

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**  
WASHINGTON, D.C.

In the arbitration proceeding between

**DANIEL W. KAPPES AND KAPPES, CASSIDAY & ASSOCIATES**  
**CLAIMANTS**

and

**REPUBLIC OF GUATEMALA**  
**RESPONDENT**

**ICSID Case No. ARB/18/43**

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**DECISION ON RESPONDENT'S PRELIMINARY OBJECTIONS**

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*Members of the Tribunal*

Ms. Jean Kalicki, President of the Tribunal

Mr. John M. Townsend, Arbitrator

Prof. Zachary Douglas QC, Arbitrator

*Secretary of the Tribunal*

Mr. Francisco Grob

**Date of the Decision:** 13 March 2020

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## FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
CALAS	Centro Internacional de Acción Legal y Social de Guatemala, a Guatemalan non-governmental organization
Claimants	Mr. Kappes and KCA together
Claimants' Preliminary Objections Counter-Memorial	Claimants' Counter-Memorial on Preliminary Objections dated 27 September 2019
Claimants' Preliminary Objections Rejoinder	Claimants' Rejoinder on Preliminary Objections dated 22 November 2019
DR-CAFTA or the "Treaty" or "CAFTA-DR"	Dominican Republic-Central America-United States Free Trade Agreement
EIA	Environmental Impact Assessment
Exh. [R-]	Exhibit [Respondent]
Exh. [C-]	Exhibit [Claimant]
Exmingua	A company incorporated under the laws of Guatemala
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 18, 1965
ICSID or the Centre	International Centre for the Settlement of Investment Disputes
The ILO Convention	The Convention concerning Indigenous and Tribal Peoples in Independent Countries
KCA	Kappes, Cassidy & Associates
Mr. Kappes	Mr. Daniel W. Kappes
La Puya	An environmental justice movement comprising community members from San José del Golfo and San Pedro Ayampuc, Guatemala

MEM	The Ministry of Energy and Mines of Guatemala
MFN	Most-Favored-Nation treatment
Minerales KC	Minerales KC Guatemala, Ltda, a company incorporated under the laws of Guatemala
NAFTA	North American Free Trade Agreement
Notice of Arbitration	Notice of Arbitration dated 9 November 2018
Notice of Intent	Notice of Intent dated 16 May 2018
PO1	Procedural Order No. 1 dated 10 September 2019
PO2	Procedural Order No. 2 dated 7 November 2019
PO3	Procedural Order No. 3 dated 27 November 2019
Progreso VII Project	A gold and silver mining project located in the municipalities of San José del Golfo and San Pedro Ayampuc
Respondent or Guatemala	Republic of Guatemala
Respondent's Preliminary Objections Memorial	Respondent's Preliminary Objections under Article 10.20.5 of CAFTA-DR dated 16 August 2019
Respondent's Preliminary Objections Reply	Respondent's Reply to Claimants' Counter-Memorial on Preliminary Objections Under Article 10.20.5 of CAFTA-DR dated 25 October 2019
Santa Margarita Project	A gold and silver mining project, located in the municipality of San Pedro Ayampuc
Tr-E, 16 December 2019 Hearing [page:line].	English Transcript of the Hearing on Preliminary Objections dated 16 December 2019
VCLT	Vienna Convention on the Law of Treaties dated 23 May 1969

## I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for the Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Dominican Republic-Central American-United States Free Trade Agreement (“**DR-CAFTA**” or the “**Treaty**”),<sup>1</sup> which entered into force for Guatemala on July 1, 2006, and for the United States on March 1, 2006, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 14 October 1966 (the “**ICSID Convention**”).
2. The Claimants are Mr. Daniel W. Kappes (“**Mr. Kappes**”) and Kappes, Cassidy & Associates (“**KCA**”), hereinafter referred to as “**Claimants**.” Mr. Kappes is a natural person having the nationality of United States of America. KCA is a company incorporated under the laws of the State of Nevada. Claimants state that Mr. Kappes owns 100% of the shares in KCA.
3. The Respondent is the Republic of Guatemala and is hereinafter referred to as “**Guatemala**” or the “**Respondent**.”
4. This decision addresses Guatemala’s preliminary objections under the expedited procedure of DR-CAFTA Article 10.20.5.

## II. PROCEDURAL HISTORY

5. On 16 May 2018, Claimants sent a “Notice of Intent to Submit a Claim to Arbitration” to Guatemala (the “**Notice of Intent**”).
6. On 9 November 2018, Claimants commenced this arbitration by delivering a “Notice of Arbitration” to Respondent and ICSID, which was received by ICSID on the same day (the “**Notice of Arbitration**”).

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<sup>1</sup> The DR-CAFTA is sometimes referred to, alternatively, as the CAFTA-DR.



7. On 11 December 2018, the Secretary-General of ICSID registered the case in accordance with Article 36(3) of the ICSID Convention.
8. Pursuant to DR-CAFTA Article 10.19, Claimants appointed Mr. John M. Townsend, a national of the United States, and Respondent appointed Prof. Zachary Douglas, a national of Australia, as arbitrators. Following a successful ballot procedure, the parties appointed Ms. Jean Kalicki, a national of the United States, to be the President of the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention.
9. On 2 July 2019, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“**Arbitration Rules**”) and the DR-CAFTA. Mr. Francisco Grob, ICSID Counsel, was designated to serve as Secretary of the Tribunal.
10. On 16 August 2019, the Republic of Guatemala submitted a Memorial on “Preliminary Objections under Article 10.20.5 of the CAFTA-DR” (the “**Respondent’s Preliminary Objections Memorial**,” and the objections presented therein, the “**Preliminary Objections**”).
11. On 26 August 2019, the Tribunal held a first session with the Parties by teleconference. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed *inter alia* that the applicable ICSID Arbitration Rules would be those in effect as of April 10, 2006, except to the extent modified and/or supplemented by the DR-CAFTA. The procedural languages would be English and Spanish and the place of proceedings would be Washington, D.C.
12. Following the First Session, the Tribunal issued Procedural Order No. 1 dated 10 September 2019, concerning various procedural matters (“**PO1**”). In Annex B to that Order, the Tribunal set a procedural timetable for the Parties’ pleadings, including in respect of the Preliminary Objections.

13. As scheduled, Claimants filed their “Counter-Memorial on Preliminary Objections” on 27 September 2019 (the “**Claimants’ Preliminary Objections Counter-Memorial**”), Respondent filed its “Reply to Claimants’ Counter-Memorial on Preliminary Objections under Article 10.20.5 of the CAFTA-DR” on 25 October 2019 (“**Respondent’s Preliminary Objections Reply**”), and Claimants filed their “Rejoinder on Preliminary Objections” on 22 November 2019 (the “**Claimants’ Preliminary Objections Rejoinder**”).
14. On 23 October 2019, La Puya, which describes itself as an environmental justice movement comprising community members from San José del Golfo and San Pedro Ayampuc, Guatemala (“**La Puya**”), submitted an “Amici Curiae Application for Leave to File Non-Disputing Party Submissions” in this proceeding. Pursuant to ICSID Arbitration Rule 37(2), DR-CAFTA Article 10.20.3 and Section 18.2 of PO1, the Tribunal invited the Parties to provide their observations on the application. As scheduled, each party filed its observations on October 31, 2019.
15. On 7 November 2019, the Tribunal issued Procedural Order No. 2 reserving its decision on La Puya’s application, on the ground that it was premature, until after its decision on Respondent’s Preliminary Objections (“**PO2**”).
16. On 20 November 2019, ICSID circulated to the Parties a draft Hearing Protocol prepared by the Tribunal. The Parties were invited to consider and discuss all open issues in the draft, as well as any other items they may have wished to add to the agenda. On 25 November 2019, the Parties submitted their comments indicating various items for the Tribunal’s resolution.
17. On 26 November 2019, the President of the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.
18. On 27 November 2019, the Tribunal issued Procedural Order No. 3 establishing a protocol for the hearing (“**PO3**”).

19. On 16 December 2019, the Tribunal held a public hearing on Respondent's Preliminary Objections at the World Bank Offices in Washington, D.C. Attending the hearing were:

Tribunal Members:

Ms. Jean Kalicki, President of the Tribunal  
Mr. John Townsend, Arbitrator  
Prof. Zachary Douglas, Arbitrator

ICSID Secretariat:

Mr. Francisco Grob, Secretary of the Tribunal  
Ms. Daniela Argüello, Legal Counsel

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Interpreters:

Daniel Giglio, Spanish-English Interpreter  
Silvia Colla, Spanish-English Interpreter  
Charles Roberts, Spanish-English Interpreter

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20. On 19 December 2019, the Tribunal inquired whether the Parties would have any objection if the Tribunal were to invoke DR-CAFTA Article 10.20.5, postponing the deadline for its

decision on the Preliminary Objections for 30 days until 13 March 2020. Both Parties confirmed that they had no objections.

21. The day after, 20 December 2019, the Parties also advised the Tribunal of their agreement not to file post-hearing briefs for this phase of the proceeding.
22. On 11 February 2020, the Secretariat advised the Parties that the Tribunal had invoked Article 10.20.5 of DR-CAFTA, as previously discussed with the Parties, with the effect of postponing the deadline for its ruling on the Preliminary Objections until 13 March 2020.
23. The Parties made their submissions on costs on 14 February 2020.

### III. FACTUAL BACKGROUND AS ALLEGED BY CLAIMANTS

24. The following summary is drawn from Claimants' pleadings to date, because DR-CAFTA Article 10.20.4(c) provides that, "[i]n 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." The Tribunal emphasizes that it has made no factual findings in these proceedings.
25. Claimants allege to have invested in two mining projects for the exploitation and exportation of gold and silver through Exploraciones Mineras de Guatemala S.A. ("**Exmingua**"), a company incorporated under the laws of Guatemala.<sup>2</sup>
26. Exmingua's direct shareholders are Mr. Kappes and Minerales KC Guatemala, Ltda. ("**Minerales KC**"), a Guatemalan company. Since 2012, Mr. Kappes directly owns 25% of Exmingua and Minerales KC owns the remaining 75%. The shares of Minerales KC in turn are owned by KCA, the second Claimant in this proceeding (which owns 90% of the

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<sup>2</sup> Notice of Arbitration ¶ 3.

Minerales KC shares, and thus indirectly owns 67.50% of Exmingua), and Mr. Kappes (who owns the remaining 10% of Minerales KC's shares).<sup>3</sup>

27. Claimants allege that as direct and indirect owners of Exmingua, they acquired all legal and beneficial rights, title, and interest in two neighboring mining projects located within the orogenic Regional Gold Belt (Cinturón Regional de Oro) called "Tambor" in Guatemala: (1) Progreso VII Derivada (the "**Progreso VII Project**"), a gold and silver mining project located in the municipalities of San José del Golfo and San Pedro Ayampuc; and (2) Santa Margarita (the "**Santa Margarita Project**"), also a gold and silver mining project, which is located in the municipality of San Pedro Ayampuc adjacent to the Progreso VII Project.<sup>4</sup>
28. According to Claimants, after conducting the required consultations with local communities and meeting all other legal requirements, Progreso Project VII was granted a 25-year exploitation license in 2011, which was followed later that year by a one-year renewable certificate of exportation for gold and silver.<sup>5</sup> Exmingua also held an exploration license for Santa Margarita, which it had acquired in 2005.<sup>6</sup>
29. In early 2012, the Progreso VII Project began construction and Claimants allege that one month later, members of the communities near the project, supported by non-governmental organizations, blockaded access to the mine. Claimants state that two months later Exmingua obtained police support to attempt to break the resistance at the mining site, but the protesters denied them passage and the police left. Exmingua further sought assistance from various local and national government authorities, with no success.
30. Claimants assert that the State failed to take meaningful or effective action to stop the ongoing, unlawful blockade of the Progreso VII Project and thus on 3 September 2012, Exmingua filed an *amparo* action (a form of request for constitutional protection) against

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<sup>3</sup> Notice of Arbitration ¶¶ 7-8, 35.

<sup>4</sup> Notice of Arbitration ¶ 36.

<sup>5</sup> Notice of Arbitration ¶ 40.

<sup>6</sup> Notice of Arbitration ¶ 46.

the General Director of the National Police.<sup>7</sup> The Second Judicial Court of Appeals granted the *amparo* to Exmingua.<sup>8</sup>

31. In their Preliminary Objections Counter-Memorial, Claimants indicate that, as a result of the *amparo*, in May 2014 Respondent's national police broke through the blockade and evicted the protesters from the site.<sup>9</sup> Exploitation activities at Progreso VII resumed and Exmingua made its first concentrate shipment.<sup>10</sup>
32. On 28 August 2014, the *Centro Internacional de Acción Legal y Social de Guatemala* ("CALAS"), a Guatemalan non-governmental organization, filed an *amparo* action against the Ministry of Energy and Mines of Guatemala ("MEM"), claiming that Exmingua's exploitation license had been wrongfully granted, due to the lack of consultations with local communities pursuant to the Convention concerning Indigenous and Tribal Peoples in Independent Countries (the "**ILO Convention**").
33. On 11 November 2015, the Guatemalan Supreme Court granted an *amparo provisional* against the MEM, suspending the exploitation license for the Progreso Project VII. Exmingua appealed this ruling to the Constitutional Court on 23 February 2016.<sup>11</sup>
34. Claimants contend in their Preliminary Objections Counter-Memorial that the Supreme Court's ruling provoked confusion and controversy, which gave rise to a new wave of protests in early 2016.<sup>12</sup> Claimants further allege that this "new wave of protests and blockades, and Respondent's associated failure to provide full protection and security" is what prevented Exmingua from carrying out the social consultations and completing the

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<sup>7</sup> Notice of Arbitration ¶ 43.

<sup>8</sup> Notice of Arbitration ¶ 44.

<sup>9</sup> Claimants' Preliminary Objections Counter-Memorial ¶ 118; *see also* Claimants' Preliminary Objections Rejoinder ¶¶ 139-140.

<sup>10</sup> Notice of Arbitration ¶ 45.

<sup>11</sup> Notice of Arbitration ¶ 54.

<sup>12</sup> Claimants' Preliminary Objections Counter-Memorial ¶ 121; *see also* Claimants' Preliminary Objections Rejoinder ¶ 139.

Environmental Impact Assessment (“EIA”) for the Santa Margarita Project, in furtherance of its application for an exploitation license.<sup>13</sup>

35. In March 2016, the MEM issued a resolution suspending Exmingua’s right to exploit gold and silver.<sup>14</sup> Two months later, the MEM issued another resolution suspending Exmingua’s certificate of exportation.<sup>15</sup>
36. In response, Exmingua filed on 22 April 2016, an *amparo* against the President of Guatemala, the MEM, and the General Directorate of the National Police. The *amparo* was denied.<sup>16</sup>
37. On 5 May 2016, the Guatemalan Constitutional Court confirmed the *amparo provisional* that the Supreme Court had granted against the MEM in November 2015 at CALAS’ request, and ruled that Exmingua’s exploitation license for the Progreso VII Project could regain effectiveness only after consultations with the local communities had been conducted and completed pursuant to the ILO Convention.<sup>17</sup> On the same date, the Guatemalan Attorney General filed a criminal action against four Exmingua workers, claiming that they were carrying concentrate and thus illegally exploiting natural resources in contravention of Guatemalan Court Rulings, and the concentrate they were carrying was impounded. The workers eventually were acquitted, but the concentrate shipment remains impounded.<sup>18</sup>
38. On 28 June 2016, the Guatemalan Supreme Court granted an *amparo definitivo* against the Progreso VII Project, which had been sought by CALAS. As a result, Exmingua’s exploitation license was definitively suspended until consultations with local communities

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<sup>13</sup> Claimants’ Preliminary Objections Counter-Memorial ¶ 122.

<sup>14</sup> Notice of Arbitration ¶ 55.

<sup>15</sup> Notice of Arbitration ¶ 55.

<sup>16</sup> Notice of Arbitration ¶ 56.

<sup>17</sup> Notice of Arbitration ¶ 57.

<sup>18</sup> Notice of Arbitration ¶ 58.

were conducted. On June 30, 2016, Exmingua appealed the Supreme Court's 2016 *amparo* decision to the Constitutional Court. Claimants allege that this appeal remains pending.<sup>19</sup>

39. On 21 December 2016, the MEM directed Exmingua to file the EIA for the Santa Margarita Project, duly approved by the Ministry of Environment and Natural Resources ("MARN"), within 30 days. Claimants state that due to the "continuous and systemic protests and blockades at the site since 2012," Exmingua's consultants could not gain access to the site to complete the local consultations required for the EIA.<sup>20</sup> Therefore, Exmingua asked the MEM to suspend the EIA requirement for the social study, including the approval by the MARN, until it was possible to complete the consultations.
40. Claimants explain in their Preliminary Objections Counter-Memorial that on 5 April 2017, the MEM issued Resolution No. 1191, denying Exmingua's request to suspend the EIA requirement to conduct local consultations, and directed Exmingua to file the EIA for its Santa Margarita Project within 30 days.<sup>21</sup> In response, Exmingua submitted the EIA for Santa Margarita that had been prepared several years earlier, before work was stopped to focus on the Progreso VII site, without the section on the social studies. According to Claimants, Exmingua did not receive any response from the MARN.
41. In May 2017, the Guatemalan Constitutional Court ruled on an appeal lodged by Oxec, a local company indirectly controlled by Guatemalan nationals, whose license the Supreme Court had found to have been wrongfully granted on the same legal basis as Exmingua's (the "*Oxec* case"). Claimants allege that, unlike in the case of Exmingua, the Constitutional Court decided the appeal in the *Oxec* case in a mere three months, and permitted Oxec to continue operating while the State conducted consultations. Such consultations were completed within only a few months.<sup>22</sup>

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<sup>19</sup> Notice of Arbitration ¶ 59.

<sup>20</sup> Notice of Arbitration ¶¶ 48, 49.

<sup>21</sup> Claimants' Preliminary Objections Counter-Memorial ¶¶ 123-125.

<sup>22</sup> Notice of Arbitration ¶¶ 61-62.



42. On 8 June 2017, Exmingua applied to revoke the Constitutional Court’s ruling dated 5 May 2016, by reference to the Court’s ruling in the *Oxec* case. This request, however, was rejected by the Constitutional Court on 5 October 2017.<sup>23</sup>
43. In another case (the “*Escobal case*”), Claimants allege that the Constitutional Court decided an *amparo* filed by a Guatemalan national in less than a year, albeit by rejecting the *amparo* on its substance. The *Escobal* case concerns a large silver mine operated and developed by Minera San Rafael, S.A., the Guatemalan subsidiary of Tahoe Resources, a Canadian mining company. This project was suspended on 5 July 2017, after the Guatemalan Supreme Court granted an *amparo provisional* sought by CALAS. The Guatemalan Supreme Court reinstated Escobal’s mining license in September 2017, but only one month later, the project was again suspended on appeal. On 3 September 2018, the Constitutional Court ruled that the Escobal mining license would remain suspended until the MEM completed public consultations in accordance with the ILO Convention.<sup>24</sup>
44. Claimants state that, by contrast, the Progreso VII Project has been suspended for over two years while an appeal to the Constitutional Court has been pending and the MEM has taken no action to commence consultations.
45. As a result of these actions, Claimants allege in this proceeding that Guatemala has breached Article 10.3 (National Treatment), Article 10.4 (Most Favored Nation Treatment), Article 10.5 (Minimum Standard of Treatment), and Article 10.7 (Expropriation and Compensation) of the DR-CAFTA. Compensation is sought for: (i) damages of no less than USD 175 million in connection with the Progreso VII Project; (ii) damages of no less than USD 175 million in connection with the Santa Margarita Project; (iii) damages of no less than USD 500,000 for the concentrate shipments impounded by the State.

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<sup>23</sup> Notice of Arbitration ¶ 60.

<sup>24</sup> Notice of Arbitration ¶ 63.

#### IV. EXPEDITED PROCEDURE UNDER ARTICLE 10.20.5 OF DR-CAFTA

##### a. Respondent's Position

46. Respondent submits that under Article 10.20.5 of DR-CAFTA, a tribunal may be asked to “decide on an expedited basis” two types of preliminary objections, namely: (i) “as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made,” as provided in Article 10.20.4 of DR-CAFTA; and (ii) “the dispute is not within the tribunal’s competence,” as provided for in Article 10.20.5 of DR-CAFTA.
47. According to Respondent, the key difference between these two types of objections is that, while those filed under Article 10.20.4 of DR-CAFTA require that the tribunal “assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration,” this requirement does not apply to objections to the tribunal’s jurisdiction or the admissibility of claims under Article 10.20.5 of DR-CAFTA. Moreover, even under 10.20.4 of DR-CAFTA, “[t]he tribunal may also consider any relevant facts not in dispute.”<sup>25</sup>
48. In response to Claimants’ reliance on the *Pac Rim* preliminary objections decision,<sup>26</sup> Respondent states that in this case its Article 10.20.5 objections do not present any complex questions of fact or mixed questions of law and fact which might counsel against resolving such objections in an expedited procedure. In any event, Respondent says, even if such complex questions existed, DR-CAFTA does not limit preliminary objections to “simple” issues of law.<sup>27</sup>
49. In addition, Respondent states that for purposes of its Preliminary Objections, it has assumed to be true all facts in the Notice of Arbitration. In Respondent’s view, it is Claimants who have alleged new facts during the briefing of the Preliminary Objections, in

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<sup>25</sup> Respondent’s Preliminary Objections Memorial ¶ 34.

<sup>26</sup> *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award, 14 October 2016 (hereinafter “*Pac Rim*”).

<sup>27</sup> Respondent’s Preliminary Objections Reply ¶ 18.

an attempt to amend the allegations and claims in their earlier Notice of Arbitration to try to address the legal deficiencies contained therein. Respondent contends that in deciding the Preliminary Objections, the Tribunal may analyze only 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.<sup>28</sup>

**b. Claimants' Position**

50. Claimants assert not only that each of the three objections lacks merit, but also that 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.<sup>29</sup> Claimants also complain that Respondent repeatedly mischaracterizes Claimants' claims.<sup>30</sup>
51. Claimants also refer to the *Pac Rim* decision, where the tribunal noted that the expedited procedural timetable renders an 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."<sup>31</sup> They recall that this procedure is "not intended to be a 'mini-trial', even without evidence."<sup>32</sup>
52. Nevertheless, Claimants point out that the Tribunal is empowered to consider facts beyond those set forth in Claimants' Notice of Arbitration in connection with Respondent's jurisdictional objections under Article 10.20.5. The limitation included in Article 10.20.4(c) does not apply to objections as to jurisdiction.<sup>33</sup>

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<sup>28</sup> Respondent's Preliminary Objections Memorial ¶ 20.

