environmental Impact Assessment for Santa Margarita Project dated Jan. 2018 (C-0543-SPA/ENG)

[316] Letter from Exmingua to the MARN dated 7 Apr. 2017, at 1 [at 1 ENG] (C-0015-SPA/ENG); Letter from Exmingua to the MEM dated 7 Apr. 2017 (C-0016-SPA/ENG).

[317] Letter from Exmingua to the MARN dated 7 Apr. 2017 (C-0015-SPA/ENG); Letter from Exmingua to the MEM dated 7 Apr. 2017, at 2 [at 1 ENG] (C-0016-SPA/ENG).

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

[319] Letter from Exmingua to the MEM dated 7 Nov. 2017 (C-0550-SPA/ENG).

[320] MEM Resolution No. 4473 dated 20 Nov. 2019 (C-0153-SPA/ENG).

124. While Exmingua ostensibly continues to hold rights under its Santa Margarita exploration license, the only value in that license was Exmingua's legitimate confidence that, if exploration is successful, as it was, Exmingua would be able to obtain an exploitation license.[321] Yet, Exmingua's exploitation license application remains pending, without any hope of being granted – in accordance with the State's *de facto* moratorium – because it cannot conduct the social studies that the MEM deems necessary for the EIA due to the continuing blockades and protests, and the MEM has refused to conduct consultations, which the Courts have held are required for a license to gain effectiveness.

5. Guatemala Initiated Baseless Criminal Actions Against Exmingua Employees And Unlawfully Seized Its Concentrate

125. By late April 2016, Exmingua had made 67 shipments of gold concentrate and was processing and preparing its next three shipments (Nos. 68, 69, and 70).[322] However, shortly after Guatemala shut down Exmingua's operations, it also impounded Exmingua's gold concentrate—which had been processed from product extracted before the shutdown—in the course of criminal proceedings Guatemala began against Exmingua.

126. In an undercover operation staged by the Public Prosecutor's office, on 9 May 2016, the police stopped and searched a vehicle with four Exmingua workers transporting 19 bags of gold concentrate from the site to the port.[323] Two mining control technicians representing the MEM arrived at the scene and investigated, which investigation was documented by the Assistant Prosecutor of the Environmental Crimes Prosecution Office accompanied by the 19th squad of the Crime Scene Investigation Division (DICRI), which also arrived at the scene.[324] The workers were arrested and detained overnight, and the gold concentrate was impounded under the custody of the Public Prosecutor's Office in its warehouses, where it remains to date.[325] Subsequently, the Guatemalan Attorney General filed a criminal action against the four Exmingua workers, claiming that they were illegally exploiting natural resources in violation of

[321] Fuentes ¶ 81.
[322] Email from D. Kappes to R. Adams dated 31 Mar. 2017 (C-0151-ENG).
[323] Criminal action by Attorney General dated 9 May 2016 (C-0148-SPA/ENG).
[324] *Id*. at 2 [at 2 ENG].
[325] *Id*.

the Court rulings suspending Exmingua's exploitation license, when they were detained transporting the gold concentrate.[326]

127. On 10 May 2016, the Fourth Judicial Criminal Court acquitted the Exmingua workers, on the basis that the Attorney General had failed to prove that the concentrate they were transporting had been extracted after Exmingua's license had been suspended.[327] The Attorney General appealed this ruling,[328] but its appeal was dismissed on 26 May 2016.[329] Notwithstanding the dismissal of the case and the appeal, the impounded concentrate was not released.[330]

128. Shortly thereafter, on 5 June 2016, the Fourth Criminal Judicial Court ordered the inspection, registration and sequestration of Exmingua's mine site and the plant, in order to determine whether and prevent Exmingua from carrying out any exploitation activities, processing, and sale of concentrate.[331] It also ordered the immobilization of all machinery at the site and ordered the site closed.[332] The order was carried out on 6 June 2016, by a Deputy Prosecutor of the Public Prosecutor's Office accompanied by representatives of the MEM and more than a dozen police agents, who searched and seized Exmingua's property located at the mining site, including gold concentrate.[333] Following Exmingua's multiple requests, some of the sequestered machinery was released, but the warehouses at the site remain sealed, together with the gold stored therein.

129. Dissatified with the Court's acquittal of Exmingua's workers and the dismissal of its appeal regarding the same, the Attorney General brought an *amparo* action before the Supreme Court seeking an order that the Fourth Judicial Criminal Court reconsider its decision on the

[326] Letter to the Court of Appeal attaching a certified copy of the Supreme Court decision of *Amparo* 1464-2016 dated 8 June 2018 (C-0545-SPA/ENG); *see infra* ¶ 130.
[327] *Id*.
[328] *Id*.
[329] Supreme Court Ruling, Amparo 1464-2016 dated 2 July 2019, at 2 [at 1 ENG]. (C-0509-SPA/ENG)
[330] Kappes ¶ 140.
[331] Court Order dated 5 June 2016 (C-0547-SPA/ENG) (ordering search and seizure of Exmingua's three properties).
[332] *Id; see also* Minutes of the weigh-ins dated 24 July 2017 (C-0548-SPA).
[333] Public Prosecutor's Office, Report dated 6 June 2016 (C-0549-SPA/ENG).

grounds that it failed to consider new evidence regarding the validity of Exmingua's license.[334] On 25 May 2017, the Supreme Court denied the *amparo* and confirmed the decision of the Fourth Judicial Criminal Court.[335] However, on 30 January 2018, the Constitutional Court reversed the Supreme Court's decision and granted the *amparo* to the Attorney General, ordering the Fourth Judicial Criminal Court to revoke its previous decision dated 26 May 2016.[336]

130. Accordingly, on 11 May 2018, the Fourth Judicial Criminal Court issued a new ruling, again denying the appeal filed by the Attorney General against its decision to acquit the four Exmingua workers.[337]

131. Determined to drag out the criminal proceedings, the Attorney General and CALAS (who had up until this point acted as an interested third party in the criminal proceedings) requested the Supreme Court to enforce the Constitutional Court's *amparo* ruling on the basis that the Fourth Judicial Criminal Court had again failed to consider the Attorney General's new evidence.[338] On 2 July 2019, the Supreme Court denied this request, declaring that the Fourth Judicial Criminal Court's second decision had complied with the Constitutional Court's *amparo* ruling.[339]

132. To date, despite the dismissal of the criminal charges against Exmingua's workers and Exmingua's continued efforts to have its concentrate released,[340] the 19 bags of gold concentrate seized on 9 May 2016 and the gold concentrate located at the site and sequestered further to the 5 June 2016 order remain impounded. Guatemala's failure to return the impounded concentrate to Exmingua as its legitimate owner violates Article 60 of the Criminal Code, because the Prosecution failed to demonstrate the link between the impounded assets and the purported

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[334] *See* Supreme Court Ruling, Amparo 1464-2016 dated 2 July 2019, at 2 [at 2 ENG] (C-0509-SPA/ENG).

[335] *Id*.

[336] *Id*. at 8 [at 5 ENG].

[337] Letter to the Court of Appeal attaching a certified copy of the Supreme Court decision dated 11 May 2018 of *Amparo* 1464-2016 dated 8 June 2018 (C-545-SPA/ENG).

[338] Supreme Court Ruling, *Amparo* 1464-2016 dated 2 July 2019 (C-0509-SPA/ENG).

[339] *Id*. at 8 [at 5 ENG].

[340] Request for Termination of Closure, Demobilization of Equipment and Liberation of Machinery filed by Exmingua, before the Fourth Criminal, Narcoactivity, and Environmental Crimes Judge, dated 31 Jan. 2020, (C-0454-ENG/SPA).

crime.[341] It also constitutes a "blatant violation" of Exmingua's Constitutional right to private property and to the principle of non-arbitrary confiscation and seizure, because the Government has unlawfully retained the concentrate.[342]

6. After A Four-Year Delay, The Constitutional Court Rejected Exmingua's Appeal And Confirmed The Suspension Of Its License

133. Although other cases raising the issue as to whether licenses previously granted pursuant to the EIA process were invalid and subject to suspension because the MEM itself had not led consultations with indigenous communities continued to be filed and ruled upon by the Constitutional Court, years passed without any activity from the Constitutional Court in Exmingua's case. After nearly two years had elapsed without a ruling on its appeal (and almost one year since Exmingua had urged the Consitutional Court to reconsider its ruling in light of the *Oxec* case), on 4 April 2018, Exmingua made an official request to the Constitutional Court to rule on its appeal that had been pending since 30 June 2016.[343] The Court, however, took no action, despite the fact that, as described above, the Court continued to rule in other cases raising the same legal issues that were filed *after* Exmingua's appeal, making it clear that its refusal to act in Exmingua's case was arbitrary and driven by nationality bias as well as political interference.

134. On 5 June 2020, Exmingua was notified that, on 28 May 2020, the Constitutional Court requested the MEM to produce "a detailed report . . . regarding the actions taken to comply with the order issued by [the] Court on 5 May 2016."[344] The Constitutional Court's request was sudden and came after almost four years since Exmingua had filed its appeal and almost three years since the Court's last activity in the case (dismissing Exmingua's request to have the case decided). Perhaps not coincidentally, the request was made on 28 May 2020, that is, *one day* before Claimants' Memorial was originally due in this Arbitration. To date, Exmingua has not

[341] Fuentes ¶ 191; Guatemala Criminal Code, Art. 60 (C-0511-SPA/ENG).

[342] Fuentes ¶ 192; Constitution of Guatemala, Arts. 40, 42 (C-0414-SPA/ENG).

[343] Exmingua's request to the Constitutional Court to render a decision on the appeal of the *amparo definitive* dated 4 Apr. 2018 (C-0544-SPA/ENG).

[344] Constitutional Court of Guatemala, Case No. 1592-2014, Notification dated 28 May 2020, at 2 [at 2 ENG] (C-0553-SPA/ENG).

received a copy of the MEM's report—and, apparently, is not entitled to receive it even though the case concerns the suspension of its license, and despite having requested it.

135. Then, on 23 June 2020 – *four years* after the appeal was filed and merely a few weeks before this filing – Exmingua was notified of the Constitutional Court's ruling dated 11 June 2020,[345] confirming the *amparo definitivo* and upholding the suspension of its license pending completion of consultations by the MEM.[346]

136. Thus, after nearly fours years, the Court rejected Exmingua's appeal dated 30 June 2016, dismissing all objections raised by Exmingua. In particular, the Constitutional Court ruled that the timeliness requirement did not apply to CALAS's *amparo*, mimicking the Supreme Court's stated rationale four years earlier that "an omission or failure to act causes continuous harm over time, and that, for such reason, such omissions to act may be the subject of a claim that is not subject to the statutory filing period referred to in the above-mentioned provision."[347] It also affirmed the Supreme Court's finding that CALAS did not have to exhaust administrative remedies because, with respect to the right to consultation of indigenous peoples, "there were no ordinary remedies or avenues available through which this situation can be properly dealt with."[348] The Court further held that CALAS had legal standing as a civil association,[349] dismissing Exmingua's argument that CALAS was "not composed of members of the communities that have allegedly not been consulted, and it does not represent, either, through legal representation mechanisms, such communities."[350]

137. The Consitutional Court's ruling dated 11 June 2020 was manifestly wrong on all these counts. First, as established by Professor Fuentes, the exception relied on by the Court to dismiss Exmingua's time-bar objection has no legal basis in Article 20 of the *Amparo* Law, and

[345] Constitutional Court of Guatemala, Case No. 1592-2014, Notification of 11 June 2020 ruling dated 23 June 2020 (C-0495-SPA/ENG).

[346] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming *amparo definitivo* dated 11 June 2020 (C-0145-SPA/ENG).

[347] *Id*. at 16.

[348] *Id*. at 18.

[349] *Id*. at 15.

[350] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Appeal by Exmingua against the Ruling granting amparo definitivo dated 30 June 2016, at 3 (C-0475-SPA/ENG).

the Court's interpretation was "clearly wrong and contrary to Article 10 of the Judiciary Law," requiring that the Court apply the literal meaning of the law rather than imposing assumptions not contained in the law.[351] Second, the Court was equally "clearly wrong" to dispense with the requirement that CALAS exhaust administrative remedies before seeking an *amparo*. Contrary to the Court's holding, and as elaborated by Professor Fuentes, "there were, indeed, ordinary remedies or actions to challenge or object to the situation and analyze or discuss the matter in the case at hand," including the objection procedure under Article 47 of the Mining Law and challenging any dismissal of objections, and a contentious-administrative proceeding.[352]

138. Third, the Court "failed to observe the legal and regulatory rules and the case law criteria adopted by the Constitutional Court . . . in relation to the standing to sue permanent requirement."[353] Although the Court purportedly relied on its "previous pronouncements" confirming CALAS's standing to bring claims as a civil association, this was inapt, because those "previous pronouncements" were in fact issued *after* the Supreme Court had issued the *amparo definitivo* in Exmingua's case on 28 June 2016, so could not have formed part of the Supreme Court's reasoning in deciding CALAS's *amparo* in Exmingua's case.[354] Furthermore, those "previous pronouncements" were issued by the Constitutional Court in the *Oxec* and *Minera San Rafael* cases, which were filed with the Constitutional Court *after* Exmingua's appeal, yet ruled on before Exmingua's case and then used by the Court as justification for rejecting Exmingua's argument.

139. In addition to violating these threshold issues under Guatemalan law, the Constitutional Court's deciding of Exmingua's appeal only on 11 June 2020 resulted in an "excessive delay," and the Court "acted quite differently – to Exmingua's disadvantage – in ruling on similar cases much faster, even when those appeals were all filed with the Court after Exmingua's."[355]

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[351] Fuentes ¶ 121; Judiciary Law, Art. 10 (C-0415-SPA/ENG); Amparo Law, Art. 20 (C-0416-SPA/ENG); *see supra* ¶ 136.

[352] Fuentes ¶ 133; Mining Law, Art. 47 (C-0186-ENG/SPA); Contentious Administrative Law, Arts. 9, 17 (C-0424-SPA/ENG); *see supra* ¶¶ 64, 75.

[353] Fuentes ¶ 142; *see supra* ¶ 62.

[354] Fuentes ¶ 141.

[355] *Id*. ¶ 162.

140. The Court also committed several serious and manifest due process and substantive law violations.[356] As established by Professor Fuentes, the Court's suspension of Exmingua's mining operations, "without having provided Exmingua notice, an opportunity to be heard, or an opportunity to defend itself in the respective fact-finding process (administrative litigation)," and after Exmingua had complied with all requirements under Guatemalan law to obtain its exploitation license, left "Exmingua in an absolute state of defenselessness and impairment which led to a violation of the rights of legal certainty and freedom of trade and industry."[357]

141. Further, unlike in every other case where the Constitutional Court held that the license would regain effectiveness once the MEM completed consultations, the Court imposed an additional, onerous requirement in Exmingua's case that heightens its state of uncertainty. Specifically, the Court held that Exmingua could only resume its operations following completion of the consultations *and* "in the event that it is determined that the execution of the project corresponding to the 'Progreso VII Derivada' license does not threaten the existence of the indigenous population settled in the area of influence of the project in question."[358] As explained by Professor Fuentes, this "could entail an additional specific evaluation to determine if the Progreso VII Derivada license threatens or not the existence of the indigenous population settled in the area of influence of the project, which, obviously, could demand any amount of research, studies and opinions. All of this could delay the resumption of mining activities indefinitely, to the detriment, of course, of the acquired rights of Exmingua."[359]

142. Exmingua's Progreso VII exploitation license thus remains suspended indefinitely. Even though the Court has indicated a time-period in which the MEM should carry out the consultations, Exmingua does not have any certainty or confidence as to whether and when the MEM will commence and complete these consultations (given its failure, among other things, to rule on Exmingua's appeal in a timely manner or to complete the consultations in the *Minera San Rafael* case within the required timeframe) or whether the MEM or the Court will find that the

[356] *See infra* § III.D.2.a and § III.D.2.b.

[357] Fuentes ¶ 165; Constitution of Guatemala, Arts 2, 43 (C-0414-SPA/ENG).

[358] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming *amparo definitive* dated 11 June 2020 [at 27 ENG] (C-0145-SPA/ENG).

[359] Fuentes ¶ 177.

Exmingua's operations "threaten the existence of the indigenous population," and refuse to restore the license on that basis, in violation of Exmingua's acquired rights as well as the ILO Convention's principle that the Convention does not grant a veto right.

III. LAW

143. Guatemala's arbitrary, unlawful, unfair, discriminatory, and bad faith actions and omissions described above breached its obligations under the DR-CAFTA towards Claimants and their investments. As demonstrated below, the measures adopted by Guatemala unlawfully expropriated Claimants' investments; denied Claimants' investments fair and equitable treatment, including full protection and security and amounted to a denial of justice; and failed to accord Claimants and their investments national and most-favored-nation treatment.

A. Guatemala Unlawfully Expropriated Claimants' Investments

144. Guatemala unlawfully expropriated Claimants' investments by depriving Claimants of the opportunity to develop and operate mining projects at Tambor, and rendering their shareholding in Exmingua worthless. In 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, Guatemala has rendered Exmingua worthless and has destroyed Claimants' investments.

145. The DR-CAFTA, in accordance with customary international law,[360] prohibits unlawful direct and indirect expropriation. Specifically, DR-CAFTA Article 10.7 provides, in relevant part:

> 1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ('expropriation'), except:
>
> (a) for a public purpose;

[360] *See* DR-CAFTA, Annex 10-C: Expropriation ¶ 1 (C-0001-ENG/SPA) ("Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation").

(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.

146. Annex 10-C of the Treaty provides further elucidation, by explaining that a direct expropriation occurs "where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure."[361] With regard to an indirect expropriation, the Annex confirms that such expropriations have an equivalent effect to a direct expropriation,[362] and provides guidance for determining whether there has been an indirect expropriation:

> 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.
>
> (a) The 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 that 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.

[361] DR-CAFTA, Annex 10-C: Expropriation ¶ 3 (C-0001-ENG/SPA).

[362] *See Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award dated 16 Dec. 2002 ¶ 100 (CL-0093-ENG/SPA) (finding that the functionally identical expropriation provision in the NAFTA "deals not only with direct takings, but indirect expropriation and measures 'tantamount to expropriation', which potentially encompass a variety of government regulatory activity that may significantly interfere with an investor's property rights. The Tribunal deems the scope of both expressions to be functionally equivalent."); *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003 ¶ 114 (CL-0122-ENG/SPA) ("Generally, it is understood that the term '. . . equivalent to expropriation . . .' or 'tantamount to expropriation' included in the Agreement and in other international treaties related to the protection of foreign investors refers to the so-called 'indirect expropriation' or 'creeping expropriation', as well as to the above-mentioned de facto expropriation. Although these forms of expropriation do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect.").

> (b) Except 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.[363]

147. As explained below, through the acts and omissions of its executive and judicial organs, Guatemala expropriated Claimants' investments.

1. The Treaty Prohibits Direct And Indirect Expropriation Without Compensation

148. It is well established, as the NAFTA tribunal in the *Metalclad v. Mexico* case explained, that expropriation may include "not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[364] An indirect expropriation thus may take one or several steps, and may be effectuated via a State's actions or omissions.[365] Like any emanation of the State, actions or omissions by a State's judiciary also may constitute an expropriation.[366] By definition, an indirect expropriation – like

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[363] DR-CAFTA, Annex 10-C: Expropriation ¶ 4 (C-0001-ENG/SPA).

[364] *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award dated 30 Aug. 2000 ¶ 103 (CL-0120-ENG/SPA) (partially set aside on other grounds); *see also Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award dated 11 Sept. 2007 ¶ 438 (CL-0180) (quoting *Metalclad* with approval).

[365] *See* Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts, Art. 2 (CL-0123-ENG) ("There 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."); ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 338 (2009) (CL-0124-ENG) ("[C]onduct consisting of an action or omission can be an expropriatory measure."); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 Sept. 2001 ¶¶ 604-605 (CL-0052-ENG) ("The expropriation claim is sustained despite the fact that the [respondent] did not expropriate [the investment] by express measures of expropriation . . . it makes no difference whether the deprivation was caused by actions or by inactions"); *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award dated 19 Aug. 2005 ¶¶ 185-186 (CL-0125-ENG) ("Relying principally on the wording . . . a 'measure taken' . . . as well as the use of the word 'measure' in [the expropriation provision], Respondent avers that this language was meant to exclude omissions from the ambit of the Treaty . . . . The Tribunal cannot accept Respondent's restrictive interpretation. It is obvious that the rights of an investor can be violated as much by the failure of a Contracting State to act as by its actions").

[366] *See, e.g., Eli Lilly & Co. v. Government of Canada*, UNCITRAL, Final Award dated 16 Mar. 2017 ¶ 221 (CL-0040-ENG) ("[I]t is possible to contemplate circumstances in which a judicial act (or omission) may engage questions of expropriation under NAFTA Article 1110, such as, perhaps, in circumstances in which a judicial decision crystallizes a taking alleged to be contrary to NAFTA Article 1110."); *Swisslion DOO Skopje v. The*

a direct expropriation – has the effect of depriving the investor of all or a substantial part of the use and enjoyment of its investment.[367]

149. As noted by UNCTAD, "[m]ost expropriations are a consequence of executive and administrative acts such as resolutions, decrees, revocation, cancellation or denial of concessions, permits, licences or authorizations that are necessary for the operation of a business."[368] Newcombe and Paradell thus give the example of a permit denial as a quintessential case of an indirect expropriation: "For example, if an investor were to build a chemical production facility in accordance with host state laws and the host state refused to issue the applicable operational, business or work permits or other regulatory approvals in order to allow the plant to operate, that could be considered expropriatory."[369] Examples thus abound where a State's executive, legislative, or judicial branches, or a combination thereof, through their acts or omissions, deprived an investor of substantially all of the value of its investment over a period of time and was found liable for an expropriation.

Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/16, Award dated 6 July 2012 ¶ 310 (CL-0119-ENG) ("[T]he Claimant made the uncontroversial point that a State is responsible for an expropriation effected by any of its organs, including its judiciary"); *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 ¶ 347 (CL-0126-ENG) ("[T]he Tribunal finds 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 […]"); *Deutsche Bank v Sri Lanka*, Award dated 31 Oct. 2012 ¶ 521 (CL-0127-ENG) (" [T]he coordinated actions of the Supreme Court and the Central Bank prevented Deutsche Bank from receiving payment under the Hedging Agreement. . . . An expropriation of Deutsche Bank's rights consequently took place . . . . "); *see also OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, UNCITRAL, Award dated 29 Jul. 2014 ¶ 461 (CL-0128-ENG) (observing that "contemporary jurisprudence and practice" recognizes "judicial expropriation").

[367] *See, e.g., Pope & Talbot Inc. v. The Government of Canada*, NAFTA, UNCITRAL, Interim Award dated 26. June 2000 ¶ 102 (CL-0129-ENG) ("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"); *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award dated 21 Nov. 2007 ¶ 246 (CL-0195-ENG/SPA) (holding that "[a]n alternative criterion … [for expropriation] is whether the host State measure affects most of the investment's economic value or renders useless the most economically optimal use of it."); *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award dated 13 Sept. 2006 ¶ 65 (CL-0130-ENG) (holding that an indirect expropriation arises where "the interference with the investor's rights [is] such as substantially to deprive the investor of the economic value, use or enjoyment of its investment."); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 118 (2nd ed. 2012) (CL-0131-ENG) (explaining that an indirect taking arises "when a host state substantially deprives the investor of the value of the investment").

[368] UNCTAD, EXPROPRIATION, at 15 (UNCTAD Series on Issues in International Investment Agreements II, 2012) (CL-0132-ENG).

[369] ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 338 (2009) (CL-0124-ENG).

150. In *Magyar Farming v. Hungary*, for example, the State enacted new legislation, which effectively denied the investment company its pre-lease rights, which would have entitled it to extend its lease by meeting any offer made by a third party at the expiration of the lease term.[370] As the tribunal explained, "while Hungary was at liberty to remove or otherwise alter the statutory pre-lease provision contained in the 1994 Arable Land Act in a prospective manner, such a change should not have applied retrospectively to already vested rights. Or else, the State should have provided compensation."[371] Indeed, as the tribunal explained, where vested rights are concerned, the State may only revoke them without compensation "in a narrow set of circumstances," namely, when "enforcing existing regulations against the investor's own wrongdoings," or where necessary to "abat[e] threats that the investor's activities may pose to public health, environment or public order . . . . such as the prohibition of harmful substances, tobacco plain packaging, or the imposition of emergency measures in times of political or economic crises."[372]

151. Similarly, in *Ampal v. Egypt*, the tribunal found the State's removal of tax-free status for the claimant's investment to be expropriatory, because it took "away a defined and valuable interest that had been validly conferred according to Egyptian law at the time that the investment was made and that had been guaranteed by the State for a defined period."[373] In so finding, the tribunal observed "that the inclusion of EMG within the tax-free zone system in Egypt was a fundamental part of the economic structure of the investment, which the Respondent knew and

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[370] *Magyar Farming Co. Ltd., Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case ARB No. 17/27, Award dated 13 Nov. 2019 ¶¶ 118, 132, 141 (CL-0133-ENG).

[371] *Magyar Farming Co. Ltd., Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case ARB No. 17/27, Award dated 13 Nov. 2019 ¶ 362 (CL-0133-ENG); *see also id.* ¶ 367 ("[I]t is not immediately apparent why this policy change – which purportedly benefited Hungarian society as a whole – should have been carried out at the expense of the Claimants' vested rights."); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003 ¶ 141 (CL-0122-ENG/SPA) ("[W]hen the Landfill was designed and built and specific technical procedures governing the Landfill's operation were established, such regulations were not effective and their application could not be retroactive . . . .").

[372] *Magyar Farming Co. Ltd., Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case ARB No. 17/27, Award dated 13 Nov. 2019 ¶ 366 (CL-0133-ENG) (citing *Chemtura v. Canada*, *Methanex v. United States*, *AWG Group v. Argentina*, and *Philip Morris v. Uruguay*). This is to be contrasted with expropriations in the public interest, including for environmental reasons, that are not based on imminent threats, where a duty to compensate remains. *See, e.g.*, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003 ¶¶ 121-122 (CL-0122-ENG/SPA); *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award dated 17 Feb. 2000 ¶¶ 71-72 (CL-0134-ENG).

[373] *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Losses dated 21 Feb. 2017 ¶ 183 (CL-0135-ENG).

accepted from the outset at the highest level of Government, and which it confirmed by the issue of the specific licence to EMG, conferring tax-free status under the free zones system until 2025."[374] Likewise, the tribunal in *Goetz v. Burundi* deemed withdrawal of a free-zone status certificate that had been granted to a bank to constitute a measure tantamount to expropriation, because it "deprived [the claimants'] investments [in the bank] of all utility and deprived the claimant investors of the benefit which they could have expected from their investments."[375]

152. In *Tecmed v. Mexico*, the tribunal found the non-renewal of the claimant's permit to operate a landfill to be expropriatory, despite the fact that the claimant had no absolute legal right to renewal. There, community opposition to the operating landfill arose, and a human rights entity filed a criminal complaint challenging the issuance of the permit.[376] At the same time, community members organized a blockade lasting more than two months.[377] The denial of the renewal of the permit as a result of "community pressure,"[378] was found to be an indirect expropriation. As the tribunal noted, in such situations:

> [T]he Arbitral Tribunal should consider whether community pressure and its consequences, which presumably gave rise to the government action qualified as expropriatory by the Claimant, were so great as to lead to a serious emergency situation, social crisis or public unrest, in addition to the economic impact of such a government action, which in this case deprived the foreign investor of its investment with no compensation whatsoever. These factors must be weighed when trying to assess the proportionality of the action adopted with respect to the purpose pursued by such measure.[379]

After considering these factors, the *Tecmed* tribunal found the non-renewal to be expropriatory, as there was not such a "serious urgent situation, crisis, need or social emergency that, weighed against the deprivation or neutralization of the economic or commercial value of the Claimant's

[374] *Id.* ¶ 182.

[375] *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award dated 10 Feb. 1999 ¶ 124 (CL-0136-ENG/FRA)

[376] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003 ¶ 108 (CL-0122-ENG/SPA).

[377] *Id.*

[378] *Id.* ¶ 109.

[379] *Id.* ¶ 133.

investment, permits reaching the conclusion that the Resolution did not amount to an expropriation under the Agreement and international law."[380]

153. Similarly, in *Copper Mesa v. Ecuador*, the tribunal found the termination of a mining concession to be expropriatory. Ecuador argued that the termination was a justified exercise of its police powers, done pursuant to adoption of laws intended to expand consultations with local communities and improve environmental protection.[381] The tribunal rejected this defense, finding that, by failing to adopt its laws in accordance with due process and pay any compensation when terminating the concession, the State did not exercise its police powers lawfully and consistently with its obligations under the bilateral investment treaty.[382] The tribunal further noted that Ecuador had ordered the claimant to cease activity at the site to appease anti-mining interests, which made it impossible for the claimant to consult with the communities to complete its environmental impact statement, and thus ensuring the termination of its concession; this materially contributed to the tribunal's assessment of the State's measures as an unlawful expropriation.[383]

154. And, in *Bear Creek Mining v. Peru*, the tribunal found an expropriation where the claimant did not yet have an exploitation license, but held an approved option to acquire mining rights pursuant to a government decree.[384] In response to anti-mining protests, however, Peru revoked the claimant's option right, which doomed the project.[385] The tribunal noted that community discontent had been present for a long time and, yet, the State had approved of the claimant's consultations and outreach efforts, thus finding them satisfactory.[386] The claimant

[380] *Id*. ¶ 139; *see also Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award dated 12 Apr. 2002 ¶ 107 (CL-0137-ENG) ("When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation or, as in the BIT, as measures 'the effect of which is tantamount to expropriation.'").

[381] *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 Mar. 2016 ¶¶ 6.11, 6.16 (CL-0138-ENG).

[382] *Id*. ¶¶ 6.64-6.69.

[383] *Id*. ¶¶ 6.83-6.85.

[384] *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 Nov. 2017 ¶¶ 379, 415-416 (CL-0139-ENG).

[385] *Id*. ¶¶ 422, 432.

[386] *Id*. ¶¶ 409-411.

therefore was entitled to assume that it had satisfied all legal requirements for consultations, and Peru could not rely upon the civil unrest in issuing the decree revoking the claimant's option.[387]

155. The tribunal in *Flamingo Duty Free v. Poland* also found an expropriation where the State terminated the claimant's lease agreements, sealed off the premises and blocked deliveries, and issued an eviction order in respect of the claimant's duty-free stores and travel business in the airport.[388] And, in *UP v. Hungary*, Hungary's introduction of two types of fringe benefits vouchers that benefitted from lower tax rates, making those offered by the claimant unattractive, was deemed expropriatory, after the tribunal found that Hungary intended to "create a State monopoly and evict CD Hungary from the meal voucher market."[389] In ruling, the tribunal focused on the effects of the governmental measure, and held that "[t]he destruction of the value of Claimants' shareholding was permanent, or at least sufficiently permanent for the purposes of expropriation."[390] It found that, "[u]nder these circumstances, [the] Claimants' decision to shut down . . . was inevitable [and] a legitimate and reasonable decision justified to avoid further losses."[391]

156. Even where the investment is not rendered completely valueless, an expropriation occurs when the investor has suffered substantial deprivation as a result of the State's measures. In *Eureko v. Poland,* for example, the tribunal held that the lost opportunity to acquire additional shares in an investment, as provided for under an agreement, amounted to an expropriation—even where the investor at all times retained possession of its initial shares and continued to receive dividends on those shares.[392] In *Vivendi II v. Argentina,* the tribunal likewise ruled that State measures leading to a decline in the rate of recovery on a concession agreement from 90% to 20% "had a devastating effect on the economic viability of the concession," and, as such,

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[387] *Id.* ¶¶ 412-414.

[388] *Flemingo Duty Free Shop Private Ltd. v The Republic of Poland*, UNCITRAL, Award dated 12 Aug. 2016 ¶¶ 593-594 (CL-0140-ENG).

[389] *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award dated 9 Oct. 2018 ¶ 351 (CL-0141-ENG).

[390] *Id.* ¶ 353.

[391] *Id.*

[392] *Eureko B.V. v. Republic of Poland*, UNCITRAL Partial Award dated 19 Aug. 2005 ¶¶ 239-240 (CL-0125-ENG).

constituted an expropriation.[393] And, in *Tza Yap Shum v. Peru*, the tribunal found an expropriation where State measures had reduced the investor's average earnings from 80 million Peruvian Soles to 3.4 million Soles, which "eliminated or substantially frustrated the operative capacity of the company."[394]

157. As noted, expropriation also may be committed through the State's judiciary.[395] In *Sistem v. Kyrgyz Republic*, for example, the claimant lost its rights in its hotel by virtue of court decisions. The tribunal found an expropriation, holding that "[t]he Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree."[396]

158. In *Rumeli v. Kazakhstan*, a joint venture and shareholder commenced court proceedings for the compulsory redemption of the claimant's shares in the joint venture. The courts upheld the compulsory redemption, and a court later valued the claimant's majority shareholding at approximately US$ 3,000, when, one year later, the company was purchased for US$ 350 million.[397] The tribunal found that the courts' decisions constituted a creeping expropriation, even though the judicial proceedings were initiated by private parties for their own benefit, and not that of the State, and they did not amount to a denial of justice.[398]

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[393] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated 20 Aug. 2007 ¶ 7.5.26 (CL-0142-ENG).

[394] *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award dated 7 July 2011 ¶¶ 161-162 (CL-0143-ENG/SPA).

[395] *See, e.g.*, *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award dated 1 Nov. 1999 ¶¶ 98-99 (CL-0144-ENG) ("[A]n international tribunal called upon to rule on a Government's compliance with an international treaty is not paralysed by the fact that the national courts have approved the relevant conduct of public officials . . . . What must be shown is that the court decision itself constitutes a violation of the treaty."); *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award dated 30 June 2009 ¶ 181 (CL-0145-ENG) ("[T]he Tribunal concurs with the parties that expropriation by the courts presupposes that the courts' intervention was illegal . . . .").

[396] *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award dated 9 Sept. 2009 ¶ 118 (CL-0146-ENG).

[397] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008 ¶ 434 (CL-0147-ENG).

[398] *Id.* ¶¶ 704, 707, 708; *see also Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award dated 30 June 2009 ¶¶ 128-129 (CL-0145-ENG) (finding that actions of the judiciary constituted an indirect expropriation, without requiring that such actions amount to a denial of justice); *id.* ¶ 181 ("While the Tribunal concurs with the parties that expropriation by the courts presupposes that the courts' intervention was illegal, this does not mean that expropriation by a court necessarily presupposes a denial of justice."); *Standard Chartered Bank*

159. An expropriation occurs, moreover, where the destruction of value of an investment is not merely ephemeral, regardless of whether the measure, on its face, is permanent or intended to be permanent.[399] As the *Azurix v. Argentina* tribunal remarked, "[u]nfortunately, there is no mathematical formula to reach a mechanical result. How much time is needed must be judged by the specific circumstances of each case."[400]

160. Thus, in *Middle East Cement v. Egypt*, for example, the tribunal held that the effects of a ban on imports of cement to the claimant's license to, among other things, import cement was sufficient to constitute a permanent, indirect expropriation. That ban was enacted more than three and one-half years before the claimant's ten-year license was to expire and, subsequently, was rescinded during the last year of the claimant's license period.[401] The tribunal found that the ban had deprived the claimant of selling cement to its primary customer for a four-month period, which indirectly expropriated the claimant's investment, although it retained possession of some of its physical possessions, including an onshore installation and ship.[402]

161. Likewise, in *Olin v. Libya*, even though the court of appeal cancelled an expropriation order that had been issued against the claimant's factory more than four years earlier, the State was found liable for an expropriation, because the uncertainty generated by that expropriation

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(Hong Kong) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/15/41, Award dated 11 Oct. 2019 ¶ 279 (CL-0278-ENG) ("[J]udicial decisions that permit the actions or inactions of other branches of the State and which deprive the investor of its [] property or property rights [] can . . . amount to expropriation. While 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").

