IN THE ARBITRATION UNDER CHAPTER TEN OF THE DOMINICAN REPUBLIC—CENTRAL AMERICA—UNITED STATES FREE TRADE AGREEMENT AND THE ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
BETWEEN

DANIEL W. KAPPES
AND
KAPPES, CASSIDAY & ASSOCIATES
Claimants

AND

REPUBLIC OF GUATEMALA
Respondent

ICSID Case No. ARB/18/43

RESPONDENT'S REPLY TO CLAIMANTS' COUNTER-MEMORIAL ON PRELIMINARY OBJECTIONS UNDER ARTICLE 10.20.5 OF CAFTA-DR

---

25 October 2019

Before:
Ms. Jean E. Kalicki (Presiding Arbitrator)
Mr. John M. Townsend
Prof. Zachary Douglas, QC

Table of Contents

I. INTRODUCTION. 4

II. THE MECHANISM FOR RAISING PRELIMINARY OBJECTIONS UNDER CAFTA-DR....7

III. CLAIMANTS DID NOT NOTIFY OR BRING CLAIMS FOR REFLECTIVE LOSS IN THEIR NOTICE OF INTENT AND NOTICE OF ARBITRATION. 11

IV. CAFTA-DR PROVIDES A UNIQUE MECHANISM TO RECOVER FOR LOSSES SUSTAINED BY A LOCAL ENTERPRISE UNDER ARTICLE 10.16.1(B).....15

A. THE NEGATIVE CONSEQUENCES OF REFLECTIVE LOSS. 17

B. REFLECTIVE LOSS CLAIMS WERE OFTEN PERMITTED IN DISPUTES INVOLVING OLDER TREATIES BECAUSE THEY PROVIDED THE ONLY MEANINGFUL REMEDY FOR SHAREHOLDERS TO RECOVER DIRECT DAMAGES SUSTAINED BY THEIR ENTERPRISE.....23

C. NAFTA SOLVED THE PROBLEMS ASSOCIATED WITH SHAREHOLDERS CLAIMS FOR REFLECTIVE LOSS BY PROVIDING THEM STANDING TO BRING DERIVATIVE CLAIMS CONDITIONED ON THE FULFILLMENT OF CERTAIN REQUIREMENTS. 28

1. Scholars Have Emphasized the Uniqueness of the NAFTA Mechanism to Bring Derivative Claims. 28

2. The NAFTA Contracting Parties Agree that Article 1116 Does Not Allow a Shareholder to Recover Reflective Loss. 29

3. Allowing Claims for Reflective Loss under Article 1116 of NAFTA Would Render the Mechanism Under Article 1117 Meaningless. 32

4. No NAFTA Jurisprudence Has Ever Granted Reflective Loss Under Article 1116 of NAFTA. 33

D. CAFTA-DR PROVIDES STANDING TO A SHAREHOLDER TO RECOVER ITS COMPANY'S LOSS PROVIDED CERTAIN REQUIREMENTS ARE MET. ALLOWING CLAIMANTS TO RECOVER REFLECTIVE LOSS UNDER ARTICLE 10.16.1(A) OF CAFTA-DR WOULD NULLIFY THE MECHANISM UNDER THE TREATY. 36

1. The CAFTA-DR Was Based on the U.S. Model BIT of 2004, Which Does Not Allow a Shareholder to Bring Claims for Reflective Loss on Its Own Behalf. 36

2. Guatemala's Position in Previous Cases Is Fully Consistent with Its Position Here that Injury to an Enterprise Should Be Sought under Article 10.16.1(b) When Available. 37

3. If Claims for Reflective Loss Were Allowed under Article 10.16.1(a), the Requirements to Bring Derivative Claims under Article 10.16.1(b) Would Be Rendered Meaningless. 39

4. The Derivative Claim Mechanism Provided Under Article 10.16.1(b) of CAFTA-DR Does Seek to Protect Creditors. 42

5. Absent a Waiver Signed by Exmingua, Guatemala Did Not Provide Consent to Arbitrate Claims Arising Out of a Direct Injury Sustained by Exmingua. 44

6. Annex 10-E of CAFTA-DR Would Prevent Exmingua from Bringing a Claim for Full Protection and Security. 46
7. Conclusion Regarding the First Objection. 50
V. CLAIMANTS' MOST-FAVORED-NATION TREATMENT CLAIM WAS OMITTED FROM THE NOTICE OF INTENT AND MUST BE DISMISSED. 51
A. CLAIMANTS ADMIT THEY OMITTED THE MFN CLAIM IN THEIR NOTICE OF INTENT. 52
B. THE ORDINARY MEANING OF ARTICLE 10.16.2 OF CAFTA-DR, IN ITS CONTEXT, REQUIRES THE DISMISSAL OF THE MFN CLAIM. 54
C. THE OBJECT AND PURPOSE OF ARTICLE 10.16.2 OF CAFTA-DR REQUIRES THE DISMISSAL OF THE MFN CLAIM. 61
D. INVESTMENT ARBITRATION TRIBUNALS REGULARLY DISMISS CLAIMS FOR FAILURE TO MEET THE NOTICE REQUIREMENT UNDER CAFTA-DR AND SIMILAR TREATIES. 63
VI. THE CLAIM FOR LACK OF FULL PROTECTION AND SECURITY IS TIME-BARRED UNDER ARTICLE 10.18.1 OF CAFTA-DR 69
A. CLAIMANTS RE-WRITE OF THEIR FULL PROTECTION AND SECURITY CLAIM TO ESCAPE ARTICLE 10.18.1 OF CAFTA-DR IS INVALID AND INEFFECTIVE. 70
B. THE LAW REQUIRES THE DISMISSAL OF THE FULL PROTECTION AND SECURITY CLAIM. 81
VII. CONCLUSION. 92
VIII. REQUEST 92

Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala

RESPONDENT'S REPLY ON PRELIMINARY OBJECTIONS

Pursuant to Procedural Order No. 1, dated 10 September 2019, the Republic of Guatemala ("Guatemala," "Respondent," or the "Republic") hereby submits its Reply on Preliminary Objections, in response to Claimants' Counter-Memorial submitted on 27 September 2019 (the "Counter-Memorial"). Guatemala submits, together with this Reply, legal authorities RL-0049 through RL-0109.

I. INTRODUCTION.

1. Claimants are running away from their Notice of Arbitration and attempting to recast their factual allegations and even allege new facts in order to overcome the deficiencies in their Notice of Arbitration. Just as Respondent is bound to the four corners of the Notice of Arbitration, so too are Claimants. Claimants cannot be allowed to re-write (and even contradict) their factual allegations and claims to escape dismissal as a matter of law.

2. Try as they may to recast the facts, allege new ones, misquote authorities, or cite to numerous decisions arising from inapplicable and antiquated treaties (especially when, as Claimants admit, the Dominican Republic-Central America-United States-Free Trade Agreement ("CAFTA-DR")[1] is "a modern, state-of-the-art treaty"),[2] Respondent's Preliminary Objections are, in fact, straightforward and appropriate for preliminary disposition.

3. Claimants advance a false narrative suggesting that there are disputed issues of fact (there are none) and that the dismissal of their claims would be inconsistent with the object and purpose of the CAFTA-DR. This is untrue. Respondent merely seeks dismissal of claims pursuant to the mechanisms specifically established within CAFTA-DR to address claims that fail either as a matter of law, or on jurisdictional or admissibility grounds. Indeed, in more than half of the CAFTA-DR cases where the respondent State objected on jurisdictional or admissibility grounds, the claims were dismissed before a decision on the merits was rendered.[3]

---

[1] All citations herein are in accordance with the Universal Citation in International Arbitration, Global Arbitration Review, as supplemented or modified by Procedural Order No. 1 dated 10 September 2019.

[2] Counter-Memorial, ¶ 37.

[3] To date, eleven cases have been initiated under CAFTA-DR, including this one. *TCW Group, Inc and Dominican Energy Holdings, L.P. v. Dominican Republic*, UNCITRAL, settled before the tribunal issued any decision. The *Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, is in its initial stages. In *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, and *TECO Guatemala Holdings,*

4. Respondent's objections are entirely legal in nature. For purposes of the Respondent's Preliminary Objections Under Article 10.20.5 of CAFTA-DR (the "Preliminary Objections"), Respondent does not challenge or dispute any of the purported facts alleged in the Notice of Arbitration.[4] Thus, although Claimants argue that Respondent failed to accept or otherwise disputed Claimants' account of facts, this is not true.[5] In fact, Claimants have not identified a single factual allegation that Respondent disputes in its Preliminary Objections.

5. The Tribunal's decision must be based on the facts that were alleged in the Notice of Intent and the Notice of Arbitration and nothing else. Thus, Claimants' improper attempts to amend or recast their claims, or to ignore the plain language of the Notice of Intent and Notice of Arbitration (the "Notices"), should be rejected. Moving the target by changing the alleged facts and the claims asserted through their Counter-Memorial violates Respondent's due process rights. Claimants' false statements seek to distract from the issues raised in the Preliminary Objections and expose the lack of legal support for their arguments.

6. The law as applied to the facts alleged in the Notice of Arbitration mandates the dismissal of all claims asserted in the Notice of Arbitration. Specifically, the claims should be dismissed because: a) Claimants are attempting to recover direct losses sustained by Exmingua in violation of CAFTA-DR's procedural requirements;[6] b) Claimants are attempting to bring a Most-Favored-Nation Treatment ("MFN") claim without complying with the notice requirements under the Treaty; and c) Claimants' claim for lack of full protection and security is time-barred under the Treaty and is not within the Tribunal's jurisdiction.

LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, the respective respondents did not submit preliminary objections. In *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, and *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, the respective tribunals dismissed the claims without addressing the merits. Finally, in *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, and *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, the respective respondents' preliminary objections were denied.

[4] Although Respondent does not dispute any facts alleged in the Notice of Arbitration, there is an important difference between Articles 10.20.4 and 10.20.5. Art. 10.20.4 of the CAFTA-DR requires the Tribunal to assume Claimants' factual allegations as true when addressing objections as a matter of law. Art. 10.20.5 does not require the Tribunal to assume the alleged facts to be true for objections as to competence. *Compare* Article 10.20.4 *with* Article 10.20.5. *See also* Preliminary Objections, ¶ 34. Regardless, Respondent is not asking the Tribunal to consider new or different factual allegations from those in the Notice of Arbitration.

[5] Counter-Memorial, ¶¶ 3, 9.

[6] Claimants did not request damages for reflective loss in their Notice of Intent and Notice of Arbitration. *See* Section III *infra*. Even if they did, they are not recoverable under Article 10.16.1(a) of CAFTA-DR. *See* Section IV *infra*.

7. As to the reflective loss objection, CAFTA-DR prescribes a modern mechanism to address the long-standing issue of whether and how a foreign shareholder can recover for direct injuries sustained by its local enterprise. The North American Free Trade Agreement ("NAFTA") States took the first step to provide investors with a mechanism for bringing derivative claims on behalf of local enterprises while protecting States and others from double recovery, undue windfall and circumvention of creditors. The CAFTA-DR States took one step further by providing shareholders-investors with a clearer avenue to recover on behalf of a local enterprise while reducing the risk of double recovery or the unjust impairment to creditors.

8. The Tribunal is being asked to enforce CAFTA-DR's modern mechanism which provides investors only two avenues: 1) the ability of the investor to recover direct losses it sustained, or 2) the ability of the investor to bring a derivative claim on behalf of a domestic enterprise that the investor owns or controls to recover losses sustained by the enterprise. The history of CAFTA-DR, its plain language, and the purpose behind the mechanism—as explained by the State parties and numerous commentators—leaves no doubt of how the Treaty was designed to operate.

9. This is a straightforward case where the Tribunal does not need to address complex issues concerning unprotected or minority shareholders. Claimants directly and indirectly own and control Exploraciones Mineras de Guatemala, S.A. ("Exmingua") and thus, because they seek to recover losses suffered by Exmingua, they were required to bring their claims derivatively on behalf of Exmingua and in accordance with the requirements under CAFTA-DR. They failed to do this. Moreover, Claimants did not request reflective loss. They sought the damages sustained by Exmingua outside the manner prescribed in CAFTA-DR. As a result, all their claims must be dismissed.

10. As to the MFN claim objection, the Tribunal must also determine whether Claimants complied with the notice of intent requirement under CAFTA-DR. They did not. The CAFTA-DR requires a claimant to deliver a written notice of intent specifying each claim at least 90 days before submitting a claim to arbitration. Although Claimants delivered a notice of intent (the "Notice of Intent"), Claimants admit that they "*included an MFN claim* in their Notice of Arbitration"[7] which was not included—let alone specified—in the Notice of Intent. Because

[7] Counter-Memorial, ¶ 84 (emphasis added).

Claimants failed to satisfy the CAFTA-DR's notice of intent requirement, Claimants' MFN claim is inadmissible and as such must be dismissed.

11. Finally, as to the full protection and security objection, the Tribunal must decide whether Claimants' claim for lack of full protection and security is time-barred under Article 10.18.1 of CAFTA-DR. It is. The plain language of the Notice of Arbitration makes it clear that it is. Knowing this, Claimants now attempt to ignore their own allegations, recast them in a misleading manner, or allege new ones outright. Thus, where Claimants alleged "Exmingua and its consultants […] were unable to complete the public consultations required for its EIA due to the *continuous and systematic protests and blockades at the site since 2012*"[8], Claimants now disingenuously allege in the Counter-Memorial that the claim "is not based on a single continuing breach"[9] but only relates to "*the protests and blockades that commenced in early 2016*."[10] Claimants cannot use their Counter-Memorial to amend and contradict the Notice of Arbitration in order to avoid the applicable limitations period. In any event, the claim, as alleged both in the Notice of Arbitration and the Counter-Memorial, must be dismissed because it is time-barred.

12. In summary, and as explained in detail below, Claimants seek to obfuscate the fatal deficiencies that are evident from the face of the Notice of Arbitration and which warrant the dismissal of all claims at this preliminary stage. Instead of addressing the fatal deficiencies head on, Claimants misrepresent and twist Respondent's arguments, recast their allegations and claims, allege new ones, bombard the Tribunal with dozens of decisions that have no application here and arise from treaties that are inapposite, and conflate basic legal concepts, such as the differences between jurisdiction and admissibility.

II. THE MECHANISM FOR RAISING PRELIMINARY OBJECTIONS UNDER CAFTA-DR.

13. Claimants argue that "Respondent inappropriately relies on disputed facts or fails to accept as true the facts alleged in Claimants' Notice of Arbitration, making their objections

[8] Notice of Arbitration, ¶ 48 (emphasis added).
[9] Counter-Memorial, ¶ 127.
[10] *Ibid*.

unsuitable for preliminary decision as well."[11] In support of this argument, Claimants cite to Article 10.20.4 (c) of the CAFTA-DR, which states:[12]

> In deciding an objection *under this paragraph*, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

14. In its Preliminary Objections, Respondent did not dispute any of the facts alleged in the Notice of Arbitration, and instead explicitly assumed, *arguendo*, that the factual allegations in the Notice of Arbitration were true.[13] Claimants fail to identify even one alleged fact that Respondent disputed in the Preliminary Objections.[14] There are none. The Preliminary Objections involve strictly legal questions which do not require the Tribunal to decide any issue of fact.

15. Claimants' argument is also legally wrong, because Respondent filed its Preliminary Objections under Article 10.20.5 of CAFTA-DR, which allows two types of objections, namely, "an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence."[15] While "in deciding an objection under [] paragraph [4], the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration,"[16] this requirement does not apply to "any objection that the dispute is not within the

[11] Counter-Memorial, ¶ 3; *see* similar allegation in ¶ 9 of the Counter-Memorial ("Respondent's objection thus not only is legally unfounded, but also requires delving into disputed factual issues that are integrally related to the merits of the case, making it particularly unsuitable for expedited decision at this preliminary phase.").
[12] Art. 10.20.4 (c) of CAFTA-DR (emphasis added), **RL-0001-024-ENG**.
[13] Preliminary Objections, ¶ 53 ("However, Claimants' own allegations, assuming *arguendo* that they are true, confirm their assertion is wrong."); *id.* ¶ 81 ("[A]ssuming that Claimants' 'factual allegations in support of [their] claim[s]' are true, as a matter of law, Claimants' are not claims 'for which an award in favor of the claimant[s] can be made under Article 10.26 of CAFTA-DR' and other CAFTA-DR provisions.") (internal references omitted).
[14] *See* Counter-Memorial, ¶ 3, including references to inapposite decisions, and not to statements in Respondent's Preliminary Objections. *See also*, *id.* ¶ 9, with no support.
[15] Art. 10.20.5 of CAFTA-DR (emphasis added), **RL-0001-024-ENG**. *See Pac Rim*, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶ 106 ("As regards the expedited procedure under Article 120.20.5, it is twinned with *the procedure under Article 10.20.4 with an additional ground of objection as to competence*….") (emphasis added), **RL-0003-057-ENG**.
[16] Art. 10.20.4(c) of CAFTA-DR, **RL-0001-024-ENG**.

tribunal's competence"[17] under Article 10.20.5 of CAFTA-DR, that is, objections to the tribunal's jurisdiction or the admissibility of claims.[18]

16. As explained in the summary of Respondent's Preliminary Objections below, the Tribunal need only assume Claimants' alleged factual allegations as true in connection with Respondent's first objection.

Claims	Argument	Grounds for Dismissal	CAFTA-DR	Does the Tribunal need to assume facts are true?	Did Respondent assume facts are true?
All	Claimants **failed to meet CAFTA-DR requirements** to seek to recover Exmingua's alleged losses	**As a matter of law**, an award cannot be made in favor of Claimants	10.16.1 **10.20.4**	Yes	Yes
	Claimants **lack standing** to seek to recover Exmingua's alleged losses	Claims are **inadmissible**	10.16.1 **10.20.5**	No	Yes
	The Respondent **did not consent to arbitrate** claims for Exmingua's alleged losses without Exmingua's waiver	The Tribunal lacks **jurisdiction**	10.18.2(b)(ii) **10.20.5**	No	Yes
MFN	Claimants **failed to include** the MFN claim in their Notice of Intent	The claim is **inadmissible**	10.16.2 **10.20.5**	No	Yes
LFPS	Respondent **did not consent to arbitrate** Claimants' claim for lack of full protection and security. The "continuous and systematic" blockades—as alleged—have occurred since 2012	The tribunal lacks **jurisdiction** to decide the claim because it is time-barred	10.18.1 **10.20.5**	No	Yes

17. Claimants also argue that "the expedited procedural timetable renders the Article 10.20.5 procedure unsuitable for objections that involve complex issues of law, still less legal issues dependent on 'complex questions of fact or mixed questions of law and fact.'"[19] In making this argument, Claimants rely on the Decision on Preliminary Objections in *Pac Rim*.[20]

18. Claimants' argument and reliance on *Pac Rim* are misplaced:

[17] Art. 10.20.5 of CAFTA-DR (emphasis added), **RL-0001-024-ENG**. *See Pac Rim*, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶ 106 ("As regards the expedited procedure under Article 10.20.5, it is twinned with *the procedure under Article 10.20.4 with an additional ground of objection as to competence* […]") (emphasis added), **RL-0003-057-ENG**.

[18] The language is absent in Art. 10.20.5 of CAFTA-DR, **RL-0001-024-ENG**. *See also The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4, 18 December 2014, ¶ 220 ("The Tribunal is **unpersuaded** by Professor Reisman's suggestion that **preliminary objections** in which **there may be disputed issues of fact** (as per Article 23(3) of the UNCITRAL Rules, and **Article 10.20.5 of the Treaty**, and unlike Article 10.20.4 of the Treaty) **are somehow incapable of being determined with expedition**") (emphasis added), **RL-0004-053**. *Renco* was decided under the Peru-United States Trade Promotion Agreement, which includes an identical provision to Art. 10.20.5 of CAFTA-DR, **RL-0001-024-ENG**. *See* Preliminary Objections, ¶ 34.

[19] Counter-Memorial, ¶ 5.

[20] *Pac Rim*, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, **RL-0003-ENG**.

a. First, there are no "complex questions *of fact* or mixed questions of law *and fact*" here, because Respondent assumed for purposes of its Preliminary Objections all facts in the Notice of Arbitration to be true.

b. Second, the Treaty does not limit preliminary objections to "simple" issues of law. Article 10.20.4 of CAFTA-DR is based on a similar provision in the United States Model Bilateral Investment Treaty ("U.S. Model BIT") of 2004, which, in order to expedite the dismissal of claims, requires "tribunals to address as a preliminary matter an objection that a claim fails as a matter of law."[21] Reasons of economy and efficiency weigh in favor of the early dismissal of claims which cannot be granted as a matter of law or which are otherwise outside the Tribunal's jurisdiction or inadmissible as submitted.[22]

c. In any event, there is nothing "complex" about Respondent's Preliminary Objections. Simply put, Claimants failed to satisfy the express requirements under the Treaty, and Respondent's factual analysis is completely based on the Notice of Arbitration (or Notice of Intent, as the case may be). Claimants' attempt to complicate the issue by recasting or changing their factual allegations and relief sought,[23] citing to dozens of irrelevant cases under inapplicable treaties,[24] and mischaracterizing the issues to be resolved by this Tribunal, should not be countenanced.[25]

---

[21] A. Menaker, *Benefiting from Experience: Development in the United States' Most Recent Investment Agreement*, 12 U.C. Davis J. Int'l L. Pol'Y 121, p. 127, **RL-0049-007-ENG**. *See also* D. Gantz, *Settlement of Disputes Under the Central America- Dominican Republic-United States Free Trade Agreement*, 30(2) B.C. Int'l & Comp. L. Rev. 331, p. 377 ("This provision is presumably designed to discourage "frivolous" actions by private claimants, and to assure (or at least to strongly encourage) tribunals to decide what are effectively motions to dismiss or motions for summary judgment in U.S. parlance as preliminary matters, rather than to combine them with decisions on the merits."), **RL-0050-048-ENG**; *Renco*, Submission of the United States of America, 10 September 2014, ¶ 3 ("In all of its subsequent investment agreements concluded to date, the United States has negotiated expedited review mechanisms that permit a respondent State to assert preliminary objections in an efficient manner."), **RL-0051-002-ENG**.

[22] *Renco*, Submission of the United States of America, 10 September 2014, ¶ 11 ("Indeed, reasons of economy and efficiency will often weigh in favor of competence objections being decided preliminarily and at the same time as objections made under paragraph 4. This is consistent with the Agreement's text, context, and object and purpose."), **RL-0051-004-ENG**.

[23] *See* ¶¶ 21-28, 120 *et seq*., 157 *et seq. infra*.

[24] *See*, *e.g.*, ¶¶ 55-56 *infra*.

[25] *See, e.g.*, ¶ 135 *infra*.

19. Moreover, even in *Pac Rim*—which Claimants rely on in support of their misguided argument—the tribunal clarified that only the allegations included in a notice of arbitration must be assumed to be true under Article 10.20.4 of CAFTA-DR:[26]

> It is only the notice… of arbitration which benefits from a presumption of truthfulness: there is to be no assumption of truth as regards factual allegations made elsewhere, for example in other written or oral submissions made by a claimant to the tribunal under the procedure for addressing the respondent's preliminary objection.

20. The irony is that it is Claimants—and not Respondent—that have alleged new facts in the briefing of the Preliminary Objections. In fact, in a futile attempt to amend the allegations and claims in the Notice of Arbitration to try to address the legal deficiencies contained therein, Claimants have attached sixteen new factual exhibits to their Counter-Memorial.[27] Of course, as the *Pac Rim* tribunal explained, in deciding the Preliminary Objections, the Tribunal may only analyze Claimants' alleged facts and claims as asserted in the Notice of Arbitration, and must reject any new allegation or evidence that Claimants belatedly seek to introduce.

III. CLAIMANTS DID NOT NOTIFY OR BRING CLAIMS FOR REFLECTIVE LOSS IN THEIR NOTICE OF INTENT AND NOTICE OF ARBITRATION.

21. Claimants now falsely argue that their claims are "on their own behalf for the loss in value of their direct and indirect interest in Exmingua," [28] in stark contrast with what they alleged or claimed in the Notices. In the Notices, Claimants alleged the following injuries and damages:

1) "The Progreso VII Project, with an estimated *net current value* of approximately US$ 150 million in 2017."[29] This amount was updated to "[d]amages of no less than US$ 175 million"[30] in 2018.

2) "The Santa Margarita Project has not received an exploitation license, . . . but based on the *quality and quantity* of the mineral resources, Guatemala's measures have resulted in *losses* of at least, and very likely in excess of, the amount for the

[26] *Pac Rim*, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶ 90 **RL-0003-054-ENG.**
[27] *See* **C-0001-ENG/SPA** through **C-0016-ENG/SPA**.
[28] Counter-Memorial, ¶ 12.
[29] Notice of Intent, p. 4 (emphasis added).
[30] Notice of Arbitration, ¶ 78.

Progreso VII Project."[31] This amount was updated to "[d]amages of no less than US$ 175 million"[32] in 2018.

3) "Three concentrate *shipments with a value of* US$ 500,000 were abruptly impounded."[33] The damage claimed was alleged as "[d]amages of no less than US$ 500,000 for the concentrate shipments impounded by the State"[34] in 2018.

22. Nowhere do Claimants allege or seek to recover for any purported loss in the value of i) their interest in Exmingua, ii) their shares, or iii) any other type of reflective losses. While the term "reflective loss" is referenced 39 times in the Counter-Memorial, it does not appear once in the Notices. Similarly, the word "share" is not mentioned once in the Notice of Intent and the only references to it in the Notice of Arbitration are in the background section to establish Claimants' ownership of Exmingua.[35] To the contrary, in the Notices Claimants made express reference to the "estimated net current value" of Progreso VII,[36] the "losses" sustained by the Santa Margarita project given the "quality and quantity of the mineral resources,"[37] and the "shipments with a value of US$500,000."[38] Nowhere do Claimants plead the impact that this direct injury to Exmingua's projects and assets (for the values expressly indicated in the Notices) had on the value of Claimants' investment in Guatemala, that is, their interest in Exmingua. The injury to Exmingua's assets and projects and the injury to the Claimants' interest in Exmingua are two different concepts and claims.[39] Claimants did not seek reflective losses against Guatemala in

[31] Notice of Intent, p. 4.
[32] Notice of Arbitration, ¶ 78.
[33] Notice of Intent, p. 4.
[34] Notice of Arbitration, ¶ 78.
[35] *Id*. ¶¶ 8, 20, 35.
[36] *Id*. p. 4.
[37] *Ibid*.
[38] *Ibid*.
[39] An investor has no enforceable rights over the assets or projects which belong to an enterprise in which the investor owns shares. *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, ¶ 278 ("It has been repeatedly held by arbitral tribunals that **an investor has no enforceable right in arbitration over the assets and contracts belonging to the company in which it owns shares**.) (emphasis added), **RL-0052-081-ENG**; *id.* ¶ 282 ("[A]n investor whose investment consists of shares cannot claim, for example, that the assets of the company are its property and ask for compensation for interference with these assets […]."), **RL-0052-081-082-ENG.** The shares in Exmingua are the protected investment, and not Exmingua's assets or projects. Pleading the connection between the direct injury to Exmingua's assets and the indirect injury to Claimants' shares in Exmingua is a fundamental basis for any claim for reflective loss. *See Postova Banka, A.S. v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, ¶¶ 231-34 ("Claimants' contention does not find any support in previous decisions of investment arbitration tribunals either. On the contrary, tribunals – such as the one in *ST-AD GmbH v. Republic of Bulgaria* – have consistently held that '*an investor has no enforceable right in arbitration over the assets and contracts belonging to the company in which it owns shares* […] The answer provided by the *El Paso v. Argentina* tribunal was straightforward: while the shares held by the claimant in the Argentinian companies were a protected

their Notice of Arbitration and they should not be able to do so now through their Counter-Memorial.

23. Where a claimant confuses damages over its property and damages over the property of the company where the claimant owns shares, tribunals have dismissed the claims. For example, in *Orascom TMT Investments Sàrl v. People's Democratic Republic of Algeria*, the tribunal held that the claim brought by the claimant, Orascom TMT Investments, was inadmissible because they were not for losses sustained by the claimant, but by the local enterprise: [40]

> In conclusion, despite the Claimant's attempts to depict the damages claimed as compensation for harm caused to itself, as opposed to OTH, the claims before the Tribunal in reality seek reparation for losses covered by the requests for relief raised in the OTH Arbitration or for losses that the Claimant (owned and managed by an experienced businessman like Mr. Sawiris) must or should have factored into the sale of its investment to VimpelCom. Under the circumstances, the Tribunal cannot but conclude that the claims are inadmissible.

24. Claimants' belated attempt to amend their claims now and characterize the damages they claimed as reflective losses in order to avoid Respondent's objections cannot be allowed. The Tribunal must analyze the claims as submitted in the Notice of Arbitration (and announced in the Notice of Intent), and as such they are inadmissible. Allowing Claimants to re-characterize their claims now based on new allegations which contradict the Notices would violate Respondent's due process rights, the integrity of the proceedings and the CAFTA-DR structure. It would defeat the policies adopted in CAFTA-DR for early disclosure of claims, the efficient resolution of disputes and the ability to address preliminary objections.