<sup>29</sup> Claimants' Preliminary Objections Counter-Memorial ¶¶ 3-5.

<sup>30</sup> Claimants' Preliminary Objections Counter-Memorial ¶ 2.

<sup>31</sup> Claimants' Preliminary Objections Counter-Memorial ¶ 5 (quoting *Pac Rim*, ¶ 112).

<sup>32</sup> *Id.* ¶ 107.

<sup>33</sup> Respondent's Preliminary Objections Reply ¶ 144.

## V. PRELIMINARY OBJECTIONS

53. Respondent argues that Claimants submitted their claims to arbitration without complying with several threshold requirements of the DR-CAFTA, as a result of which their claims must be dismissed on an expedited basis.<sup>34</sup>
54. Specifically, Respondent submits that the claims should be dismissed because: **(1)** Claimants are attempting to recover for themselves losses sustained directly by Exmingua, in violation of DR-CAFTA's procedural requirements; **(2)** Claimants are attempting to bring a Most-Favored-Nation Treatment ("MFN") claim without complying with the notice requirements under the Treaty; and **(3)** Claimants' claim for lack of full protection and security is time-barred under the DR-CAFTA and is not within the Tribunal's jurisdiction.
55. The following chart provided by Respondent identifies its objections and the corresponding Treaty provisions. The Tribunal addresses each of these below.<sup>35</sup>

Section of Memorial	Affected Claims	Grounds for Dismissal	CAFTA-DR
V.	All Claims	As a matter of law, no award in favor of Claimants can be made.	10.20.4 and 10.16.1
		The Claims are inadmissible. Claimants do not have standing to seek to recover Exmingua's losses.	10.20.5 and 10.16.1
		The Tribunal does not have jurisdiction to determine the Claims for Exmingua's losses because Exmingua's waiver was not submitted with Claimants' Notice of Arbitration.	10.20.5 and 10.18.2
VI.	Most Favored Nation	The claim is inadmissible because it was not included in the Notice of Intent.	10.20.5 and 10.16.2
VII.	Lack of Full Protection and Security	The Tribunal has no jurisdiction to decide the claim because it is time barred.	10.20.5 and 10.18.1

<sup>34</sup> Respondent's Preliminary Objections Memorial ¶ 25. Respondent emphasizes that its presentation of the Preliminary Objections is without prejudice to its right, which it expressly reserves, to raise further objections in any future phases of this Arbitration. *Id.*

<sup>35</sup> Respondent's Preliminary Objections Memorial ¶ 12.

**(1) AVAILABILITY OF ARTICLE 10.16.1 FOR “INDIRECT LOSS” CLAIMS**

**a. Respondent’s Position**

56. Respondent states that Claimants are seeking to recover Exmingua’s losses, yet Claimants have brought these claims on their *own* behalf under Article 10.16.1(a) of DR-CAFTA. In Respondent’s view, that provision allows investors to recover only for their own losses, and not for the losses of a local enterprise in which they invested. Nor, Respondent says, does Article 10.16.1(a) permit “reflective loss claims,” *i.e.*, claims for a decrease in the value of a shareholding caused by injury to the company in which the shares are held. Rather, DR-CAFTA provides a unique mechanism to bring derivative claims under Article 10.16.1(b). Respondent argues that Claimants have failed to comply with the applicable procedure and requirements under either Article 10.16.1(a) or Article 10.16.1(b).<sup>36</sup>
57. Consequently, Respondent asks the Tribunal to dismiss Claimants’ claims based on: (i) Article 10.20.4 of CAFTA-DR, because as a matter of law these are not claims for which an award in favor of Claimants can be made under Article 10.26 of CAFTA-DR; (ii) Articles 10.20.5 and 10.16.1(a) of CAFTA-DR, because the claims are “inadmissible” as Claimants lack standing to seek to recover the losses or damages suffered by their local enterprise;<sup>37</sup> and (iii) Articles 10.20.5 and 10.18.2 of CAFTA-DR, because Claimants’ claims are not within the Tribunal’s jurisdiction as Claimants did not submit a waiver of Exmingua’s right to initiate or continue local litigation.<sup>38</sup>

**A. Loss claimed by Claimants in this arbitration**

58. Respondent states that Claimants seek improperly through this arbitration to recover losses suffered by Exmingua.

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<sup>36</sup> See generally Respondent’s Preliminary Objections Memorial ¶¶ 36-105 and Respondent’s Preliminary Objections Reply ¶¶ 21-120.

<sup>37</sup> See also Tr-E, 16 December 2019 Hearing, pp. 32:6-35:2 (Respondent’s explanations).

<sup>38</sup> In response to a question during the hearing whether Respondent would object (or timeliness grounds or otherwise) if Claimants were to withdraw their current claims and resubmit similar claims on Exmingua’s behalf under Article 10.16.1(b), Respondent stated that it would not be prepared to waive such potential objections. Tr-E, 16 December, 2019 Hearing, p. 170:15-17.

59. According to Respondent, nowhere in the Notice of Intent or the Notice of Arbitration do Claimants allege or seek to recover for any purported loss in the value of their interest in Exmingua, their shares, or any other type of reflective losses. Similarly, 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. Respondent submits that tribunals have rightly dismissed cases in which, as here, a claimant confuses damages over its property and damages over the property of the company where the claimant owns shares, citing *Orascom TMT Investments Sàrl v. People's Democratic Republic of Algeria*.<sup>39</sup>
60. Respondent contends that Claimants are attempting, in response to Guatemala's Preliminary Objections, to recharacterize the damages they claimed as reflective losses, but that this belated amendment of their claims cannot be allowed. This would violate Respondent's due process rights, the integrity of the proceedings and the DR-CAFTA structure. It would also defeat the policies adopted in DR-CAFTA for early disclosure of claims, the efficient resolution of disputes and the ability to address preliminary objections.
61. Furthermore, Respondent contends that discounting debt to calculate reflective loss still would not permit one to equate a shareholder's recovery for reflective loss with the losses suffered by its local enterprise. None of the sources upon which Claimants seek to rely support this proposition. In the passage Claimants quote from Professor Kantor's book *Valuation for Arbitration*, he simply acknowledges that to calculate reflective loss, the debt of the enterprise should be discounted.<sup>40</sup> The same can be said about the *Hochtief* and *Nykomb* decisions. In any event, Respondent agrees this is not the stage to quantify or prove Claimants' damages.<sup>41</sup>

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<sup>39</sup> Respondent's Preliminary Objections Memorial ¶ 23.

<sup>40</sup> Respondent's Preliminary Objections Reply ¶ 25 (citing M. Kantor, *Valuation for Arbitration* 197 (Wolters Kluwer 2008)).

<sup>41</sup> Respondent's Preliminary Objections Reply ¶¶ 25-26 (citing *Hochtief AG v. Republic of Argentina*, ICSID Case No. ARB/07/31, Award, 21 December 2016, ¶ 84, CL-0067-ENG/SPA; and *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, SCC Case, Award, 16 December 2003 (hereinafter "*Nykomb*"), p. 39, CL-0073-ENG).

B. *Article 10.16.1(a)'s and Article 10.16.1(b)'s scope of protection*

62. Respondent submits that, even if Claimants were allowed to recast their damages claims at this stage, Claimants' claims still would fail because they cannot recover for reflective loss under Article 10.16.1(a) of DR-CAFTA.
63. According to Respondent, a shareholder proceeding under Article 10.16.1(a) may recover only for its direct injury. This provision requires a shareholder to show that such "claimant has incurred loss."<sup>42</sup> As noted by the ICJ in the *Barcelona Traction* case and reiterated in the *Diallo* case, such direct injury results from violations to their rights as shareholders, which typically include "the right to any declared dividend, the right to attend and vote at general meetings, [and] the right to share in the residual assets of the company on liquidation."<sup>43</sup>
64. Respondent argues that the key difference between Article 10.16.1(a) and Article 10.16.1(b) is the type of loss or damage available to a claimant under the section of the article invoked. While section (a) of Article 10.16.1 allows a claimant to recover the direct injury it sustained, section (b) is the avenue required if a claimant seeks to recover, on behalf of a local enterprise, the damage that enterprise sustained. Article 10.16.1 determines the relief available under each subsection. If a claimant's injury is only indirect (*i.e.*, its shares lost value as a result of injury to the local company), that claimant must bring a claim under Article 10.16.1(b) on behalf of the enterprise which sustained the injury. The distinction is ultimately based on the right that allegedly has been infringed.<sup>44</sup>
65. Respondent explains that Article 10.16.1 uses the word "may" rather than "shall" because the investor has no *obligation* to file for arbitration (simply a right to do at its option) when

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<sup>42</sup> Respondent's Preliminary Objections Memorial ¶ 42.

<sup>43</sup> Respondent's Preliminary Objections Memorial ¶ 42 (citing the *Case Concerning Barcelona Traction, Light, and Power Co., Ltd (Belgium v. Spain)*, Judgment, 5 February 1970, 1970 I.C.J. Rep. 3 (hereinafter "*Barcelona Traction*"), ¶ 47, RL-0006-027) and Respondent's Preliminary Objections Reply ¶ 36 (citing *Barcelona Traction* and *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment (Preliminary Objections), 24 May 2007, 2007 I.C.J. Rep. 582 ¶ 88 (CL-0060- ENG) (hereinafter "*Diallo*").

<sup>44</sup> Respondent's Preliminary Objections Memorial ¶ 46; *see also* Tr-E, 16 December 2019 Hearing, p. 166:4-16.

it considers that it has suffered damages as a result of a Treaty breach. But if damages have been sustained by a local enterprise rather than directly by the investor itself, the only avenue to arbitration is under Article 10.16.1(b).<sup>45</sup>

66. According to Respondent, the analogy Claimants seek to draw between DR-CAFTA Article 10.16.1 and ICSID Convention Article 25(2)(b) is misconceived. Article 25(2)(b) provides the Centre with jurisdiction to resolve a dispute presented by a claimant that is a local company, on the basis of the nationality of that company's controlling shareholder, but it does not necessarily address reflective loss claims (*i.e.*, how the controlling shareholder may proceed with respect to losses suffered by the company in which it holds shares). DR-CAFTA, by contrast, does regulate when and how a controlling shareholder may bring suit for losses sustained by a local enterprise, but it does so subject to very specific requirements.<sup>46</sup>
67. Respondent asserts that this distinction is not a mere formality. It contends that DR-CAFTA uses this distinction to avoid the negative consequences of reflective loss, such as the potential risks of double recovery and multiple proceedings, and to respect the separate legal personality of a company from that of its shareholders.<sup>47</sup> That is why most advanced corporate law systems, including that of Guatemala, bar claims for reflective loss. Investment law organizations, contracting States, scholars and tribunals in cases such as *GAMI*, *Nykomb*, *Orascom* and *El Paso* have also identified the numerous undesirable consequences resulting from reflective loss claims.<sup>48</sup>

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<sup>45</sup> Tr-E, 16 December 2019 Hearing, pp. 167:21-168:12.

<sup>46</sup> Tr-E, 16 December 2019 Hearing, pp. 168:13-170:8.

<sup>47</sup> Respondent's Preliminary Objections Reply ¶¶ 35; *see also* Respondent's Preliminary Objections Memorial ¶¶ 38, 56.

<sup>48</sup> Respondent's Preliminary Objections Reply ¶¶ 36-49 (citing *Gami Investments, Inc. v. The Government of the United Mexican States*, Final Award, 15 November 2004 (hereinafter "*GAMI*"), ¶¶ 116-121, CL-0036-ENG/SPA; *Nykomb*, p. 9, CL-0073-ENG; *Orascom TMT Investments Sàrl v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017 (hereinafter "*Orascom*"), ¶ 388, RL-0054-101-ENG; *El Paso Energy International Company v. Republic of Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (hereinafter "*El Paso*"), ¶ 204 CL-0047-ENG/SPA).



C. *Reflective loss claims under older Treaties including NAFTA*

68. Respondent argues that these concerns have been overlooked by some investor-State arbitration tribunals because, under the structure of most treaties (including the Argentine investment treaties Claimants cite), reflective loss claims were considered to be the only available remedy for certain shareholders to recover for injuries sustained by their local companies.<sup>49</sup> Even so, it contends, some tribunals have rejected reflective loss claims, given the troubling consequences associated with this type of redress.<sup>50</sup> Respondent emphasizes that it is not arguing that Claimants' direct or indirect shareholding in Exmingua does not constitute an "investment" under DR-CAFTA, and therefore Claimants' argument and cases on the definition of "investment" are beside the point.<sup>51</sup>
69. Respondent stresses the fact that DR-CAFTA, unlike older treaties, is a modern instrument that has put in place a mechanism in Article 10.16.1 specifically designed to address this issue. This mechanism, which scholars have labeled as unique,<sup>52</sup> was first devised by the U.S. and introduced in NAFTA in the form of Articles 1116 and 1117, and later enhanced in the context of DR-CAFTA. The Tribunal must, accordingly, decide this case based on the specific regime of DR-CAFTA (*lex specialis*), and not rely on the cases Claimants invoke which concern the interpretation of older treaties.
70. Importantly, the NAFTA Contracting Parties agree that Article 1116, which Respondent asserts is substantially the same as Article 10.16.1(a) of DR-CAFTA, does not allow a shareholder to recover reflective loss. That is the position that the United States has

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<sup>49</sup> Respondent's Preliminary Objections Reply ¶¶ 50-59. For instance, Respondent characterizes a Rule 41(5) ruling in *Eskosol* as holding that reflective loss claims were admissible, but doing so only after acknowledging that the ECT offers no avenue to address the policy concerns raised by reflective loss claims. Respondent's Preliminary Objections Reply ¶ 53 (citing *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 (hereinafter "*Eskosol*"), ¶ 170, CL-0058-ENG).

<sup>50</sup> Respondent's Preliminary Objections Reply ¶ 54.

<sup>51</sup> Respondent's Preliminary Objections Reply ¶ 57.

<sup>52</sup> Respondent's Preliminary Objections Reply ¶¶ 61-64.

consistently taken in *Pope & Talbot*, *GAMI*, and *Clayton*.<sup>53</sup> In the *Clayton* case, for instance, the United States stated in unambiguous terms that the only route for shareholder claims is that of Article 1116 and that “[m]inority shareholders who do not own or control the enterprise may not bring a claim for loss or damage under Article 1117, thereby reducing the risk of multiple actions with respect to the same 4 disputed measures.”<sup>54</sup> Respondent contends that Canada’s and Mexico’s positions are the same.<sup>55</sup>

71. Moreover, Respondent stresses that no NAFTA tribunal that has considered the distinction between Articles 1116 and 1117 has ever awarded damages for reflective loss under Article 1116. Neither *Mondev*, *Pope & Talbot*, *GAMI* nor *Clayton* awarded damages for reflective loss.<sup>56</sup> The limited damages the *Clayton* tribunal awarded were not meant to compensate reflective losses; that tribunal discussed this issue explicitly and concluded that the damages it would award were not reflective in nature.<sup>57</sup> Nor did the *UPS* tribunal award damages for reflective loss.<sup>58</sup>

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<sup>53</sup> Respondent’s Preliminary Objections Reply ¶¶ 66-68 (citing *Pope & Talbot Inc. v. Government of Canada*, Seventh Submission from the United States of America, 6 November 2001, ¶¶ 3-5 (hereinafter, “*Pope & Talbot, Submission of the US*”) RL-0071-002-ENG; *GAMI*, Submission of the United States of America, 30 June 2003, ¶ 14 (hereinafter, “*GAMI, Submission of the US*”) RL-0072-005-ENG; *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, (hereinafter, “*Clayton, Submission of the US*”), RL-0008-ENG-005 ).

<sup>54</sup> Tr-E, 16 December 2019 Hearing, pp. 153:7-154:9 (quoting *Clayton*, Submission of the US, ¶ 11, RL-0008-ENG. The full paragraph of the US submission reads: “Article 1117(1) addresses this issue by creating a right to present a claim not found in customary international law. Where the investment is an enterprise of another Party, an investor of a Party that owns or controls the enterprise may submit a claim on behalf of the enterprise for loss or damage incurred by the enterprise. However, minority shareholders who do not own or control the enterprise may not bring a claim for loss or damage under Article 1117, thereby reducing the risk of multiple actions with respect to the same disputed measures.”

<sup>55</sup> Respondent’s Preliminary Objections Reply ¶ 69; see also Tr-E, 16 December 2019 Hearing, pp. 154:9-155:6.

<sup>56</sup> Respondent’s Preliminary Objections Reply ¶¶ 74-77, and 80 (citing *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (hereinafter “*Mondev*”), ¶ 86, RL-0018-030-ENG; *Pope & Talbot*, Award in Respect of Damages, 31 May 2002, (hereinafter “*Pope & Talbot, Award*”) ¶ 85, CL-0028-ENG; *GAMI* ¶ 119, CL-0036-ENG/SPA; *Clayton*, Final Award on Damages, 10 January 2019, ¶ 396, (hereinafter “*Clayton, Award on Damages*”) CL-0070-ENG.).

<sup>57</sup> Tr-E, 16 December 2019 Hearing, pp. 163:6-164:3.

<sup>58</sup> Respondent’s Preliminary Objections Reply ¶ 78 (citing *United Parcel Service of America Inc. v. Canada*, Case No. UNCT/02/1, Award on the Merits, 24 May 2007 (hereinafter “*UPS*”), ¶ 35, CL-0037-ENG).

D. *Guatemala's position in previous cases*

72. Respondent says that Guatemala's position in previous cases such as *TECO* and *RDC* is fully consistent with its position here that injury to an enterprise should be sought under Article 10.16.1(b) when available.<sup>59</sup>
73. First, Guatemala's decision not to object in *TECO* to the use of Article 10.16.1(a) cannot be used against Guatemala here. The reasons in any case for raising some objections but not others may be for efficiency, an intentional allocation of resources, or to focus on other arguments. Second, *TECO* already had agreed to sell its interest in the local company, EEGSA, at the time the arbitration was initiated, and the sale of EEGSA closed the day after the arbitration was brought. Further, *TECO* did not control EEGSA because it was a minority shareholder, and as such "could not have brought a claim under Article 10.16(1)(b) of the DR-CAFTA."<sup>60</sup> Nor was there any parallel ongoing litigation in the local courts, unlike the situation here.<sup>61</sup>
74. The Respondent asserts that *RDC*, the other case Claimants cite, is also significantly different from the present case. First, *RDC* brought claims both on its own behalf and on behalf of its local enterprise, FVG. Second, *RDC* filed waivers signed by both itself and FVG. 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 payable directly to itself, and Guatemala objected to *RDC*'s request because this would violate Article 10.26.2 of DR-CAFTA, which requires monetary compensation for claims on behalf of a local enterprise to be paid to the enterprise itself. Fifth, and most important, in *RDC* the tribunal awarded

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<sup>59</sup> Respondent's Preliminary Objections Reply ¶ 85 (citing *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013 (hereinafter "*TECO*") ¶438, CL-0031-ENG/SPA; *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012 (hereinafter "*RDC*") ¶ 1, CL-0068-ENG.).

<sup>60</sup> Respondent's Preliminary Objections Reply ¶¶ 86-88; Respondent's Rebuttal Argument Presentation, 16 December 2019 Hearing, p. 4.

<sup>61</sup> Tr-E, 16 December 2019 Hearing, p. 158:9-14.

damages to the claimant rather than the enterprise only on the proviso that all the claimant's shares in the local enterprise were transferred to Guatemala.<sup>62</sup>

E. *Consequences of allowing reflective loss claims under Article 10.16.1(a)*

75. Respondent submits that if claims for reflective loss were allowed under Article 10.16.1(a), the requirements imposed on bringing derivative claims under Article 10.16.1(b) would be easily circumvented and would become essentially meaningless.
76. According to Respondent, any such result would contravene the interpretative principles of Article 31.1 of the Vienna Convention on the Law of Treaties (“VCLT”).<sup>63</sup> The object and purpose of the derivative claims mechanism under DR-CAFTA Article 10.16.1(b) is to avoid the problems associated with reflective loss claims. Therefore, the Treaty provides for strict requirements in order to bring a claim on behalf of a local company and to seek to recover that company's direct loss. These requirements are that (i) any requested monetary compensation is to be paid to the enterprise (Article 10.26 of DR-CAFTA); (ii) any right to initiate or continue any local litigation in the host State with respect to any measure alleged to constitute a breach in the arbitration must be waived (Article 10.18.2 of DR-CAFTA); and (iii) any claims for breach of protections already litigated in the host State are foreclosed (Annex 10-E of DR-CAFTA).<sup>64</sup> Here, Claimants have complied with none of these requirements.
77. *First*, Claimants request compensation be paid to themselves directly under Article 10.16.1(a) of DR-CAFTA, even though (Respondent asserts) they are measuring compensation by reference to Exmingua's losses. If this is condoned, it could prevent any creditors of Exmingua from enforcing any rights they may have over the assets of the enterprise, including an arbitral award. As explained by the *Renco* tribunal on the basis of an almost identical provision, such interpretation would render this mechanism

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<sup>62</sup> Respondent's Preliminary Objections Reply ¶ 89; *see also* Tr-E, 16 December 2019 Hearing, p. 164:8-165:19.

<sup>63</sup> Respondent's Preliminary Objections Reply ¶¶ 90 *et seq.*

<sup>64</sup> Respondent's Preliminary Objections Reply ¶ 93.