[399] *See* ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 345 § 7.16 (2009) (CL-0124-ENG) ("The deprivation in question must amount to a lasting removal of the ability of an owner to make use of its economic rights. The deprivation must be intense and enduring. The degree of permanence required is fact specific."); *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-ENG) ("While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The 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."); *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award dated 17 Feb. 2000 ¶ 77 (CL-0134-ENG) (quoting same).

[400] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006 ¶ 313 (CL-0149-SPA/ENG-/SPA).

[401] *Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award dated 12 Apr. 2002 ¶¶ 108-111 (CL-0137-ENG).

[402] *Id.* ¶ 107.

order lasted "a significant period of time for a business that had just started its operations."[403] As the tribunal confirmed, "State measures, even if temporary, can have an effect equivalent to expropriation if their length and impact on the investment are sufficiently important."[404]

162. The same was true in *Tza Yap Shum v. Peru*, where the tribunal found that the imposition of back taxes and fines, and related interim measures, constituted an expropriation. Although the claimant successfully challenged some of the taxes and fines, the claimant was unable to access in-country banking for its transactions and its sales decreased dramatically, leading to a debt restructuring.[405] The tribunal held that the duration of the adverse impact on the investment was only one aspect it had to consider, together with the gravity of the impact,[406] and found that the measures in place for initially one year constituted an expropriation, because they substantially frustrated the claimant's operational capacity.[407] Notably, the tribunal's conclusions were not altered by the fact that the affected company later initiated bankruptcy proceedings, which allowed it to restructure its finances, access the banking system, and resume operations.[408] The tribunal ruled that these mitigating measures did not impact its expropriation ruling because the company had "initiated the proceeding to recover the operating conditions that it had lost for a considerable period of time as a result of [the State's] actions. It would thus be illogical to allow [the State] to benefit from these efforts of the [investor], in order to justify or minimize the impact of its own conduct."[409]

163. *Wena Hotels v. Egypt* also illustrates the expropriatory effect that a temporary measure may have on an investment. There, the State seized the claimant's two hotels for one year, before returning them "stripped of much of their furniture and fixtures."[410] The tribunal found

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[403] *Olin Holdings Ltd. v. State of Libya*, ICC Case No. 20355/MCP, Final Award dated 25 May 2018 ¶ 165 (CL-0152-ENG).

[404] *Id*.

[405] *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award dated 7 July 2011 ¶ 222 (CL-0143-ENG/SPA).

[406] *Id*. ¶ 156.

[407] *Id*. ¶¶ 162, 170.

[408] *Id*. ¶ 222.

[409] *Id*. ¶ 222.

[410] *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award dated 8 Dec. 2000 ¶ 99 (CL-0151-ENG).

Egypt liable for an expropriation, holding 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.'"[411]

164. Here, as demonstrated below, 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.

2. Guatemala's Actions And Omissions Expropriated Claimants' Investment In Exmingua

165. As detailed above, Guatemala – through its executive and judicial branches – took the following 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:

- On 9 July 2013, the President of Guatemala announced a *de facto* moratorium on issuing exploration and exploitation licenses for mining projects;[412]
- On 11 November 2015, the Guatemalan Supreme Court granted an *amparo provisional* against the MEM, suspending the granting of the Progreso VII exploitation license;[413]
- Between March and May 2016, the MEM issued resolutions suspending Exmingua's Progreso VII exploitation license;[414]
- On 3 May 2016, the MEM issued a resolution suspending Exmingua's exportation license for concentrate;[415]
- On 5 May 2016, the Guatemalan Constitutional Court confirmed the *amparo provisional*, ruling that Exmingua's Progreso VII exploitation license could regain

[411] *Id*.

[412] Market Wired, "Guatemala Proposes Temporary Moratorium on New Mining Licenses" dated 10 July 2013 (C-0116-ENG).

[413] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo provisional* dated 11 Nov. 2015, at III (C-0004-SPA/ENG).

[414] Resolution No. 1202 of the Ministry of Energy and Mines dated 10 Mar. 2016 (C-0139-SPA/ENG); MEM Resolution No. 1677 dated 14 Apr. 2016 (C-0442-SPA/ENG); MEM Resolution No. 1516 dated 3 May 2016 (C-0443-SPA/ENG).

[415] MEM Resolution No. 1516 dated 3 May 2016 (C-0443-SPA/ENG); Resolution No. 146 of the Ministry of Energy and Mines dated 3 May 2016 (C-0140-SPA/ENG).

effectiveness only once the State conducted and completed consultations pursuant to the ILO-Convention;[416]

- On 9 May 2016, the Guatemalan authorities seized and impounded Exmingua's concentrate. On 8 May 2016, the Court of Appeals acquitted the workers who were criminally charged with unlawful possession of concentrate.[417] To date, the concentrate remains impounded.

- On 28 June 2016, the Guatemalan Supreme Court granted an *amparo definitvo* to CALAS, definitively suspending Exmingua's Progreso VII exploitation license and directing the State to conduct consultations with indigenous communities;[418]

- Since early 2016, the national police have failed to take steps to enable Exmingua to have regular access to its property and for its consultants to conduct social studies in the area;[419]

- On 21 December 2016, the MEM directed Exmingua to file the EIA for Santa Margarita.[420]

- On 22 March 2017, Exmingua wrote to the MEM explaining that the protests and blockades prevented it from gaining access to the project site and surrounding communities and completing its EIA for Santa Margarita.[421] No action was taken by the MEM, the police, or any other agency or instrumentality in Guatemala.[422]

- On 7 April 2017, Exmingua resubmitted its EIA for Santa Margarita in a revised format (pursuant to new regulations), but without the social studies, and asked the MARN for assistance in conducting the public consultations for the EIA. The MARN did not respond.[423]

- On 7 April 2017, Exmingua wrote to the MARN (copying the MEM) seeking recommendations to complete consultations for the Santa Margarita EIA, which letter remains unanswered.[424]

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[416] Decision dated 5 May 2016, issued in Case No. 1592-2014 by the Constitutional Court (C-0143-SPA/ENG).

[417] Letter to the Court of Appeal attaching a certified copy of the Supreme Court decision of Amparo 1464-2016 dated 8 June 2018; (C-0545-SPA/ENG).

[418] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo definitivo*, 28 June 2016 (C-0144-SPA/ENG).

[419] *See* Kappes ¶¶ 138-139; Amparo application by Exmingua dated 22 Apr. 2016 (C-0146-ENG/SPA).

[420] Official Notification No. 497 from the MEM to Exmingua, attaching Resolution No. 4056, dated 21 Dec. 2016 (C-0012-SPA/ENG).

[421] Letter from Exmingua to the MEM, attaching Notary Public's Certification dated 21 Mar. 2017 (C-0013-SPA/ENG).

[422] *See* Letter from Exmingua to the MEM dated 6 Nov. 2017 (C-0152-SPA/ENG) (showing that the blockades were still ongoing six months later).

[423] Letter from Exmingua to the Ministry of Environment and Natural Resources dated 7 Apr. 2017 (C-0015-ENG/SPA).

[424] *Id*.; Exmingua's letter to the Ministry of Energy and Mines dated 7 Apr. 2017 (C-0016-SPA/ENG).

- On 5 October 2017, the Guatemalan Constitutional Court rejected an application made by Exmingua on 8 June 2017 to revoke the Guatemalan Constitutional Court's ruling dated 5 May 2016.[425]

- To date, the MEM has failed to conduct consultations for the Progreso VII project, as directed by the Guatemalan Courts;[426]

- After delaying for nearly four years, on 11 June 2020, the Constitutional Court ruled on Exmingua's appeal of the Supreme Court's 28 June 2016 decision.[427] The Constitutional Court maintained the suspension of Exmingua's exploitation license until the MEM conducts and completes consultations and, further, a determination is made that the license does not threaten the indigenous people in the area.[428]

166. By and through these measures, Guatemala expropriated Claimants' investments. In particular, as demonstrated by assessing these facts against the factors set out in DR-CAFTA Annex 10-C, namely, the economic impact of Guatemala's measures, the extent to which they interfered with Claimants' distinct, reasonable investment-backed expectations, and the character of the measures, these measures amount to an expropriation.

a. Guatemala's Measures Rendered Claimants' Investment In Exmingua Worthless

167. Through both the MEM and its courts, Guatemala indefinitely suspended Exmingua's Progreso VII exploitation license, preventing Exmingua from carrying out mining operations and cutting off its only source of revenue. Exmingua generated revenue by selling the gold concentrate that it produced by processing the mined material. In addition to suspending its exploitation license and thereby preventing Exmingua from mining gold, the MEM also suspended Exmingua's exportation certificate, without cause, and then arbitrarily and unlawfully

[425] Constitutional Court resolution on Appeals of *Amparo* 1592-2014 dated 5 Oct. 2017, at 1 [at 1 ENG] (C-0563-SPA/ENG).

[426] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming *amparo provisional* dated 5 May 2016, at 6 [at 3 ENG] (C-0143-SPA/ENG); Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo definitivo*, 28 June 2016 (C-0144-SPA/ENG); Decision dated 11 June 2020, issued in Consolidated Cases No. 3207-2016 and 3444-2016 by the Constitutional Court, at 84-91 [at 41-45 ENG] (C-0145-ENG/SPA); Fuentes ¶¶ 79-80.

[427] Constitutional Court of Guatemala, Consolidated Case Nos. 3207-2016 and 3344-2016-2016, Decision dated 11 June 2020 (C-0145-ENG/SPA).

[428] *Id*. at 30, 44.

seized Exmingua's concentrate that was being transported for shipment.[429] After Exmingua's workers were acquitted of the spurious criminal charges that had been brought against them, on account of the fact that the State could not show that the seized concentrate derived from gold that had been mined after operations had been suspended, the State still refused to release the concentrate.

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. In *CME v. Czech Republic*, the tribunal found that the State media regulator's termination of a broadcasting license amounted to an indirect expropriation, because it "caused the destruction of the [investment's] operations, leaving [the investment] with assets, but without business," and "destroyed . . . the commercial value of the [claimant's] investment."[430] As in *CME v. Czech Republic*, Guatemala's suspension of the Progreso VII exploitation license, compounded by the seizure of Exmingua's concentrate, destroyed Exmingua's operations and deprived Claimants of all commercial value of their investment, thereby constituting an expropriation.

169. Exmingua also derived its value from the expectation that it would be able to exploit the Santa Margarita project area.[431] To recall, Exmingua has long held an exploration license for Santa Margarita and applied for an exploitation license in 2009.[432] However, Guatemala's Constitutional Court, in a case involving Minera San Rafael's *exploration* and exploitation licenses for the Juan Bosco and Escobal mines, respectively, not only suspended Escobal's exploitation license (as was done with Exmingua's Progreso VII exploitation license), but held that *both* pre-existing exploration as well as exploitation licenses are subject to State-conducted consultations under Article 15 of ILO Convention 169.[433] The Court also held that pre-existing

[429] Supreme Court of Guatemala, Case No. 1592-2014, Ministry of Energy and Mines' submission in relation to compliance with *amparo provisional* dated 10 Mar. 2016, at 4 [at 3 ENG] (C-0008-SPA/ENG); Resolution No. 1202 of the Ministry of Energy and Mines dated 10 Mar. 2016 (C-0139-SPA/ENG); Fuentes ¶¶ 54, 186-193.

[430] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 Sept. 2001 ¶ 591 (CL-0052-ENG).

[431] *See* SRK ¶ 6, 207; Versant ¶ 106.

[432] *See supra* § 7; Fuentes ¶¶ 74-75.

[433] *See* Decision dated 3 Sept. 2018, issued in Case No. 4785-2017 by the Constitutional Court (*Minera San Rafael* case), at 30 [at 15 ENG] (C-0459-SPA/ENG) (finding with respect to Minera San Rafael's Juan Bosco exploration

exploration licenses will be suspended in the same way as pre-existing exploitation licenses where MEM-led consultations under the ILO Convention have not been conducted, and that new exploitation licenses will not be issued without such consultations having been completed.[434]

170. Exmingua's Santa Margarita exploration license accordingly has been *de facto* suspended, just like Exmingua's Progreso VII exploitation license. Although no court order or MEM resolution has expressly suspended the Santa Margarita exploration license, just as it would be economically infeasible for Exmingua to continue exploration under the license without any hope of obtaining an exploitation license, it would be legally imprudent and futile to continue exploration at the Santa Margarita site, only to 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.

171. As in *UP v Hungary*, where the tribunal found that the host State's measures rendered the investment worthless, where those measures forced the claimants to shut down operations in order to avoid further losses, the circumstances faced by Exmingua and Claimants here render their investment with respect to Santa Margarita worthless.[435] Further, as in *Copper Mesa*, where Ecuador's actions made it impossible for the claimant to consult with the communities to complete its environmental impact statement, which the tribunal found to materially contribute to its expropriation finding,[436] by its actions and omissions, Guatemala has made it impossible for Exmingua to complete the social studies for its Santa Margarita EIA, reap the benefits of its exploration works and license and obtain an exploitation license, which constitutes an expropriation.[437] The MEM's and the courts' actions, as well as the President's announcement

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license that both exploration and exploitation licenses are covered by the consultation requirement under ILO Convention 169, that the MEM must conduct and complete such consultations, and that a decision to grant an exploration license may be made only after the valid conclusion of such consultations).

[434] *Id*.

[435] *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award dated 9 Oct. 2018 ¶¶ 353-354 (CL-0141-ENG).

[436] *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case No. 2012-2, Award dated 15 Mar. 2016 ¶¶ 6.83-6.85 (CL-0138-ENG).

[437] *See also Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award dated 10 Feb. 1999 ¶ 124 (CL-0136-FR/ENG) ("Since . . . the revocation of the Minister for Industry and Commerce of the free zone certificate forced them to halt all activities . . . which deprived their investments of all utility and deprived the claimant investors of the benefit which they could have expected from their investments, the disputed decision can

of the *de facto* moratorium, all ensure that Exmingua cannot obtain an exploitation license for Santa Margarita, thus depriving it of the value of its exploration license and its corresponding investments.

172. The economic impact of Guatemala's unlawful measures has been devastating. As described, the effect of Guatemala's measures has been to deprive Claimants of all of the value of their investments in Exmingua, as (i) Exmingua can no longer generate any revenue because it is prohibited from continuing to mine gold, (ii) Exmingua's valuable concentrate has been taken from it, and (iii) Exmingua has been unlawfully deprived of its reasonable expectation of receiving an exploitation license for the Santa Margarita area. As in *Middle East Cement v. Egypt*, where the tribunal found that the effects of a two and one-half year ban on imports of cement were so great effect that it deprived the claimant of all the value of its cement import license,[438] and as in *Tza Yap Shum v. Peru*, where the tribunal found the impact of the imposition of back taxes and fines, even though some of them were successfully challenged, was so great as to substantially frustrate the claimant's operational capacity,[439] Guatemala's actions here had the effect of destroying all value of Claimants' investment and, accordingly, satisfy the requirement for establishing an indirect expropriation by "depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property."[440]

b. Guatemala's Measures Deprived Claimants Of Any Reasonably Expected Benefits And Use Of The Licenses Guatemala Had Granted To Exmingua

173. The second factor set forth in the DR-CAFTA's Annex—the extent to which the measure interferes with distinct, reasonable, investment-backed expectations—also supports a finding of expropriation here. Claimants had distinct, reasonable, investment-backed expectations that Exmingua would be able to continue operating in accordance with its validly-issued Progreso

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be regarded as a 'measure having similar effect' to a measure depriving of or restricting property within the meaning of Article 4 of the Investment Treaty").

[438] *Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award dated 12 Apr. 2002 ¶ 107 (CL-0137-ENG).

[439] *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award dated 7 July 2011 ¶¶ 162, 170 (CL-0143-ENG/SPA).

[440] *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award dated 30 Aug. 2000 ¶ 103 (CL-0120-ENG/SPA) (partially set aside on other grounds).

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. Guatemala's measures, however, have upended each and every one of those distinct, reasonable, and investment-backed expectations.

174. As in *Magyar v. Hungary* and *Abengoa v. Mexico*, Exmingua had a vested right, which, in this case was in the form of its valid exploitation license issued by the State for Progreso VII, that subsequently was expropriated when Guatemala prevented Exmingua from deriving any use or benefit from that license. While Guatemala was entitled to enact new laws or regulations to implement the ILO Convention and require the State to conduct consultations *before* issuing exploitation licenses, as the *Magyar v. Hungary* tribunal made clear, it could not retroactively apply those new standards to pre-existing rights.[441] This, however, is exactly what Guatemala did when it suspended Exmingua's Progreso VII license.

175. As Professor Fuentes explains, the MEM issued the exploitation license in 2011, after the MARN had reviewed and approved the EIA, which included, among other documents, social studies that entailed a public participation process as required by the MEM.[442] Guatemala, moreover, 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.[443] In these circumstances, it was in

[441] *Magyar Farming Co. Ltd., Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award dated 13 Nov. 2019 ¶ 362 (CL-0133-ENG).

[442] Fuentes ¶¶ 15-20.

[443] *See* 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-ENG/SPA) (reflecting the position set forth by Guatemala in 2010 as follows: "[U]nder domestic law, it is incumbent on the entity interested in securing a mining right to present the EIA conducted by consultants certified by the MARN and based on the terms of reference prepared by said ministry. . . . [O]nce the results of the EIA were obtained, it issued public announcements . . . although any party concerned could object, neither the petitioners nor anyone else did so. . . . '[T]he right of the indigenous people to be consulted is unquestionable,' in accordance with the treaties ratified by Guatemala and the jurisprudence of the Constitutional Court. . . . accordingly, the MARN informed the company that it was mandatory to conduct a public participation process, in keeping with Article 74 of the Regulations on Environmental Assessment, Control, and Monitoring (Government Agreement 431-2007), which was carried out in full. . . . [A]lthough it is not called a 'consultation,' 'it is indeed a prior process' in which 'notification was given that a mining project would be executed.'"); *see also* Fuentes ¶ 52.

violation of Exmingua's vested rights and of the Constitutional principles of certainty, legitimate confidence, and proportionality for Guatemala's courts years later to require a further consultation process while indefinitely suspending the license, which had been validly granted in accordance with the pre-existing laws and regulations, until such time as a determination is made that the license does not threaten the existence of the indigenous populations in the surrounding area.[444]

176. Given that Exmingua had validly acquired its Progreso VII exploitation license, it also had a reasonable investment-backed expectation that its property right in the gold concentrate it produced would be respected. As Professor Fuentes explains, the criminal action filed against four Exmingua workers alleging that they were transporting concentrate in contravention of the suspension of Exmingua's exploitation operations was dismissed because there was no evidence that the concentrate had been extracted after the suspension took effect.[445] As a consequence of the dismissal of the action, the seized concentrate should have been returned to Exmingua, and Guatemala's failure to do so "constitutes a blatant violation of Exmingua's Constitutional right to private property and to the principle of non-arbitrary confiscation and seizure."[446]

177. With respect to the Santa Margarita area, Exmingua held a vested right in the form of an exploration license and, based on that license, had the reasonable expectation that it would be allowed to continue operating under that license so long as it complied with the terms of the license and with applicable laws and regulations of general application. Exmingua further had the reasonable expectation that it would be granted an exploitation license in accordance with the lawful administrative process in effect at the time. As the tribunal in *Gold Reserve v. Venezuela* succinctly stated, "[l]egitimate expectations are created when a State's conduct is such that an investor may reasonably rely on that conduct as being consistent."[447] The tribunal in *Tecmed v. Mexico* spelled this out as follows:

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[444] Fuentes ¶¶ 37, 48, 55, 168.

[445] *Id*. ¶¶ 186-192.

[446] *Id*. ¶ 193.

[447] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award dated 22 Sept. 2014 ¶ 570 (CL-0205-ENG).

> The foreign investor . . . 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. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the functions usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation."[448]

178. In 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.[449] As the tribunal in *Tethyan Copper v. Pakistan* observed, 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."[450] The tribunal in *Bear Creek Mining v. Peru* similarly noted that "[w]ithout these authorizations [to conduct mining activities], Claimant could not have been expected to invest the amounts it undisputedly invested . . . ."[451]

179. When Exmingua applied for a 25-year exploitation license for Santa Margarita in early 2009, Exmingua had already received positive feedback from the MEM on its earlier application for an exploitation license for Progreso VII, which the MEM granted in 2011.[452] The granting of the Progreso VII exploitation license confirmed Exmingua's reasonable, investment-backed expectation that it would be granted an exploitation license also for Santa Margarita, given that the mine was conceived of as one project run by the same operator, the license area for Santa Margarita was directly adjacent to that of Progreso VII, and the environmental and social conditions of both areas thus were very similar.[453] Accordingly, Exminga had a reasonable,

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[448] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003 ¶ 154 (CL-0122-ENG/SPA).

[449] Fuentes ¶ 81; Kappes ¶ 146.

[450] *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-ENG).

[451] *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award dated 30 Nov. 2017 ¶ 376 (CL-0139-ENG/SPA).

[452] *See supra*, § II.B.

[453] *See supra*, § II.A.

investment-backed expectation that it would be able to receive an exploitation license for Santa Margarita and, in the meantime, that its exploration license would not retroactively be subjected to new, additional requirements and be indefinitely *de facto* suspended.

c. The Character Of Guatemala's Measures Confirms Their Expropriatory Nature

180. The very nature—or character—of the measures here also confirm that they are expropriatory. In particular, each of the measures was unlawful under Guatemalan law, penalized Exmingua and Claimants for the *State's* alleged wrongdoing, and was arbitrary, discriminatory and, thus, not at all like the lawful, non-discriminatory, regulatory measures of general application that are typically deemed non-expropriatory.

181. The suspension by the Courts and the MEM of Exmingua's Progreso VII exploitation license and, as a *de facto* consequence, of Exmingua's Santa Margarita exploration license and its opportunity to obtain an exploitation license for Santa Margarita, was expropriatory in its character, insofar as the suspension, among other things, was arbitrary, unlawful, and discriminatory. As detailed above, the suspension interfered with Exmingua's vested rights in a manner not even contemplated by Guatemalan law.[454] It was the State, moreover, that was responsible for the alleged violation of law—by failing to conduct consultations allegedly required by ILO Convention 169—and the alleged violation also was known by the State, since it approved Exmingua's Progreso VII EIA and granted it an exploitation license. And, yet, the suspension penalized only Exmingua and Claimants, and not the State in any manner. Furthermore, and as explained in even more detail below, the suspension was applied in a discriminatory manner, as other similarly-situated projects were permitted to continue operating, while the State conducted consultations, whereas Eximingua was precluded from doing so.[455] The Constitutional Court also imposed an additional condition for Exmingua's exploitation

[454] Fuentes ¶¶ 23-35 (explaining that, once granted, a mining license may only be suspended via an administrative process that includes an opportunity to be heard, for failure to comply with certain obligations the licensee has undertaken under the Mining Law, or through a declaration of *lesividad*, upon a finding of public interest by the President, neither of which occurred in this case).

[455] *See infra* § III.D.2.c and § III.E.

license to regain effectiveness, which it did not impose on any other projects, that the result of those consultations indicate no threatening effect on the consulted population.[456]

182. As in *Tecmed*, where the tribunal explained that Mexico could not escape liability on the basis that the granting of the landfill permit violated Mexican regulations, because the authorities had to be deemed aware of the law when they granted the permits,[457] the MEM and Guatemala's courts cannot justify their actions by relying on the failure of Guatemala's legislative and executive branches to implement Guatemala's international obligation under ILO Convention 169. Further, as also in *Tecmed*,[458] community opposition to Claimants' mining project in the form of blockades, protests, and the filing of court actions was the precipitating factor in the State's expropriatory suspension of the Progreso VII license and *de facto* suspension of the Santa Margarita license. As in that case, there was no emergency situation that could possibly warrant expropriating Claimants' investment without compensation. This is confirmed by the rationale given for the suspension, namely, the State's failure to conduct consultations.

183. Just as the *Copper Mesa* tribunal rejected the State's assertion that the objective of expanding consultations with local communities affected by mining projects warranted application of new regulations and ceasing the claimant's operations in the absence of due process and without payment of compensation,[459] the character of the measures here also is expropriatory. As the Manual on the ILO Convention makes clear, the Convention does not grant any right to indigenous people to *veto* a project, but only grants them a right to be consulted.[460] Thus, even an alleged derogation from that right does not warrant suspending an

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[456] *Id*.

[457] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003 ¶ 140 (CL-0122-ENG/SPA).

[458] *Id*. ¶ 137 ("Neither [investment's] shortcomings as to Alco Pacífico's waste transportation nor the community opposition that such transportation brought about seem to have originated emergency situations, genuine social crisis or public unrest or urgency, which, due to their severity, could have led the competent authorities to terminate the contractual relationship governing the transport operation or to revoke or deny the renewal of the licenses or permits under which such transport operation was carried out.").

[459] *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case No. 2012-2, Award dated 15 Mar. 2016 ¶¶ 6.11-6.16 and 6.69 (CL-0138-ENG).

[460] INTERNATIONAL LABOUR ORGANIZATION, ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES, 1989 (NO. 169): A MANUAL, at 16 (2003) (CL-0152-ENG) ("What about the right to veto? The Convention does not give indigenous and tribal peoples the right to veto.").

ongoing project, which the community would be unable to veto in any event.[461] That there was no emergency is further confirmed by the fact that Exmingua *did* consult with the local communities, including by retaining a qualified professional company to lead those consultations.[462] As in *Bear Creek*, where the State was aware and approved of the claimant's efforts at consultations, and only later reversed course in issuing its anti-mining decree, Guatemala has done the same.[463]

184. Most notably, moreover, the fact that the MEM *still* has not undertaken consultations, belies any suggestion that the alleged lack of State-led consultations conducted pursuant to the ILO Convention was so important that their alleged absence constituted an emergency justifying depriving Claimants of their investment without any compensation. Indeed, the situation is unlike those that the *Magyar v. Hungary* tribunal indicated would constitute an emergency situation.[464]

185. Likewise, Guatemala's seizure and continued impoundment of Exmingua's concentrate is expropriatory. By contrast with a criminal forfeiture, here, the criminal complaint pursuant to which the concentrate was seized was dismissed and, yet, the concentrate has remained unlawfully impounded for four years.

186. As the jurisprudence confirms, moreover, Claimants' deprivation is not merely temporary, despite that Exmingua's Progreso VII license has been suspended, and not rescinded or revoked. It has been more than *four years* since the license was "suspended," and the MEM has failed to undertake the consultations that the courts have held are necessary for the license to be reinstated. Exmingua's concentrate also has been impounded for more than four years. And Exmingua has been precluded from obtaining an exploitation license for Santa Margarita for

[461] *See Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award dated 30 Nov. 2017 ¶ 664 (CL-0139-ENG) ("ILO Convention 169 imposes direct obligations only on States. Contrary to Respondent's arguments, private companies cannot 'fail to comply' with ILO Convention 169 because it imposes no direct obligations on them. The Convention adopts principles on how community consultations should be undertaken, but does not impose an obligation of result. It does not grant communities veto power over a project.").

[462] *See supra* § II.B.

[463] *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award dated 30 Nov. 2017 ¶¶ 379, 415-416, 422 (CL-0139-ENG).

[464] *Magyar Farming Co. Ltd., Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award dated 13 Nov. 2019 ¶ 366 (CL-0133-ENG).

more than four years. This is far longer than the four *month* deprivation at issue in *Middle East Cement* and not unlike the four years of uncertainty under which the claimant in *Olin* operated before the expropriation decree on its property was invalidated; albeit, here, Exmingua is in a far more dire situation, as it has no hope of having the suspension order lifted for its Progreso VII license, in having its concentrate released, or in obtaining a Santa Margarita exploitation license. The facts thus leave no doubt that Claimants' deprivation is not merely ephemeral and that Claimants' investment has been expropriated.

3. Guatemala's Expropriation Of Claimants' Investments Was Unlawful

187. Guatemala not only expropriated Claimants' investments, but it did so unlawfully. As noted, an expropriation is lawful under the Treaty only where that expropriation is (i) for a public purpose; (ii) non-discriminatory; (iii) accompanied by prompt, adequate, and effective compensation; and (iv) completed in accordance with due process of law.[465]

188. As the tribunal in *Crystallex v. Venezuela* observed, where, as here, "a treaty cumulatively requires several conditions for a lawful expropriation, arbitral tribunals seem uniformly to hold that failure of any one of those conditions entails a breach of the expropriation provision."[466] Numerous other tribunals have held similarly.[467] Here, Guatemala has failed to meet *any* of the conditions required for a lawful expropriation.

189. *First*, there can be no dispute that Guatemala has failed to make *any* payment to Claimants, much less prompt, adequate, and effective payment for their lost investments. As the

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[465] DR-CAFTA Art. 10.7.1 (C-0001-ENG/SPA).

[466] *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated 4 Apr. 2016 ¶ 716 (CL-0153-ENG); *see also* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 99 (2nd ed. 2012) (CL-0131-ENG) ("It is today generally accepted that the legality of a measure of expropriation is conditioned on three (or four) requirements. These requirements are contained in most treaties. They are also seen to be part of customary international law. These requirements must be fulfilled cumulatively.").

[467] *See, e.g.*, *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award dated 17 Mar. 2006 ¶ 266 (CL-0154-ENG) (noting that non-compliance with one or more of the conditions set out in Article 5 of the Treaty would lead to the conclusion that the respondent has breached Article 5 of the Treaty); *Gemplus S.A. and Talsud S.A. v. The United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB (AF)/04/4, Award dated 16 June 2010 ¶¶ 8-25 (CL-0155-ENG) ("The Tribunal concludes that these expropriations were unlawful under the BITs and international law, given the facts found by the Tribunal and the further fact that the Respondent did not meet the condition required by Article 5 of both treaties regarding the payment of adequate compensation.").

Treaty indicates and as many tribunals have confirmed, this alone renders Guatemala's expropriation unlawful.[468]

190. *Second*, Guatemala's expropriation was discriminatory. It is well-established, as the *Siemens v. Argentina* tribunal observed, 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."[469] Recognizing this same principle, the tribunal in *Saluka v. Czech Republic* concluded that dissimilar treatment among four similarly-situated banks without reasonable justification constituted discriminatory

[468] DR-CAFTA Art. 10.7.1 (C-0001-ENG/SPA) (making requirement of payment cumulative to other requirements for a lawful expropriation); *see also Magyar Farming Co. Ltd., Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case ARB No. 17/27, Award dated 13 Nov. 2019 ¶ 368 (CL-0133-ENG) ("It is undisputed that Hungary has not compensated the Claimants for the expropriation of their statutory pre-lease right. Thus, the expropriation is unlawful for lack of compensation."); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability dated 14 Dec. 2012 ¶¶ 543-545 (CL-0156-ENG) (observing that "[m]any tribunals have held that the lack of payment is sufficient for the expropriation to be deemed unlawful," and holding that because "Ecuador made no 'prompt, adequate and effective' payment to compensate for the expropriation of [claimant's] investment . . . the Tribunal cannot but conclude that Ecuador's expropriation was unlawful"); *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award dated 31 Jan. 2014 ¶¶ 441-442 (RL-0102-ENG/SPA) (holding that the expropriation was unlawful on the basis that Bolivia had failed to compensate the claimants, without finding that the expropriation was discriminatory, not for a public purpose, or lacked due process); *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award dated 28 July 2015 ¶ 497 (CL-0157-ENG) (finding that lack of compensation made the expropriation unlawful, without needing to review whether other conditions for an unlawful expropriation were met); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (Award of 20 Aug. 2007) ¶ 7.5.21 (CL-0142-ENG) (explaining that, "[i]f we conclude that the challenged measures are expropriatory, there will be violation of [the expropriation provision in] the Treaty, even if the measures might be for a public purpose and non-discriminatory, because no compensation has been paid."); *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award dated 22 Apr. 2009 ¶¶ 98, 107 (CL-0158-ENG) (noting that the treaty requirements for a lawful expropriation are cumulative, and ending its inquiry after determining that Zimbabwe had not paid compensation); *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Arbitration V, Case No. 079/2005, Final Award dated 12 Sept. 2010 ¶¶ 632-33 (CL-0053-ENG) (ruling that Russia's expropriation was unlawful because it had not offered, let alone paid, any compensation to the claimant) (set aside on unrelated ground).

[469] *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 ¶ 321 (CL-0159-ENG); *see also Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award dated 27 Aug. 2009, ¶ 390 (CL-0160-ENG) (noting that the assessment of discriminatory treatment is "objective," is not based on the State's intent, but only on the effect of the measure in question, and that a "showing of discrimination of an investor who happens to be a foreigner is sufficient"); *LG&E Energy Corp., LG&E Capital Corp., and LG&E Int'l Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated 3 Oct. 2006 ¶ 146 (CL-0161-ENG) (observing that "a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect"); ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 306 (2009) (CL-0124-ENG) ("The better position is that discrimination is an effects-based analysis. . . . As in the case of national treatment and fair and equitable treatment, subjective intention is not a necessary element for breach of an IIA treatment standard").

treatment.[470] Likewise, the tribunal in *Olin v. Libya* found that the State's expropriation was discriminatory where the claimant's request from an exemption from an expropriation order was not granted, whereas an exemption was granted for two similarly-situated Libyan-owned factories.[471]

191. Here, and as further elaborated below,[472] the MEM and the courts discriminated against Exmingua and Claimants in expropriating Claimants' investment. As discussed, the MEM suspended Exmingua's Progreso VII license and the Guatemalan courts ordered that Exmingua cease all operations pending the completion of State-led consultations. By contrast, although the court[s] ruled that the Oxec project licenses also had been granted without State-led consultations, they ruled that Oxec could *continue* operating while the MEM conducted consultations.[473] The courts also imposed an additional, subjective, and onerous condition for the suspension of Exmingua's license to be lifted, namely, that the outcome of the consultations indicate that the communities are not threatened by the project, which condition has not been imposed on any other license-holder.[474] And, while the MEM has refused to commence consultations for Progreso VII during the four years since the Court first ordered it to do so in June 2016,[475] it commenced *and* completed consultations for Oxec within a seven-month

[470] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award dated 17 Mar. 2006 ¶¶ 313, 347 (CL-0154-ENG); *see also South American Silver Ltd. v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award dated 22 Nov. 2018 ¶¶ 710-711 (CL-RL-0053--ENG) ("[D]iscrimination involves 'a differential treatment of people or companies in like circumstances, without a rational justification for that differential treatment'").

[471] *Olin Holdings Ltd. v. State of Libya*, ICC Case No. 20355/MCP, Final Award dated 25 May 2018 ¶¶ 92-93, 210-215, 218 (CL-0150-ENG); *see also ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶¶ 442-43 (CL-0162-ENG) (finding that the State's cancellation of an airport management contract in favour of another company was discriminatory, because the treatment "received by the Respondent-appointed operator and that received by foreign investors as a whole" was different); *Eureko B.V. v. Poland, Ad Hoc* Arbitration, Partial Award dated 19 Aug. 2005 ¶¶ 233, 242 (CL-0125-ENG) (finding that the State's expropriatory measures that prevented the foreign investor from becoming the majority owner in an insurance company were unlawful, because they were "linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character.").

[472] *See infra* § III.D.2.c and § III.E.

[473] Constitutional Court of Guatemala, Case Nos. 90-2017, 91-2017 and 92-2017, Decision dated 26 May 2017, at 4 (C-0441-SPA/ENG).

[474] Constitutional Court of Guatemala, Consolidated Case No. 3207-2016 and 3344-2016, Decision dated 11 June 2020, at 78, 87 (C-0145-SPA/ENG); Fuentes ¶ 174.

[475] Supreme Court of Guatemala, Case No. 1592-2014, Ruling granting *amparo definitivo*, dated 28 June 2016, at 18 (C-0144-SPA/ENG).

period.[476] The Constitutional Court also discriminated against Exmingua by deciding expeditiously the *Oxec*, *Minera San Rafael*, and *CGN* cases, all of which were appealed to the Court after Exmingua's case was filed and all of which raised the same legal issues, while delaying nearly four years—right before this filing—to rule on Exmingua's appeal.[477]

192. *Third*, Guatemala's expropriation lacked due process. As the NAFTA tribunal in *Azinian v. Mexico* confirmed, "the clear and malicious application of the law" constitutes a lack of due process for purposes of finding an expropriation unlawful.[478] Furthermore, an expropriation is unlawful for a lack of due process where an investor is denied a reasonable chance to challenge the expropriation within a reasonable amount of time.[479]

193. Here, Exmingua was not accorded due process when its Progreso VII exploitation license was indefinitely suspended. In particular, the Supreme Court granted an *amparo provisional* based on CALAS's untimely application, which was submitted two years after the license was granted and the public had an opportunity to raise objections.[480] Moreover, Exmingua was not even a party to the action that resulted in the *amparo provisional*: it did not receive notification of the case until *after* that *amparo provisional* had been granted.[481] Additionally, in issuing the

[476] Memorial of Final Report of Public Consultations by the MEM dated 11 Dec. 2017 (C-0561-SPA/ENG); Maria Rosa Bolaños, "MEM completes consultations with 11 communities for Oxec case," *La Prensa Libre* (C-0562-SPA/ENG).