25. Claimants allege that "shareholder's recovery for reflective loss will be the same whether it recovers that amount directly (pursuant to a claim under DR-CAFTA Article 10.16.1(a)), or whether the enterprise recovers the full amount of its loss (pursuant to a claim made

---

investment under the US-Argentina BIT, *the licenses and other contracts granted to the Argentinian companies were not protected investments*.") (emphasis in original in part, and emphasis added in part), **CL-0056-ENG**; *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 30 August 2018, ¶ 800 (finding that the shareholder had no enforceable right against the assets of the company, including mining concessions and the investments made in the project by the company. The shareholder can only submit claims based on measures adopted against the company's assets which affect the value of its shares.), **RL-0053-238-ENG**.

[40] *Orascom TMT Investments Sàrl v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, ¶ 518, **RL-0054-149-ENG**. *See also Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005 (holding that the Tribunal had no jurisdiction over the dispute in question, and dismissing indirect claims), **RL-0055-ENG**.

under DR-CAFTA Article 10.16.1(b)), pays off its creditors, and distributes the remaining equity value to its shareholders."[41] To support this allegation, Claimants refer to Mark Kantor's publication, *Valuation for Arbitration*,[42] and to the award in *Hochtief AG v. Republic of Argentina*.[43] But none of these sources support Claimants' assertion. In the passage Claimants quote, Professor Kantor simply acknowledges that to calculate reflective loss, the debt of the enterprise should be discounted.[44] Similarly, the *Hochtief* tribunal recognized that "the debt actually owing to [creditors] had to be assumed to be paid off before any funds could be freed up for dividends to the shareholders."[45] Discounting debt to calculate reflective loss does not mean that "shareholder's recovery for reflective loss will be the same"[46] as Exmingua's loss. In *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, the tribunal addressed the issue as follows:[47]

> The Respondent has argued, and the Arbitral Tribunal must agree, that the reduced flow of income into [the enterprise] obviously does not cause an identical loss for Nykomb as an investor.
>
> If one compares this with a situation where Latvenergo would have paid the double tariff to [the enterprise], it is clear that *the higher payments for electric power would not have flowed fully and directly through to [the investor]. The money would have been subject to Latvian taxes etc., would have been used to cover [the enterprise's] costs and down payments on [the enterprise's] loans etc., and disbursements to the shareholder would be subject to restrictions in Latvian company law on payment of dividends. An assessment of the Claimant's loss on or damage to its investment based directly on the reduced income flow into [the enterprise] is unfounded and must be rejected*.

26. Further, Claimants ignore a key difference between a claim for reflective loss and for direct loss sustained by the company is that in that latter the creditors are actually paid.

27. In any event, Respondent agrees this is not the stage to quantify or prove Claimants' damages. This is a stage provided by CAFTA-DR to determine if Claimants have alleged a valid

---

[41] Counter-Memorial, ¶ 50.
[42] *Id.* ¶ 49.
[43] *Id.* ¶ 50 and fn. 98.
[44] M. Kantor, *Valuation for Arbitration*, p. 197 (2008), **CL-0066-ENG**; Counter-Memorial, ¶ 49.
[45] *Hochtief AG v. Republic of Argentina*, ICSID Case No. ARB/07/31, Award, 21 December 2016, ¶ 84, **CL-0067-ENG/SPA**; Counter-Memorial, ¶ 50.
[46] Counter-Memorial, ¶ 50.
[47] *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, SCC Case, Arbitral Award, 16 December 2003, p. 39 (emphasis added in part, and emphasis in original in part), **CL-0073-ENG**.

claim. Indeed, Respondent does not challenge the quanta of damages at this stage. An investor's reflective loss claim is distinct from a claim for the local enterprise's loss, and as such, Claimants cannot argue now that their claims for Exmingua's losses in the Notices are actually the same as bringing claims for reflective loss. They are not. The Treaty did require Claimants to specify the "relief sought"[48] under their claims in the Notice of Intent. The Treaty also provides that a claimant may submit a claim to arbitration that "the *claimant* has incurred loss or damage" under Article 10.16.1(a) of CAFTA-DR, as opposed to that "the *enterprise* has incurred loss or damage," which must be filed under Article 10.16.1(b). Claimants only announced claims for alleged losses suffered by Exmingua in certain projects and assets, and not for any impact that Exmingua's direct losses had on the value of Claimants' shares in Exmingua or Minerales KC Guatemala, Ltda.[49] This impact was never mentioned, let alone pleaded, in the Notices.

28. The Tribunal should reject Claimants' attempt to reengineer their Notices at this stage, and decide Respondent's Preliminary Objections based on the allegations contained in the Notice of Arbitration. Claimants brought claims to directly recover Exmingua's losses without meeting the CAFTA-DR requirements. All four of Claimants' claims must therefore be dismissed.

IV. CAFTA-DR PROVIDES A UNIQUE MECHANISM TO RECOVER FOR LOSSES SUSTAINED BY A LOCAL ENTERPRISE UNDER ARTICLE 10.16.1(b).

29. Even if the Tribunal were to allow Claimants to recast their damages claims (and it should not do so), Claimants cannot recover for reflective loss under Article 10.16.1(a) of CAFTA-DR.

30. The troubling consequences of granting claims for reflective loss in investor-state arbitration proceedings have been identified and acknowledged by States, tribunals and scholars, often in connection with the policy reasons that have banned reflective loss claims in national corporate law regimes.[50] These consequences, however, have often times been discounted by investor-State arbitration tribunals because, under the structure of most treaties, reflective loss was

[48] Art. 10.16.2 (d) of CAFTA-DR- **RL-0001-20-ENG**.
[49] *Postova Banka, A.S.*, Award, 9 April 2015, ¶ 233-34 ("[In *El Paso v. Argentina*] […] In other words, the tribunal had to examine whether certain assets of the companies in which the claimant had a shareholding qualified as protected investments under the treaty. The answer provided by the *El Paso v. Argentina* tribunal was straightforward: while the shares held by the claimant in the Argentinian companies were a protected investment under the US-Argentina BIT, the licenses and other contracts granted to the Argentinian companies were not protected investments."), **CL-0056-ENG**; *id.* ¶ 236 ("[T]he *El Paso v. Argentina* tribunal stated that '*what is protected are 'the shares, all the shares, but only the shares*.'") (emphasis in original), **CL-0056-ENG**.
[50] *See* ¶¶ 35 *et seq. infra*.

considered the only remedy available for certain shareholders to recover for the injuries sustained by their local companies.[51] Absent any specific provision on the standing of a shareholder to bring claims against the host State for damage to the company, tribunals traditionally focused on the applicable treaty's definition of "investor" and "investment."[52] If the claimant shareholder was a protected investor under the treaty and its shareholding interest a protected investment, international tribunals have allowed claims for reflective loss to proceed, refusing to take the cues from domestic corporate law. In other words, reflective loss was the lesser of two evils. Because reflective loss was the only remedy available for otherwise covered investors to obtain any meaningful recovery for the injury to their enterprise, tribunals ignored corporate formalities, disregarded the troubling consequences of overlooking public policy considerations, and allowed claims for reflective loss.

31. But the modern treaty applicable to this case, the CAFTA-DR, specifically designed a mechanism to address this issue. The Treaty maintains similar definitions of "investment" and "investor" as those found in older treaties, but it provides standing to shareholders to recover losses sustained by their local enterprise provided that a few requirements are met. These requirements seek to address the same policy concerns that ban claims for reflective loss in most advanced corporate domestic regimes, that is, they seek to avoid double recovery, multiple proceedings and conflicting outcomes, as well as protect the creditors and other stakeholders of the local enterprise.

32. The Tribunal must decide this case based on the specific regime that the CAFTA-DR Parties agreed to (*lex specialis*), and not rely on the interpretation of older treaties by other tribunals addressing different frameworks.

33. Here, Claimants brought claims for alleged damages sustained by Exmingua's assets and two of its projects, that is, injury directly sustained by Exmingua. CAFTA-DR provides Claimants with a mechanism to seek to recover this injury by bringing a claim on behalf of Exmingua. By doing so, Claimants are indirectly compensated (through Exmingua) for any indirect loss in their shareholding interest. Through this procedure, Exmingua's creditors are also paid and the risk of potential double recoveries and inconsistent or contradictory outcomes through different proceedings is definitively addressed. To seek such remedy, however, Claimants must, (i) bring the claims on behalf of Exmingua, (ii) submit a waiver signed by Exmingua, (iii) withdraw

[51] *See* ¶¶ 50 *et seq. infra*.
[52] *See* ¶ 57 *infra*.

from the ongoing local litigation with respect to measures alleged to constitute a breach of CAFTA-DR here, (iv) request an award be made payable to Exmingua, and (v) refrain from re-litigating claims already decided by Guatemalan courts at Exmingua's request.

34. Because Claimants failed to meet the CAFTA-DR requirements to seek to recover Exmingua's losses, all of the claims must be dismissed.

A. The Negative Consequences of Reflective Loss.

35. Most advanced corporate law systems, including the United States (Claimants' nationality), Australia, France, Germany, Hong Kong, the Netherlands, and the United Kingdom bar claims for reflective loss,[53] largely because of the acute problems associated with allowing such claims to proceed.[54] Guatemala also bars claims for reflective loss.[55] This type of claim seeks to recover the loss shareholders sustained only indirectly as a result of a direct injury sustained by the company. This type of recovery, which disregards corporate formalities, is highly

---

[53] D. Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency: A preliminary framework for policy analysis*, OECD Working Papers on International Investment, No. 2013/3, OECD Investment Division (2013), pp. 15-17, **RL-0056 -015-017-ENG**; V. Korzun, *Shareholder Claims for Reflective Loss: How Investment Law Changes Corporate Law and Governance*, 40(1) U. PA J. Int'l L. 189, pp. 201-08, **RL-0057 -013-020-ENG**.

[54] Note by the Secretariat of the UNCITRAL Working Group III, *Possible reform of investor-State dispute settlement (ISDS) Shareholder Claims and Reflective Loss*, 9 August 2019, ¶ 5 ("Domestic courts in States with advanced national corporate law systems generally reject shareholder claims for reflective loss – largely for policy reasons relating to consistency, predictability, avoidance of double recovery and judicial economy. Shareholders are permitted to bring cases for direct injury but not for reflective loss they suffer. Only the directly-injured company can bring a claim. A single company claim and recovery of any damages is viewed as both more efficient and fairer to defendants and corporate stakeholders, including creditors and shareholders. There are few shareholder claims against governments for reflective loss in domestic courts; those few cases are generally dismissed on the grounds that only the company can submit a claim."), **RL-0058 -002-003-ENG/SPA**.

[55] *See* Decreto 2-70, Commerce Code of the Republic of Guatemala, Diario Oficial: Tomo 188, 22 April 1970 (Excerpts), Art. 14 ("A corporation incorporated in accordance with the provisions of this Code and registered in the Mercantile Registry shall have its own legal personality and distinct from that of the shareholders individually considered…"), **RL-0059-SPA/ENG**; *see also* Constitutional Court of Guatemala, Case no. 4497-2011, Judgment, 28 March 2012, p. 7 (holding that "[b]ased on the aforementioned regulations, it can be stated that [the shareholder], when trying to appear as a shareholder to defend the interests of the aforementioned corporation, does not have the standing necessary to bring an *amparo* action, because the corporation legally constituted has its own legal personality and distinct from that of the shareholders individually considered, so the condition of shareholder is not a basis to appear to defend a right that does not pertain to [the shareholder] individually, but, it is argued, belongs to the corporation as a legal person."), **RL-0060-SPA/ENG**; Constitutional Court of Guatemala, Case 3841-2010, Judgment, 11 February 2011, p. 4 ("Hence, the shareholder intends to exercise a personal and direct action that corresponds to the legal representative of the related entity, since the legal entity (Real Estate Koltov, Public Limited Company) is an entity other than the members that comprise it (partners shareholders), so as not being the owner of the invoked rights and acting solely as a founding shareholder of said entity, it lacks standing to bring this constitutional action. (…) "), **RL-0110-004 -SPA**; Decreto Ley 106, Civil Code of the Republic of Guatemala, Diario Oficial: Tomo 82, 14 September 1963 (Excerpts), Art. 16 ("The legal entity forms a civil entity distinct from its individually considered members."), **RL-0061-SPA/ENG**; *id*. Art. 1434 ("Damages which consist of the losses that the creditor sustains in its patrimony, and the lost profits, must be an immediate and direct consequence of the violation, whether they have been caused or must necessarily be caused."), **RL-0061-SPA/ENG**.

problematic. It may lead to double recovery, conflicting outcomes in different proceedings, an undue windfall and it completely ignores creditors or other stakeholders who have an interest (and in the case of creditors, a priority interest) in any potential recovery.[56] The principle of no reflective loss is based on the assumption that the enterprise has an alternative available to recover the loss.[57]

36. As explained below, in the international arena, investment law organizations, contracting States, scholars and tribunals have identified the numerous undesirable consequences resulting from reflective loss claims.[58]

37. The United Nations Commission on International Trade Law created a working group to address the possible reform of investor-State dispute settlement ("ISDS"). The Secretariat was instructed to undertake preparatory work on a number of topics, including indirect claims, claims by shareholders and reflective loss. The Secretariat identified several of the problems associated with claims for reflective loss, such as the increased number of cases and multiple proceedings, the impact on the cost and duration of ISDS proceedings, the lack of consistent outcomes and interpretations and the double recovery—possibly leading to excessive damages,

---

[56] D. Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency: A preliminary framework for policy analysis*, OECD Working Papers on International Investment, No. 2013/3, OECD Investment Division (2013), p. 29 ("In domestic law and general international law, the general bar on shareholder claims for reflective loss is driven by policy. […] Judgments on shareholder claims for reflective loss in national law regularly review the policy interests that weigh against such claims, including the risks of multiple actions and inconsistent outcomes, double recovery, and the impact on creditors and other shareholders."), **RL-0056 -029-ENG.**

[57] *Id.* p. 19 ("The prohibition on shareholder claims is based on the premise that the company has the power to recover the loss. Recovery by the company is seen as more efficient: it avoids multiple claims (and complex and expensive efforts to allocate the reflective losses). It is also seen as fairer: all interested parties who suffer reflective loss will automatically benefit in accordance with their relative interests in any flow of assets to the company."), **RL-0056 -019-ENG**.

[58] D. Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency: A preliminary framework for policy analysis*, OECD Working Papers on International Investment, No. 2013/3, pp. 21 *et seq.*, **RL-0056 -021-ENG**; V. Korzun, *Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance*, pp. 221-24, **RL-0057 -033-036-ENG**; Note by the Secretariat of the UNCITRAL Working Group III, *Possible reform of investor-State dispute settlement (ISDS) Shareholder Claims and Reflective Loss*, 9 August 2019, ¶¶ 13-24, **RL-0058-005-007-ENG/SPA**; D. Gaukrodger, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, OECD Working Papers on International Investment, No. 2014/02, **RL-0062-ENG**; M. Clodfelter and J. Klingler, *Reflective Loss and Its Limits under International Investment Law*, in C. Beharry (ed.), *Contemporary and Emerging Issues on the Law of Damages and valuation in International Investment Arbitration* (2018), **RL-0009-ENG**; M. Kinnear, A. K. Bjorklund , et al., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (2006), p. 1116-8, **CL-0035-ENG**; E. Ferran, *Litigation by Shareholders and Reflective Loss,* 60(2) CLJ 231, **RL-0063-ENG**; J. Arato, K. Claussen, et al., *Reforming Shareholder Claims in ISDS*, Academic Forum on ISDS Working Paper 2019/9, ¶¶ 9-15, **RL-0064 -005-008-ENG**.

and distortion of corporate and finance law. The resulting Secretariat's note summarized how investor claims seeking an enterprise's losses negatively impact ISDS proceedings as follows:[59]

> Taken together, the above-mentioned elements relating to shareholder claims for reflective loss could contribute to undermine the predictability and legal certainty for States, investors and shareholders alike, potentially leading to increases in cost of ISDS.

38. The Roundtable on Freedom of Investment 18 of the Organisation for Economic Co-operation and Development ("OECD"), held on 20 March 2013 in Paris, "generally recognised that shareholder claims for reflective loss raise important policy issues relating to consistency."[60] The European Commission participated in the Roundtable as did the Secretariats of the ICSID and of the United Nations Conference on Trade and Development ("UNCTAD"). The Roundtable summary stated the following:[61]

> Additional government input in this area was encouraged, but there was a consensus about the widely-applied prohibition under domestic law. *The general no reflective loss principle is also applied in customary international law* and under the European Convention on Human Rights.

39. Contracting States have consistently raised concerns about the impact that claims for reflective loss may have in international proceedings. For instance, in *Suez v. Argentine Republic*, a case cited by Claimants, Argentina expressed its concerns about allowing claims for reflective loss:[62]

> The right to bring an action for any alleged injury lies with the corporation itself, not its shareholders. The Respondent further pointed out that to award a monetary recovery to the Claimants in their capacity as shareholders, as well as to AASA as the entity directly wronged, would result in an unjust double recovery and moreover would grant a recovery to specific shareholders, thus prejudicing other shareholders as well as AASA creditors.

[59] Note by the Secretariat of the UNCITRAL Working Group III, *Possible reform of investor-State dispute settlement (ISDS) Shareholder Claims and Reflective Loss*, 9 August 2019, ¶ 24, **RL-0058 -007-ENG/SPA**.
[60] *Roundtable on Freedom of Investment 18*, OECD Secretariat, 20 March 2013, p. 7, **RL-0065-007-ENG**.
[61] *Id*. p. 5 (emphasis added), **RL-0065 -005-ENG**.
[62] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua S.A. v. Republic of Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 3 August 2006, ¶ 46, **CL-0014-ENG/SPA**.

40. Scholars have also analyzed and commented on the challenge related to claims for reflective loss in international investment law. Dr. Michael Waibel summarized his concerns as follows:[63]

> When shareholder derivative claims and actions for reflective loss are admissible without limitation in international law, a serious risk of parallel proceedings ensues. In IIL, any compensation awarded is paid to whoever brings the successful claim. The incentives for shareholders to bring derivative claims are much greater than in domestic corporate law. I argue that the limitations on derivative claims and reflective loss have thus far been improperly overlooked in IIL.

41. Ms. Meg Kinnear and Ms. Andrea Kay Bjorklund have also identified the issues related to reflective loss in their publication on Investment Disputes under NAFTA:[64]

> Derivative damages raise a concern about double recovery. If an enterprise were indeed to suffer loss or damage due to a breach of Section A of Chapter 11, damages to the enterprise could be awarded under Article 1117. *If an investor pursuing a claim on its own behalf could also recover for the diminution in the value of the interest it owned, the injury might be recompensed twice.*
>
> *Derivative damages also raise a concern about basic corporate structure*. If an enterprise is injured, but damages are paid directly to shareholders with standing to bring a claim under an investment treaty such as NAFTA Chapter 11, what is the *effect on other shareholders of the corporation and on creditors*? Are their rights *effectively circumvented by the payment of damages directly* to other shareholders?

42. Professor Gabriel Bottini, at the time the Coordinator of the International Department of the Solicitor General's Office of the Argentine Republic, identified the problem as follows:[65]

> Although in principle indirect actions are beneficial for foreign investors, who increase their chances of bringing claims against measures that affect their investments, they also involve *serious legal complexities*. Perhaps the most acute is the *possibility of double recovery* since, if under different legal theories it is

[63] M. Waibel, *Coordinating Adjudication Processes*, in Z. Douglas (eds.), *International Investment Law: Bringing Theory into Practice* (2014), p. 511, **RL-0066-013-ENG**.
[64] M. Kinnear, A. Bjorklund, *et al*., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (2006), p. 1116-8 (emphasis added), **CL-0035-ENG**.
[65] G. Bottini, *Indirect Claims under the ICSID Convention*, 29 U. Pa. J. Int'l L. 563 (2008), p. 566, **RL-0067 -004-ENG**.

> established that *the same measure having one economic impact affects both the rights of the company and the rights of the shareholders, the state that adopted the measure could theoretically be required to pay compensation to the latter and to the former*.

43. Investor-State tribunals have also acknowledged the difficulties arising from reflective loss claims. In *GAMI*, a case heavily cited by Claimants,[66] the Tribunal considered at length the difficulties associated with reflective loss claims in examining the claimant's expropriation claim, including the risks of inconsistent judgments and double recovery.[67] In the Tribunal's words:[68]

> What effect should the Mexican courts now give to the NAFTA award? How could [the company's] recovery be reduced because of the payment to [the investor]? [The company] is the owner of the expropriated assets. It has never paid dividends. It would have been most unlikely to distribute revenues in the amount recovered by [the investor]. At any rate such a decision would have required due deliberation of [the company's] corporate organs. Creditors would come first. And other shareholders would have an equal right to the distribution. [The company] would obviously say that it is the expropriated owner and that its compensatable loss under Mexican law could not be diminished by the amount paid to one of its shareholders.
>
> *These difficulties are attributable to the derivative nature of* [the investor's] *claim*. They can quickly transport the analysis onto a fragile limb. It is necessary to revert to basic propositions.

44. Although the *GAMI* tribunal found it had jurisdiction over the claimant's claims, it dismissed them in their entirety, thus, never awarding damages for reflective loss.

45. In *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, the Tribunal acknowledged the risk of double recovery associated with the fact that the investor brought claims for violations sustained by its subsidiary:[69]

> The risk of double payment is admittedly an effect of the establishment of an arbitration facility also for alleged losses or damages suffered indirectly by an investor, for instance through

[66] Counter-Memorial, ¶ 32 and fns. 53, 54, 105, 142.
[67] *Gami Investments, Inc. v The Government of the United Mexican States*, Final Award, 15 November 2004, ¶¶ 116-121, **CL-0036-ENG/SPA**.
[68] *Id.* ¶ 119 (finding that "[t]he overwhelming implausibility of a simultaneous resolution of the problem [of double recovery] by national and international jurisdictions impels consideration of the practically certain scenario of unsynchronized resolution.") (emphasis in original), **CL-0036-ENG/SPA**.
[69] *Nykomb*, Award, 16 December 2003, p. 9, **CL-0073-ENG**.

> violations against its subsidiary in a country that has adhered to the Treaty. No definite remedies have been developed at this stage, but clearly the Treaty based right to arbitration is not excluded or limited in cases where there is a possible risk of double payment. This risk of double payment is only likely to be resolved through the further development of the law in this area, such as by the means of new judgements, decisions, guidance or other relevant developments.

46. In *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, the Tribunal acknowledged the dangers associated with reflective loss claims as follows:[70]

> While the Respondent recognizes that past decisions have admitted claims by indirect shareholders based on BITs in order to protect "the real party in interest", it points out that arbitral tribunals and scholars have also insisted on the importance of limiting the number of shareholders entitled to claim, especially taking into account the dangers associated with the proliferation of arbitral proceedings based on the same facts commenced by different shareholders.

47. In *El Paso Energy International Company v. The Argentine Republic*, the Tribunal explained that claims for reflective loss and claims for direct injury to the company may lead to double recovery on the claimant:[71]

> [I]nvestors cannot have their cake and eat it too. The loss of value of El Paso's shares is due, to a large extent, to the measures taken against the legal and contractual rights of the Argentinian companies. *To allow claims of El Paso on both counts, for the loss of value of its shares in the companies and for the prejudice suffered by the latter, would amount to compensating the Claimant twice*.

48. The *Orascom* Tribunal acknowledged that compensating the company for its loss also restores any indirect loss the shareholders may have suffered:[72]

> To the extent OTH would have restored its company value through arbitration proceedings under the BIT, all of the companies higher up in the corporate chain, including the Claimant, would have been made whole as well. Indeed, their loss depends on the diminution in value of their shares in OTH, which depends on the value of OTH (which in turn is a function of OTA's value). If the value of OTH is restored, then the shareholders of OTH suffer no loss, unless they incurred a loss of their own which is independent of the value of OTH.

---

[70] *Orascom,* Award, 31 May 2017, ¶ 388, **RL-0054 -101-ENG**.
[71] *El Paso Energy International Company v. Republic of Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 204 (emphasis added), **CL-0047-ENG/SPA**.
[72] *Orascom,* Award, 31 May 2017, ¶ 498, **RL-0054 -141-ENG**.

49. The problems associated with a reflective loss claim are therefore real[73] and widely recognized by arbitrators, practitioners and scholars.

B. Reflective Loss Claims Were Often Permitted in Disputes Involving Older Treaties Because They Provided the Only Meaningful Remedy for Shareholders to Recover Direct Damages Sustained by their Enterprise.

50. Despite acknowledging the problems associated with investor claims for an enterprise's loss, international tribunals have oftentimes overlooked them,[74] in part because this type of claim is the only meaningful remedy available to shareholders to recover damages suffered by their company under the respective treaties.

51. David Gaukrodger, Head of Unit and Senior Legal Adviser at the OECD Investment Division, has studied the particularities and consequences of shareholder claims in investment law. Mr. Gaukrodger attributes the limited consideration that investment tribunals have given to the acute consequences of reflective loss claims to the otherwise lack of alternatives available to investors:[75]

> National and international law barring shareholder claims for reflective loss is often explicitly driven by policy considerations relating to consistency, predictability, avoidance of double recovery and judicial economy. Limiting recovery to the company is seen as both more efficient and fairer to all interested parties. In contrast, *ISDS tribunals and commentators have generally given limited consideration to the policy consequences of allowing shareholder claims for reflective loss.*
>
> […]
>
> *Shareholders generally cannot recover reflective loss directly.* Except for the special case of NAFTA-type treaties and ICSID art. 25(2)(b) (see below section F.1), *BITs generally do not provide for recovery by the company in ISDS as a solution for shareholder reflective loss. ISDS tribunals have awarded damages for*

[73] These problems are particularly real in this case. *See* ¶ 118 *infra*.

[74] Z. Douglas, *The International Law of Investment Claims* (2009), p. 455 ("The remarkable and disquieting feature of the investment treaty jurisprudence is that tribunals have so readily abdicated their responsibility to give proper consideration to the factors listed in [the rule dealing with the requirements to be met for a shareholder's claim to be admissible]. The common refrain is no more sophisticated than 'it is not our problem.'[…] "), **RL-0068-012-ENG**; D. Gaukrodger, *Investment Treaties as corporate law: Shareholder claims and issues of consistency. A preliminary framework for policy analysis*, OECD Working Papers on International Investment, No. 2013/3, p. 8 ("ISDS tribunals have given limited consideration to policy aspects and the consequences of allowing shareholder claims for reflective loss."), **RL-0056-008-ENG**.

[75] D. Gaukrodger, *Investment Treaties as corporate law: Shareholder claims and issues of consistency. A preliminary framework for policy analysis*, OECD Working Papers on International Investment, No. 2013/3, pp. 3, 26, **RL-0056-0003-ENG**.

> *shareholders' reflective loss to the claimant shareholder rather than to the company*.

52. Likewise, Professor Gabriel Bottini addressed a number of investment cases where the tribunals, despite acknowledging the serious problems posed by claims for reflective loss, offered no alternative:[76]

> However, the most troubling aspect of this jurisprudence is that *it leaves the most acute problems posed by indirect claims without resolution*. In this respect, *several tribunals have acknowledged the danger of double recovery when ordering the payment of compensation to a shareholder for measures directed against the company* in which the shareholder has shares. *None, however, has suggested a satisfactory solution*, and the alternatives that have been mentioned are quite *ad hoc*, contingent on the facts of each case, and not based upon legal principles.

53. Several investment arbitration tribunals have acknowledged that reflective loss was the only remedy available under the applicable treaty to the shareholder to recover the direct loss sustained by its enterprise. For instance, in *Eskosol S.p.A. in Liquidazione v. Italian Republic*, a case Claimants cite to,[77] the tribunal held the reflective loss claims were admissible only after acknowledging that the applicable treaty, the ECT, offers no avenue to address two of the policy concerns of reflective loss claims, namely, the multiplicity of proceedings and the possibility of double recovery, and that reflective loss claims are the only remedy available to the shareholders of the local enterprise. In the tribunal's words:[78]

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

[76] G. Bottini, 29(3), *Indirect Claims under the ICSID Convention*, 29 U. Pa. J. Int'l L. 563, p. 638, **RL-0067-076-ENG**.
[77] Counter-Memorial, ¶ 41 and fn. 78.
[78] *Eskosol S.p.A. in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Application Under Rule 41(5), 20 March 2017, ¶ 170, **CL-0058-ENG**.

> investors from exercising their fundamental right to access the ICSID system.