“ineffective, contrary to the customary international law principle of effectiveness.”<sup>65</sup> Claimants effectively would have circumvented the safeguard built into Article 10.26.2 of DR-CAFTA to protect creditors of a local enterprise.<sup>66</sup>

78. *Second*, Claimants also have failed to submit the waiver required by DR-CAFTA Article 10.18.2(b)(ii).<sup>67</sup> This provision requires a shareholder who seeks to recover its enterprise’s losses to: (i) submit an enterprise’s written waiver of “any” right to initiate or continue “any” local proceeding, monetary or not, with respect to “any” measure alleged to constitute a breach in the Arbitration; and (ii) withdraw from any corresponding local proceedings.<sup>68</sup> The purpose of this provision, which is an element of Respondent’s consent, is to avoid double recovery, multiplicity of proceedings, contradictory findings from different tribunals and legal uncertainty.<sup>69</sup> This is a jurisdictional requirement and cannot be remedied by allowing Claimants to expand or amend the waiver on file.<sup>70</sup>
79. In this case, the key measure that is alleged to amount to a Treaty breach, namely the suspension of Exmingua’s exploitation license for the Progreso VII Project in 2015, is the object of local, ongoing, proceedings. If Claimants succeed in this arbitration, they will obtain compensation for Exmingua’s inability to exploit its mine over the past several years, while Exmingua still might have its exploitation license reinstated by the Constitutional Court of Guatemala, continuing to be effective for another 25 years. That is exactly the type of situation that the waiver requirement seeks to prevent.
80. *Lastly*, had Claimants initiated this Arbitration on behalf of Exmingua under Article 10.16.1(b) of DR-CAFTA, they would be precluded from bringing their full protection and

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<sup>65</sup> Respondent’s Preliminary Objections Memorial ¶ 61 (quoting *The Renco Group, Inc. v. Republic of Peru*, Case No. UNCT/13/1, Second Submission of the United States of America, 1 September 2015, (hereinafter “*Renco, Second Submission by the US*”) fn. 14, RL-0005-005).

<sup>66</sup> Respondent’s Preliminary Objections Reply ¶¶ 97-104.

<sup>67</sup> Respondent’s Preliminary Objections Reply ¶¶ 105-109.

<sup>68</sup> Respondent’s Preliminary Objections Memorial ¶¶ 64-67.

<sup>69</sup> Respondent’s Preliminary Objections Memorial ¶ 65.

<sup>70</sup> Tr-E, 16 December 2019 Hearing, pp. 170:18-171:5.

security claim again in this Arbitration under Annex 10-E of DR-CAFTA.<sup>71</sup> Under Annex 10-E of DR-CAFTA, a U.S. investor cannot submit to arbitration a claim for breach of an obligation under the Treaty on behalf of an enterprise if the enterprise “has alleged that breach of an obligation” in proceedings before a local court. 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 DR-CAFTA.

**b. Claimants’ Position**

81. Claimants assert that their claims were properly submitted to arbitration under DR-CAFTA Article 10.16.1(a). They invoke the ordinary meaning and the object and purpose of Article 10.16.1(a). They assert that they have submitted claims for losses suffered by *themselves* as a result of Guatemala’s actions and have therefore complied with the waiver requirement. They also claim that the DR-CAFTA Annex 10-E is inapplicable to their claims.<sup>72</sup>

*A. Article 10.16.1(a)’s ordinary meaning and context*

82. According to Claimants, Article 10.16.1(a)’s ordinary meaning, in context, allows Claimants to make claims on their own behalf for the loss in value of their direct and indirect interest in Exmingua, suffered as a result of measures taken by Respondent against Exmingua.
83. *First*, Claimants point out that the text of DR-CAFTA Articles 10.16.1(a) and (b) do not contain any limiting or restrictive language. To the contrary, the ordinary meaning of the words confirms that a claimant “may” submit a claim to arbitration under Article 10.16.1(a) when the claimant has incurred loss or damage arising out of that breach. This language is clearly “permissive, not mandatory,” as the tribunal in *Pope & Talbot* found with respect to the corresponding language in NAFTA Articles 1116 and 1117.<sup>73</sup> Had the

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<sup>71</sup> Respondent’s Preliminary Objections Reply ¶¶ 110-117.

<sup>72</sup> See, generally, Claimants’ Preliminary Objections Counter-Memorial ¶¶ 10-81 and Claimants’ Preliminary Objections Rejoinder ¶¶ 9-90.

<sup>73</sup> Claimants’ Preliminary Objections Counter-Memorial ¶ 21 (quoting *Pope & Talbot, Award*, ¶ 79).

DR-CAFTA Parties wanted to require claimants who owned or controlled an enterprise to bring claims only on behalf of that enterprise, they easily could have (and should have) done so, particularly in view of the then already existing long line of cases interpreting similar provisions as allowing reflective loss claims.<sup>74</sup>

84. In accordance with Article 31(1) of the VCLT, 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.”<sup>75</sup> Accordingly, tribunals have rejected attempts to read limiting or qualifying terms into the language of otherwise broad treaty provisions. For example, the tribunals in cases such as *Siemens* and *Waste Management II* both refused to restrict coverage of investment treaties to “direct” investments, and to dismiss indirect investment claims, where the definition of “investment” contained no such qualifying language.<sup>76</sup> Furthermore, the words “by reason of, or arising out of that breach” immediately following the phrase “loss or damage” further support its broad meaning. Respondent, Claimants say, offers no response.
85. Claimants further submit that the inclusion of “shares” in the definition of “investment” does no more than confirm that Claimants’ claim is admissible. To the extent that a qualifying claimant holds shares in a protected enterprise, that claimant will have made an investment within the meaning of the Treaty and will be entitled to bring a claim for damage that it has suffered as a result of a breach of the Treaty. As the annulment committee in *Azurix* reasoned, whether such damage is indirect or direct is irrelevant.<sup>77</sup>

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<sup>74</sup> Claimants’ Preliminary Objections Rejoinder ¶ 78; *see also* Tr-E, 16 December 2019 Hearing, pp. 92:22-93:10.

<sup>75</sup> Claimants’ Preliminary Objections Counter-Memorial ¶ 16 (quoting J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* 47-48 (OUP 2012), CL-0007-ENG).

<sup>76</sup> Claimants’ Preliminary Objections Counter-Memorial ¶¶ 17-18 (referring to *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 137, CL-0018-ENG/SPA; *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB/AF/00/03, Award, 30 April 2004, ¶ 85, CL-0022-ENG/SPA).

<sup>77</sup> Claimants’ Preliminary Objections Counter-Memorial ¶ 40 (referring to *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009 (hereinafter “*Azurix, Annulment Decision*”) ¶¶ 105, 108, CL-0051-ENG/SPA) and Claimants’ Preliminary Objections Rejoinder ¶ 14.

86. *Second*, Claimants assert that Respondent’s own prior state practice shows that claims for reflective loss are admissible under the DR-CAFTA. In *TECO*, TECO brought a claim for so-called reflective loss under Article 10.16.1(a) and Guatemala did not raise any objection in this regard.<sup>78</sup> In Claimants’ view, the fact that TECO was a minority shareholder and could not have submitted a claim pursuant to Article 10.16.1(b) does not make any difference. Allowing a minority shareholder to file a claim for reflective loss under Article 10.16.1(a), but requiring a majority or controlling shareholder to file that same claim under Article 10.16.1(b), makes no sense if the correct interpretation of DR-CAFTA, as Guatemala suggests, is that no indirect loss claims are permitted other than under Article 10.16.1(b).<sup>79</sup>
87. Similarly, Claimants allege that the tribunal in *RDC* also made an award for reflective loss. Although initially the claimant brought its claim under both Article 10.16.1(a) and (b), the award was paid, at Guatemala’s urging, to the claimant – and not to its enterprise – which shows that it was made pursuant to Article 10.16.1(a).<sup>80</sup> Claimants argue that Respondent offers no explanation other than mere speculation as to its own motivations concerning this past and consistent practice.<sup>81</sup> In Claimants’ view, this is not inconsequential for this Tribunal’s task of interpreting Article 10.16.1. In *Oil Platforms*, for instance, the ICJ rejected Iran’s novel interpretation of a provision in the underlying Treaty, observing that the interpretation was inconsistent with the parties’ practice in their prior pleadings before the ICJ in earlier cases based on the same treaty.<sup>82</sup>
88. *Third*, Claimants state that NAFTA jurisprudence confirms the right of shareholders to bring claims on their own behalf for reflective loss. NAFTA tribunals have rejected

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<sup>78</sup> Claimants’ Preliminary Objections Counter-Memorial ¶¶ 26-29; *see also* Tr-E, 16 December 2019 Hearing, pp. 196:12-199:22.

<sup>79</sup> Claimants’ Preliminary Objections Rejoinder ¶¶ 15-18, 21; *see also* Tr-E, 16 December 2019 Hearing, pp. 195:15-196:15.

<sup>80</sup> Claimants’ Preliminary Objections Rejoinder ¶¶ 22-23.

<sup>81</sup> Claimants’ Preliminary Objections Rejoinder ¶ 16.

<sup>82</sup> Claimants’ Preliminary Objections Rejoinder ¶¶ 19-20 (citing *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, 12 Dec. 1996, 1996 I.C.J. Rep. 803, (hereinafter “*Oil Platforms*”) at 812 ¶ 24, CL-0103-ENG.).



respondent States' objections that claimants may not recover for reflective loss under NAFTA Article 1116, or that majority shareholders may only recover for reflective loss indirectly under Article 1117. Examples in Claimants' view include *Mondev*, *GAMI*, *Pope & Talbot*, *UPS*, and *S.D. Myers*.<sup>83</sup> That some of those particular claimants may not have prevailed on the merits of their cases is irrelevant; what matters, according to Claimants, is that none of those tribunals dismissed claims or refused to award damages on account of the claims being for reflective loss.

89. Claimants consider it telling that Respondent supports its discussions of NAFTA Articles 1116 and 1117 by references to scholarly work and to the NAFTA Parties' submissions in various cases, but not to any tribunal decisions. Scholarly views cannot alter the meaning of the NAFTA's text, and tribunals have declined to adopt the interpretations proposed in the various NAFTA Party submissions Respondent cites, neither dismissing for lack of jurisdiction nor finding Article 1116 claims to be inadmissible. Had the NAFTA Parties wished to exclude reflective loss claim from Article 1116, they could have issued an official interpretation through the NAFTA Free Trade Commission (FTC), but they did not do so.<sup>84</sup> Furthermore, the NAFTA Parties in any event are not coextensive with the DR-CAFTA Parties.
90. Claimants reject Respondent's contention that allowing claims for reflective loss under NAFTA Article 1116 (or DR-CAFTA Article 10.16.1(a)) would render the mechanism under NAFTA Article 1117 (or DR-CAFTA Article 10.16.1(b)) meaningless. NAFTA Article 1117 and DR-CAFTA Article 10.16.1(b) provide an *additional* option for an investor that owns or controls an enterprise to bring a claim. This option provides for different and broader coverage than Article 1116 and DR-CAFTA Article 10.16.1(a), including the ability for the local company to seek recovery for its *entire* injury, which may be much higher than the reflective loss portion traceable up through the shares of the controlling investor. There may be other good reasons for a shareholder claimant to make a

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<sup>83</sup> Claimants' Preliminary Objections Rejoinder ¶¶ 24, 30-31.

<sup>84</sup> Tr-E, 16 December 2019 Hearing, pp. 191:9-194:3.

claim under NAFTA Article 1117 or DR-CAFTA Article 10.16.1(b), for example having to do with lower tax rates in certain countries or a desire to reinvest the proceeds of an award in the host state, without having to convert and repatriate the funds if they were first paid to the shareholder under NAFTA Article 1116 or DR-CAFTA Article 10.16.1(a). Another reason could be to avoid the uncertainties of having to prove that the damages sustained by the local enterprise truly flowed up to the shareholders, which is generally an additional hurdle to proving reflective loss claims.<sup>85</sup> It is thus by no means clear that a shareholder who has both procedural options will always choose NAFTA Article 1116 (or DR-CAFTA Article 10.16.1(a)) over NAFTA Article 1117 (or DR-CAFTA Article 10.16.1(b)).

B. *Article 10.16.1(a)'s object and purpose*

91. Claimants maintain that admitting claims for reflective loss is also consistent with the DR-CAFTA's object and purpose of providing effective means of dispute settlement.<sup>86</sup>
92. *First*, they contend that their interpretation is in line with DR-CAFTA's object and purpose of providing effective means of dispute settlement. Respondent's interpretation, by contrast, would deprive shareholder investors of any opportunity to seek investor-State arbitration for the most commonly suffered damages, and would provide considerably less protection to foreign investors than any of the multitude of modern investment treaties. Unsurprisingly, tribunals interpreting Argentina's investment treaties all have dismissed similar objections and found that claimants may bring claims for reflective loss.<sup>87</sup> The same is true under various other investment treaties.<sup>88</sup> Claimants note that Respondent has not, in fact, 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. In Claimants' view, Respondent's

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<sup>85</sup> See the discussion at Tr-E, 16 December 2019 Hearing, pp. 100:5-104:3.

<sup>86</sup> Claimants' Preliminary Objections Rejoinder ¶¶ 34-60.

<sup>87</sup> See the cases referenced in Claimants' Preliminary Objections Counter-Memorial ¶ 38, ft. 72 and in ¶¶ 39-40.

<sup>88</sup> See the cases referenced in Claimants' Preliminary Objections Counter-Memorial ¶ 41, ft. 78.

reliance instead on the customary international law of diplomatic protection and in particular on the ICJ's judgments in the *Barcelona Traction* and *Diallo* cases, ignores that the DR-CAFTA derogates from customary international law by providing shareholders the right to recover for losses suffered as a result of actions taken against the enterprise in which they invested.<sup>89</sup> This was made clear in the ICJ's Judgment on Preliminary Objections in the *Diallo* case.

93. According to Claimants, Respondent's contention that most "advanced" national legal systems bar claims for reflective loss is inapposite. None of the domestic laws that Respondent quotes is applicable in this proceeding, which is governed by the DR-CAFTA and international law. National laws cannot override the Treaty. Claimants likewise reject Respondent's argument that claims for reflective loss were often permitted in disputes involving "older" treaties because they provided the only meaningful avenue for shareholders to recover.
94. Claimants remark that many of the treaties Respondent cites include certain local enterprises in the definition of an "investor," while others allow certain local companies to be treated as a national of the other Contracting Party in accordance with Article 25(2)(b) of the ICSID Convention.<sup>90</sup> In their view, the ICSID Article 25(2)(b) mechanism serves a purpose similar to DR-CAFTA Article 10.16.1(b), insofar as it provides a means for an enterprise of the host State to recover its losses suffered as a result of host State's measures aimed at that enterprise. If the existence of DR-CAFTA Article 10.16.1(b) meant that a claimant who owns or controls an enterprise *must* bring a claim for any loss pursuant to that Article and on behalf of the enterprise itself, as Respondent suggests, then it would stand to reason that in ICSID cases where the Parties had agreed to treat foreign-controlled local companies as non-nationals of the respondent State, claimants likewise would be limited to causing such local companies to file claims in their own names pursuant to Article 25(2)(b). Arbitral tribunals however have properly rejected that proposition;

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<sup>89</sup> Claimants' Preliminary Objections Counter-Memorial ¶¶ 44-47 and Claimants' Preliminary Objections Rejoinder ¶ 36.

<sup>90</sup> See also Tr-E, 16 December 2019 Hearing, p. 210:6:20.

Claimants refer to the annulment decision in *Azurix* and the decisions in *Cube Infrastructure* and *Sempra*.<sup>91</sup>

95. Claimants also contend that, none of the perceived negative consequences Respondent invokes, such as the prospect of multiple proceedings and/or double recovery or double payment, can affect Claimants' standing or the jurisdiction of the Tribunal. They emphasize that tribunals have various means at their disposal to address such concerns, including by fashioning awards so as to prevent double recovery or double payment. Importantly, the *Renco* award, on which Respondent relies, did not rule on Peru's objection to the admissibility of reflective loss claims, but rather dismissed the claim for lack of jurisdiction on account of a defective waiver.<sup>92</sup>
96. *Second*, Claimants assert that shareholders bringing claims for reflective loss on their own behalf do not recover at the expense of creditors, and in any event, Respondent has not demonstrated that Articles 10.16.1(a) and (b) must be interpreted in a manner that is most protective of creditors. Article 10.26.2(c) does not support that contention, nor does it shed any light on whether a claimant may make a claim for reflective loss under DR-CAFTA Article 10.16.1(a). It merely recognizes that an award under DR-CAFTA does not and cannot affect rights to the proceeds of that award that others may have under domestic law. Similarly, DR-CAFTA Article 10.26.2 merely provides that where a claim is filed on behalf of an enterprise under Article 10.16.1(b), then naturally the award ought to be paid to the enterprise, as it is compensating the enterprise for its losses.
97. Claimants further submit that Respondent's arguments are based on a misunderstanding of basic damages calculation with respect to reflective loss claims. It is only after an

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<sup>91</sup> Claimants' Preliminary Objections Counter-Memorial ¶¶ 46-49 (citing *Azurix, Annulment Decision*, ¶¶ 102, 127; *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICISD Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, ¶ 174, CL-0059-ENG; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005 (hereinafter "*Sempra, Decision on Objections to Jurisdiction*") ¶¶ 42, 45, CL-0072-ENG/SPA). Claimants likewise reject Respondent's invocation of *Eskosol*, which in their view addressed a different issue, namely whether the local company was precluded from bringing a claim in its own name after its majority shareholder had brought a separate claim for reflective loss. Claimants' Preliminary Objections Rejoinder ¶ 50.

<sup>92</sup> Tr-E, December 16, 2019 Hearing, p. 200:1-22.

enterprise's debt has been satisfied that there would be any value assigned to shareholders, and therefore a shareholder's recovery will be the same whether it recovers that amount directly (pursuant to a reflective loss claim under DR-CAFTA Article 10.16.1(a)) or indirectly after the enterprise recovers the full amount of its loss (pursuant to a claim under DR-CAFTA Article 10.16.1(b)), pays off its creditors, and distributes the remaining equity value to its shareholders. On the other hand, the respondent State's liability may well be *greater* where a majority shareholder files a claim on behalf of the enterprise under DR-CAFTA Article 10.16.1(b)), because the liability in that scenario extends to the enterprise's full losses, not only to the portion attributable to a particular upstream shareholder after accounting for priority debt. Indeed, Claimants argue that Respondent itself recognized this possibility in *RDC v. Guatemala*, where it objected to the tribunal's awarding damages to the local enterprise on the grounds that this would result in compensation to minority shareholders who did not themselves have any treaty rights.<sup>93</sup>

C. *Loss recovery under Article 10.16.1(a)*

98. Claimants state that they have submitted claims for losses that they themselves suffered. Specifically, Claimants state that they seek damages for the diminution in the value of their shares in Exmingua as a result of the measures taken by Guatemala in breach of DR-CAFTA.
99. In Claimants' view, the fact that they did not use the term "reflective" to describe their losses in their Notice of Intent and Notice of Arbitration is completely irrelevant. The DR-CAFTA does not require that a notice of arbitration further specify the relief requested. There is no requirement that Claimants expressly characterize their damages in their Notice of Arbitration as "direct," "indirect" or "reflective," as Respondent suggests. This is confirmed in arbitral practice as the *TECO* and *Khan* decisions show.<sup>94</sup>

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<sup>93</sup> Claimants' Preliminary Objections Rejoinder ¶¶ 53, 59.

<sup>94</sup> Claimants' PO Rejoinder. ¶¶ 71-72 (referring to *TECO*, ¶ 742; *Khan Resources Inc., Khan Resources B.V., and Cauc Hldg. Co. Ltd. v. The Government of Mongolia*, UNCITRAL, Award on the Merits, 2 March 2015 (hereinafter "*Khan*") ¶ 77(2), CL-0114-ENG ).

100. Claimants also accuse Respondent of ignoring each and every reference in the Notice of Intent and Notice of Arbitration to Claimants' loss or damage suffered as a result of Respondent's actions, and of focusing exclusively on the fact that the measures at issue were targeted at Exmingua, which also incurred damage as a result of Respondent's alleged Treaty breaches. Claimants contend that there is nothing out of the ordinary in such references to the local target of State action, which do not prevent shareholders from pursuing recovery of their own separately cognizable losses.
101. Claimants further contend that none of the jurisprudence Respondent cites supports a contrary conclusion. The *OTMTI* award, upon which Respondent relies, is different from this case, which does not involve multiple proceedings or a prospect of former Exmingua shareholders bringing a claim challenging the same measures.<sup>95</sup> Respondent's reliance on *LESI-Dipenta* is also misplaced, Claimants say, because unlike in that case – where the claimant did not own the investment and the tribunal thus found no jurisdiction – here, Mr. Kappes and KCA hold shares in Exmingua, and those shares qualify as investments under the Treaty.<sup>96</sup> Nor does *Nykomb* assist Respondent, Claimants argue. In that case, the claimant sought to recover damages equal to its subsidiary's alleged loss of income and the tribunal rejected that deficient calculation, but here, Claimants have not yet set out their quantification of their losses.<sup>97</sup>
102. Claimants also reject Respondent's invocation of *Clayton*. They say that despite misinterpreting NAFTA Articles 1116 and 1117, the *Clayton* tribunal still rejected Canada's objection that the claimants only recourse would have been to file a claim on behalf of their wholly-owned enterprise pursuant to NAFTA Article 1117.<sup>98</sup> The tribunal

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<sup>95</sup> Claimants' Preliminary Objections Rejoinder ¶¶ 64-65 (discussing *Orascom* ¶¶ 488-489, ¶¶ 496-498, 539-545.).

<sup>96</sup> Claimants' Preliminary Objections Rejoinder ¶ 66 (discussing *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, at 33, CL-0112-FR/ENG).

<sup>97</sup> Claimants' Preliminary Objections Rejoinder ¶ 67 (discussing *Nykomb* (n 40) at 3-5, 39 (CL-0073-ENG)).

<sup>98</sup> Claimants' Preliminary Objections Counter-Memorial ¶¶ 58-60 and Claimants' Preliminary Objections Rejoinder ¶¶ 32-33 (citing *Clayton, Award on Damages*, ¶ 396); see also Tr-E, 16 December 2019 Hearing, pp. 202:2-205:22 (Claimants' counsel stating that one cannot, as the *Clayton* tribunal did, "say that an interpretation renders a

explained that the claimants, and not only the Canadian enterprise in which they held shares and which was denied a permit, had suffered losses as a result of Canada's breach. This was so because the opportunity to develop the project was that of the claimants, who had invested in the opportunity. The same is true here, Claimants say, where the sole purpose of Exmingua was to build and operate the Tambor mining project. Moreover, Claimants' investment in Exmingua has been rendered useless as a result of Respondent's actions and omissions. In such circumstances, they assert, there can be no doubt that they have suffered a "direct" injury and may make a claim on their own behalf.