[477] *See supra* § II.E.3.

[478] *Azinian and others v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award dated 1 Nov. 1999 ¶ 103 (CL-0144-ENG).

[479] *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, dated 2 Oct. 2006 ¶ 435 (CL-0162-ENG) ("'[D]ue process of law', in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. . . . In general, the legal procedure must be of a nature to grant an affected investor *a reasonable chance within a reasonable time* to claim its legitimate rights and have its claims heard.") (emphasis added); *see also Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award dated 3 Mar. 2010 ¶ 396 (CL-0163-ENG) ("[T]he Respondent in the present case failed to ensure that there was a procedure or mechanism in place, either before the taking or thereafter, which allowed Mr. Kardassopoulos, within a reasonable period of time, to have his claims heard"); *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela [I]*, ICSID Case No. ARB/11/26, Award dated 29 Jan. 2016 ¶ 496 (CL-0164-ENG) (finding that "the affected investor has not had: 'a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard'").

[480] *See* Fuentes ¶¶ 110-123; *see also infra*, § III.D.2.c.

[481] *Id*. ¶¶ 89, 94.

amparo provisional, the Supreme Court ignored the objection raised by the MEM that CALAS lacked standing to sue.[482]

194. The Constitutional Court, moreover, has denied Exmingua due process with respect to that suspension, by taking nearly four years to rule on its appeal of the Supreme Court's decision, in violation of its own procedural rules[483] and contrary to the treatment that it has accorded other litigants.[484] As the *ADC* tribunal put it, a delay of this length constitutes a lack of due process, as it fails "to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard."[485]

195. With respect to Exmingua's rights in the Santa Margarita area that have been expropriated, Guatemala has denied due process by, among other things, failing to grant Exmingua an extension for submitting a completed EIA, failing to respond to Exmingua's letters regarding that extension and the difficulties it has encountered due to the blockades in completing the social studies for the EIA, and failing to take any action to commence Government-led consultations, as ordered by its courts (which is now a necessary prerequisite to having an exploitation license issued and to avoid the suspension of pre-existing exploration licenses).[486]

196. Guatemala further denied due process to Exmingua when it expropriated its physical assets, by keeping Exmingua's concentrate impounded without any legal basis and without any ability for Exmingua to challenge the impoundment and obtain its return.[487]

197. *Finally*, Guatemala's expropriation of Claimants' investments was unlawful, because it was committed without a public purpose. Simply stating that an act has a public purpose clearly

[482] *Id*. ¶¶ 90, 137; *see also* Mem Report dated 5 Sept. 2014, at 4-7 (C-0465-SPA/ENG) (raising objection that CALAS lacked standing).

[483] *See* Fuentes ¶¶ 153-154; *see also Amparo Law*, Arts. 39 and 66 (C-0416-ENG/SPA) (providing that the Constitutional Court shall render its decision within five days from the date on which the appeal is filed).

[484] *See supra* § II.E.3; *see also infra*, § III.D.2.c and § III.E; Fuentes ¶¶ 155-162.

[485] *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal dated 2 Oct. 2006 ¶ 435 (CL-0162-ENG).

[486] *See supra* § II.E.4; Fuentes ¶¶ 78, 81; Letter from Exmingua to the MARN dated 7 April 2017, at 1-2 [at 1-2 ENG] (C-0015-ENG/SPA); Letter from Exmingua to the MEM dated 7 April 2017, at 1 [p. 1 ENG] (C-0016-ENG/SPA).

[487] *See supra* § II.E.5; *see also infra* § III.B.3; Fuentes ¶¶ 185-192.

is insufficient.[488] The tribunal in *Abengoa v. Mexico*, for instance, found that the revocation of the claimant's license for operating a waste facility constituted an unlawful expropriation because such revocation led to a total and permanent deprivation of the investors' use and enjoyment of their investment and could not be justified by a legitimate public purpose.[489] In that case, Mexico attempted to justify the cancellation on the grounds of the public's right to enjoy an adequate environment, and by relying on purported irregularities in the regulatory processes that had resulted in the approval of the license.[490] The tribunal rejected this, finding that the cancellation was not undertaken for a legitimate public purpose, given that the license was cancelled just prior to the election of a hostile administration, and that the municipal and federal authorities previously had confirmed that the plant had properly obtained all necessary environmental and administrative permits.[491]

198. So too here. Any alleged interest in having the State conduct consultations with indigenous community members cannot constitute a public interest for purposes of rendering the expropriation lawful. Like the claimant in *Abengoa* that had the assurance of the State that it had obtained all necessary permits, the MARN confirmed that Exmingua had obtained all necessary authorizations, by, among other things, approving its EIA and granting it a license to operate the Progreso VII mine.

199. Nor has Guatemala taken any steps in the 24 years since it signed and ratified the ILO Convention to enact any laws, regulations or guidance for implementing the Convention. In fact, while Exmingua retained an experienced and respected consulting firm to carry out public consultations for its EIA, the State *still* has failed to commence any public consultations for

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[488] *See, e.g.*, *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶ 432 (CL-0272-ENG) ("[A] treaty requirement for '*public interest*' requires some genuine interest of the public. If mere reference to '*public interest*' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless . . . .") (emphasis in the original).

[489] *Abengoa S.A. y COFIDES S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award dated 18 Apr. 2013 ¶¶ 610-623 (CL-0165-SPA).

[490] *Id.* ¶¶ 619-621, 623.

[491] *Id.* ¶¶ 611-616; *see also CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award dated 13 Sept. 2001 ¶¶ 601-603 (CL-0052-ENG) (finding that the State's stated motivation "to obtain regulatory control again over the broadcasting operation" did not constitute a legitimate public purpose for the State's expropriation of the claimant's investment in the operating company of a television station).

Progreso VII, despite the courts' ordering it to do so. As the tribunal in *Vestey Group v. Venezuela* reasoned, in determining whether an expropriation has a public purpose, a tribunal must consider "the government's post-expropriation conduct," and "[t]he government's failure to advance a declared purpose may serve as evidence that the measure was not taken in furtherance of such purpose."[492] Here, where the government has failed to undertake consultations, there can be no question that the suspension of Exmingua's license lacked a public purpose.

200. Similarly, there is no public purpose behind Guatemala's *de facto* moratorium, which violates its own laws, and has prevented Exmingua from obtaining an exploitation license for the Santa Margarita area. Nor is there any public purpose behind the State's refusal to respond to Exmingua's application for an extension to file its EIA for Santa Margarita or to obtain the State's assistance in conducting consultations. Finally, the lack of a public purpose for the seizure of Exmingua's concentrate is apparent.

B. Guatemala Failed To Accord Claimants' Investment Fair And Equitable Treatment

201. As demonstrated below, by retroactively imposing new obligations on Exmingua's mining licenses, arbitrarily and unlawfully suspending those licenses, in line with a *de facto* moratorium on mining, discriminating against Exmingua and Claimants, filing meritless and harassing criminal charges against Exmingua's employees, unlawfully impounding Exmingua's concentrate, Guatemala breached its obligation under Article 10.5 of the DR-CAFTA to accord Claimants' investments fair and equitable treatment.

1. Article 10.5 Of The DR-CAFTA Prohibits States From Treating Investments Unfairly And Inequitably

202. Article 10.5 of the DR-CAFTA obligates Guatemala to provide covered investments, such as Exmingua, the customary international law minimum standard of treatment, including fair and equitable treatment ("FET").[493] Annex 10-B of the Treaty confirms that this obligation

[492] *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award dated 15 Apr. 2016 ¶ 296 (CL-0166-ENG).

[493] DR-CAFTA, Art. 10.5 (CL-0001-ENG/SPA).

extends "to all customary international law principles that protect the economic rights and interests of aliens."[494]

203. It is well established that the customary international law minimum standard of treatment has evolved over time. Today, as the tribunal in *Mondev v. United States* explained, "what is unfair or inequitable need not equate with the outrageous or the egregious," and "a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[495] Likewise, the *ADF v. United States* tribunal observed that "the customary international law referred to in [the FET provision] is not 'frozen in time' and that the minimum standard of treatment does evolve," such that the treaty incorporates "customary international law 'as it exists today.'"[496]

204. The *Waste Management v. Mexico II* tribunal observed more than 15 years ago that, "despite certain differences of emphasis a general standard for [FET] is emerging."[497] In that case, the tribunal interpreted the FET provision in the NAFTA, which, read together with the Parties' binding interpretation,[498] is identical to the FET provision in the DR-CAFTA. In oft-

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[494] DR-CAFTA, Annex10-B (CL-0001-ENG/SPA); *see also* Vienna Convention on the Law of Treaties, Art. 31(1)-(2) (CL-0005-ENG/SPA) ("1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes").

[495] *Mondev Int'l Ltd. v. United States of America*, NAFTA, ICSID Case No. ARB(AF)/99/2, Final Award dated 11 Oct. 2002 ¶ 116 (RL-0018-ENG).

[496] *ADF Group Inc. v. United States of America*, NAFTA, ICSID Case No. ARB(AF)/00/1, Award dated 9 Jan. 2003 ¶ 179 (CL-0081-ENG); *see also William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 Mar. 2015 ¶ 438 ("At the same time, the international minimum standard exists and has evolved in the direction of increased investor protection precisely because sovereign states—the same ones constrained by the standard—have chosen to accept it."); *Chemtura Corp. v. Government of Canada*, NAFTA/ UNCITRAL, Award dated 2 Aug. 2010 ¶ 121 (CL-0087-ENG) (observing that it could not "overlook the evolution of customary international law, nor the impact of BITs on this evolution"); *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award dated 31 Mar. 2010 ¶ 193 (CL-0201-ENG) (noting "a shared view that customary international law has not been frozen in time and that it continues to evolve in accordance with the realities of the international community"); *Int'l Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Arbitral Award dated 26 Jan. 2006 ¶ 194 (C-0198-ENG/SPA) ("The content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law."); *Pope & Talbot v. Canada*, Award in Respect of Damages dated 31 May 2002 ¶¶ 57-58 (CL-0028-ENG) ("Canada considers that the principles of customary international law were frozen in amber at the time of the *Neer* decision. . . . The Tribunal rejects this static conception of customary international law.").

[497] *Waste Management Inc. v. United Mexican States (II)*, NAFTA, ICSID Case No. ARB/AF/00/03, Award dated 30 Apr. 2004 ¶¶ 91-98 (CL-0022-ENG/SPA).

[498] *See* NAFTA Notes of Interpretation of Certain Chapter 11 Provisions NAFTA Free Trade Commission dated 31 July 2001 (CL-0279-ENG).

cited remarks that have established the contemporary minimum standard of treatment in the context of foreign investment, the *Waste Management* tribunal stated:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that 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*. . . . In applying this standard it is relevant that the treatment is *in breach of representations made by the host State which were reasonably relied on by the claimant.*[499]

The tribunal further elaborated that "[a] basic obligation of the State under [the FET provision] is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means,"[500] and noted that "[e]vidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[501] While bad faith on the part of the State necessarily will establish a violation of the minimum standard of treatment, an investor need not demonstrate bad faith to engage the international responsibility of the State.[502]

205. Since *Waste Management II*, numerous State Parties and tribunals, including those applying the DR-CAFTA, have endorsed this standard. The DR-CAFTA tribunal in *RDC v. Guatemala*, for example, held that "*Waste Management II* persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment."[503] Similarly, the tribunal in *TECO v. Guatemala*, another case under the DR-CAFTA, agreed with the *Waste Management* tribunal, confirming that the minimum standard of treatment under customary international law can be infringed "by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or

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[499] *Waste Management Inc. v. United Mexican States (II)*, NAFTA, ICSID Case No. ARB/AF/00/03, Award dated 30 Apr. 2004 ¶¶ 98 (CL-0022-ENG/SPA) (emphasis added).

[500] *Id*. ¶ 138.

[501] *Id*. ¶ 99.

[502] *Id*. ¶¶ 91-97.

[503] *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award dated 29 June 2012, ¶ 219 (CL-0068-ENG).

idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety."[504] The *TECO* tribunal also emphasized:

> [T]he minimum standard is part and parcel of the international principle of good faith. There is no doubt in the eyes of the Arbitral Tribunal that the *principle of good faith is part of customary international law* as established by Article 38.1(b) of the Statute of the International Court of Justice, and that a *lack of good faith on the part of the State or of one of its organs should be taken into account in order to assess whether the minimum standard was breached.*[505]

206. Indeed, in *Merrill & Ring v. Canada*, the tribunal observed that, even if there were no "stand-alone obligations" under the NAFTA or international law regarding good faith and the prohibition of arbitrariness, "these concepts are to a large extent the expression of general principles of law and hence also a part of international law. . . . Good faith and the prohibition of arbitrariness are no doubt an expression of such general principles and no tribunal today could be asked to ignore these basic obligations of international law."[506] The tribunal also noted that a "close connection" exists between these general principles of law and the "availability of a secure legal environment."[507]

207. The tribunal in *Merrill & Ring* further observed that a State must not only respect these general principles of law, but also must "provide[] for the fair and equitable treatment of alien investors within the confines of reasonableness."[508] In reaching this conclusion, the tribunal looked to other NAFTA decisions and found a "trend towards liberalization of the standard applicable to the treatment of business, trade and investments" that has "continued unabated over several decades and has not yet stopped."[509] Taking note of prior decisions that found that a State could not engage in "[c]onduct which is unjust, arbitrary, unfair, discriminatory or in

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[504] *TECO Guatemala Hldgs., LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award dated 19 Dec. 2013, ¶¶ 454-455 (CL-0031-ENG/SPA).

[505] *Id.* ¶ 456 (emphasis added).

[506] *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award dated 31 Mar. 2010 ¶ 187 (CL-0201-ENG); *see also Glamis Gold, Ltd. v. United States of America*, NAFTA/ UNCITRAL, Award dated 8 June 2009 ¶ 625 (RL-0041-ENG) (concluding that "arbitrariness that contravenes the rule of law, rather than a rule of law, would occasion surprise not only from investors, but also from tribunals") (emphasis omitted).

[507] *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award dated 31 Mar. 2010 ¶ 187 (CL-0201-ENG).

[508] *Id.* ¶ 213; *see also id.* ¶ 211 (finding that "fair and equitable treatment has become a part of customary law").

[509] *Id.* ¶ 207.

violation of due process," the tribunal observed that "[a] requirement that aliens be treated fairly and equitably in relation to business, trade and investment is the outcome of this changing reality and as such it has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*."[510] The tribunal concluded that the applicable standard thus "protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness."[511]

208. With respect to an investor's expectations, the *BG Group v. Argentina* tribunal concurred with the "unambiguous statement" in *Waste Management II* that "commitments to the investor are relevant to the application of the minimum standard of protection under international law."[512] The tribunal held that the host State's obligations accordingly "must be examined in the light of the legal and business framework as represented to the investor at the time that it decides to invest."[513] The tribunal also held, "in concurrence with prior arbitral findings," that "the violation of the standard of fair and equitable treatment does not require bad faith by the host State."[514]

209. Accordingly, pursuant to the customary international law minimum standard of treatment, as it has evolved over time and repeatedly been confirmed in investment treaty jurisprudence, a host State must (among other things) act in good faith, refrain from acting arbitrarily, provide a stable and secure legal and business environment, and respect an investor's legitimate expectations that arise from conditions that the State offered to induce the investor's investment. Guatemala has failed to meet those obligations through a pattern of acts and omissions, discussed further below, which are analogous to other cases where tribunals have found FET violations.

[510] *Id*. ¶¶ 208, 210.
[511] *Id*. ¶ 210.
[512] *BG Group v. Argentina*, Final Award dated 24 December 2007 ¶¶ 294, 296 (CL-0050-ENG).
[513] *Id*. ¶ 298.
[514] *Id*. ¶ 301.

2. Numerous Tribunals Have Held The Host State Liable Where, As Here, The State Acted Arbitrarily, Unfairly, And In Complete Disregard Of Its Legal Framework

210. It is "[t]he record as a whole – not isolated events – [that] determines whether there has been a breach of international law."[515] Tribunals thus consistently have held that an FET violation need not be based on a single unlawful act. Rather, a breach also may occur as part of a process extending over time and comprising "a succession or an accumulation of measures which, taken separately, would not breach [the FET standard] but, when taken together, do lead to such a result."[516] This is true even where the measures were not necessarily taken in accordance with any kind of coordinated scheme or plan.[517] Applying the standard set forth above, many tribunals have found breaches of the FET obligation in circumstances analogous to this case, including (among others) where a State arbitrarily denied permission for a previously authorized project.

211. In *Bilcon v. Canada*, for example, the investment concerned a project to develop and operate a quarry and maritime terminal. The project required a permit and approvals and, after it raised widespread public concern about potentially significant adverse environmental effects, underwent a lengthy environmental assessment by a Joint Review Panel ("JRP").[518] The JRP

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[515] *See GAMI Investments, Inc. v. United Mexican States*, NAFTA, UNCITRAL, Final Award dated 15 Nov. 2004 ¶ 97 (CL-0036-ENG) (referring to *Waste Management v. Mexico (II)*).

[516] *El Paso Energy Int'l Co. v Argentine Republic*, ICSID Case No ARB/03/15, Award dated 31 Oct. 2011 ¶ 518 (CL-0047-ENG/SPA); *see also OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Award dated 29 July 2014 ¶ 413 (CL-0128-ENG) ("The aggregate of the events discussed can only be considered as amounting to arbitrariness and unreasonableness as far as the treatment of the Claimant's rights are concerned."); *Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award dated 22 Sept. 2014 ¶ 566 (CL-0205-ENG) ("[E]ven if a measure or conduct by the State, taken in isolation, does not rise to the level of a breach of the FET, such a breach may result from a series of circumstances or a combination of measures."); *Flemingo Duty Free Shop Private Ltd. v Republic of Poland*, UNCITRAL, Award dated 12 Aug. 2016 ¶ 536 (CL-0140-ENG) ("[A] succession of acts – whether or not individually significant – can build up to unfair and inequitable treatment."); *Walter Bau AG v. The Kingdom of Thailand*, UNCITRAL, Award dated 1 July 2009 ¶ 12.43 (CL-0206-ENG ("The Tribunal sees no reason why a breach of a FET obligation cannot be a series of cumulative acts and omissions. One of these may not on its own be enough, but taken together, they can constitute a breach of FET obligations.").

[517] *See, e.g.*, *Blusun SA, Jean-Pierre Lecorcier & Michael Stein v Italian Republic*, ICSID Case No ARB/14/3, Award dated 27 Dec. 2016 ¶ 362 (CL-0207-ENG) ("A breach of an obligation to … 'to accord at all times ... fair and equitable treatment' could be breached by a single transformative act aimed at an investment, or by a program of more minor measures, or by a series of measures taken without plan or coordination but having the prohibited effect.").

[518] *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶ 5 (CL-0088-ENG).

recommended rejection of the project on the basis that it was inconsistent with "community core values," a standard which was not set forth in any law, regulation, or guideline.[519]

212. The *Bilcon* tribunal held that the claimants had "reasonable expectations" based on general investment promotion materials and policy statements by government officials who repeatedly had encouraged the claimants to pursue the project.[520] The tribunal further found that the claimants made a "major consequent investment of resources and reputation" in an approval process that was "the most rigorous, public and extensive kind provided under the laws of Canada" – and that the "JRP's decision was effectively to impose a moratorium on projects of the category involved here."[521] The tribunal concluded that the application of the "community core values" standard was arbitrary and inherently unfair because it "departed in fundamental ways from the standard of evaluation required by the laws of Canada," and that the claimants had no "reasonable notice" that the JRP would deviate from the applicable legal framework in this manner.[522] Accordingly, the *Bilcon* tribunal ruled that Canada had violated its FET obligation.[523]

213. In *Tecmed v. Mexico*, the claimant's subsidiary, Cytrar, acquired authorisation to operate a hazardous waste landfill for an infinite duration; Mexican authorities thereafter replaced that authorisation with an annually renewable permit.[524] After the local community expressed opposition to Cytrar's operations, Cytrar and the authorities agreed that it would relocate the landfill, that it would be provided new land and licenses to do so, and that it would continue to operate at the existing site pending the relocation.[525] Before Cytrar could relocate, however, the authorities refused to renew its operating permit, thus bringing the investment to a standstill.[526]

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[519] *Id*. ¶¶ 503, 591.

[520] *Id*. ¶¶ 589, 594.

[521] *Id*. ¶¶ 454, 594.

[522] *Id*. ¶¶ 534-535, 543, 594.

[523] *Id*. ¶ 604.

[524] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award dated 29 May 2003 ¶ 58 (CL-0122-ENG).

[525] *Id*. ¶ 44.

[526] *Id*. ¶ 58.

214. In assessing Mexico's conduct, the *Tecmed* tribunal highlighted the importance of an investor's expectations that a State will act in a consistent, non-arbitrary manner:

> *The foreign investor . . . 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*. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[527]

215. The tribunal determined that Mexico had acted in a contradictory manner by, on the one hand, reassuring the investor that it could continue operations and, on the other hand, denying renewal of the operating permit.[528] The tribunal further held that the denial of the permit renewal was not based on any misconduct by Cytrar (or, indeed, any basis under the applicable legal framework), but rather was an arbitrary revocation of previous authorizations designed to serve political ends with respect to the community opposition.[529] Accordingly, the *Tecmed* tribunal ruled that Mexico had violated its FET obligation.[530]

216. The tribunal likewise found the State to have acted in a contradictory manner and, thus, to have violated its FET obligations in *MTD v. Chile*. In that case, a State Foreign Investment Commission approved the claimants' investment in an urban development project; at the same time, however, another agency refused to re-zone the land on the basis that it would be inconsistent with urban development policies, thus preventing the project from going forward.[531] The tribunal reasoned that "[a]pproval of a Project in a location would give prima facie to an

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[527] *Id*. ¶ 154 (emphasis added); *see also id*. (holding that FET "in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations").

[528] *Id*. ¶¶ 44, 172-173.

[529] *Id*. ¶¶ 163-164.

[530] *Id*. ¶ 174.

[531] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 ¶¶ 72, 81-82 (CL-0208-ENG).

investor the expectation that the project is feasible in that location from a regulatory point of view," and stressed "the inconsistency of action between two arms of the same Government."[532] Applying the FET standard as formulated in *Waste Management II* and *Tecmed*,[533] the tribunal determined that Chile had "an obligation to act coherently and apply its policies consistently,"[534] and held that "approval of an investment by the [Foreign Investment Commission] for a project that is against the urban policy of the Government is a breach of the obligation to treat an investor fairly and equitably."[535]

217. In a similar manner, in *Walter Bau v. Thailand*, the State was found liable in connection with an agreement to which it and the investor had entered with respect to toll increases as part of a highway project. Contrary to the agreement, Thailand instead decreased the tolls, claiming that it could not increase tolls until after the removal of a highway ramp – a separate project which the State failed to authorise due to a deadlock between two of its own agencies regarding the ramp removal.[536] The tribunal confirmed that the FET standard requires a State to act in good faith, in a consistent and non-discriminatory manner, and with respect for the investor's legitimate expectations.[537] It concluded that Thailand's decision to decrease the toll payments, and its use of State inaction on the ramp project as purported justification, was arbitrary and a violation of the prior agreement and claimant's legitimate expectations, in breach of the FET obligation.[538]

218. Likewise, in *Arif v. Moldova*, the claimant acquired rights to operate duty free shops which were repeatedly validated by State organs, including through a contract entered into by a State entity, approval of the contract by a regulatory authority, and issuance of an updated

[532] *Id*. ¶ 163.

[533] *Id*. ¶¶ 114-115, fn. 65.

[534] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 ¶ 165 (CL-0208-ENG).

[535] *Id*. ¶ 166.

[536] *Walter Bau AG v. The Kingdom of Thailand*, UNCITRAL, Award dated 1 July 2009 ¶ 12.24 (CL-0206-ENG).

[537] *Id*. ¶ 11.5 (quoting *Biwater Gauff v. Tanzania*, Award ¶ 602); *see also id*. ¶ 11.6 (referring approvingly to *Tecmed*).

[538] *Walter Bau AG v. The Kingdom of Thailand*, UNCITRAL, Award dated 1 July 2009 ¶¶ 12.14, 12.26, 12.36, 12.44 (CL-0206-ENG).

operating license.[539] Moldova subsequently invalidated the contract. The tribunal stressed that "[c]onsistency by the State in its relations with the investor is an important element of the fair and equitable treatment standard, whether viewed independently or within the context of legitimate expectations," and that an "investor's legitimate expectations might be breached not only by a substantive change in policy, but also by the treatment of the investor during the process of the change of policy."[540] The tribunal also observed that "the acts of an organ or official, for which the State is responsible in international law, might create legitimate expectations on the international plane, even though the official or organ has acted legally in domestic law."[541] The tribunal held that the claimant had invested – and operated – in good-faith reliance on the authorization provided by various State organs, and that the subsequent revocation of operating rights breached legitimate expectations to a secure legal framework, in violation of Moldova's FET obligations.[542]

219. Applying similar reasoning, the *Windstream v. Canada* tribunal found Canada liable for an FET violation. There, the claimant and a State entity had entered into a contract for the sale of offshore wind farm energy.[543] Provincial officials subsequently delayed issuing permits and authorizations needed to develop the offshore wind farms, and eventually imposed a moratorium that frustrated and effectively "cancelled" the project.[544] The tribunal found that the provincial Government "did relatively little to address the scientific uncertainty surrounding offshore wind that it had relied upon as the main publicly cited reason for the moratorium," and also that "[m]ost importantly, the Government did little to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium."[545] The tribunal concluded that the Government had failed to take necessary measures "within a reasonable

[539] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 ¶¶ 540-541 (CL-0246-ENG).

[540] *Id*. ¶ 538.

[541] *Id*. ¶ 539.

[542] *Id*. ¶ 547.

[543] *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award dated 27 Sept. 2016 ¶ 99 (CL-0210-ENG).

[544] *Id*. ¶¶ 5, 189.

[545] *Id*. ¶¶ 378-379.

period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty," and that this failure constituted a breach of Canada's FET obligation.[546]

220. Further to the principles and jurisprudence addressed above, a breach of the obligation to accord fair and equitable treatment arises where a State's measures are arbitrary, inconsistent, unreasonable, discriminatory, and/or contrary to the State's own legal framework and an investor's legitimate expectations. Guatemala breached its Article 10.5 obligations in all such respects, as detailed below.

3. Guatemala Breached Its Treaty Obligation To Accord Claimants' Investments Fair and Equitable Treatment

221. Guatemala breached its Treaty obligation to accord Claimants' investments fair and equitable treatment by, among other things:

- Arbitrarily suspending Exmingua's Progreso VII exploitation and exportation licenses, and retroactively imposing a new licensing requirement contrary to established law, *years after* Exmingua had been granted and been operating under a valid exploitation license. In this way, Guatemala penalized Exmingua and Claimants for what the courts held was a failure of the State with respect to purported consultation obligations.[547]
- Arbitrarily and unfairly discriminating against Exmingua and Claimants by granting preferential treatment to other investors and investments with respect to the alleged consultation and licensing requirements.[548]
- Filing meritless and harassing criminal actions against Exmingua employees, and arbitrarily and unlawfully impounding concentrate.[549]
- Effectively stripping Claimants of their rights under the validly-issued exploration license for Santa Margarita and precluding Claimants from securing an exploitation license for that project, by actions of the MEM and the courts, in line with the Government's arbitrarily announced *de facto* moratorium on granting exploration or exploitation licenses, contrary to established law.[550]

222. Each of these measures was arbitrary, inconsistent, unreasonable, discriminatory, and/or contrary to Guatemala's legal framework and Claimants' legitimate expectations, in violation of

[546] *Id*. ¶¶ 379, 380-382.

[547] *See supra* § II.E.1-2, 6.

[548] *See supra* § II.E.3.

[549] *See supra* § II.E.5.

[550] *See supra* § II.E.4.

Guatemala's obligations under Article 10.5 of the Treaty. Together, the measures devastated Claimants' investments in their mining project.

a. Guatemala Arbitrarily Suspended The Progreso VII Exploitation License And Exportation License After Retroactively Imposing New Requirements Through A Novel Interpretation Of The Law

223. The factual record detailed above shows that Exmingua diligently complied with all requirements under Guatemalan law to obtain a valid Progreso VII exploitation license, including conducting extensive and exhaustive environmental and social studies in the DAI for the purposes of its EIA.[551] The process was closely monitored and approved by the Guatemalan authorities (in particular by the MARN and the MEM), publicized for comment as required, and unopposed by any party.[552] After a thorough year-long review of Exmingua's EIA by the MARN and a further four-month review of a completed application by the MEM, the MEM granted Exmingua its exploitation license on 30 September 2011, noting that the Progreso VII mine was "in the interest of the country."[553]

224. Professor Fuentes confirms that, "once the statutory procedure was completed, the MEM found Exmingua to have satisfied the requirements then established in the Constitution and the Guatemalan legal system, and validly granted it a mining exploitation license."[554] Accordingly, "*no circumstances existed that might preclude Exmingua from exercising its rights and carrying out mining activities during the term of the license*."[555] Indeed, under Guatemalan law, "the granting of mining licenses, once all relevant legal requirements have been satisfied, is governed by the principle of estoppel . . . involv[ing] the *obligation to safeguard all vested rights associated with Exmingua's exploitation license*. . . . Revoking or suspending a license by other means, without compensation whatsoever, is tantamount to going against the State's own actions, which constitutes an illegal decision under Guatemalan law."[556] Thus, as Professor Fuentes confirms, "Exmingua was entitled to have *legitimate confidence that the license would*

[551] *See supra* § II.B.
[552] *See supra* § II.B.
[553] *See supra* § II.B.
[554] Fuentes ¶ 20.
[555] *Id*. ¶ 35 (emphasis added).
[556] *Id*. ¶ 41 (emphasis added).

not be suspended or revoked other than for the reasons and with the procedures specified in Guatemalan law."[557]

225. Much as Exmingua was entitled to "legitimate confidence" under Guatemalan law, Claimants had legitimate and reasonable expectations as a matter of international law that 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.

226. As the tribunal in *MTD v. Chile* reasoned, the "[a]pproval of a Project in a location would give *prima facie* to an investor the expectation that the project is feasible in that location from a regulatory point of view."[558] In *Tecmed v. Mexico*, the tribunal confirmed that a foreign investor "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."[559] And, in *Bilcon v. Canada*, the tribunal determined that investors had "reasonable expectations" arising from representations made by officials as to a mining project even before an environmental assessment process had begun[560] – let alone after approvals and licenses were granted.

227. Accordingly, upon obtaining its exploitation license, Claimants proceeded with a multi-million dollar development of the Progreso VII site, including by designing, building, and sending a processing plant with a lab; purchasing heavy machinery; commencing open pit mining; and processing, producing and shipping gold concentrate for almost two years.[561] Indeed, the fact that mining operations advanced lawfully pursuant to the validly-issued

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[557] *Id.* ¶ 48 (emphasis added).

[558] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 ¶ 163 (CL-0208-ENG/SPA).

[559] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award dated 29 May 2003 ¶ 154 (CL-0122-ENG).

[560] *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶ 589 (CL-0088-ENG); *see also Waste Management Inc. v. United Mexican States (II)*, NAFTA, ICSID Case No. ARB/AF/00/03, Award dated 30 Apr. 2004 ¶ 98 (CL-0022-ENG/SPA) ("In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.").

[561] *See supra* § II.D.2.

exploitation license further reinforced Claimants' legitimate expectations that they would be able to continue operating their mining investment under a secure legal framework.[562]

228. Contrary to the established legal framework and Claimants' legitimate expectations, Guatemala subsequently suspended Exmingua's Progreso VII exploitation license and certificate of exportation through a series of arbitrary, discriminatory, and unlawful measures.

229. As detailed above, to Claimants' great surprise, the Guatemalan courts suspended the exploitation license in *amparo* proceedings filed by the non-governmental organization CALAS, on the purported basis that the Government was responsible under ILO Convention 169 to ensure consultations with indigenous communities.[563] This represented a novel interpretation of, and significant departure from, Guatemalan law. In fact, as Professor Fuentes explains, if it becomes "necessary to suspend the operations of a certain mining project, the MEM has, by law, only two avenues available to do so: (i) by invoking the application of Article 51 of the Mining Law, or (ii) by seeking a declaration of *Lesividad*."[564] Guatemala, however, did not invoke either basis for suspending the Progreso VII license. "That is to say," Professor Fuentes confirms, "the State failed to apply the only legal mechanisms available to it to suspend the exercise of such rights under the license."[565] Accordingly, it is implausible and unlawful that, "years after Exmingua's license was granted," Guatemala's courts "*changed all the rules of the game*."[566]

230. The courts' retroactive application of this novel, "game-changing" requirement to the validly-issued Progreso VII exploitation license was thus contrary to Guatemala's legal framework – and also contradicted the official position which Guatemala had publicly taken before the international community and its own judiciary. As described above, Guatemala was aware of its ILO Convention 169 obligations for more than 15 years at the time that Exmingua's

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[562] *See, e.g., Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 ¶¶ 542-544 (CL-0126-ENG) ("This legitimate expectation strengthened over time as Le Bridge made its investment . . . with the knowledge and consent of . . . organs of the State. . . . . The expectation of a secure legal framework for the investment was confirmed over a period of 16 months. . . . The open, transparent and continuous performance of [the claimant's] investment contributed to building legitimate trust in the validity of his position.").

[563] *See supra* § II.E.1.

[564] Fuentes ¶ 24.

[565] *Id.* ¶ 35.

[566] *Id.* ¶ 168 (emphasis added).

license was issued in 2011. Guatemala, however, had not enacted any laws or regulations with respect to consultations beyond the requirement for applicant-led consultations at the EIA stage – with which Exmingua fully complied and pursuant to which Exmingua's license was granted. In fact, Guatemala expressly represented to the Inter-American Commission on Human Rights that its EIA requirements satisfied Guatemala's Convention obligations.[567] In the *amparo* proceedings, moreover, the MEM repeatedly represented to the Courts in 2014 and 2016 that the Progreso VII license had been lawfully granted and could not be suspended.[568] The MEM's later suspension of the license in 2016, further to Court order, was thus a complete reversal of the position which Guatemala had taken up to that point and on which Claimants had relied.

231. Nor did Guatemala stop there. Among other further measures, on 3 May 2016, the MEM unlawfully suspended Exmingua's exportation license for concentrate. As detailed above, the Supreme Court's *amparo provisional* had no connection to Exmingua's exporting activities, and there was no legal basis whatsoever for the MEM to suspend Exmingua's exportation license.[569] Nor did the MEM purport to offer one when issuing the resolution suspending the exportation license. After Exmingua promptly requested revocation of the suspension (within days), the MEM took *five months* to act – only to lift the suspension *one day after the license had expired* – and of which Exmingua was notified only two and one-half months after the suspension was lifted and seven months after Exmingua challenged the suspension. Thus divested of the authorization to mine or even to export previously produced concentrate, Exmingua was forced to shut down operations.

232. Guatemala's suspension of the Progreso VII licenses violated Exmingua's (and Claimants') vested rights and Guatemala's Article 10.5 obligations. Indeed, the facts presented here are directly analogous to various other cases in which tribunals have found an FET violation, as detailed above. In *Bilcon v. Canada*, as one example, the tribunal found that the State effectively "impose[d] a moratorium" when a review panel applied a new "community core

[567] *See supra* § II.E.1; Fuentes ¶ 52; Inter-American Commission of Human Rights, Admissibility Report No. 20/14, Petition 1566-07, Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán, dated 3 Apr. 2014, at 5 (CL-0225-ENG/SPA).