54. Some investment tribunals have nonetheless rejected reflective loss claims, even if no alternative was available to the shareholders under the applicable treaty, given the troubling consequences associated with this type of redress.[79]

55. Claimants argue that "Tribunals interpreting Argentina's investment treaties with various countries, including the United States, the United Kingdom, Spain, Italy, Germany, and France, all have found that claimants may bring claims for reflective loss."[80] In support of this assertion, Claimants cite to thirteen awards.[81] In none of those cases, however, did the applicable treaty offer a mechanism to recover injuries directly sustained by the local company as provided under CAFTA-DR.[82] Thus, unlike Claimants here, the only way for the investors in the Argentine cases to recover for the injuries they indirectly sustained was through reflective loss claims. For instance, in *Siemens v. Argentina*, the tribunal concluded that the claims had to be admissible, otherwise the investors would have no remedy under the applicable treaty. The applicable treaty in *Siemens* did not include a mechanism to bring claims on behalf of Siemens' local enterprise. The tribunal stated:[83]

> *If the Treaty should be interpreted as alleged by Argentina* - by excluding from its application every specific situation that has not been included -, *we would be bound to reach the conclusion that*, in cases of discrimination, arbitrary measures, or treatment short of the just and equitable standard, *there would not be a right to compensation under the Treaty - an unlikely intended result by the Contracting Parties given the Treaty's purpose*. […]

56. Claimants also contend that reflective loss claims have similarly been allowed "under various other investment treaties."[84] They assert that, "for example, in cases under the Czech Republic-Netherlands BIT; Russia's BITs with Moldova, the United Kingdom, and Mongolia; the United States' BITs with Ecuador and Estonia; the Austria-Slovak Republic BIT; the Slovakia-Greece BIT; as well as under the Energy Charter Treaty ("ECT"), tribunals have

---

[79] *Consorzio Groupement,* Award, 10 January 2005 (holding that the Tribunal had no jurisdiction over the dispute in question, and dismissing indirect claims), **RL-0055-ENG**.
[80] Counter-Memorial, ¶ 38.
[81] *Id*. ¶ 38 and fn. 72.
[82] *See* Annex 1.
[83] *Siemens v. Republic of Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 140 (**CL-0018-ENG/SPA**)
[84] Counter-Memorial, ¶ 41.

reached the same result."[85] In support of this argument, Claimants rely on nine awards issued under the aforementioned treaties.[86] But again, unlike CAFTA-DR, none of those treaties include a mechanism to bring claims to recover the loss directly sustained by the local company.[87] Thus again, a claim for reflective loss was the only mechanism available to those investors to obtain a meaningful remedy under the treaties. But this is not the case for Claimants because CAFTA-DR does include such a mechanism.

57. Claimants further argue that this Tribunal should allow what they now call reflective loss claims to proceed because other investment tribunals have done so in the past, claiming that "Tribunals, for example, uniformly have refused to restrict coverage of investment treaties to 'direct' investments and to dismiss claims where the investment was made indirectly, where the definition of 'investment' contained no such qualifying language.'"[88] In the cases cited by Claimants in support of this argument, such as *Siemens*[89] or *Waste Management II*,[90] the respondent sought dismissal of indirect claims for lack of jurisdiction based on the definition of "investment." The treaties applicable to those cases did not provide standing to shareholders to bring claims on behalf of their injured local enterprise. As a result, tribunals traditionally focused on the applicable treaty's definition of "investor" and "investment" to allow claims for reflective loss to proceed, absent specific provisions granting standing to a shareholder to bring claims against the host State for damage to a local company. But again, Claimants' argument and cases are off point here because CAFTA-DR does provide standing to a shareholder to bring a claim on behalf of its enterprise. At this stage of these proceedings, Respondent has not argued that Claimants' direct or indirect shareholding in Exmingua does not constitute an "investment" under CAFTA-DR.[91] Instead, Respondent contends that:

---

[85] *Ibid*.
[86] *Id*. ¶ 41 and fn. 78.
[87] *See* Annex 2.
[88] *Id*. ¶ 17.
[89] *Id*. ¶ 17 ("The tribunal in *Siemens v. Argentina* thus rejected Argentina's objection that the tribunal lacked jurisdiction because the claimant held its investment indirectly.")
[90] *Id*. ¶ 18 ("The *Waste Management v Mexico II* tribunal similarly rejected Mexico's objection that, because the claimant lacked a direct interest in the affected local enterprise, in which it held shares through an intermediate company constituted in a non-NAFTA State, it did not qualify as an 'investor' under the treaty.")
[91] Respondent, however, has reserved its right to challenge the Tribunal's jurisdiction on additional grounds. Preliminary Objections, fn. 9.

a. The four claims fail *as a matter of law* because Claimants failed to bring them on behalf of Exmingua under Article 10.16.1(b) of CAFTA-DR and to meet the Treaty's requirements;

b. The four claims are *inadmissible* because—under the Treaty—Claimants lack standing to bring claims on their own behalf for Exmingua's losses;[92] and

c. The Tribunal lacks *jurisdiction* to hear the claims because the claims are for Exmingua's losses and Exmingua did not sign a waiver, as required by CAFTA-DR.[93]

58. In light of the above, whether Claimants' direct and indirect investment in Exmingua is a protected "investment" under CAFTA-DR is completely irrelevant for this discussion. For the purposes of its Preliminary Objections, Respondent assumes it is.

59. In sum, unlike the operative treaties in the cases cited by Claimants, Article 10.16.1(b) of CAFTA-DR provides a specific mechanism for shareholders to recover their alleged loss by bringing claims on behalf of the local enterprise that sustained the direct injury (here, Exmingua), provided that certain conditions are satisfied. As explained below,[94] this mechanism was first designed by the U.S. and negotiated for the NAFTA, and later enhanced in the CAFTA-DR. Claimants cannot disregard the Treaty or the requirements thereunder.

---

[92] The primary legal basis for Respondent's lack of standing argument is not the traditional principle of international law that "a company has a legal personality distinct from that of its shareholders." *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 30 November 2010, 2010 ICJ Rep. 639, ¶ 155 (citing to *Barcelona Traction*), **RL-0015-054-ENG**. Respondent bases its argument on the very language of the Treaty which, under Article 10.16.1(b), allows shareholders to bring claims "when the enterprise has incurred loss or damage," provided that a few requirements are met. **RL-0001-020-ENG**. Certainly, Article 10.16.1 of CAFTA-DR was drafted in light of that principle of international law, *inter alia*. *See* L. Caplan and J. Sharpe, *Commentary on the 2012 U.S. Model BIT*, in C. Brown (ed.), *Commentaries on Selected Model Investment Treaties* (2013), p. 825 ("Article 24(1)(b) [identical to Article 10.16.1(b) of CAFTA-DR] creates a derivative right of action, allowing an investor to claim for losses or damages suffered nor directly by it, but by a locally organized company that the investor owns or controls. The right to claim 'on behalf of an enterprise' resolves two problems arising under customary international law. First, as pronounced in *Barcelona Traction*, corporations have a legal existence that is separate from that of their shareholders […]"), **RL-0069-065-ENG**.

[93] Art. 10.18.2(b) of CAFTA-DR *conditions Guatemala's consent to arbitration* to the notice of arbitration being "accompanied" "by the claimant's *and the enterprise's* written waivers" "for claims submitted to arbitration under Article 10.16.1(b)," which is the avenue to submit a claim "when the enterprise has incurred loss or damage.", **RL-0001-022-ENG**.

[94] *See* Section IV.C *infra*.

C. NAFTA Solved the Problems Associated With Shareholders Claims for Reflective Loss by Providing Them Standing to Bring Derivative Claims Conditioned on the Fulfillment of Certain Requirements.

60. NAFTA offered a unique solution to address the policy concerns involving claims for reflective loss by providing shareholders standing to bring derivative claims, that is, claims on behalf of their local company, provided a few requirements are met. In this regard, NAFTA included a "significantly more developed system for shareholder claims"[95] than the majority of investment treaties at the time.

1. *Scholars Have Emphasized the Uniqueness of the NAFTA Mechanism to Bring Derivative Claims.*

61. Scholars have emphasized the uniqueness of the NAFTA approach and how its solution regarding derivative claims was the first of its kind negotiated and included in a modern trade agreement. For example, Professor Gabriel Bottini commented that NAFTA's allowance of indirect claims under Article 1117 is strong evidence of the contracting states' intent to expressly regulate such claims:[96]

> In fact, there are treaties that provide for indirect claims, but through specific provisions that expressly authorize shareholders to initiate them, and that are subject to very important conditions. For instance, the North American Free Trade Agreement ("NAFTA") authorizes indirect claims in Article 1117 by controlling shareholders, but subject to certain requirements, including the ones established in Article 1135, which provide that any compensation to be granted does not go to the shareholder but to the company on behalf of which the claim was brought.
>
> *These provisions are strong evidence that when the states intend to allow for indirect claims of shareholders, they do so expressly*. A different interpretation would render such provisions superfluous, a result which is contrary to basic principles of treaty construction.

[95] D. Gaukrodger, *Investment Treaties as corporate law: Shareholder claims and issues of consistency. A preliminary framework for policy analysis*, OECD Working Papers on International Investment, No. 2013/3, p. 52 ("NAFTA contains a significantly more developed system for shareholder claims than most investment treaties. Two separate provisions govern the standing of shareholders to bring claims."), **RL-0056-052-ENG**.

[96] G. Bottini, 29(3), *Indirect Claims under the ICSID Convention*, 29 U. Pa. J. Int'l L. 563, p. 572, **RL-0067-010-ENG**.

62. Similarly, Dr. Michael Waibel stated: "NAFTA, *unlike most investment agreements*, has an established mechanism for coordinating claims by shareholders and companies."[97]

63. Claimants cite to Ms. Meg Kinnear and Ms. Andrea Bjorklund's Guide to NAFTA Chapter Eleven[98] as support for their argument that "NAFTA Jurisprudence confirms the right of shareholders to bring claims on their own behalf for reflective loss."[99] Claimants however selectively quoted the author's paragraph and left out the explanation regarding the injuries, suffered by the enterprise, that are compensable *only* under Article 1117. The full paragraph reads as follows:[100]

> Article 1116 does permit an investor of a Party to submit a claim alleging that it has been harmed due to injuries suffered by its investment, including an investment that is itself an enterprise. What constitutes injuries suffered ***separately by the investor*** that are compensable under Article 1116, and ***injuries suffered by the investment that is an enterprise, compensable only under Article 1117, must be determined on a case-by-case basis.***

64. Further, in subsequent paragraphs of their publication, Ms. Meg Kinnear and Ms. Andrea Bjorklund acknowledge that "derivative damages raise a concern about double recovery," and that "derivative damages also raise a concern about basic corporate structure," and conclude that "these questions have not yet been thoroughly addressed in NAFTA jurisprudence."[101]

2. *The NAFTA Contracting Parties Agree that Article 1116 Does Not Allow a Shareholder to Recover Reflective Loss.*

65. The types of injury that Articles 1116 and 1117 address are distinct. When presenting the issue to the United States Congress prior to the implementation of NAFTA, the United States executive branch described the difference between Articles 1116 and 1117 as follows:[102]

---

[97] M. Waibel, *Coordinating Adjudication Processes*, in Z. Douglas (eds.), *International Investment Law: Bringing Theory into Practice* (2014), p. 514, **RL-0066-016-ENG**.
[98] M. Kinnear, A. Bjorklund, et al., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (2006), **CL-0035-ENG**.
[99] Counter-Memorial, ¶ 30.
[100] M. Kinnear, A. Bjorklund, et al., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (2006), p. 1116-8, **CL-0035-ENG** (emphasis added).
[101] *Ibid*.
[102] North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I, 103d Cong., 1st Sess., at 146 (1993) (emphasis added), **RL-0070-146-ENG**.

> Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: *respectively*, allegations of *direct injury* to an investor, and allegations of *indirect injury* to an investor *caused by injury to a firm* in the host country that is owned or controlled by an investor. […]

66. The United States has consistently taken the position that Article 1116 does not allow the recovery of reflective loss. That type of injury, the U.S. has insisted, must be sought through a claim under Article 1117 after certain requirements are met. In *Pope & Talbot*, the U.S. clarified that any damage to the enterprise will be a derivative loss to the investor and it must be recovered under Article 1117 of NAFTA:[103]

> Articles 1116 and 1117 of the NAFTA serve distinct purposes. *Article 1116 provides recourse for an investor to recover for loss or damage suffered by it. Article 1117 permits an investor to bring a claim on behalf of an investment for loss or damage suffered by that investment.*
>
> *Where the investment is a separate legal entity, such as an enterprise, any damage to the investment will be a derivative loss to the investor, and the investor will have standing to bring a claim under Article 1117*. Where the investment is not a separate legal entity, any damage to the investment will be a direct loss to the investor, and the investor will have standing to bring a claim under Article 1116.
>
> When an investor files a claim under Article 1116 for direct losses suffered by it, only those losses that were sustained by that investor in its capacity as an investor are recoverable.

[103] *Pope & Talbot Inc. v. Government of Canada*, Seventh Submission from the United States of America, 6 November 2001, ¶¶ 3-5 (emphasis added), **RL-0071-002-ENG**.

67. Similarly, in *GAMI*, the United States clearly stated that "Article 1116 provides standing for *direct* injuries; Article 1117 provides standing for *indirect* injuries."[104] The U.S. adopted similar positions in *S.D. Myers*[105] and *UPS*.[106]

68. More recently, in *Clayton*, the U.S. has reiterated its position (a position that the *Clayton* tribunal upheld)[107] that allowing shareholders to bring claims for direct injury to the company under Article 1116 of NAFTA would render the mechanism under Article 1117 meaningless:[108]

> *Article 1116, in contrast, adheres to the principle of customary international law that shareholders may assert claims only for direct injuries to their rights*. Were shareholders to be permitted to claim under Article 1116 for indirect injury, Article 1117's limited carve out from customary international law would be superfluous. Moreover, it is well-recognized that *an international agreement should not be held to have tacitly dispensed with an important principle of international law "in the absence of words making clear an intention to do so."* Nothing in the text of Article 1116 suggests that the NAFTA Parties intended to derogate from customary international law restrictions on the assertion of shareholder claims.

---

[104] *GAMI*, Submission of the United States of America, 30 June 2003, ¶ 14 (emphasis added), **RL-0072-005-ENG**.

[105] *S.D. Myers, Inc. v. Government of Canada*, Submission of the United States of America, 18 September 2001, ¶¶ 7-9 ("Where the investment is a separate legal entity, such as an enterprise, any damage to the investment will be a derivative loss to the investor and the investor will have standing to bring a claim under Article 1117. Where the investment is not a separate legal entity, any damage to the investment will be a direct loss to the investor and the investor will have standing to bring a claim under Article 1116. When an investor files a claim under Article 1116 for direct losses suffered by it, only those losses that were sustained by that investor in its capacity as an investor are recoverable. Examples of direct losses sustained by an investor in its capacity as an investor that would give rise to a claim under Article 1116 are, for example, losses suffered as a result of an investor's stock certificates having been expropriated or losses sustained as a result of the investor having been denied its right to vote its shares in a company incorporated in the territory of another NAFTA Party."), **RL-0073-002-ENG.**

[106] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Third Submission of the United States of America, 23 August 2002, ¶ 9 ("The United States incorporates here its positions and arguments in paragraphs 2 through 10 of the attached submission made in the case of *Pope & Talbot*: Seventh Submission of the United States of America, dated November 6, 2001."), **RL-0074-004-ENG**.

[107] *See* ¶ 79 *infra*.

[108] *William Ralph Clayton, & Bilcon of Delaware Inc. et al. v. Government of Canada*, PCA Case No. 2009-04, Submission of the United States of America, 29 December 2017, ¶ 12**, RL-0008- ENG-005** (internal citations omitted) (emphasis added). Claimants argue that "the Clayton Tribunal properly rejected Canada's objection that the claimant's only recourse would have been to have filed a claim on behalf of its wholly-owned enterprise, pursuant to NAFTA Article 1117." Counter-Memorial, ¶ 58. This is false. The tribunal did not reject the objection, but rather saw no need to address it in light of the tribunal's conclusions on other issues, *See Clayton ,* Award on Damages, 10 January 2019, ¶ 397 ("In light of these conclusions, *the Tribunal sees no need to address the Investors' contentions that* the Respondent's argument that the damages claim under Article 1116 has been brought too late, or that *the Tribunal should treat the claim as one made under Article 1117*.") (emphasis added**), CL-0070-ENG**.

69. Canada's[109] and Mexico's[110] positions are consistent with that of the U.S.

3. *Allowing Claims for Reflective Loss under Article 1116 of NAFTA Would Render the Mechanism Under Article 1117 Meaningless.*

70. Furthermore, it makes little sense for NAFTA to include a mechanism under Article 1117 for investors to bring claims on behalf of an investment for direct losses to that investment, and to impose several requirements to do so if, as Claimants wrongly suggest, investors could simply avoid the mechanism and its requirements by submitting a claim under Article 1116 for reflective loss. This is especially so if Claimants' argument that "shareholder's recovery for reflective loss will be the same whether it recovers that amount directly […] or whether the enterprise recovers the full amount of its loss"[111] were correct (which is not).[112]

71. As pointed out by Professor Zachary Douglas:[113]

> It is difficult to imagine why a shareholder would elect to bring a claim for the account of its company if it had the option of bypassing the company altogether. The company might be liable to pay creditors, local taxes and discharge other obligations before distributing the residual amount of any damages recovered to the shareholders.

72. The U.S. has echoed this position in its submissions in NAFTA cases. For instance, in its more recent submission on this issue in *Clayton*, the U.S. stated as follows:[114]

> *Allowing an investor to claim for any indirect loss under Article 1116(1) would render the above framework ineffective*. For example, if an investor had the right to bring its own claim for loss or damage suffered by an enterprise, that investor might choose to make a claim under Article 1116(1) rather than Article 1117(1) in order to protect the award from creditors or other shareholders.

73. Indeed, why would NAFTA impose requirements on investors who seek to recover the company's injury (and the shareholder's indirect loss) if avoiding them were as easy as

---

[109] *See*, *e.g.*, *Clayton,* Government of Canada Counter-Memorial on Damages, 9 June 2017, ¶ 28; *id*. fn. 50 (authorities cited including Canada's prior statements on same), **RL-0017-019-ENG**; *S.D. Myers*, Counter-Memorial (Damages Phase), 7 June 2001, ¶¶ 108-109, **RL-0075-035-ENG.**

[110] *See*, *e.g.*, *GAMI*, Statement of Defense, 24 November 2003, ¶¶ 167(e) and (h), **RL-0076-067-068-SPA**.

[111] Counter-Memorial, ¶ 50.

[112] Respondent does not necessarily agree with this argument, which does not need to be addressed at this preliminary stage of the proceedings.

[113] Z. Douglas, *The International Law of Investment Claims* (2009), p. 452, ¶ 848, **RL-0068-009-ENG**.

[114] *Clayton,* Submission of the United States of America, 29 December 2017, ¶ 20, **RL-0008-008-ENG.**

bringing a claim under Article 1116 for reflective loss, isolating the award from creditors and other shareholders?

4. *No NAFTA Jurisprudence Has Ever Granted Reflective Loss Under Article 1116 of NAFTA.*

74. Astonishingly, Claimants argue that "NAFTA jurisprudence confirms the right of shareholders to bring claims on their own behalf for reflective loss."[115] However, contrary to Claimants' argument, "no NAFTA tribunal that has considered the distinction between Articles 1116 and 1117 has ever awarded damages for reflective loss under Article 1116."[116]

75. In *Mondev*, the tribunal acknowledged that "NAFTA does not adopt the device commonly used in bilateral investment treaties […] to deal with the foreign investment interests held in local holding companies […]"[117] and concluded that NAFTA's detailed mechanism to deal with shareholder claims is *lex specialis* and should be applied as such by the tribunal. In the tribunal's view, "*[f]aced with this detailed scheme* [under Articles 1116 and 1117 of NAFTA], *there does not seem to be any room for the application of any rules of international law* dealing with the piercing of the corporate veil or with derivative actions by foreign shareholders […]."[118] Thus, while Claimants cite to paragraph 82 of the *Mondev* award to support their allegation that "NAFTA jurisprudence confirms the right of shareholders to bring claims on their own behalf for reflective loss,"[119] they fail to acknowledge that the tribunal concluded just the opposite four paragraphs below. Specifically, at paragraph 86, the *Mondev* tribunal stated that "[h]aving regard to the distinctions drawn between claims brought under Articles 1116 and 1117, *a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article*

---

[115] Counter-Memorial, p. 14 (Caption II.A.4).
[116] *Clayton*, Submission of the United States of America, 29 December 2017, ¶ 21, **RL-0008-009-ENG**.
[117] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 79 ("NAFTA does not adopt the device commonly used in bilateral investment treaties ("BITs") to deal with the foreign investment interests held in local holding companies, namely, that of deeming the local company to have the nationality of the foreign investor which owns or controls it. On the contrary, it distinguishes between claims by investors on their own behalf (Article 1116) and claims by investors on behalf of an enterprise (Article 1117). Under Article 1116 the foreign investor can bring an action in its own name for the benefit of a local enterprise which it owns and controls; by contrast, in a case covered by Article 1117, the enterprise is expressly prohibited from bringing a claim on its own behalf (Article 1117(4)). Faced with this detailed scheme, there does not seem to be any room for the application of any rules of international law dealing with the piercing of the corporate veil or with derivative actions by foreign shareholders. The only question for NAFTA purposes is whether the claimant can bring its interest within the scope of the relevant provisions and definitions."), **RL-0018-027-028-ENG**.
[118] *Ibid.* (emphasis added).
[119] Counter-Memorial, p. 14 (Caption II.A.4).

1117, to be paid directly to the investor."[120] Ultimately, the *Mondev* tribunal dismissed all the claims and no indirect damages were awarded.

76. Moreover, in *GAMI*, the primary case that Claimants rely on, the tribunal discussed at length the difficulties associated with the "*derivative nature of GAMI's claim*."[121] Ultimately, there too, the claims were dismissed, and no claims for reflective loss were granted.[122]

77. In *Pope & Talbot*, another case that Claimants rely on, the tribunal—just like the tribunal in *S.D. Myers*—found that Canada breached the protections granted under NAFTA, but ultimately only awarded damages for losses suffered directly by the claimant-investor, and not by the companies-investments.[123]

78. In the *UPS* award, a decision that has been consistently criticized by academics and tribunals,[124] the tribunal explicitly acknowledged that "the distinction between claiming under article 1116 and 1117, *in the context of this dispute* at least, is an almost entirely formal one, without any significant implication for the substance of the claims or the rights of the parties."[125] This is because in *UPS*, Claimants submitted a waiver for both the investor and the investment,[126] and also offered to resubmit the claim to bring it under Article 1117 of NAFTA.[127] Further, because the *UPS* tribunal dismissed all the claims, it never had to analyze to whom the award should be paid, that is, the claimant UPS or its enterprise, UPS Canada. Here, there are stark differences between bringing the claim under Article 10.16.1(a) or (b) of CAFTA-DR, to name a

---

[120] *Mondev*, Award, 11 October 2002, ¶ 86, **RL-0018-030-ENG**. *See also id.*, ¶ 84 ("If the claim is brought under Article 1117, these must be paid to the enterprise, not to the investor (see Article 1135(2)). This would enable third parties with, for example, security interests or other rights against the enterprise to seek to satisfy these out of the damages paid. It could also make a difference in terms of the tax treatment of those damages."), **RL-0018-029-030-ENG**.

[121] *GAMI,* Final Award, 15 November 2004, ¶ 119 (finding that "[t]he overwhelming *implausibility* of a simultaneous resolution of the problem [of double recovery] by national and international jurisdictions impels consideration of the practically certain scenario of unsynchronized resolution") (emphasis in original), **CL-0036-ENG/SPA**.

[122] *Mondev*, Award, 11 October 2002, p. 58, **RL-0018-060-ENG.**

[123] *See Pope & Talbot*, Award in Respect of Damages, 31 May 2002, ¶ 85, **CL-0028-ENG**; *S.D. Myers*, Second Partial Award, 21 October 2002, ¶¶ 222-28, **RL-0077-055-056-ENG**.

[124] *See* ¶ 179 *infra*.

[125] *UPS*, Award on the Merits, 24 May 2007, ¶ 35 (emphasis added), **CL-0037-ENG**; *see also* Counter-Memorial, ¶ 34.

[126] *UPS*, Statement of Claim, 19 April 2000, ¶ 4 ("With the Submission of this Claim on April 19, 2000, the Investor and the Investment have filed their waivers and the Investor has filed its consent to the extent required by NAFTA Article 1121(1)"), **RL-0078-004-ENG**; *see also id.*, Amended Statement of Claim, 30 November 2001, ¶13 ("UPS and UPS Canada have filed waivers and UPS has filed its consent to the extent required by NAFTA Article 1121 (1)"), **RL-0079-004-ENG.**

[127] *UPS*, Award on the Merits, 24 May 2007, ¶ 34 (" If this Tribunal does not accept its contentions respecting the construction of Article 1116, UPS asks that it be permitted to modify its claims as a claim under Article 1117"), **CL-0037-ENG**.

few: (i) Exmingua never signed a waiver and as a result Guatemala never gave its consent to arbitrate claims arising out of direct injury to Exmingua, (ii) Exmingua is a party to an ongoing litigation in Guatemala related to the same measure at issue in this Arbitration, and (iii) Claimants would receive any monetary sum awarded instead of Exmingua. The circumstances in *UPS* make that case inapposite to this one.

79. Finally, in the most recent decision, *Clayton*, the tribunal found that it was "prohibit[ed] against awarding 'reflective loss'"[128] under Article 1116, holding that article 1116 does not allow that type of recovery:[129]

> [T]he Tribunal is persuaded that the Respondent and the United States are in principle correct. *Articles 1116 and 1117 are to be interpreted to prevent claims for reflective loss from being brought under Article 1116*. This follows from the wording of Article 1116 in its context, which includes Articles 1121 and 1135. Moreover, the Tribunal takes account of the common position of the NAFTA Parties in their submissions to Chapter Eleven tribunals.

80. Claimants allege that "Respondent has not identified a single case under any modern investment treaty where a tribunal has found that an investor lacked standing to bring a claim for reflective loss as a result of a respondent State's alleged breach of the treaty."[130] The reason why Respondent did not identify cases dealing with reflective loss claims in its Preliminary Objections is because Claimants did not bring claims for reflective loss in their Notices. However, *Clayton* is a good example of a very recent case under a modern treaty, NAFTA, which does provide standing to shareholders to bring derivative claims, in which the tribunal rejected Claimants' proposition that, despite this derivative claim mechanism being available, Claimants may still bring claims for reflective loss on their own behalf: "Articles 1116 and 1117 are to be interpreted to prevent claims for reflective loss from being brought under Article 1116."[131]

81. In conclusion, Article 1116 of NAFTA does not allow for claims for reflective loss. A different conclusion would render the NAFTA mechanism under Article 1117 meaningless.

---

[128] *Clayton*, Final Award on Damages, 10 January 2019, ¶ 396, **CL-0070-ENG**.
[129] *Id*. ¶ 389 (emphasis added).
[130] Counter-Memorial, ¶ 43.
[131] *Clayton*, Final Award on Damages, 10 January 2019, ¶ 389, **CL-0070-ENG**.

D. CAFTA-DR Provides Standing to a Shareholder to Recover its Company's Loss Provided Certain Requirements are Met. Allowing Claimants to Recover Reflective Loss under Article 10.16.1(a) of CAFTA-DR Would Nullify the Mechanism Under the Treaty.

82. CAFTA-DR enhanced the mechanism under NAFTA to provide standing to a shareholder to recover injury to its local company, provided a few requirements are met. The Treaty improvements would be rendered meaningless if shareholders were allowed to circumvent the safeguards built into the Treaty by bringing claims for reflective loss under Article 10.16.1(a) of CAFTA-DR.

1. The CAFTA-DR Was Based on the U.S. Model BIT of 2004, Which Does Not Allow a Shareholder to Bring Claims for Reflective Loss on Its Own Behalf.

83. The U.S. incorporated an enhanced version of the NAFTA mechanism in its Model BIT of 2004, which in turn was the basis for CAFTA-DR.[132] The U.S. Model BIT of 2004 is very similar in this respect to the U.S. Model BIT of 2012, which includes an identical mechanism to allow shareholders to bring derivative claims on behalf of the enterprise which sustained the direct injury.[133]

84. Commentators agree that the derivative claim structure of the model treaty (encompassed in Article 10.16.1 of CAFTA-DR) does not allow investors to bring claims for reflective loss on their own behalf. Rather, an investor who has suffered an indirect loss as a result of a direct injury to its local company must bring a claim under Article 10.16.1(a) of CAFTA-DR and meet certain requirements in order to recover:[134]

> Article 24(l)(a) and 24(l)(b) establish a claimant's standing to claim under Section B, respectively, in two circumstances: where the claimant submits a claim 'on its own behalf' and 'on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly'. *Article 24(1)(a) thus allows an investor to recover for injury suffered directly by it*, whereas Article 24(l)(b) permits an investor to bring a claim for indirect harm suffered by it resulting from injury to a company in the host country that the investor owns or controls.
>
> *Article 24(1)(a) entitles a claimant to submit claims for loss or damage suffered directly by it in its capacity as an investor while*

[132] C. Dugan, et al., *Investor-State Arbitration* (2008), p. 72, **RL-0010-004**.
[133] U.S. Model Bilateral Investment Treaty (2012), Section B, Art. 24, "Submission of a Claim to Arbitration," **RL-0080-026-027-ENG**.
[134] L. Caplan and J. Sharpe, *Commentary on the 2012 U.S. Model BIT*, in C. Brown (ed.), *Commentaries on Selected Model Investment Treaties*, pp. 824-25 (emphasis added), **RL-0069-064-065-ENG**.