103. In any event, Claimants say that they have *alleged* that they themselves suffered damages as a result of Respondent's Treaty breaches, and the Tribunal should accept that allegation as true for purposes of determining Respondent's Article 10.20.5 preliminary objections, pursuant to DR-CAFTA Article 10.20(4)(c). Contrary to Respondent's assertions, Claimants are not attempting to "amend" or "re-characterize" their claims or to "reengineer" their Notices. Be that as it may, the issue of existence of loss is one for the merits, they argue, citing decisions in the *Glamis Gold* and *UPS* cases.<sup>99</sup>

D. *Waiver requirement under Article 10.18.2(b)*

104. Claimants state that they have complied with the applicable DR-CAFTA waiver requirement. They make three major arguments.
105. *First*, Claimants note that they submitted their claims pursuant to Article 10.16.1(a) and, consequently, in accordance with the ordinary meaning of Article 10.18.2(b)(i), were required to submit a waiver on behalf of themselves and not on behalf of Exmingua. Therefore, Respondent's reliance on *Commerce Group* is misplaced. Here, Claimants have not acted contrary to the waiver that *they* provided, nor are Claimants themselves parties to

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provision meaningless or inutile, it needs to do so in all circumstances, not just in the particular circumstances in front of you").

<sup>99</sup> Claimants' Preliminary Objections Counter-Memorial ¶ 63 (*Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (revised) 31 May 2005 ¶¶ 22-23, CL-0071-ENG; *UPS* ¶ 37; see also *Pope & Talbot, Award* ¶ 80).

any proceedings before a Guatemalan court or administrative tribunal.<sup>100</sup> If the Tribunal decides that Claimants are permitted to bring claims under Article 10.16.1(a), then Respondent's arguments regarding the need for an enterprise's waiver are moot.

106. In respect of the Guatemala court proceedings to which Exmingua is a party, Claimants consider that the Constitutional Court has no intention of ruling on that matter. It should have done so in five days, they say, and it already has been three-and-a-half years. The only reason why Exmingua has not formally withdrawn those proceedings is to avoid an accusation in this case that Claimants have failed any requirement to exhaust local remedies.<sup>101</sup>
107. *Second*, Claimants point out that while NAFTA requires a claimant making a claim on its own behalf to file a waiver on behalf of an enterprise in certain circumstances, DR-CAFTA contains no corresponding language, and there is no basis to insert additional waiver requirements into the Treaty. Accordingly, Respondent's assertion that Claimants' claims are "exactly the type of outcome the DR-CAFTA's derivative claim mechanism seeks to prevent" is unsupported and belied by the plain text of the Treaty.<sup>102</sup>
108. Claimants also contend that it would defy VCLT treaty interpretation principles to construe the absence of an enterprise waiver requirement for Article 10.16.1(a) claims as proof that the DR-CAFTA Parties wished to prohibit claims for reflective loss claims under that Article, and intended to require any claims for losses suffered by a claimant as a result of measures aimed at a local enterprise to be brought under Article 10.16.1(b) and accompanied by an enterprise waiver. If the State Parties had so intended, Claimants argue, they could have inserted text in Article 10.18.2 to that effect, but did not do so.
109. *Finally*, Claimants assert that the perceived advantages of an enterprise waiver – such as preventing double recovery, multiple proceedings or inconsistent decisions – cannot

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<sup>100</sup> Claimants' Preliminary Objections Counter-Memorial ¶ 67.

<sup>101</sup> Tr-E, 16 December 2019 Hearing, pp. 105:2-12.

<sup>102</sup> Claimants' Preliminary Objections Rejoinder ¶ 78 (citing Respondent's Preliminary Objections Reply ¶ 107).



override the plain language of the Treaty. Moreover, these advantages could not necessarily be secured even where a local enterprise waiver is provided. In any event, Claimants argue, to the extent that double recovery or double payment is a concern, tribunals have other means at their disposal to guard against such risks. Moreover, numerous tribunals have confirmed that these concerns are irrelevant to a tribunal's jurisdiction. With regard to the multiplicity of claims and the possibility of inconsistent decisions, as Professor Schreuer explains, "[a]ny difficulties arising from a multiplicity of claimants can be taken care of by a number of devices but do not require that the investor be deprived of its standing."<sup>103</sup>

E. *DR-CAFTA Annex 10-E*

110. Claimants contest the applicability of DR-CAFTA Annex 10-E to this case. They refer, in particular, to the ordinary meaning of Annex 10-E and Article 10.18.2(b), and the object and purpose of DR-CAFTA.
111. Claimants explain that DR-CAFTA does not contain a fork-in-the-road provision, but, rather, has a "no-u-turn" provision, which allows claimants to first pursue local court remedies before commencing arbitration.<sup>104</sup> Annex 10-E establishes a limited exception to the no-u-turn rule for U.S. investors, but such exception is inapposite here.
112. According to Claimants, the plain language of Annex 10-E makes it clear that it applies to local proceedings where a "*breach of an obligation under Section A*" of Chapter 10 of the DR-CAFTA is alleged. It does not apply to local actions alleging only infringement of local laws. Respondent's contention to the contrary moreover would make the provision inconsistent with the waiver provision in Article 10.18.2(b), which presupposes that a claimant or an enterprise, as the case may be, may have initiated local court proceedings challenging the same measure at issue in the arbitration. If doing so constituted a

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<sup>103</sup> Claimants' Preliminary Objections Counter-Memorial ¶ 71 (quoting Christoph Schreuer, Shareholder Protection in International Investment Law, in Pierre-Marie Dupuy et al. eds, *Common Values in International Law: Essays in Honour of Christian Tomuschat* 612 (2006), CL-0076-ENG.).

<sup>104</sup> Claimants' Preliminary Objections Counter-Memorial ¶ 74.

preclusive election of local remedies over a potential DR-CAFTA remedy, then there would be no purpose in requiring a waiver of the right to continue court proceedings as a condition of commencing a DR-CAFTA case.

113. Claimants submit that the purpose and object of Annex 10-E was instead to address the particular circumstance in some civil law countries that claims may be made in domestic court for a breach of the Treaty itself. This was made clear by the tribunal in *Corona*, a case that Respondent has chosen to ignore.<sup>105</sup> Nor does Respondent address *Nissan*, where the tribunal interpreted a similar provision, and rejected the respondent's objection in that case because the claimant had not presented any claim for breach of the treaty before local courts.<sup>106</sup>
114. Here, Claimants emphasize that they have not submitted any claims, much less DR-CAFTA claims, before the Guatemalan courts. Nor has Exmingua (Claimants' investment) brought any DR-CAFTA claim before the local courts. Exmingua's Guatemalan court proceedings have exclusively alleged violations of Guatemalan law.
115. Finally, Claimants contend that Respondent's reliance on *H&H Enterprises* and *Pantechniki* does not support its position that the Tribunal should apply a "fundamental basis" test to determine if DR-CAFTA claims are barred by prior local court claims.<sup>107</sup> These cases addressed typical fork-in-the-road clauses which preclude arbitration of claims when a claimant already has submitted the "dispute" to court; neither case involved a provision akin to Annex 10-E, which alludes instead to the prior filing of claims for Treaty breach. For the same reason, Claimants contend, decisions interpreting ordinary fork-in-the-road clauses are generally irrelevant to the interpretation of Annex 10-E.

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<sup>105</sup> Claimants' Preliminary Objections Counter-Memorial ¶ 79 (citing *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (hereinafter "*Corona*") ¶ 269, RL-0002-ENG); see also Claimants' Preliminary Objections Rejoinder ¶ 87.

<sup>106</sup> Claimants' Preliminary Objections Rejoinder ¶ 87 and Claimants' Preliminary Objections Counter-Memorial n. 156 (quoting *Nissan Motor Co. Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019 (hereinafter "*Nissan*") ¶ 214, CL-0078-ENG).

<sup>107</sup> Claimants' Preliminary Objections Rejoinder ¶ 88.

**c. The Tribunal's Analysis**

**A. Preliminary Observations**

116. While Respondent has presented three separate “grounds for dismissal” related to interpretation of DR-CAFTA Article 10.16.1(a),<sup>108</sup> these grounds in essence present a single, related question: whether the Treaty permits Claimants to proceed under that Article rather than under Article 10.16.1(b). The Tribunal here briefly explains why, in its view, the three grounds effectively collapse into this one central inquiry.

117. First, Respondent’s initial ground for complaint is that, pursuant to DR-CAFTA Article 10.20.4, the “claim submitted is not a claim for which an award in favor of the claimant may be made.” The first step in any such analysis is a determination of *what claim in fact has been submitted*, since that is a predicate to assessing whether the Treaty would allow an award based on such a claim. The Tribunal accepts that under the DR-CAFTA preliminary objections framework, an objection pursuant to Article 20.4 must be resolved on the basis of the allegations Claimants made in the pleading by which the claim was “submitted,” which in this instance was Claimants’ Notice of Arbitration.<sup>109</sup> This proposition does not mean, however, that in the event of any ambiguity in that document as to what relief Claimants are seeking, the Tribunal must flatly reject any clarifications Claimants subsequently offer on that score. It would be nonsensical to decide a proposition about the legal cognizability of a “claim submitted” while ignoring Claimants’ clarifications about what that claim actually is.

118. Respondent argues that, from the Notice of Arbitration, it appeared that Claimants were seeking to recover for their own account the losses allegedly suffered by Exmingua, rather

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<sup>108</sup> See Respondent’s chart reproduced in ¶ 55 above, arguing that (a) as a matter of law, no award in Claimants’ favor can be made, (b) the claims are inadmissible because Claimants do not have standing to proceed, and (c) the Tribunal does not have jurisdiction over the claims absent a waiver by Exmingua.

<sup>109</sup> Article 10.20.4(a) also envisions the possibility of preliminary objections being made later in a proceeding, after a claimant submits an amendment to its prior notice of arbitration or even after a claimant submits its memorial. In such instances, determination of what claim has been “submitted” necessarily would involve interpretation of these subsequent pleadings.

than any losses they themselves suffered, whether directly or indirectly.<sup>110</sup> Claimants contend otherwise, stating that they always intended to submit a claim for their own losses and not Exmingua's, but emphasized harm to Exmingua in their pleading because that is a relevant step in the causation chain for measuring their own losses.<sup>111</sup> Having closely reviewed the Notice of Arbitration, the Tribunal accepts that there are sufficient references in that document to harm to Claimants' investment in Exmingua, and not simply harm to Exmingua itself, to support the clarification that Claimants subsequently provided.<sup>112</sup> The same is true for Claimants' prior Notice of Intent.<sup>113</sup> The Tribunal therefore does not consider Claimants' arguments in response to the Preliminary Objections to be a wholesale amendment of a clearly different prior claim, as Respondent suggests. Moreover, to the extent there was any ambiguity in the prior framing, Claimants now expressly accept that Exmingua's losses cannot simply be equated to their own losses. They acknowledge that the proof of their losses would require additional showings of causation as well as potentially more complex quantification, including accounting for any claims by Exmingua's creditors.<sup>114</sup>

119. Given this finding about the nature of the "claim submitted," Respondent's first ground for dismissal cannot be resolved simply on a finding that Claimants are seeking the wrong relief (*i.e.*, a different entity's losses). Rather, it presents the central question of whether DR-CAFTA allows Claimants to proceed under Article 10.16.1(a) to recover their own

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<sup>110</sup> See, e.g., Respondent's Preliminary Objections Memorial ¶¶ 5, 11(a), 47.

<sup>111</sup> See, e.g., Claimants' Preliminary Objections Counter-Memorial ¶¶ 56-57; Claimants' Preliminary Objections Rejoinder ¶ 63.

<sup>112</sup> See, e.g., Notice of Arbitration ¶¶ 21, 51, 64 (alleging that "Claimants have incurred significant loss and damages by reason of, or arising out of, these breaches," that Guatemala's actions "prevented the Claimants from reaping any benefits from their investments," and that "Claimants have incurred significant losses as a result of these breaches").

<sup>113</sup> See, e.g., Notice of Intent at 2, 3 (alleging that "the Investors have been deprived of the use and enjoyment of their investment in Exmingua, which has been subjected to a series of acts and omissions by the State ...," and that "Mr. Kappes and KCA have incurred significant losses as a consequence of those breaches").

<sup>114</sup> Claimants' Preliminary Objections Counter-Memorial ¶ 49 ("an investor's shares in an enterprise only have value to the extent that the enterprise has a positive value after having paid off its creditors .... Thus, when calculating damage to a shareholder as a result of its reflective loss, one does not simply calculate the loss in cash flow to the enterprise and apply the claimant's percentage ownership to that amount. Rather, it is only after the enterprise's debt has been satisfied that there is any value to be assigned to shareholders."); Claimants' Preliminary Objections Rejoinder ¶ 57.

losses, if those losses were sustained only *indirectly* (through decline or destruction of the value of their Exmingua shares, due to State action aimed at Exmingua), rather than *directly* (because of State action aimed at Claimants' shareholding itself). Respondent's core objection is that as a matter of law, Article 10.16.1(a) is available only for the latter, *i.e.*, for claims of "direct damages."<sup>115</sup> Otherwise stated, Respondent contends that any claims for harm *derived from* a local enterprise's losses must be brought through a different DR-CAFTA mechanism, namely by the controlling shareholders presenting a claim under Article 10.16.1(b) on behalf of the local enterprise itself.

120. Thus framed, the question essentially is the same one that arises under Respondent's second ground for dismissal, which is that Claimants "do not have standing to seek to recover Exmingua's losses,"<sup>116</sup> or even to seek their own losses if these were causally derived from Exmingua's losses. Although Respondent frames this question as a matter of admissibility,<sup>117</sup> the Tribunal sees it more fundamentally as an issue of jurisdiction. Either DR-CAFTA provides consent under Article 10.16.1(a) for a shareholder claim based on indirect or "reflective" harm, measured by the diminished value of the shareholder's shares in a local enterprise, or it does not. If the Treaty provides no such consent, there is no need to reach secondary arguments about admissibility: Claimants would have chosen to proceed under a path that had not been offered to them. There can be no mutual consent in these circumstances, and issues of admissibility therefore do not arise. Correspondingly, if the Treaty provides consent for such claims, the Tribunal has not been alerted to any special reason why it should decline to exercise the jurisdiction it has been granted.

121. Respondent's third related ground for dismissal is that the Tribunal does not have jurisdiction to determine claims for "Exmingua's losses," because Claimants did not submit a waiver by Exmingua pursuant to DR-CAFTA Article 10.18.2.<sup>118</sup> In the Tribunal's

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<sup>115</sup> Respondent's Preliminary Objections Memorial ¶ 5 ("Article 10.16.1(a) of CAFTA-DR only allows Claimants to recover direct damages").

<sup>116</sup> See Respondent's chart reproduced in ¶ 55 above.

<sup>117</sup> Respondent's Preliminary Objections Memorial ¶¶ 6, 83.

<sup>118</sup> See Respondent's chart reproduced in ¶ 55 above; *see also* Respondent's Preliminary Objections Memorial ¶¶ 7, 11(a), 82.

view, recasting the issue as about whether proper waivers were submitted does not advance the debate beyond the core jurisdictional question presented. That is because, on its face, Article 10.18.2 does not require an enterprise waiver for claims submitted to arbitration under Article 10.16.1(a), but only for those submitted on behalf of an enterprise under Article 10.16.1(b),<sup>119</sup> *i.e.*, the alternative avenue that Claimants concededly have not pursued.<sup>120</sup> In consequence, the issue of waivers will become moot upon determination of the core jurisdictional issue the Tribunal has identified. Stated flatly: if there is jurisdiction for Claimants to proceed as they have done under Article 10.16.1(a), then they have submitted sufficient waivers to do so – and if there is no jurisdiction to proceed under Article 10.16.1(a), then it would not matter what waivers they submitted, as an additional waiver would not cure the fundamental problem of lack of consent.

122. For these reasons, the Tribunal considers each of Respondent’s three grounds for dismissal related to Article 10.16.1(a) to boil down to a single fundamental question: does DR-CAFTA provide jurisdiction for an investor to proceed under that Article with a claim seeking compensation for losses that are not a direct result of the challenged State conduct, but rather are “reflective” losses,<sup>121</sup> flowing indirectly to the investor in consequence of State conduct towards an enterprise in which it holds shares? The Tribunal addresses this question below.

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<sup>119</sup> See DR-CAFTA Article 10.18.2 (“No claim may be submitted to arbitration under this Section unless ... (b) the notice of arbitration is accompanied, (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant’s written waiver, and (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant’s and the enterprise’s written waivers ....”) (CL-0001-ENG).

<sup>120</sup> In this respect, DR-CAFTA is distinct from NAFTA, which requires enterprise waivers to accompany claims submitted under *either* its Article 1116 (for a claimant’s own losses, where those losses involve damage to its interest in a local enterprise) or its Article 1117 (for claims on behalf of the enterprise, for the enterprise’s losses). See NAFTA Articles 1121.1(b), 1121.2(b) (CL-0034-ENG).

<sup>121</sup> For purposes of this decision, the Tribunal adopts the definition of “reflective loss” provided by Professor Douglas, namely that “[r]eflective loss can be defined as ‘the diminution of the value of the shares [...] the loss of dividends [...] and all other payments which the shareholder may have obtained from the company if it had not been deprived of its funds.’” Z. Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (2009), p. 402.

B. *Interpretation of Article 10.16.1*

123. The Parties broadly agree that DR-CAFTA should be interpreted by means of a traditional VCLT analysis, in particular according to the principles set forth in VCLT Articles 31 and 32. In conducting this analysis of the core question presented, the Tribunal bears in mind several propositions. First, under VCLT Article 31, the provisions of DR-CAFTA are to be interpreted and applied in accordance with the “ordinary meaning” of their terms, in the “context” in which they occur and in light of the Treaty’s “object and purpose.”<sup>122</sup> While the Contracting Parties’ use of unambiguous terms should be taken as reflecting their clear intent, context and purpose must also be considered. The relevant “context” for construing any given passage in a treaty includes the words and sentences found in close proximity to that passage, including definitional terms, as well as other provisions of the same treaty which help illuminate its object and purpose.<sup>123</sup> In accordance with VCLT Article 31(3), a tribunal construing the terms of DR-CAFTA should also take into account (*inter alia*) “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,” as well as “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”<sup>124</sup>
124. In accordance with Article 32 of the VCLT, “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion,” only “to confirm the meaning” resulting from the textual approach required by Article 31, or in the event the textual approach leaves a meaning “ambiguous or obscure” or would lead to a result that is “manifestly absurd or unreasonable.”<sup>125</sup> The ICJ has explained that even in these circumstances, “a decisive reason” (such as unmistakable evidence of the State Parties’ intentions from such supplementary materials)

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<sup>122</sup> VCLT, Article 31(1).

<sup>123</sup> See generally *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award ¶ 5.2.6 (2 July 2013) (“Treaty terms are obviously not drafted in isolation, and their meaning can only be determined by considering the entire treaty text. The context will include the remaining terms of the sentence and of the paragraph; the entire article at issue; and the remainder of the treaty [...].”).

<sup>124</sup> VCLT, Article 31(2).

<sup>125</sup> VCLT, Article 32.

would be required “[t]o warrant an interpretation other than that which ensues from the natural meaning of the words” of a provision.<sup>126</sup>

125. In applying these principles to the DR-CAFTA, the Tribunal acknowledges that debate about the concept of “reflective loss” has arisen in a variety of contexts, including in investment cases under other treaties (Argentine BITs, NAFTA, etc.) and also in analysis of Article 25(2)(b) of the ICSID Convention. While such debate may be part of the historical background against which the DR-CAFTA Parties negotiated, this cannot be the starting point of any VCLT analysis of what they actually agreed in the final DR-CAFTA text. The Tribunal thus agrees with Respondent that it “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.”<sup>127</sup> The Tribunal begins this analysis below with an assessment of the Treaty’s plain text.

*i. Ordinary meaning of Article 10.16.1(a)*

126. Claimants have invoked Article 10.16.1(a), which states in relevant part that “[i]n the event that a disputing party considers that *an investment dispute* cannot be settled by consultation and negotiation: (a) the claimant, *on its own behalf*, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Section A, ...; and (ii) that the claimant *has incurred loss or damage by reason of, or arising out of*, that breach ....” (emphasis added). Several phrases in this provision, italicized above, are relevant to its construction.
127. First, the phrase “investment dispute” must be understood in the context of Article 10.1(1), which states that Chapter Ten on Investment applies to “measures adopted or maintained by a Party relating to ... covered investments.” The notion of a “covered investment” in turn harkens back to the definition of investment in Article 10.28, which states that an investment may take the form, *inter alia*, of an “enterprise” or “shares, stock, and other

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<sup>126</sup> *Admission of a State to Membership in the United Nations* (Charter, Article 4), Advisory Opinion: I.C.J Reports 1948, p. 57, p. 63.

<sup>127</sup> Respondent’s Preliminary Objections Reply ¶ 32.



forms of equity participation in an enterprise.” There appears to be no dispute in this case that Claimants hold a covered investment, by virtue of their collective ownership (directly and indirectly) of the shares of a local enterprise (Exmingua). Contrary to Claimants’ suggestion, however, this does not appreciably assist the jurisdictional analysis,<sup>128</sup> because the fact that shares are protected does not necessarily imply that shareholders may seek damages for loss of share *value*, as opposed to deprivation of share *ownership* or interference with shareholder *rights*. For that proposition, one must examine the additional words of Article 10.16.1(a), authorizing “the claimant, on its own behalf,” to submit a claim that “the claimant has incurred loss or damage by reason of, or arising out of,” an alleged breach of a Treaty obligation.

128. The phrase “on its own behalf” plainly refers to the entity whose interests are being pursued. To act on behalf on someone means to act for their benefit or to represent their interests. When a claimant proceeds under DR-CAFTA Article 10.16.1(a), it does not purport to be acting for anyone’s benefit or interest other than its own – a point to which the Tribunal returns when assessing the contrasting language in Article 10.16.1(b). The clear text of Article 10.16.1(a) allows a claimant to proceed for its sole benefit for any claims that *it* has “incurred loss or damage” (*i.e.*, an alleged result), “by reason of, or arising out of” a challenged State action (*i.e.*, an alleged causal link).
129. With respect to the critical phrase “*incurred loss or damage*,” it important to note both what it says and what it does not. First, as to what it says, the requirement is that the claimant itself must have “incurred” harm; it would not be sufficient for a claimant to demonstrate only that a local enterprise in which it has an interest has incurred harm. The burden is on the claimant to allege (and eventually to prove) its own injury. Second, the claimant bears the burden of proving causation, *i.e.*, that its own injury was suffered “by reason of, or arising out of” the challenged State conduct. The more tenuous the connection between the challenged conduct and the alleged injury to a claimant, the heavier this burden may be.