[568] *See supra* § II.E.2.

[569] *See supra* § II.E.2.

values" standard that "departed in fundamental ways from the standard of evaluation required by the laws of Canada".[570] In that case, as here, the claimants had no "reasonable notice" that the State would deviate from the applicable legal framework.[571] As the tribunal further noted, breaches of the minimum standard of treatment can arise where a State imposes "changes in a legal or policy framework that have retroactive effect."[572] Here, Guatemala's suspension of the Progreso VII exploitation license was contrary to Guatemala's legal framework and prior authorizations and representations, and further to the retroactive application of a novel consultation requirement. Guatemala's suspension of the exportation license, on the other hand, had no basis whatsoever in the applicable framework, and Guatemala did not even purport to offer one. These measures were thus arbitrary, made in complete disregard of Guatemalan law, and repudiated Claimants' vested rights and the secure legal framework on which they had reasonably relied.[573]

233. Notably, moreover, *Bilcon* concerned a finding by the State review panel that *the investor* allegedly had failed to meet licensing requirements. Here, in contrast, the suspension of the Progreso VII exploitation license was predicated on a purported failure by *the State* to fulfil consultation obligations under the ILO Convention 169 – *and not any act or omission by Exmingua or Claimants*. As the *GAMI* tribunal observed, a "government's failure to implement or abide by its own law in a manner adversely affecting a foreign investor" may lead to a violation of the FET obligation, particularly "if its officials fail to implement or implement regulations in a discriminatory or arbitrary fashion."[574] The tribunal accepted that "an abject failure to implement a regulatory program indispensable for the viability of foreign investments that had relied upon it. . . . is no different from a violation by the government of the rules of that

[570] *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶¶ 454, 535, 543, 594 (CL-0088-ENG).

[571] *Id.* ¶ 534-535, 543, 594.

[572] *Id.* ¶ 572.

[573] *See, e.g., id.* ¶ 591 ("The Tribunal finds that the conduct of the joint review was arbitrary. The JRP effectively created, without legal authority or fair notice to Bilcon, a new standard of assessment rather than fully carrying out the mandate defined by the applicable law . . . .").

[574] *GAMI Investments, Inc. v. Government of the United Mexican States*, NAFTA UNCITRAL, Final Award dated 15 Nov. 2004 ¶¶ 91, 94 (CL-0036-ENG/SPA).

program. Both action and inaction may fall below the international standard."[575] Here, it is arbitrary and fundamentally unfair that Claimants and their investment must pay the price for what the courts found to be the State's failure to comply with the State's obligations.

234. The arbitrary and unlawful nature of Guatemala's measures is further accentuated by the fundamental inconsistencies between the positions taken over time by different elements of the Government. In *Arif v. Moldova*, for example, the tribunal found that there was a "direct inconsistency between the attitudes of different organs of the State to the investment," because certain executive agencies had "endorsed and encouraged the investment . . . while the courts found the same investment to be illegal."[576] The tribunal concluded that "*[t]his type of direct inconsistency in itself amounts to a breach of the fair and equitable treatment standard*".[577] Likewise, in *MTD v. Chile*, where a foreign investment commission had approved the project but another agency refused to make necessary zoning adjustments, the tribunal held that the State had "an obligation to act coherently and apply its policies consistently,"[578] and that "inconsistency of action between two arms of the same Government" was a breach of the FET obligation.[579] Here, the MEM approved Exmingua's Progreso VII exploitation license after a thorough review, including as to the consultations held with indigenous populations; the MEM repeatedly represented to the courts that the license was lawfully issued and could not be suspended;[580] the Guatemalan courts reached the exact opposite conclusion, contrary to established law;[581] and the MEM then adopted and implemented the position of the courts.[582] Such glaring inconsistencies underscore Guatemala's failure to act coherently and regulate in a lawful, non-arbitrary manner.

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[575] *Id.* ¶ 108. The GAMI tribunal ultimately rejected the FET claim in that case, because it found that GAMI was unable to show that "the failures in the Sugar Program were both directly attributable to the government and directly causative of GAMI's alleged injury." *Id.* ¶ 108. Here, in contrast, Guatemala bears sole responsibility for failing to enact implementing legislation for ILO Convention 169.

[576] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 ¶ 547(b) (CL-0126-ENG).

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

[578] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 ¶ 165 (CL-0208-ENG).

[579] *Id.* ¶¶ 163, 165-166.

[580] *See supra* § II.B.

[581] *See supra* §§ II.E.1, II.E.6.

[582] *See supra* § II.E.1.

235. Indeed, Guatemala's arbitrary and unlawful measures also run afoul of general international law principles of estoppel, again reinforcing Guatemala's failure to accord Claimants' investments fair and equitable treatment. Estoppel, which "[r]est[s] on principles of good faith and consistency,"[583] 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."[584] This general principle of law has been affirmed by the ICJ[585] and various ICSID tribunals,[586] and precludes a party from "acting inconsistently where the result of the inconsistency would be to prejudice the other party."[587] As the tribunal in *ADC*

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[583] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 221 (9th ed. 2019) (CL-0212-ENG); *see also* D.W. Bowett, *Estoppel before International Tribunals and its Relation to Acquiescence*, 33 BYIL 176 (1957) (CL-0213-ENG) (noting that the basis of the rule of estoppel "is the general principle of good faith and as such finds a place in many systems of law"); ANDREW NEWCOMBE AND LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT § 10.27 (Kluwer 2009) (CL-0124-ENG) (noting that "[e]stoppel operates to preclude a party from acting inconsistently where the result of the inconsistency would be to prejudice the other party").

[584] MALCOLM N. SHAW, INTERNATIONAL LAW 383 (8th ed. 2017) (CL-0214-ENG); *see also* D.W. Bowett, *Estoppel before International Tribunals and its Relation to Acquiescence*, 33 BYIL 176 (1957) (CL-0213-ENG) ("The rule of estoppel . . . operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit.").

[585] *See, e.g.*, Case Concerning the Temple of Preah Vihear (*Cambodia v. Thailand*) [1962] ICJ Rep. 6, 32 (holding that Thailand was "precluded by her conduct from asserting that she did not accept" a boundary that Thailand had observed and benefitted from for 50 years) (CL-0215-ENG).

[586] *See, e.g.*, *ADC Affiliate Ltd and ADC & ADMC Mgmt Ltd v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶ 475 (CL-0272-ENG); *Duke Energy Int'l Peru Investments No. 1, Ltd. v. Peru*, ICSID Case No. ARB/03/28, Award dated 18 Aug. 2008 ¶ 231 (CL-0202-ENG/SPA) (observing that "estoppel or the principle of consistency – has also been universally applied as a general legal principle, both in civil and international law, to prohibit a State from taking actions or making representations which are contrary to or inconsistent with actions or representations it has taken previously to the detriment of another"); *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction dated 6 July 2007 ¶ 194 (CL-0163-ENG) (finding that "even if the JVA and the Concession were entered into in breach of Georgian law, the fact remains that these two agreements were 'cloaked with the mantle of Governmental authority'. Claimant had every reason to believe that these agreements were in accordance with Georgian law, not only because they were entered into by Georgian State-owned entities, but also because their content was approved by Georgian Government officials without objection as to their legality on the part of Georgia for many years thereafter."); *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award dated 6 Feb. 2008 ¶ 120 (CL-0216-ENG) (holding that estoppel "applies *a fortiori* when the alleged problem is not violation of law, but merely – as here – the failure to accomplish a formality foreseen by law, and not even required by it except as a condition of obtaining benefits unconnected with those of the BIT itself"); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award dated 22 Aug. 2017 ¶ 628 (CL-0217-ENG) ("Pakistan has consistently maintained that Karkey's investment was established in accordance with Pakistani laws, and it is now estopped from arguing that the investment must be deemed invalid on the basis of a breach of those laws.").

[587] ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT § 10.27 (2009) (CL-0124-ENG).

v. Hungary observed, "[a]lmost all systems of law prevent parties from blowing hot and cold."[588] That, however, is precisely what Guatemala did here. Acting through its Courts and the MEM, Guatemala retroactively applied further requirements for Exmingua's exploitation license – years after the MEM had validly issued the license and Exmingua reasonably relied on that authorization to lawfully operate the mine. Guatemala's suspension of the license, thus depriving Exmingua of its vested rights under the license, violates these long-established principles of international law requiring parties to act consistently and to refrain from reversing course after another party acts in reliance on its prior actions.[589]

236. Finally, the arbitrary and unlawful nature of Guatemala's measures is further evidenced by the fact that Guatemala granted preferential treatment to other investors with respect to the same alleged licensing requirements. Guatemala's discriminatory measures in this regard included suspending Exmingua's operations at Progresso VII, while allowing Oxec to continue operating until the MEM commenced and concluded consultations; conducting and completing consultations for Oxec in just a few months, while refusing even to commence consultations for Exmingua; imposing additional onerous conditions on Exmingua for resumption of operations which were not imposed on any other comparable project; and expeditiously deciding the same licensing issues with respect to other projects in significantly less time than in the proceedings relating to Exmingua's exploitation license, which were delayed for years.[590] Guatemala's arbitrary and discriminatory treatment *vis-à-vis* Exmingua and Claimants, in breach of its FET obligation, is substantially similar to the treatment giving rise to Claimants' national treatment and MFN claims, and is detailed further in the corresponding sections below.[591]

b. Guatemala Arbitrarily And Unlawfully Pursued Baseless Criminal Charges And Impounded Exmingua's Gold Concentrate

237. Shortly after Guatemala shut down Exmingua's Progreso VII operations by arbitrarily suspending its exploitation license, Guatemala initiated baseless and harassing criminal

[588] *ADC Affiliate Ltd and ADC & ADMC Mgmt Ltd v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶ 475 (CL-0272-ENG).

[589] *See e.g.*, BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141-142 (Cambridge University Press 2006) (1958) (CL-0218-ENG).

[590] *See supra* § II.E.3; *see infra* § III.D.2.c.

[591] *See infra* § III.E.

proceedings against Exmingua employees, and unlawfully impounded its gold concentrate.[592] In particular:

- ***Unlawful Criminal Proceedings.*** On 9 May 2016, after an undercover operation targeting Exmingua, Guatemala brought groundless criminal charges against several Exmingua employees for alleged illegal exploitation of natural resources. The Fourth Judicial Criminal Court acquitted the workers the very next day, but Guatemala was bent on pursuing the baseless charges. Guatemala appealed the acquittal and brought other actions, dragging out the criminal proceeding until an ultimate judgment was rendered on 2 July 2019 – more than three years after the charges had been brought and dismissed by the lower court, leaving the innocent workers in a state of sustained limbo.[593]

- ***Unlawful Concentrate Impoundment.*** Guatemala seized concentrate being transported by the arrested Exmingua workers. Then, in June 2016, pursuant to an order of the Criminal Court, Guatemala impounded Exmingua's gold concentrate (and other property) in warehouses at the mining site. Guatemala has unlawfully retained the concentrate, in violation of Article 60 of the Criminal Code (requiring the prosecution to demonstrate a link between impounded assets and a crime), Exmingua's Constitutional right to private property, and the principle of non-arbitrary confiscation and seizure.[594]

238. It is well established that a State's pursuit of baseless prosecutions, or other misuse of its police powers, against foreign investors or their investments constitutes a breach of the FET obligation. In *Rompetrol v. Romania*, for example, the tribunal determined that "a State may incur international responsibility for breaching its obligation under an investment treaty to accord fair and equitable treatment . . . by a pattern of wrongful conduct during the course of a criminal investigation or prosecution."[595] In that case, the tribunal found an FET violation on the basis of "procedural irregularities during the criminal investigation of" two officers of the claimant, "including the conduct of the prosecutors" the "attachment of . . . shares," and "the arrest and attempted imprisonment" of those officers.[596]

239. Similarly, in *Al-Warraq v. Indonesia*, the tribunal held that "[f]ailure to comply with the most basic elements of justice when conducting a criminal proceeding against an investor

[592] *See supra* § II.E.5.

[593] *See id*.

[594] *See id*.

[595] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award dated 6 May 2013 ¶ 278 (CL-0211-ENG).

[596] *Id*. ¶ 279.

amounts to a breach of the investment treaty," and that the claimant "did not receive fair and equitable treatment" over the course of a criminal prosecution that was characterized by such fundamental failures.[597] In *Tokios Tokeles v. Ukraine*, where the State had twice discontinued and revived criminal charges against the claimant's chairman over several years, the tribunal confirmed that "a manifest and gross failure to comply with the elementary principles of justice in the conduct of criminal proceedings, when directed towards an investor in the operation of his investment, may be a breach, or an element in a breach, of an investment treaty."[598] In *Swisslion v. Macedonia*, the tribunal found a breach of the FET standard by "virtue of measures taken or not taken prior to and on the margins of the judicial proceedings," including the public announcement of a criminal investigation against the claimant's manager and its officer without later publishing the prosecutor's determination that the allegations lacked merit.[599]

240. Likewise, the groundless seizure of, and refusal to return, an investor's property in the course of proceedings conducted by the State can amount to an FET violation. In *Paushok v. Mongolia*, for example, the Central Bank appropriated gold that the claimants' subsidiary had placed into the Bank's custody.[600] The tribunal ruled that Mongolia "first tried to hide that fact and, for a significant period of time, misled [c]laimants who had legitimate expectations that they would retain full ownership of their gold" – and, as a result, that the subsidiary "was prematurely and without any right deprived of the continuing ownership of its deposited gold in breach of" the FET provision of the applicable treaty.[601]

241. Here, Guatemala's arbitrary and unlawful pursuit of criminal proceedings against Exmingua employees, and Guatemala's arbitrary and unlawful impoundment of Exmingua's

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[597] *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award dated 15 Dec. 2014 ¶ 621 (CL-0273-ENG).

[598] *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 ¶ 133 (CL-0274-ENG). The *Tokios Tokeles* tribunal ultimately found that it could not "explore the matter in any depth" due to the "refusal of the State to respond to questions from the Tribunal as to the legal justification of the criminal proceeding much less give access to its files." *Id.*

[599] *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award dated 6 July 2012 ¶¶ 297-298, 300 (CL-0275-ENG); *see also id.* ¶ 299 (finding that the "criminal investigation measures contributed to a general deterioration in Swisslion's prospects").

[600] *Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co. v. Government of Mongolia*, Award on Jurisdiction and Liability dated 28 April 2011 ¶ 594 (CL-0276-ENG).

[601] *Id.* ¶¶ 595-596.

gold concentrate, constitute further breaches of Article 10.5 of the Treaty. Indeed, this pattern of misconduct is a further extension of the FET breaches that preceded the baseless criminal measures and, through the suspension of Progreso VII's exploitation license, gave Guatemala the pretext to further harass, obstruct, and damage Claimants' investment.

c. Guatemala Arbitrarily And Unlawfully De Facto Suspended The Santa Margarita Exploration License, Made It Impossible To Obtain An Exploitation License, And Left The Project And Claimants In A Protracted State Of Limbo

242. When Claimants acquired Exmingua on 22 January 2009, it already held an exploration license for Santa Margarita, had conducted significant exploration for years, and just days prior had submitted an exploitation license application which automatically extended the exploration license.[602] Claimants were committed to completing the exploitation license application, as with the license for Progreso VII. Towards this end, Exmingua engaged GSM and had completed its EIA for Santa Margarita, save for the social studies.[603] Indeed, the granting of the exploitation license for Progreso VII, directly adjacent, confirmed Claimants' reasonable expectations that Exmingua also would be granted an exploitation license for Santa Margarita. Based on Exmingua's vested right in the form of the exploration license, Claimants had the legitimate expectation that Exmingua would be allowed to continue operating under that license in the Santa Margarita area – and, critically, that Exmingua would be granted an exploitation license to mine the area, without being subject retroactively to new, additional legal requirements or an indefinite *de facto* suspension.

243. As detailed above, however, Guatemala's Constitutional Court has since ruled that *both* pre-existing exploration *and* exploitation licenses are subject to ILO Convention 169 consultations, and that pre-existing exploration licenses will be suspended just like pre-existing exploitation licenses when State-led consultations have not been conducted.[604] Accordingly, Exmingua's Santa Margarita exploration license has been *de facto* suspended, just like its Progreso VII exploitation license, as a result of Guatemala's arbitrary and unlawful conduct.

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[602] *See supra* § II.A.

[603] *See supra* § II.B.

[604] Constitutional Court Ruling, Case No. 4785-2017 dated 3 Sept. 2018 (C-0459-SPA/ENG).

244. Just as it would be economically infeasible to continue exploration under the license without any hope of obtaining an exploitation license, it would be legally imprudent and futile to continue exploration on Santa Margarita, only to have CALAS bring another *amparo* action seeking to suspend the exploration license. Furthermore, given that the MEM has refused to conduct consultations for the validly-issued Progreso VII exploitation license – despite Court orders dating back several years directing it to do so – there is no reasonable prospect of the MEM conducting consultations for the Santa Margarita area, whether for the exploration or the exploitation license.

245. In fact, in addition to the issue of State-led consultations, through a variety of other acts and omissions, Guatemala has made it impossible for Exmingua to obtain an exploitation license for the Santa Margarita license area. As detailed above,[605] these include:

- Failing to stop a new wave of protests at Tambor in early 2016 and to safeguard Exmingua's right to access its property, as needed for Claimants to carry out the social studies and complete the Santa Margarita EIA.
- Arbitrarily demanding in December 2016 that Exmingua file the EIA for Santa Margarita, duly approved by the MARN, within 30 days.
- Unjustifiably denying, in April 2017, 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," and directing Exmingua to file the EIA for Santa Margarita within 30 days of Exmingua's notification of the resolution (which, inexplicably, the MEM delivered five months after the resolution was issued).
- Failing to act in accordance Exmingua's appeal against that resolution since September 2017, in disregard of its legal obligation to do so.
- Failing to issue any guidelines or recommendations for Exmingua to complete the required community consultations.

246. Together, the actions of the MEM and the courts, which were in line with with the President's announcement of the *de facto* moratorium, all ensure that Exmingua's exploration license for Santa Margarita remains *de facto* suspended, and also that Exmingua cannot obtain an exploitation license, thus depriving Claimants of the value of the exploration license and

[605] *See supra* § II.E.4.

corresponding investments. Indeed, the necessary outcome of Guatemala's measures is that Claimants' investments in the Santa Margarita development have been, and indefinitely remain, in a state of limbo. This, too, constitutes a breach of Guatemala's FET obligations.

247. As seen in *Bilcon v. Canada*, for example, the decision by the State review panel to apply a novel "community core values" concept to environmental assessments served "effectively to impose a moratorium on projects of the category involved here."[606] As part of its ruling that Canada violated the FET standard, the tribunal concluded:

> [I]t was unjust for officials to encourage coastal mining projects in general and specifically encourage the pursuit of the project at the Whites Point site, and then, after a massive expenditure of effort and resources by Bilcon on that basis, have other officials effectively determine that the area was a 'no go' zone for this kind of development rather than carrying out the lawfully prescribed evaluation of its individual environmental merits.[607]

248. Likewise, in *Windstream v. Canada*, where officials had delayed issuing permits for offshore wind farm development and eventually imposed a moratorium that effectively cancelled the claimant's project, the tribunal found that, "[m]ost importantly, the Government did little to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium."[608] The tribunal thus held that Canada had breached its FET obligation because the Government failed to take measures "within a reasonable period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty."[609]

249. Similarly, here, Guatemala's measures – including its retroactive application of a novel requirement regarding State-led consultations for both exploration and exploitation licenses, and its further actions and omissions, all in line with its *de facto* moratorium, making it impossible for Exmingua to obtain an exploitation license for Santa Margarita – together violated Claimants' legitimate expectations of continued and further operations in the area; deprived Claimants of the regulatory and legal certainty on which they had reasonably relied; and

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[606] *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 Mar. 2015 ¶¶ 454, 594 (CL-0088-ENG).

[607] *Id*. ¶ 592.

[608] *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award dated 27 Sept. 2016 ¶¶ 378-379 (CL-0210-ENG).

[609] *Id*. ¶¶ 379, 382.

extinguished the value of Claimants' exploration license and corresponding investments. Accordingly, Guatemala violated Article 10.5 with respect to Claimants' investments in Santa Margarita, just as in Progreso VII.

C. Guatemala Failed To Accord Claimants' Investment Full Protection And Security

250. Guatemala has failed to take reasonable measures to ensure that Exmingua had access to the Project sites and the ability to conduct the social studies for the Santa Margarita EIA and, thereby, has breached its obligation to provide Exmingua full protection and security in violation of Article 10.5 of the DR-CAFTA.

251. The full protection and security ("FPS") provision of DR-CAFTA Article 10.5 is "a core component of the minimum standard of treatment" under the Treaty,[610] and requires Guatemala "to provide [to covered investments] the level of police protection required under customary international law."[611] Annex 10-B clarifies that the Treaty's FPS standard "refers to all customary international law principles that protect the economic rights and interests of aliens."[612]

252. The FPS standard obliges the host State to take measures to protect the investment from adverse effects[613] by exercising "vigilance" and "due diligence."[614] In this regard, it is not sufficient for a State to merely refrain from actively harming an investment; rather, the FPS

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[610] *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award dated 29 June 2012 ¶ 238 (CL-0068-ENG).

[611] DR-CAFTA, Arts 10.5.1, 10.5.2(b) (CL-0001-ENG/SPA).

[612] *Id*. Annex 10-B; *see also* U.S. Trade Representative, The Dominican Republic-Central America-United States Free Trade Agreement: Summary of the Agreement, at 12, available at <https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/cafta/CAFTA-DR%20FTA%20Chapter%20Summaries.pdf> ("[CAFTA] provisions reflect traditional standards incorporated in earlier U.S. investment agreements (including those in the North American Free Trade Agreement and U.S. bilateral investment treaties)") (CL-0188-ENG).

[613] Christoph Schreuer, *Full Protection and Security*, J. INT'L DISPUTE SETTLEMENT 1, at 2 (June 2010) (CL-0189-ENG).

[614] *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated 1 June 2009 ¶ 447 (CL-0167-ENG); *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award dated 28 July 2015 ¶ 596 (CL-0260-ENG); *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award dated 4 May 2016 ¶ 351 (CL-0015-ENG); *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss dated 21 Feb. 2017 ¶ 244 (CL-0135-ENG).

obligation requires the State to adopt a "pro-active" attitude,[615] and, thus, requires "active, and not merely passive, conduct by the host State that may go beyond the mere abstention from prejudicial conduct."[616]

253. It is widely acknowledged that a forcible seizure of or interference with the investment may amount to a breach of the FPS obligation.[617] Tribunals accordingly have found FPS violations where a State has failed to protect an investment from damage caused by public demonstrations,[618] workers' protests,[619] armed militias and civilian mobs,[620] groups of local individuals,[621] and local business groups.[622]

254. In *Copper Mesa v. Ecuador*, for instance, the claimant complained that the Ecuadorian authorities' failure to protect its mine site from a blockade by demonstrators constituted a breach of Ecuador's obligations to ensure FPS. The blockade and Ecuador's subsequent order to cease all mining activity made it impossible for the claimant to finish the consultation process for purposes of its environmental impact study (EIS).[623] Ecuador then adopted a law terminating all

[615] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006 ¶ 372 (CL-0149-ENG); *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award dated 4 May 2016 ¶ 356 (CL-0015-ENG).

[616] *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA No. 2012-2, Award (redacted) dated 15 Mar. 2016 ¶ 6.81 (CL-0138-ENG).

[617] Christoph Schreuer, *Full Protection and Security*, J. INT'L DISPUTE SETTLEMENT 1, at 4-5 (June 2010) (CL-0189-ENG).

[618] *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA No. 2012-2, Award (redacted) dated 15 Mar. 2016 ¶¶ 6.82-6.85 (CL-0138-ENG).

[619] *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award dated 4 May 2016 ¶¶ 352-356 (CL-0015-ENG).

[620] *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, Award dated 7 Nov. 2018 ¶¶ 451-452 (CL-0190-ENG); *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss dated 21 Feb. 2017 ¶¶ 290-291 (CL-0135-ENG); *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award dated 21 Feb. 1997 ¶¶ 6.13-6.14 (CL-0191-ENG).

[621] *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award dated 28 July 2015 ¶ 597 (CL-0260-ENG).

[622] *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award dated 8 Dec. 2000 ¶ 84 (CL-0151-ENG); *OAO Tatneft v. Ukraine*, PCA UNCITRAL, Award on the Merits dated 29 July 2014 ¶ 428 (CL-0128-ENG).

[623] *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA No. 2012-2, Award (redacted) dated 15 Mar. 2016 ¶¶ 4.285, 6.79 (CL-0138-ENG).

mining concessions with incomplete consultation processes,[624] which caused the revocation of the claimant's mining concession.[625]

255. The *Copper Mesa* tribunal noted that "the risk from anti-miners in the Junín area was both real, long standing and well-known even before the [c]laimant's Junín concessions; and that the State's presence in the Junín area, including its police was invariably weak, intermittent and ineffective."[626] It held that, while the local government "could hardly have declared war on its own people . . . it could not do nothing."[627] The tribunal also stressed that "rather than giving legal force to the factual effect of the anti-miners' physical blockade of the Junín concessions, [Ecuador] should have attempted something to assist the [c]laimant in completing its consultations and other requirements for the EIS."[628] Instead, however, Ecuador made the situation "even worse, by making it legally impossible . . . for the [c]laimant to complete its EIS."[629] Ecuador's conduct thus was "arbitrary, in the sense that it was unreasonable and disproportionate at that time to side so completely with the anti-miners as to make it impossible, both legally and physically, for the [c]laimant to complete its EIS, with inevitable consequences."[630] Accordingly, the tribunal found that Ecuador had failed to provide the claimant's investment FPS.[631]

256. In another context, the tribunal in *MNSS v. Montenegro* found an FPS violation where the police were forewarned about imminent workers' protests and nevertheless failed to take any measures to prevent the occupation of the administration buildings of the claimant's factory.[632] Noting that it was "surprising that the police would not ensure the physical integrity of buildings

[624] *Id*. ¶ 4.310.

[625] *Id*. ¶ 6.44.

[626] *Id*. ¶ 6.83.

[627] *Id*.

[628] *Id*.

[629] *Id*. ¶ 6.84.

[630] *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA No. 2012-2, Award (redacted) dated 15 Mar. 2016 ¶ 6.84 (CL-0138-ENG); *see also id*. ¶ 6.85 (holding that Ecuador failed to accord FPS by, among other things, terminating all mining concessions where the holder of rights had failed to complete consultations).

[631] *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA No. 2012-2, Award (redacted) dated 15 Mar. 2016 ¶ 6.85 (CL-0138-ENG).

[632] *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8 dated Award dated 4 May 2016 ¶¶ 352-353 (CL-0015-ENG).

and persons irrespective of their location or ownership," and "also surprising that [the] Minister [of Economy] saw no reason to take steps in response to [the company]'s police protection request,"[633] the tribunal held that Montenegro had breached its obligation to provide FPS, as the obligation "requires the Government to have a more pro-active attitude to ensure the protection of persons and property in the circumstances of [the claimant]."[634]

257. And in both *Ampal v. Egypt* and *Cengiz v. Libya*, tribunals found FPS breaches where the respective respondents failed to take reasonable precautionary, preventive, and remedial measures to ensure the claimants' access to and the physical integrity of the investments. More particularly, while the *Ampal* tribunal recognized the turmoil unleashed by the Arab Spring protests and revolutions and, thus, found that some of the attacks on the claimant's pipeline network could not have been prevented, it found Egypt liable for an FPS violation, because this was not the case for all of the claimant's installations and Egypt had failed to mobilize its forces and heighten security surrounding the investments.[635] The *Cengiz* tribunal likewise held Libya liable for a breach of FPS after finding that it had failed to protect the claimant's investments from local militias and civilian mobs during and after the Libyan Revolution.[636]

258. Here, Guatemala failed to provide Claimants' investment FPS by refusing 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. Among other things, Guatemala's failure to act in this regard prevented Exmingua from entering the Project site, using its laboratory facilities, and having consultants conduct the social studies required for the EIA in furtherance of Exmingua's application for an exploitation license for Santa Margarita.[637]

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[633] *Id*. ¶ 355.

[634] *Id*. ¶ 356.

[635] *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss dated 21 Feb. 2017 ¶¶ 284-291 (CL-0135-ENG).

[636] *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, Award dated 7 Nov. 2018 ¶¶ 436-442, 451-452 (CL-0190-ENG).

[637] *See supra* § II.E.4; Kappes ¶ 141.

259. Under Guatemalan law, the State has an obligation to protect the exercise of the right to property and the right to locomotion, the latter of which includes the right to access one's property.[638] Specifically, the State – acting through the National Civil Police – is responsible for ensuring the "preservation and custody of property under any kind of danger," as well as maintaining and restoring, where necessary, "public order and security."[639] The protests and blockades that began in early 2016 and are continuing, however, have prevented Claimants and Exmingua from accessing the Project site, which is located on land owned by Exmingua and on which it has property rights.[640] As Mr. Kappes explains, "Guatemala has refused to clear the gate protestors and allow Exmingua free access to the site situated on the land owned by Exmingua and where Exmingua maintains a fully functional laboratory and machine shop. Given that Exmingua still maintains professional personnel who could run these facilities, including a lab manager, we could use these facilities to provide services to other companies in mining or other industries, but Exmingua is prevented from doing so."[641]

260. Further, as noted, Exmingua held an exploration license for Santa Margarita, which value "is the legitimate confidence that, if exploration is successful, the holder will be able to obtain an exploitation license."[642] To do so, however, Exmingua needed to have its EIA approved, which required completing consultations with neighboring communities for the social studies.[643] In accordance with the right to free movement enshrined in the Guatemalan Constitution, Exmingua was entitled to enter its property and move around its neighboring public roads and areas in order to hold consultations that would allow it to complete its EIA and thus be able to request the respective exploitation license.[644] Despite Claimants' and Exmingua's entreaties and petitions, however, the National Civil Police sat by and allowed the protestors to blockade the mining site

[638] Fuentes ¶ 61.
[639] *Id*. ¶ 60.
[640] *See* Kappes ¶ 145.
[641] *Id*. ¶ 145.
[642] Fuentes ¶ 81.
[643] *Id*. ¶¶ 13, 75.
[644] *Id*. ¶ 76; *see also id*. ¶¶ 61, 73.

and foreclose Exmingua from safely entering the neighboring communities and conducting consultations for the EIA social studies.[645]

261. Not only did the National Civil Police fail to take any steps to remove the blockade, the Constitutional Court also 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.[646] As Professor Fuentes explains, "[a]lthough the mining exploitation license had been suspended, the right of freedom of movement of Exmingua's representatives was not and, therefore, there was no legal reason to deny the requested protection of the Guatemalan Civil Police against the constant blockades, which not only have affected the Progreso VII Derivada area, but also the Santa Margarita area."[647]

262. In fact, the Constitutional Court's decision to deny Exmingua an *amparo* against the National Civil Police was contrary to an earlier decision involving a similar project, in which it ordered the National Civil Police to take measures to peacefully remove a blockade and roadblock that prevented access to a hydroelectric plant.[648] The Court's ruling was also at odds with the decision of the Second Appeals Chamber of the Criminal Branch in relation to the 2012 blockade at Tambor, where the Court held that the National Civil Police had violated Exmingua's right to freedom of locomotion, industry and commerce by failing to remove protesters, and that those rights "must be protected by the State's security forces, as set forth in Article 9 of the Guatemalan Civil Police Law."[649]

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[645] *See supra* § II.F.

[646] *See supra* § II.F.

[647] Fuentes ¶ 72.

[648] Constitutional Court of Guatemala, Case No. 3093-2011, Ruling dated 18 Jan. 2012 (C-0448-SPA/ENG) (ordering the President of Guatemala to adopt "the necessary measures and issue the relevant orders to . . . allow the right of freedom of action, freedom of movement, and freedom of industry, trade and work [and ensure that] the National Civil Police made possible peaceful removal of the barriers and fences preventing access to the area, and cleared the way to the route leading to the engine room of the hydroelectric plant Chixoy . . ."); *see also* Fuentes ¶ 65. (emphasis added)

[649] Decision dated 19 Oct. 2012 by the Division No. 2 of the Court of Appeals in Criminal Matters, at 13 (C-0111-SPA/ENG); *see also* Fuentes ¶ 67.

263. Far from affording Claimants' investment full protection and security, 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 of the blockade and protests.[650] The request from the MEM was unreasonable because Exmingua's inability to comply was directly linked to Guatemala's passive conduct in relation to the blockade at the Project site.

264. As discussed above, moreover, there was a *de facto* moratorium on the granting of mining licenses in place at the time, and the Courts had ordered the MEM to carry out consultations with the local communities in order for Exmingua's Progreso VII exploitation license to regain effectiveness, which the MEM has for years refused to do.[651] It thus is apparent that the MEM's request to submit a completed and approved EIA for Santa Margarita was an orchestrated attempt to deny Exmingua the opportunity to obtain an exploitation license, in keeping with the State's *de facto* moratorium, and that its denial of full protection and security to Exmingua – by failing to ensure it access to the Project site and provide security that would enable Exmingua to conduct the social studies that it insists are necessary for its EIA application – has made it impossible for Exmingua to obtain an exploitation license for Santa Margarita.

265. As was the case in *Copper Mesa*, where the protesters' blockade made it impossible for the claimant to complete the consultations that were necessary for the EIS and, therefore, to obtain an approved EIS and mining license,[652] Exmingua also was prevented from completing the consultations necessary for the social studies aspect of its EIA, thus preluding it from obtaining approval of its EIA and an exploitation license for Santa Margarita.[653] In the words of

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[650] *See supra* § II.F.

[651] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming *amparo provisional* dated 5 May 2016 (C-0143-SPA/ENG); *see also supra* § II.E.1; Rosa María Bolaños, "Exploitation of Metallic Minerals is Suspended In Guatemala, After Three Rulings of the Constitutional Court," *La Prensa Libre*, 18 July 2020 (C-0615-ENG/SPA) (quoting the spokesperson for the Extractive Industries Union stating that "exploration has not been possible either because the Court's judgments place exploration licenses at the same level as exploitation licenses. Added to this is that since 2008 there has been a moratorium in which the Álvaro Colom government, a similar situation continued in the administrations of Otto Pérez Molina and Jimmy Morales[.]").

[652] *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA No. 2012-2, Award (redacted) dated 15 Mar. 2016 ¶¶ 4.285, 6.79 (CL-0138-ENG).

[653] *See supra* § II.E.4.

the *Copper Mesa* tribunal, "rather than giving legal force to the factual effect of the anti-miners' physical blockade . . . [Guatemala] should have attempted something to assist the [c]laimant in completing its consultations and other requirements for the EIS."[654] Instead, however, Guatemala aggravated the situation "by making it legally impossible . . . for the [c]laimant to complete its EIS,"[655] by demanding that Exmingua submit a completed EIA in 30 days and conditioning approval on the MEM conducting consultations, which it refuses to do. Guatemala, like Ecuador in the *Copper Mesa* case, accordingly has violated its Treaty obligation to provide FPS to Claimants' investment.

D. Guatemala's Courts Have Denied Justice To Claimants' Investment

266. By retroactively, and in a discriminatory manner, applying a new legal requirement to deprive Exmingua of its vested rights and the right of certainty, denying Exmingua fundamental due process rights, including timely notice and the right to be heard, and failing to rule on Exmingua's appeal within the legally proscribed or a reasonable timeframe, while ruling on other similar appeals, Guatemala denied justice to Claimants' investment.

1. The Treaty Prohibits Denial Of Justice

267. Guatemala's obligation under Article 10.5(1) of the DR-CAFTA to accord fair and equitable treatment includes an obligation not to deny justice:

> '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; […][656]

268. A State commits a denial of justice where it administers justice in a seriously inadequate manner.[657] Among other things, "[a] failure to allow a party due process will often result in a

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[654] *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA No. 2012-2, Award (redacted) dated 15 Mar. 2016 ¶ 6.83 (CL-0138-ENG).

[655] *Id*. ¶ 6.84.

[656] DR-CAFTA Art. 10.5(2)(a).