> *making or after having made an investment.* Even before a covered investment has been established, an investor may claim in its capacity as an investor for loss or damage suffered by it during the establishment or acquisition stage of an investment, such as loss or damage caused by discriminatory treatment by an investment screening authority. Once an investment is established, a claim may result, for example, from injury to an investor in its capacity as shareholder in a locally organized company, e.g., its shares have been expropriated or it was denied its right to receive dividend payments or vote its shares. Article 24(l)(a) entitles an investor to bring a claim whether as a majority or minority shareholder.
>
> *Article 24(1)(b) creates a derivative right of action, allowing an investor to claim for losses or damages suffered nor directly by it, but by a locally organized company that the investor owns or controls.* The right to claim 'on behalf of an enterprise' resolves two problems arising under customary international law. First, as pronounced in Barcelona Traction, corporations have a legal existence that is separate from that of their shareholders; thus the shareholders of a corporation do not, as a rule, have standing to bring a claim for compensation for a violation of the rights of the corporation, as opposed to their own rights, e.g., to vote, to receive dividends, or in ownership of stock certificates. Second, the law of diplomatic protection establishes a rule of diversity of nationality, such that a claim may not be asserted against a State on behalf of the State's own nationals, such as a locally organized enterprise in the State's territory. *Article 24(1)(b) ensures that investors who choose to carry out their foreign investment activities through locally organized enterprises that they own or control have a remedy under international law where loss or damage is suffered directly by the company*.

2. *Guatemala's Position in Previous Cases Is Fully Consistent with Its Position Here that Injury to an Enterprise Should Be Sought under Article 10.16.1(b) When Available.*

85. Claimants allege that "Respondent's own past practice confirms that Article 10.16.1(a)'s ordinary meaning, in context, permits claimants to file claims on their own behalf for the loss of value of their shares in an enterprise that has been the target of measures that violate the respondent State's treaty obligations."[135] But in both CAFTA-DR cases where Guatemala was

[135] Counter-Memorial, ¶ 25.

a party that Claimants reference,[136] Guatemala's position was fully consistent with its position in this Arbitration.

86. Specifically, Claimants refer to *Teco*, and argue that "although Guatemala raised numerous jurisdictional and admissibility objections to TECO's claim, it did *not* raise any objection that TECO was not entitled to bring a claim under Article 10.16.1(a) for so-called reflective loss."[137]

87. First, Guatemala's decision not to bring certain objections while bringing others in a different case cannot be used against Guatemala here. The reasons may have been for efficiency, an intentional allocation of resources, or to focus on any number of specific arguments. Claimants and this Tribunal cannot use objections raised or not raised in other cases as grounds to evaluate the propriety of objections raised here.

88. Second, *Teco*, in fact, had already agreed to sell its interest in the local company, EEGSA, at the time the arbitration was initiated (20 October 2010),[138] and the sale of EEGSA closed the day after the arbitration was brought (21 October 2010).[139] Further, Teco did not control EEGSA because it was a minority shareholder.[140] According to Claimants' counsel, who also represented Teco in *Teco v. Guatemala*, Article 10.16.1(b) was not available to Teco.[141] This Tribunal, however, does not need to decide this issue because Claimants are the sole owners of Exmingua.

---

[136] The cases are *Teco Guatemala Holdings LLC v. Republic of Guatemala* and *RDC v. Republic of Guatemala*. *See* Counter-Memorial, ¶¶ 26-29, 51-52, 54-55.
[137] *Id.*, ¶ 27 (emphasis in the original).
[138] *Teco*, Notice of Arbitration, 20 October 2010, ¶ 70, **CL-0030-ENG/SPA**.
[139] *Teco*, Award, 19 December 2013, ¶ 237, **CL-0031-ENG/SPA**.
[140] *Id.*, ¶ 336 ("Teco's loss, given its 24.3 percent stake in the company, was . . ."), **CL-0031-ENG/SPA**.
[141] Claimants' counsel represented Teco in *Teco* and also the Republic of Peru in *Renco*. In the latter case, Claimants' counsel argued the following: "Renco's reliance on *TECO v. Guatemala*, moreover, is misplaced. Unlike Renco, ***TECO did not own or control a local enterprise***. Rather, TECO held a 30 percent ownership interest in a consortium, which, in turn, held an 80 percent ownership interest in a Guatemalan electricity company. ***Accordingly, TECO, as a minority shareholder, could not have brought a claim under Article 10.16(1)(b) of the DR-CAFTA***, which, like Article 10.16.1(b) of the Treaty, requires the 'claimant [to] own[] or control[] directly or indirectly' the local enterprise. For the same reason, the TECO tribunal did not address a 'flow through' of damages in circumstances where the claimant purports to seek compensation for its alleged own injuries resulting from measures undertaken by the host State vis-à-vis an investment which the claimant owns and controls." (emphasis added) *Renco*, Peru's Reply on Waiver, 17 August 2015, ¶ 29, **RL-0014-013-ENG**. The U.S. has adopted a similar position with regards to Article 1117 of NAFTA. For example, in *GAMI*, a case where Claimants' counsel represented the U.S., the U.S. asserted that "[a] minority non-controlling shareholder may not, however, bring a claim on behalf of an enterprise. Only investors that own or control an enterprise of another Party directly or indirectly have standing to bring a claim for loss or damage suffered by that enterprise under Article 1117 […]." *GAMI,* Submission of the United States of America, 30 June 2003, ¶ 7, **RL-0072-007-ENG**.

89. Claimants also refer to *RDC v. Guatemala* to assert that, "it lies ill in the mouth of Respondent to argue now before this Tribunal that Claimants ought to have filed their claims on behalf of Exmingua."[142] But *RDC* is significantly different from the allegations in this Arbitration. First, RDC brought claims on its own behalf and on behalf of its local enterprise, FVG.[143] Second, RDC filed waivers signed by both itself and its local enterprise, FVG.[144] Third, in *RDC*, the local enterprise's minority shareholders were not Guatemalan nationals, an issue that is absent in the present case. Fourth, despite bringing claims on behalf of its local enterprise, RDC requested the award be fully payable to RDC, and Guatemala objected RDC's request would violate Article 10.26.2 of CAFTA-DR.[145] Fifth, and most important, in *RDC* the tribunal recognized that an award should be paid to the enterprise and awarded damages to the claimant provided that all the claimant's shares in the local enterprise were transferred to Guatemala.[146] For all these reasons, Guatemala's positions in *RDC* are fully consistent with Claimants' position in this Arbitration.

3. *If Claims for Reflective Loss Were Allowed under Article 10.16.1(a), the Requirements to Bring Derivative Claims under Article 10.16.1(b) Would Be Rendered Meaningless.*

90. The Vienna Convention on the Law of Treaties ("VCLT"), Article 31.1, provides that "[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."[147]

91. The terms of the Treaty are clear that, when "the enterprise has incurred loss or damage by reason of, or arising out of, [a] breach," "the claimant, on behalf of an enterprise […] that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration […] a claim" under Article 10.16.1(b) of CAFTA-DR.[148] Further, the object and

[142] Counter-Memorial, ¶ 55.
[143] *RDC*, Award, 29 June 2012, ¶ 266 ("Claimant filed its arbitration request both on its own behalf and on behalf of FVG"), **CL-0068-ENG**.
[144] RDC, Notice of Arbitration, 14 June 2007, ¶ 14 ("As required by Article 10.18.2, RDC and FVG provide copies of their written consents and waivers"), **RL-0081-006-ENG**.
[145] *RDC*, Award, 29 June 2012, ¶ 266 ("As pointed out by Respondent, Claimant ignores Article 10.26.2's requirement that, where a claim is submitted to arbitration under Article 10.16.1(b), an award of monetary damages shall provide that the sum be paid to the enterprise."), **CL-0068-ENG**.
[146] *Id*. ¶ 277 ("[A]nd until payment by Respondent of the awarded compensation, at which point Respondent will receive Claimant's shares in FVG."), **CL-0068-ENG**.
[147] Vienna Convention on the Law of Treaties, signed 23 May 1969, Article 31.1, **RL-0027-019-ENG.**
[148] Art. 10.16.1(b) of CAFTA-DR, **RL-0001-020-ENG**.

purpose of the derivative mechanism under CAFTA-DR, *inter alia*, is to avoid the problems associated with reflective loss claims.[149]

92. Moreover, pursuant to the principle of effectiveness in the interpretation of treaties, all its terms must be given meaning. A tribunal is not free to adopt an interpretation which would reduce clauses or paragraphs to be redundant. As the tribunal in *Postova Banka AS* put it:[150]

> As indicated by the Appellate Body of the WTO: "We have also recognized, on several occasions, the principle of effectiveness in the interpretation of treaties (ut res magis valeat quem pereat) which requires that a treaty interpreter: '…must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'. In light of the interpretative principle of effectiveness, it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously'. An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole.

93. Thus, allowing claims for reflective loss under Article 10.16.1(a) would render the CAFTA-DR mechanism to bring derivative claims for injury to the enterprise and its requirements meaningless. Once a company is made whole, any associated injury to the company's shareholders is fully restored.[151] The Treaty provides for certain requirements in order to bring a claim on behalf of the company and seek to recover the company's direct loss, including that the shareholder must own or control the company, the company must sign a waiver, and the award must be payable to the company. Interpreting Article 10.16.1(a) of CAFTA-DR to allow for recovery of the indirect loss to the shareholder arising out of that direct injury to the company would "result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility," because all the requirements to recover the direct loss the company sustained would be circumvented.

94. Claimants allege that "in accordance with Article 31(1) of the Vienna Convention, a good faith interpretation must take into account the consequences that the State Parties must

---

[149] *See* ¶ 100 *infra.*

[150] *Postova Banka AS*, Award, 9 April 2015, ¶ 293, **CL-0056-ENG**.

[151] *Orascom* Award, 31 May 2017, ¶ 498 ("To the extent [the enterprise] would have restored its company value through arbitration proceedings under the BIT, all of the companies higher up in the corporate chain, including the Claimant, would have been made whole as well. Indeed, their loss depends on the diminution in value of their shares in [the enterprise], which depends on the value of [the enterprise] (which in turn is a function of OTA's value). If the value of [the enterprise] is restored, then the shareholders of [the enterprise] suffer no loss, unless they incurred a loss of their own which is independent of the value of [the enterprise]."), **RL-0054-141-ENG**.

'reasonably and legitimately' be considered to have envisaged as flowing from their undertakings."[152] On this basis, Claimants allege that "Tribunals […] uniformly have refused to restrict coverage of investment treaties to 'direct' investments and to dismiss claims where the investment was made indirectly, where the definition of 'investment' contained no such qualifying language."[153] Once again, Claimants miss the point. Respondent does not seek to "restrict coverage" of CAFTA-DR because the "investment was made indirectly."[154] This is Claimants' mischaracterization of Respondent's argument to cite to dozens of irrelevant cases.[155] Respondent seeks dismissal of the claims because Claimants failed to comply with the mechanism under Article 10.16.1 of CAFTA-DR despite seeking to recover Exmingua's loss (or any impact that loss had on Claimants' indirect interest in Exmingua). As Claimants argue, "a good faith interpretation must take into account the consequences that the State Parties must 'reasonably and legitimately be considered to have envisaged as flowing from their undertakings.'"[156] Allowing Claimants to bring claims for reflective loss under Article 10.16.1(a) of CAFTA-DR would render the mechanism under Article 10.16.1(b) meaningless, and would open the door to double recovery, multiple proceedings and conflicting outcomes, as well as harm creditors and other stakeholders of the local enterprise.

95. Claimants argue that "Claimants certainly 'reasonably and legitimately' considered that the Treaty provided them with the ability to submit a claim to arbitration seeking recovery for harm suffered by them as a result of measures taken by Respondent against Exmingua."[157] And Claimants are right. CAFTA-DR does provide them with the ability to submit a claim to arbitration or seek to recover the indirect harm Claimants sustained as a result of the alleged measures taken by Guatemala against Exmingua: bringing a derivative claim on behalf of Exmingua under Article 10.16.1(b) after complying with a few requirements.

96. When interpreting CAFTA-DR, this Tribunal must consider the consequences that Claimants' reading of the Treaty would have (rendering the safeguards built into the derivative

[152] Counter-Memorial, ¶ 16.
[153] *Id.* ¶ 17.
[154] *Ibid.*
[155] For the purposes of its Preliminary Objections, Respondent assumes Claimants are covered investors and Exmingua is a covered investment under CAFTA-DR. *See* ¶ 58 *supra.*
[156] Counter-Memorial, ¶ 16.
[157] *Id.* ¶ 24.

claim mechanism illusory) and require that any claim arising out of direct injury to Exmingua be brought under Article 10.16.1(b) of CAFTA-DR.

4. *The Derivative Claim Mechanism Provided Under Article 10.16.1(b) of CAFTA-DR Does Seek to Protect Creditors.*

97. Claimants assert that "[t]here is no indication anywhere in the text of the DR-CAFTA that an object and purpose of the Treaty is to provide protection to creditors."[158] Claimants also complain that Respondent has not "produced any evidence that the Parties intended to protect creditors when structuring Article 10.16.1(a) and (b)."[159] Both assertions are wrong.

98. Article 10.26.2 of CAFTA-DR provides as follows:[160]

> Subject to paragraph 1, where a claim is submitted to arbitration *under Article 10.16.1(b)*:
>
> > (a) an award of restitution of property shall provide that restitution be made to the enterprise;
> >
> > (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and
> >
> > (c) *the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law*.

99. The primary example of a person that may have a "right . . . in the relief under applicable domestic law" is a creditor of the company, which would have priority rights over the company's shareholders. This is precisely one of the safeguards that CAFTA-DR State Parties agreed to and Claimants want to bypass. Yet, Claimants seek to receive compensation for Exmingua's alleged injury directly, circumventing "any right that any person may have in the relief under applicable domestic law."[161]

100. The distinct function of Article 10.16.1(b) of CAFTA furthers the policy goal of protecting creditors (and other goals, including avoiding double recovery). As explained, this mechanism is present in the US Model BIT of 2004 and 2012, which sought to protect creditors:[162]

---

[158] *Id*. ¶ 48.
[159] *Ibid.*
[160] Art. 10.26.2 of CAFTA-DR, **RL-0001-030-ENG**.
[161] *Ibid*.
[162] L. Caplan and J. Sharpe, *Commentary on the 2012 U.S. Model BIT*, in C. Brown (ed.), *Commentaries on Selected Model Investment Treaties*, p. 826 (emphasis added), **RL-0069-066-ENG**.

> The distinct function of [Article 10.16.1(b) of CAFTA-DR] furthers two additional policy goals. First, *by maintaining the distinction between the rights of shareholders and the corporation, the provision prevents investors 'from effectively stripping away a corporate asset—the claim—to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors'*. [Article 10.26.2 of CAFTA-DR] reinforces this goal by requiring that an award resolving a claim under [Article 10.16.1(b) of CAFTA-DR] be made in favour of the enterprise, not the investor, and that the award provide 'that it is made without prejudice to any right that any person may have in the relief under applicable domestic law'. Second, allowing only investors who own or control a locally organized enterprise to claim under [Article 10.16.1(b) of CAFTA-DR], coupled with the requirements in Article [10.18.2(b) of CAFTA-DR] that the enterprise waive its rights to local court or other dispute settlement proceedings, avoids the problem of double recovery.

101. Contracting Parties, academics and tribunals have acknowledged that the similar provision under Article 1117 of NAFTA also seeks to protect creditors.

102. In *GAMI*, the U.S. submitted the following:[163]

> The distinction between Articles 1116 and 1117 is also critical to ensuring that creditors' rights with respect to the investment are respected. Under Article 1135(2)(a) and (b), where a claim is made under Article 1117(1), the award must provide that any restitution be made, or monetary damages be paid, to the enterprise. *This prevents the investor from effectively stripping away a corporate asset -- the claim -- to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors.* This goal is reflected in Article 1135(2)(c), which provides that where a claim is made under Article 1117(1), the award must provide that it is made without prejudice to any person's right (under applicable domestic law) in the relief.

103. In *Mondev*, the tribunal noted the U.S. position that Article 1117 of NAFTA protects creditors, and concluded tribunals should ensure that, when those interests are at stake, damages are recovered by the company:[164]

> [T]he United States […] pointed to the importance of the distinction between claims brought by an investor of a Party on its own behalf under Article 1116 and claims brought by an investor of a Party on behalf of an enterprise under Article 1117. The principal difference

[163] *GAMI,* Submission of the United States of America, 30 June 2003, ¶ 17 (emphasis added), **RL-0072-006-ENG**.
[164] *Mondev*, Award, 11 October 2002, ¶¶ 84-86 (emphasis added), **RL-0018-029-030-ENG**.

> relates to the treatment of any damages recovered. *If the claim is brought under Article 1117, these must be paid to the enterprise, not to the investor (see Article 1135(2)). This would enable third parties with, for example, security interests or other rights against the enterprise to seek to satisfy these out of the damages paid*. It could also make a difference in terms of the tax treatment of those damages
>
> […]
>
> Having regard to the distinctions drawn between claims brought under Articles 1116 and 1117, a NAFTA tribunal should be careful *not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor*.

104. In sum, as explained by Professor Zachary Douglas:[165]

> *Article 1135 serves to protect the rights of the creditors of the enterprise* by ensuring that any damages recovered by an action brought on behalf of the enterprise pursuant to Article 1117 are paid to the enterprise and not to the investor/shareholder, thus *allowing the creditors to enforce any security interests or other rights they may have over assets of the enterprise, which would include the award.*

5. *Absent a Waiver Signed by Exmingua, Guatemala Did Not Provide Consent to Arbitrate Claims Arising Out of a Direct Injury Sustained by Exmingua.*

105. Article 10.18.2(b) of CAFTA-DR requires a claimant to accompany its notice of arbitration with the claimant's and the enterprise's waivers when a claim is submitted to arbitration under Article 10.16.1(b) of CAFTA-DR, which is the avenue to claim that "the enterprise has incurred loss or damage by reason of, or arising out of, [the respondent's] breach."[166] Under *Commerce*, this requirement is not only formal, but also material, that is, a claimant must also withdraw from any local litigation related to any measure by the State alleged to constitute a breach of CAFTA-DR in the arbitration.[167] Moreover, a CAFTA-DR arbitral tribunal "has no jurisdiction without agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver" and "[i]t is for the Respondent and not the Tribunal to waive any deficiency under Article 10.18 or to allow a defective waiver to be remedied."[168]

---

[165] Z. Douglas, *The International Law of Investment Claims* (2009), ¶ 834, **RL-0068-004-ENG**.
[166] Art. 10.16.1(b)(ii) of CAFTA-DR, **RL-0001-020-ENG**.
[167] *Commerce*, Award, 14 March 2011, ¶ 107, **RL-0021-037-ENG**; *see also* Preliminary Objections, ¶ 69.
[168] *RDC*, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, ¶ 61, **RL-0020-026**; *see also* Preliminary Objections, ¶ 69.

106. Claimants concede their claims are related to harm sustained "as a result of the respondent State's measures aimed at the enterprise."[169] It therefore follows that it is Exmingua that "has incurred loss or damage by reason of, or arising out of, [Guatemala's alleged] breach."[170] Notwithstanding, Claimants brought the claims on their own behalf, and failed to submit a waiver signed by Exmingua. Further, Exmingua continues to pursue—through local litigation—the reinstatement of the mining license they allege here Guatemala expropriated. On this basis, Claimants argue that "Claimants submitted their claims pursuant to Article 10.16.1(a) and, consequently, in accordance with the plain language of Article 10.18.2(b)(i), were required to submit [only] a waiver on behalf of themselves."[171] Further, Claimants argue that *they* "are not parties to *any* proceedings before any Guatemalan court or administrative tribunal."[172]

107. This is exactly the type of outcome the CAFTA-DR's derivative claim mechanism seeks to prevent. Under Claimants' logic, the safeguards against double recovery and multiple proceedings established under the Treaty can be completely disregarded by simply submitting a claim under Article 10.16.1(a) for reflective loss and avoid the waiver requirement by having the party to the local litigation (the enterprise) not waive the same claims asserted in an arbitration by a shareholder investor. Such an interpretation would undercut a threshold requirement and is not permissible under the Treaty. Claimants' attempt to circumvent the waiver requirement must be rejected.

108. CAFTA-DR enhanced the NAFTA by eliminating the requirement that the enterprise must also submit a waiver on behalf of the enterprise even for claims brought under Article 1116.[173] The inclusion made tribunals question whether claims for reflective loss could be brought under Article 1116, given the requirement under Article 1121.1(b) of a waiver signed by the enterprise.[174]

---

[169] Counter-Memorial, ¶ 24.
[170] Art. 10.16.1(b) of CAFTA-DR, **RL-0001-020-ENG**.
[171] Counter-Memorial, ¶ 66.
[172] *Id.* ¶ 67 (emphasis in original).
[173] Article 1121.1(b) ("1. A disputing investor may submit a claim under Article 1116 to arbitration only if: […] (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party."), **CL-0034-ENG/SPA**.
[174] *See Clayton*, Submission of the United States of America, 29 December 2017, ¶ 13, **RL-0008-005-006-ENG.**

109. CAFTA-DR made it clear that, when claims are for direct injury to the shareholder, then the shareholder may bring a claim on its own behalf and submit a waiver signed only by itself. However, when the injury is to the company, then the shareholder must bring the claim on behalf of the company and submit waivers signed by both the shareholder and the enterprise.[175]

6. *Annex 10-E of CAFTA-DR Would Prevent Exmingua from Bringing a Claim for Full Protection and Security.*

110. According to Claimants, Respondent argues "Claimants have acted in contravention of DR-CAFTA Annex 10-E, by submitting to arbitration [the full protection and security claim] after Guatemalan courts had ruled on Exmingua's *amparo* actions."[176] This is not what Respondent argued. Rather, Respondent asserts that "Claimants should not be allowed to circumvent the 'Fork-in-the-Road' provision by disguising their claims as claims made on their own behalf under Article 10.16.1(a) of CAFTA-DR."[177] Indeed, had Claimants brought their claims for the 350,000,000 USD in alleged damages sustained by Exmingua under Article 10.16.1(b) of CAFTA-DR, Claimants' full protection and security claim would be barred under CAFTA-DR Annex 10-E because the claim has already been litigated before the courts of Guatemala.[178]

111. First, had Claimants brought their claims under Article 10.16.1(b) of CAFTA-DR, the local proceedings before the Guatemalan courts would have triggered the Fork-in-the-Road provision under Annex 10-E of CAFTA-DR. Indeed: (i) Claimants are "investor[s] of the United States"; (ii) they would have submitted to arbitration a claim that Guatemala, "a Central American Party [,] . . . has breached an obligation under Section A"; (iii) the claim would have been submitted on behalf of Exmingua, which is "an enterprise of a Central American Party . . . that is a juridical person that the investor owns or controls directly or indirectly under Article 10.16.1(b)"; (iv) when Exmingua, "the enterprise, . . . has alleged that breach under Section A" in proceedings before Guatemalan domestic courts.[179] Instead, Claimants brought their claims under Article 10.16.1(a) of CAFTA-DR to bypass the restrictions under Annex 10-E of CAFTA-DR.

---

[175] Art. 10.18.2(b) of CAFTA-DR, **RL-0001-0022-ENG**.
[176] Counter-Memorial, ¶ 73.
[177] Preliminary Objections, ¶ 78.
[178] Preliminary Objections, ¶¶ 75-77. *Compare* Notice of Arbitration, ¶¶ 73-74 *with* Notice of Arbitration, ¶¶ 43, 56.
[179] Annex 10-E of CAFTA-DR, **RL-0001-039**.

112. Second, the law under which Exmingua initiated the local proceedings in Guatemala is not relevant to determine whether Annex 10-E of CAFTA-DR applies, as Claimants contend.[180] Instead, a tribunal should assess whether the claims brought in an arbitration and before the local courts "share the same fundamental basis."[181] In other words, "[t]he key is to assess whether the same dispute has been submitted to both national and international fora."[182]

113. In *H&H Enterprises Investments v. Egypt*, for instance, Article VII.1, VII.3(a)(ii) and (iii) of the applicable BIT read as follows:[183]

> 1. For purposes of this Article, **a legal investment dispute is defined as a dispute involving** (i) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; or (ii) **an alleged breach of any right conferred or created by this Treaty with respect to an investment.**
>
> […]
>
> 3. (a) In the event that the legal investment dispute is not resolved under procedures specified above, then national or company concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes ("Centre") for settlement by conciliation or binding arbitration, if, within six (6) months of the date upon which it arose: […] (ii) the **dispute has not**, for any good faith reason, **been submitted for resolution in accordance with any applicable dispute-settlement procedures previously agreed to by the Parties to the dispute**; or (iii) the national or company concerned has not brought the dispute **before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a Party to the dispute**."

---

[180] Counter-Memorial, ¶ 81.

[181] *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award (excerpts), 6 May 2014, ¶ 368, **RL-0024-036-ENG**; *see also Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania,* ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶ 61 ("it is common ground that the relevant test is the one expressed by the America-Venezuela Mixed Commission in the *Woodruff* case (1903): whether or not 'the fundamental basis of a claim' sought to be brought before the international forum is autonomous of claims to be heard elsewhere."), **RL-0025-017-ENG**; *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, ¶ 330, **RL-0032-147-ENG**; *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, ¶ 4.75-4.76, **RL-0082-128-129-ENG**.

[182] *Pantechniki*, Award, 30 July 2009, ¶ 61, **RL-0025-017-ENG**.

[183] Treaty between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragements and Protections of Investments, signed in Washington on 29 September 1982, with a Related Exchange of Letters signed 11 March 1985 and a Supplementary Protocol signed 11 March 1986, entered into force 27 June 1992, p. 21 (emphasis added), **RL-0083-021-**ENG; *see also H&H*, Award (excerpts), 6 May 2014, ¶ 366 (emphasis in the original in part and added in part), **RL-0024-035**.

Thus, the definition of the term "dispute" in the BIT included as an element "an alleged breach of any right conferred or created" by the BIT. Despite this language, the *H&H* tribunal did not find that the investor had to allege a *treaty breach* in the local proceedings in order to trigger the fork-in-the-road provision. Instead, the *H&H* tribunal determined that the "fundamental basis" test had to be met:[184]

> 368. In the Tribunal's view, therefore, **instead of focusing on whether the causes of actions relied upon** in the claims brought to the local courts and the arbitration **are identical, one must assess whether the claims share the same fundamental basis**.
>
> 369. Accordingly, in order to decide whether the Claimant's Treaty claims in the present case are barred by the fork-in-the-road clause, the Tribunal must determine whether the Treaty claims have the same fundamental basis as the claims submitted before the local fora.

114. As a result, the *H&H* tribunal held that the claims were barred by the fork-in-the-road provision because the claimant had already submitted the dispute to arbitration before a Cairo arbitral tribunal and to competent domestic courts. In its analysis, the tribunal emphasized that claimant's claims in the ICSID arbitration proceedings "were based on the very same facts and . . . on the very same contract" relied upon by the claimant in the arbitration proceeding under Egyptian law and in the litigation proceedings before Egyptian domestic courts.[185]

115. Here, CAFTA-DR Annex 10-E does not mandate that the specific CAFTA-DR provision allegedly breached by the Respondent be invoked before the domestic courts in order to trigger the Fork-in-the-Road provision. Annex 10-E reads as follows:[186]

> 1. An investor of the United States may not submit to arbitration under Section B a claim that a Central American Party or the Dominican Republic *has breached an obligation under Section A* either:
>
> (a) on its own behalf under Article 10.16.1(a), or
>
> (b) on behalf of an enterprise of a Central American Party or the Dominican Republic that is a juridical person that the investor owns or controls directly or indirectly under Article 10.16.1(b),

[184] *H&H*, Award (excerpts), 6 May 2014, ¶¶ 368-369, **RL-0024-036-ENG**.
[185] *Id.* ¶¶ 382, 372-382, **RL-0024-037-040-ENG**.
[186] Annex 10-E of CAFTA-DR, **RL-0001-039-ENG**.

> if the investor or the enterprise, respectively, has alleged *that breach of an obligation under Section A* in proceedings before a court or administrative tribunal of a Central American Party or the Dominican Republic.

Thus, Annex 10-E states that a CAFTA-DR investor cannot initiate an arbitration for the breach of an obligation under Section A of Chapter 10 of CAFTA-DR if the investor, or the enterprise it owns or controls, has already alleged before a domestic court "that breach of an obligation under Section A" that a claimant is resubmitting now to a CAFTA-DR arbitration. In other words, in order to trigger the Fork-in-the-Road provision, the investor or the enterprise must have submitted a claim before the domestic courts for the same *breach* as the breach alleged before a CAFTA-DR arbitral tribunal. The provision does not require specifically that a violation of CAFTA-DR be invoked before a domestic court.

116. Interpreting the Fork-in-the-Road provision as requiring that a violation of Section A of Chapter 10 of CAFTA-DR be invoked before a domestic court would deprive the fork-in-the-road provision of its practical effect. The object and purpose of a fork-in-the-road provision is "to ensure that the same dispute is not litigated before different fora,"[187] avoiding conflicting outcomes and double recovery. If CAFTA-DR Annex 10-E were only triggered when an investor claims that a State party has violated Section A of Chapter 10 of CAFTA-DR, as Claimants contend, the investor would be inclined to base its claims on domestic laws before the domestic courts. That way, the investor would avoid the application of the Fork-in-the-Road clause and preserve its right to resubmit the same claims before a CAFTA-DR tribunal alleging that Section A of Chapter 10 of CAFTA-DR has been violated. This interpretation is incompatible with the object and purpose of the provision.