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<sup>128</sup> Claimants’ Preliminary Objections Rejoinder ¶ 14 (contending that “the inclusion of ‘shares’ within the definition of ‘investment’ supports the conclusion that the Treaty allows claims for reflective loss”).

130. But notably, nothing in the plain text of Article 10.16.1(a) forbids a claimant from trying to make such showings of injury and causation based on a multi-step analysis, such as the one that would be necessary for any claimant arguing that it incurred harm through a *chain of events* starting with State conduct towards a company in which it holds shares. There is no qualification in the provision that limits the mechanisms through which loss must be incurred. Thus, although Respondent cites various secondary sources opining that Article 10.16.1(a) is limited to pursuit of “direct” loss or damage, the words “direct” or “indirect” appear nowhere in the provision itself.<sup>129</sup> Nor is a limitation to direct harm a necessary implication of the causation requirement, namely that injury be incurred “by reason of, or arising out of” the challenged conduct. The causation requirement points to a “but for” analysis, but it does not restrict that analysis to a single-step of “but for” postulation, nor indicate that there is a threshold requirement of immediate or proximate causation, such that injuries based on more attenuated causation would automatically fall outside the scope of consent. It would have been possible, of course, for the DR-CAFTA Parties to include a reference to direct injury or direct causation in the Treaty provision, but they did not do so. Thus, if the interpretative lens were restricted to Article 10.16.1(a) alone, the text of this provision would not support a conclusion that an investor is barred even from trying to establish, through a chain of causation, that it suffered injury in consequence of State conduct that immediately impacted at a downstream entity in which it holds shares.

ii. *Context of Article 10.16.1(a)*

131. Nonetheless, any VCLT interpretation must rest not on construction of a treaty provision in isolation, but rather on that provision in the context of surrounding or otherwise relevant

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<sup>129</sup> The absence of any such language in the corresponding NAFTA provisions was acknowledged by the *Clayton* tribunal, notwithstanding its eventual finding on different grounds that “in principle” NAFTA should be interpreted as not allowing reflective loss claims under Article 1116. *Clayton, Award on Damages*, ¶ 389 (CL-0070-ENG). Prior to reaching this conclusion, the *Clayton* tribunal observed that “[t]he critical question in this case is the meaning of ‘the investor has incurred loss or damage’ arising out of the breach. The terms of Article 1116 do not make clear whether they are limited to direct loss or they can include indirect loss, that is, reflective loss.” *Clayton, Award on Damages*, ¶ 371 (CL-0070-ENG). Professor Douglas has similarly observed that NAFTA Articles 1116 and 1117 “left open” the question whether shareholder actions for reflective loss were available, and that “[t]he arguments for and against each possible interpretation are evenly balanced,” at least as a purely textual matter. Z. Douglas, *The International Law of Investment Claims* (2009), ¶ 835 (RL-0068-ENG).

treaty provisions. The most important context for Article 10.16.1(a) is Article 10.16.1(b) which immediately follows, and indeed Respondent acknowledges that its key argument for limiting the former to direct injury rests on inferences drawn from the two provisions read in conjunction.<sup>130</sup> The Tribunal agrees with this methodology and therefore turns next to Article 10.16.1(b).

132. Article 10.16.1(b) has a parallel construction to Article 10.16.1(a). It starts with an indication of whose interest is being pursued, namely that a claimant may proceed to arbitration under that Section “*on behalf of an enterprise* of the respondent that is a juridical person that the claimant owns or controls directly or indirectly ....” (emphasis added). Utilizing the same definition of “on behalf of,” this provision provides a mechanism by which a controlling shareholder may act, not for its own sake, but rather for the benefit of a local enterprise, representing its interests. If a claimant seeks to do this, the necessary predicate that it must allege (and eventually prove) is that “the *enterprise* has incurred loss or damage by reason of, or arising out of,” the alleged breach (emphasis added). In other words, if an investor wishes to bring a DR-CAFTA claim in representation of another entity, it must prove injury to and causation with respect to that represented entity. The investor simply stands in the entity’s shoes for purposes of making the claim.

133. At the same time, and precisely because the claimant stands in the enterprise’s shoes for purposes of an Article 10.16.1(b) claim, a claim under this Article apparently may be brought for the *full* measure of “loss or damage” the enterprise incurred, without restriction based on the upstream division of shareholding interests. Under this provision, a hypothetical 51% shareholder could assert the same claim under Article 10.16.1(b), on behalf of the enterprise it controls, as it could if it had owned 100% of the shares, seemingly without regard to the identity (or protected or unprotected treaty status) of the

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<sup>130</sup> Respondent’s Preliminary Objections Reply, ¶ 57, n.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.’ .... 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.”).

actual holders of the other 49% of the shares. This is because it is asserting the *enterprise's* injury and not its own.<sup>131</sup> Nor would the claimant bringing an Article 10.16.1(b) claim have to demonstrate whether, how, and to what extent *it* ultimately might have incurred harm as a result of the enterprise's injury (such as through the non-payment of expected dividends or the diminished market value of shares). The sole questions for purposes of Article 10.16.1(b) standing, where the claimant proceeds "on behalf of" the enterprise, are whether the claimant owns or controls the enterprise and whether the enterprise itself has incurred injury by reason of the alleged State breach.

134. There is no doubt that this alternative mechanism in Article 10.16.1(b) can be invoked *only* by a controlling shareholder, although the control in question may be exercised either "directly or indirectly," according to the provision's terms. A minority shareholder can never bring a claim under Article 10.16.1(b), and therefore – to the extent it has any path itself to DR-CAFTA arbitration, an issue to which the Tribunal returns further below – that path would have to be through Article 10.16.1(a). For the controlling shareholder, however, the question is whether the path offered to it under Article 10.16.1(b) becomes the only way it may bring a claim predicated on State action which harms the local enterprise, or whether Article 10.16.1(b) provides an optional additional path, without displacing the possibility of pursuing an Article 10.16.1(a) claim solely for its own (indirect) injury (namely, an injury to its shareholding interest in the injured enterprise).
135. Otherwise stated, does the inclusion of the Article 10.16.1(b) path for a controlling shareholder provide an implicit answer to the scope or limitations of the Article 10.16.1(a) path? Does it indicate a clear intent that the former be limited to instances of direct injury to an investor, and not instances of derivative injury flowing to it through harm to its downstream investment? For Claimants, the answer to this core question is no: "if an investor owns or controls an enterprise, it has the additional option of submitting a claim

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<sup>131</sup> The Tribunal returns below to the implications of this fact for DR-CAFTA's regulation of the entity to which any damages award must be paid.

under Article 10.16.1(b), but it need not do so.”<sup>132</sup> For Respondent, the answer is yes: “If the injury is to the company, CAFTA-DR *requires* the claim be submitted by the investor on the company’s behalf. Also, if the claimant’s injury is only indirect, that is, the shares lost value as a result of injury to the company, that company *has to* bring a claim on behalf of the enterprise that sustained the injury under Article 10.16.1(b) of CAFTA-DR.”<sup>133</sup>

136. The difficulty is that the majority of the Tribunal finds no textual basis in either Article 10.16.1(a) or 10.16.1(b) for Respondent’s conclusion that the Treaty “*requires*” the use of the latter where available, such that the company “*has to*” pursue that path and is prohibited from invoking the former instead. Nor is there any textual indication of such an intent by use of so-called “linkage” or “relationship” words that might explain the intended interaction between the two provisions. The provisions are separated by an “and,” *viz*: “(a) the claimant, on its own behalf, may ....; *and* (b) the claimant, on behalf of an enterprise ... may ....”<sup>134</sup> The word “and” customarily implies an addition, not a mutual exclusion or a conditionality. There is no use of any other linkage language which might have implied exclusivity, such as “if and only if,” “except where,” or “may, unless ...” Thus, solely grammatically, it would appear that Article 10.16.1 provides two options, each with its own specification of *who* must be shown to have sustained loss of damage (the claimant or the enterprise), but without mandating that if an investor *can* make the latter showing “on behalf of” the enterprise, then this is its only available path to jurisdiction. Such a mandate (or restriction) could have been expressed in the treaty text, but this was not done, at least with any clarity that the majority of the Tribunal can identify.

137. The next question in a VCLT analysis is whether additional assistance is provided by other Treaty provisions, which might cast further light on the intended scope and interpretation of the two parts of Article 10.16.1. Claimants invoke DR-CAFTA’s definition of

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<sup>132</sup> Claimants’ Preliminary Objections Counter-Memorial ¶ 21; *see also id.* ¶ 33 (citing *Pope & Talbot, Award* ¶ 80, CL-0028-ENG, for its finding that “the existence of Article 1117 does not bar bringing a claim under Article 1116.”).

<sup>133</sup> Respondent’s Preliminary Objections Memorial ¶ 42(b) (emphasis added).

<sup>134</sup> DR-CAFTA, Article 10.16.1 (emphasis added) (CL-0001-ENG).

investment, as including express reference to shares as one protected form.<sup>135</sup> As noted above, however, it would prove too much to say that inclusion of shares as a protected investment necessarily answers the question of *what kind* of injury to a shareholding interests is cognizable under the Treaty. There is no dispute, for example, that a claimant could invoke Article 10.16.1(a) for a direct injury to its shareholder rights, such as interference with dividend distribution or voting rights, or where the enterprise's assets have been expropriated, which would leave the shareholder with bare title to a stripped entity.<sup>136</sup> Claimants assert an expropriation claim here,<sup>137</sup> so in theory that claim could survive even on Respondent's interpretation of the provision.<sup>138</sup> The broader question of whether DR-CAFTA permits shareholders to pursue reflective loss claims for derivative injury, in circumstances short of complete expropriation, is not answered simply by reference to the definition of investment.

138. Respondent invokes three other DR-CAFTA provisions as additional context, namely Article 10.18.2 (on waivers), Article 10.26 (on payment of awards) and Annex 10-E (on the implications of prior local proceedings).<sup>139</sup> However, in the view of the majority, none of these provisions commands a different reading of the Article 10.16.1 text than appears on its face.

139. With respect to Articles 10.18.2 and 10.26, it is clear that DR-CAFTA sets out different preconditions for and consequences of a claim, depending on whether a claimant invokes Article 10.16.1(a) (to claim "*on its own behalf*" for its own asserted injury) or Article

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<sup>135</sup> Claimants' Preliminary Objections Rejoinder ¶ 14.

<sup>136</sup> Respondent's Preliminary Objections Memorial ¶ 42(a) ("Article 10.16.1(a) allows a claimant to seek to recovery direct injury to shareholders," which "results from violations to their rights as shareholders," such as "the right to any declared dividend, the right to attend and vote at general meetings, [and] the right to share in the residual assets of the company on liquidation") (quoting *Barcelona Traction*, ¶ 47 (RL-0006)); *see id.*, ¶ 42(a), n.44 (quoting the U.S. Government Submission in *Clayton*, RL-0008, for the proposition that shareholders could use NAFTA Article 1116 to assert "a direct loss or damage ... where the disputing State wrongfully expropriates the shareholders' ownership interests – whether directly through an expropriation of the shares or indirectly by expropriating the enterprise as a whole").

<sup>137</sup> *See* Notice of Intent, p. 4; Notice of Arbitration, ¶¶ 75-77.

<sup>138</sup> *See* Partial Dissenting Opinion, ¶ 28.

<sup>139</sup> Respondent's Preliminary Objections Memorial ¶¶ 38, 56

10.16.1(b) (to claim “*on behalf of*” an enterprise for the enterprise’s asserted injury). In either case, the claimant must submit a waiver of local proceedings by the entity on whose “behalf” the claim is brought<sup>140</sup> – and in either case, any damages awarded must be paid to that same entity, *i.e.*, the entity on whose “behalf” the claim is brought.<sup>141</sup> But these distinctions flow logically from the notion of bringing a claim “on behalf of” (*i.e.*, “in the shoes of,” or representing, or for the benefit of) a particular entity.<sup>142</sup> They do not themselves confirm the intended *scope* of any given path.

140. The Tribunal acknowledges Respondent’s argument that permitting a claimant to bring a reflective loss claim under Article 10.16.1(a), while not requiring it to file an enterprise waiver as it would have to do had it proceeded instead under Article 10.16.1(b), could result in complications. For example, the enterprise could pursue local remedies for its direct losses, while its upstream shareholders could pursue claims of treaty breach related to the same challenged measures.<sup>143</sup> This creates some risk of inconsistent rulings on common issues of fact or local law, and some possibility of duplicative victories that could result in double recovery. The Tribunal acknowledges these policy concerns, but as discussed further below, its role is not to determine how best to address policy concerns, only to determine what the Contracting State Parties themselves have provided.

141. With respect to waivers, for example, the DR-CAFTA Parties easily could have required dual waivers for any claims under Article 10.16.1(a) involving a local enterprise; that is

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<sup>140</sup> DR-CAFTA, Article 10.18.2 (CL-0001-ENG).

<sup>141</sup> DR-CAFTA, Article 10.26.2 (CL-0001-ENG).

<sup>142</sup> In particular, if a claim is brought “on behalf of” a local entity – meaning that the claimant is representing its interests rather than the claimant’s own – it stands to reason that any recovery for the enterprise’s losses must be to the enterprise itself. An upstream shareholder could not bypass the local enterprise, whom it purports to represent, to seize the benefits of that representation solely for itself. As a corollary, however, if the claimant brings a claim only “on its own behalf,” then any recovery could only be to the extent of its own proven losses, which may be both harder to prove and lower in amount than the enterprise’s own direct losses.

<sup>143</sup> The Tribunal does not address in this decision the separate question of whether, and under what circumstances, an upstream investor might be able to invoke Article 10.16.1(a) to claim for its own injury on the basis of a State’s breach of an investment agreement with the local enterprise. The Partial Dissenting Opinion suggests the majority would allow such claims (*see* Partial Dissenting Opinion, ¶ 12), but to be clear, the majority decision does not purport to reach this question, because the issue of shareholder standing with respect to breaches of local enterprise contracts was never even argued by the Parties in this case.

precisely what the NAFTA Parties did for claims brought under the fairly similar NAFTA Article 1116, notwithstanding NAFTA's similar structural distinction between Article 1116 (claims asserted on a claimant's "own behalf") and Article 1117 (claims asserted "on behalf of an enterprise").<sup>144</sup> By contrast, the DR-CAFTA Parties chose *not* to require double waivers under Article 10.16.1(a). There is no indication in the Treaty text that they did this to adopt a different approach to reflective loss claims; to the contrary, each of the NAFTA Parties has objected to reflective loss claims being asserted under Article 1116, notwithstanding NAFTA's requirement of enterprise waivers for Article 1116 claims. It is therefore difficult for the Tribunal to conclude, simply from DR-CAFTA's omission of the NAFTA double-waiver requirement for claims brought on a claimant's "own behalf," that this was done to clarify an intended bar on bringing reflective loss claims. There are other far more direct ways the State Parties could have provided such a clarification within the Treaty's express text.

142. Finally, Annex 10-E of DR-CAFTA does not provide helpful context to resolve the intended scope of Article 10.16.1(a). Respondent argues that allowing Claimants to pursue reflective loss claims under that Article would circumvent Annex 10-E's bar on a U.S. claimant's pursuing treaty claims (such as "full protection and security"), in circumstances where its local enterprise already has pursued related local remedies (for example, protesting the failures of local policing).<sup>145</sup> This argument fails, for two reasons. First, Annex 10-E by its plain terms attaches only where the local court action already has "alleged *that breach of an obligation under Section A,*" *i.e.*, the same alleged Treaty breach as the U.S. investor seeks to assert under DR-CAFTA.<sup>146</sup> This circumstance could arise in

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<sup>144</sup> NAFTA, Article 1121.1 ("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 ...."). CL-0034-ENG (emphasis added).

<sup>145</sup> See Respondent's Preliminary Objections Memorial ¶ 78 (contending that "[h]ad Claimants initiated this Arbitration on behalf of Exmingua under Article 10.16.1(b) of CAFTA-DR, they would be precluded from bringing their full protection and security claim again in this Arbitration under Annex 10-E of CAFTA-DR").

<sup>146</sup> DR-CAFTA, Annex 10-E(1) (CL-0001-ENG) (emphasis added). See *Corona*, ¶ 269 (RL-0002-ENG) (noting that DR-CAFTA's "fork in the road" provision, Article 10.18.4, and the associated Annex-E for U.S. investors, "appl[y] only to claims of an alleged breach of an obligation under Section A of Chapter 10" asserted in local



some DR-CAFTA countries, where international treaties have direct effect and can give rise to private rights of action under local law.<sup>147</sup>

143. Second, and more fundamentally for present purposes, Annex 10-E makes no distinction between treaty claims brought under Article 10.16.1(a) and those brought under Article 10.16.1(b): in either case, the impediment to filing a treaty claim (such as it is) applies on the exact same terms.<sup>148</sup> It is therefore not logically possible to read Annex 10-E as providing any additional context to elucidate what distinctions may have been intended between claims being brought through one path or the other. Nothing in Annex 10-E helps illustrate the intended scheme in Article 10.16.1, or explains or limits in particular the scope of claims that a claimant might bring under Article 10.16.1(a), “on its own behalf,” for the “loss or damage” that it has “incurred ... by reason of, or arising out of, that breach.”
144. In short, the majority of the Tribunal is unable to find anything in the Treaty text itself, including the context of various provisions related to Article 10.16.1, which would impose a limitation of “direct” losses, or an exclusion for derivative or reflective loss, onto Article 10.16.1(a)’s open language about a claimant pursuing its own losses on its own behalf.

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proceedings). As in the *Nissan* case, there is therefore no need for this Tribunal to take any position in the doctrinal debate about fork-in-the-road clauses, as to whether a “triple identity” test or a “fundamental basis” test might be more appropriate in the absence of expressly defined treaty terms. The use of specific defined terms (in DR-CAFTA, the requirement of an asserted “breach of an obligation under Section A”) “leaves no textual ambiguity for the Tribunal to resolve in this fashion.” *Nissan*, ¶ 215 (CL-0078-ENG).

<sup>147</sup> See *Corona*, ¶ 269 (RL-0002-ENG); cf. *Nissan*, ¶ 216 (CL-0078-ENG) (noting that for other “national systems [that] do not provide a judicial or administrative avenue to pursue alleged treaty breaches, a treaty provision barring international arbitration only where proceedings in those States have alleged a treaty breach would have little practical effect”).

<sup>148</sup> DR-CAFTA, Annex 10-E.1 (CL-0001-ENG) (“An investor of the United States may not submit to arbitration ... a claim that [another Treaty Party] 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 ... under Article 10.16.1(b)*, 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 ....”) (emphasis added).

iii. *Effet utile*

145. Nonetheless, the Tribunal takes seriously Respondent’s arguments about *effet utile*, namely that whatever the strict textual interpretation of Articles 10.16.1(a) and (b) might be, the intent of the Contracting State Parties could not have been to make the first path so broad as to render the second path effectively meaningless. Respondent argues that if a controlling shareholder could pursue derivative claims under Article 10.16.1(a), without having to file an enterprise waiver and without having to channel any financial recovery through the enterprise itself, there is no reason it would *ever* invoke Article 10.16.1(b), which imposes both of these requirements.<sup>149</sup> The Tribunal notes that in the NAFTA context, the *Clayton* tribunal was troubled by a similar argument, observing that permitting reflective loss claims under NAFTA Article 1116 “would raise questions about the relationship between” that Article and NAFTA Article 1117, “*perhaps* rendering 1117 inutile.”<sup>150</sup> The *Clayton* tribunal did not further analyze this possibility.
146. With all due respect to the *Clayton* tribunal, the “perhaps” in its reasoning is not sufficient to persuade this Tribunal that Article 10.16.1(b) would be rendered entirely useless, if Article 10.16.1(a)’s requirement that a claimant have “incurred loss or damage” is interpreted to mean just what it says, without inferring a non-textual limitation of only “direct” loss. First, as the claimants in *Clayton* also observed, if the local enterprise remained a going concern – *i.e.*, it had not been subject to expropriation but only to lesser harm – then the controlling shareholder might well view the alternative path, of bringing a claim “on behalf of” the enterprise and allowing an award directly to the enterprise, to be

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<sup>149</sup> The Partial Dissenting Opinion chides the majority for addressing the *effet utile* argument “from the perspective of the putative claimants,” to determine if a rational claimant ever would pursue Article 10.16.1(b) if Article 10.16.1(a) were construed as available in the alternative. Partial Dissenting Opinion ¶ 13. The majority notes that this was largely the way the argument was framed in this case. *See, e.g.*, Respondent’s Preliminary Objections Reply ¶ 71 (“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.”) (quoting Z. Douglas, *The International Law of Investment Claims* (2009), ¶ 848 (RL-0068-ENG)); Transcript of 16 December 2019 Hearing, p. 100 (Prof. Douglas: “[W]hen would any Majority Shareholder bring a claim under (b)? Doesn’t it read out the mechanism envisaged by (b) because no one in their right mind would ever go down that route if they had the option?”).

<sup>150</sup> *Clayton, Award on Damages*, ¶ 372 (CL-0070-ENG) (emphasis added).

“a more suitable option” to restore the health of the weakened operation.<sup>151</sup> Certainly, this would be the case if restitution is sought, since that remedy is open only to the enterprise under Article 10.16.1(b), not to its shareholders under Article 10.16.1(a).<sup>152</sup> But even if monetary damages are sought (as most often in these cases), there is no reason to assume that a controlling shareholder who prefers to continue operating the local business necessarily would bypass it, in order to hijack an award to its own account.

147. This is particularly the case where the controlling shareholder does not hold all of the enterprise’s shares. By pursuing the Article 10.16.1(b) path, the controlling shareholder could provide the going-concern enterprise with a potential route to far greater damages recovery, and therefore greater restored health, precisely because the claim could be brought for the enterprise’s full injury regardless of its upstream shareholding structure. Thus, for the hypothetical 51%-49% joint venture discussed above, the 51% shareholder could bring a claim “on behalf of” the joint venture under Article 10.16.1(b), seeking damages payable to the enterprise for 100% of the enterprise’s losses, regardless of the nationality of the minority shareholder. By contrast, the same shareholder proceeding on “its own behalf” under Article 10.16.1(a) *at best* could seek only 51% of the damages – and most likely would face strong objections even to a claim for that amount, on the basis that in a “but for” world, the enterprise as a going concern would not have distributed all of its earnings upstream to its shareholders, but instead would have used substantial portions for other purposes, including paying off potential debts, covering additional costs, and the like.