[657] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award dated 1 Nov. 1999 ¶ 102 (CL-0144-ENG).

denial of justice."[658] Where a court's actions or resulting decision shocks a sense of judicial propriety, this too will constitute a denial of justice,[659] as will judicial or administrative decisions that are biased, politically motivated, or otherwise arbitrary.[660] The "clear and malicious misapplication of the law" likewise constitutes a denial of justice,[661] as does the discriminatory application of a host State's law.[662]

269. Furthermore, it is insufficient for a legal system to offer recourse to courts that is only theoretically, but not practically, available. Thus, where a party encounters undue judicial delay,

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[658] *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated 1 June 2009 ¶ 452 (CL-0167-ENG); *see also Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of the Award dated 2 July 2018, ¶ 462 (CL-0168-ENG) ("[D]enial of justice is encapsulated as the arbitrary disregard of due process."); The Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners (1929 Harvard Draft Convention), Art. 9, 23 AM. J. INT'L L. SPEC. SUP. 133, at 173 (1929) (CL-0169-ENG) ("Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgment.").

[659] *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability dated 24 Aug. 2015 ¶ 146 (CL-0178-ENG) (finding a denial of justice where the court's decision "does shock a sense of juridical propriety."); *see also Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award dated 26 June 2003 ¶ 132 (CL-0170-ENG) (observing that a denial of justice is a "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety").

[660] *See* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 89, 204 (2005) (CL-0171-ENG) (describing that, for a denial of justice, a judgment (or non-action) must be "unjustifiable that [it] could have been only the product of bias or some other violation of the right of due process" and other "acts or omissions," including failures of enforcement and sanctions against persons or property without trial, among others, also can constitute a denial of justice); *Asylum Case (Peru v. Colombia)*, Judgment of 20 Nov. 1950, 1950 ICJ REP. 266, at 284 (CL-0172-ENG) ("In principle . . . asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims."); *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 ¶ 442 (CL-0126-ENG) ("The responsibility of States not to breach the fair and equitable treatment standard through a denial of justice is engaged if and when the judiciary has rendered final and binding decisions after fundamentally unfair and biased proceedings or which misapplied the law in such an egregiously wrong way, that no honest, competent court could have possibly done so.").

[661] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award dated 1 Nov. 1999 ¶ 103 (CL-0144-ENG).

[662] ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 252 (2009) (CL-0124-ENG); *see also* The Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners (1929 Harvard Draft Convention), Comment to Art. 9, 23 AM. J. INT'L L. SPEC. SUP. 133, at 175 (1929) (CL-0169-ENG) ("[D]iscrimination or ill-will against the alien as such, or as a national of a particular state . . . have all been deemed, under particular circumstances instances of 'denial of justice.'"); *see also Mercer Int'l Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Submission of the United States of America dated 8 May 2015 ¶ 23 (CL-0173-ENG) ("Customary international law does prohibit discrimination under certain circumstances. These include prohibitions against discriminatory takings or access to judicial remedies or treatment by the courts . . . .").

the State will commit a denial of justice.[663] As Jan Paulsson observed in his seminal study on the topic, "delays may be 'even more ruinous' than absolute refusal or access, because in the latter situation the claimant knows where he stands and take actions accordingly."[664] In assessing whether judicial delay constitutes a denial of justice, tribunals consider, among other things, the complexity of the matter, the interests at stake, and the effect of the delay.[665]

270. The United States – Mexico General Claims Commission found a denial of justice in several well-known cases where, as in the *Chattin Case*, for instance, Mexico was found to have conducted "highly insufficient" criminal proceedings, by unduly delaying the proceedings and failing to accord the accused due process.[666] More recently, in *Pey Casado v. Chile*, the claimant initiated arbitral proceedings two years after it had filed suit in national court seeking compensation for a printing press that had been confiscated during the nationalization of its newspaper.[667] The tribunal found a denial of justice, holding that what became a seven-year wait for a first-instance decision constituted excessive delay and a "classic form of a denial of justice."[668]

271. Further, the NAFTA tribunal in *Loewen v. United States* held that the Mississippi trial court, in a civil proceeding, had "permitted the jury to be influenced by persistent appeals to

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[663] *See, e.g.*, ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 240 (2009) (CL-0124-ENG) ("Denial of justice can . . . arise from procedural irregularities in judicial proceedings, such as undue delays, lack of due process, failure to provide a fair hearing or the non-execution of a judgment. This is sometimes referred to as procedural denial of justice."); The Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners (1929 Harvard Draft Convention), Comment to Art. 9, 23 AM. J. INT'L L. SPEC. SUP. 133, at 175 (1929) (CL-0169-ENG) ("[U]ndue delay in rendering judgment . . . have all been deemed, under particular circumstances instances of 'denial of justice.'"); *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award dated 1 Nov. 1999 ¶ 102 (CL-0144-ENG) ("A denial of justice could be pleaded if the relevant courts . . . subject [a suit] to undue delay . . . ."); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award dated 7 Dec. 2011 ¶ 602 (CL-0174-ENG) ("The Tribunal acknowledges that undue delay to rule on a dispute may amount to a denial of justice."); *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of the Award dated 2 July 2018 ¶¶ 449, 455 (CL-0168-ENG) (referring to "the old adage of 'justice delayed, justice denied'").

[664] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 177 (2005) (CL-0171-ENG).

[665] *Chevron Corp. (USA) and Texaco Petroleum Co. (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award dated 30 Mar. 2010 ¶ 250 (CL-0175-ENG).

[666] *B.E. Chattin (USA) v. Mexico*, United States Mexican Claims Commission, Award dated 23 July 1927, IV REP. INT'L ARB. AWARDS 282, 295 (1951) (CL-0176-ENG).

[667] *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award dated 8 May 2008 ¶¶ 78-79 (CL-0177-SPA/ENG) (partially annulled on other grounds).

[668] *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award dated 8 May 2008 ¶ 659 (CL-0177-SPA/ENG) (partially annulled on other grounds).

local favouritism as against a foreign litigant," rendering the "whole trial and its resultant verdict [ ] clearly improper and discreditable and [inconsistent with] minimum standards of international law and fair and equitable treatment."[669]

272. The tribunal in *Flughafen Zürich v. Venezuela*, moreover, found that a decision of the Constitutional Chamber of the Supreme Court of Venezuela transferring management and control of an airport to the government amounted to a denial of justice, because the Court thereby, in furtherance of a political objective and without any legal basis, deprived the claimants of their contractual right to manage the airport without having allowed the claimants to intervene in the proceeding:[670]

> Adopting a decision of this importance without having given the possibility to intervene to the injured, who were deprived of their legitimate rights over the Airport . . . is a procedure contrary to the most basic principles that should govern judicial proceedings: no one can be affected in their rights and their assets without having had the possibility of the judge hearing their allegations and evaluating their evidence.[671]

273. Lastly, the tribunal in *Dan Cake v. Hungary* found a denial of justice where a bankruptcy court refused to convene a hearing, to which the claimant was entitled under Hungarian law, which made it impossible for the claimant to prevent a sale of its assets by the liquidator.[672] The tribunal considered the unlawful nature of the refusal and found that "the Court simply did not want, for whatever reason, to do what was mandatory."[673]

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[669] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award dated 26 June 2003 ¶¶ 136-137 (CL-0170-ENG). The tribunal would have found a denial of justice, but for the failure of the defendants in the court action to have petitioned the U.S. Supreme Court for *certiorari* review. *Id*. ¶ 217.

[670] *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award dated 18 Nov. 2014 ¶¶ 695, 707-708 (CL-0227-SPA/ENG).

[671] *Id*. ¶ 695 (translation by counsel).

[672] *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability dated 24 Aug. 2015 ¶¶ 142, 150 (CL-0178-ENG).

[673] *Id*. ¶ 142.

2. The Conduct Of Guatemala's Courts Amounts To A Denial Of Justice

274. As Claimants have demonstrated above,[674] by subjecting Exmingua's exploitation license for Progreso VII to new, additional consultation requirements more than four years after the license had been validly issued, and suspending its operations, Guatemala retroactively deprived Exmingua of its vested right to exploit Progreso VII, in violation of international law. Additionally, the court proceedings challenging the validity of Exmingua's license were riddled with serious procedural irregularities in violation of Guatemalan law and fundamental Constitutional principles, undermining Exmingua's due process rights and its ability to protect its interests effectively, in violation of Guatemala's treaty obligation not to deny justice.

275. In addition, the actions of Guatemala's courts also were discriminatory, as the Constitutional Court delayed ruling on Exmingua's appeal for nearly four years, but ruled quickly on similar challenges to the licenses held by other, domestic and foreign-owned companies that were subject to comparable requirements. Shockingly, the courts also allowed other projects to continue operations while court proceedings challenging the validity of their licenses and social consultations were ongoing, whereas they refused to do the same for Exmingua.

a. Guatemala's Courts Seriously Violated Exmingua's Fundamental Procedural And Due Process Rights

276. The Guatemalan court proceedings involving and affecting Exmingua's Progreso VII exploitation license were marred with a series of severe procedural deficiencies in blatant violation of mandatory rules of Guatemalan law and in fundamental disregard of Exmingua's due process rights, which resulted in undermining Exmingua's vested rights and leaving it unprotected by the law—an outcome that not by coincidence aligned with Guatemala's politically motivated *de facto* moratorium on the issuance of new mining licenses and on operations under existing licenses until the Guatemalan Congress adopts a new mining law, which it has not done.[675]

[674] *See supra*, § III.A.

[675] *See* Fuentes ¶ 77.

277. *First*, Exmingua was not served with notice of the *amparo* action, by which CALAS challenged the validity of Exmingua's Progreso VII exploitation license, and the related court papers, *including* the Supreme Court's 11 November 2015 *amparo provisional*, until 22 February 2016,[676] eighteen months after CALAS commenced the action on 24 September 2014. In Professor Fuentes's words, this was "clearly in violation of the *Amparo* Law."[677] Indeed, Article 34 of the *Amparo* Law explicitly imposes on the parties to an *amparo* action a duty to inform the court if they are aware that any third person is "directly interested" in the outcome of the case, in which circumstance the court must hear that third person.[678]

278. Here, there can be no question that, already at the commencement of the *amparo* action in 2014, both CALAS and the MEM were fully aware of Exmingua's key interest in the outcome of the case, as the validity of Exmingua's exploitation license was the very object of the litigation. Shockingly, however, Exmingua was not given an opportunity to be heard and to participate in the case until *after* the Supreme Court issued its *amparo provisional* suspending the Progreso VII exploitation license on 11 November 2015.[679] As Professor Fuentes explains, this was in violation of the Constitutional Court's jurisprudence concerning the right to be heard, whereby "the conviction or deprivation of a person's rights may only be legitimate if the interested party received prior notice and has had the opportunity of an adequate defense," which "begins with the affected party's opportunity to be heard, so that they may make any allegations they may deem relevant regarding the accusation that is made, as well with respect to the claims" and which entails that a third party "shall not be impaired in the exercise of their rights, nor limited with regard to them, without having had the opportunity to defend them."[680]

279. It was only after the Supreme Court issued its 11 November 2015 decision that Exmingua, on its own request, joined the case as an interested third party on 1 December

[676] Notice of service to Exmingua dated 22 Feb. 2016, at 1 (C-0470-SPA/ENG) (stating "I hereby certify that I served notice of resolution(s) dated: [*sic*] 28 August 2014, 5 September 2014, 15 December 2014, 11 November 2015, 3 December 2015, on: [Exmingua]"); *see also* Fuentes ¶ 94.

[677] Fuentes ¶ 94; *see also id*. ¶ 184.

[678] *Amparo* Law, Art. 34 (C-0416-SPA/ENG); *see also* Fuentes ¶ 94.

[679] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo provisional* dated 11 Nov. 2015, at 1 (C-0004-SPA/ENG); *see also* Fuentes ¶ 93.

[680] Constitutional Court of Guatemala, Case No. 1223-2006, Decision dated 3 Oct. 2006, at 6 (C-0502-SPA/ENG); Fuentes ¶ 184.

2015.[681] Exmingua thus was denied the right to be heard from the outset of the case and placed into the clearly disadvantageous position of having to attempt to persuade the Court after it already had issued an adverse decision. Unsurprisingly, that attempt was doomed to fail.

280. As the tribunal in *Krederi v. Ukraine* observed, "[a] failure to inform a party of claims directed against it and the conduct of legal proceedings without its participation give rise to serious due process concerns since they may indicate that a party was deprived of its fundamental procedural rights."[682] And, as in *Dan Cake v. Hungary*, where a Hungarian court's unlawful refusal to hear a party prevented it from defending its rights, and in *Flughafen Zürich v. Venezuela*, where the Venezuelan Supreme Court decided to hand over management and control of an airport to the government in furtherance of political objectives without giving the investors, who thus were deprived of their right to run the airport, an opportunity to intervene, so does the Guatemalan Supreme Court's unlawful failure to give notice to Exmingua in advance of issuing the *amparo provisional*, by which the Court suspended Exmingua's operations, "shock a sense of judicial propriety" and constitute a denial of justice.[683]

281. *Second*, in admitting CALAS's *amparo* action against the MEM, the Supreme Court entirely disregarded Article 20 of the *Amparo* Law, which requires that such an action must be filed within 30 days from the date on which the aggrieved party receives notice or becomes

[681] Exmingua's Request to Appear and Prove Representation dated 1 Dec. 2015, at 1-2 (C-0469-SPA/ENG); *see also* Fuentes ¶ 94.

[682] *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of the Award dated 2 July 2018 ¶ 596 (CL-0168-ENG). In that case, the reason the tribunal would have found a denial of justice, except that the claimant ultimately did not dispute that a notice of claim had been sent to the relevant company's registered address. *Id*. ¶¶ 597, 601; *see also Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. 064/2008, Partial Award on Jurisdiction and Liability dated 2 Sept. 2009 ¶¶ 226-227 (CL-0228-ENG) (observing that the absence of notice of a hearing, "if proved, could constitute a denial of due process," but finding itself unable "to make such a determination on the basis of the limited evidence on the record").

[683] *See Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability dated 24 Aug. 2015 ¶ 142 (CL-0178-ENG); *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award dated 18 Nov. 2014 ¶¶ 695, 707-708 (CL-0227-SPA/ENG).

aware of the measure that it seeks to challenge.[684] If an *amparo* action is filed outside of the 30-day period, the court "is prevented from examining the merits of the case."[685]

282. Here, there was no question that the MEM gave public notice of the Progreso VII EIA on 27 May 2010, in compliance with the law.[686] This date triggered a 20-day period for public participation, during which members of the public had the opportunity to make observations or raise objections, with a subsequent hearing on any objections and the opportunity to present evidence.[687] As the MARN recorded in a resolution, no such objections were raised during the public participation period for Exmingua's Progreso VII EIA, which extended from 1 to 28 June 2010.[688] To the contrary, the members of the public who participated "in general, approve[d] of the project being carried out, based on the study."[689]

283. Professor Fuentes concludes:

> The fact that no objections were raised as a consequence of the publication of the notices means that any objection to the granting of a license became precluded, prescribed or expired, because any person with standing to object failed to do so within the period prescribed by law. In this case, those individuals or entities which could have objected to the exploitation license for Progreso VII Derivada being granted forfeited their right to do so.[690]

284. The Supreme Court, nonetheless, admitted CALAS's *amparo* action, which it filed on 24 August 2014, more than *four years* after expiry of the public participation period and almost

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[684] *Amparo* Law, Art. 20 (C-0416-SPA/ENG); *see also* Fuentes ¶¶ 84, 110-123.

[685] Fuentes ¶ 111 (quoting Guatemalan Constitutional Court, Case No. 3173-2016, Decision dated 17 Oct. 2016, at 11 (C-0489-ENG/SPA)).

[686] *See* EIA notice publication in Siglo XXI - Al Día of 31 May 2010 (C-0083-SPA/ENG). The MEM further gave public notice of Exmingua's pending exploitation license application in the Official Gazette on 22 June 2011. *See* Letter from Exmingua to the MEM dated 22 June 2011 (C-0462) (attaching excerpt of the Official Gazette dated 22 June 2011, at 25); *see also* Mining Law, Articles 45, 46 (C-0186-SPA/ENG) (requiring the MEM to publish a notice in the Official Gazette and a newspaper of large circulation, to allow an person who expects to be harmed by the application for a mining license to object to its issuance "at any time prior to the dictating of the resolution of the grant issuance of the granting resolution"); Fuentes ¶¶ 12, 15, 17-18.

[687] *See* Environmental Assessment, Control and Monitoring Regulations, Art. 76 (C-0212-SPA/ENG); Fuentes ¶¶ 12-13.

[688] Resolution No. 1010-2011 of the Ministry of Environment and Natural Resources approving the Environmental Impact Assessment for Progreso VII, at 5 (C-0212-SPA/ENG); *see also* Fuentes ¶ 17.

[689] Resolution No. 1010-2011 of the Ministry of Environment and Natural Resources approving the Environmental Impact Assessment for Progreso VII, at 5 (C-0212-SPA/ENG); *see also* Fuentes ¶ 16.

[690] Fuentes ¶ 21.

three years after the MEM granted the Progreso VII exploitation license on 30 September 2011. The Supreme Court did so over the MEM's objection that its resolution granting Exmingua's exploitation license was "notified . . . to the involved municipalities on 10 January 2012" and that "over two years have elapsed from that date, on account of which this *amparo* is inadmissible."[691] Indeed, the Supreme Court did not even address this objection in its ruling granting the *amparo provisional*.[692]

285. Exmingua raised this objection again, once it joined the proceeding as an interested third party, in its appeal of the *amparo provisional* to the Constitutional Court, pointing out in addition that the issuance of the license was widely reported in the press.[693] Moreover, protests and blockades against the Project had begun already in 2012 shortly after the granting of the license,[694] further demonstrating that the granting of Exmingua's license was well known. The Attorney General again raised an objection on this basis before the Supreme Court at the *amparo definitivo* stage.[695] It was only at that stage that the Supreme Court and the Constitutional Court considered the timeliness of CALAS's action, holding that the time period under Article 20 of the *Amparo* Law did not apply where the challenge concerned an omission by the challenged authority.[696]

286. As Professor Fuentes explains, these decisions of the Guatemalan courts not only are clearly wrong, because they apply a non-existent exception to Article 20 of the *Amparo* Law by disregarding the procedural principle of timeliness, the fact that the public consultation process already had been conducted for the purposes of the EIA, and the fact that public notice had been validly given, the Courts' decisions also were fundamentally flawed in that they violated Exmingua's procedural due process rights in a way that undermines the constitutional principle

[691] Response by the Ministry of Energy and Mines to CALAS' application for new amparo dated 5 Sept. 2014, at 4-7 (C-0465-SPA/ENG); *see also* Fuentes ¶ 115.

[692] *See* Supreme Court of Guatemala, Decision dated 5 Sept. 2014 (C-0466-SPA/ENG); Supreme Court of Guatemala, *Amparo* granted to CALAS, dated 11 Nov. 2015, at 1 (C-0004-SPA/ENG).

[693] Exmingua Appeal dated 23 Feb. 2016, at 14 (C-005-SPA/ENG); *see also* Fuentes ¶ 116.

[694] Fuentes ¶ 116.

[695] Attorney General's Participation at First Hearing before the Supreme Court of Guatemala on 22 Feb. 2016, at 5 (C-0487-SPA/ENG).

[696] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting amparo definitivo, at 23 (C-0144-SPA/ENG); Constitutional Court of Guatemala, Consolidated Case Nos. 2307-2016 and 3344-2016, Decision dated 11 June 2020, at 32 (C-0145-SPA/ENG).

of legal certainty enshrined in the Constitution of Guatemala.[697] A violation of such a fundamental procedural protection, such as this, constitutes a denial of justice.

287. *Third*, the Guatemalan courts allowed CALAS to proceed with its *amparo* action despite the undisputed fact that CALAS had not first exhausted administrative remedies against the issuance of the exploitation license, as required by Article 19 of the *Amparo* Law.[698] While the Supreme Court, by its decision of 5 September 2014, initially did dismiss CALAS's action on this very ground,[699] the Constitutional Court overturned that decision on appeal, finding that no administrative remedy was available to CALAS.[700] In its decision, the Constitutional Court blatantly disregarded that CALAS did have the possibility of objecting in the public participation process.[701] Additionally, as Exmingua pointed out in it its later appeal, CALAS also could have filed an action for reconsideration against the issuance of the license in a contentious-administrative proceeding.[702] As Professor Fuentes observes, the Court's reasoning to exempt CALAS from the exhaustion of remedies requirement was "clearly wrong" given that various remedies were indeed available to CALAS,[703] which CALAS failed to avail itself of.

288. *Fourth*, the Guatemalan courts created a further exception for CALAS from the established rule governing standing to sue under Article 25 of the *Amparo* Law. That provision allows only the Public Prosecutor's Office and the Human Rights State Attorney to file *amparo* actions on behalf of a group.[704] Accordingly, both the MEM and the Attorney General objected that CALAS lacked standing to sue under the *Amparo* Law.[705] Both Courts, however, ignored this objection in their respective *amparo provisional* decisions, and the Supreme Court addressed

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[697] Fuentes ¶¶ 121-123.

[698] *See Amparo* Law, Art. 19 (C-0416-SPA/ENG) ("Except in the cases herein indicated, to seek *amparo* protection, all ordinary court and administrative remedies available to adequately dispose of the matter through due process must be exhausted first."); *see also* Fuentes ¶ 124.

[699] Supreme Court of Guatemala, Decision dated 5 Sept. 2014, at 8 (C-0466-SPA/ENG); *see also* Fuentes ¶ 127.

[700] Constitutional Court of Guatemala, Resolution dated 3 Nov. 2015, at 4 (C-0468-SPA/ENG); *see also* Fuentes ¶ 128.

[701] Fuentes ¶ 130.

[702] Exmingua Appeal dated 23 Feb. 2016, at 24 (C-0471-SPA/ENG); *see also* Fuentes ¶ 129.

[703] Fuentes ¶ 133.

[704] *Amparo* Law, Art. 25 (C-0416-SPA/ENG); *see also* Fuentes ¶ 134.

[705] Response by the Ministry of Energy and Mines to CALAS' application for new amparo dated Sept. 2014, at 4-7 (C-0465-SPA/ENG); Attorney General's Participation at First Hearing before the Supreme Court on 22 Feb. 2016, at 3-4 (C-0487-SPA/ENG); *see also* Fuentes ¶ 135.

it only later, in its *amparo definitivo* decision, stating that the standing requirement should be dispensed with "given the primacy of the fundamental rights alleged to have been violated."[706]

289. As Professor Fuentes remarks, however, that reasoning violates a standing order of the Constitutional Court, pursuant to which the Supreme Court cannot dispense with the standing requirement and, where it is not met, must dismiss an *amparo* action with finality.[707] Nevertheless, in its recent decision, the Constitutional Court agreed with the Supreme Court's ruling and relied in this regard on its purported "previous decisions" holding that CALAS had standing in comparable cases involving the right to a healthy environment.[708] Having analyzed the Court's jurisprudence, Professor Fuentes notes that these supposed "previous decisions" are, in fact, decisions in the other cases previously discussed where the Constitutional Court ruled that the MEM needed to conduct consultations, all of which were filed with the Court *after* Exmingua's appeal.[709] The Court thus pulled itself up by its own bootstraps by ruling on those other later-filed cases first, and then relying on those very decisions to support its ruling in Exmingua's case.

290. *Fifth*, the Guatemalan courts ignored that the MEM lacked standing to be sued in the *amparo* action brought by CALAS. The MEM objected in the proceedings before both the Supreme Court and the Constitutional Court that it was not the proper respondent; rather, the MEM asserted that State of Guatemala as a whole, including the Government and the Congress, were proper parties, because they had obligated Guatemala by signing and ratifying ILO Convention 169, but had failed to provide any legal guidance, by legislation or regulation, to implement the consultation requirement under its Article 15. Consequently, those entities should

[706] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting amparo definitivo dated 28 June 2016, at 25 (C-0144-SPA/ENG); *see also* Fuentes ¶ 137.

[707] Constitutional Court of Guatemala, Order No. 1-2013 dated 9 Dec. 2013, Art. 26 (C-0430-SPA/ENG); *see also* Fuentes ¶ 138.

[708] Constitutional Court of Guatemala, Consolidated Case No. 3207-2016 and 3344-2016, Decision dated 11 June 2020, at 31 (C-0145); *see also* Fuentes ¶ 140.

[709] Fuentes ¶¶ 141-142.

have been held responsible under Guatemalan law for the harm caused by any failure to conduct such consultations.[710]

291. In fact, in the *Oxec* case, the Constitutional Court itself, in the operative part of its decision, "urged" the Congress of Guatemala "to carry out, within one year from the notification of this decision, the relevant legislative procedure in order to ensure that the legal regulation applicable to the right to be consulted is approved within such term."[711] In view of the failure of the Congress to act, the Constitutional Court in the *Minera San Rafael* case, more than one year later, ordered the Congress to submit a report to the Court on the progress made in complying with its order in the *Oxec* case.[712] As Professor Fuentes notes, an alternative to Congressional action would be for the President of Guatemala to enact a regulation under Article 183 of the Constitution, given that ILO Convention 169 was transformed into Guatemalan law by a law under Article 171 of the Constitution.[713] As neither the Congress nor the President has acted to provide guidance on the procedure to implement Article 15 of ILO Convention 169, and in view of the Constitutional Court's decisions in the *Oxec* and *Minera San Rafael* cases, it was contradictory for the Constitutional Court to find that the MEM had standing to be sued in Exmingua's case. Indeed, a former Magistrate of the Constitutional Court has remarked that, in the absence of a Congressionally-enacted regulation, ILO Convention 169 cannot be made operational by the Courts.[714]

292. *Sixth*, in violation of the Constitutional principle of legal certainty and the right to a speedy trial, as well as specific time limits prescribed in the *Amparo* Law, the Constitutional Court took almost four years to reach its final decision in the *amparo* case brought by CALAS concerning the Progreso VII exploitation license. Under the *Amparo* Law, "the Constitutional Court shall render a second-instance decision within five days from the date the appeal is

[710] *See* Response by the Ministry of Energy and Mines to CALAS' application for new amparo, at 34 (C-0465-SPA/ENG); MEM Appeal dated 23 Feb. 2016, at 1 (C-0471-SPA/ENG).

[711] Constitutional Court of Guatemala, Consolidated Case Nos. 90-2017, 91-2017, and 92-2017, Decision dated 26 May 2017, at 111 (C-0441-SPA/ENG) (*Oxec* case); *see also* Fuentes ¶ 149.

[712] Decision dated 3 September 2018, issued in Case No. 4785-2017 by the Constitutional Court *(Minera San Rafael* case), at 551-552 (C-0459-SPA/ENG); *see also* Fuentes ¶ 150.

[713] Fuentes ¶ 151.

[714] *See* "Exploitation of Metallic Minerals is Suspended In Guatemala, After Three Rulings of the Constitutional Court," *Prensa Libre* dated 18 July 2020 (C-0615-SPA/ENG).

brought."[715] While Professor Fuentes confirms that, based on his experience, the Court in practice does not usually adhere to this time limit, he explains that "a delay of nearly four years constitutes excessive delay."[716] Indeed, in the three *amparo* cases that are comparable to the *Exmingua* case in terms of the procedural and substantive issues involved, the Constitutional Court took significantly less time to reach a final decision.

293. In the *Oxec* case, which was filed on 11 December 2015, approximately one year after the *Exmingua* case, the Constitutional Court rendered its final decision approximately 18 months after the case was brought.[717] In the *Minera San Rafael* case, the Constitutional Court issued its final decision on 3 September 2018, approximately 16 months after the case was commenced on 16 May 2017.[718] And, in the *GCN* case, which was commenced after the *Exmingua* case, the Constitutional Court rendered its final decision on 18 June 2020, a little over two years after the case was initiated.[719] The overall duration of these cases clearly compares highly favorably to the almost four years the Constitutional Court alone took in the *Exmingua* case, whose overall duration reached almost six years. The fact that Exmingua's appeal was filed *before* any of the appeals in these other cases further underscores the Court's disparate and unfavourable treatment accorded to Exmingua. And the timing of the Court's belated decision confirms that the delay was politically motivated and based on nationality bias, as the Court issued an order out of the blue, after Exmingua's appeal had been pending for nearly four years, directing the MEM to provide it with a report as to the status of its consultations just *one day before* Claimants' Memorial in this Arbitration was due to be filed.[720] Then, it issued its ruling on Exmingua's appeal a couple of weeks later, and just a few weeks before this filing. [721]

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[715] *Amparo* Law, Arts. 39 & 66 (C-0416-SPA/ENG); *see also* Fuentes ¶ 154.

[716] Fuentes ¶ 154.

[717] *See* Constitutional Court of Guatemala, Consolidated Case Nos. 90-2017, 91-2017, and 92-2017, Decision dated 26 May 2017, at 1 (C-0441-SPA/ENG) (*Oxec* case); *see also* Fuentes ¶ 159.

[718] *See* Decision dated 3 September 2018, issued in Case No. 4785-2017 by the Constitutional Court (*Minera San Rafael* case), at 1-5 (C-0459-SPA/ENG); *see also* Fuentes ¶ 160.

[719] *See* Constitutional Court of Guatemala, Case No. 697-2019, Decision dated 18 June 2020, at 1 (C-0496-SPA/ENG) (*CGN* case); *see also* Fuentes ¶ 161.

[720] Constitutional Court of Guatemala, Case No. 1592-2014, Notification of the 28 May 2020 request (C-0553-SPA/ENG).

[721] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming *amparo definitivo*, 11 June 2020 (C-0145-SPA/ENG). As noted above, that ruling was only notified to Exmingua two weeks after it was made. *See*

294. In *Pey Casado v. Chile*, the tribunal found a six-year delay to be significant and a classic form of denial of justice, observing that "delays may be 'even more ruinous' than absolute refusal of access [to justice], because in the latter situation the claimant knows where he stands and take action accordingly."[722] Here, the discriminatory delay that Exmingua has encountered in the Guatemalan judiciary over the past six years likewise is significant and ruinous, such that it constitutes "undue delay"[723] that amounts to a denial of justice.

295. Together, this and the series of other serious violations of Exmingua's fundamental procedural and due process rights described above, demonstrate that Guatemala's courts, while "clearly prompted by political aims,"[724] "administered justice in a seriously inadequate way,"[725] in "arbitrary disregard of due process"[726] and in proceedings that were "fundamentally unfair"[727] to Exmingua and thus amounted to a denial of justice.

Constitutional Court of Guatemala, Case No. 1592-2014, Notification of 11 June 2020 ruling, 23 June 2020 (C-0495-SPA/ENG).

[722] *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award dated 8 May 2008 ¶¶ 659-660 (CL-0177-SPA/ENG) (partially annulled on other grounds) (quoting JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 177 (2005) (CL-0171-ENG)).

[723] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award dated 1 Nov. 1999 ¶ 102 (CL-0144-ENG) ("A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way.").

[724] *Asylum Case (Peru v. Colombia)*, Judgment of 20 Nov. 1950, 1950 ICJ REP. 266, at 284 (CL-0172-ENG) ("In principle . . . asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims.").

[725] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award dated 1 Nov. 1999 ¶ 102 (CL-0144-ENG) ("A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way.").

[726] *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of the Award dated 2 July 2018, ¶ 462 (CL-0168-ENG) ("[D]enial of justice is encapsulated as the arbitrary disregard of due process.").

[727] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 ¶ 442 (CL-0126-ENG) ("The responsibility of States not to breach the fair and equitable treatment standard through a denial of justice is engaged if and when the judiciary has rendered final and binding decisions after fundamentally unfair and biased proceedings or which misapplied the law in such an egregiously wrong way, that no honest, competent court could have possibly done so.").

b. Guatemala's Courts Blatantly Violated Exmingua's Substantive Acquired Rights

296. The Guatemalan court proceedings concerning the validity of Exmingua's exploitation license for Progreso VII also were marred by blatant violations of Exmingua's substantive acquired rights.

297. *First*, Guatemala retroactively applied new requirements to the prior issuance of the Progreso VII exploitation license. The MEM granted the Progreso VII exploitation license in 2011, after the MARN had reviewed and approved the EIA, which contained, among other things, the social studies which entailed a public participation process. Guatemala, moreover, had already in 2010 officially and publicly taken the 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.[728] Against this background, it was inconsistent with the principles of legal certainty and the rule of law for the Courts years later to require yet another consultation process while suspending the license, which had been validly granted in accordance with the pre-existing laws and regulations and, thereby, in the words of Professor Fuentes, "chang[ing] all the rules of the game."[729]

298. The Court's ruling also was akin to retroactively applying a new law in violation of Exmingua's acquired rights. As Professor Fuentes explains, "[u]nder the Mining Law, an exploitation license grants its holder a real property right [which is] a right that is subject to encumbrance and registration with the Land Registry."[730] Once the MEM has granted an

[728] *See* 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 (C-0225-SPA/ENG) (reflecting the position set forth by Guatemala in 2010 as follows: "[U]nder domestic law, it is incumbent on the entity interested in securing a mining right to present the EIA conducted by consultants certified by the MARN and based on the terms of reference prepared by said ministry. . . . [O]nce the results of the EIA were obtained, it issued public announcements . . . although any party concerned could object, neither the petitioners nor anyone else did so. . . . '[T]he right of the indigenous people to be consulted is unquestionable,' in accordance with the treaties ratified by Guatemala and the jurisprudence of the Constitutional Court. . . . accordingly, the MARN informed the company that it was mandatory to conduct a public participation process, in keeping with Article 74 of the Regulations on Environmental Assessment, Control, and Monitoring (Government Agreement 431-2007), which was carried out in full. . . . [A]lthough it is not called a 'consultation,' 'it is indeed a prior process' in which 'notification was given that a mining project would be executed.'"); *see also* Fuentes ¶ 52.

[729] Fuentes ¶ 168.

[730] *Id*. ¶ 23.

exploitation license, it can be suspended only in two ways: (i) under Article 51 of the Mining Law based on specific grounds enumerated therein and subject to an administrative procedure in which the license holder has the opportunity to be heard and to pursue further remedies, or (ii) by a declaration of *Lesividad* by an Executive Decree issued by the President of Guatemala within three years of the issuance of the license, on the basis that the license is detrimental to public or general interests.[731] Because Guatemala failed to suspend the license under Article 51 of the Mining Law or to declare its *Lesividad*, Guatemala, as Professor Fuentes confirms, "failed to apply the *only* legal mechanisms available to it to suspend the exercise of [Exmingua's] rights under the license."[732]

299. Professor Fuentes explains that, in these circumstances, Exmingua was protected by the principle of legal certainty, which "allows the exercise of a right acquired by a certain party to be truly, indubitably, and infallibly free and exempt from all danger, risk or harm."[733] The principle of legal certainty further gives rise to the principle of estoppel (or *nemo potest contra proprium factum venire*) and, as its corollary, the principle of legitimate confidence under Guatemalan law.[734] Under the principle of estoppel, Guatemala was "obligat[ed] to safeguard all vested rights associated with Exmingua's exploitation license."[735] As Guatemala had failed to suspend or revoke the license under either Article 51 of the Mining Law or a declaration of *Lesividad*, Exmingua had such a protected vested right, which Guatemala could not revoke or suspend by any other means without compensation, because that would be "tantamount to going against the State's own actions [and] illegal."[736]

300. Moreover, the principle of legitimate confidence, which is rooted in fundamental principles of law, such as good faith and the rule of law, protects an individual's acquired rights "against the possibility that the State, through arbitrary or unjustified decisions, may revoke or

[731] *Id*. ¶¶ 24-34.

[732] *Id*. ¶ 35. (emphasis added)

[733] Fuentes ¶ 37 (quoting Constitutional Court of Guatemala, Case No. 4833-2013, Decision dated 5 Mar. 2014, at 9 (C-0427-SPA/ENG)).

[734] Fuentes ¶¶ 38-39, 43.

[735] *Id*. ¶ 41.