117. As explained in the Preliminary Objections, the full protection and security claim before the Tribunal shares the same fundamental basis as the claims asserted by Exmingua before the Guatemalan Constitutional Court in 2012 and 2016.[188] Both claims were rejected by the Guatemalan courts. Claimants should not be allowed to circumvent the Fork-in-the-Road provision by bringing claims on its own behalf for losses incurred by Exmingua under Article 10.16.1(a) of CAFTA-DR instead of Article 10.16.1(b) of CAFTA-DR.

[187] *H&H*, Award (excerpts), 6 May 2014, ¶ 367, **RL-0024-035-ENG**.
[188] Preliminary Objections, ¶¶ 74-77.

7. *Conclusion Regarding the First Objection.*

118. In conclusion, CAFTA-DR provides a specific mechanism that governs derivative claims. While Article 10.16.1(a) allows investors to bring claims for direct losses, when a shareholder seeks to recover indirect losses for direct injuries to a local enterprise it owns or controls, the shareholder must use the derivative claim mechanism provided under Article 10.16.1(b) of the CAFTA-DR and satisfy its requirements. Otherwise, the mechanism and protections provided under Article 10.16.1(b) would be illusory and provide no protection at all.

119. Claimants should have brought their claims on behalf of Exmingua because, as they allege, they only sustained indirect, and not direct, injuries. The entity which allegedly suffered direct injury from Guatemala's measures is Exmingua. Unlike the treaties Claimants reference, Claimants had the legal mechanism under CAFTA-DR available to them to bring their claims before this international tribunal on behalf of Exmingua. This mechanism was designed to avoid the traditional problems domestic and international tribunals have encountered involving reflective loss claims, problems which Claimants have now improperly injected in this arbitration. Allowing Claimants to bring their new claims for reflective loss under Article 10.16.1(a), would render the CAFTA-DR mechanism meaningless, and Claimants would be allowed to ignore not only the Treaty provisions, but the very policy concerns the Treaty sought to address. The policy concerns are real in this case. If permitted to proceed in this manner, Claimants would be allowed to directly claim losses allegedly sustained by Exmingua, with the entire award payable to Claimants instead of to Exmingua, the entity that has allegedly sustained the injury. Exmingua's creditors (such as its employees, vendors, tax authorities or other members of the community with claims against Exmingua) and other stakeholders would be ignored and any priority rights that they have would be eviscerated. Making matters worse, Exmingua would be allowed to continue to pursue local litigation to reinstate the licenses for the projects—each of which were originally granted for 25 years[189]—that, in the meantime, Claimants allege have been expropriated, which could result in a double recovery if not a windfall for Claimants. The CAFTA-DR contracting Parties wanted to avoid these problems and provided Claimants with the mechanism to do so. Ignoring it at the expense of the ISDS system and the Republic of Guatemala is not, and should not, be allowed under CAFTA-DR.

[189] Notice of Arbitration, ¶¶ 40, 47.

120. In sum, Claimants used Exmingua as an independent entity to shield themselves from unlimited liability in Guatemala, but they now seek to disregard the corporate veil and the Treaty's requirements to claim reflective loss. This is impermissible under CAFTA-DR.

V. CLAIMANTS' MOST-FAVORED-NATION TREATMENT CLAIM WAS OMITTED FROM THE NOTICE OF INTENT AND MUST BE DISMISSED.

121. Claimants admit they did not comply with Article 10.16.2 of CAFTA-DR.[190] Seeking to avoid this reality, Claimants now attempt to re-write the factual basis for their MFN claim and minimize their failure to include the MFN claim in their Notice of Intent.[191]

122. In support of their MFN claim, Claimants allege that Exmingua's projects received less favorable treatment than what Respondent accorded to Escobal, a silver mine operated by the Guatemalan subsidiary of a Canadian company.[192] Specifically, the Notice of Arbitration alleges that "*in contrast with Exmingua's case*, the Guatemalan Supreme Court reinstated Escobal's mining license in September 2017."[193] One month later, Escobal's mining license was again suspended on appeal.[194] On 3 September 2018, the Constitutional Court rendered a final ruling and decided that the license would remain suspended until public consultations were carried out in accordance with the ILO Convention.[195] According to Claimants, the ruling of the Constitutional Court "was rendered even though the *Escobal* appeal was filed more than one year after Exmingua filed its appeal with the Constitutional Court, which the Court has failed to act upon."[196]

123. Although the Notice of Arbitration specifically contrasts the treatment received by Exmingua with the treatment received by Escobal through both the ruling of the Guatemalan Supreme Court of September 2017 (*i.e.*, more than seven months *before* Claimants submitted the Notice of Intent of 16 May 2018) and the 3 September 2018 ruling of the Constitutional Court (*i.e.*, more than three months *after* the Notice of Intent of 16 May 2018),[197] the Counter-Memorial ignores the former and only focuses on the latter.[198] Claimants cannot ignore specific allegations

[190] Counter-Memorial, ¶¶ 84, 91.
[191] *Compare* Notice of Arbitration, ¶ 63 *with* Counter-Memorial, ¶ 84.
[192] Counter-Memorial, ¶ 84; Notice of Arbitration, ¶ 63.
[193] Notice of Arbitration, ¶ 63 (emphasis added in part and omitted in part).
[194] *Ibid*.
[195] *Ibid*.
[196] *Ibid*.
[197] *Ibid*.
[198] Counter-Memorial, ¶ 84.

in the Notice of Arbitration to justify the absence of the claim from the Notice of Intent. The Notice of Arbitration alleges the claim was ripe before Claimants submitted their Notice of Intent. Accordingly, because the alleged legal and factual bases of the MFN claim—let alone any reference to Article 10.4 of CAFTA-DR—are nowhere to be found in the Notice of Intent notwithstanding the requirements of Article 10.16.2 of CAFTA-DR, the MFN claim should be dismissed.

A. Claimants Admit They Omitted the MFN Claim in Their Notice of Intent.

124. Article 10.16.2 of CAFTA-DR requires a claimant to deliver a notice of intent that "shall specify", among others, "[…] (b) for each claim, the provision of [CAFTA-DR] alleged to have been breached and any other relevant provisions; (c) the legal and factual basis for each claim; and (d) the relief sought and the approximate amount of damages claimed."[199] In their Counter-Memorial, Claimants admit they did not plead these three elements in the Notice of Intent in connection with their MFN claim, which is not even identified or included.

125. First, Claimants concede that the "MFN claim […] was not expressly referenced in their Notice of Intent."[200] Thus, the provision alleged to have been breached, Article 10.4 of CAFTA-DR, was not included in the Notice of Intent.

126. Second, although Claimants now argue that they "set forth the essential facts and legal basis for their MFN claim" in their Notice of Intent,[201] the Notice of Intent itself leaves no doubt that the legal and factual bases for the MFN claim are missing. In the Notice of Intent, Claimants included the factual and legal bases for their National Treatment claim: the treatment that Respondent afforded to Exmingua's projects was allegedly less favorable than the treatment it accorded to "two projects owned *by Guatemalan companies*."[202] But Claimants did not allege

[199] Art. 10.16.2 of CAFTA-DR, **RL-0001-020-ENG**; *Pac Rim*, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶¶ 92-93, **RL-0003-054-055-ENG**; D. Gantz, *Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement*, 30(2) B.C. Int'l & Comp. L. Rev. 331, p. 370 ("The claimant is required to specify, in addition to names and addresses, the particular provisions of Section A or of the investment authorization or investment agreement for which a breach is claimed, the 'legal and factual basis for each claim,' as well as the relief sought and the approximate damages claimed. This requires something more than simple 'notice' pleading, given the language about the legal and factual basis for each claim."), **RL-0050-041-ENG**.

[200] Counter-Memorial, ¶ 91.

[201] *Id.* ¶ 83.

[202] Notice of Intent, p. 3 (emphasis added), **C-5**.

"the essential condition of the violation of a MFN clause": that Respondent did not accord to Exmingua's projects the same treatment it granted to the investors of Canada or any other State.[203]

127. Further, even if the Tribunal were to allow Claimants' improper attempt to recast their MFN claim in the Counter-Memorial by alleging now that the relevant decision was only issued after the Notice of Intent was sent, the claim would still fail because Claimants have made it abundantly clear that the legal and factual bases of the MFN claim were missing at the time the Notice of Intent was transmitted.

128. Claimants argue that such legal and factual bases did not exist at the time of the Notice of Intent (an argument which is belied by the allegations in the Notice of Arbitration), and which, if true, proves that such allegations were not included in the Notice of Intent. Specifically, Claimants argue that "[a] few months *after* Claimants submitted their Notice of Intent, the Constitutional Court ruled in the *Escobal* case […]," [204] and it was that decision which forms the legal and factual basis for the MFN claim.[205] Thus, at the time Claimants submitted the Notice of Intent, Claimants claim they did not know they had an MFN claim. Well, if Claimants were not aware of the MFN claim, then certainly Claimants could not have included it in the Notice of Intent and Respondent could not have been made aware of it.[206]

---

[203] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 369 ("The essential condition of the violation of a MFN clause is the existence of a different treatment accorded to another foreign investor in a similar situation."), **RL-0084-078-ENG**. *See also UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary,* ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, ¶ 162 ("The self-evident purpose of an MFN clause is to ensure that treatment accorded to investors under one BIT will be no less advantageous than treatment accorded to investors under another BIT. The purpose of such a clause is to ensure that there will be no discrimination between foreign investors."), **RL-0085-056-057-ENG**; A. Newcombe, L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), p. 225 ("Despite the variation between MFN clauses, two common issues arise in their application: (i) identifying the relevant comparator; and (ii) comparing the treatment received by the foreign investor or investment and the comparator to determine if there is less favourable treatment. Since MFN treatment is a relative standard, its application always turns on making the appropriate comparison between two different entities or things. **In the case of MFN treatment, the comparison will be between third state investors or investments and the foreign investors or investments benefiting under the basic treaty between the home and host state. Identifying the appropriate comparator is a key element in the analysis.** Second, there must be a comparison of the treatment afforded to the applicable investors or investments to assess whether the host state accorded less favourable treatment.") (emphasis added), **RL-0086-014-ENG**.

[204] Counter-Memorial, ¶ 84 (emphasis added in part).

[205] *Id.* ¶ 84 ("**Claimants referenced these facts in their Notice of Arbitration** and, because the San Rafael mine was operated by the Guatemalan subsidiary of Tahoe Resources, a Canadian company, Claimants included an MFN claim in their Notice of Arbitration. **Accordingly, the factual bases for this claim**, including the nature of the measures giving rise to the MFN claim, which concerns the differential treatment afforded by Respondent's courts, **were set forth in Claimants' Notice of Intent**, and Respondent cannot credibly suggest that it was not on notice as to these complaints.") (emphasis added).

[206] Beyond this, per Claimants' own allegation, Claimants did not comply with the mandatory minimum period of six months under Art. 10.16.3 of CAFTA-DR between the date of the events giving rise to the MFN claim – the 3

129. Third, Claimants' admission that they did not plead an MFN claim in the Notice of Intent[207] confirms that the relief sought and the damages claimed in the Notice of Intent do not include the MFN claim. Claimants' improper new MFN claim[208] fails if Claimants are correct that their MFN claim did not exist at the time they submitted the Notice of Intent[209] (which, again, is belied by the factual allegations in the Notice of Arbitration).[210] The MFN claim is doomed because the relief sought and the amount of damages that Claimants specified in the Notice of Intent did not and could not have included the relief and damages now sought for the alleged breach of Article 10.4 of CAFTA-DR.

130. For the foregoing reasons, per Claimants' own account, the Notice of Intent does not satisfy the express requirements under Article 10.16.2 of CAFTA-DR with regards to Claimants' MFN claim. Accordingly, the MFN claim should be dismissed.

B. The Ordinary Meaning of Article 10.16.2 of CAFTA-DR, In Its Context, Requires the Dismissal of the MFN Claim.

131. Contrary to Claimants' argument,[211] the "ordinary meaning" of the terms of Article 10.16.2 of CAFTA-DR "in their context"[212] requires the dismissal of the MFN claim. In arguing that "[i]t would be inconsistent with the plain language of the DR-CAFTA's notice provisions, interpreted in their context, to dismiss Claimants' MFN claim because that claim was not expressly referenced in their Notice of Intent,"[213] Claimants ignore the integrated exercise of interpretation required under Article 31 of the VCLT and cherry pick certain provisions of CAFTA-DR to provide misleading examples of "context" for Article 10.16.2.

132. First, although Claimants maintain that they interpret the "ordinary meaning of Article 10.16.2, in its context," Claimants arrive at the incorrect conclusion that "non-compliance with Article 10.16.2 is not a bar to the admissibility of claims"[214] *only* on the basis of context. Indeed, under Claimants' twisted interpretation, the terms "shall specify" and "for each claim" – included twice in the provision – would be devoid of any legal effect and can simply be ignored.

September 2018 ruling of the Constitutional Court – and the date when they submitted the claim to arbitration – 9 November 2018.

[207] Counter-Memorial, ¶ 91.

[208] *Compare* Notice of Arbitration, ¶ 63 *with* Counter-Memorial, ¶ 84.

[209] Counter-Memorial, ¶ 84.

[210] Notice of Arbitration, ¶ 63.

[211] Counter-Memorial, ¶¶ 86-91.

[212] VCLT, Art. 31, **RL-0027-019-020-ENG**.

[213] Counter-Memorial, ¶ 91.

[214] *Id.* ¶ 88.

Claimants would thus have this Tribunal bypass the express wording of the provision on the basis that they do not deem it to be of any significance, "in context."

133. Claimants cannot ignore that the rules of interpretation mandated by Article 31 of the VCLT are designed to apply within a single and integrated exercise of treaty interpretation. As the International Law Commission explained:[215]

> The Commission, by heading the article 'General rule of interpretation' in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, article [31] is entitled 'General *rule* of interpretation' in the singular, not 'General *rules*' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.

Thus, the rules of interpretation must be applied as mutually reinforcing elements of a holistic exercise.

134. Claimants cannot ignore the ordinary meaning of the terms used in Article 10.16.2 of CAFTA-DR or have this Tribunal rewrite the article to their liking. Shall is a modal verb "used in laws, regulations, or directives to express what is mandatory."[216] Further, "the term 'each'

---

[215] Draft Articles on the Law of Treaties with Commentaries, adopted by the International Law Commission at its Eighteenth Session, United Nations Conference on the Law of Treaties, A/CONF.39/11/Add.2, Vienna, 26 March – 24 May 1968 and 9 April – 22 May 1969, p. 39, ¶ 8, **RL-0087-035-ENG**; *see also Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Decision on the Treaty Interpretation Issue, 12 June 2009, ¶ 164, **RL-0088-039-ENG**.

[216] "Shall" in Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/shall (last accessed 25 October 2019), **RL-0089-001-ENG**; C. Leathley, *International Dispute Resolution in Latin America: An Institutional Overview* (2007), p. 243 ("Given the **obligation** to file a notice of intent, this will often mean that at the slightest sign of a claim, a disputing investor will tend to lodge a notice of intent, to ensure the relevant timeframes do not become an obstacle in the event negotiations are unsuccessful.") (emphasis added), **RL-0026-006-ENG**; *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, ¶¶ 28, 59 ("28. Article 8(1) provides that a claim that meets the three conditions specified in that article 'shall […] be submitted to international arbitration.' The use of the auxiliary verb 'shall' makes that statement mandatory. As the tribunal in *Wintershall v. Argentin*a put it, '[t]he use of the word 'shall' […] is itself indicative of an 'obligation' – not simply a choice or option. **The word 'shall' in treaty terminology means that what is provided for <u>is legally binding</u>** […]. . 59 […] As noted above (¶ 28), **the words 'shall apply' appear to the majority of this Tribunal to be intended to require the application of the one to the other, not merely to permit it. These terms of the BIT, like all terms of a treaty, are to be given effect.**") (emphasis added in part, and emphasis in original in part), **RL-0090-019-032-033-ENG**; *Pac Rim*, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, ¶¶ 92-93, **RL-0003-054-055-ENG**.

means 'every one of two or more people or things, regarded and identified separately.'"[217] When the ordinary meaning of Article 10.16.2 of CAFTA-DR is considered together with the context of the provision, the only possible conclusion is that only the claims properly identified in the notice of intent are admissible.

135. Second, Claimants contend that the context of the Article "indicates that non-compliance with Article 10.16.2 is not a bar to the admissibility of claims."[218] This is false. Claimants again reach for a different interpretation applying their version of "context." Specifically, Claimants identify four provisions of CAFTA-DR which include the language "no claim may be submitted," or "provided that 'x,' a claimant may submit a claim"[219] to allege that the absence of similar language in Article 10.16.2 of CAFTA-DR "indicates that non-compliance with Article 10.16.2 is not a bar to *admissibility* of claims."[220] But, the four provisions Claimants identified,[221] limit a tribunal's *jurisdiction* under CAFTA-DR,[222] not the *admissibility* of claims.

136. At least three of the four requirements to jurisdiction under CAFTA-DR– cooling off period, prescription and waiver[223] – are not considered limitations to the jurisdiction of a tribunal under general international law.[224] CAFTA-DR elevated them to make them jurisdictional

---

[217] Preliminary Objections, ¶ 90; "Each" in Lexico.com, Oxford University Press, https://www.lexico.com/en/definition/each (last accessed 16 August 2019), **RL-0030-001-ENG**.
[218] Counter-Memorial, ¶ 88.
[219] *Id*. ¶ 87.
[220] *Id*. ¶ 88 (emphasis added).
[221] Arts. 10.16.3, 10.18.1, 10.18.2 and 10.18.4 of CAFTA-DR, **RL-0001-020-023-ENG**; Preliminary Objections, ¶ 87.
[222] *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶¶ 191, 188-190, **RL-0002-059-060-ENG** (finding that the CAFTA-DR Parties conditioned their consent to arbitration to compliance with "the conditions and limitations established in Article 10.18."). Further, Art. 10.16.3 of CAFTA-DR also limits a tribunal's jurisdiction. Pursuant to Art. 10.17.1 of CAFTA-DR, the CAFTA-DR Parties conditioned their consent to arbitration on a potential claimant "submi[tting] a claim to arbitration under [Section B of CAFTA-DR Chapter Ten] in accordance with [CAFTA-DR]." The "submission of a claim to arbitration" under Chapter Ten of CAFTA-DR is a very specific process. Art. 10.16.3 only allows a claimant to submit a claim to arbitration "[p]rovided that six months have elapsed since the events giving rise to the claim […]." Thus, any claim for which a claimant has not waited six months from the relevant events is not submitted in accordance with Art. 10.17.1 of CAFTA-DR and does not satisfy the consent requirements. *See* **RL-0001-020-021-ENG**.
[223] Arts. 10.16.3, 10.18.1 and 10.18.2 of CAFTA-DR, **RL-0001-020-023-ENG**; Preliminary Objections, ¶ 87.
[224] I. Brownlie, *Principles of Public International Law* (6th ed., 2003), pp. 481–82 ("The lapse of time in presentation may bar an international claim in spite of the fact that no rule of international law lays down a time limit. Special agreements may exclude categories of claim on a temporal basis, but otherwise the question is one for the discretion of the tribunal. The rule is widely accepted by writers and in arbitral jurisprudence […] **prescription is a 'universal' basis of inadmissibility**.") (emphasis added), p. 482 (listing waiver as a ground of inadmissibility), **RL-0091-028-029-ENG**; *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998, ¶ 91 (noting that claimant's delay in complying with NAFTA's waiver provision does not affect the jurisdiction of the tribunal), **CL-0086-ENG**; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II (1986), pp. 438–39 ("[T]here is a clear jurisprudential distinction between an objection to the jurisdiction of the tribunal, and an objection to the substantive admissibility of the claim. The latter is a plea that the tribunal should rule

requirements. The CAFTA-DR Parties used the restrictive language Claimants refer to in order to "condition[] their consents to arbitration."[225] In other words, these conditions are "conventionally jurisdictional."[226] The CAFTA-DR Parties intended to make it clear from the terms they used that the four provisions Claimants identified constitute limits to a tribunal's jurisdiction.[227] The absence of similar wording in Article 10.16.2 of CAFTA-DR is inapposite to Respondent's *admissibility* objection. Consistent with its Preliminary Objections, Respondent reiterates: failure to comply with Article 10.16.2 of CAFTA-DR bars the admissibility of the claim and as such, the MFN claim must be dismissed.

137. The context of Article 10.16.2 confirms Respondent's conclusion. When the State Parties intended to make the fulfillment of a condition discretionary, they used wording such as "should."[228] In contrast, there are other provisions where the CAFTA-DR Parties used the term "shall" to make compliance mandatory. For instance:

---

the claim to be inadmissible on some ground other than its ultimate merits; the former is a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim."), **RL-0092-006-007-ENG**; G. Fitzmaurice, *The Law and Practice of the International Court of Justice: International Organizations and Tribunals*, 29 BYIL 1, pp. 40-41 (noting that the requirement to engage in prior negotiations is a matter of competence (or admissibility) rather than jurisdiction), **RL-0093-040-041-ENG**; G. Bermann and J. Townsend, *BG Group PLC v. Republic of Argentina*, Motion For Leave to File *Amicus Curiae* Brief and Brief of Professors and Practitioners of Arbitration Law as *Amici Curiae* in Support of Petition for a Writ of Certiorari, Supreme Court of the United States, 29 August 2012, fn. 5 ("In the language of investment treaty arbitration, an objection to jurisdiction asserts that the particular *tribunal* is not competent to hear the dispute, while an objection to admissibility asserts that a particular *claim* may not be heard by the tribunal."), **RL-0094-021-022-ENG**.

[225] *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶¶ 191, 188-190, **RL-0002-059-060-ENG**.

[226] *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic), Dissenting Opinion, Georges Abi-Saab, 28 October 2011, ¶ 23 (noting that under general international law the requirements of prior consultations or negotiations and prior resort to domestic courts for 18 months before instituting international arbitration are "conditions of admissibility". However, these conditions become "conventionally jurisdictional, in addition to being admissibility conditions by their legal nature", when they are included in the jurisdictional title of the BIT), **RL-0095-010-011-ENG**.

[227] Arbitral Tribunals pay close attention to the wording of the relevant BIT provision in order to determine whether the Parties intended it to be a jurisdictional or admissibility requirement. *See Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, ¶ 323, **CL-0078-ENG**; *Ethyl Corporation v. The Government of Canada*, Award on Jurisdiction, 24 June 1998, ¶ 91, **CL-0086-ENG**. *See also* Z. Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74(1) BYBIL 151, p. 279 ("This distinction should bear some influence on the interpretation of each clause because a jurisdictional objection, if successful, disposes of the claimant's case *in limine*, whereas a claim that is defective on admissibility grounds can be potentially resubmitted upon rectification by the claimant or severed from other parts of the case which remain untainted. One would expect, therefore, that jurisdictional restrictions should be approached with greater circumspection due to the draconian consequences they entail in light of the object and purpose of investment treaties."), **RL-0096-129-ENG**.

[228] Art. 10.15 of CAFTA-DR ("In the event of an investment dispute, the claimant and the respondent *should* initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures such as conciliation and mediation.") (emphasis added), **RL-0001-019-ENG**.

- "The consent under paragraph 1 and the submission of a claim to arbitration under this Section *shall* satisfy the requirements of . . ."[229]

- "Each Party *shall* accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors . . . "[230]

- "In deciding an objection under this paragraph, the tribunal *shall* assume to be true claimant's factual allegations in support of any claim in the notice of arbitration . . . "[231]

Using Claimants' logic, compliance with the requirements of Article 10.17.2 of CAFTA-DR is not a precondition to the State Parties' consent to arbitrate and non-compliance with Article 10.3 would not amount to a breach of the Treaty's National Treatment protection because "shall" would not impose an obligation on Guatemala. Similarly, under Claimants' logic, the term "shall" under Article 10.20.4(c) could be ignored, even though Claimants argue that the requirements under Article 10.20.4(c) are mandatory.[232] Finally, the Preamble of CAFTA-DR is to be taken into account as "context."[233] Claimants' interpretation is incompatible with the goals of CAFTA-DR as stated in the Preamble.[234]

138. Third, Claimants rely on two NAFTA cases, *B-Mex v. Mexico* and *ADF v. United States*, to support their erroneous interpretation of the ordinary meaning of Article 10.16.2 of CAFTA-DR, in its context.[235] In doing so, Claimants wrongly assert that NAFTA Article 1119 "is *identical* to DR-CAFTA Article 10.16.2 in all relevant respects."[236] This is not true. The notice requirements under NAFTA are less stringent than CAFTA-DR's. While a notice of intent under NAFTA must include "**the provisions** .[. .] alleged to have been breached" and the "issues and the factual basis **for the claim**,"[237] a notice of intent under CAFTA-DR must include "***for each claim*, the provision** [. . .] alleged to have been breached" and "the legal and factual basis ***for each claim***."[238] The chart below highlights the differences between the two provisions:[239]

---

[229] Art. 10.17.2 of CAFTA-DR (emphasis added), **RL-0001-021-022-ENG**.
[230] Art. 10.3(1) of CAFTA-DR (emphasis added), **RL-0001-010-011-ENG**.
[231] Art. 10.20.4(c) of CAFTA-DR (emphasis added), **RL-0001-024-ENG**.
[232] Counter-Memorial, ¶¶ 3, 61.
[233] VCLT, Art. 31(2), **RL-0027-019-020-ENG**.
[234] Preliminary Objections, ¶ 94.
[235] Counter-Memorial, ¶¶ 89-90.
[236] *Id.* ¶ 89 (emphasis added).
[237] Art. 1119 of NAFTA (emphasis added), **RL-0012-011-ENG**.
[238] Art. 10.16.2(b) and (c) of CAFTA-DR (emphasis added), **RL-0001-020-ENG**.
[239] Art. 1119 of NAFTA (emphasis added), **RL-0012-011-ENG**; Art. 10.16.2 of CAFTA-DR (emphasis added), **RL-0001-020-ENG**.

NAFTA Article 1119: Notice of Intent to Submit a Claim to Arbitration	CAFTA-DR Article 10.16: Submission of a Claim to Arbitration
The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify: […] (b) **the provisions** of this Agreement alleged to have been breached and any other relevant provisions; (c) the **issues** and the factual basis **for the claim**; and (d) the relief sought and the approximate amount of damages claimed.	2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify: […] (b) **for each claim, the provision** of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions; (c) the **legal** and factual basis **for each claim**; and (d) the relief sought and the approximate amount of damages claimed.

The differences between the language of NAFTA Article 1119 and CAFTA-DR Article 10.16.2 cannot be ignored and the plain meaning must be given to the more stringent language in CAFTA-DR. As a result, "the ordinary meaning of the [NAFTA] notice of intent provision, in its context,"[240] cannot be transposed to CAFTA-DR Article 10.16.2.

139. But there is more. In *ADF v. United States*, "the claimant first raised an MFN claim in its counter-memorial"[241] because the day before the submission of the counter-memorial, the NAFTA Free Trade Commission issued an interpretation of NAFTA Article 1105(1) which could undercut claimant's argument under that provision.[242] By adding the NAFTA Article 1103 claim, claimant was "responding to and seeking to mitigate what it perceived to be the impact of the FTC Interpretation upon the Investor's Article 1105 claim."[243] Here, the Supreme Court's *Escobal* decision is dated September 2017.[244] That decision, of course, is one which Claimants allege provides a legal and factual basis for their MFN claim.[245] Thus, Claimants could (and should) have included the MFN claim in the Notice of Intent if they intended to pursue a claim on that basis. Instead, they now contradict the Notice of Arbitration and argue that the ruling of the

[240] Counter-Memorial, ¶ 89.
[241] *Id.* ¶ 90.
[242] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003, **CL-0081-ENG**, ¶ 136.
[243] *Ibid*.
[244] Notice of Arbitration, ¶ 63.
[245] *Ibid*.

Constitutional Court of 3 September 2018 provides the sole legal and factual basis for the MFN claim.[246] Even if the Tribunal were to allow Claimants to contradict and essentially re-write the allegations pertaining to the MFN claim in such a manner, the claim would not be admissible under CAFTA-DR Article 10.16.2 because it was not specified in the Notice of Intent. Beyond that, the Tribunal would not have jurisdiction to hear the claim under CAFTA-DR Article 10.16.3 because Claimants would have needed to allow six months to elapse before bringing such a claim.[247] The Notice of Arbitration was filed on 9 November 2018, only three months after the event that Claimants now belatedly and disingenuously argue gave rise to its MFN claim.