148. This latter point introduces yet another limitation of the *effet utile* theory, which is that there can be significant hurdles, as a matter of causation and proof, to demonstrating upstream injury in consequence of downstream harm. Reflective loss claims can be quite

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<sup>151</sup> Clayton, *Award on Damages*, ¶ 358 (CL-0070-ENG). While the Partial Dissenting Opinion criticizes the majority for assuming that the Treaty intended to provide “the broadest possible flexibility” to controlling shareholders, *see* Partial Dissenting Opinion, ¶ 14, the majority makes no such assumption. It simply concludes that the structure of Article 10.16.1 of the Treaty gives a majority shareholder a choice, whether that choice is broad or otherwise.

<sup>152</sup> DR-CAFTA, Article 10.26.2(a) (CL-0001-ENG).

difficult to prove at the damages stage.<sup>153</sup> The Tribunal can imagine various scenarios where a controlling shareholder might prefer not to have to grapple with these additional hurdles, or risk a skeptical tribunal, when it alternatively could bring a claim “on behalf of” the local enterprise and more cleanly seek full recovery for the enterprise of all of the enterprise’s losses.

149. The point of this discussion is not to determine which path ultimately would prove more appealing to controlling shareholders in different situations and with different objectives. That could depend on a number of variables. Rather, the point is that for a treaty interpretation to rest on an *effet utile* conclusion, beyond simply construing the ordinary meaning of treaty terms in their context, a tribunal must be convinced that the alternative interpretation would leave a treaty provision with *no effective meaning at all*. It is not enough to say that the textual interpretation would make path “a” (an Article 10.16.1(a) claim) potentially more attractive than it otherwise might be under a different interpretation; the Tribunal would have to conclude that path “b” (an Article 10.16.1(b) claim) would be left to serve no purpose at all. The *Clayton* tribunal did not make a case for such a finding under NAFTA (only speculating that “perhaps” it could be so), and this Tribunal (by majority) is unable to make such a finding under DR-CAFTA.

*iv. Object and Purpose*

150. Having thus failed to find a limitation on Article 10.16.1(a) claims either in the Treaty’s text or by virtue of the *effet utile* principle, the next step in a VCLT analysis is to determine if the Treaty’s “object and purpose” nonetheless dictates such a limitation.<sup>154</sup> On that question, the Tribunal agrees with the *Clayton* tribunal (which considered a similar question in the NAFTA context) that appeals to the object and purpose of the Treaty as a

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<sup>153</sup> For an example of the additional hurdles, see *Nykomb*, p. 39 (CL-0073-ENG) (explaining that in a but-for world where the enterprise would have received additional income, “it is clear that the higher payments ... 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.”).

<sup>154</sup> VCLT, Article 31(1).

whole are not “particularly helpful” in interpretation of the relevant provisions.<sup>155</sup> It is certainly true, as Claimants emphasize, that the DR-CAFTA Preamble refers to a goal to “ENSURE a predictable commercial framework for business planning and investment,”<sup>156</sup> and that its Article 1.2 lists as “Objectives,” *inter alia*, to “substantially increase investment opportunities in the territories of the Parties.”<sup>157</sup> But that observation cannot be the end of the story. Every treaty creates a varied and nuanced balance between extending protections and limiting or conditioning those protections. It would be too facile to simply advert to the general notion of investor protection as a catch-all tool (or a proverbial finger-on-the-scale) to resolve all disputed issues regarding the extent, limits or conditions on protections.

151. Nor can the interpretative question be resolved simply by observing, as Claimants do, that Respondent’s reading of Article 10.16.1(a) would leave minority shareholders “entirely unprotected,” unable ever to bring claims for the diminished value of their shares attributable to wrongful State conduct.<sup>158</sup> The Tribunal agrees that this would be the *effect* of interpreting that Article to exclude reflective loss claims, since minority shareholders – unlike controlling shareholders – could not pursue Article 10.16.1(b)’s alternative path of bringing claims “on behalf of” the local enterprise. Accordingly, in the hypothetical joint venture context described above, the 49% shareholder would be dependent on the 51% shareholder to protect its interest, either by initiating an investment treaty claim on the enterprise’s behalf (if the 51% shareholder has qualifying nationality under a treaty that provides such an option), or by pursuing local remedies on behalf of the enterprise.<sup>159</sup> Claimants are also correct that such an interpretation, which would leave minority

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<sup>155</sup> Clayton, *Award on Damages*, ¶ 375 (CL-0070-ENG).

<sup>156</sup> DR-CAFTA, Preamble (CL-0001-ENG).

<sup>157</sup> DR-CAFTA, Article 1.2.1(d) (CL-0001-ENG).

<sup>158</sup> Claimants’ Preliminary Objections Counter-Memorial ¶ 29.

<sup>159</sup> The *GAMI* tribunal, which was faced with a question under NAFTA about the rights of a minority shareholder, noted that the majority shareholders who were “Mexican nationals and do not have standing under Chapter 11 of NAFTA,” might have had “reasons of their own ... not to cause [the local company] to seek relief before the Mexican courts. In its (They might simply have been defeatists. Or they might have made their separate peace with the Government and abandoned any complaint in return for offsetting benefits.)” *GAMI*, ¶¶ 37, 38(B) (CL-0036-ENG).

shareholders with treaty remedies only over direct assaults on shareholder rights or in the event of expropriation, would constitute a more significant restriction than other tribunals have been willing to read into other investment treaties.<sup>160</sup> Claimants argue that this could not have been the object and purpose of the DR-CAFTA Parties. At the same time, Respondent is correct that under customary international law, developed in the context of diplomatic protection, minority shareholders did not traditionally have “reflective loss” protections either. It is thus entirely possible that State Parties to the earliest investment treaties did not consciously plan to depart from these principles by providing minority shareholders with direct avenues to assert claims for derivative injury – in other words, that they did not foresee the how tribunals ultimately would interpret their chosen treaty text.

152. At the end of the day, neither of these interesting arguments about the history of the jurisprudence, or the relationship between customary international law and investment treaty law, helps to resolve the core interpretative question the Tribunal faces here. That question is what the DR-CAFTA Parties, presumably with full knowledge of all that had gone before under prior treaties, *actually decided* to do in DR-CAFTA, by virtue of adopting *the particular Treaty text* that they did. The Tribunal remains bound to answer that question using the VCLT interpretative tools available to it.
153. Both Parties identify other negative consequences arising from the other’s interpretation. For Claimants, Respondent’s interpretation would force controlling shareholders to seek higher damages from States by pursuing Article 10.16.1(b) claims on behalf of their local enterprises, including additional amounts that might be attributable to investments by minority shareholders without treaty rights (such as host State nationals). Claimants correctly observe that Respondent previously objected to precisely such a scenario in the *RDC* case.<sup>161</sup> Respondent, for its part, emphasizes that allowing shareholders to assert reflective loss claims could bypass creditors whose claims otherwise would have to be satisfied if awards were paid to the enterprise itself; Respondent also notes the risk of

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<sup>160</sup> Claimants’ Preliminary Objections Counter-Memorial ¶¶ 6, 37.

<sup>161</sup> See, e.g., Claimants’ Preliminary Objections Rejoinder ¶¶ 15, 22, 53, 59.

double recovery if the local enterprise prevails in local law claims, while individual shareholders prevail in treaty claims.<sup>162</sup> Claimants respond that DR-CAFTA is not intended as a means to help creditors collect from local enterprises; that any creditor claims would be factored into a proper reflective loss damages analysis to reduce recovery by upstream shareholders; and that tribunals have various means to guard against double recovery without improperly declining to exercise jurisdiction.<sup>163</sup>

154. Ultimately, all of these points are valuable observations from a system design perspective, and no doubt are ones that States can (and should) take into account in considering which avenues of relief they wish to offer investors, and which preconditions to relief they wish to impose. But weighing these competing policy concerns is for States, not arbitrators. In the absence of articulated references to these concerns by the State Parties in a form that the VCLT accepts as probative evidence for treaty interpretation – such as contemporaneous statements in the official *travaux préparatoires* or a subsequent agreement or practice regarding treaty interpretation – it would not be appropriate for arbitrators to use their own views of desirable policy to help guide them (one way or the other) to an interpretation either of the existing text, or of the object and purpose of the DR-CAFTA Parties in agreeing to that text.

v. *Preparatory works; subsequent agreement and practice*

155. Neither Party has submitted excerpts from the *travaux préparatoires*, the official record of DR-CAFTA negotiations, to shed light on the evolution of the relevant terms or communications between the State Parties regarding their respective or shared interpretation and intent. Respondent does invoke the U.S. “Statement of Administrative Action” presented in 1993 to the U.S. Congress in connection with the ratification process for NAFTA. This statement referred to NAFTA Article 1116 as involving “allegations of direct injury to an investor” and Article 1117 as involving “allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by an

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<sup>162</sup> See, e.g., Respondent’s Preliminary Objections Memorial ¶¶ 56, 71.

<sup>163</sup> See e.g., Claimants’ Preliminary Objections Counter-Memorial ¶¶ 49, 70.

investor.”<sup>164</sup> As noted above, however, the words “direct” and “indirect” were not included either in the NAFTA text itself, or in the subsequent DR-CAFTA text, notwithstanding considerable debate about the issue in the interim. More to the point, a single State’s interpretation of a treaty, circulated for internal implementation purposes rather than as a negotiating document shared with other State Parties, does not qualify as “preparatory work” of the treaty within the meaning of VCLT Article 32 (much less as preparatory work of a later treaty involving a broader set of State Parties). The Tribunal agrees with the *Sempra* tribunal that “[t]he view of one State does not make international law, even less so when such a view is ascertained only by indirect means of interpretation .... What is relevant is the intention which [all] parties had in signing” a particular treaty.<sup>165</sup>

156. Nor has the Tribunal been shown anything that could qualify under VCLT Article 31(3) either as a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,” or “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”<sup>166</sup> For both of these concepts, the predicate requirement is an agreement or practice by all of the parties to a particular treaty, not some subset of the treaty parties.<sup>167</sup> The Tribunal understands why the *Clayton* tribunal considered it important to acknowledge the “consistent subsequent practice of NAFTA Parties in their submissions to investor-State tribunals,”<sup>168</sup> and why that tribunal found that this “subsequent practice militates in favour of adopting Respondent’s position on this issue, although only analyzing subsequent

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<sup>164</sup> Respondent’s Preliminary Objections Reply ¶ 65 (citing RL-0070-ENG).

<sup>165</sup> *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 385; see also *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction, 22 December 2015, ¶ 90.

<sup>166</sup> VCLT, Article 31(2).

<sup>167</sup> *Eskosol S.p.A. in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy’s Request for Immediate Termination and Italy’s Jurisdictional Objection Based on Applicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019, ¶ 220 (“there is a significant distinction in international law between interpretations agreed by *all* Contracting Parties to a multilateral treaty, and those offered unilaterally by *only a subset* of such Parties. This point is firmly established by ... the ILC’s 2001 Guide to Practice on Reservations to Treaties, which distinguishes between “interpretative declarations” made unilaterally by one or more States or international organizations and those accepted by *all* signatories to a particular treaty.”).

<sup>168</sup> *Clayton*, Award on Damages, ¶ 376 (CL-0070-ENG).



practices does not replace the primary rule of interpretation of Article 31(1).”<sup>169</sup> The Tribunal further agrees with the *Clayton* tribunal that the availability of a formal treaty mechanism for authoritative joint interpretations, such as through the Free Trade Commission mechanism in NAFTA or DR-CAFTA,<sup>170</sup> is not the sole avenue by which States can express their mutual interpretation of a treaty.<sup>171</sup> VCLT Article 31(3) allows for consideration of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its application,” and a demonstration that *all* the State Parties to a particular treaty had expressed a common understanding, albeit through separate submissions in separate cases, could be compelling evidence of subsequent practice. In the case of DR-CAFTA, however – unlike NAFTA, addressed by the *Clayton* tribunal – there has not yet been any unanimous expression of views about the scope and implications of Article 10.16.1(a).

### C. Conclusion

157. The broader conclusion of this VCLT interpretative analysis is this: while the Tribunal accepts there may be a range of potential consequences of the Article 10.16.1(a) text, which contains no limitations on the nature or proximity of “losses” a claimant can pursue, it is for the States themselves to decide whether they are comfortable with this outcome. The old adage applies here, that States should “say what they mean and mean what they say.” The DR-CAFTA States were undoubtedly aware, when they crafted the particular

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<sup>169</sup> *Clayton, Award on Damages*, ¶ 379 (CL-0070-ENG).

<sup>170</sup> See DR-CAFTA, Article 10.22.3 (CL-0001-ENG) (“A decision of the Commission declaring its interpretation of a provision of this Agreement under Article 19.1.3(c) (The Free Trade Commission) shall be binding on a tribunal established under this Section, and any decision or award issued by the tribunal must be consistent with that decision.”).

<sup>171</sup> *Clayton, Award on Damages*, ¶¶ 377, 378 (CL-0070-ENG) (“the Tribunal is not convinced by the Investors’ argument that the power of the FTS to make authoritative interpretations of NAFTA replaces the rule in Article 31(3)(b) of the VCLT that ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ shall be taken into account ‘together with the context’. The NAFTA Parties have an option to make a binding interpretation under Article 1131(2) but the fact that they have not done so means that treaty interpretation simply follows the normal interpretative rules .... In this regard, the Tribunal notes that the commentary to the ILC draft conclusions on ‘Subsequent agreements and subsequent practice in relation to the implementation of treaties’ includes ‘statements in the course of a legal dispute’ as potentially relevant subsequent practice of States for the purposes of interpretation.”).

text in this Treaty, of how various investment tribunals had interpreted NAFTA Articles 1116 and 1117, including in the context of reflective loss claims. If this was the historical backdrop against which they were working, DR-CAFTA provided an opportunity to express their intentions clearly on the issue, either in the Treaty text or in the *travaux préparatoires*.<sup>172</sup> The State Parties clearly knew how to express their views on issues that had arisen under other investment treaties, as they did (for example) in a series of footnotes inserted within the definition of investment.<sup>173</sup> But with respect to Article 10.16.1(a), the text they adopted contains no language suggesting that it be interpreted other than through the ordinary meaning of its terms – and the particular terms adopted are not consistent with barring a claimant from pursuing “on its own behalf” a claim for losses it “incurred,” just because those losses may have been incurred indirectly rather than directly. If this was not what the State Parties intended, they still may clarify this through the recognized mechanisms for doing so, including issuance of a joint interpretation. But unless and until they do so, tribunals interpreting DR-CAFTA must work with the tools they have, rather than ascribing to the State Parties particular intentions which (however potentially sound from a policy perspective) are not revealed through recognized VCLT analysis.

158. In this regard, the Tribunal refers to the statement of the *Nissan v. India* tribunal, in the context of a different treaty interpretation exercise:

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<sup>172</sup> In the view of the majority, this is the primary difference separating its conclusions from those of the eloquent dissent. The dissent considers that “what is expressed in the treaty is that the State Parties were motivated to ensure that controlling shareholders could not bring a claim in their own right and at the same time direct their company to pursue other remedies in different fora (Article 10.18). What is also expressed in the treaty is that the State Parties were motivated to ensure that there would be no risk of double recovery and that the rights of creditors of the company would not be undermined or extinguished as result of paying damages directly to shareholders rather than through the company (Article 10.26).” Partial Dissenting Opinion, ¶ 14 (emphasis in original). The majority considers that these policy objectives certainly *could have been expressed* in the Treaty text, including through a clear formulation in Article 10.16.1(a) that limited the types of losses for which a claimant might claim – but for whatever reason, they were not so expressed.

<sup>173</sup> See, e.g., DR-CAFTA Article 10.28 & nn. 8-9 (clarifying that despite the definition of “investment” including debt instruments as among the “[f]orms that an investment may take,” “[s]ome forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt are less likely to have such characteristics,” and “claims to payment that are immediately due and result from the sale of goods or services are not investments”); see also n. 11 (clarifying that despite the definition of “investment” including “rights conferred pursuant to domestic law,” the term “does not include an order or judgment entered in a judicial or administrative action”).

States are free to adopt whatever treaty text they prefer, including text that is likely to address common situations as well as text addressing circumstances that are unlikely to arise. States are also free to mutually amend prior treaties, if they conclude that the text to which they had agreed – as interpreted through a VCLT analysis – is proving ill-suited to their common objectives. Alternatively, States may seek to issue joint interpretations with prospective effect, to clarify that they had actually intended a meaning beyond what the ordinary meaning of the treaty text might suggest.

However, absent State invocation of such tools to clarify on a mutual basis their intentions for future cases, an arbitral tribunal must proceed on the basis of a VCLT analysis of the *existing* text to which they have agreed. It is not within a tribunal's remit to override the drafting choices evident in a particular treaty, in order to substitute a different test that does not flow from the ordinary meaning of that text in the context of surrounding provisions. Otherwise stated, the task of a tribunal is not to make policy choices about the preferable design of an investment arbitration system, but rather to respect and enforce the choices already made by the Contracting Parties, to the extent these can be divined through the interpretative tools that the VCLT provides. To the extent Contracting State Parties find themselves disappointed by such interpretations, they retain various tools as noted above to address this situation. But they cannot expect an arbitral tribunal to undertake *sub rosa* what they have not undertaken themselves, namely an effort effectively to amend the treaty by ignoring existing text and instead substituting a different approach that the current text cannot support.<sup>174</sup>

159. For these reasons, the Tribunal, by a majority, denies Respondent's first set of Preliminary Objections, which in common address the availability of Article 10.16.1(a) for claims of indirect loss. At the same time, the Tribunal also emphasizes that it is acutely alert to the causation and quantum implications of claims for indirect loss, including the additional hurdles of proof that a claimant pursuing such a claim ultimately may face. The Tribunal thus agrees with prior NAFTA tribunals that it is important to be attuned to the distinction between damages incurred directly by a local enterprise and those said to have been incurred indirectly by an upstream investor,<sup>175</sup> including the very real possibility that not all of the former may be equated to the latter.<sup>176</sup> At the end of the day, whether these

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<sup>174</sup> *Nissan*, ¶¶ 216, 217 (CL-0078-ENG).

<sup>175</sup> *See, e.g., Pope & Talbot, Award*, ¶ 80 (CL-0028-ENG) ("It remains of course for the Investor to prove that loss or damage was caused to its interest, and that it was causally connected to the breach complained of."); *UPS, Award* ¶ 35 (CL-0037-ENG) (distinguishing between its jurisdictional finding and a potential damages question "of how much of UPS Canada's losses flow through to UPS," while seemingly assuming the latter to be straightforward in a situation of only one shareholder).

<sup>176</sup> The Partial Dissenting Opinion suggests the majority's ruling would allow shareholders to pursue recovery of their own losses, while "avoid[ing] satisfying the legitimate claims of the creditors" of the local enterprise. Partial Dissenting Opinion, ¶¶ 8-9. To the contrary, the majority has made clear that a proper causation and quantum

particular Claimants will be able to demonstrate not only that Respondent breached a DR-CAFTA obligation, but also that *they in particular* incurred cognizable “loss or damage by reason of, or arising out of” that breach, is a matter for proof. At the Preliminary Objections stage, it suffices that Claimants have so alleged, and the Treaty does not bar them at the outset, as a matter of law, from seeking to prove their case.

160. Finally, the Tribunal also defers for the merits Claimants’ suggestion that their claim potentially could be seen as one for *direct damages* rather than reflective loss, on the same theory the *Clayton* tribunal adopted to award damages under NAFTA Article 1116 despite finding “in principle” that this article does not allow reflective loss claims.<sup>177</sup> In *Clayton*, at the liability stage, the tribunal found that the local enterprise (Bilcon) should have been given “an opportunity to voice its objections” on an environmental impact issue, that Bilcon was “denied a fair opportunity to know the case it had to meet,” and accordingly that “the Investors and their investment were not afforded a fair opportunity to have the specifics of [their] case considered, assessed and decided in accordance with applicable laws.”<sup>178</sup> At the damages stage, Canada argued that the particular way the claimants framed their damages case was “impermissible” under NAFTA Article 1116.<sup>179</sup> The Tribunal concluded “in principle” that NAFTA Article 1116 does not allow reflective loss claims,<sup>180</sup> but nonetheless awarded the claimants damages under that Article, on the theory that the relevant “loss of opportunity” (somewhat reframed from the earlier description) had been for the upstream shareholders rather than the enterprise itself.<sup>181</sup> Based on this rather broad

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analysis would *have to factor in* creditor claims, which take priority, before there can be any determination of *net* losses (if any) that actually were incurred by shareholders. Because shareholders in these circumstances do not recover any proceeds that properly were due to creditors, there is thus no issue of the shareholders themselves (much less a tribunal) “avoid[ing] satisfying” creditor claims. Creditors of the local enterprise retain all rights and remedies they otherwise had against local enterprise.

<sup>177</sup> See Claimants’ Preliminary Objections Rejoinder ¶ 33.

<sup>178</sup> *Clayton*, Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 585, 590, 603 (CL-0088-ENG).

<sup>179</sup> *Clayton*, Award on Damages, ¶¶ 70, 322 (CL-0070-ENG).

<sup>180</sup> *Clayton*, Award on Damages, ¶ 389 (CL-0070-ENG).

<sup>181</sup> In its damages decision, the *Clayton* tribunal described its earlier liability findings as about a loss of “opportunity to develop and submit the ... Project for approval,” which was “entirely an opportunity of the Clayton Group in New Jersey”; stated that “[t]he fact that the Claytons used a local enterprise as an instrument for pursuing their opportunity ... does not turn that opportunity into Bilcon of Nova Scotia’s opportunity,” since the local enterprise “was no more than a conduit to facilitate the Clayton’s operations.” It then concluded that “the *opportunity to invest*

framing – now described as about an “opportunity to invest” – the *Clayton* tribunal concluded that “compensation is owed directly to the Investors pursuant to Article 1116. It is not precluded by the prohibition against awarding ‘reflective loss’.”<sup>182</sup>

161. Claimants in this case suggest that the same broad framing would allow them to proceed under DR-CAFTA even if the Tribunal were to adopt the *Clayton* reasoning about reflective loss, because “[l]ike the claimants in *Clayton*, Claimants here have lost their opportunity to develop the Tambor project,” which was an opportunity of theirs rather than of Exmingua.<sup>183</sup> The Tribunal sees no need at this time to address this alternative theory of a direct rather than an indirect injury, given its ultimate findings regarding interpretation of DR-CAFTA Article 10.16.1(a).