[736] *Id*. ¶¶ 39, 41.

annul government or administrative decisions that favor the individual."[737] As Exmingua acquired its license in good faith and in compliance with all requirements under Guatemalan law, Exmingua was entitled to the legitimate confidence that it could exercise the rights under the license, without it being suspended or revoked other than for the reasons and under the procedures specified in Guatemalan law.[738]

301. *Second*, Guatemala's courts wrongfully burdened Exmingua with the severe consequences of Guatemala's own purported failure to implement its international obligations, in violation of the Constitutional principle of proportionality. As Professor Fuentes explains, Articles 2, 239 and 243(1) of the Guatemalan Constitution enshrine the principle of proportionality as it applies to any limitations on fundamental rights.[739] The Guatemalan Constitutional Court has held that the principle of proportionality requires "a) that said limitations be intended to apply for the sake of general interest purposes, and always provided that constitutionally lawful purposes are pursued; b) that the regulated limitation should provide for appropriate and necessary means for achievement of such purpose; and c) that such limit should not result in any exaggerated or excessive effects, in terms of reasonability, against the law."[740] In addition to serving as a mandatory principle restricting the limitation of fundamental rights, the principle of proportionality provides parameters for constitutional review.[741]

302. As Professor Fuentes points out, the Constitutional Court had the power under the *Amparo* Law to revoke the suspension of the Progreso VII license while ordering the MEM to conduct the consultations, as it did in the *Oxec* case.[742] Indeed, in the *Minera San Rafael* case, Supreme Court Judge Valdés Quezada in her dissenting opinion applied the principle of proportionality to conclude that it was neither adequate nor necessary to suspend the mining

[737] *Id*. ¶¶ 43, 47.

[738] *Id*. ¶ 48.

[739] *Id*. ¶ 173.

[740] Constitutional Court of Guatemala, Consolidated Cases Nos. 1079-2011, 2858-2011, 2859-2011, 2860-2011, 2861-2011 and 2863-2011, Decision dated 12 Nov. 2013, at 48 (C-0499-SPA/ENG); *see also* Fuentes ¶ 173.

[741] Constitutional Court of Guatemala, Consolidated Cases Nos. 1079-2011, 2858-2011, 2859-2011, 2860-2011, 2861-2011 and 2863-2011, Decision dated 12 Nov. 2013, at 48 (C-0499-SPA/ENG); *see also* Fuentes ¶ 173.

[742] Constitutional Court of Guatemala, Consolidated Case Nos. 90-2017, 91-2017, and 92-2017, Decision dated 26 May 2017, at 101-102 (C-0499-SPA/ENG); *see also Amparo* Law, Art. 49 (C-0441-SPA/ENG) (allowing for an order revoking the measure at issue); Fuentes ¶ 174.

operations in order to conduct the consultations.[743] Similarly, in the *CGN* case, Constitutional Court Judge Dina Josefina Ochoa Escribá, in her concurring opinion, expressed her disagreement with the continued suspension of operations in that case, as it was contrary to the holding of the Constitutional Court in *Oxec*.[744]

303. As Professor Fuentes explains, in the case of Exmingua, as in *Oxec*, the MEM's conducting consultations did not require the suspension of mining operations, especially given that Exmingua already had conducted consultations in the context of the social studies required for its EIA.[745] The Constitutional Court, however, explicitly upheld the continuing suspension pending completion of MEM-led consultations, and furthermore indefinitely extended the suspension until such time as a determination is made that the license does not threaten the existence of the indigenous populations in the surrounding area.[746]

304. As Constitutional Court Judge María de los Ángeles Araujo Bohr confirmed in her concurring opinion in the recent decision regarding Exmingua, the right to consultations under ILO Convention 169 "does not imply a right to veto nor is the result of the consultations necessarily the reaching of agreement or consent."[747] She noted that her colleagues on the Court failed to consider this, "since, when they decided to suspend the mining exploitation activities, while the consultation is conducted, Progreso VII's rights of property, liberty of industry and trade were violated."[748] Indeed, if having the MEM conduct additional consultations served such an important public purpose so as to disproportionally affect Exmingua's acquired rights, the MEM should have commenced and completed such consultations years ago – when the Courts

[743] Supreme Court of Guatemala, Case No. 176-2017, Dissenting Opinion by Judge I Silvia Patricia Valdés Quezada, Decision dated 27 July 2017, at 2-3 (C-0498-SPA/ENG) (*San Rafael* case).

[744] Constitutional Court of Guatemala, Case No. 697-2019, Concurring Opinion by Judge Dina Josefina Ochoa Escribá in the Decision dated 18 June 2020, at 1 (C-0496-SPA/ENG); *see also* Fuentes ¶ 180.

[745] Fuentes ¶ 178.

[746] Constitutional Court of Guatemala, Consolidated Case No. 3207-2016 and 3344-2016, Decision dated 11 June 2020, at 78, 87 (C-0145-ENG/SPA); Fuentes ¶ 174.

[747] Constitutional Court of Guatemala, Consolidated Case No. 3207-2016 and 3344-2016, Concurring Opinion by Judge Maria de los Angeles Araujo Bohr in Decision dated 11 June 2020, at 94-94 (C-0145-SPA/ENG); *see also* Fuentes ¶ 181.

[748] Constitutional Court of Guatemala, Consolidated Case No. 3207-2016 and 3344-2016, Concurring Opinion by Judge Maria de los Angeles Araujo Bohr in Decision dated 11 June 2020, at 94-94 (C-0145-SPA/ENG); *see also* Fuentes ¶ 181.

first ordered it to do so, and as it did in the *Oxec* case. That it has not done so further confirms the disproportionate nature of the Court's ruling.

305. In the above-described instances of blatant violations of Exmingua's substantive vested rights, Guatemala's courts "misapplied [Guatemalan] law in such an egregiously wrong way, that no honest, competent court could have possibly done so."[749] This is precisely the kind of "clear and malicious misapplication of the law" that constitutes a denial of justice.[750]

c. Guatemala's Courts Discriminated Against Exmingua

306. Guatamala's courts also discriminated against Exmingua by treating it less favorably than comparable Guatamalan-owned and foreign-owned companies, which they allowed to continue operating while social consultations were being conducted. Specifically, Exmingua was in a comparable situation with other companies operating in Guatemala, such as Oxec, S.A., Oxec II, S.A., Minera San Rafael, S.A., and Compañía Guatemalteca de Níquel ("CGN"). All of these companies, like Exmingua, were subject to a similar environmental regulatory regime insofar as they had to complete and have approved an EIA for their projects. Each of their projects – in the case of the Oxec companies, a hydroelectric plant, in the case of Minera San Rafael, a silver mine, and in the case of CGN, a ferronickel mine – was regulated by the same government entity, the MEM, which granted each of them licenses for their respective projects.

307. In 2013 and 2015, the Guatemalan-owned Oxec companies had been operating the hydroelectric plant in the municipality of Santa María Cahabón, department of Alta Verapaz.[751] Minera San Rafael, S.A., then the Guatemalan subsidiary of Tahoe Resources Inc. of Canada (now owned by Pan American Silver Corp of Canada), obtained its Escobal exploitation license to mine silver in April 2013.[752] CGN, the Guatemalan subsidiary of Swiss-owned Solway Investment Group, had been operating a ferronickel mine located in El Estor in Eastern

[749] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 ¶ 442 (CL-0126-ENG) ("The responsibility of States not to breach the fair and equitable treatment standard through a denial of justice is engaged if and when the judiciary has rendered final and binding decisions . . . which misapplied the law in such an egregiously wrong way, that no honest, competent court could have possibly done so.").

[750] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award dated 1 Nov. 1999 ¶ 103 (CL-0144-ENG).

[751] MEM appeal against the provisional *Amparo* of date 29 January 2017, dated 22 Apr. 2017 (C-0552-SPA/ENG).

[752] CALAS *amparo* request against the Escobal and Juan Bosco mining license dated 17 May 2017 (C-0564-SPA).

Guatemala since 2014 when the mine reopened and had its Fenix license extended by the MEM in 2016.[753] As explained above, although all of these projects – as well as Exmingua's mine – were operational, all three were subject to *amparo* proceedings before the Guatemalan courts, alleging that their licenses had been improperly granted by the MEM on account of the State's alleged failure to carry out consultations with the local indigenous communities in accordance with ILO Convention 169.[754]

308. Despite their comparable situations, the Guatemalan courts treated Exmingua less favourably than Oxec, Minera San Rafael and CGN. Specifically, even though the Guatemalan Courts held that Oxec's license—like Exmingua's—had purportedly been invalidly issued because the MEM had not conducted consultations before granting the licenses, the Constitutional Court in its final *amparo* ruling allowed Oxec to continue operating after its license was suspended, while the MEM conducted consultations.[755]

309. Exmingua, in contrast, was ordered by the Supreme Court in its *amparo definitivo* ruling to suspend its operations pending completion of consultations by the MEM with the local communities.[756] When Exmingua sought reconsideration of that ruling after the Courts ruled allowing Oxec to continue its operations pending the MEM's conducting consultations, the Constitutional Court rejected Exmingua's request.[757] And even in its recent ruling on Exmingua's appeal – which had been pending for four years – the Constitutional Court again insisted on keeping in place the suspension pending completion of consultations by the MEM.[758] Thus, while Oxec was not held hostage to the MEM in deciding whether to commence

[753] *See* Solway's website, available at https://solwaygroup.com/our-business/fenix-project-guatemala/; *see also* Paul Harris, *Fenix Grounded in Guatemala*, Mining Journal dated 29 July 2019 (C-0614-ENG).

[754] Amparo Action brought by CALAS, dated 28 Aug. 2014, at 2-4 (C-0137-ENG/SPA); Amparo application 2826-2015 against the MEM dated 11 Dec. 2015 (C-0556-SPA/ENG); CALAS amparo request against the Escobal and Juan Bosco mining license dated 17 May 2017 (C-0564-SPA/ENG); Decision dated 18 June 2020, issued in Case No. 697-2019 by the Constitutional Court (*CGN* case), at 1 (C-0496-ENG/SPA).

[755] Constitutional Court of Guatemala, Case Nos. 90-2017, 91-2017 and 92-2017, Decision dated 26 May 2017 (C-0441-SPA/ENG); *see also supra* § II.E.3.

[756] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming *amparo provisional* dated 5 May 2016 (C-0143-SPA/ENG); *see also supra* § II.E.1.

[757] Constitutional Court Case No. 1592-2014, ruling denying Exmingua's request for reconsideration of the amparo dated 5 Oct. 2017 (C-0563-SPA/ENG).

[758] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming *amparo definitivo* dated 11 June 2020 (C-0145-SPA/ENG); *see also supra* § II.E.1.

consultations or how long it would take to conclude those consultations, Exmingua has been and remains at the mercy of the MEM, which has refused to commence – much less conclude – consultations, and its operations remain suspended.[759] As Professor Fuentes explains, such unequal treatment violates the Constitutional principle of equality before the law, which, in the words of the Constitutional Court "is based on the idea that persons shall be entitled to the same rights and be subject to the *same limitations under the law*."[760]

310. In addition to suspending Exmingua's Progreso VII license pending completion of MEM-led consultations, the Constitutional Court in its recent decision imposed a new condition for resumption of operations under the license, namely, that "the outcome of the consultation with the indigenous population established in the project's area of influence . . . enables a determination that the performance of tasks does not affect the referred human collective's existence."[761] As Professor Fuentes explains, this means that the Court ordered two conditions to be met before Exmingua may resume operations under its Progreso VII license: not only must consultations under Article 6 of ILO Convention 169 be held and completed, but additionally "there must be reliable evidence that the Progreso VII Derivada mining exploitation licence does not threaten the existence of the indigenous population settled in the area of influence of the mentioned project."[762]

311. As Professor Fuentes points out, obtaining such evidence could require "any amount of research, studies and opinions [which] could delay the resumption of mining activities indefinitely, to the detriment of course, of the acquired rights of Exmingua."[763] Significantly, the Constitutional Court did not impose any such condition precedent to resuming operations in the *Oxec*, *Minera San Rafael* or *CGN* cases,[764] thus further discriminating against Exmingua. As the *Loewen* tribunal found, "[i]nternational law does . . . attach special importance to discriminatory

[759] Minera San Rafael also was permitted to operate while its proceeding was pending, albeit only for a few, non-consecutive months, before its exportation certificate was suspended, apparently causing it to suspend operations. *See supra* § II.E.3.

[760] Constitutional Court of Guatemala, Case No. 682-1996, Decision dated 21 June 1996 (Consultative Opinion), at 3 (C-0501-SPA/ENG) (emphasis added); Fuentes ¶ 183.

[761] *Id*. at 90.

[762] Fuentes ¶ 177.

[763] *Id*.

[764] *Id*.

violations of municipal law [and a] decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law."[765] Here, only US-owned Exmingua has been singled out for disparate treatment resulting in the indefinite suspension of its exploitation license.

* * *

312. Together, the serious violations of Exmingua's fundamental procedural and due process rights and its substantive acquired rights, along with Exmingua's discriminatory treatment, by Guatemala's courts, all in breach of fundamental Constitutional principles, rendered Exmingua unable to rely on Guatemala's court system effectively to protect its legitimately acquired, vested rights and interests. This becomes especially apparent when comparing the case of US-owned Exmingua with contemporaneous cases of other companies that are owned by Guatemalan nationals or nationals of third States. These gross failures by Guatemala's courts constitute the very "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety"[766] and amounts to a denial of justice under international law.

E. Guatemala Failed To Accord Claimants And Their Investment National And Most-Favored-Nation Treatment

313. Guatemala discriminated against Claimants and Exmingua and, thereby, has violated its national and most-favored-nation ("MFN") treatment obligations in breach of Articles 10.3 and 10.4 of the DR-CAFTA.

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[765] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award dated 26 June 2003 ¶ 135 (CL-0170-ENG) (citing Harvard Law School, Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Persons or Property of Foreigners ("1929 Draft Convention") 23 AM. J. INT'L L. 133, 174 (Spec. Supp. 1929) (characterizing a denial of justice as "a judgment [which] is manifestly unjust, especially if it has been inspired by ill-will towards foreigners as such or as citizens of a particular states"); Adede, *A Fresh Look at the Meaning of Denial of Justice under International Law*, XIV CAN. Y.B. INT'L L. 91 (CL-0277-ENG) ("[A] . . . decision which is clearly at variance with the law and discriminatory cannot be allowed to establish legal obligations for the alien litigant")).

[766] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award dated 26 June 2003 ¶ 132 (CL-0170-ENG) (observing that a denial of justice is a "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety"); *see also Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability dated 24 Aug. 2015 ¶ 146 (CL-0178-ENG) (finding a denial of justice where the court's decision "does shock a sense of juridical propriety.").

314. The national treatment and MFN provisions of DR-CAFTA Articles 10.3 and 10.4 provide, in relevant part, that each Party shall accord to investors and investments of the other Party "treatment no less favorable than that it accords, in like circumstances," to its own investors and investments, as well as to investors and investments of another Party and any non-Party "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory."[767]

315. Regarding the phrase "in like circumstances," the tribunal in *S.D. Myers v. Canada*, interpreting an identical formulation under the NAFTA,[768] noted that it "is open to a wide variety of interpretations in the abstract and in the context of a particular dispute," and "invites an examination of whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor."[769] In this regard, the tribunal observed that "the word 'sector' has a wide connotation that includes the concepts of 'economic sector' and 'business sector.'"[770]

316. NAFTA tribunals have found an investor or investment to be in "like circumstances" with another investor or investment, when the investor or investment was involved in the same type of business or business sector as the comparator, such as engaging in remediation

[767] DR-CAFTA, Arts. 10.3-10.4 (CL-0001-ENG/SPA).

[768] *See* NAFTA, Arts. 1102-1103 (CL-0034-ENG/SPA). Notably, the provisions of the DR-CAFTA and the NAFTA both refer to "like" circumstances, while certain other treaties require that the circumstances be the "same" or "identical," rendering the standard in such other treaties more stringent. *See, e.g.*, Belize-United Kingdom BIT (1982), Art. 3(1) (CL-0192-ENG) ("Neither Contracting Party shall . . . subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable treatment than that which it accords in the *same* circumstances to investments or returns of its own nationals") (emphasis added); *see also William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶ 692 (CL-0088-ENG) (finding that "the operative word in Article 1102 is 'similar', not 'identical'"); UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS, "*National Treatment*" (U.N. 1999), at 33 (CL-0193-ENG) ("Qualifications such as 'like situations', 'similar situations' and 'like circumstances' may be seen as synonymous . . . They may be less restrictive of national treatment in that they may apply to any activity or sector that is not subject to exceptions. What is a 'like' situation or circumstance is a matter that needs to be determined in the light of the facts of the case."); UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, "*Most-Favoured-Nation Treatment*" (U.N. 2010), at 27, 53-54 (CL-0194-ENG) ("[NAFTA] Tribunals have used a variety of criteria for comparison depending on the specific facts and the applicable law of each case. They include: same business or economic sector, same economic sector and activity, less like but available comparators and direct competitors. Flexibility has prevailed, with the aim of comparing what is reasonably comparable and considering all the relevant factors.").

[769] *S.D. Myers, Inc. v. Government of Canada*, NAFTA, UNCITRAL, Partial Award dated 13 Nov. 2000 ¶¶ 243, 250 (CL-0104-ENG).

[770] *Id*.

services,[771] exporting cigarettes,[772] or supplying sweeteners.[773] The NAFTA tribunal in *Clayton v. Canada* further found that like circumstances arise where the relevant investors are subject to a similar regulatory process, such as an environmental assessment, even when their circumstances and the nature of their businesses are not identical to one another.[774]

317. Where an investor or investment is found to be in like circumstances with a national or third-State party, and receives less favorable treatment, the State will have violated its treaty obligation, regardless of whether it intended to discriminate against the investor or investment.[775] As the *Siemens v. Argentina* tribunal explained, "intent is not decisive or essential for a finding of discrimination, and [ ] the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment."[776] Equally, an investor does not need to show that the differential treatment was motivated by the investor's or investment's nationality, as any such requirement could place an insurmountable burden on the claimant.[777] Tribunals thus have found a national treatment or MFN treatment violation where, as here, the treatment accorded to a foreign investor or investment has been unfavorable vis-à-vis other investors or investments in similar circumstances.

318. In *Clayton v. Canada*, for instance, the claimant complained that Canada evaluated its environmental application for a quarry and maritime terminal less favorably than those of other

[771] *Id*. ¶ 251.

[772] *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/99/1, Award dated 16 Dec. 2002 ¶ 171 (CL-0093-ENG/SPA).

[773] *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/04/5, Award dated 21 Nov. 2007 ¶¶ 201-202 (CL-0195-SPA/ENG); *Corn Prods. Int'l Inc. v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility dated 15 Jan. 2008 ¶ 120 (CL-0196-SPA/ENG); *Cargill, Inc. v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/05/2, Award dated 18 Sept. 2009 ¶¶ 211-214 (CL-0197-SPA/ENG).

[774] *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶¶ 692-705 (CL-0088-ENG).

[775] *S.D. Myers, Inc. v. Government of Canada*, NAFTA, UNCITRAL, Partial Award dated 13 Nov. 2000 ¶ 254 (CL-0104-ENG).

[776] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 ¶ 321 (CL-0159-ENG).

[777] *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA, UNCITRAL, Arbitral Award dated 26 Jan. 2006 ¶ 177 (CL-0198-ENG); *see also Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/99/1, Award, dated 16 Dec. 2002 ¶ 181 (CL-0093-ENG/SPA); *Corn Prods. Int'l Inc. v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility dated 15 Jan. 2008 ¶ 138 (CL-0196-ENG); *Cargill, Inc. v. Republic of Poland II*, UNCITRAL, Award dated 29 Feb. 2008 ¶ 345 (CL-0199-ENG).

Canadian companies with projects in ecologically sensitive zones.[778] The NAFTA tribunal noted that subjecting the claimant's project to a panel review before the Joint Review Panel was "unusual," as it was used in only 0.3% of cases, including for projects that were much larger than the claimant's and those which, unlike the claimant's, involved novel or inherently dangerous activities.[779] Because the claimant was time-barred from challenging the method of review, the tribunal assessed whether Canada discriminated against the claimant's investment with respect to the standard applied by the JRP to evaluate its quarry project.

319. The tribunal found that the standard of review applied to the claimant's project was not used in three projects deemed to be sufficiently "like," *i.e.*, two quarry and marine terminal projects and one harbor project, all of which were operated by Canadian-owned companies.[780] This was notwithstanding the fact that some of the comparator projects were either larger or involved greater environmental risks.[781] With respect to one of the comparator projects, the tribunal rejected Canada's contention that "there was no significant public opposition," finding that this assertion did "not explain . . . why the [claimant's] project was not, as part of the analysis, subjected in all of its likely adverse effects to the same thorough application of the approach" required by law.[782] Noting that the investor was not required to provide "a demonstration of discriminatory intent"[783] and that, once it had *prima facie* proven the less favorable treatment vis-à-vis other investors or investments in like circumstances, the onus was on the State to justify the discriminatory treatment,[784] the tribunal found that Canada's conduct amounted to "unequal and unfavorable treatment."[785]

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[778] *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶¶ 685, 687 (CL-0088-ENG).

[779] *Id*. ¶ 688.

[780] *Id*. ¶¶ 696-700.

[781] *Id*.

[782] *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶ 700 (CL-0088-ENG); *see also id*. ¶ 704 (explaining that strong community opposition to the claimant's project did not justify conducting an environmental assessment on this project that failed to apply the applicable legal standard).

[783] *Id*. ¶ 719.

[784] *Id*. ¶¶ 718-723; *see also United Parcel Service of America, Inc. v. Government of Canada*, NAFTA, ICSID Case No. UNCT/02/1, Award on the Merits dated 24 May 2007 ¶ 83 (CL-0037-ENG) (adopting a three-part test for determining a national treatment violation, where the foreign investor must demonstrate that the respondent accorded treatment to it with respect to the establishment, acquisition, expansion, management, conduct, operation,

320. The State's policy and its interpretation and implementation also was found to violate national treatment in the *Occidental v. Ecuador* case. The investor in that case, an oil producer and exporter, complained that the method for calculating the VAT taxes on its oil exports was more burdensome than that which was applied to domestic exporters of other products, such as flowers, seafood, or minerals.[786] The tribunal determined that these other local companies were in a "like situation" with the claimant, and explained that the objective of according national treatment "cannot be [realized] by addressing exclusively the sector in which that particular activity is undertaken."[787] Although the tribunal concluded that the State authorities had acted professionally and followed legal procedures, it held that the respondent had breached its national treatment obligation because "the result of the policy enacted and the interpretation followed by the [Ecuadorian authorities] in fact has been a less favorable treatment of [the investor]."[788]

321. In *Feldman v. Mexico*, the NAFTA tribunal likewise found discrimination, where the Mexican authorities *de facto* treated the claimant less favorably under laws that applied equally to the claimant and its domestic competitors. Specifically, the authorities withheld tax rebates from the claimant while granting them to the claimant's domestic competitors, denied the claimant permission to register as an exporter while allowing its domestic competitors to do so, and subjected only the claimant to audits, but not its domestic competitors.[789]

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and sale or other disposition of investments; the foreign investor or investment must be in like circumstances with local investors or investments; and the NAFTA Party must be shown to have treated the foreign investor or investment less favorably than it treats the local investors or investments); *Corn Prods. Int'l Inc. v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 Jan. 2008 ¶¶ 116-117 (CL-0196-ENG) (endorsing the *UPS* three-part test); *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 Mar. 2015 ¶ 720 (CL-0088-ENG) (same); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 199, fn 512 (2nd ed. 2012) (CL-0131-ENG) (same).

[785] *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶ 716 (CL-0088-ENG).

[786] *Occidental Exploration and Production Co. v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award dated 1 July 2004 ¶¶ 168-170 (CL-0184-ENG).

[787] *Id.* ¶ 173.

[788] *Id.* ¶ 177.

[789] *See Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/99/1, Award dated 16 Dec. 2002 ¶¶ 187-188 (CL-0093-ENG/SPA).

322. And, in *Olin v. Libya*, the tribunal found a national treatment violation where the claimant demonstrated that Libya had treated it less favorably than its two local competitors, because their factories were exempt from an expropriation order while the claimant was not granted an exemption.[790] Having considered that "if the Claimant can prove that it was treated less favourably than a person similarly situated, then there would be discriminatory treatment, unless the Respondent can prove that such different treatment was justified,"[791] the tribunal found a breach notwithstanding that the investor's assets ultimately were not expropriated.[792]

323. For the purposes of the measures at issue in this case, Exmingua is in "like circumstances" with Oxec, S.A., Oxec II, S.A., Minera San Rafael, S.A. and CGN. As detailed above, each of these companies operated in Guatemala and was subject to a similar environmental regulatory regime insofar as each had to complete an EIA and have it approved by the MEM.[793] Moreover, each of the companies was subject to *amparo* proceedings where an NGO challenged the validity of their previously-issued licenses on account of the State's failure to lead consultations in accordance with ILO Convention 169.[794] And, in each instance, the Courts found that the State had failed to comply with its obligations under ILO Convention 169 when issuing the licenses, and that those licenses could only "regain effectiveness" once the MEM conducted and completed consultations.[795] 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.[796]

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[790] *Olin Hldgs. Ltd. v. State of Libya*, ICC Case No. 20355/MCP, Final Award dated 25 May 2018 ¶¶ 184-185, 194, 205 (CL-0150-ENG).

[791] *Id*. ¶ 203.

[792] *Id*. ¶¶ 211, 213, 215.

[793] *See supra* §§ II.B, III.D.2.c.

[794] *See supra* § II.E.3.

[795] *See supra* § II.E.3.

[796] *See supra* § II.E.3.

324. Despite being in like circumstances, Claimants and Exmingua received less favorable treatment, by the Guatemalan courts and the MEM, than Oxec, San Rafael, and CGN, and their respective investors, in regard to the operation of Claimants' investment.

325. *First*, as in *Clayton*, where Canada was found to have subjected the claimant's project to a more onerous standard of review than its comparators, 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.[797] This unfavorable treatment was conferred despite the fact that the Guatemalan courts found the same violation by the State in both cases.[798]

326. *Second*, in addition to requiring that the MEM conduct and complete consultations with the local communities before Exmingua's license could "regain effectiveness," Guatemala's courts imposed an additional, onerous, subjective and uncertain condition on Exmingua—that was not imposed on any other comparable project—before its operations could resume. As detailed above, unlike in the cases involving Oxec, San Rafael, or CGN, the Constitutional Court ruled that Exmingua cannot resume operations unless a determination is made that operations would not threaten the existence of the indigenous population in the vicinity of the mining project.[799] This, too, amounts to disparate treatment, in violation of both Guatemala's national and MFN treatment obligations.

327. *Third*, and as also described in more detail above, Guatemala's courts delayed the proceedings relating to Exmingua's exploitation license for six years, in violation of fundamental Constitutional principles as well as the *Amparo* Law, while deciding the same issues with respect to licenses held by investments of domestic and third-State investors in less than half that time.[800] Those other cases, moreover, were filed *after* Exmingua's case[801] and, yet, were decided

[797] *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶¶ 685, 687 (CL-0088-ENG); *see also supra* § III.D.2.c.

[798] *William Ralph Clayton and others v. Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 ¶¶ 685, 687 (CL-0088-ENG); *see also supra* § III.D.2.c.

[799] *See supra* § III.D.2.c.

[800] *See supra* § III.D.2.a.

[801] *See supra* § II.E.3.

in remarkably less time. This is starkly seen with respect to the Constitutional Court's ruling on Exmingua's appeal—which appeal was the first of the four appeals filed in respect of each of the aforementioned projects—and the last, by far, to be decided.[802]

328. *Finally*, in addition to the judiciary, the executive branch also has discriminated against Claimants and Exmingua. In particular, the MEM began and completed consultations for *Oxec* over a timeframe of just a few months, whereas it has refused even to commence consultations for Exmingua, and certainly has not concluded any such consultations. As described above, on 26 June 2017 – two months after the Constitutional Court's ruling in the *Oxec* case ordering the MEM to carry out consultations – the MEM informed the Supreme Court that it had executed a consultation plan.[803] The MEM then swiftly implemented the consultation plan and completed the consultations five months later, on 11 December 2017.[804] By contrast, the MEM has refused to conduct consultations in Exmingua's case in over four years, despite being ordered to do so by the Constitutional Court on 5 May 2016 and by the Supreme Court on 28 June 2016.[805] Like the Mexican authorities in *Feldman*, whose inconsistent application of the law led to unfavorable treatment of the claimant by being subjected to audits, denied tax rebates, and being precluded from exporting, the MEM's disparate approach to conducting consultations has resulted in Exmingua receiving less favorable treatment than Oxec in this regard as well.[806]

IV. DAMAGES

A. Guatemala Is Obligated To Make Full Reparation For The Damage Caused By Its Breaches Of The DR-CAFTA

329. As is commonplace in many investment treaties, the DR-CAFTA provides only a formula for compensation for lawful expropriation, but does not set out a standard of compensation or

[802] *See supra* § II.E.3.

[803] *See* Corrective Consultation Plan dated July 2016 (C-0559-SPA/ENG); Memorial of First Quarterly Report of Public Consultations by the MEM dated 29 June 2017 (C-0560-SPA/ENG); *see also supra* § II.E.1.

[804] Memorial of Final Report of Public Consultations by the MEM dated 11 Dec. 2017 (C0561-SPA/ENG); Maria Rosa Bolaños, "MEM completes consultations with 11 communities for Oxec case," *La Prensa Libre* (C-0562-SPA/ENG).

[805] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming *amparo provisional* dated 5 May 2016 (C-0143-SPA/ENG); Supreme Court of Guatemala, Case No. 1592-2014, Ruling granting *amparo definitivo* dated 28 June 2016, § VII (C-0144-SPA/ENG); *see also supra* § II.E(4).

[806] *See Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/99/1, Award dated 16 Dec. 2002 ¶¶ 187-188 (CL-0093-ENG/SPA).

specify any other form of reparation for unlawful expropriation or for violations of other investment protections.[807] Where, as here, the applicable investment treaty provides no express form of reparation or compensation standard for violations, customary international law applies to determine the appropriate measure of damages.[808] Under customary international law, the general standard of compensation for internationally wrongful acts, including but not limited to unlawful expropriations, is "full reparation."[809]

330. The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles") provide that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[810]

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[807] *See* DR-CAFTA, Art. 10.7.2 (CL-0001-ENG/SPA) ("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."); *id.*, Art. 10.7.3 ("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.").

[808] *See, e.g.*, *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Co. Ltd. v. The Government of Mongolia and MonAtom LLC*, UNCITRAL, PCA Case No. 2011-09, Award on the Merits dated 2 Mar. 2015 ¶¶ 368-369 (CL-0114-ENG) (applying "the customary international law principles set out in the *Chorzów Factory* case" where "the liability of the Respondents having been established under the Foreign Investment Law – a Mongolian statute – and the ECT – an international treaty – . . . neither the ECT nor Mongolian law set out a specific standard of compensation for illegal expropriation"); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 ¶ 349 (CL-0159-ENG) ("The law applicable to the determination of compensation for a breach of such Treaty obligations [unlawful expropriation and fair and equitable treatment] is customary international law. The Treaty itself only provides for compensation for expropriation in accordance with the terms of the Treaty."); *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award dated 12 May 2005 ¶ 409 (CL-0062-ENG/SPA) ("[T]he Treaty offers no guidance as to the appropriate measure of damages or compensation relating to fair and equitable treatment and other breaches of the standards laid down in Article II. This is a problem common to most bilateral investment treaties and other agreements such as NAFTA. The Tribunal must accordingly exercise its discretion to identify the standard best attending to the nature of the breaches found.").

[809] *See, e.g.*, *Case Concerning the Factory at Chorzów (Merits) (Ger. v. Pol.)*, Judgment No. 13 dated 13 Sept. 1928, 1928 P.C.I.J., Series A-No. 17 (hereinafter "*Chorzów Factory*"), at 29 (CL-0232-ENG) ("[R]eparation, therefore, is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself."); *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶ 484 (CL-0162-EN) ("The customary international law standard for the assessment of damages resulting from an unlawful act is set out in the decision of the PCIJ in the *Chorzow Factory* case . . . ."); *LG&E Energy Corp. and others v. The Argentine Republic*, ICSID Case No. ARB/02/1, Award dated 25 July 2007 ¶¶ 30-31 (CL-0237-ENG) ("[T]he appropriate standard for reparation under international law is 'full' reparation as set out . . . in the *Factory at Chorzów* case and codified in Article 31 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts").

[810] Rep. of the Int'l Law Comm'n on the Responsibility of States for Internationally Wrongful Acts, 53rd Sess., UN Doc./56/10, reprinted in [2001] 2(2) Y.B. INT'L L. COMM'N 20, UN Doc. A/CN.4/SER.A/2001/Add.1 (hereinafter "ILC Articles"), Art. 31(1) (emphasis added) (CL-0123-ENG).

Specifically, ILC Articles 35 and 36 provide that "[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed," that the State "is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution," and that "compensation shall cover any financially assessable damage including loss of profits."[811]

331. Thus, in the landmark *Case Concerning the Factory at Chorzów*, the Permanent Court of International Justice ("PCIJ") held that:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that *reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed*.[812]

The PCIJ further explained that what is required is "restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; [and] the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it."[813]

332. Investor-State tribunals have widely applied this standard to compensate investors for damage unlawfully caused by States.[814] As the tribunal in *ADC v. Hungary* observed, "there can

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[811] ILC Articles, Arts. 35, 36 (CL-0123-ENG)

[812] *Chorzów Factory*, at 47 (emphasis added) (CL-0232-ENG); *see also ATA Construction, Industrial and Trading Co. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Decision on Interpretation and on the Request for Provisional Measures dated 7 Mar. 2011 ¶ 40 (CL-0238-ENG) (finding the *Chorzów Factory* standard to be a "universally acknowledged standard"); *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *Ad Hoc* Committee dated 25 Mar. 2010, ¶ 141 (CL-0239-ENG) ("The general test of '*full reparation*,' found in Article 31 of the ILC Draft Articles, can be simply stated. It is that classically formulated . . . in the *Chorzów Factory* Case . . . .") (emphasis in the original).

[813] *Chorzów Factory*, at 47 (CL-0232-ENG); *see also* DR-CAFTA, Art. 10.26.1 (CL-0001-ENG/SPA) ("Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.").

[814] *See, e.g.*, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award dated 28 Mar. 2011 ¶ 149 (CL-0253-ENG) ("It is generally admitted that in situations where the breach of the FET standard does not lead to total loss of the investment, the purpose of the compensation must be to place the investor in the same pecuniary position in which it would have been if respondent had not violated the BIT . . . .").

be no doubt about the present vitality of the *Chorzów Factory* principle, its full current vigor having been repeatedly attested to by the International Court of Justice."[815] Accordingly, as explained by the tribunal in *AAPL v. Sri Lanka*, "the amount of the compensation due has to be calculated in a manner that adequately reflects the full value of the investment lost as a result of said destruction and the damages incurred as a result thereof."[816]

333. Numerous tribunals have affirmed that this standard applies to determine compensation for unlawful expropriations,[817] as well as for violations of other investment treaty protections, including for failure to accord full protection and constant security and fair and equitable treatment, as well as for discriminatory or arbitrary treatment.[818]

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[815] *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶ 493 (CL-0162-ENG).

[816] *Asian Agricultural Prods. Ltd. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award dated 27 June 1990 ¶ 88 (CL-0254-ENG); *see also ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶ 495 (CL-0162-ENG) (holding that claimants should be awarded, "in the words of the *Chorzów Factory* decision, 'payment of a sum corresponding to the value which a restitution in kind would bear'"); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 ¶ 352 (CL-0159-ENG) (holding that "compensation must take into account 'all financially assessable damage' or 'wipe out all the consequences of the illegal act'"); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated 20 Aug. 2007 ¶ 8.2.7 (CL-0142-ENG) (holding that "the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action"); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008 ¶ 774 (CL-0085-ENG) (observing that "compensation is to cover '*any financially assessable damage including loss of profits insofar as it is established*'") (emphasis in original); *Petrobart Ltd. v. Kyrgyz Republic*, SCC Case No. 126/2003, Award dated 29 Mar. 2005, at 77-78 (CL-0255-ENG) (holding that "Petrobart shall so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred").

[817] *See Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 ¶¶ 349-352 (CL-0159-ENG); *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award dated 30 June 2009 ¶ 201 (CL-0145-ENG); *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶¶ 483-484 (CL-0162-ENG); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 ¶ 238 (CL-0208-ENG).