140. *B-Mex v. Mexico* is also inapposite. There, the tribunal interpreted NAFTA Article 1119, not CAFTA-DR Article 10.16.2 (which, as explained, is more stringent). Moreover, the *B-Mex* tribunal found that the inclusion of additional claimants did not render the claims inadmissible because identifying additional shareholders in the notice of intent "would not have expanded on the notice given to the Respondent as regards the nature of the dispute."[248] In other words, the new claimants' claims were "co-extensive with those asserted by the Original Claimants in the [notice of intent] . . . ."[249] Here, the claims specified in the Notice of Intent are not "co-extensive" with the MFN claim alleged in the Notice of Arbitration.

141. Finally, *Aven v. Costa Rica* confirms that Claimants' interpretation of the ordinary meaning of the notice of intent provision, in its context, [250] is wrong. The *Aven* tribunal in fact reached the opposite conclusion: since the claimants did not comply with CAFTA-DR Article 10.16.2, the tribunal "declare[d the new] claim as inadmissible *in limine*."[251]

142. Thus, the ordinary meaning of Article 10.16.2 of CAFTA-DR, in its context, confirms that Claimants' untimely MFN claim cannot be heard by the Tribunal.

---

[246] Counter-Memorial, ¶ 84.
[247] Art. 10.16.3 of CAFTA-DR ("Provided that **six months** have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1: (a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention.") (emphasis added), **RL-0001-020-021-ENG**. *See* fn. 222 *supra*.
[248] *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶ 132, **CL-0080-ENG**.
[249] *Ibid*.
[250] Counter-Memorial, ¶ 88 ("[N]on-compliance with Article 10.16.2 is not a bar to the admissibility of claims.").
[251] *David R. Aven et. al. v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, ¶ 346, **RL-0031-120-ENG**.

C. The Object And Purpose of Article 10.16.2 of CAFTA-DR Requires the Dismissal of the MFN Claim.

143. Claimants disregard the object and purpose of CAFTA-DR Article 10.16.2 and instead seek to apply their interpretation of arbitral jurisprudence applicable to other treaties.

144. First, contrary to Claimants' contention, Respondent has "shown that preparing a defense is an object and purpose of the notification provision."[252] In the *Aven* tribunal's words, the object and purpose of the notice of intent under CAFTA-DR Article 10.16.2 "is evident: to allow a respondent State to prepare and argue its defense."[253] Claimants' Notice of Intent did not identify—let alone specify— the MFN claim.[254] Claimants provided no indication that they would include such a claim in the Notice of Arbitration.[255] Respondent was therefore deprived of the opportunity to obtain legal advice with respect to the MFN claim before the start of the arbitration. Further, Respondent had the right to begin preparing its defense before the start of the arbitration,[256] the same way that Claimants could take advantage of the period of time between the notice of intent and the notice of arbitration to prepare their legal and factual analysis. Communicating within a large governmental structure, collecting evidence and analyzing large files of documents, require time.[257] Because Claimants did not include the MFN claim in the Notice of Intent, Respondent was deprived of its right to have the assistance of counsel regarding the MFN claim before the initiation of the arbitration, have a complete picture of the claims being asserted, fully advise decision-makers and government officials of the nature of the claims and fully investigate the claims.

---

[252] Counter-Memorial, ¶ 93. *See* Preliminary Objections, ¶ 92.

[253] *Aven*, Final Award, 18 September 2018, ¶ 346, **RL-0031-120-ENG**. *See also Merrill & Ring Forestry L. P. v. Government of Canada,* ICSID Case No. UNCT/07/1, ICSID Administered, Decision on a Motion to Add a New Party, 31 January 2008, ¶ 29 (referring to NAFTA Articles 1101 and 1116-1121, which include the notice of intent requirement**)** ("The Tribunal has no doubt about the importance of **the safeguards noted** and finds that they **cannot be regarded as merely procedural niceties**. They perform a substantial function which, **if not complied with**, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim announced. This **would be hardly compatible with the requirements of good faith under international law and might even have an adverse effect on the right of the Respondent to a proper defence**.") (emphasis added), **RL-0097-010-011-ENG**.

[254] Notice of Intent, **C-5-ENG**.

[255] *Ibid*.

[256] According to Claimants' own government, "[t]ogether with the notice requirement in Article 1119, the 'cooling-off' requirement in Article 1120(1) affords a NAFTA Party time to identify and assess potential disputes, **coordinate among relevant national and subnational officials**, and consider amicable settlement or other courses of action prior to arbitration." *Mesa Power Group LLC v Canada*, PCA Case No. 2012-17, Submission of the United States of America, 25 July 2014, ¶ 3 (emphasis added), **RL-0098-001-002-ENG**.

[257] Preliminary Objections, ¶ 104.

145. Second, the notice of intent requirement is designed to provide a respondent the ability to evaluate, consider, and have meaningful settlement discussions "for each claim."[258] "[P]roper notice allows the State to examine and possibly resolve the dispute through negotiation."[259] If the Tribunal accepts Claimants' new argument and allows Claimants to re-write their MFN claim, the claim arose on 3 September 2018, after the submission of the Notice of Intent.[260] Two months later, Claimants filed the Notice of Arbitration without leaving any room for the parties to engage in settlement discussions of the claim. Thus, Respondent was deprived of the opportunity to assess the cost-benefit of settlement and to conduct discussions and negotiations.[261] Contrary to Claimants' unfounded assertion,[262] Guatemala took negotiations regarding the claims included in the Notice of Intent seriously, consistent with the large amount being claimed.[263] In any event, the settlement negotiations were confidential and subject to a confidentiality agreement and it is improper for Claimants to disclose any information concerning the negotiations.

146. Third, Claimants' combative approach to the filing of the MFN claim runs afoul of CAFTA-DR's goal to strengthen the relations among the CAFTA-DR Parties.[264] Claimants adopted an adversarial approach instead of following the constructive route agreed to by the CAFTA-DR Parties.[265] The State Parties designed a dispute resolution mechanism that requires a claimant to exhaust several steps before a notice of arbitration is filed, including the submission of a notice of intent that specifies "each claim."[266] The goal is to avoid arbitration and promote amicable relations. Indeed, an arbitration "generally makes future business relationships difficult."[267]

---

[258] Art. 10.16.2 of CAFTA-DR, **RL-0001-0020-ENG**.
[259] *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, ¶ 339, **RL-0032-149-ENG**. *See* Preliminary Objections, ¶ 93, fn. 147.
[260] Counter-Memorial, ¶ 84; Notice of Arbitration, ¶ 63.
[261] Preliminary Objections, ¶¶ 93, 104.
[262] Counter-Memorial, ¶ 102.
[263] Notice of Arbitration, ¶ 78.
[264] Preliminary Objections, ¶ 94.
[265] Art. 10.16.2 of CAFTA-DR, **RL-0001-020-ENG**.
[266] *Ibid.*
[267] *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, ¶ 151, **RL-0099-041-ENG/SPA**. *See also* Preliminary Objections, ¶ 94.

147. Thus, the object and purpose of Article 10.16.2 of CAFTA-DR requires the dismissal of the MFN claim. Claimants should not be allowed to disregard the notice requirement and undermine the object and purpose of the provision.

D. Investment Arbitration Tribunals Regularly Dismiss Claims for Failure to Meet the Notice Requirement Under CAFTA-DR and Similar Treaties.

148. Claimants' arguments regarding the decisions cited in the Preliminary Objections in support of the MFN objection are unfounded. The cases in fact confirm that arbitration tribunals often dismiss claims for a claimant's failure to meet the notice requirement under CAFTA-DR and similar treaties. In *Antoine Goetz et consorts v. République du Burundi*, for example, the tribunal found some claims inadmissible because they had not been properly notified,[268] not because they were "unrelated to the claims that had been notified", as Claimants contend.[269] Similarly, the tribunal in *Burlington v. Ecuador* dismissed claimant's full protection and security claim because the respondent had not been notified of that claim,[270] not "only because that claim was completely unrelated to the notified claims", as Claimants allege.[271]

149. In *Supervisión y Control v. Costa Rica*, the tribunal "remind[ed] the importance of proper notice"[272] and held that "any claim that has not been notified is inadmissible in the respective proceeding, because the prior negotiation process agreed to by the parties has not been exhausted."[273] The tribunal found that the claims included in the notice of arbitration and kept in the memorial were admissible because, unlike this Arbitration, they had been clearly pleaded in the notice of the dispute and coincided with the claims discussed in the memorial, as the table below shows:

---

[268] *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, ¶¶ 90-93, **RL-0035-001-002-ENG**; Preliminary Objections, ¶ 101.
[269] Counter-Memorial, ¶ 98.
[270] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador))*, Decision on Jurisdiction, 2 June 2010, ¶¶ 308-309, 337-340, **RL-0037-064-071-ENG**.
[271] Counter-Memorial, ¶ 98.
[272] *Supervision*, Award, 18 January 2017, ¶ 339, **RL-0032-149-ENG**.
[273] *Id.* ¶ 340, **RL-0032-150-ENG**.

The statements in the Notice of Dispute coincided with the claims in the Memorial in *Supervisión y Control v. Costa Rica*	
The notice of the dispute[274]	**Memorial**[275]
a. Failure to give to the investment performed by Supervisión y Control a **fair and equitable treatment** guaranteeing its full protection.	a. Not granting at all times to SyC's investment **fair and equitable treatment** by seriously breaching obligations undertaken in the Contract.
b. Arbitrarily breaching its obligations with an investor and through which **it was obliged to approve tariff readjustments** under the service contract for [V]ehicle [T]echnical [I]nspections executed with corporation Riteve.	b. Giving unjust and discriminatory treatment by **not issuing a decision on the request for rate readjustments**, preventing SyC from fully enjoying its investments.
c. **Abrogating through Executive Decree** from the Ministry of Transportation **the tariffs readjusted** which the Council for Public Transportation had approved to make payments under the service contract for Vehicle [T]echnical [I]nspection with corporation Riteve.	c. Violation of the obligation of granting at all times fair and equitable treatment and full protection and security to SyC's investment by **repealing Executive Order 30185-MOPT through which the methodology for the readjustment of rates had been approved** and published.
d. Failing to approve and publish in the Official Gazette, arbitrarily and unfairly over more than eight years a procedure for tariff readjustment and the tariff readjustments when it should have done so within a three month term.	[Not discussed]
e. Amend through a Resolution and against a contract the terms and conditions agreed with the investor which precisely led it to perform significant capital investments.	[Not discussed]

As the table above shows, the claims discussed in the memorial "**coincid[ed]** with the notice or [were] **directly linked** to the issues raised therein."[276] However, the tribunal rejected a denial of justice claim, two expropriation claims, a national treatment claim and a most favored nation claim because these "new claims [were] not notified to Respondent nor directly related to those included in the Notice of Intent […]."[277] Under the standard of the *Supervisión* tribunal, Respondent's MFN claim is not admissible. The MFN claim was "not notified to Respondent nor directly related to those included in the Notice of Intent […]."[278]

150. In any event, "the provision governing notices under CAFTA-DR is stricter than the analogous provision under the Costa Rica – Spain BIT"[279] which, among others, only requires a claimant to give "[n]otice of any investment-related **dispute**"[280] and not of each claim it intends

[274] *Id.* ¶ 342, **RL-0032-150-151-ENG**.
[275] *Id.* ¶ 344, **RL-0032-151-ENG**.
[276] *Ibid.*
[277] *Id.* ¶¶ 345-346, **RL-0032-151-152-ENG**.
[278] *Id.* ¶ 346, **RL-0032-152-ENG**.
[279] Preliminary Objections, ¶ 100.
[280] *Supervision*, Award, 18 January 2017, ¶ 5 (emphasis added), **RL-0032-011-ENG**.

to submit to arbitration.[281] Thus, as *Aven v. Costa Rica* confirms, the standard under CAFTA-DR for the admission of new claims is stricter than the *Supervision*'s standard:[282]

> 346. The Tribunal finds that **even though there were limited mentions in Claimants' Memorial and Reply to breaches on the part of Respondent to the standard of full protection and security, Article 10.16.2 DR-CAFTA requires more from a Claimant. The "Notice to submit a claim to arbitration" must specify not only the specific provision of the Treaty alleged to have been breached, but the 'legal and factual basis for each claim'.** Similar provisions are found in UNCITRAL Arbitration Rules Article 20. The need to timely and properly submit a claim is evident: to allow a respondent State to prepare and argue its defense. Therefore, since Claimants failed to timely plead a claim for breach of full protection and security, it declares this claim as inadmissible *in limine*. The Tribunal nonetheless expressly states that this does not prejudice the rest of the claims timely presented by Claimants, and these will be examined below.

151. In *Tulip v. Turkey* and *Salini v. Morocco*, the tribunals adopted a so-called "flexible approach"[283] to the notice requirement on the basis of the flexible language of the applicable BITs. In *Tulip v. Turkey*, the tribunal made clear that the notice, the consultations and negotiations were "mandatory" and "not to be watered down to a mere statement of aspiration."[284] Unlike the CAFTA-DR, however, the applicable BIT did not "impose a formal notice requirement" or "require the investor, on the giving of notice of a dispute arising, to invoke specific BIT provisions […]."[285] The BIT only required the investor "to apprize the host State of the dispute as arising

---

[281] Art. 10.16.2 of CAFTA-DR, **RL-0001-020-ENG**.
[282] *Aven*, Final Award, 18 September 2018, ¶ 346 (emphasis added), **RL-0031-120-ENG**.
[283] Counter-Memorial, ¶ 97.
[284] *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶¶ 71-72, **RL-0029-019-020-ENG**.
[285] *Id.* ¶ 83, **RL-0029-023-ENG**. *Compare* Art. 8(2) of the BIT between the Kingdom of the Netherlands and the Republic of Turkey, *id.* ¶ 42 ("In the event of an investment dispute between a Contracting Party and an investor of the other Contracting Party, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations in good faith. If such consultations or negotiations are unsuccessful, the dispute may be settled through the use of non-binding, third party procedures upon which such investor and the Contracting Party mutually agree. If the dispute cannot be resolved through the foregoing procedures the investor concerned may choose to submit the dispute to the International Centre for the Settlement of Investment Disputes ('Centre') for settlement by arbitration, at any time after one year from the date upon which the dispute arose provided that in case the investor concerned has brought the dispute before the courts of justice of the Contracting Country that is a party to the dispute, and there has not been rendered a final award."), **RL-0029-010-ENG** *with* Art. 10.16.2 of CAFTA-DR ("At least 90 days before submitting any claim to arbitration under this Section, a claimant **shall deliver** to the respondent a written notice of its intention to submit the claim to arbitration ('notice of intent'). The notice **shall specify**: (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise; (b) **for each claim**, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions; (c) the legal and factual basis for each claim; and (d) the relief sought and the approximate amount of damages claimed.") (emphasis added), **RL-0001-020-ENG**.

under the BIT and that the likely consequences if negotiation processes break down are proceedings before an international tribunal pursuant to the BIT."[286] For that reason, the tribunal found that although the "Claimant clearly did not employ the most perfect forms" of notification, it complied with the requirements of the BIT.[287] Thus, *Tulip v. Turkey* does not support Claimants' position that "non-compliance with Article 10.16.2 of CAFTA-DR is not a bar to the admissibility of claims."[288] *Tulip v. Turkey* confirms that adherence to the notice requirement as mandated under the specific language of the applicable BIT cannot be "watered down to a mere statement of aspiration."[289]

152. Likewise, in *Salini v. Morocco*, the respondent alleged that the claimant had not given notice of the dispute to the respondent because the notices were sent to the Minister of Infrastructure in his capacity as president of a company, and not as Minister.[290] Unlike CAFTA-DR, the applicable BIT did "not set out any procedure to be followed in relation to reaching an amicable settlement of the dispute between the two Parties."[291] Indeed, it only required the parties to attempt to resolve the dispute amicably "within six months of the date of the request, presented in writing."[292] It is in this context that the tribunal explained that its mission was "not to set strict rules that the Parties should have followed" but to determine "whether, while respecting the term of six months, the Claimants actually took the necessary and appropriate steps to contact the relevant authorities in view of reaching a settlement", as the applicable BIT required.[293] The *Salini v. Morocco* tribunal found that the requirements imposed by the BIT were mandatory and that claimants had complied with them.[294] As a result, the claims were admissible. *Salini v. Morocco*

[286] *Tulip*, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶ 121, **RL-0029-033-ENG**.
[287] *Ibid.*
[288] Counter-Memorial, ¶ 88.
[289] *Tulip*, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶ 72, **RL-0029-020-ENG**.
[290] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, ¶ 13, **RL-0036-004-ENG**.
[291] *Id.* ¶ 19, **RL-0036-006-ENG**.
[292] *Id.* ¶ 15 ("1) All disputes or differences, […] between a Contracting Party and an investor of the other Contracting Party concerning an investment of the said investor on the territory of the first Contracting Party should, if possible, be resolved amicably. 2) If the disputes cannot be resolved in an amicable manner within six months of the date of the request, presented in writing, the investor in question may submit the dispute either: a) to the competent court of the Contracting Party concerned; b) to an ad hoc tribunal, in accordance with the Arbitration Rules of the UN Commission on International Trade Law; c) to the [ICSID]."), **RL-0036-004-005-ENG**.
[293] *Id.* ¶ 19, **RL-0036-006-ENG**.
[294] *Id.* ¶¶ 15-16, 19-21, **RL-0036-004-006-ENG**.

discredits Claimants' position "that non-compliance with Article 10.16.2 is not a bar to the admissibility of claims."[295]

153. Further, the cases relied upon by Claimants do not support their assertion that the MFN claim is admissible. In *Chemtura v. Canada*, the tribunal focused on the question of whether the addition of a new *argument* in connection with the NAFTA MFN clause in the memorial had caused any prejudice to the respondent,[296] not on whether "the omission of the [MFN] *claim* from the notices of intent and arbitration […] prejudice[d] the respondent's right to respond", as Claimants allege.[297] Indeed, in *Chemtura*, the claimant submitted two notices of intent, a notice of arbitration with respect to those two notices and a third notice of intent followed by a notice of arbitration.[298] The "second Notice of Intent submitted by the Claimant […] *focused specifically* on the alleged breach of Article 1103 […] and the third Notice of Intent […] incorporated this claim by reference."[299] Beyond this, because the language of CAFTA-DR Article 10.16.2 is more stringent than the language of NAFTA Article 1119, the standard for the admission of new claims under CAFTA-DR must be more stringent as well.

154. *Al-Bahloul v. Tajikistan* addressed "whether a *cooling-off period* […] constitutes a mere procedural requirement, such that failure to comply would not affect jurisdiction, or a jurisdictional requirement."[300] It did not involve claimant's failure to comply with the notification requirement under the applicable treaty, the ECT. In fact, the ECT does not even contain a formal notification requirement.[301] Respondent's position is that "Claimants did not comply with the *notice of intent* requirement of Article 10.16.2 of CAFTA-DR" and that, as a result, the claim is inadmissible.[302] Further, while Claimants argue that in *Al-Bahloul v. Tajistan* "the claimant filed its request for arbitration two weeks before the three-month cooling off period would have

---

[295] Counter-Memorial, ¶ 88.
[296] *Chemtura Corporation v. Government of Canada*, UNCITRAL (formerly Crompton Corporation v. Government of Canada), Award, 2 August 2010, ¶¶ 103-104, **CL-0087-ENG**.
[297] Counter-Memorial, ¶ 99 (emphasis added).
[298] *Chemtura*, Award, 2 August 2010, ¶ 50, **CL-0087-ENG**.
[299] *Id.* ¶ 103 (emphasis added), **CL-0087-ENG**.
[300] *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, ¶ 154 (emphasis added), **CL-0083-ENG**.
[301] *Id.* ¶ 13 ("Article 26(2) [of the ECT] provides […] that 'If such disputes cannot be [amicably settled] within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution: . . . c) in accordance with the following paragraphs of this Article.'") (emphasis omitted), **CL-0083-ENG**.
[302] Preliminary Objections, ¶ 105 (emphasis added). *See also id*. ¶¶ 9, 12, 86-105.

expired,"[303] in reality, the arbitral tribunal stated that it was "debatable when Claimant may have triggered the three-month period."[304] If the relevant date was the date when a company wholly-owned by the claimant wrote a letter to the respondent, claimant complied with the waiting period.[305] In any event, the *Al-Bahloul v. Tajistan* tribunal noted that there was "nothing in the record showing that Respondent demonstrated a willingness to find an amicable settlement to the dispute."[306] Here, Respondent demonstrated its willingness to discuss and settle the dispute before Claimants proceeded to arbitration. Indeed, "[a] negotiation meeting took place, but the Parties reached no agreement on the settlement of the dispute during or after the conclusion of this negotiation period."[307]

155. Moreover, although Claimants focus on the *Al-Bahloul v. Tajistan* decision, they fail to address key cases that have held that cooling-off periods have to be strictly complied with.[308] For instance, in *Rurelec v. Bolivia*, the tribunal found that the claimants' failure to abide by the applicable BIT's six-month notification and cooling-off period prior to asserting new claims in

[303] Counter-Memorial, ¶ 95.
[304] *Al-Bahloul*, Partial Award on Jurisdiction and Liability, 2 September 2009, ¶ 151, **CL-0083-ENG**.
[305] *Id.* ¶¶ 151-152, **CL-0083-ENG**.
[306] *Id.* ¶ 155, **CL-0083-ENG**.
[307] Notice of Arbitration, ¶ 28 (quoting the Notice of Intent, C-5).
[308] *Murphy Exploration*, Award on Jurisdiction, 15 December 2010, ¶ 135 ("In the Tribunal's opinion, **the obligation to negotiate is an obligation of means, not of results**. There is no obligation to reach, but rather to try to reach, an agreement. To determine whether negotiations would succeed or not, the parties must first initiate them.") (emphasis added), ¶ 149 ("This Tribunal finds **the requirement that the parties should seek to resolve their dispute through consultation and negotiation** for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, 'a procedural rule' or a 'directory and procedural' rule which can or cannot be satisfied by the concerned party. To the contrary, it **constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration** under the ICSID rules.") (emphasis added), **RL-0099-036-040-ENG**; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 14.3 ("Some authorities consider the requirement to consult and negotiate before proceeding to arbitration as 'procedural' rather than a condition precedent for the vesting of jurisdiction. **This Tribunal would be hesitant to interpret a clear provision of the BIT in such a way so as to render it superfluous, as would be the case if a 'procedural' characterisation of the requirement effectively empowered the investor to ignore it at its discretion**.") (emphasis added), **RL-0100-048-ENG**. *See also ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, ¶¶ 267, 273 (finding that the Tribunal is not empowered to ignore the 18-month litigation prerequisite on the basis that it would be futile or inefficient) ("267. […] **The Tribunal cannot** therefore **create exceptions to treaty rules where these are merely based upon an assessment of the wisdom of the policy in question**, having no basis in either the treaty text or in any supplementary interpretive source, however desirable such policy considerations might be seen to be in the abstract." […] 273. […] The Tribunal further finds that the Claimant has manifestly not complied with this prerequisite and that **there is no compelling reason to exempt the Claimant from its application on the basis of futility or otherwise**.") (emphasis added), **RL-0101-088-090-ENG/SPA**.

their statement of claim deprived the tribunal of jurisdiction over them because it is not a tribunal's or a claimant's prerogative to "'rewrite' the BIT":[309]

> 386. […] Rurelec was fully aware of the rule at play here and it would not have been difficult to comply with the cooling off period, which did not in fact occur. **The Tribunal has no mandate to "rewrite" the BIT.**
>
> 388. The explicit wording requiring a written notification and the expiry of a period of six months from that notification leads the Tribunal to consider that the "cooling off period" narrows the consent given by the Contracting Parties to international arbitration.
>
> 389. **It is not up to the Tribunal to evaluate the importance or effect of such a condition, but simply to acknowledge that it was agreed by the two Contracting Parties** as a condition precedent to the availability of an arbitral forum which is, and must be, based on consent. The fact is that the Contracting Parties only gave their consent to arbitration subject to the existence of a *written notification of a claim* and subject to the passing of six months' time between such notification and any request of arbitration.
>
> 390. The Tribunal thus concludes that, at least in this case, the "cooling off period" is a jurisdictional barrier conditioning the jurisdiction of the Tribunal *rationae voluntatis*, since **it is not up to a claimant to decide whether and when to notify the host State of the dispute, just as it is not up to such claimant to decide how long they must wait before submitting the request for arbitration.**

156. For the foregoing reasons, investment arbitral tribunal decisions confirm that Claimants' failure to notify Respondent of the MFN claim renders the claim inadmissible.

157. Claimants did not submit a notice of intent with regard to their MFN claim. Instead, they introduced the MFN claim in an adversarial process and did not abide by the multi-step dispute resolution mechanism that the CAFTA-DR Parties carefully designed. "[I]t is not up to [Claimants] to decide whether and when to notify [Respondent]" of the MFN claim.[310] CAFTA-DR's language cannot be ignored. Claimants' untimely claim must be dismissed.

VI. THE CLAIM FOR LACK OF FULL PROTECTION AND SECURITY IS TIME-BARRED UNDER ARTICLE 10.18.1 OF CAFTA-DR.

[309] *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, ¶¶ 386, 388-390 (emphasis added), **RL-0102-144-145-ENG/SPA**.
[310] *Id.* ¶ 390, **RL-0102-145-ENG/SPA**.

A. Claimants Re-Write of Their Full Protection and Security Claim to Escape Article 10.18.1 of CAFTA-DR is Invalid and Ineffective.

158. Claimants' Notice of Arbitration asserts a full protection and security claim for Guatemala's alleged failure to respond to the continuous and systematic protests and blockades since 2012.[311] In their Counter-Memorial, Claimants rewrite their claim in an effort to avoid the limitations period. Now they allege that their full protection and security claim "is not based on a single continuing breach" but targeted to "the protests and blockades that commenced in early 2016 […]."[312] In an attempt to focus the Tribunal's attention on what they now state is a "new wave of protests" that began in 2016,[313] Claimants supplement their claim with new (and contradictory) factual allegations[314] and thirteen exhibits related to the 2016 and 2017 events,[315] all in an effort to escape the allegations they presented that the protests and blockades were "continuous and systematic" since 2012. After Claimants' "multiple and clear pleadings" in the Notice of Arbitration, the Tribunal should not accept Claimants' attempt to re-characterize the pre-2016 events "as mere background information."[316] In any event, Claimants' arguments cannot change the fact that their full protection and security claim as pleaded in the Notice of Arbitration and discussed in the Counter-Memorial is time-barred.

[311] Notice of Arbitration, ¶ 74. *Id.* ¶¶ 42, 45, 48.
[312] Counter-Memorial, ¶ 127. *Id*. ¶¶ 9, 116, 119, 126. *See also* Preliminary Objections, ¶¶ 115-118.
[313] Counter-Memorial, ¶ 121.
[314] *See, e.g., id.* ¶¶ 120-125.
[315] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo provisional*, 11 November 2015, **C-0004-SPA/ENG**; Supreme Court of Justice of Guatemala, Case No. 1592-2014, Appeal by Exmingua against the Ruling granting *amparo provisional*, 23 February 2016, **C-0005-SPA/ENG**; M. R. Bolaños, *The MEM will not suspend the project*, La Prensa Libre, 1 March 2016, **C-0006-SPA/ENG**; N. Gándara, *CIG urges the MEM to not bend over pressure*, La Prensa Libre, 11 March 2016, **C-0007-SPA/ENG**; Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ministry of Energy and Mines' submission in relation to compliance with *amparo provisional*, 10 March 2016, **C-0008-SPA/ENG**; G. Contreras, *Locals from La Puya continue with the protests*, La Prensa Libre, 13 March 2016, **C-0009-SPA/ENG**; J. Ramos and J. Rosales, *Protesters of La Puya burn doll of the Minister of Energy*, La Prensa Libre, 26 March 2016, **C-0010-SPA/ENG**; N. Rivera, *The new camp at the peaceful resistance La Puya*, Prensa Comunitaria Km. 169, 19 May 2019, **C-0011-SPA/ENG**; Official Notification No. 497 from the MEM to Exmingua, attaching Resolution No. 4056, 21 December 2016, **C-0012-SPA/ENG**; Letter from Exmingua to the MEM, attaching Notary Public's Certification, 22 March 2017, **C-0013-SPA/ENG**; Official Notification No. 5099 from the MEM to Exmingua, attaching Resolution No. 1191, 5 April 2017, **C-0014-SPA/ENG**; Letter from Exmingua to the MARN, 7 April 2017, **C-0015-SPA/ENG**; Letter from Exmingua to the MEM, 7 April 2017, **C-0016-SPA/ENG**.
[316] *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017, ¶ 108, **RL-0103-037-ENG**.

159. First, Claimants' new factual account contradicts the Notice of Arbitration wherein Claimants allege a continuing violation by the Respondent since 2012 of its obligation to provide full protection and security to Claimants under Article 10.5 of CAFTA-DR:[317]

> As part of the process to obtain the exploitation license for the Santa Margarita Project, Exmingua undertook all necessary efforts to prepare its EIA. **Exmingua and its consultants**, however, **were unable to complete the public consultations required for its EIA due to the continuous and systematic protests and blockades at the site since 2012**.

Notwithstanding this factual allegation, Claimants now conveniently allege: [318]

> **Claimants' claim arises out of** Respondent's failure to provide full protection and security in connection with **protests and blockades that erupted in early 2016**, following the decision of the Guatemalan Supreme Court on 11 November 2015, granting an amparo against the MEM. This breach caused damage to Claimants insofar as **Exmingua was unable to obtain an exploitation license for Santa Margarita, because it could not conduct consultations to complete its EIA**.