## **(2) ADMISSIBILITY OF CLAIMANTS’ “UNNOTIFIED” MFN CLAIM**

### **a. Respondent’s Position**

162. Respondent states that Claimants’ claim for breach of DR-CAFTA Article 10.4 (Most-Favored-Nation Treatment) must be dismissed because Claimants did not include this alleged breach in their Notice of Intent. In support of this objection, Respondent invokes the ordinary meaning and the object and purpose of DR-CAFTA Article 10.16.2, under a VCLT Article 31 analysis, and prior decisions of certain investment arbitral tribunals.<sup>184</sup>

#### *A. The characterization of Claimants’ MFN claim*

163. Respondent points out that Claimants added this claim only in their Notice of Arbitration, where they argued for the first time (as they themselves have admitted) that Exmingua’s

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in a quarry and a marine terminal, which was denied by the Respondent’s unlawful conduct, was an opportunity of the Investors and not an opportunity of Bilcon of Nova Scotia.” *Clayton, Award on Damages*, ¶¶ 392, 394, 396 (CL-0070-ENG) (emphasis added).

<sup>182</sup> *Clayton, Award on Damages*, ¶ 396 (CL-0070-ENG).

<sup>183</sup> Claimants’ Preliminary Objections Rejoinder ¶ 33.

<sup>184</sup> Respondent’s Preliminary Objections Memorial ¶¶ 86-105 and Respondent’s Preliminary Objections Reply ¶¶ 121-157.

projects received less favorable treatment than Respondent accorded Escobal, a silver mine operated by the Guatemalan subsidiary of a Canadian company.<sup>185</sup> In the Notice of Intent, by contrast, Claimants referred exclusively to their National Treatment claim, arguing that the treatment that Respondent accorded Exmingua's projects was less favorable than that accorded to "two projects owned by Guatemalan companies."<sup>186</sup>

164. According to Respondent, this claim must be precluded even if the Tribunal were to accept Claimants' current argument that the relevant judicial decision which provides the legal and factual basis for their MFN claim is the Constitutional Court's ruling of September 3, 2018 (which post-dated the Notice of Intent), rather than the Supreme Court's *Escobal* decision of September 2017 (which predated that Notice). This is because, regardless of whether Claimants' MFN claim is considered an "additional claim" under ICSID Arbitration Rule 40, DR-CAFTA prevails over any contrary ICSID Rules, and DR-CAFTA requires Claimants to send a subsequent notice of intent for any new claim, and then allow several months to elapse before bringing such a claim under Article 10.16.3 of DR-CAFTA. Admittedly, Claimants did neither.<sup>187</sup>

B. *The applicable legal standards*

165. *First*, Respondent asserts that the ordinary meaning of this provision requires a notice of a claim to be given at least 90 days before it may be submitted to arbitration. The notice of intent must provide not merely general information, but must specify, "for each claim, the provision of [DR-CAFTA] . . . alleged to have been breached," "the legal and factual basis for each claim," and "the relief sought," among other elements. In Respondent's view, the term "shall" in Article 10.16.2 of DR-CAFTA, as opposed to "may" or "should" in other provisions (*e.g.*, Articles 10.15 and 10.16.1), indicates the DR-CAFTA Parties' deliberate choice to make the notice of intent mandatory. Further, the term "each" means "every one

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<sup>185</sup> Respondent's Preliminary Objections Reply ¶ 122.

<sup>186</sup> Respondent's Preliminary Objections Reply ¶ 126 (quoting from Notice of Intent, ¶ 3).

<sup>187</sup> Tr-E, 16 December 2019 Hearing, pp. 52:5-53:16; 57:17-58:14, 178:2-187:11.

of two or more people or things, regarded and identified separately.”<sup>188</sup> Recasting the delivery of a notice of intent from a requirement to a discretionary or optional condition would ignore and effectively remove these words, contrary to the principle of *effet utile*. Thus, only the claims properly identified in a notice of intent can be heard by an arbitral tribunal.

166. Respondent contends that the “context” on which Claimants rely to argue otherwise is of no avail. As explained by the International Law Commission, the rules of interpretation must be applied as mutually reinforcing elements of a holistic exercise.<sup>189</sup> If anything, Respondent says, the context of Article 10.16.2 confirms its conclusion. When the State Parties intended to make the fulfillment of a condition discretionary, they used wording such as “should” rather than “shall”, which is used to make compliance mandatory.
167. *Second*, the object and purpose of the notice of intent provision also requires, according to Respondent, the dismissal of the MFN claim. The idea behind this notice requirement is to allow a respondent State to prepare and argue its defense, as the *Aven* tribunal aptly put it.<sup>190</sup> It also enables government officials to examine and possibly resolve the dispute through negotiation. Respondent asserts that contrary to Claimants’ allegations, it takes negotiations seriously. However, the negotiations in this case were subject to a confidentiality agreement and it is improper for Claimants to disclose any information concerning them.<sup>191</sup> Respondent also argues that the notice requirement serves to promote fairness, efficiency and transparency,<sup>192</sup> and these objectives would be frustrated if the requirement is not strictly enforced. So too would other goals set out in the Preamble of

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<sup>188</sup> Respondent’s Preliminary Objections Memorial ¶ 90 (quoting from the definition of “each” in Lexico.com, Oxford University Press, <https://www.lexico.com/en/definition/each>, RL-0030-ENG).

<sup>189</sup> Respondent’s Preliminary Objections Reply ¶ 133 (referring to the 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).

<sup>190</sup> Respondent’s Preliminary Objections Reply ¶ 144 (referring to *David R. Aven et. al. v. Republic of Costa Rica*, Case No. UNCT/15/3, Final Award, 18 September 2018 (hereinafter “*Aven*”), ¶346, RL-0031-120-ENG.).

<sup>191</sup> Respondent’s Preliminary Objections Reply ¶ 145.

<sup>192</sup> Respondent’s Preliminary Objections Memorial ¶ 95.

DR-CAFTA, such as friendship and cooperation among nations, the development and expansion of world trade and hemispheric integration.<sup>193</sup>

168. *Third*, Respondent submits that investment arbitration tribunals have dismissed claims for failure to meet the notice requirement under DR-CAFTA and similar treaties. Respondent refers to the *Pac Rim* tribunal, which explained that compliance with DR-CAFTA’s Article 10.16.2 notice requirement is mandatory,<sup>194</sup> and to the *Aven* tribunal, which declared a belated new claim to be inadmissible *in limine*.<sup>195</sup>
169. Contrary to Claimants’ allegations, Respondent says, in *Antoine Goetz* and *Burlington*, the tribunals did not dismiss unnotified claims because they were “unrelated” to the claims that had been notified; they dismissed them because they were not included in the relevant notices of intent.<sup>196</sup> So too did the tribunal in *Supervisión y Control* in respect of a number of unnotified claims, although it admitted others directly linked to the issues that had already been raised.<sup>197</sup> In any event, the provision governing notices under DR-CAFTA is stricter than the analogous provision under the Costa Rica–Spain BIT at issue in *Supervisión y Control*, which only required a claimant to give “[n]otice of any investment-related dispute” and not of each claim.<sup>198</sup> The DR-CAFTA language is also stricter than the

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<sup>193</sup> Respondent’s Preliminary Objections Reply ¶ 146.

<sup>194</sup> Respondent’s Preliminary Objections Memorial ¶ 97 (discussing *Pac Rim* ¶¶ 92-93, RL-0003-054-055).

<sup>195</sup> Respondent’s Preliminary Objections Reply ¶ 141 (discussing *Aven*, ¶346); *see also* Respondent’s Preliminary Objections Memorial ¶ 99.

<sup>196</sup> Respondent’s Preliminary Objections Reply ¶ 148 (discussing *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, (hereinafter “*Antoine Goetz*”) ¶¶ 90-93, RL-0035-001-002-ENG; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, (hereinafter “*Burlington, Decision on Jurisdiction*”) ¶¶ 308-309, 337-340, RL-0037-064-071-ENG).

<sup>197</sup> Respondent’s Preliminary Objections Reply ¶ 149 (discussing *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017 (hereinafter “*Supervisión y Control*”), ¶¶ 339-340, RL-0032-149-ENG.).

<sup>198</sup> Respondent’s Preliminary Objections Reply ¶ 150.



applicable investment treaties in *Tulip* and *Salini*, where tribunals adopted a so-called “flexible approach.”<sup>199</sup>

170. Respondent argues that the same can be said about the NAFTA cases cited by Claimants: *B-Mex*, *ADF*, and *Chemtura*.<sup>200</sup> The notice requirements under NAFTA are less stringent than those in DR-CAFTA, as NAFTA does not have the DR-CAFTA language requiring that a notice of intent include the treaty provisions alleged to have been breached and the legal and factual basis “for each claim.”<sup>201</sup> In addition, in *B-Mex* the shortcoming of the notice of intent (which consisted in failing to identify additional claimants) did not result in a subsequent expansion of the nature of the dispute; the new claimants’ claims were co-extensive with those already asserted in the notice.<sup>202</sup> *ADF* and *Chemtura*, on the other hand, involved completely different situations than the present one, where Claimants could and should have included in their notice the Supreme Court’s *Escobal* decision of September 2017, which provides a legal and factual basis for their MFN claim even prior to the later Constitutional Court decision.<sup>203</sup> Finally, *Al-Bahloul* is inapposite because it concerns a cooling-off period, not a failure to comply with a notice requirement, and the underlying facts are distinguishable from the present case, where Respondent demonstrated its willingness to discuss and settle the dispute before Claimants proceeded to

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<sup>199</sup> Respondent’s Preliminary Objections Reply ¶¶ 151-152 (citing *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 (hereinafter “*Tulip, Decision on Bifurcated Jurisdictional Issue*”), RL-0029-ENG; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, Decision on Jurisdiction, hereinafter “*Salini, Decision on Jurisdiction*,” RL-0036-ENG).

<sup>200</sup> Respondent’s Preliminary Objections Reply ¶ 153 (*Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, 2 August 2010, (hereinafter “*Chemtura*”) ¶¶ 103-104, CL-0087-ENG; *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019 (hereinafter “*B-Mex*”) ¶¶ 122-123, CL-0080-ENG/SPA; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 (hereinafter “*ADF*”) ¶ 127, CL-0081-ENG).

<sup>201</sup> Respondent’s Preliminary Objections Reply ¶¶ 138, 140, 153.

<sup>202</sup> Respondent’s Preliminary Objections Reply ¶ 140.

<sup>203</sup> Respondent’s Preliminary Objections Reply ¶¶ 139, 153.

arbitration.<sup>204</sup> In any event, tribunals in other cases (such as in *Rurelec*) have held that claimants must strictly comply also with cooling-off periods.<sup>205</sup>

**b. Claimants' Position**

171. Claimants contend that their MFN claim is admissible under DR-CAFTA Article 10.16.2 or, alternatively, as an ancillary claim under Rule 40 of the ICSID Arbitration Rules. They dispute Respondent's characterization of this claim and put forward two main arguments relating to the ordinary meaning and the object and purpose of Article 10.16.2. Claimants also discuss several decisions concerning notification of claims.<sup>206</sup>

*A. The characterization of Claimants' MFN claim*

172. Claimants state that Respondent's objection depends upon a mischaracterization of their MFN claim. The basis for this claim is not the Guatemalan Supreme Court's decision of September 2017 in the *Escobal* case, which briefly reinstated that project's mining license, but the Guatemalan Constitutional Court's decision of September 2018.

173. Claimants complain that, although Exmingua filed its appeal from the Supreme Court's decision more than one year before the *Escobal* appeal was filed, the Constitutional Court issued its decision on the *Escobal* appeal on September 3, 2018 (although the decision was to reject the appeal), while Exmingua's appeal still remains pending.<sup>207</sup> It is this disparate

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<sup>204</sup> Respondent's Preliminary Objections Reply ¶¶ 154-155 (discussing *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, (hereinafter "*Al-Bahloul*") ¶ 154, CL-0083-ENG.).

<sup>205</sup> Respondent's Preliminary Objections Reply ¶ 155 (discussing *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, ¶¶ 386, 388-390, RL-0102-144-145-ENG/SPA.).

<sup>206</sup> See generally Claimants' Preliminary Objections Counter-Memorial ¶¶ 82-103 and Claimants' Preliminary Objections Rejoinder ¶¶ 91-133.

<sup>207</sup> See also Tr-E, 16 December 2019 Hearing, pp. 224:1-225:2.

treatment that forms the basis for Claimants' MFN claim. Claimants deny that they "re-wr[o]te the factual basis for their MFN claim" in their Counter-Memorial.<sup>208</sup>

174. Claimants explain that they did not reference their MFN claim in the Notice of Intent because the specific facts giving rise to that claim did not exist at the time the Notice was submitted. The same happened in *Pope & Talbot*, yet the tribunal in that case had no problem finding liability in respect of a State measure that was launched more than three months after the claimant filed its notice of intent.<sup>209</sup> Moreover, Claimants emphasized that their Notice of Intent already generally discussed Respondent's discriminatory treatment of Exmingua, as compared with investments owned by others, which forms the basis for both Claimants' national treatment and MFN claims.<sup>210</sup> Both of these are, at bottom, discrimination claims.

B. *The applicable legal standards*

175. *First*, Claimants submit that the ordinary meaning of Article 10.16.2, in its context, confirms that Claimants' MFN claim is admissible.<sup>211</sup> In their view, this provision does not provide that compliance is a precondition to arbitration; Respondent's error in concluding the opposite is to focus exclusively on the modal verb "shall" in Article 10.16.2, disregarding Article 31 of the VCLT. That provision requires taking into consideration also context and object and purpose. The context here shows that where the State Parties intended to condition the submission of a claim on the satisfaction of certain requirements, they did so expressly. Clear examples can be found in DR-CAFTA Articles 10.18.1, 10.18.2, and 10.18.4.<sup>212</sup>

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<sup>208</sup> Claimants' Preliminary Objections Rejoinder ¶ 97 (referencing Respondent's Preliminary Objections Reply ¶ 121); *see also* the discussion at Tr-E, December 16, 2019 Hearing, pp. 142:1-143-13.

<sup>209</sup> Claimants' Preliminary Objections Rejoinder ¶ 98 (referring to *Pope & Talbot, Award*, ¶¶ 156, 160-163, 171)

<sup>210</sup> *Id.* ¶ 99 (referencing the Notice of Intent at 2-3).

<sup>211</sup> Claimants' Preliminary Objections Rejoinder ¶¶ 100 *et seq.*

<sup>212</sup> *See* Claimants' Preliminary Objections Counter-Memorial ¶ 87 (where these provisions are quoted).

176. According to Claimants, the absence of such wording in DR-CAFTA Article 10.16.2 indicates that non-compliance with that provision is not a bar to the admissibility of claims. The tribunal in *B-Mex* confirmed this understanding when interpreting NAFTA Article 1119, which is identical to DR-CAFTA Article 10.16.2 in all relevant respects.<sup>213</sup> So did the *ADF* tribunal in that case.<sup>214</sup> Contrary to Respondent’s contention, the language in NAFTA Article 1119, requiring inclusion in the notice of intent of “the provisions of this Agreement alleged to have been breached and any other relevant provisions,” means “all of the provisions alleged to have been breached” for each of the claims set forth in the notice of intent. Thus, there is no material difference between the applicable NAFTA and DR-CAFTA provisions.
177. *Second*, Claimants assert that their Notice of Intent fulfills the object and purpose of DR-CAFTA Article 10.16.2. Although Respondent has not shown that preparing a defense is an object and purpose of the notification provision, Respondent in any event was not deprived of any opportunity to prepare its defense as a result of the content of Claimants’ Notice of Intent. Claimants are not seeking to advance an entirely separate claim distinct from the measures complained of in their Notice of Intent. The factual basis for their MFN claim all were set forth in Claimants’ Notice of Intent: the alleged arbitrary and discriminatory treatment by the Guatemalan courts and the MEM, by allowing other projects to continue operating while the MEM conducted consultations; by ruling on appeals in other cases filed long after Exmingua’s; and by commencing and concluding consultations in other cases.<sup>215</sup> Respondent thus had sufficient information and ample opportunity and time to pursue amicable settlement discussions with Claimants, who even traveled to Guatemala to meet in person with Respondent’s representatives. There was nothing stopping Respondent from pursuing settlement discussions in the eight months between Claimants’ filing of their Notice of Arbitration and the constitution of the Tribunal, or indeed to this day.

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<sup>213</sup> Claimants’ Preliminary Objections Counter-Memorial ¶ 89 (citing *B-Mex*, ¶¶ 122-123).

<sup>214</sup> Claimants’ Preliminary Objections Counter-Memorial ¶ 92 (citing *ADF* ¶¶ 120, 127.).

<sup>215</sup> Claimants’ Preliminary Objections Counter-Memorial ¶ 101 (citing Notice of Intent at 2-3).

178. Claimants state that furthermore, DR-CAFTA's object and purpose of promoting the efficient resolution of disputes would be wholly thwarted by Respondent's interpretation. If, as Respondent pleads, Claimants' MFN claim were to be dismissed, Claimants would be entitled to re-submit that claim to arbitration, by filing a new notice of intent to include that single claim, waiting three months, and then filing a new notice of arbitration, all before seeking to consolidate that new claim with this one. In Claimants' view, no purpose would be served by requiring them to go through these extra steps.
179. *Third*, Claimants maintain that their position is also consistent with the jurisprudence. Where a notice provision's object and purpose of apprising the respondent of the dispute and granting time for attempts at a settlement already have been satisfied, tribunals properly have refused to dismiss claims on account of a defect in the notice. That happened in *B-Mex* and *Al-Bahloul*, to name a few.<sup>216</sup> Claimants also argue that tribunals have also taken a pragmatic approach by admitting unnotified claims where no prejudice to the respondent's ability to react has been shown; *Chemtura* and *ADF* are good examples of this.<sup>217</sup>
180. According to Claimants, none of the cases on which Respondent relies indicates otherwise or supports the consequence which Respondent seeks to impose on Claimants. The *Pac Rim* tribunal did not even consider the effect of non-compliance with a notice requirement, whereas the decisions in *Tulip v. Turkey*, *Salini v. Morocco* and *Ethyl v. Canada* adopted a flexible approach to the notice provisions in the applicable BITs, finding claimants' claims to be admissible despite not employing the "most perfect forms" of notification.<sup>218</sup> On the other hand, in *Supervision y Control*, *Goetz*, *Burlington* and *Rurelec*<sup>219</sup> the new claims

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<sup>216</sup> Claimants' Preliminary Objections Counter-Memorial ¶¶ 94-95 (citing *B-Mex*, ¶ 132 ; *Al-Bahloul* ¶ 154).

<sup>217</sup> Claimants' Preliminary Objections Counter-Memorial ¶¶ 99-100 (citing *Chemtura*, ¶¶ 92, 103-104; *ADF*, ¶ 138).

<sup>218</sup> Claimants' Preliminary Objections Rejoinder ¶¶ 115-120 (referring to *Ethyl Corp. v. The Government of Canada*, NAFTA, UNCITRAL, Award on Jurisdiction, 24 June 1998, ¶¶ 65, 69, 80, CL-0086-ENG; *Tulip, Decision on Bifurcated Jurisdictional Issue*; *Salini, Decision on Jurisdiction*); see also Claimants' Procedural Objections Counter-Memorial, ¶¶ 95-97.

<sup>219</sup> Claimants' Preliminary Objections Rejoinder ¶ 118.

were largely unrelated to the claims that had been notified, which is not the case here.<sup>220</sup> As for *Aven*, Claimants argue that the tribunal there did not engage with the ordinary meaning of DR-CAFTA Article 10.16.2, but rather found a late-raised claim to be inadmissible because the claimants only raised that claim at the end of the merits hearing (notwithstanding some passing references in their memorial), a situation far from that which exists here.<sup>221</sup>

181. Alternatively, Claimants submit that their MFN claim is admissible as an ancillary claim. Although they deny having made any amendment, Claimants argue that the last sentence of DR-CAFTA Article 10.16.14 presupposes that there may be amendments to claims. There are also other provisions of DR-CAFTA, particularly, Articles 10.20.4(a) and (c), which indicate that the Notice of Arbitration may be amended. Moreover, DR-CAFTA incorporates by reference the applicable arbitration rules, and ICSID Arbitration Rule 40 allows amendments as well as ancillary incidental claims.<sup>222</sup>
182. Claimants state that their MFN claim complies with all requirements in this respect. The claim arises directly out of the subject-matter of the dispute in these proceedings, since it involves Respondent's alleged discriminatory treatment of Claimants' investment as compared to those of other investors. As explained by the *CMS v. Argentina* tribunal, the test is whether a close factual connection exists between the new and older claims, to require adjudication of the new claim in order to achieve the final settlement of the dispute.<sup>223</sup> That test is satisfied here, Claimants say. Claimants also emphasize that they raised their MFN claim in their Notice of Arbitration, which is well before Rule 40's deadline of the submission of their Reply. Claimants' MFN claim is likewise within the scope of the Parties' consent and the jurisdiction of the Centre, as required by ICSID Arbitration Rule 40. In their view, this provision of the Arbitration Rules applies along

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<sup>220</sup> *Id.* (referring to *Supervisión y Control*, ¶¶ 342, 349, 344-346; *Antoine Goetz* ¶¶ 91-93; *Burlington, Decision on Jurisdiction*, ¶¶ 263, 308-309); *see also* Preliminary Objections Counter-Memorial, ¶ 98.

<sup>221</sup> Claimants' Preliminary Objections Rejoinder 110 (referring to *Aven*, ¶¶ 343-346).

<sup>222</sup> Tr-E, 16 December 2019 Hearing, pp. 225:3-226:6.

<sup>223</sup> Claimants' Preliminary Objections Rejoinder ¶ 129 (referring *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award on Jurisdiction, 17 July 2003, ¶ 116, CL-0038-ENG).

with the notification requirement of DR-CAFTA Article 10.16.2, and is not displaced by the latter. The *Metalclad v. Mexico* tribunal confirmed this interpretation, they say, when it considered the applicability of Article 48 of the 1978 ICSID Additional Facility Rules (equivalent to Article 40 of the ICSID Arbitration Rules) in the context of NAFTA Articles 1119 and 1120.<sup>224</sup>

**c. The Tribunal's Analysis**

*A. Preliminary Observations*

183. The Tribunal begins its analysis of this Objection, as it did for Respondent's first Objection, with a few preliminary observations.