[818] *See, e.g., Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Cases Nos. ARB/05/18 and ARB/07/15, Award dated 3 Mar. 2010 ¶¶ 408, 451-452, 594 (CL-0163-ENG) (applying the customary international law standard of compensation to an unlawful expropriation and a violation of the FET obligation); *Gold Reserve, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award dated 22 Sept. 2014 ¶ 678 (CL-0256-ENG) (applying the customary international law standard of compensation to violation of the FET obligation); *Petrobart Ltd. v. Kyrgyz Republic*, SCC Case No. 126/2003, Award dated 29 Mar. 2005, at 77-78 (CL-0255-ENG) (applying the customary international law standard of compensation to violations of the FET and Effective Means obligations); *Occidental Exploration & Prod. Co. v. Ecuador*, LCIA Case No. UN3467, Final Award dated 1 July 2004 ¶¶ 200, 207-210 (CL-0200-ENG) (applying the customary international law standard of compensation to violations of the National Treatment, FET and Non-Impairment obligations); *National Grid plc v. Argentine Republic*, UNCITRAL, Award dated 3 Nov. 2008 ¶¶ 180, 190, 269-270 (CL-0257-ENG) (applying the customary international law standard of compensation to violations of the FET and Protection and Constant Security

334. Where, as here, the host State's measures constitute a treaty breach, including an unlawful expropriation, and the value of the investment increased from the date of the taking to the date of the award, the valuation date should be the date of the award, which is necessary in order to wipe out the consequences of the breach.[819]

335. Thus, in the *Chorzów Factory* case, where the PCIJ held that the compensation due the German Government had to cover the restitution value of the enterprise that had been expropriated in violation of the terms of the Geneva Convention, and given the likelihood that,

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obligations); *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award dated 24 Dec. 2007 ¶¶ 422-429 (CL-0050-ENG) (applying the customary international law standard of compensation to violations of the FET and Non-Impairment obligations); *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award dated 28 Sept. 2007 ¶¶ 304, 314, 400-403 (CL-0258-ENG) (applying the customary international law standard of compensation to violations of the FET obligation and the umbrella clause) (annulled on unrelated grounds); *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award dated 22 May 2007 ¶ 359 (CL-0259-ENG) (applying the customary international law standard of compensation to violations of the FET obligation and umbrella clause) (annulled on unrelated grounds); *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award dated 12 May 2005 ¶¶ 400-409 (CL-0062-ENG/SPA) (applying the customary international law standard of compensation to violations of the FET obligation and umbrella clause) (partially annulled on unrelated grounds); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated 20 Aug. 2007 ¶¶ 8.2.3-8.2.8 (CL-0142-ENG) (applying the customary international law standard of compensation to a violation of the FET obligation).

[819] *See, e.g., ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶¶ 496-497 (CL-0162-ENG) (finding that, where "the value of the investment after the date of expropriation . . . has risen . . . , the application of the *Chorzów Factory* standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed."); *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award dated 28 July 2015 ¶ 813 (CL-0260-ENG) ("The sum of compensation that the [t]ribunal arrives at should reflect the value of the [e]state that would have been received if restitution had been successful; that is, the value at the date of the [a]ward."); *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 ¶¶ 352-353 (CL-0159-ENG) ("The key difference between compensation under the Draft Articles and the *Factory at Chorzów* case formula, and Article 4(2) of the Treaty is that under the former, compensation must . . . 'wipe out all the consequences of the illegal act' as opposed to compensation 'equivalent to the value of the expropriated investment' under the Treaty . . . It is only logical that, if all the consequences of the illegal act need to be wiped out, the value of the investment at the time of this [a]ward be compensated in full."); *El Paso Energy Int'l Co. v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award dated 31 Oct. 2011 ¶¶ 706-707 (CL-0047-ENG/SPA) (finding that, because the expropriation was unlawful, "the property . . . is to be evaluated by reference not to the time of the dispossession, as in the case of a lawful expropriation, but to the time when compensation is paid," *i.e.*, the date of the award, because "[c]ompensation is in fact in lieu of restitution that 'has become impossible', so that it should correspond 'to the value which a restitution in kind would bear'"); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated 20 Aug. 2007 ¶¶ 8.2.3–8.2.5 (CL-0142-ENG) ("[T]he Treaty thus *mandates* that compensation for *lawful* expropriation be based on the *actual value* of the investment . . . However, it does not purport to establish a *lex specialis* governing the standards of compensation for *wrongful* expropriations . . . There can be no doubt about the vitality of [*Chorzów Factory*'s] statement of the damages standard under customary international law . . . It is also clear that such a standard permits, if the facts so require, a higher rate of recovery than that prescribed in Article 5(2) for lawful expropriations.") (emphases in the original).

but for Poland's conduct, the value of the enterprise would have had a higher value as of the date of judgment, the PCIJ explained that:

> It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated; in the present case, such a limitation might result in placing Germany and the interests protected by the Geneva Convention, on behalf of which interests the German Government is acting, in a situation more unfavorable than that in which Germany and these interests would have been if Poland had respected the said Convention. Such a consequence would not only be unjust, but also and above all incompatible with the aim of . . . the Convention . . . .[820]

336. Similarly, where the *ADC* tribunal concluded that Hungary had unlawfully expropriated the claimant's investment, the tribunal held that "application of the *Chorzów Factory* standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed."[821] Likewise, in *Siemens v. Argentina*, the tribunal held that:

> Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages. . . . It is only logical that, if all the consequences of the illegal act need to be wiped out, the value of the investment at the time of this Award be compensated in full. Otherwise compensation would not cover all of the consequences of the illegal act.[822]

337. As explained above, Guatemala's expropriation also was unlawful. 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.

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[820] *Chorzów Factory*, at 47 (CL-0232-ENG).

[821] *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶ 497 (CL-0162-ENG).

[822] *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 ¶¶ 352, 353 (CL-0159-ENG).

B. Full Reparation Includes Compensation For Lost Profits

338. Customary international law, as reflected in Article 36(2) of the ILC Articles, requires that compensation for an internationally wrongful act "cover any financially assessable damage, including loss of profits insofar as it is established."[823] Accordingly, compensation for future lost profits should be awarded when established,[824] as numerous investment arbitration tribunals have confirmed.[825]

339. Generally, lost profits are calculated using an Income Approach, where the future cash flows of the enterprise are projected and discounted back to the valuation date, as in a discounted cash flow ("DCF") analysis, or using a Market Approach, where a value for the enterprise is calculated by deriving a multiple from comparable publicly-traded companies or comparable transactions.[826]

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[823] ILC Articles, Art. 3(2) (CL-0123-ENG).

[824] *See, e.g.*, *The Government of the State of Kuwait v. The American Independent Oil Co.*, Final Award dated 24 Mar. 1982, 21 I.L.M. 976, ¶¶ 148-149 (1982) (CL-0261-ENG) (granting lost profits on the basis of "legitimate expectation" flowing from the concession agreement at issue); *Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co.*, Award dated 15 Mar. 1963, 35 I.L.R. 136, at 186 (1994) (CL-0241-ENG) ("The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international tribunals"); Stephen M. Schwebel and J. Gillis Wetter, *Some Little-Known Cases on Concessions*, 40 BRIT. Y.B. INT'L L. 183, 222 (1964) (CL-0262-ENG), discussing *Greek Telephone Co. v. Greece*, Award dated 3 Jan. 1935 (ruling that the claimant must be compensated "for what it would have obtained" had the State acted lawfully in regard to the concession); *May Case (Guatemala v. US)*, Award dated 16 Nov. 1900, 15 R.I.A.A. 47, 72 (1900) (CL-0263-ENG) (awarding lost profits for "all the profit to be derived from the railroad until the completion of the [concession] term"); *Delagoa Bay and East African Railway Co. (US and Great Britain v. Portugal)*, Award dated 30 Mar. 1900, excerpts reported in 3 MARJORIE WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1694, 1697 (1943) (CL-0264-ENG) (awarding both "damage that has been sustained and the profit that has been missed" following the annulment of a 35-year railroad concession notwithstanding that the concessionaire had not begun operations at the time the concession was annulled).

[825] *See, e.g.*, *Liberian Eastern Timber Corp. v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award dated 31 Mar. 1986, 2 I.L.R. 346, at 372 (1994) (CL-0265-ENG) (holding that claimant was "entitled to compensation for damages for both its lost investments and its foregone future profits" following the wrongful withdrawal of a forestry concession); *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Second Partial Award dated 21 Oct. 2002 ¶ 228 (CL-0266-ENG) (holding that "Canada should compensate [the claimant] for the net income streams that it lost" and thus awarding a measure of lost profits where claimant demonstrated that its business likely would have succeeded but for Canada's actions); *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶¶ 507, 514 (CL-0162-ENG) (awarding compensation on the basis of a DCF analysis set forth in a contemporaneous business plan); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008 ¶¶ 810-813 (CL-0147-ENG) (holding that, "[s]ince the value of that asset was directly linked to its potential to produce future income, there is no realistic alternative to using the DCF method to ascribe a value to it").

[826] Versant ¶¶ 20-21.

340. In order to recover expected lost profits, a claimant cannot be held to the impossible standard of establishing the amount of those future lost profits with absolute certainty. As the *Crystallex v. Venezuela* tribunal explained:

> [O]nce the *fact* of future profitability is established and is not essentially of speculative nature, the amount of such profits need not be proven with the same degree of certainty. In other words, the Claimant must prove that it has been deprived of profits that would have actually been earned. This requires proving that there is sufficient certainty that it had engaged or would have engaged in a profitmaking activity but for the Respondent's wrongful act, and that such activity would have indeed been profitable.[827]

341. The tribunal in *Lemire v. Ukraine* similarly recognized that a claimant cannot be expected to prove the amount of damages, particularly lost profits, with the same degree of certainty as the existence of damage:

> While the existence of damage is certain, calculating the precise amount of the compensation is fraught with much more difficulty, inherent in the very nature of the 'but for' hypothesis. Valuation is not an exact science. The Tribunal has no crystal ball and cannot claim to know what would have happened under a hypothesis of no breach; the best any tribunal can do is to make an informed and conscientious evaluation, taking into account all the relevant circumstances of the case, not unlike that made by anyone who assesses the value of a business on the basis of its likely future earnings.[828]

342. Similarly, the tribunal in *Impregilo v. Argentina* held that, while it was incumbent upon the claimant "[i]n principle . . . to prove that it suffered the damage for which it asks to be compensated," because "it cannot be established with certainty in what situation AGBA – and

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[827] *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated 4 Apr. 2016 ¶ 875 (emphasis in original) (CL-0153-ENG); *see also Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award dated 21 Nov. 2007 ¶ 285 (CL-0195-ENG) (holding that "lost profits are allowable insofar as the Claimants prove that the alleged damage is not speculative or uncertain – i.e., that the profits anticipated were probable or reasonably anticipated and not merely possible"); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated 20 Aug. 2007 ¶ 8.3.3 (CL-0142-ENG) (noting that "compensation for lost profits is generally awarded only where future profitability can be established (the fact of profitability as opposed to the amount) with some level of certainty"); 3 MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1837 (1943) (CL-0267-ENG) ("in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were reasonably anticipated; and that the profits anticipated were probable and not merely possible").

[828] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award dated 28 Mar. 2011, ¶ 248 (CL-0246-ENG).

thus Impregilo – would have been, had the Argentine Republic's breach of the fair and equitable treatment standard not occurred," "it would be unreasonable to require precise proof of the extent of the damage sustained by Impregilo."[829] The tribunal thus ruled that, "[i]nstead, reasonable probabilities and estimates have to suffice as a basis for claims for compensation."[830] Likewise, the tribunal in *Kardassopoulos v. Georgia* observed that the "principle articulated by the vast majority of arbitral tribunals . . . does not impose on the Parties any burden of proof beyond a balance of probabilities."[831] The *ad hoc* committee in *Rumeli v. Kazakhstan* agreed, holding that "[t]he fact that the [valuation] exercise is inherently uncertain is not a reason for the tribunal to decline to award damages," and that it was "enough . . . to admit with sufficient probability the existence and the extent of the damage."[832]

343. Indeed, were a tribunal to impose upon a party an evidentiary burden so onerous that it cannot possibly be discharged, the tribunal would violate the principle of equal treatment of the parties. As the tribunal in *Achmea v. Slovak Republic* explained:

> It is for Claimant to prove its case regarding the 'damage caused'. That said, *the requirement of proof must not be impossible to discharge*. Nor must the requirement for reasonable precision in the assessment of the quantum be carried so far that the search for exactness in the quantification of losses becomes disproportionately onerous when compared with the margin of error.[833]

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[829] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award dated 21 June 2011, ¶ 371 (CL-0045-ENG/SPA).

[830] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award dated 21 June 2011, ¶ 371 (CL-0045-ENG/SPA).

[831] *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award dated 3 Mar. 2010 ¶ 229 (CL-0163-ENG) (quoting *Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co.*, Award dated 15 Mar. 1963, 35 ILR 136, at 187-188 (1994)).

[832] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision on Annulment dated 25 Mar. 2010 ¶ 144 (CL-0239-ENG) (quoting *Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co.*, Award dated 15 Mar. 1963, 35 ILR 136, at 187-188 (1994)).

[833] *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic [I]*, PCA Case No. 2008-13, Final Award dated 7 Dec. 2012 ¶ 323 (emphasis added) (CL-0268-ENG); *see also* MARK KANTOR, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE 73 (Kluwer Law Int'l 2008) (CL-0269-ENG) ("[T]he amount of lost profits does not need to be established concretely or with certainty. That would place an *almost insurmountable burden on the claimant and benefit the party who caused the damage* and prevent the claimant from being able to prove concretely its loss. In order to be entitled to lost profits, the claimant must show with reasonable certainty that profits would have been made absent the respondent's actions. Once a claimant is able to show with reasonable certainty the fact of loss of profits, the claimant then needs only to provide a basis upon which a tribunal can reasonably estimate the extent of the claimant's loss of profits. This approach strikes a balance between the need for evidence upon which a tribunal may base an award of lost profits and the recognition

Thus, while a claimant must demonstrate that the respondent State's conduct caused it damage, it need only prove, by a standard of "reasonable" or "sufficient probability," that is, "not . . . beyond a balance of probabilities," the amount of damage it has sustained.[834]

C. As An Alternative, Tribunals May Award Compensation For A Claimant's Lost Opportunity To Earn Profits

344. Where a claim for lost profits based on the Income or Market approaches is either not appropriate or feasible, because future revenue streams are too uncertain, a tribunal nonetheless may award compensation for the value of a lost opportunity, or chance, to make a profit.[835] As the *Gemplus v. Mexico* tribunal observed, the concept of damages for the loss of a chance (opportunity) is a general principle of law, and there is "no doubt that similar principles form part of international law."[836]

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that the difficulty in proving damages stems from the respondent's action.") (quoting John Y. Gotanda, *Assessing Damages in International Commercial Arbitration: A Comparison with Investment Treaty Disputes*, *presented at* BIICL 8th Annual Investment Treaty Forum, 11 May 2007) (emphasis added).

[834] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award dated 21 June 2011 ¶ 371 (CL-0045-ENG/SPA); *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award dated 3 Mar. 2010 ¶ 229 (CL-0163-ENG) (quoting *Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co.*, Award dated 15 Mar. 1963, 35 ILR 136, at 187-188 (1994)).

[835] SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 291 (2008) (CL-0233-ENG); *see also Société Ouest Africaine des Bétons Industriels v. Republic of Senegal*, ICSID Case No. ARB/82/1, Award dated 25 Feb. 1988, English translation of French original *reprinted in* 2 ICSID REP. 190 ¶¶ 7.13, 12.05 (1994) (CL-0234-ENG) (claimant awarded compensation based on the "loss of opportunity," as it was "impossible to calculate the profits that would have been made had the parties' relations not been terminated").

[836] *Gemplus S.A.*, et al. *v. The United Mexican States*, ICSID Cases No. ARB(AF)/04/3 & ARB(AF)/04/4, Award dated 16 June 2010 ¶ 13-90 (CL-0155-ENG/SPA); *see also Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 dated 2 Aug. 2010 ¶ 246 (CL-0235-ENG) ("[I]t may be possible for such damages to be quantified as compensation for the loss of a chance even if (which the Tribunal does not here decide) such damages could not be characterised as compensation for the loss of an 'automatic' or 'perfected' right to a mining exploitation concession . . . ."); *Société Ouest Africaine des Bétons Industriels v. Republic of Senegal*, ICSID Case No. ARB/82/1, Award dated 25 Feb. 1988, 2 ICSID Rep. 190, at 257 ¶ 7.13 (CL-0008-ENG/FR) (explaining that "[w]hat gives rise to the claim in damages is not the loss of profits itself, but rather the loss of opportunity, the value of which is set in the discretion of the judge or arbitrator, as the case may be."); *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award dated 20 May 1992, 3 ICSID Rep. 189, at 240-241 ¶¶ 215-218 (CL-0209-ENG) (finding that, although the project had not been operating long enough to award damages based on a DCF calculation, the claimant was entitled to compensation for the loss of the "opportunity of making a commercial success of the project.").

345. The *Gemplus* claimants partially owned a Mexican company, which held a concession to operate a national vehicle registry.[837] The tribunal determined that it could not value the claimants' losses using a DCF approach because, as a result of earlier measures taken by the State, the concession had not been operating as a going concern as envisaged in the concession agreement when Mexico displaced the concessionaire and ultimately revoked the concession agreement.[838] Nor did the tribunal find the respondent's proposed sunk costs approach (*i.e.*, awarding claimants the amounts they had invested, without regard to any lost profits or loss of opportunity to make a profit) to be appropriate.[839] Instead, it used a "middle course," and valued the claimants' shares in the concession "by reference (inter alia) to the Concessionaire's reasonably anticipated loss of future profits . . . ."[840]

346. In doing so, the *Gemplus* tribunal relied on the claimants' forecasted future income, but not their DCF methodology, characterizing this as "a modified form of the income-based approach,"[841] and finding support for the same in the jurisprudence of other international tribunals, the work of the International Law Commission, and in many national legal systems, as reflected in the UNIDROIT Principles.[842]

347. Turning to "the quality of the evidential proof" required to establish lost future income, the *Gemplus* tribunal observed that, while the ILC's commentary appeared to emphasize the element of "certainty," the legal authorities cited in the commentary made clear "that the concept

[837] *Gemplus S.A.*, et al. *v. The United Mexican States*, ICSID Cases No. ARB(AF)/04/3 & ARB(AF)/04/4, Award dated 16 June 2010, ¶¶ 4-41 – 4-43 (CL-0155-ENG/SPA).

[838] *Id*. ¶¶ 13-70 – 13-72.

[839] *Id*. ¶ 13-73.

[840] *Id*. ¶ 13-75; *see also Bilcon of Delaware, Inc.*, et al. *v. Government of Canada*, UNCITRAL, Award on Damages, Concurring Opinion of Professor Bryan P. Schwartz dated 10 Jan. 2019 ¶ 9 (CL-0244-ENG) (characterizing this as an "in-between approach" to valuation, between the DCF-based calculation of lost profits and the recovery of sunk costs, which is supported by international law and "in which the investor is compensated for a lost opportunity – not a certainty – of obtaining regulatory approval and otherwise being able to proceed with the project, absent the internationally wrongful act.").

[841] *Gemplus S.A.*, et al. *v. The United Mexican States*, ICSID Cases No. ARB(AF)/04/3 & ARB(AF)/04/4, Award dated 16 June 2010 ¶ 13-75 (CL-0155-ENG).

[842] *Id*. ¶¶ 13-83 – 13-90.

of certainty is both relative and reasonable in its application, to be adjusted to the circumstances of the particular case."[843]

348. The *Gemplus* further observed that Article 7.4.3(1) of the UNIDROIT Principles, which "broadly restate[s]" a general principle from several national legal systems,[844]

> requires a '*reasonable degree of certainty*' for establishing compensation for future harm, thereby further confirming that the requirement for certainty in proving a claimant's claim for compensation is relative and not incompatible with an award of compensation for loss of opportunity.[845]

Indeed, the UNIDROIT Principles recognize the notion that "[c]ompensation may be due for the loss of a chance in proportion to the probability of its occurrence."[846]

349. The *Gemplus* tribunal further noted that the arbitrator in *Sapphire v. National Iranian Oil Company* awarded compensation for loss of opportunity, even though the claimant had not yet prospected the concession area and, thus, was unable to establish lost profits:[847]

> Since the question concerns the concession of an area which has not yet been prospected and where therefore the presence of oil-bearing beds in commercially workable quantities was and still is today uncertain, the existence of damage is not without doubt. No one today can affirm that the operation would have been profitable, and no one can deny it. But if the existence of damage is uncertain, it is nevertheless clear that *the plaintiff had an opportunity* to discover oil, an opportunity which both parties regarded as very favourable. Does the loss of this opportunity give the right to compensation?

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[843] *Gemplus S.A.*, et al. *v. The United Mexican States*, ICSID Cases No. ARB(AF)/04/3 & ARB(AF)/04/4, Award dated 16 June 2010 ¶¶ 13-82 – 13-83 (citing JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 228, ¶ 27 (2002)) (CL-0155-ENG).

[844] *Gemplus S.A.*, et al. *v. The United Mexican States*, ICSID Cases No. ARB(AF)/04/3 & ARB(AF)/04/4, Award dated 16 June 2010 ¶ 13-90 (CL-0155-ENG).

[845] *Id.* ¶ 13-88 (emphasis added).

[846] *See* UNIDROIT Principles of International Commercial Contracts 2016, available at https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf, Art. 7.4.3 (CL-0240-ENG) ("Certainty of Harm. (1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty. (2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence. (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.").

[847] *Gemplus S.A.*, et al. *v. The United Mexican States*, ICSID Cases No. ARB(AF)/04/3 & ARB(AF)/04/4, Award dated 16 June 2010 ¶ 13-84 (CL-0155-ENG); *see also Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co.*, Award dated 15 Mar. 1963, 35 ILR 136, at 187-188 (1994) (CL-0241-ENG).

> *It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage.*[848]

350. Relying on expert testimony indicating that the prospect of discovering oil was "highly likely," the *Sapphire* tribunal awarded the claimant damages for this opportunity lost as a result of the respondent's unlawful conduct:

> [I]t is highly likely that the geological characteristics common to every oil-bearing territory are to be found in the territory granted to Sapphire under the concession, which is situated in a region very rich in oil. The geological conditions of this territory make it possible to affirm that there is a very strong chance, but not a certainty, that deposits of commercially workable oil exist in the concession area. The expert supported his evidence by reference to similar conclusions formulated by other geologists and other oil companies . . . .[849]

351. The *Gemplus* tribunal also endorsed the *Sapphire* tribunal's burden-of-proof reasoning quoted above, observing that, "as a general legal principle, when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound the respondent's wrongs and unfairly defeat the claimant's claim for compensation."[850] The tribunal concluded that, "confronted by evidential difficulties created by the respondent's own wrongs, [it] considers that the claimant's burden of proof may be satisfied to the tribunal's satisfaction, subject to the respondent itself proving otherwise."[851]

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[848] *Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co.*, Award dated 15 Mar. 1963, 35 ILR 136, at 187-188 (1994) (emphasis added); *see also Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award dated 20 May 1992, 3 ICSID Rep. 189, at 240 ¶ 215 (CL-0209-ENG) (awarding damages for loss of opportunity and acknowledging that, although "[t]his determination necessarily involves an element of subjectivism and, consequently, some uncertainty," "it is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred.").

[849] *Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co.*, Award dated 15 Mar. 1963, 35 ILR 136, at 188 (1994) (CL-0241-ENG).

[850] *Gemplus S.A.*, et al. *v. The United Mexican States*, ICSID Cases No. ARB(AF)/04/3 & ARB(AF)/04/4, Award dated 16 June 2010 ¶ 13-92 (CL-0155-ENG) (referring to *Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co.*, Award dated 15 Mar. 1963, 35 ILR 136, at 187-188 (1994) (CL-0241-ENG)).

[851] *Id.*; *see also Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision on Annulment dated 25 Mar. 2010 ¶ 145 (CL-0147-ENG) ("[I]n assessing the damages attributable to the loss of the claimants' opportunity to make a commercial success of the project, '. . . it is well settled that the fact that damages cannot be assessed with certainty is no reason not to award

352. More recently, the tribunal in *Bilcon v. Canada* found that Canada had breached the minimum standard of treatment under NAFTA Article 1105 by failing to afford the claimants' investment a "fair *opportunity*" to have its environmental assessment for a quarry and maritime terminal considered in accordance with applicable laws.[852] Instead, the Canadian federal and provincial governments accepted the report of a joint review panel, which recommended rejecting the permit application on the grounds of a newly-constructed legal standard, holding that the project did not satisfy "community core values."[853] Because the quarry and maritime terminal had not been permitted and, therefore, never had operated, and in light of other factors possibly affecting the project's long-term future profitability, the tribunal declined to calculate damages for lost profits using a DCF approach.[854]

353. The *Bilcon* tribunal nonetheless held that value was attributable to the opportunity to have the environmental impact of the [project] assessed in a fair and non-arbitrary manner, which opportunity the claimants had lost as a result of the respondent's treaty breach.[855] The tribunal found that "the minimum value of the opportunity lost" corresponded approximately to the amount the investors had expended.[856] However, as that amount did "not reflect any prospect that return on the investment might have been generated in the event of the successful permitting, construction and operation of the [project]," the tribunal examined prior transactions concerning the quarry site.[857] Recognizing that "[n]o reasonable business person would spend over US$ [amount redacted] on an opportunity whose value does not exceed that amount by some reasonable margin,"[858] the tribunal observed that "even where income-based approaches are inappropriate in view of the uncertainty of future income streams, the prospect of future

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damages when a loss has been incurred.'") (quoting *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award dated 20 May 1992, 3 ICSID Rep. 189, at 240 ¶ 215).

[852] *Bilcon of Delaware, Inc.*, et al. *v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability dated 17 Mar. 2015, ¶ 603 (emphasis in original) (CL-0242-ENG).

[853] *Id*. ¶ 594.

[854] *Id*. ¶¶ 276-279.

[855] *Id*. ¶ 280.

[856] *Id*. ¶ 287.

[857] *Id*.

[858] *Id*. ¶ 288.

earnings must not be disregarded entirely;" rather, "[s]uch prospects inform the value of the opportunity that a claimant has lost."[859]

354. In his concurring opinion, Professor Bryan Schwartz agreed that international law supported compensating an investor "for a lost opportunity – not a certainty – of obtaining regulatory approval and otherwise being able to proceed with the project, absent the internationally wrongful act."[860] He also explained that the lost opportunity approach in the case at hand called for a particular method of valuation: "Damages would have [to be] based on multiplying two estimates: first, the probability of obtaining regulatory approval based on the evidence of legal experts, and second, the likely future profits in the event of regulatory approval based on the evidence of the experts on business projections."[861]

355. Professor Schwartz further explained that the tribunal largely focused on past expenditures in determining damages, in light of its finding that the claimants had failed to mitigate their damages by not pursuing Canadian court review of the adverse permitting decision.[862] The tribunal thus unanimously found that it would not have been just to award the claimants lost profits calculated over 50 years for a project they did not pursue further by seeking such judicial review.[863] Had the claimants challenged the permit denial in court and lost, Professor Schwartz explained, they could have recovered damages both for the costs of the domestic litigation and the consequential delays in starting operations, and, most importantly, for lost profits based on projected earnings.[864]

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[859] *Bilcon of Delaware, Inc.*, et al. *v. Government of Canada*, UNCITRAL, Award on Damages dated 10 Jan. 2019, ¶ 288 (CL-0243-ENG) (citing *Gemplus S.A.*, et al. *v. The United Mexican States*, ICSID Cases No. ARB(AF)/04/3 & ARB(AF)/04/4, Award dated 16 June 2010 ¶ 13-70 (CL-0155-ENG)).

[860] *Bilcon of Delaware, Inc.*, et al. *v. Government of Canada*, UNCITRAL, Award on Damages, Concurring Opinion of Professor Bryan P. Schwartz dated 10 Jan. 2019 ¶ 9 (CL-0244-ENG).

[861] *Id*. ¶ 14.

[862] *Id*. ¶¶ 5-6.

[863] *Id*. ¶¶ 17, 19, 36.

[864] *Bilcon of Delaware, Inc.*, et al. *v. Government of Canada*, UNCITRAL, Award on Damages, Concurring Opinion of Professor Bryan P. Schwartz dated 10 Jan. 2019 ¶ 34 (CL-0244-ENG).

D. Interest Should Accrue At An Appropriate Commercial Rate Running From The Date Of Valuation To The Date Of Payment Of The Award

356. It is firmly established that an award of interest is necessary to ensure full reparation for wrongful conduct.[865] That an award of interest is an integral element of the full reparation principle under international law has been widely acknowledged by international tribunals.[866]

357. As the ILC Articles recognize, to compensate the injured party interest must run until the date the obligation to pay is fulfilled, *i.e.*, until the date of payment.[867] In their review of the subject, Sir Elihu Lauterpacht and Penelope Nevill observe that this principle was recognized multilaterally in the Decision of the Governing Council of the United Nations Compensation Commission of 18 December 1992,[868] and, more generally, that "[i]nternational courts and tribunals for the most part now award post-award interest, including the regional human rights courts, the European Union courts, and arbitral tribunals."[869] This principle also has been affirmed by many investor-State arbitral tribunals.[870]

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[865] ILC Articles, Art. 38 (CL-0123-ENG).

[866] *See id.*, Art. 38, cmt. (2) ("Support for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence."); *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated 4 Apr. 2016 ¶¶ 930-932 (CL-0153-ENG) ("The substantive international legal obligation to pay interest on monies due is well established. An authoritative statement of the position is to be found in Article 38(1) of the ILC Articles.... Indeed, an award of interest is an integral component of the full reparation principle under international law, because, in addition to losing its property and other rights, an investor loses the opportunity to invest funds or to pay debts using the money to which that investor was rightfully entitled."); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Award dated 27 Nov. 2013 ¶ 251 (CL-0063-ENG/SPA) ("[I]t is undisputable that the delay incurred by the creditor... in receiving the payment of the amount of money due to it must be compensated through the awarding of interest at an appropriate rate. This is required in order to compensate a creditor for the lack of use of the funds (*i.e.* reflecting 'the time value of money') and 'to the extent that is necessary to ensure full reparation.'") (quoting ILC Articles, Art. 38, cmt (2)); *see also* Elihu Lauterpacht and Penelope Nevill, *The Different Forms of Reparation: Interest*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 613, at 614 (James Crawford, Alain Pellet and Simon Olleson, eds. 2010) (CL-0245-ENG).

[867] ILC Articles, Art. 38, cmt. (2) (CL-0123-ENG).

[868] Elihu Lauterpacht and Penelope Nevill, *The Different Forms of Reparation: Interest*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 613, at 615 (James Crawford, Alain Pellet and Simon Olleson, eds. 2010) (CL-0245-ENG) (quoting Decision of the Governing Council of the UNCC of 18 Dec. 1992, S/AC.26/1992/16, as follows: "Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.").

[869] Elihu Lauterpacht and Penelope Nevill, *The Different Forms of Reparation: Interest*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 613, at 617 (James Crawford, Alain Pellet and Simon Olleson, eds. 2010) (CL-0245-ENG).

[870] *See, e.g.*, *Ioannis Kardassopoulos & Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 & ARB/07/15, Award dated 3 Mar. 2010 ¶ 677 (CL-0163-ENG) ("[I]nterest is to be awarded at such a rate so as to

358. The rate of interest must be set at the level necessary to ensure full reparation in the circumstance and, as such, requires a case-specific assessment. As the commentary to ILC Article 38 explains, "[t]he interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act."[871]

359. The circumstances of this case include that Article 10.26.1 of the DR-CAFTA provides for the award of "any applicable interest,"[872] and Articles 10.7.3 and 10.7.4 of the DR-CAFTA provide that, to be lawful, an expropriation must be accompanied by compensation that includes "interest at a commercially reasonable rate . . . accrued from the date of expropriation until the date of payment."[873] As the DR-CAFTA thus requires compensation to include interest at a commercially reasonable rate until the date of payment in the case of a lawful expropriation, any award of compensation in this case for an unlawful expropriation or other violations of the Treaty likewise must be accompanied by interest at least at that level.[874]

360. Further, the overwhelming majority of investment treaty tribunals award interest on a compound basis. That is because, as the tribunal in *Wena Hotels v. Egypt* observed, "it is neither

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achieve full reparation and runs from the date when the principal sums should have [been] paid until the obligation to pay is fulfilled."); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award dated 28 Mar. 2011 ¶ 364 (CL-0246-ENG) ("Interest shall continue to accrue, until all amounts owed in accordance with this Award have been finally paid."); *Occidental Petroleum Corp. and Occidental Exploration and Prod. Co. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award dated 5 Oct. 2012 ¶ 847 (CL-0184-ENG) ("[T]he Tribunal concludes that . . . interest should run until the date of payment of the present Award, in accordance with established practice . . . .").

[871] ILC Articles, Art. 38, cmt. (10) (CL-0224-ENG).

[872] DR-CAFTA, Art. 10.26.1 (CL-0001-ENG/SPA).

[873] *Id*. Arts. 10.7.3 and 10.7.4; *see also Murphy Exploration & Prod. Co. – Int'l v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award dated 6 May 2016 ¶ 511 (CL-0203-ENG) (noting that where "the Treaty is silent on interest applicable to an award of compensation for breach of the FET standard . . . , the Tribunal finds guidance on the matter in Article 38 of the ILC Articles on State Responsibility").

[874] *See* IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 73 ¶ 3.81 (2nd ed. 2017) (CL-0247-ENG) (noting that compensation for unlawful conduct cannot be at a level less than that which would be owed for a lawful taking, that "the financial consequences of lawful and unlawful behaviour would otherwise be the same," and that "[t]his would not be in the interest of legal justice and [would] run counter the general preventive function of law.").

logical nor equitable to award the claimant only simple interest."[875] The *Continental Casualty v. Argentina* tribunal explained:

> The time value of money in free market economies is measured in compound interest; simple interest cannot be relied upon to produce full reparation for a claimant's loss occasioned by delay in payment; and under many national laws recently enacted, an arbitration tribunal is now expressly empowered to award compound interest.[876]

361. Even as of 2010, "the balance of investment treaty tribunal practice ha[d] shifted towards awarding compound interest where requested by the claimant."[877] This trend has continued, with the vast majority of investment treaty tribunals in the last decade awarding compound interest.[878]

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[875] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award dated 8 Dec. 2000 ¶ 129 (CL-0151-ENG) (quoting John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 AMER. J. INT'L L. 40, 61 (1996)).

[876] *Continental Casualty Co. v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award dated 5 Sept. 2008, ¶ 309 (CL-0248-ENG); *see also, e.g., Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006 ¶ 440 (CL-0149-ENG/SPA) ("The Tribunal considers that compound interest reflects the reality of financial transactions, and best approximates the value lost by an investor."); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 ¶ 251 (CL-0208-ENG) ("The Tribunal considers that compound interest is more in accordance with the reality of financial transactions and a closer approximation to the actual value lost by an investor."); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award dated 8 Dec. 2000 ¶ 129 (CL-0151-ENG) ("[A]n award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations."); *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated 1 June 2009 ¶ 595 (CL-0167-ENG) ("[T]he Tribunal is certain that in recent times compound interest has indeed been awarded more often than not, and is becoming widely accepted as an appropriate and necessary component of compensation for expropriation."); *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award dated 12 Apr. 2002 ¶ 174 (CL-0137-ENG) ("[I]nternational jurisprudence and literature have recently, after detailed consideration, concluded that interest is an integral part of the compensation due after the award and that compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases").

[877] Elihu Lauterpacht and Penelope Nevill, *The Different Forms of Reparation: Interest*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 613, at 620 (James Crawford, Alain Pellet and Simon Olleson, eds. 2010) (CL-0245-ENG); *see also id.*, n. 29 (listing 19 case examples).