But the Notice of Arbitration does not distinguish between pre-2016 protests and the protests that occurred in 2016 and thereafter. The claim is instead pleaded on the basis of a continuous and systematic event.[319] Thus, it strains all credulity for Claimants to argue, as they now do, that their "full protection and security claim […] is not based on a single continuing breach." [320] In other words, they ask the Tribunal that, notwithstanding the express allegations in the Notice of Arbitration, the protests and blockades from 2016 be treated as an autonomous breach of the full protection and security standard.

160. Claimants attempt to camouflage the contradiction between the allegations in the Notice of Arbitration versus those in the Counter Memorial by falsely representing that the claim "**as explained in Claimants' Notice of Arbitration** […] stems from […] protests and blockades that began in early 2016 […]."[321] To the contrary, the Notice of Arbitration clearly explains that

---

[317] Notice of Arbitration, ¶ 48 (emphasis added).
[318] Counter-Memorial, ¶ 116 (emphasis added).
[319] Notice of Arbitration, ¶¶ 42, 45, 48. *Id.* ¶ 74 ("**2. Lack of Full Protection and Security** […] Guatemala has breached its obligation to provide Exmingua full protection and security by failing to take reasonable measures to ensure that Claimants and Exmingua have access to the Progreso VII and Santa Margarita project sites. Among other things, Guatemala's failure to act in this regard despite Claimants' and Exmingua's entreaties and petitions have resulted in Exmingua's employees being threatened when attempting to access the sites and work stoppages at the site, and have prevented Exmingua's consultants from being able to complete the social studies required for the EIA and thereby complete the application for an exploitation license for the Santa Margarita Project."). *See also* Preliminary Objections, ¶¶ 115-118.
[320] Counter-Memorial, ¶ 127.
[321] *Id*. ¶ 119 (emphasis added).

the claim stems from alleged "**continuous and systematic protests and blockades at the site since 2012.**"[322] This explains why Claimants fail to cite to even one specific allegation in the Notice of Arbitration to support their baseless argument. Tellingly, even the new evidence that Claimants submit regarding the alleged "new wave of protests"[323] (which should not be considered by the Tribunal per Claimants' own contention[324]) confirms that the pre-2016 and post-2015 protests constitute the same "continuous and systematic" event[325] alleged in the Notice of Arbitration:[326]

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

Apparently, Claimants are of the view that they are not constrained by what they alleged in their Notice of Arbitration. They also do not appear to be constrained by the facts. Not only did Claimants improperly submit with their Counter-Memorial 13 new exhibits, but the exhibits contradict Claimants new narrative in the Counter-Memorial. Indeed, in their letter to the Ministry of the Environment and Natural Resources of 7 April 2017 (to which Claimants' attached the EIA for Santa Margarita), Claimants themselves took the same position they adopted in the Notice of Arbitration and which they now contradict.[327] In the letter, as in the Notice of Arbitration, Claimants did not differentiate between two purported waves of protests and in fact treated the protests as a "continuous and systematic"[328] event giving rise to the same breach of CAFTA-DR:[329]

> The reason for this submission before your honorable office is, that **community unrest started in the municipality of San Pedro Ayampuc, Department of Guatemala, since the year 2012** and, in this context, several social groups are opposing mining activities in said municipality and in neighboring municipalities.

---

[322] Notice of Arbitration, ¶¶ 48 (emphasis added), 74.
[323] Counter-Memorial, ¶ 121.
[324] *Id.* ¶ 3 ("In an attempt to avoid liability, Respondent has raised three preliminary objections, pursuant to DR-CAFTA Article 10.20.5, to be decided on an expedited basis. As set forth below, each of the three objections not only lacks merit, but Respondent inappropriately relies on disputed facts or fails to accept as true the facts alleged in Claimants' Notice of Arbitration, making its objections unsuitable for preliminary decision as well.")
[325] Notice of Arbitration, ¶ 48.
[326] J. Ramos and J. Rosales, *Protesters of La Puya burn doll of the Minister of Energy*, La Prensa Libre, 26 March 2016, p. 1 (emphasis added), **C-0010-SPA/ENG**.
[327] Letter from Exmingua to the MARN, 7 April 2017, **C-0015-SPA/ENG**.
[328] Notice of Arbitration, ¶ 48.
[329] Letter from Exmingua to the MARN, 7 April 2017 (emphasis added in part and omitted in part), **C-0015-SPA/ENG**.

> **This situation remains to this day, and has prevented the project from being presented to the community** and base line updates from being performed as appropriate, pursuant to the rules and regulations which apply to this type of studies.

161. There is, therefore, no valid basis for disregarding the Notice of Arbitration and treating the blockades and protests prior to 2016 as distinct from the blockades and protests that occurred after the beginning of 2016. Because Claimants acquired knowledge of the alleged breach of the full protection and security standard and related loss or damage more than six years before the submission of the claim to arbitration, the claim is time-barred.[330]

162. Even assuming *arguendo* that the alleged "new wave of protests in early 2016"[331] amounts to a distinct breach of the full protection and security standard under CAFTA-DR, which is not the case, Claimants cannot evade the limitations period under Article 10.18.1 of CAFTA-DR, by basing their claim "on the most recent transgression" of a "series of similar and related actions" by Respondent.[332] Indeed, Claimants alleged that the protests in both Progreso VII and Santa Margarita project sites started in 2012[333] and that Exmingua was "**unable to complete the public consultations required for its EIA** due to the continuous and systematic protests and blockades at the site **since 2012**."[334] Assuming that Claimants only wish to claim damages arising from the post-2015 protests and blockades, that cannot change the date on which Claimants *first* acquired the relevant knowledge. The CAFTA-DR Parties decided to have the three-year limitations period commence "from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged . . . [and of] the loss or damage [incurred]."[335] The purpose of this provision is to force potential claimants to take action within the prescribed time since they *first* acquire the relevant knowledge.[336] To allow Claimants to evade the limitations

---

[330] Preliminary Objections, ¶¶ 106-142.
[331] Counter-Memorial, ¶ 121.
[332] *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶¶ 214-215 (*citing Grand River*, ¶ 81), **RL-0002-067-ENG**.
[333] Notice of Arbitration, ¶ 43 ("[O]n 3 September 2012, Exmingua filed an *amparo* action against the General Director of the National Police, claiming the 'omission of intervention, by the authority, to protect people and vehicles in and around the facilities of the mining project Progreso VII […].'"), ¶ 48 ("As part of the process to obtain the exploitation license for the Santa Margarita Project, Exmingua undertook all necessary efforts to prepare its EIA. Exmingua and its consultants, however, were unable to complete the public consultations required for its EIA due to the continuous and systematic protests and blockades at the site since 2012.").
[334] Notice of Arbitration, ¶ 48 (emphasis added). *See also* Letter from Exmingua to the MARN, 7 April 2017, **C-0015-SPA/ENG**.
[335] Art. 10.18.1 of CAFTA-DR, **RL-0001-022-ENG**.
[336] Preliminary Objections, ¶ 139.

period by basing their claim on the post-2015 protests would "render the limitations provisions ineffective."[337]

163. Second, Claimants' arguments concerning the scope of their full protection and security claim also contradict the Notices. In the Notices, Claimants clearly argued that the claim covered the protests and blockades affecting both Progreso VII and Santa Margarita since 2012:

- "In addition, **Guatemala has failed to provide full protection and security to Exmingua**, despite its multiple requests to the State. In particular, **protesters**, mainly organized by CALAS, **have illegally blocked the entrance to the Progreso VII and Santa Margarita Projects**, preventing access to these sites. Despite the Investors' efforts to obtain relief by petitioning local and national governmental authorities and filing court actions, Guatemala has failed to provide Exmingua with access to its **Projects' sites**."[338]

- "**2. Lack of Full Protection and Security** […] Guatemala has breached its obligation to provide Exmingua full protection and security by failing to take reasonable measures to ensure that Claimants and Exmingua have access to the **Progreso VII and Santa Margarita project sites**."[339]

- "**As to the Progreso VII Project**, Exmingua was prevented from exploiting the mine and processing and extracting product for export. **As to the Santa Margarita Project**, the blockades to the mining site prevented Exmingua from completing the EIA, which was a condition for securing an exploitation license.[340]

- "As part of the process to obtain the exploitation license for the Santa Margarita Project, Exmingua undertook all necessary efforts to prepare its EIA. Exmingua and its consultants, however, were unable to complete the public consultations required for its EIA **due to the continuous and systematic protests and blockades at the site since 2012**."[341]

Now, for the first time in their Counter-Memorial, Claimants contend that their full protection and security claim is only premised on the protests and blockades that they now allege commenced in 2016 and allegedly prevented Exmingua from completing the Santa Margarita EIA:

---

[337] *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 215 (*citing Grand River*, ¶ 81), **RL-0002-067-ENG**. *See also Berkowitz*, Interim Award (Corrected), 30 May 2017, ¶ 208, **RL-0038-134-135-ENG**; Preliminary Objections, ¶¶ 138-139.
[338] Notice of Intent, p. 3 (emphasis added), **C-5-ENG**.
[339] Notice of Arbitration, ¶ 74 (emphasis added).
[340] *Id.* ¶ 50 (emphasis added).
[341] *Id.* ¶ 48 (emphasis added).

- "**Claimants' full protection and security claim** thus is not based on a single continuing breach. Rather, it **concerns Respondent's failure to provide full protection and security in connection with the protests and blockades that commenced in early 2016**, after the Supreme Court's *amparo* ruling, and which prevented Exmingua from completing the social studies for the **Santa Margarita** EIA to obtain an exploitation permit."[342]

- "This breach caused damage to Claimants insofar as Exmingua was unable to obtain an exploitation license for **Santa Margarita**, because it could not conduct consultations to complete its EIA."[343]

- "Although the 2012 protests and Respondent's associated failure to protect Claimants' investments delayed the start of exploitation activities at the **Progreso VII site** for more than two years – and even though Respondent never compensated Claimants for the delay and damages sustained – **Claimants have not and are not alleging any breach in respect of that failure**."[344]

164. Tellingly, Claimants cannot even keep their story straight in the Counter-Memorial. At paragraph 126, and contrary to the paragraphs cited above, Claimants argue that their full protection and security claim "arises out of Respondent's failure, beginning in early 2016 […] 'to take reasonable measures to ensure that Claimants and Exmingua have access to **the Progresso** [sic.] **VII and Santa Margarita project sites**.'"[345] While the argument is inaccurate as to time period at issue, it is accurate as to the fact that, in the Notice of Arbitration, Claimants allege that the full protection and security claim arises from the protests and blockades at both the Santa Margarita and Progreso VII projects. And, although Claimants now argue that the breach occurred in **2016**, per the Notice of Arbitration, on 3 September **2012**, Exmingua filed an *amparo* action against the General Director of the National Police, claiming the "omission of intervention, by the authority, to protect people and vehicles in and around the facilities of the mining project Progreso VII […]."[346]

165. Third, in order to divert the Tribunal's attention to the post-2015 blockades and protests, Claimants supplement their claim with a new factual account and thirteen factual exhibits

[342] Counter-Memorial, ¶ 127 (emphasis added).
[343] *Id.* ¶ 116 (emphasis added).
[344] *Id.* ¶ 118 (emphasis added). *See also id.* ¶ 122.
[345] *Id.* ¶ 126 (emphasis added).
[346] Notice of Arbitration, ¶ 43.

related to the 2016 and 2017 events.[347] For instance, Claimants explain the alleged position of the MEM and the Chamber of Industry of Guatemala regarding the *amparo provisional* of November 2015.[348] They also add detail about, among others, a certificate from a notary public,[349] the date when Exmingua was notified of MEM's Resolution No. 1191,[350] and the EIA for Santa Margarita.[351] All this new information is irrelevant to the question at issue here. Even if the exhibits could be considered (and they cannot be considered per Claimants' own contention),[352] Claimants' desperate last minute move does not change, but confirms, the fact that Claimants' claim is directed against a "continuous and systematic"[353] event giving rise to the same breach of CAFTA-DR.[354] In any event, if the Tribunal were to accept that "Claimants' full protection and security claim […] is not based on a single continuing breach," as Claimants now contend,[355] the claim would be time-barred as well. Claimants concede that the blockades and protests began in

[347] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo provisional*, 11 November 2015, **C-0004-SPA/ENG**; Supreme Court of Justice of Guatemala, Case No. 1592-2014, Appeal by Exmingua against the Ruling granting *amparo provisional*, 23 February 2016, **C-0005-SPA/ENG**; M. R. Bolaños, *The MEM will not suspend the project*, La Prensa Libre, 1 March 2016, **C-0006-SPA/ENG**; N. Gándara, *CIG urges the MEM to not bend over pressure*, La Prensa Libre, 11 March 2016, **C-0007-SPA/ENG**; Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ministry of Energy and Mines' submission in relation to compliance with *amparo provisional*, 10 March 2016, **C-0008-SPA/ENG**; G. Contreras, *Locals from La Puya continue with the protests*, La Prensa Libre, 13 March 2016, **C-0009-SPA/ENG**; J. Ramos and J. Rosales, *Protesters of La Puya burn doll of the Minister of Energy*, La Prensa Libre, 26 March 2016, **C-0010-SPA/ENG**; N. Rivera, *The new camp at the peaceful resistance La Puya*, Prensa Comunitaria Km. 169, 19 May 2019, **C-0011-SPA/ENG**; Official Notification No. 497 from the MEM to Exmingua, attaching Resolution No. 4056, 21 December 2016, **C-0012-SPA/ENG**; Letter from Exmingua to the MEM, attaching Notary Public's Certification, 22 March 2017, **C-0013-SPA/ENG**; Official Notification No. 5099 from the MEM to Exmingua, attaching Resolution No. 1191, 5 April 2017, **C-0014-SPA/ENG**; Letter from Exmingua to the MARN, 7 April 2017, **C-0015-SPA/ENG**; Letter from Exmingua to the MEM, 7 April 2017, **C-0016-SPA/ENG**.

[348] *Compare* Counter-Memorial, ¶¶ 120, 121 *with* Notice of Arbitration, ¶ 54.

[349] *Compare* Counter-Memorial, ¶ 123 *with* Notice of Arbitration, ¶ 49.

[350] *Compare* Counter-Memorial, ¶ 124 *with* Notice of Arbitration, ¶ 49.

[351] *Compare* Counter-Memorial, ¶ 125 *with* Notice of Arbitration, ¶ 49.

[352] Counter-Memorial, ¶ 3.

[353] Notice of Arbitration, ¶ 48.

[354] *See, e.g.,* Letter from Exmingua to the MARN, 7 April 2017, p. 1 ("The reason for this submission before your honorable office is, that **community unrest started in the municipality of San Pedro Ayampuc, Department of Guatemala, since the year 2012** and, in this context, several social groups are opposing mining activities in said municipality and in neighboring municipalities. **This situation remains to this day, and has prevented the project from being presented to the community** and base line updates from being performed as appropriate, pursuant to the rules and regulations which apply to this type of studies.") (emphasis added), **C-0015-SPA/ENG**; J. Ramos and J. Rosales, *Protesters of La Puya burn doll of the Minister of Energy*, La Prensa Libre, 26 March 2016, p. 1 ("***Since 2 March 2012*** **the residents of the communities** located in San Jose del Golfo, Guatemala, took action to reject the mine and **blocked the entrance to the company** because they installed huts on the road.") (emphasis added), **C-0010-SPA/ENG**.

[355] Counter-Memorial, ¶ 127.

2012.[356] They cannot circumvent the limitations period by basing their claim on "the most recent transgression" of a "series of similar and related actions by a respondent State."[357]

166. Finally, as shown in the table below, the Counter-Memorial contains numerous inaccurate and misleading representations or cites to purported factual allegations concerning Claimants' full protection and security claim, all in a transparent attempt by Claimants to try to avoid the three-year limitations period under Article 10.18.1 of CAFTA-DR. The following lists Claimant's inaccurate citations and representations:[358]

No.	Claimants' assertion in the Counter-Memorial[359]	Written submission Claimants use to support the assertion	Distortion
1.	¶ 116: "**Selectively referencing Claimants' factual description in their Notice of Arbitration**, Guatemala mischaracterizes Claimants' claim for lack of full protection and security as relating to the '**continuous and systematic protests** […] **since 2012**' and Guatemala's 'continuing' failure to protect claimants investments." (citing to Preliminary Objections, ¶ 118)	Respondent's Preliminary Objections, ¶ 118: "Thus, Claimants' claim is built on the premise that the '**continuous and systematic protests and blockades at the site since 2012**' and the alleged failure by Guatemala to take reasonable measures or effectively respond constitute a 'breach [of Guatemala's] obligation to provide Exmingua full protection and security.' In other words, Claimants submit that a 'series of similar and related actions' or omissions amount to a breach of CAFTA-DR by the Respondent."	Selective quotation of Respondent's Preliminary Objections to imply that Respondent mischaracterized Claimants' full protection and security claim.
2.	¶ 117: "This resulted in a nearly two-year delay (from February 2012 to May 2014), during which time Claimants and Exmingua were denied access to their property, and unable to commence construction or operations." (citing to Notice of Arbitration, ¶ 50)	Claimants' Notice of Arbitration, ¶ 50: "Meanwhile, the continuous blockades and protests severely affected both of Exmingua's projects. As to the Progreso VII Project, Exmingua was prevented from exploiting the mine and processing and extracting product for export. As to the Santa Margarita Project,	Assertion unsupported by paragraph cited.

[356] Notice of Arbitration, ¶¶ 41-45.
[357] *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 215 (*citing Grand River*, ¶ 81), **RL-0002-067-ENG**.
[358] The purpose of this exercise is to emphasize the new misleading facts in the Counter-Memorial.
[359] Footnotes omitted. *See* Counter-Memorial.

No.	Claimants' assertion in the Counter-Memorial[359]	Written submission Claimants use to support the assertion	Distortion
		the blockades to the mining site prevented Exmingua from completing the EIA, which was a condition for securing an exploitation license."	
3.	¶ 118: "As also explained in the Notice of Arbitration, **in May 2014, Respondent's national police broke through the blockade and evicted the protesters from the site**." (citing to Notice of Arbitration, ¶ 45)	Claimants' Notice of Arbitration, ¶ 45: "**Following considerable efforts by Claimants**, **on 25 May 2014, the exploitation activities at Progreso VII resumed**, and, by year-end, Exmingua made its first concentrate shipment. Irregular blockades continued, however, **without effective responses from the State**."	Contradiction between assertion and support.
4.	¶ 118: "Claimants and Exmingua then were able to access the site, and construction commenced, soon followed by operations." (citing to Notice of Arbitration, ¶ 45)	Claimants' Notice of Arbitration, ¶ 45: "**Following considerable efforts by Claimants**, **on 25 May 2014, the exploitation activities at Progreso VII resumed**, and, by year-end, Exmingua made its first concentrate shipment. Irregular blockades continued, however, without effective responses from the State."	Assertion unsupported by paragraph cited.
5.	¶ 121: "The Supreme Court's ruling and the MEM's initial refusal to suspend Exmingua's license provoked confusion and controversy, which **gave rise to a new wave of protests in early 2016**. The protestors 'urged the authorities to close the operations' of the Progreso VII Project." (citing to C-007, C-009, C-0010 & C-0011)	C-007: "Demonstrations against the mining project have intensified in recent days. […] **For the past week, residents of La Puya, San José del Golfo, have been standing in front of the headquarters of the Ministry of Energy and Mines** (MEM) in zone 11, and are asking the authorities to close the operations of the Progreso VII Derivadas project, owned by Exploraciones Mineras de Guatemala, S. A., Exmingua."	Inaccurate description of evidence. There was no "new wave of protests" that prevented Claimants from completing the EIA for Santa Margarita.[360] According to the documents submitted by Claimants with the Counter-Memorial, the communities blocked the entrance to Exmingua's projects since 2012.[361] Then, from 3 March 2016, they "stationed" in front of the MEM facilities.

[360] Counter-Memorial, ¶ 122.

[361] J. Ramos and J. Rosales, *Protesters of La Puya burn doll of the Minister of Energy*, La Prensa Libre, 26 March 2016, p. 1, **C-0010-SPA/ENG**.

No.	Claimants' assertion in the Counter-Memorial[359]	Written submission Claimants use to support the assertion	Distortion
	¶ 122: **This new wave of protests and blockades**, and Respondent's associated failure to provide full protection and security, **prevented Exmingua from carrying out the social consultations and completing the EIA for Santa Margarita**, in furtherance of its application for an exploitation license.	C-009: "**Since March 2, dozens of people have been stationed in front of the MEM facilities**, zone 11, as a pressure measure to comply with a ruling of the Supreme Court of Justice (CSJ), which, according to them, orders the closure of operations at the mine." C-0010: "**Since 2 March 2012 the residents of the communities** located in San Jose del Golfo, Guatemala, took action to reject the mine and **blocked the entrance to the company** because they installed huts on the road. This movement has generated several confrontations with the public force, which has come in protection of the entry of machinery of the company that has the license." C-0011: "The neighbors of the peaceful resistance 'La Puya' set up **a new camp in front of the MEM**, the tents were installed immediately, the kitchen, the pantry, an improvised bedroom, a bathroom, the washing area, a Mayan altar and a Catholic one were **installed from 3 March 2016**. […] The community members take turns covering the camp, **now** surely the shifts have to be double because **both 'La Puya' and the MEM have to be covered**. […] The May rains began this week, **the resistance camp will have to face** the wind, **the rain that** will . . . **run through the**	

No.	Claimants' assertion in the Counter-Memorial[359]	Written submission Claimants use to support the assertion	Distortion
		asphalt wetting everything in its path. **Those who resist in this new camp** demand that the Minister of Energy and Mines comply with Guatemalan law . . . ."	
6.	¶ 126: "**As set forth in Claimants' Notice of Arbitration** and as explained more fully above, Claimants' claim under Article 10.5 of the DR-CAFTA for lack of full protection and security thus arises out of Respondent's failure, beginning in early 2016 after the Supreme Court's ruling, 'to take reasonable measures to ensure that Claimants and Exmingua have access to the Progresso VII and Santa Margarita project sites.' **This breach 'prevented Exmingua's consultants from being able to complete the social studies required for the EIA and thereby complete the application for an exploitation license for the Santa Margarita Project.'**" (citing to Notice of Arbitration, ¶ 74)	Claimants' Notice of Arbitration, ¶ 74: "Guatemala has breached its obligation to provide Exmingua full protection and security by failing to take reasonable measures to ensure that Claimants and Exmingua have access to the Progreso VII and Santa Margarita project sites. Among other things, Guatemala's failure to act in this regard despite Claimants' and Exmingua's entreaties and petitions have **resulted in Exmingua's employees being threatened when attempting to access the sites and work stoppages at the site, and have prevented Exmingua's consultants from being able to complete the social studies required for the EIA and thereby complete the application for an exploitation license for the Santa Margarita Project.**"	Selective quotation of the Notice of Arbitration to imply that Claimants' position in the Counter-Memorial is consistent with the Notice of Arbitration. Indeed, as explained in the Notice of Arbitration, the alleged threats to Exmingua's employees took place in 2012 and 2016.[362]

167. In sum, Claimants' efforts to re-engineer their full protection and security claim at this stage in the proceeding only confirms that Claimants are fully aware that the claim, as pleaded in the Notice of Arbitration, is time-barred. Their attempt to circumvent the limitations period through new allegations in, and documents submitted with, the Counter-Memorial is invalid and ineffective. Again, Claimants' exhibits only confirm what they wrote in the Notice of Arbitration:

[362] Notice of Arbitration, ¶¶ 43, 48, 56.

Respondent's alleged breach was "continuous and systematic."[363] In any event, Claimants cannot evade Article 10.18.1 of DR-CAFTA by basing their claim "on the most recent transgression" of a "series of similar and related actions" by Respondent.[364] The full protection and security claim is thus time-barred.

B. The Law Requires the Dismissal of the Full Protection and Security Claim.

168. Knowing that their full protection and security claim cannot succeed under Article 10.18.1 of CAFTA-DR, Claimants falsely assert that "Respondent misstates the law."[365] In support of their baseless argument, Claimants turn to a NAFTA award issued more than twelve years ago[366] which has been consistently rebuked by a line of NAFTA and CAFTA-DR decisions. Claimants also rely on awards which they either interpret incorrectly or misapply to try to overcome the deficiencies in the Notice of Arbitration.

169. First, Claimants draw a dividing line between cases involving "a series of similar and related actions by a respondent state"[367] and cases where there was "a singular measure at issue."[368] On the one hand, Claimants attempt to reconcile *Grand River v. United States*[369] with the case at hand to argue that different limitation periods should be applied to the pre-2016 and post-2015 alleged inactions by Respondent.[370] But *Grand River* shows just the opposite. There, the tribunal rejected claimant's position that there were several limitations periods at issue, with each state's adoption and enforcement of its escrow statutes implementing the master settlement agreement constituting a separate measure from which the three-year limitations period should run.[371] The tribunal found, however, that the "complementary legislation"[372] and the amendments

[363] *Id*. ¶ 48; Letter from Exmingua to the MARN, 7 April 2017, p. 1, **C-0015-SPA/ENG**; J. Ramos and J. Rosales, *Protesters of La Puya burn doll of the Minister of Energy*, La Prensa Libre, 26 March 2016, p. 1, **C-0010-SPA/ENG**.
[364] *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 215 (*citing Grand River*, ¶ 81), **RL-0002-067-ENG**.
[365] Counter-Memorial, Section IV(A), pp. 48-58.
[366] *UPS*, Award on the Merits, 24 May 2007, **CL-0037-ENG**. *See* Counter-Memorial, ¶¶ 111, 113, 114.
[367] Counter-Memorial, ¶ 107.
[368] *Id.* ¶ 108.
[369] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, **RL-0039-ENG**.
[370] Counter-Memorial, ¶¶ 107, 126-127.
[371] *Grand River*, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 81 ("At the hearing, the Claimants advanced a further argument, to the effect that the limitations periods under Articles 1116(2) and 1117(2) applied separately to *each* contested measure taken by *each* state implementing the MSA. […] [T]his analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries."), **RL-0039-035-ENG**. *See also id.* ¶ 12, **RL-0039-007-ENG**.
[372] *Id.* ¶ 15 (emphasis added), **RL-0039-008-009-ENG**.

to the escrow laws[373] adopted after the critical date could be challenged.[374] Importantly, the tribunal paid particular attention to whether these measures "were clearly identified as included in the claim in the Notice of Arbitration and the Particularized Statement of Claim,"[375] which is clearly not the case here.

170. Further, Claimants ignore *Ansung v. China*,[376] which confirms that different limitation periods cannot be applied to the pre-2016 and post-2015 alleged omissions by Respondent. *Ansung* addressed claims arising out of respondent's alleged inactions in relation to claimant's investment in the construction of a golf and country club and luxury condominiums. As here, the claimant alleged that State inactions constituted a breach of the applicable BIT.[377] Also as here, the claimant first argued that the breaches began before the critical date and then "attempted to change its story […] by concentrating on" the post-critical date breach.[378] Before the critical date, among other things, respondent "took no measures to enjoin the illegal operation of [a competing] golf course,"[379] "unheeded" claimant's "requests for police protection" when the main gate of its golf course was blockaded and its employees assaulted,[380] and forced claimant to pay a higher price for the land than originally agreed.[381] The tribunal rejected claimant's argument that it incurred loss or damage only as a consequence of the government inaction concerning the allotment of land for the second phase of the project after the critical date.[382] It acknowledged that "damages for [a continuing omission] […] may be measured from different times after the first incident of that omission"[383] but found that neither respondent's "continued inaction" after the critical date nor the claimant's final liquidation of its damages restarted the limitations period.[384] The tribunal found the claims were time-barred and dismissed them.

171. Thus, *Grand River* and *Ansung* confirm that Claimants' full protection and security claim is time-barred.

---

[373] *Id.* ¶¶ 13, 16, **RL-0039-008-009-ENG**.
[374] *Id.* ¶¶ 86, 104, **RL-0039-036-037-045-ENG**.
[375] *Id.* ¶¶ 87-89, 94, **RL-0039-037-041-ENG**.
[376] *Ansung*, Award, 9 March 2017, **RL-0103-ENG**.
[377] *Id.* ¶¶ 93, 95, 109, **RL-0103-031-037-ENG**.
[378] *Id.* ¶ 78, **RL-0103-025-ENG**.
[379] *Id.* ¶¶ 46, 107(d) **RL-0103-016-037-ENG**.
[380] *Id.* ¶¶ 50, 107(b), **RL-0103-017-036-ENG**.
[381] *Id.* ¶¶ 44, 107(d), **RL-0103-016-037-ENG**.
[382] *Id.* ¶¶ 95, 109, **RL-0103-031-037-ENG**.
[383] *Id.* ¶ 112, **RL-0103-038-ENG**.
[384] *Id.* ¶¶ 109-110, **RL-0103-037-038-ENG**.

172. On the other hand, Claimants attempt to distinguish their case from *Corona Materials v. Dominican Republic* and *Berkowitz v. Costa Rica* by arguing that, here, the purported breach arose from autonomous measures with different limitations periods for each as opposed to from a "singular measure"[385] from which the same three-year limitations period should be computed. Both cases, however, confirm that Claimants' full protection and security claim is time-barred. For example, in *Corona*, the tribunal found that respondent's failure to reconsider the refusal to grant claimant's license was "an implicit confirmation of its previous decision" and, therefore, could "not be considered as a separate action," as the claimant argued.[386] Notably, Claimants ignore that the *Corona* tribunal expressly stated that assuming *arguendo* that respondent's failure to reconsider its license amounted to a denial of justice distinct from the non-issuance of the environmental license, the claimant could not "evade the limitations period by basing its claim on 'the most recent transgression […]'" of a "'series of similar and related actions by a respondent State.'"[387] Here, the pre-2016 and post-2015 failures to provide full protection and security amount to a single measure and a continuing violation.[388] Even assuming that Respondent's post-2015 conduct "amount[ed] to a [violation of the treaty]" distinct from[389] Respondent's pre-2016's conduct, Claimants cannot evade the limitations period by basing their claim on the "most recent transgression."[390] Thus, *Corona* confirms that the full protection and security claim is time barred.

173. Likewise, in *Berkowitz v. Costa Rica* the tribunal found that claimants should have known before the critical date of a court decision requiring expropriation of their properties as falling within the boundaries of a national park.[391] The claimants could not circumvent the three-year limitations period by alleging that respondent's conduct constituted a continuing breach. The tribunal held that *whether claimants' allegations* "*are cast in terms of post-limitation period conduct* by the Respondent *or in terms of continuing violations*," the respondent acquired the

[385] Counter-Memorial, ¶¶ 108, 127.
[386] *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 211, **RL-0002-066-ENG**.
[387] *Id.* ¶¶ 214-215, **RL-0002-067-ENG**.
[388] Notice of Arbitration, ¶ 74. *Id.* ¶¶ 42-45, 48; J. Ramos and J. Rosales, *Protesters of La Puya burn doll of the Minister of Energy*, La Prensa Libre, 26 March 2016, p. 1, **C-0010-SPA/ENG**; Letter from Exmingua to the MARN, 7 April 2017, p. 1, **C-0015-SPA/ENG**. *See* Preliminary Objections, ¶¶ 115-118.
[389] *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶¶ 214-215, **RL-0002-067-ENG**.
[390] *Id.* ¶ 215, **RL-0002-067-ENG**.
[391] *Berkowitz*, Interim Award (Corrected), 30 May 2017, ¶¶ 66, 171, 204, **RL-0038-054-121-132-ENG**.

relevant knowledge before the critical date.[392] Here, whether Claimants' allegations are cast in terms of a continuing breach, as in the Notice of Arbitration, or in terms of an independent breach after November 9, 2015 (the "Critical Date"),[393] as in the Counter-Memorial, Claimants acquired the relevant knowledge before the relevant date. Thus, under the *Berkowitz* approach, Claimants' full protection and security claim is time-barred.

174. Second, in the Notice of Arbitration, Claimants did not ask the Tribunal to consider events prior to the CAFTA-DR limitations period as *background facts*.[394] Instead, the *factual basis* for Claimants' full protection and security claim was Guatemala's alleged failure to respond to the continuous and systematic protests and blockades since 2012. After Claimants' "multiple and clear pleadings" in the Notice of Arbitration, the Tribunal should not accept Claimants' "attempts to characterize [the pre-Critical Dates] […] as mere background information."[395] In any event, none of the cases relied upon by Claimants supports Claimants' argument that they are entitled to seek damages for Respondent's alleged failure to provide full protection and security in connection with Respondent's alleged failure to respond to the post-2015 protests and blockades.

175. For example, in *Eli Lilly v. Canada*, the tribunal found that claimant's written submissions clearly showed that the claimant framed its claims not against the promise utility doctrine developed by the Canadian courts before the critical date, but against its application to Eli Lilly's patents after the critical date.[396] Because the claimant only relied on the events that occurred before the critical date as "factual background" to its "timely claim",[397] the tribunal considered it "appropriate."[398] Further, the tribunal held that the "[c]laimant did not suffer, and could not have suffered, the loss of which it complains […] (*i.e.*, invalidation of the [patents]) before those patents were invalidated."[399] Claimant's patents were only invalidated after the

[392] *Id.* ¶¶ 251-252 (emphasis added), **RL-0038-148-149-ENG**.
[393] Because Claimants Submitted the Claim to Arbitration on November 9, 2018, the Critical Date is November 9, 2015. *See* Preliminary Objections, ¶¶ 113-114.
[394] Counter-Memorial, ¶ 109.
[395] *Ansung*, Award, 9 March 2017, ¶ 108, **RL-0103-037**.
[396] *Eli Lilly and Co. v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, ¶¶ 163-165 ("Claimant's challenge is aimed solely at the invalidation of the Zyprexa and Strattera Patents [which occurred after the critical date]. Indeed, this is clear even if one focuses specifically on the paragraphs of the Reply cited by Respondent for its portrayal of the claim. Claimant does not allege that the promise utility doctrine itself in the abstract [which occurred before the critical date] is a violation of NAFTA Chapter Eleven."), **RL-0040-055-056-ENG**.
[397] *Id.* ¶¶ 171-173, **RL-0040-058-059-ENG**.
[398] *Ibid*.
[399] *Id.* ¶ 168, **RL-0040-057-ENG**.

critical date, when the promise utility doctrine was applied to Eli Lilly's patents,[400] not when the Canadian courts developed the promise utility doctrine in the abstract. Accordingly, the *Eli Lilly* tribunal found that there was no continuing breach but a single and autonomous violation when the patents were invalidated.[401] Here, Claimants do not merely rely on events that occurred before the Critical Date as "factual background and context."[402] They are *bringing a claim* on the basis of events that occurred before the Critical Date.[403] Further, contrary to *Eli Lilly*, the measures allegedly adopted prior to the limitations period were specifically directed against Exmingua and purportedly amounted to a breach of the CAFTA-DR when they were adopted.[404]

176. Third, Claimants rely on *Mobil v. Canada* to assert that "a mere suspicion or expectation that damage *might* occur is insufficient to commence [the limitations period]."[405] In *Mobil*, the claimant challenged Canada's implementation of the 2004 Guidelines for Research and Development Expenditures (the "2004 Guidelines"), which compelled claimants to conduct research and development.[406] While the imposition of the 2004 Guidelines occurred on 5 November 2004, "it was not until 19 February 2009, when the Supreme Court of Canada dismissed Mobil's petition for leave to appeal and thus ended the challenge in the Canadian courts, that the Guidelines were actually enforced […] against Mobil or that Mobil could have acquired knowledge that they would be enforced."[407] Accordingly, the *Mobil* tribunal found that the claimant could not have acquired knowledge that it would suffer loss or damage resulting from the

---

[400] *Id.* ¶¶ 167-170, **RL-0040-057-ENG**.
[401] *Id.* fn. 159 ("In the present case, Claimant has not advanced a theory of continued breach or otherwise advocated the suspension or extension of the limitation period. Nor does the Tribunal adopt any such approach in reaching its decision. This case is simpler: the alleged breach for each investment—the invalidation of the patent—occurred at a single point in time within the three-year period."), **RL-0040-058-ENG**.
[402] Counter-Memorial, ¶ 109.
[403] Notice of Arbitration, ¶ 74. *Id.* ¶¶ 42, 48.
[404] *Id.* ¶¶ 43, 48 (" 43. **[O]n 3 September 2012, Exmingua filed an *amparo* action** against the General Director of the National Police, **claiming the 'omission of intervention, by the authority, to protect people and vehicles in and around the facilities of the mining project Progreso VII** ….' Exmingua noted that 'illegal arrests, harassment, injuries, threats and coercion against the project's workers had occurred on the project site, in addition to various damages to its facilities, and although the national police was aware of this situation, the necessary measures have not been taken to guarantee and protect the people and vehicles that must enter to the project.' […] 48. As part of the process to obtain the exploitation license for the Santa Margarita Project, Exmingua undertook all necessary efforts to prepare its EIA. **Exmingua and its consultants**, however, **were unable to complete the public consultations required for its EIA due to the continuous and systematic protests and blockades at the site since 2012**.") (emphasis added); Letter from Exmingua to the MARN, 7 April 2017, p. 1, **C-0015-SPA/ENG**.
[405] Counter-Memorial, ¶ 110.
[406] *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 6, **CL-0090-ENG**.
[407] *Id.* ¶ 152, **CL-0090-ENG**.

enforcement of the 2004 Guidelines before the enforcement of the Guidelines in 2009.[408] Tellingly, Claimants omit the key sentence emphasized below from their incomplete quote of *Mobil v. Canada* in their Counter-Memorial:[409]

> **Even if it is possible to read the requirement in Articles 1116(2) and 1117(2) that the investor must have acquired knowledge that loss or damage *has been* incurred as embracing a case in which the investor knows that loss or damage *will be* incurred, the time limit imposed in those provisions could not start to run until the investor had *knowledge* that it would suffer such loss or damage**. To suspect that something will happen is not at all the same as knowing that it will do so. Knowledge entails much more than suspicion or concern and requires a degree of certainty. While the Tribunal agrees with Canada that it is not necessary that the quantum of loss or damage be known, it is clear that there must be at least a reasonable degree of certainty on the part of the investor that some loss or damage will be sustained.

177. Likewise, in *Nissan v. India*, the tribunal found that Respondent's alleged breach crystallized after the critical date.[410] As a result, Nissan's claims were not time-barred because it only acquired knowledge of the relevant loss or damage it suffered after the critical date.[411] Thus, *Mobil v. Canada* and *Nissan v. India* confirm that Claimants' full protection and security claim is time-barred. Unlike *Mobil* and *Nissan*, according to Claimants' own account, Respondent's alleged breach crystallized before the Critical Date and Claimants knew that damage had allegedly occurred before the Critical Date. Indeed, among other things, Exmingua filed an *amparo* action for Respondent's alleged failure to provide protection and security at Exmingua's project sites as early as 2012.[412] Knowledge of the loss or damage "is triggered by the first appreciation that loss or damage will be (or has been) incurred."[413] As other CAFTA-DR and NAFTA tribunals have held, knowledge of the full or precise extent of loss or damage is not required.[414]

---

[408] *Id.* ¶¶ 154-155, **CL-0090-ENG**.
[409] *Id.* ¶ 155 (emphasis added), **CL-0090-ENG**. *See* Counter-Memorial, ¶ 110.
[410] *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, ¶ 328, **CL-0078-ENG**; Counter-Memorial, ¶ 112 ("The tribunal found the respondent had not 'categorically repudiated its payment obligation' prior to the cut-off date […].").
[411] *Nissan*, Decision on Jurisdiction, 29 April 2019, ¶ 328, **CL-0078-ENG**.
[412] Notice of Arbitration, ¶ 43. *See also* Preliminary Objections, ¶¶ 119-129.
[413] *Berkowitz*, Interim Award (Corrected), 30 May 2017, ¶ 213, **RL-0038-137-ENG**; *Ansung*, Award, 9 March 2017, ¶ 111, **RL-0103-038**.
[414] *Berkowitz*, Interim Award (Corrected), 30 May 2017, ¶ 213, **RL-0038-137-ENG**; *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 194 ("It warrants emphasizing that knowledge of the breach in and of itself is insufficient to trigger the limitation period's running; subparagraph 1 requires knowledge of breach and knowledge of loss or damage. That said, **in order for the limitation period to begin to run, it is not necessary that a claimant be in a position to fully particularize**

178. Claimants' argument that the three-year limitations period did not start running until 2016 because Article 10.18.1 of CAFTA-DR requires knowledge of "the loss or damage suffered as a consequence of the specific measure which it alleges constitutes the breach"[415] is simply wrong. As alleged in the Notice of Arbitration, and as the documents submitted with the Counter-Memorial confirm, Respondent's alleged failure to respond to the protests and blockades since 2012 were "continuous and systematic".[416] "[D]amages for such a continuing breach may be measured from different times after the first incident of that omission. […] However, even assuming a continuing omission breach attributable to [Respondent] […] and even assuming [Claimants] might wish to claim damages from a date later than the first knowledge of [Respondent']s continuing omission […] that could not change the date on which [Claimants] *first* knew [they] had incurred damage."[417] The limitation period begins to run from the "first" acquisition of relevant knowledge, not from the last acquisition of such knowledge under CAFTA-DR Article 10.18.1.[418]

---

its legal claims (in that they can be subsequently elaborated with more specificity); **nor must the amount of loss or damage suffered be precisely determined.** It is enough, as the *Mondev* tribunal found when applying NAFTA's limitation clause, that a "claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear…") (emphasis added), **RL-0002-061-ENG**; *Clayton,* Award on Jurisdiction and Liability, 17 March 2015, ¶ 275 ("**The plain language of Article 1116(2) does not require full or precise knowledge of loss or damage.** It might be that some qualification can be read into the plain language, such as a requirement that the loss be material. To require a reasonably specific knowledge of the amount of loss would, however, involve reading into Article 1116(2) a requirement that might prolong greatly the inception of the three-year period and add a whole new dimension of uncertainty to the time-limit issue […].") (emphasis added), **CL-088-ENG**; *Grand River*, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 78 ("[T]he Tribunal's views parallel those of the NAFTA Tribunal in Mondev. […] The Tribunal […] [found] that **'a Claimant may know that it has suffered loss of** [sic.] **damage even if the extent of quantification of the loss or damage is still unclear**.'") (emphasis added), **RL-0039-033-ENG**; *Mondev*, Award, 11 October 2002, ¶ 87 ("A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear. […]"), **RL-0018-031-ENG**. *See also Ansung*, Award, 9 March 2017, ¶ 111 ("'[T]he limitation clause **does not require full or precise knowledge of the loss or damage**….such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result'") (emphasis added), **RL-0103-038-ENG**; *Nissan*, Decision on Jurisdiction, 29 April 2019, ¶ 325 ("[T]he triggering event for the running of the limitations period is knowledge that the investor has been harmed (*i.e.*, qualitatively has incurred 'loss or damage'), not knowledge of the precise calculation of that harm."), **CL-0078-ENG**.

[415] Counter-Memorial, ¶ 111.

[416] Notice of Arbitration, ¶ 48; J. Ramos and J. Rosales, *Protesters of La Puya burn doll of the Minister of Energy*, La Prensa Libre, 26 March 2016, p. 1, **C-0010-SPA/ENG**; Letter from Exmingua to the MARN, 7 April 2017, p. 1, **C-0015-SPA/ENG**.

[417] *Ansung*, Award, 9 March 2017, ¶¶ 112-113 (emphasis in original), **RL-0103-038-39-ENG**.

[418] *Berkowitz*, Interim Award (Corrected), 30 May 2017, ¶ 208, **RL-0038-134-135-ENG**; *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 215 (*citing Grand River*, ¶ 81), **RL-0002-067-ENG**. *See also Ansung*, Award, 9 March 2017, ¶ 113, **RL-0103-038-ENG**.

179. Fourth, Claimants surprisingly contend that a continuing breach renews the limitations period and cite *UPS v. Canada* and *Feldman v. Mexico* as support.[419] CAFTA-DR tribunals have unanimously rejected the *UPS* tribunal's reading of the limitations language under Articles 1116(2) and 1117(2) of the NAFTA. As stated by the *Berkowitz* tribunal:[420]

> In this regard, **the Tribunal disagrees with the analysis in the *UPS* Award that "continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly".** While it may be that a continuing course of conduct constitutes a continuing breach, the Tribunal considers that such conduct cannot without more renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims. Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period. This does not comport with the policy choice of the parties to the treaty. While, from a given claimant's perspective, a limitation clause may be perceived as an arbitrary cut off point for the prosecution of a claim, such clauses are a legitimate legal mechanism to limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring.

180. Similarly, the *Corona* tribunal agreed with the United States' non-disputing party submission that a claimant cannot use the latest in a series of alleged breaches to avoid the three-year limitations period and endorsed the *Grand River* tribunal's, not *UPS*'s, reading of the three-

[419] Counter-Memorial, ¶¶ 113-114, 128.
[420] *Berkowitz*, Interim Award (Corrected), 30 May 2017, ¶ 208 (emphasis added), **RL-0038-134-135-ENG**.

year limitations period.[421] Other tribunals[422] and scholars[423] have expressed their disagreement with the *UPS* tribunal's holding. Importantly, Claimants disregard that the "subsequent practice [of the CAFTA-DR Parties] in the application"[424] of Article 10.18.1, and that of NAFTA Parties in the application of Articles 1116(2) and 1117(2), confirms that continuing courses of conduct do not renew the limitations period under the Treaties.[425]

---

[421] *Corona*, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 215 ("In any event, even hypothetically assuming that the DR administration's silence in reply to the Motion for Reconsideration would amount to a denial of justice, which the Tribunal does not consider to be the case here, it would remain, as rightly pointed out by the United States in their submissions on questions of interpretation of the DR-CAFTA, that: *'Where a series of similar and related actions by a respondent State is at issue, an investor cannot evade the limitations period by basing its claim on the most recent transgression in that series. To allow an investor to do so would, as the tribunal in Grand River recognized, render the limitations provisions ineffective'."*) (emphasis in original) (citations omitted), **RL-0002-067-ENG**.

[422] *See e.g. Peter A. Allard v. Government of Barbados*, PCA Case No. 2012-06, Award on Jurisdiction, 13 June 2014, ¶ 102 ("Plainly, **the UPS v. Canada decision** on which the Claimant relies **misapplies the relevant law and ignores the purpose of the limitation period**.") (emphasis added), **RL-0104-029-ENG**; *Apotex Inc v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, ¶¶ 325-327 ("325. **Apotex cannot avoid this conclusion by asserting that the** FDA **measure is part of a 'continuing breach'** by the United States, or 'part of the same single, continuous action,' in so far as this is intended as a mechanism to use later court proceedings to toll the limitation period for the earlier FDA measure. 326. As the Respondent has forcefully argued, **nothing in the text or jurisprudence of NAFTA Chapter Eleven suggests that a party can evade NAFTA's limitation period in this way**.") (emphasis added), **RL-0105-106-107-ENG**; *Grand River*, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 81, **RL-0039-035-ENG**; *Mobil*, Decision on Jurisdiction and Admissibility, 13 July 2008, ¶ 161 ("**[A]part from *UPS***, Mobil's **continuing breach argument has attracted comparatively little support** in the jurisprudence of NAFTA arbitration tribunals. While Mobil rightly points out that none of the awards on this subject concerned facts directly comparable to those in the present case, **it is now over ten years since the award in *UPS* and the absence of any subsequent endorsement of that tribunal's views on continuing breach means that, at the very least, they should be treated with caution**.") (emphasis added), **CL-0090-ENG**.

[423] *See, e.g.,* S. Blanchard, *State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration*, 10(3) Washington University Global Studies Law Review 419, pp. 471-72 ("At first glance, UPS's argument that a continuing act should extend the limitation period with each new application has intuitive appeal. […] This logic ignores the purpose of the limitation period, as Canada pointed out. **A reading that resets the limitation period with each new application of a regulation eviscerates the limitation.** Also, as explained above, sophisticated international investors should be able to estimate their losses from a new regulation or policy within the three-year window. If a new state action truly causes unforeseen losses, it will likely fall within the definition of a measure and thus begin a new limitation period.") (emphasis added), **RL-0106-054-055-ENG**; R. Digon, *Jurisdiction Ratione Temporis under NAFTA Article 1116(2)*, 2008 Yale Law School Legal Scholarship Repository 1, pp. 37-38 ("The final award for consideration, ***UPS v. Canada***—a dispute concerning Canada's alleged unlawful treatment of UPS and UPS Canada relative to Canada Post— not only departs significantly from the analytical framework of and findings in the abovementioned awards, but **contradicts the *lex specialis* and general principles of international law**. […] First, it supports the incorrect statement that a continuing breach can be likened to a continuing violation under international law. Second, it supports the incorrect statement that prior NAFTA jurisprudence treats continuing breaches and continuing violations equally. […]") (emphasis added), **RL-0107-038-039-ENG**.

[424] VCLT, Art. 31(3)(b), **RL-0027-020-ENG**.

[425] Preliminary Objections, ¶¶ 135-138. *See Corona*, Submission of the United States of America, 11 March 2016, ¶ 6 ("**The interpretation provided by the Tribunal in *UPS v. Canada* with respect to this point is misplaced.** That tribunal found that "it was true generally in the law" that continuing courses of conduct constituting continuing breaches may renew claims limitation periods under international law. Irrespective of whether the tribunal in *UPS v. Canada* properly characterized the law, a general rule would not override the specific requirements of Article 10.20.1, which operates as a *lex specialis* and governs the operation of the limitations period for claims brought under CAFTA-

181. Further, *Feldman v. Mexico* is not "concordant with" *UPS v.* Canada, as Claimants incorrectly contend.[426] The *Feldman* tribunal did not hold that a permanent course of conduct by a respondent would renew the limitations period. It merely found that NAFTA has no retroactive effect and could not apply to acts and omissions that occurred before NAFTA came into effect on 1 January 1994.[427] If there is a "permanent course of action by Respondent which start[s] before January 1, 1994 and [goes] on after that date", the tribunal would have jurisdiction over the "post-January 1, 1994 part of Respondent's alleged activity . . . ."[428] Thus, the *Feldman* tribunal only analyzed whether the lack of jurisdiction over actions that occurred before NAFTA entered into force, precluded the tribunal's jurisdiction over the part of a continuing course of action that occurs after the NAFTA's entry into force. The *Feldman* tribunal did not deal with a course of action that began, and continued, after NAFTA's entry into force.

182. The specific excerpts of *Feldman* that Claimants rely on[429] do not support Claimants' contention that continuing acts can overcome CAFTA-DR's three-year limitations period either.[430] In paragraph 43 of the Interim Decision on Preliminary Jurisdictional Issues, the

---

DR Chapter Ten. […]") (emphasis added), **RL-0042-002-ENG**; *Mobil*, Canada's Counter-Memorial, 30 June 2016, ¶ 166 ("**The only NAFTA case which has suggested that a continuing breach can evade Articles 1116(2) and 1117(2) was *UPS v. Canada***, decided in 2007. **With due respect to that tribunal, all three NAFTA Parties have agreed that it was wrong on this point.** No other NAFTA tribunal has endorsed the reasoning of the *UPS* tribunal, which was unsupported and lacking in analysis. The tribunal summarily stated that it was 'true generally in the law' that limitation periods are renewed by continuing courses of conduct but made no assessment of the *lex specialis* specifically imposed by the NAFTA Parties in the treaty. The interpretation gives the word 'first' no meaning and runs afoul of the principle of interpretation of *effet utile*.") (emphasis added), **RL-0108-070-071-ENG**; *Berkowitz*, *Submission of The United States of America*, 17 April 2015, ¶ 7 ("'[A]n investor cannot evade the limitations period by basing its claim on 'the most recent transgression in [a series of similar and related actions].' […] Accordingly, once a claimant *first* acquires (or should have acquired) knowledge of breach and loss, **subsequent transgressions by the State Party arising from a continuing course of conduct**, as opposed to a legally distinct injury, **do not renew the limitations period** […].") (emphasis added), **RL-0043-003-ENG**; *Berkowitz*, Respondent's Post-Hearing Submission, 26 May 2015, ¶¶ 32-36 ("'[A]n investor cannot evade the limitations period by basing its claim on 'the most recent transgression in [a series of similar and related actions].'" Therefore, **any continuing effect does not renew the limitations period**. […]") (emphasis added), **RL-0045-012-013-ENG**; *Corona*, Respondent's Reply Memorial on Expedited Preliminary Objections, 19 February 2016, ¶¶ 84-89 ("The Claimant cites only one authority to support its claim — namely, the award on the merits in *UPS v. Canada,* a NAFTA case. However, at least two other NAFTA tribunals — those in *Grand River* and *Feldman* — have concluded that the statute of limitations period is not subject to any type of suspension. […]"), **RL-0046-001-003-ENG**.

[426] Counter-Memorial, ¶ 114.

[427] *Marvin Roy Feldman Karpa v. United Mexican States,* ICSID Case No. ARB(AF)/99/1 (also known as *Marvin Feldman v. Mexico)*, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶ 62, **CL-0094-ENG**.

[428] *Ibid*.

[429] *Id.*, ¶ 43, **CL-0094-ENG**; *Feldman*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 199, **CL-0093-ENG**.

[430] Blanchard, p. 466 ("The tribunal in *Feldman v. Mexico* considered the meaning of Articles 1116 and 1117 in its Interim Decision on Preliminary Jurisdictional Issues and in its Final Award. The discussion in the Interim Decision focused on the definition of 'making a claim' for the purpose of determining the cut-off date for the limitation period.

Feldman tribunal analyzed the meaning of "make a claim" under Article 1117(2) of NAFTA.[431] The tribunal found that an investor makes a claim under NAFTA upon delivery of the notice of arbitration, not of the notice of intent.[432] This issue is not relevant under CAFTA-DR where a claim is expressly deemed submitted to arbitration when the claimant files the notice of arbitration.[433] Consistent with its finding that the cut-off date of the three-year limitations period was 30 April 1996,[434] in paragraph 199 of the *Feldman* award the tribunal acknowledged that the claimants' claim for lost profits during the period 1 January 1994 - May 1996 was covered by the limitations period under NAFTA.[435] It did not find that when the course of action begins, and continues, after NAFTA's entry into force, a claimant is entitled to claim lost profits relating to the part of a continuing course of action that is not time-barred, but cannot claim lost profits in connection with the part of a continuing course of action that is time-barred.

183. Fifth, Claimants seek to rely on irrelevant case law from the European Court of Human Rights to justify their argument that a continuing breach neutralizes Article 10.18.1 of CAFTA-DR.[436] International human rights do not have any bearing on the jurisdiction of an investor-state arbitral tribunal, which remains a matter of specific consent by the parties. Article 10.18.1 of CAFTA-DR is *lex specialis* and its text must prevail. Further, Article 10.18.1 of CAFTA-DR is "a time-bar which is directed at the investor […] and represents an absolute limitation on the rights granted to the investor as a putative claimant" under CAFTA-DR Chapter Ten.[437] "This is a true time-bar of rights and it is absolute."[438] In contrast, timeliness provisions in an international human rights instrument relate to a tribunal's competence to enforce fundamental human rights norms, not to the commercial interests of an investor, and "have been interpreted more broadly."[439] In sum, the human rights context is inapposite for jurisdictional

---

The tribunal's analysis on this issue fully supports the applicability of the three-year limitations period and does not touch on continuing acts. Though *UPS v. Canada* cited *Feldman* for the proposition that continuing acts can overcome NAFTA's three-year limitations period, *Feldman* in no way supports this contention.") (emphasis added), **RL-0106-049-ENG**.

[431] *Feldman*, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶¶ 43-44, **CL-0094-ENG**.

[432] *Ibid*.

[433] CAFTA-DR, Art. 10.16.4, **RL-0001-021-ENG**.

[434] *Feldman*, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶ 47, **CL-0094-ENG**.

[435] *Feldman*, Award, 16 December 2002, ¶ 199, **CL-0093-ENG**.

[436] Counter-Memorial, ¶ 115.

[437] *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Opinion with respect to the Effect of NAFTA Article 1116(2) On Merrill & Ring's Claim, 22 April 2008, ¶ 45 (interpreting NAFTA Article 1116(2)), **RL-0109-029-030-ENG**.

[438] *Ibid.*

[439] *Ibid.*

purposes in a CAFTA-DR Chapter Ten case. Under Article 10.18.1 of CAFTA-DR, continuing breaches do not extend the limitations period.

VII. CONCLUSION.

184. Claimants' claims fail as a matter of law. The Counter-Memorial is full of alternative facts, incomplete quotes, irrelevant authorities, misleading descriptions and an overall wholesale revision of the claims stated in the Notice of Arbitration. Unable to overcome the jurisdictional and admissibility barriers to their claims, Claimants present a Counter-Memorial that is a moving target. They try to create issues by challenging the facts they themselves alleged in their own Notice of Arbitration. Respondent's due process rights would be violated if Claimants are allowed to alter their Notice of Arbitration to overcome the Preliminary Objections mechanism in CAFTA-DR. The Tribunal should dismiss the claims in the Notice of Arbitration because Claimants seek damages they cannot recover under the section of the Treaty invoked, fail to meet the requirements of the correct section including the submission of a written waiver signed by Exmingua, and include a claim they did not notify and another claim that is time-barred. In conclusion, the Notice of Arbitration cannot survive the Preliminary Objections, and all claims asserted therein should therefore be dismissed in their entirety.

VIII. REQUEST.

185. Respondent respectfully requests that the Tribunal grant the relief sought in the Preliminary Objections.

RESPONDENT'S REPLY TO CLAIMANTS' COUNTER-MEMORIAL ON PRELIMINARY OBJECTIONS

Office of the Attorney General
Republic of Guatemala

_____
Jorge Luis Donado Vivar
Ana Luisa Gatica
Lilian Nájera

Ministry of Economy
Republic of Guatemala

_____
Acisclo Valladares Urruela

Holland & Knight LLP

_____
Adolfo E. Jiménez
Brian A. Briz
Katharine Menéndez de la Cuesta
Arantxa Cuadrado