[878] *See, e.g., Ioan Micula and Others v. Romania*, ICSID Case No. ARB/05/20, Award dated 11 Dec. 2013 ¶ 1266 (CL-0249-ENG) ("The overwhelming trend among investment tribunals is to award compound rather than simple interest. The reason is that an award of damages (including interest) must place the claimant in the position it would have been had it never been injured."); *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. The Argentine Republic*, ICSID Case No. ARB/03/19, Award dated 9 Apr. 2015 ¶ 65 (CL-0250-ENG) ("[I]nternational tribunals manifest a growing tendency to apply compound rather than simple interest in damage calculations."); *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corp. v. Romania*, ICSID Case No. ARB/10/13, Award dated 2 Mar. 2015 ¶ 519 (CL-0251-ENG) ("Compound interest is increasingly recognised in the field of investment protection as better reflecting current business and economic reality, therefore actual damages suffered by a party."); *Khan Resources Inc., Khan Resources B.V. & CAUC Holding Co. Ltd. v. Government of Mongolia & MonAtom LLC*, PCA Case No. 2011-09, Award on the Merits dated 2 Mar. 2015 ¶ 425 (CL-0114-ENG) ("It is also consistent with recent practice to [award] compound interest, rather than to award it on a simple

E. Claimants Are Entitled To Compensation For Lost Profits As Well As Loss Of Opportunity, And Applicable Interest

362. As explained below, Claimants have suffered damages in the amount of US$ 403 to US$ 450 million as a result of Guatemala's Treaty breaches.

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.[879] At the time, its operations were arbitrarily and unlawfully suspended, Exmingua had been operating a mine that was intended to process gold from several deposits, which had already been explored and their potential to be mined for gold established. It also expected to expand mining to additional deposits on Tambor, all the while conducting further exploration to target its future operations.[880] As explained above, Eximgua's current value is nil, as it is no longer operating and earning revenue from mining, its concentrate has

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basis (as used to be the prevailing view)."); *Quasar de Valores SICAV S.A. and Others v. The Russian Federation*, SCC, Award dated 20 July 2012 ¶ 226 (CL-0270-ENG) ("[T]he Tribunal considers that the Claimants' position should prevail on the footing that the proper measure of compensation under general principles of international law should put them into the position they would have been in if there had been compliance with the BIT, that is to say compensation would have been paid to the Claimants upon expropriation of Yukos and they would have been in a position to earn interest thereon. The tribunal accepts that as a matter of realism this includes the compounding of interest.") (set aside on unrelated grounds); *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award dated 16 Sept. 2015 ¶ 524 (CL-0226-ENG) ("[A] review of arbitral decisions shows that compound interest has been deemed to 'better reflect[] contemporary financial practice' and to constitute 'the standard of international law in [] expropriation cases.' The view that compound interest better achieves full reparation has been adopted in a large number of decisions and is shared by this Tribunal."); *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award dated 17 Dec. 2015 ¶¶ 555-556 (CL-0271-ENG) ("The Tribunal has little difficulty accepting that interest should be compounding. In modern practice, tribunals often compound interest. . . . In essence, compounding interest reflects simple economic sense. Business people invest money and expect some yield from it."); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Award dated 27 Nov. 2013 ¶ 261 (CL-0063-ENG/SPA) ("The trend towards granting compound interest in investment awards reflects the different status and position of investors in such disputes from that of States in inter-States disputes, since investors operate in a commercial environment."); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award dated 22 Sept. 2014 ¶ 854 (CL-0205-ENG) ("While awarding simple interest was once the norm in investment arbitration . . . there has been an evident shift in investment treaty cases in recent years towards awarding compound interest. Compound interest better reflects current business and economic realities and therefore the actual damage suffered by a party.") (internal citations omitted); *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated 4 Apr. 2016 ¶ 935 (CL-0153-ENG/SPA) ("With regard to the issue of whether such interest should be simple or compound, the Tribunal decides that such interest should be compound. . . . [M]ore recently, it has become increasingly recognized that simple interest may not adequately ensure full reparation for the loss suffered and the award of interest on a compound basis is therefore not excluded. This is because modern financial activity normally involves compound interest.") (internal citations omitted).

[879] Versant ¶ 18.

[880] *See supra* § II.A; Kappes ¶¶ 122-126.

been seized and impounded, and it is foreclosed from obtaining an exploitation license for the Santa Margarita area. 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.[881]

364. But for Respondent's breaches, Exmigua would have continued operating the mine and would have expanded mining to other deposits. It would have also continued exploration and development in order to determine how and when to mine the various deposits. Exmingua thus not only lost its operating cash flow and resulting profits from the mining operation that was shut down, but it also lost the opportunity to define and develop further mineral resources. As such, Exmingua's value is a reflection of its projected future cash flows from operations as well as the likelihood that it would advance potential resources in the license areas that it could then mine and process into gold concentrate. As demonstrated above, both of these aspects of loss are recoverable, as Claimants are entitled to be placed in the position that they would have been absent the breaches.[882] Here, this requires compensating Claimants for Exmingua's loss in value as a result of the seizure of its concentrate, the lost profits that Exmingua would have earned had its operations not been suspended, and the loss of Exmingua's opportunity to define and develop mineral resources.

365. Versant valued Exmingua in the but-for scenario, *i.e.*, as if there had been no Treaty breaches, as of a current date. Versant chose 31 March 2020 as the valuation date, and will move that date into the future with its next report.[883] Valuing Exmingua as of a date as close as possible to the date of the Award – in other words, conducting an *ex post* valuation – is necessary in this case. As Versant explains:

[881] Versant ¶ 79; Exmingua, 2015 Income Statement (C-0239-ENG); Exmingua, 2016 Balance Sheet and Income Statement (C-0227-ENG/SPA); Public deed 448242 dated 22 Jan. 2009 (C-0071-SPA/ENG); Exmingua Shares Registry, Certificate no. 3 (C-0072-ENG/SPA); Purchase Agreement executed by and among Radius (Cayman) Inc., Minerales KC and KCA dated 29 Aug. 2012 (C-0073-ENG); Exmingua Shares Registry, Certificates no. 2 and 4. (C-0074-SPA/ENG) (on 4 Sept. 2012, Radius Cayman Inc. endorsed 41 shares of Exmingua to Minerales KC and Pedro Rafael García Varela endorsed 1 share of Exmingua to Mr. Kappes); Exmingua Shares Registry, Certificate no. 1. (C-0075-SPA/ENG) (on 4 Sept. 2012, Radius Cayman Inc. endorsed 42 shares of Exmingua to Mr. Kappes).

[882] *See supra* §§ IV.B, IV.C.

[883] Versant ¶¶ 18, 80.

> For projects like the Tambor Project, significant value is created by advancing the exploration, gathering information, and preparing for exploitation. The delays caused by the Measures deprived Claimant of making those advancements and increasing value. An *ex ante* valuation of the Tambor Project would not reflect this increase in value. Therefore, to arrive at full reparation, we implement an *ex-post* analysis.[884]

366. In order to place Claimants in the position they would have been absent Guatemala's breach, as is required under customary international law, it is therefore necessary to conduct an *ex post* valuation. This is further borne out by jurisprudence, in which investment tribunals consistently have held that, where a State commits an unlawful expropriation and the value of the claimant's investment increased after the date of the expropriation, the claimant – and not the State – ought to benefit from that increase in value.[885] Here, the value of the Tambor Project has increased during the past four years as the price of gold has increased.[886] Moreover, as SRK and Versant explain in their respective reports, the Tambor Project would have been worth more today than four years ago, had Respondent not expropriated the investment, because exploration

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[884] *Id.* ¶ 106; *see also id.* ("The valuations we performed reflect a profile consistent with *expectations* prior to the impact of the Measures.").

[885] *See, e.g., ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 Oct. 2006 ¶¶ 496-497 CL-0162-ENG) (finding that, where "the value of the investment after the date of expropriation . . . has risen . . . , the application of the *Chorzów Factory* standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed."); *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award dated 28 July 2015 ¶ 813 (CL-0157-ENG) ("The sum of compensation that the [t]ribunal arrives at should reflect the value of the [e]state that would have been received if restitution had been successful; that is, the value at the date of the [a]ward."); *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award dated 6 Feb. 2007 ¶¶ 352-353 (CL-0159-ENG) ("The key difference between compensation under the Draft Articles and the *Factory at Chorzów* case formula, and Article 4(2) of the Treaty is that under the former, compensation must . . . 'wipe out all the consequences of the illegal act' as opposed to compensation 'equivalent to the value of the expropriated investment' under the Treaty . . . It is only logical that, if all the consequences of the illegal act need to be wiped out, the value of the investment at the time of this [a]ward be compensated in full."); *El Paso Energy Int'l Co. v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award dated 31 Oct. 2011 ¶¶ 706-707 (CL-0047) (finding that, because the expropriation was unlawful, "the property . . . is to be evaluated by reference not to the time of the dispossession, as in the case of a lawful expropriation, but to the time when compensation is paid," *i.e.*, the date of the award, because "[c]ompensation is in fact in lieu of restitution that 'has become impossible', so that it should correspond 'to the value which a restitution in kind would bear'"); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated 20 Aug. 2007 ¶¶ 8.2.3-8.2.5 (CL-0142-ENG) ("[T]he Treaty thus *mandates* that compensation for *lawful* expropriation be based on the *actual value* of the investment . . . However, it does not purport to establish a *lex specialis* governing the standards of compensation for *wrongful* expropriations . . . There can be no doubt about the vitality of [*Chorzów Factory*'s] statement of the damages standard under customary international law . . . It is also clear that such a standard permits, if the facts so require, a higher rate of recovery than that prescribed in Article 5(2) for lawful expropriations.") (emphases in the original).

[886] Versant ¶¶ 125-126, Figure 9.

would have advanced rendering Exmingua more valuable.[887] As in *ADC v. Hungary*, Claimants are therefore entitled to compensation in the amount of the current value of Exmingua absent Respondent's breaches.

367. As of the date of Guatemala's breaches, the Tambor Project had components of both a production and an exploration property. This warrants utilizing different valuation methodologies to value different aspects of Exmingua and to calculate Claimants' damages. Relying on contemporaneous reports and data, SRK identified 14 zones or deposits comprising the Tambor Project, 11 of which are valued for purposes of calculating Claimants' damages. The resources in these zones are only valued once, in one of the three categories described below.[888] As SRK explains, the category in which they are categorized depends on various factors, most notably their development status, including the amount of exploration that has taken place.[889]

368. Three of the zones on Tambor, namely, Guapinol, Poza del Coyote, and Laguna Norte had defined mineral resources and were the object of the mine, which processed high-grade ore in the operating flotation plant (the "Operating Mine"). The Operating Mine is valued using a discounted cash flow method, with inputs from a life of mine plan ("LoM Plan") derived from historical operating and financial data and forecasts as to how the mine would have developed absent Guatemala's Treaty breaches.

369. SRK also has identified several additional exploration targets on Tambor consisting of hard-rock, high-grade ore, as well as lower-grade saprolite. These targets have been divided into known exploration projects that were identified before Exmingua's operations shut down (Tambor's "Known Exploration Potential") and additional gold mineralization in areas that extend—at depth or laterally—from the known targets that have not yet been explored but have a high probability of containing additional gold resources that could have been defined had

[887] *See id.* ¶¶ 100-106; SRK ¶¶ 117-123; The Valuation of an Exploration Project Having Inferred Resources, May 2016, at 91 (C-0229-ENG) ("Exploration Properties have asset values derived from their potential for the discovery of economically viable mineral deposits. Exploration property interest are bought and sold in the market.").

[888] Versant ¶ 23; SRK ¶¶ 133-139, Figure 5-1.

[889] SRK ¶¶ 3-6.

Exmingua continued exploration from May 2016 through the present (Tambor's "Exploration Opportunity").

370. For Tambor's Known Exploration Potential, SRK estimates the potential value of each of the identified targets should they become producing mines, and then applies well-accepted methodologies to assess the likelihood that those targets could become producing mines, based upon their stage of development in 2020, had Exmingua been able to continue operating since May 2016. Versant, in turn, values Tambor's Known Exploration Potential using the market approach to calculate an enterprise value/resource (EV/resource) multiple based on comparable Latin American exploration and development stage projects, which it then applies to Tambor using SRK's potential value. Versant then takes the median value of the overlapping ranges of value from both its and SRK's calculations.

371. To value Tambor's Exploration Opportunity, SRK estimates the potential resources that could be present in those zones by reference to other exploration and mine properties that are comparable to Tambor in terms of geology (age and style of gold mineralisation). Versant then uses SRK's potential gold resources to value the Exploration Opportunity using a market approach, and the same exploration and development stage comparable companies and transactions as it uses to value Tambor's Known Exploration Potential.

1. Claimants' Losses Related To Exmingua's Operating Mine

372. Claimants' sustained damages of US$ 70 million related to Exmingua's inability to carry on and complete mining that it began in 2014, in addition to the value of its impounded concentrate.

373. The Operating Mine zones—Guapinol South, Poza del Coyote, and Laguna Norte—had either been producing ore during 2014 to 2016, or are included in the LoM Plan because they were part of the initial conceived mine and slated to produce ore in the near future. As described above, Exmingua planned to mine each of these deposits, beginning with open-pit mining and then, after about two years or so mining the open pits, continuing on to underground mining.[890] As of the time when Exmingua's operations were suspended, Exmingua was already considering

[890] Kappes ¶¶ 95-96, 114.

underground mining at Guapinol and Poza del Coyote pit but had not yet begun mining at Laguna Norte.[891] In anticipation of commencing the underground mining phase, beginning at Guapinol, while advancing the open-pit mining on the rest of the zones, Claimants purchased equipment and Exmingua had begun to prepare the site.[892]

374. As noted above, the Maynard Report presents an estimate of over 244,000 ounces of gold in these three deposits on the basis of exploration conducted by Goldfields;[893] the CAM report, moreover, remarks that it is likely that this resource estimate could be doubled or tripled for these three target zones with a concerted drilling program.[894] To value Claimants' damages arising from the measures that shut down the Operating Mine, Versant calculated Exmingua's lost cash flows using an income approach,[895] which relies on an LoM Plan prepared by SRK based on information provided by Claimants, actual production and financial information for the period October 2014 to May 2016, Claimants' view on how the operation would have continued to extract the defined resource had operations not been shut down, and SRK's experience and professional judgment.[896] To the lost cash flows from the date of shutdown in May 2016 until the valuation date of 31 March 2020 (the "historical lost cash flows"), Versant adds interest until the valuation date at a commercial rate.[897]

375. Specifically, to calculate the Operating Mine's free cash flow, Versant considered the following components:

(i) *Production*: The Operating Mine was producing at an average annual rate of 95,520 tons per year during the three months before it stopped operating.[898] The LoM Plan

[891] *Id*. ¶¶ 95, 114, 122; SRK ¶¶ 36, 52.

[892] *Id*. ¶ 122.

[893] Stephen R. Maynard, Tambor Joint Venture – Summary of Exploration Potential dated 18 Nov. 2003, at 4, Table 1 (C-0046-ENG).

[894] Chlumsky, Ambrust and Meyer Technical Report dated 7 Jan. 2004, at 1.5 (C-0039-ENG); Radius Press Release, Radius Closes Acquisition of Tambor Interest dated 30 Mar. 2004 (C-0216-ENG).

[895] Versant ¶ 113.

[896] *Id*. ¶¶ 76-77.

[897] *Id*. ¶¶ 281-282.

[898] *Id*. ¶ 118, fn. 95; Mining data for Poza Del Coyote for the period between Aug. 2015 and Apr. 2016 (C-0124-ENG/SPA).

forecasts that the Operating Mine would have continued producing at a rate of 87,500 tons of ore per year.[899]

The LoM Plan assumes an average grade of 8.1 grams per ton, for both open pit and underground ore, which is consistent with the grade achieved prior to shutdown.[900] SRK applies an 82% recovery rate, which was less than that achieved at times by the plant, and conservative as compared to other plants in the region processing similar ore.[901] The LoM Plan anticipates that, from the beginning of 2016 through the end of the life of mine, total contained gold of 234,379 ounces will be extracted.[902] Taking into account the gold already extracted, this amounts to total contained gold of 255,615 ounces for the Operating Mine.[903]

Neither SRK nor Versant assumes any additional resources from the Operating Mine, notwithstanding the CAM report's conclusion that the current resource in the Operating Mine could double or treble with additional drilling.[904] Instead, they have valued those additional resources as part of Tambor's Known Exploration Potential or Tambor's Exploration Opportunity.

(ii) *Prices*: Versant relies on the actual market price for gold between May 2016 and 2019, and gold price forecasts by Consensus Economics for the period after that through the end of the LoM Plan in 2026.[905] Combining its projections for production and prices, Versant calculates that the Operating Mine would have generated revenue of US$ 236 million between May 2016 and 2026.[906]

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[899] SRK ¶¶ 28, 35, 37.

[900] *Id*. ¶¶ 37, 38. 45.

[901] *Id*. ¶¶ 40, 46.

[902] *Id*. ¶¶ 41, 45.

[903] Versant ¶ 119 (Appendix D.2 – Cash Flow Projection; Historical ounces extracted is based on Mining data for Guapinol South for the period between Nov. 2014 and Oct. 2015 (C-0123-ENG/SPA) and Mining data for Poza Del Coyote for the period between Aug. 2015 and Apr. 2016 (C-0124-ENG/SPA)).

[904] SRK ¶ 21; Versant ¶ 121; Chlumsky, Ambrust and Meyer Technical Report dated 7 Jan. 2004, at 1.5 (C-0039-ENG).

[905] Versant ¶¶ 124-126, Figure 9.

[906] *Id*. ¶ 127 (referencing Appendix D.2 – Cash Flow Projection).

(iii) *Costs, depreciation, and amortization*: Relying on historical data along with its professional experience and judgment, SRK has forecast mining costs, for both the continued open-pit development as well as the underground mining operations.[907] Versant then uses an inflation rate to adjust these costs for the period from 2020 until the end of the LoM Plan in 2026.[908] For depreciation and amortization expense, Versant similarly uses historical data and forecasts at the same rate through the life of mine.[909]

(iv) *Royalties and taxes*: Versant takes into account various royalty payments that Exmingua was obligated or agreed to pay, such as those to the MEM, Royal Gold, Geominas, and Radius.[910] It also accounts for taxes.[911]

(v) *Capital expenditures*: Versant uses the estimated underground development costs, ongoing sustaining capital costs, and mine closure costs from the LoM Plan and adjusts those costs for future years to account for actual changes in mining costs and inflation.[912]

376. Versant then tested the reasonableness of its cash flow projections for the Operating Mine by looking at comparable companies with operating mines. The key assumptions in Versant's cash flow projections are the gold recovery rate of 82% and the all-in sustaining costs (which include the payability costs, operating costs, royalties, and capital expenditures), which amount to US$ 983 per ounce.[913] Versant's analysis of comparable operating mines confirms the high gold grade at Tambor; as shown by historical data, the Operating Mine's gold grade is among the highest of the comparable mines.[914] Yet, while the comparable mines have recovery rates of between 87% to 96%, SRK has used a lower and more conservative 82% recovery rate in the

[907] SRK ¶¶ 50-51.
[908] Versant ¶ 129.
[909] *Id*. ¶¶ 131-132.
[910] *Id*. ¶ 134.
[911] *Id*. ¶ 135.
[912] *Id*. ¶¶ 137-138.
[913] *Id*. ¶¶ 142-143.
[914] *Id*. Table 12.

LoM Plan.[915] Additionally, the all-in sustaining costs of these comparable mines ranged from US$ 734 to US$ 1,079 per ounce, placing Versant's US$ 983 per ounce in the upper half of the range, *i.e.*, among the more conservative estimates of costs for mine development.[916] As Versant observes, the comparables thus indicate that Claimants' and SRK's assumptions concerning the Operating Mine are conservative.[917]

377. Having determined and tested the reasonableness of its lost cash flow calculations, Versant took the cash flows that Exmingua would have earned in the four years, from the date of shut down to the valuation date,[918] and applied interest to those cash flows at the U.S. Prime rate plus 2%, compounded annually.[919] This amounts to a total, with interest, of approximately US$ 27 million.[920] Versant then took the remainder of the cash flows—from the 31 March 2020 valuation date through the end of the assumed life of mine in 2026—and discounted those cash flows back to the valuation date at Exmingua's weighted average cost of capital.[921] The value of the Operating Mine as of the valuation date is US$ 42.9 million.[922]

378. Summing (i) the historical lost cash flows from the Operating Mine, plus interest, (ii) the value of Exmingua's impounded concentrate—which would have contributed to the value of the Operating Mine—plus interest from the date of seizure, amounting to US$ 645,121,[923] and (iii) Exmingua's value as of the valuation date, Versant calculates Claimants' damages arising out of the loss the value of the Operating Mine but-for the measures to be US$ 70.6 million.[924]

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[915] SRK ¶¶ 40, 46; Versant ¶¶ 143-144.

[916] Versant Table 12.

[917] *Id*. ¶ 144.

[918] *Id*. ¶¶ 116, 164.

[919] *Id*. ¶ 164.

[920] *Id*. ¶ 165, Table 16.

[921] This yields a discount rate of 11.64%. *Id*. ¶ 161, Table 15. As Versant observes, this discount rate also is conservative, as discount rates estimated for the metals and mining industry in emerging markets as well as for several comparable mining companies range from 7.86% to 10%, thus again rendering Versant's rate conservative. *See id*. ¶¶ 162-163.

[922] *Id*. ¶ 165.

[923] *Id*. ¶ 166.

[924] *Id*. ¶ 167, Table 17.

2. Claimants' Losses Related To The Known Exploration Potential Of The Tambor Project

379. In addition to the lost value from the Operating Mine, Claimants suffered damages in the amount of approximately US$ 89 million, because they were unable to mine additional known gold targets that extend deeper or laterally from the Operating Mine or are otherwise located throughout Tambor.[925]

380. SRK reviewed the geological and testing data (specifically, the geochemical sampling results within the soil and rock chip assay results) and determined that, "by virtue of their gold content and surface extent," three hard-rock targets, Guapinol North, Rio Quixal and JNL (both East and West), "may host significant strike extents of mineralisation similar to those identified by drilling at Poza del Coyote, Guapinol South and Laguna North."[926] Those latter deposits comprise the Operating Mine, where mineral resources already have been defined and estimated, and are part of the DCF calculation discussed above. In addition, SRK observes that low-grade saprolite mineralization exists in the exposed open pits at Guapinol South and Poza del Coyote (again, both part of the Operating Mine) and "that there are wide-spread areas where similar mineralisation has been shown to be present."[927]

381. As explained in its report, SRK estimates that these hard-rock and saprolite targets outside of the Operating Mine contain, respectively, the potential of 750,000 and 1,500,000 ounces of gold resources if fully developed.[928] SRK arrived at this estimate by analysing the characteristics of the mineralization of deposits at Tambor, data from the Operating Mine, and information about other mines that have geological characteristics similar to the Tambor deposits.[929]

382. SRK then calculated a potential value for these hard-rock and saprolite zones as well as the likelihood of the mine achieving that value. It did this by applying two different methods—the Exploration Status Approach and the Geological Probabilistic Approach, both of which are

[925] *Id*. ¶¶ 270-271.
[926] SRK ¶ 71; Tambor Goldfields Resource Calculations dated Nov. 2003 (C-0183-ENG).
[927] SRK ¶ 72.
[928] *Id*. ¶¶ 78, 82.
[929] *Id*. ¶¶ 74-75.

used to calculate the potential value of mineral targets, taking into account their stage of development and the likelihood of them developing into a mine.[930]

383. The Exploration Status Approach was developed, and is routinely relied upon, by SRK.[931] It first takes the potential value of the deposits, which SRK has calculated based on the exploration data as well as comparable projects at US$ 55 million for each of the three hard-rock deposits and US$ 425 million for the saprolite target, and estimates the current value on the basis of how close that target is to becoming a mine and realizing its full value.[932] Deposits are categorized by stage of development, being grassroots exploration, intermediate exploration, advanced exploration, resource definition, and full feasibility stage.[933] SRK determined that the three hard-rock targets on Tambor were in the intermediate stage and, had Exmingua been able to continue exploration for the past four years, they would have progressed to the advanced stage.[934] As for the saprolite target, SRK concluded that it was in the mid-range grassroots level and, with four more years of exploration, would have advanced to the intermediate stage.[935]

384. The Geological Probabilistic Approach shares some similarities with the above approach, and is a variation on the well-known Kilburn Method that has been developed by SRK and others in the industry and is widely used by geologists.[936] This methodology also takes into account the probability of advancing to the next stage of development, as well as the deposit's specific geological factors.[937] Targets are categorized into one of six stages (A through F), representing generative, reconnaissance, systematic drill testing, resource delineation, feasibility, and mine,[938] and the target's geological features are assessed through four geological factors (source, pathway, fluid, and trap) that are indicative of the ability to successfully convert the target into a

[930] *Id*. ¶¶ 67, 116.
[931] *Id*. ¶ 87.
[932] *Id*. ¶¶ 87-88.
[933] *Id*. ¶ 90.
[934] *Id*. ¶¶ 95-96.
[935] *Id*. ¶¶ 97-98.
[936] *Id*. ¶ 100.
[937] *Id*. ¶¶ 101-104.
[938] *Id*. ¶ 104.

mine and from which a so-called scaling factor is derived.[939] After conducting its analysis, SRK concludes that the three hard-rock targets were at the start of exploration stage C,[940] and they had a scaling factor of 52% to advance to resource definition, or exploration stage D, after another four years of exploration.[941] The saprolite target was assessed to be at the reconnaissance phase, exploration stage B,[942] with a scaling factor of 18% to advance to the drill testing or exploration stage C in another four years.[943]

385. Implementing these two SRK's approaches, Versant implies a value between US$ 41 million to US$ 83 million for each of the three hard-rock targets, and between US$ 43 million to US$ 74 million for the saprolite target.[944] Together, this results in an implied value between US$ 84 million and US$ 157 million for the Tambor Project's Known Exploration Potential.[945]

386. Further to SRK's analysis, Versant calculated the Tambor Project's Known Exploration Potential implementing a market approach. As Versant explains, a common multiple used to value and compare gold companies and projects is the company's enterprise value (EV) per ounce of gold resources (EV/Resource), which essentially assigns a value to the project or transaction based upon the gold expected to be in the ground.[946] To implement the market approach to value Tambor's Known Exploration Potential, Versant identified publicly-traded companies with gold mining projects in Latin America that were at a similar stage of development, taking into account—as SRK did—the progression of exploration that would have occurred but for Guatemala's Treaty breaches.[947] After removing from this list those companies that (i) had revenue from mining operations in order to focus on pre-production companies, (ii) were facing unique legal or operational challenges or issues, (iii) lacked resource estimates, (iv) had significant non-gold resources; or (v) had other project-specific factors that rendered them

[939] *Id*.
[940] *Id*. ¶ 108.
[941] *Id*. ¶ 114.
[942] *Id*. ¶ 109.
[943] *Id*. ¶¶ 110, 115.
[944] Versant ¶ 269.
[945] *Id*. ¶ 270.
[946] *Id*. ¶ 170.
[947] *Id*.

less comparable to Tambor,[948] Versant divided the remaining seven companies into those that had hard-rock ore or saprolite.[949]

387. Versant then calculated the EV/Resource multiple for each of these seven comparable companies.[950] For the companies with higher-grade, hard-rock targets, the EV/Resource was between US$ 54.1 per ounce and US$ 79.9 per ounce, with a median of US$ 67 per ounce,[951] while the multiple for companies with the lower-grade, saprolite was between US$ 7.9 per ounce and US$ 57.7 per ounce, with a median of US$ 16.4 per ounce.[952]

388. Versant then did this same calculation using comparable transactions and, as was the case for the comparable public companies, identified a list of comparable transactions and calculated the EV/Resource multiple for those companies.[953] Using a database, Versant identified 112 completed transactions for gold projects or companies with operations in Latin America which took place between 2016 and 2020.[954] Versant then eliminated from this list transactions where the company or asset (i) had operations in addition to gold mining; (ii) operated outside of Latin America, (iii) lacked a resource estimate as of the transaction date, (iv) had specific legal issues or other problems that impeded the prospects, or where the transaction was for (i) the acquisition of a minority interest, or (ii) an operational mine, which left 10 transactions.[955] With respect to these 10 transactions, Versant calculated the EV/Resource multiples for the companies, and then updated those multiples to account for market changes since the date of the transaction in question.[956]

389. The resulting EV/Resource multiple for the two higher-grade projects was US$ 72.6 per ounce and US$ 86.8 per ounce, with a median of US$ 79.7 per ounce.[957] And the EV/Resource

[948] *Id*. ¶¶ 171-172, AppendixE.
[949] *Id*. ¶ 174.
[950] *Id*. ¶¶ 170-215.
[951] *Id*. Table 18.
[952] *Id*.
[953] *Id*. ¶¶ 217-253.
[954] *Id*. ¶ 218.
[955] *Id*. ¶¶ 218-219.
[956] *Id*. ¶¶ 220-253.
[957] *Id*. Table 19.

multiple for lower-grade projects was between US$ 9.6 per ounce and US$ 47.4 per ounce, with a median of US$ 16 per ounce.[958]

390. Versant then reviewed analyst and industry reports to verify the reasonableness of the EV/Resource multiples that it derived from its comparable company and comparable transaction approaches.[959] These sources showed EV/Resource multiples consistently in excess of US$ 50, although they did not differentiate between high- and low-grade projects, as Versant did in its analysis.[960] This confirmed the reasonableness of Versant's multiple, which is below the average range of the multiple reported by these sources based on combined hard-rock and saprolite comparables.[961]

391. Having confirmed the reasonableness of its EV/Resource multiple based on the comparable companies and transactions, Versant applied that multiple to the potential resource estimate for the four Known Exploration Potential targets, as estimated by SRK.[962] Versant thus derived a value of between US$ 41 million and US$ 83 million for each of the three hard rock targets and between US$ 43 million and US$ 74 million for the saprolite target.[963]

392. Considering Versant's derived value using the market approach and SRK's implied value using the Exploration Status and Geological Probabilistic approaches, Versant considers the value of the Tambor Project's Known Exploration Potential to be within the overlapping range of value between all of those approaches, which is between US$ 84 million and US$ 93 million.[964] Versant then takes the mid-point of this overlapping range to arrive at a value of US$ 89 million for Tambor's Known Exploration Potential, and Claimants' damages from being deprived of the opportunity to exploit that potential.[965]

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[958] *Id*.
[959] *Id*. ¶ 255.
[960] *Id*. ¶¶ 256-257.
[961] *Id*. ¶ 257.
[962] *Id*. ¶¶ 260-269.
[963] *Id*. ¶ 269.
[964] *Id*. ¶¶ 270-271, Figure 14.
[965] *Id*. ¶ 271.

3. Claimants' Losses Related To The Exploration Opportunity Of The Tambor Project

393. Lastly, Claimants incurred US$ 244 to US$ 291 in damages on account of the lost opportunity of exploring for additional gold resources at Tambor and developing those resources into mines (Tambor's "Exploration Opportunity").[966]

394. SRK categorized seven targets as representing exploration opportunity for Exmingua—and Claimants.[967] These include six additional hard-rock targets, namely, an additional area within Laguna Norte beyond the Operating Mine, as well as further areas in Guapinol North, Rio Quixal and JNL East beyond those included in Tambor's Known Exploration Potential, and additional areas from Achiotes South and Q78, as well as an additional saprolite target (Poza del Coyote east extension).[968] Although Exmingua's Exploration Opportunity includes extensions from the Operating Mine and the Known Exploration Potential, the resources from these extensions are not included in either of those categories.[969]

395. In order to estimate the resource potential in these seven zones that Exmingua could have explored and developed absent Respondent's Treaty breaches, SRK uses a probability-adjusted calculation of the gold ounces that could have been discovered between 2016 and 2020. To do so, it first estimates the amount of gold that could be contained in each of these targets by comparing the targets – in terms of strike length and depth – to other orogenic gold deposits that occur in similar geological settings in rocks that are of a similar age to that at Tambor.[970] SRK identifies the Mako Mining San Albino deposit in Nicaragua as one of these comparators.[971] Because there was only one such deposit in Central America sharing geological features similar to Tambor for which there is publicly available information on its geology and resources, SRK also looked to deposits worldwide, and identified five orogenic gold deposits with similar age

[966] *Id*. ¶ 279, Table 25.
[967] SRK ¶ 174.
[968] *Id*.
[969] SRK ¶¶ 119, 175; Versant ¶ 27.
[970] SRK ¶ 120.
[971] *Id*. ¶ 121.

and geological features.[972] Using these benchmarks, SRK estimates that the seven targets on Tambor could contain an estimated 4.8 million to 8.3 million ounces of gold.[973]

396. Because this indicates the potential amount of contained gold in these deposits, SRK reduces this range to reflect that these deposits required further exploration until they would be ready to be mined, applying a probability of exploration success.[974] To this range of amounts, SRK thus applies the Geological Probabilistic Approach (as used to measure Tambor's Known Exploration Potential, and as described above).[975] This has the effect of reducing the potential gold resource derived from these targets by approximately 43% to an estimated 2.7 million to 4.7 million ounces to account for the probability of advancing to the next stage of exploration in the four years since Respondent's Treaty breaches.[976]

397. SRK concludes that Tambor's Exploration Opportunity lies between that derived from the Central America and worldwide benchmarks.[977] This is because, while the Central American comparator is in closest proximity to Tambor, the deposits in the worldwide benchmarks provide a larger statistical population for comparison, and are all either historical or operating mines, and have therefore received extensive exploration.[978] The average potential resource between these two benchmarks, after applying the Geological Probabilistic Approach to these amounts, is 3.7 million ounces.[979]

398. Having estimated the potential resource, Versant then uses the market approach to value Tambor's Exploration Opportunity.[980] To do so, Versant uses the same EV/resource multiples that it derived from public companies and transactions involving economically- comparable exploration and development projects that it used to value Tambor's Known Exploration

[972] *Id*. ¶¶ 179-180, 187.
[973] *Id*. ¶ 193.
[974] SRK ¶¶ 194-197; *see also* Versant ¶¶ 272-277.
[975] SRK ¶ 198.
[976] *Id*. ¶¶ 198-206, Table 5-11.
[977] *Id*. ¶ 205.
[978] *Id*. ¶ 196.
[979] *Id*. ¶ 206.
[980] Versant ¶¶ 112, 272.

Potential.[981] Applying those same multiples to SRK's probabilistic-adjusted potential resource range, Versant calculates that Claimants' damages arising from the Exploration Opportunity at Tambor ranges from US$ 244 million to US$ 291 million.[982]

4. Summary Of Claimants' Damages

399. Summing the damages from Claimants' lost profits from the Operating Mine, as well as the value of the Known Exploration Potential and the Exploration Opportunity, Claimants' damages as of 31 March 2020 are between US$ 403 million to US$ 450 million, as shown below.

Lost Cash Flow from the Operating Mine from May 2016 to 31 March 2020	$ 23.6 million
Interest on Lost Cash Flow from the Operating Mine at U.S. Prime plus 2%, compounded annually	$ 3.4 million
Value of Impounded Concentrate, with interest from date of seizure until 31 March 2020	$ 645,121
Lost Value of the Operating Mine as of 31 March 2020	$ 42.9 million
Lost Value from Tambor's Known Exploration Potential	$ 89 million
Lost Value from Tambor's Exploration Opportunity	$ 244 – 291 million
Total Nominal Damages	**$ 403 – 450 million**

400. Finally, Claimants are entitled to post-award interest, from the date of the Award until the date of full payment by Respondent, at the same reasonable commercial rate of U.S. Prime plus 2%, compounded annually, on all damages amounts awarded.[983]

[981] *Id*. ¶ 278, Table 25.
[982] *Id*. ¶ 279.

V. CONCLUSION

401. Claimants hereby request that the Arbitral Tribunal constituted in this case issue a final award declaring that Guatemala has breached its obligations under the DR-CAFTA and ordering Guatemala to compensate Claimants in the amount of:

i) Damages of US$ 403-450 million;

ii) Pre-award interest at the U.S. Prime Rate plus 2%;

iii) Costs associated with these proceedings, including arbitration costs, professional fees, attorneys' fees, and disbursements;

iv) Post-award interest at the U.S. Prime Rate plus 2% on all amounts awarded until the date of payment;

v) Such further or other relief as the Tribunal may deem appropriate.

402. Claimants reserve their rights to amend this Memorial and assert additional claims as permitted by the ICSID Convention and the ICSID Arbitration Rules.

Respectfully submitted

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Kappes, Cassiday & Associates
20 July 2020

[983] *Id*. ¶ 282.