184. First, Claimants' contention that their Notice of Intent already "set forth the essential facts and legal basis for their MFN claim"<sup>225</sup> cannot be sustained. The Notice of Intent had two sections relevant to this issue, one entitled "Factual Basis for the Claim" and the other entitled "Breach of Obligations Under the Treaty." In the former, Claimants made the general allegation that "the Guatemalan courts notably have failed to rule in a consistent fashion when compared with other cases," but while the phrase "other cases" was framed in the plural, the Notice of Intent identified only one example of alleged discrimination, described as involving "two projects owned by Guatemala companies."<sup>226</sup> No allegation was made regarding more favorable treatment of investors of any third State, as would be necessary to set forth the basis for an MFN claim. The following section confirmed this understanding, stating that "Guatemala's actions violate the following provisions of the DR-CAFTA" and listing "Article 10.3 – National Treatment," but not Article 10.4 on "Most-Favored-Nation Treatment."<sup>227</sup> In these circumstances, the Tribunal cannot accept Claimants' contention that "[t]he factual basis for Claimants' MFN claim ... was set out in

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<sup>224</sup> Claimants' Preliminary Objections Rejoinder ¶¶ 132-133 (referring *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, CL-0120-ENG/SPA).

<sup>225</sup> Claimants' Preliminary Objections Counter-Memorial ¶ 83.

<sup>226</sup> Notice of Intent, p. 3, C-5.

<sup>227</sup> Notice of Intent, pp. 3-4, C-5.

Claimants' Notice of Intent ...."<sup>228</sup> A "factual basis" necessarily requires an allegation of fact, and there are no facts alleged in the Notice of Intent that would suggest an MFN claim (as opposed to a National Treatment claim) was being noticed for eventual submission to arbitration.

185. However, the Tribunal accepts Claimants' alternative point that a reference to the MFN claim could not have been included in the Notice of Intent, because the particular act that Claimants later challenged as an Article 10.4 breach had not yet occurred. The Notice of Intent was dated 16 May 2018, but according to Claimants' later Notice of Arbitration, the alleged MFN breach arose from a 3 September 2018 ruling of Guatemala's Constitutional Court in the *Escobal* case, involving a project indirectly owned by a Canadian investor.<sup>229</sup> Respondent is correct that the relevant paragraph of the Notice of Arbitration (again in a section entitled "Factual Basis for Claimants' Claims") also mentioned a September 2017 Supreme Court ruling concerning Escobal's mining license, but a close reading of the paragraph, particularly in the context of the preceding paragraph, makes clear that Claimants' complaint was focused on the Constitutional Court decision.<sup>230</sup> The focus on the Constitutional Court was further clarified in the following section, entitled "Breach of Obligations Under the DR-CAFTA," which alleged breach of Articles 10.3 and 10.4 by reference respectively to the Constitutional Court's resolution of the *Oxec* and *Escobal* appeals, with no mention of any earlier lower court rulings in either case.<sup>231</sup>

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<sup>228</sup> Claimants' Preliminary Objections Rejoinder ¶ 109.

<sup>229</sup> Notice of Arbitration ¶ 63.

<sup>230</sup> The prior paragraph compared the Constitutional Court's prompt decision in the *Oxec* case (involving the Guatemalan-owned projects) with the absence of any Constitutional Court decision in Exmingua's case. Notice of Arbitration ¶ 62. This led directly to the statement, "Apart from the *Oxec* case, the Court also has taken action in the *Escobal* case, although that case was filed significantly later than Exmingua's case." *Id.* ¶ 63 (emphasis added). The reference to "the Court" in context of the prior paragraph clearly referred to the Constitutional Court. The paragraph then provided some history of how the *Escobal* case came to be before the Constitutional Court (including a reference to the earlier Supreme Court decision), but it closed again with a comparison between the *Escobal* Constitutional Court ruling and the lack of any ruling in Exmingua's case. *Id.* ¶ 63 ("This final ruling was rendered even though the *Escobal* appeal was filed more than one year after Exmingua filed its appeal with the Constitutional Court, which the court has failed to act upon.").

<sup>231</sup> Notice of Arbitration ¶ 68.



186. In these circumstances, the Tribunal rejects Respondent’s protest that Claimants “now attempt to re-write the factual basis for their MFN claim” in response to the Preliminary objections, by “ignor[ing]” their prior reference to the *Escobal* Supreme Court ruling and “only focus[ing] on” the Constitutional Court ruling.<sup>232</sup> A proper reading of Notice of Arbitration confirms that the MFN claim always focused on the Constitutional Court ruling. Since that ruling post-dated Claimants’ submission of the Notice of Intent, by definition the Notice of Intent could not have included the MFN claim. No issue of a deliberate or negligent omission therefore arises.
187. In consequence of these findings, the Preliminary Objection presents a fairly narrow question. The Tribunal need not decide whether DR-CAFTA prevents a claimant from raising in an arbitration additional claims that it *could* have included in its original notice of intent, but for whatever reason did not originally include. The only “new claim” in this case concerns a complaint about State action occurring *after* the issuance of the Notice of Intent. Nor does this case involve issues of tardiness, where a claimant sat on its rights for a substantial period in the arbitration, seeking to add a new claim only late in the proceedings. Claimants to the contrary pleaded their MFN claim in their 9 November 2018 Notice of Arbitration, which was filed just two months after the *Escobal* Constitutional Court decision which is the subject of that claim.
188. Accordingly, the Objection to Claimants’ MFN claim concerns a narrow issue only. The question is whether DR-CAFTA bars a claimant from including in its notice of arbitration a claim about *new* State conduct, occurring after a prior notice of intent, without first issuing a second notice of intent and then waiting for a second consultation or cooling-off period to expire. The Tribunal focuses below on this particular question, which is somewhat distinct from the fact pattern arising in certain other cases the Parties have invoked in their respective pleadings.

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<sup>232</sup> Respondent’s Preliminary Objections Reply ¶¶ 121, 123.

B. *Interpretation of Article 10.16.2*

189. Once again, the question presented should be resolved by VCLT interpretation, through assessment of the ordinary meaning of the relevant DR-CAFTA provision, in the context in which it occurs and in light of the Treaty’s object and purpose.<sup>233</sup>

190. Article 10.16.2 provides in relevant part as follows:

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 ... alleged to have been breached and any other relevant provisions;

(c) the legal and factual basis for *each claim*; ....<sup>234</sup>

191. The first observation is that the reference to delivery of a prior notice of intent applies to the submission of “any claim,” and the specifications for the notice are framed as applying “for each claim.” The second observation is that each of the two relevant sentences uses the phrase “shall” (as in “shall deliver” and “shall specify”), which commonly denotes a requirement rather than a mere recommendation. The combination of these two elements makes clear that a notice of intent is required to initiate an arbitration, and that a claimant must include in that notice a reference to all then-intended claims. The notice is not characterized as a merely illustrative document, articulating some subset of known claims while omitting others, but rather as a mandatory precondition, requiring advance provision of information regarding all claims that the claimant intends to submit to arbitration. The Tribunal does not accept Claimants’ suggestion that because Article 10.16.2 does not specify a consequence for failure to abide by its terms, the provision is thereby rendered somehow discretionary. To the contrary, it must be given meaning, and the obvious meaning is that a claimant may not proceed directly to a notice of arbitration, without first giving a respondent the notice required with respect to each of the claimant’s intended claims.

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<sup>233</sup> VCLT, Article 31(1).

<sup>234</sup> DR-CAFTA, Article 10.16.2 (CL-0001-ENG) (emphasis added).

192. Article 10.16.2 does not on its face discuss what happens later, *after* submission of a claim to arbitration, in the event that a claimant considers new developments to warrant submission of new claims. Nonetheless, if this were the only relevant provision in DR-CAFTA, the Tribunal could understand the basis for a strict reading that would require submission of a new notice of intent prior to submission of additional claims.
193. However, as with any treaty provision, Article 10.16.2 must be interpreted in the context of surrounding and related Treaty provisions. In this case, there are several other provisions of DR-CAFTA which expressly allude to claim *amendments*, after an initial claim or set of claims has been submitted to arbitration.
194. The first such provision is two paragraphs later, within the same general Article 10.16 on “Submission of a Claim to Arbitration.” Article 10.16.4, which addresses the date on which a given claim “shall be deemed submitted to arbitration,” is divided structurally into two sentences. The first sentence refers to claims included in the claimant’s notice of arbitration, which are deemed submitted based on the relevant arbitration rules the claimant invoked (the ICSID Convention, the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules). The second sentence addresses the submission date of *subsequent* claims, and states that “[a] claim *asserted for the first time after such notice of arbitration* is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.”<sup>235</sup> By its plain terms, this provision expressly contemplates the assertion of additional claims after the filing of a notice of arbitration, and it does so without suggesting that such assertion is preconditioned on a *renvoi* to the prior Article 10.16.2, *i.e.*, to a prerequisite of filing of a second notice of intent and exhausting a second waiting period, before filing a second (or amended) notice of arbitration. Indeed, the only reference to a notice of arbitration in Article 10.16.4 is to the *original* notice of arbitration, predating the assertion of the new claim. The absence of any mention of a second notice of arbitration applicable to this circumstance is significant, because it seems

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<sup>235</sup> DR-CAFTA, Article 10.16.4 (CL-0001-ENG) (emphasis added).

to suggest that the assertion of the new claim is through a separate process (not governed by Article 10.16.2) from the one applied to the original initiation of the case.

195. In other words, Article 10.16 must be read as a whole, in such a way as to give meaning both to its subparagraph 2 (Article 10.16.2) and to its subparagraph 4 (Article 10.16.4). Read together, the Article seems to establish requirements for *initiating* an arbitration, defined to require prior identification of all then-intended claims through a notice of intent, but it also expressly allows for the possibility that an additional claim may be “asserted for the first time after such notice of arbitration,” without requiring a repetition of the notice of intent and notice of arbitration process.

196. This reading is reinforced by two paragraphs of the subsequent Article 10.20.4, which authorizes the filing of preliminary objections that “as a matter of law, a claim submitted is not a claim for which an award ... may be made.” Article 10.20.4(a), which regulates the deadline for filing preliminary objections, calculates those deadlines based on the possibility of two different categories of claims: those submitted in the original notice of arbitration, and those applicable “in the case of *an amendment to the notice of arbitration*.”<sup>236</sup> Article 10.20.4(c) likewise refers to amendments, stating that “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*) ....”<sup>237</sup> Yet nothing in the Treaty text conditions the amendment process – resulting in the assertion of a new claim – on a prior return to the notice of intent stage of Article 10.16.2. And of course, it would be nonsensical to allow new claims to be added *after* the Notice of Arbitration more easily than *within* the Notice of Arbitration itself.

197. It is equally relevant that in both of these DR-CAFTA provisions – Article 10.16.4, referring to a “claim asserted for the first time after” the notice of arbitration, and Article 10.20.4, referring to an “amendment” of the notice of arbitration – there are cross-references to the applicable arbitration rules. DR-CAFTA was clearly prepared with

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<sup>236</sup> DR-CAFTA, Article 10.20.4(a) (CL-0001-ENG) (emphasis added).

<sup>237</sup> DR-CAFTA, Article 10.20.4(c) (CL-0001-ENG) (emphasis added).

knowledge of the ICSID Arbitration Rules, the ICSID Additional Facility Rules and the UNCITRAL Rules, and nothing in the Treaty text suggests an intent to displace those rules with respect to the admissibility of additional claims. In the case of the ICSID Arbitration Rules, the relevant rule is Rule 40, which addresses in its three subparagraphs the substantive, temporal and procedural requirements for asserting “an incidental or additional claim,” also referred to as an ancillary claim.<sup>238</sup> In this case, Respondent has not suggested that any of these requirements independently would bar admission of Claimants’ MFN claim. Its suggestion rather is that Claimants cannot even reach analysis under the ICSID Rules, because DR-CAFTA supplants that analysis by providing its own overarching requirement of a prior notice of intent before any new claim may be submitted to arbitration. The Tribunal is unable to accept that proposition, given the express references in DR-CAFTA to assertion of new claims and amendments to the notice of arbitration, as well as the express references *inter alia* to the ICSID Rules in the same Treaty provisions.

198. Finally, this reading of the relevant DR-CAFTA provisions, in their appropriate context, would not override the object and purpose of requiring a notice of intent or a waiting period before a claimant may initiate arbitration proceedings. The Tribunal accepts that there are several purposes of such requirements, including to enable the respondent State to investigate the claim, conduct such dispute settlement negotiations as it considers appropriate, and to take initial steps to organize its defense prior to the proceedings getting underway. Once an arbitration has commenced, the addition of an ancillary claim does not significantly prejudice these objectives, provided that the claim is related to the existing dispute and is added early enough in the proceedings that the State will have appropriate opportunity to investigate, discuss and respond. These are precisely the objectives that ICSID Arbitration Rule 40 seeks to safeguard. Where, as here, the new claim is added at

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<sup>238</sup> With respect to substantive requirements, ICSID Arbitration Rule 40(1) permits presentation of “an incidental or additional claim ... arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.” With respect to temporal requirements, Rule 40(2) requires that an additional claim “be presented not later than in the Reply ..., unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.” Finally, with respect to procedure, Rule 40(3) requires a tribunal permitting an additional claim to provide an opportunity for the responding party to file written observations on that claim.

the *earliest possible moment* in the arbitration process – in the Notice of Arbitration commencing the proceedings themselves, and shortly after the new event complained of – the Tribunal does not see real prejudice, much less such severe prejudice as to outweigh its contextual reading of the DR-CAFTA as allowing new claims in these circumstances.

199. Finally, the Tribunal notes that Respondent’s contrary reading of DR-CAFTA – which would require a claimant to recommence the notice of intent and waiting period process with respect to any new State conduct after its original notice of intent, before it could present any claim in the proceedings regarding that subsequent conduct – would provide potential for disruption and duplication, as well as potential for mischief. Given the reality of procedural timetables, it would be very difficult to complete briefing on any new claim in time to be heard together with the original claims. This effectively would result in a choice between either (a) requesting the existing tribunal to suspend or elongate the procedural timetable, to allow the new claim to catch up, or (b) filing a new arbitration to address the new claim, so as not to delay resolution of the original claims – even though the old and new claims may be closely related and it would be more sensible for them to be resolved together by a single tribunal. Nothing in DR-CAFTA, which expressly envisions the filing of additional and amended claims even *after* a notice of arbitration (*i.e.*, later in the proceedings than occurred here) appears to mandate such an improbable and awkward result.

### **(3) TIMELINESS OF CLAIMANTS’ LACK OF FULL PROTECTION AND SECURITY CLAIM**

#### **a. Respondent’s Position**

200. Respondent submits that Claimants’ claim for lack of full protection and security should be dismissed because it is time-barred and therefore outside the scope of consent to the Tribunal’s jurisdiction, pursuant to the three-year statute of limitations contained in DR-CAFTA Article 10.18.1.<sup>239</sup> In its Reply, Respondent further contends that Claimants have

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<sup>239</sup> Respondent’s Preliminary Objections Memorial ¶¶ 106-140.

attempted to re-write this claim in response to its objections, and reiterates that the law requires dismissal of this claim.<sup>240</sup>

A. *The characterization of Claimants' full protection and security claim*

201. According to Respondent, Claimants' Notice of Arbitration reveals that Claimants first acquired knowledge in 2012 of Guatemala's alleged failure to respond to the "continuous and systematic protests and blockades" of their investment and related losses.<sup>241</sup> However, they did not file this claim until November 9, 2018, long after the three-year limitation period had expired. Pursuant to DR-CAFTA Article 10.18.1, Respondent argues, any claim arising from events before the critical date of November 9, 2015 is time barred. Respondent refers to the *Berkowitz* tribunal for the proposition that first appreciation of loss or damage triggers the limitation period under DR-CAFTA; knowledge of the full extent or quantification of the loss or damage is not required.<sup>242</sup> Here, Respondent argues, Claimants should at the very least be charged with constructive knowledge dating back to 2012.
202. Respondent says that Claimants have attempted to rewrite their full protection and security claim, alleging now that there was a "new wave of protests" that began in 2016,<sup>243</sup> and supplementing their prior claim with new (and contradictory) factual allegations and thirteen exhibits related to the 2016 and 2017 events. Respondent emphasizes that the Notice of Arbitration by contrast did not distinguish between pre-2016 protests and the protests that occurred in 2016 and thereafter.<sup>244</sup>

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<sup>240</sup> Respondent's Preliminary Objections Reply ¶¶ 158-183.

<sup>241</sup> Respondent's Preliminary Objections Memorial ¶¶ 118, 124, 128 (quoting from Claimants' Notice of Arbitration ¶ 121).

<sup>242</sup> Respondent's Preliminary Objections Memorial ¶ 111 (relying on *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, (hereinafter "*Berkowitz*") ¶ 213, RL-0038-137).

<sup>243</sup> Respondent's Preliminary Objections Reply ¶ 158 (quoting from Claimants' Preliminary Objections Counter-Memorial, ¶ 121).

<sup>244</sup> Respondent's Preliminary Objections Reply ¶¶ 158-164 (discussing the purported changes in Claimants' asserted factual basis for its full protection and security claim).

203. Respondent also contends that Claimants’ characterization of the alleged breach as “continuing” does not allow them to escape the three-year time limit for submission of a claim to arbitration. Even assuming *arguendo* that the alleged “new wave of protests in early 2016” amounts to a distinct breach of the full protection and security standard, and that Claimants only seek damages arising from the post-2015 events, the limitation period under DR-CAFTA Article 10.18.1 still applies. In Respondent’s view, a “continuing breach” does not renew the limitation period, nor does it change the date when Claimants first acquired the relevant knowledge. Claimants cannot base their claim “on the most recent transgression” of a “series of similar and related actions” by Respondent to circumvent this restriction, as the *Corona* tribunal aptly noted.<sup>245</sup>

B. *The applicable legal standards*

204. In support of this objection, Respondent relies on the jurisprudence of DR-CAFTA tribunals, the subsequent practice of the DR-CAFTA Parties under VCLT Article 31(3)(b), and the ordinary meaning, context, object and purpose of DR-CAFTA Article 10.18.1.

205. *First*, Respondent states that DR-CAFTA tribunals have consistently held that the running of the three-year statute of limitations is to be calculated from the “first” acquisition of the relevant knowledge, not subsequent or ultimate acquisition of such knowledge. The *Berkowitz* and *Corona* cases are good examples of this.<sup>246</sup> As noted by the former tribunal, it is immaterial whether claimants’ allegations “are cast in terms of post-limitation period conduct by Respondent or in terms of continuing violations.”<sup>247</sup>

206. Respondent submits that Claimants, by contrast, place too much emphasis on a single case issued more than twelve years ago, *UPS*, which has not been followed by a line of subsequent NAFTA and DR-CAFTA decisions (including *Berkowitz* and *Corona*), and

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<sup>245</sup> Respondent’s Preliminary Objections Reply ¶ 162 (quoting *Corona*, ¶¶ 214-215 (citing *Grand River*, ¶ 81, RL-0002-ENG/SPA).

<sup>246</sup> Respondent’s Preliminary Objections Memorial ¶¶ 131-132 and Respondent’s Preliminary Objections Reply ¶¶ 172-173, 179 (citing *Berkowitz*, ¶ 208; *Corona*, ¶¶ 198, 215).

<sup>247</sup> Respondent’s Preliminary Objections Reply ¶ 173 (citing *Berkowitz, Award*, ¶¶ 251-252).



also has been criticized by scholars.<sup>248</sup> Nor in Respondent's view does *Feldman* support the *UPS* tribunal's interpretation. The *Feldman* tribunal analyzed only whether the lack of jurisdiction over actions pre-dating NAFTA's entry into force also precluded jurisdiction over the part of a continuing course of action that occurred after entry into force; the tribunal did not deal with a course of action that both began and continued after NAFTA's entry into force.<sup>249</sup>

207. Respondent also contends that Claimants rely on awards which they either misinterpret or misapply. In *Grand River*, for instance, the tribunal rejected claimant's position that there were several limitations periods at issue, and found that certain "complementary legislation" and amendments to the existing laws adopted after the critical date could be challenged. The *Grand River* 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," which is clearly not the case here.<sup>250</sup> Respondent argues that Claimants also ignore *Ansung*, which confirms that different limitation periods cannot be applied to Respondent's alleged pre-2016 and post-2015 alleged omissions. The tribunal in that case accepted that "damages for [a continuing omission] [...] may be measured from different times after the first incident of that omission," but found that neither respondent's "continued inaction" after the critical date nor the claimant's final liquidation of its damages restarted the limitation period.<sup>251</sup> The other decisions Claimants cite, such as *Eli Lilly*, *Mobil*, and *Nissan*, are equally inapposite in Respondent's view.<sup>252</sup>

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<sup>248</sup> Respondent's Preliminary Objections Reply ¶¶ 179-180 (citing *Berkowitz*, Award, ¶ 208; *Corona*, Award, ¶ 215).

<sup>249</sup> Respondent's Preliminary Objections Reply ¶¶ 181-182 (discussing *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶ 62, CL-0094-ENG).

<sup>250</sup> Respondent's Preliminary Objections Reply ¶ 169 (quoting *Grand River v. Canada*, Decision on Objections to Jurisdiction, 20 July 2006, ¶¶ 87-89, 94, RL-0039-037-041-ENG); see also Tr-E, 16 December 2019 Hearing, p. 176:5-21.

<sup>251</sup> Respondent's Preliminary Objections Reply ¶ 170 (quoting *Ansung v. China*, ICSID Case No. ARB/14/25, Award, 9 March 2017, RL-0103-ENG, ¶¶ 109-110, 112).

<sup>252</sup> Respondent's Preliminary Objections Reply ¶¶ 174-177 (citing *Eli Lilly and Co. v. Canada*, Case No. UNCT/14/2, Final Award, 16 March 2017, ¶¶ 163-165; *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, (hereinafter "*Mobil*"), ¶ 6, CL-0090-ENG; *Nissan* ¶ 328, CL-0078-ENG).

This is not a case where Claimants point to certain measures as background facts, or where the breach did not crystallize until after the critical date. Nor, Respondent argues, is case law from the European Court of Human Rights, upon which Claimants rely, of any help for this case. International human rights jurisprudence does not have any bearing on the jurisdiction of an investor-state arbitral tribunal.<sup>253</sup>

208. *Second*, Respondent asserts that the subsequent practice of the DR-CAFTA Parties in the application of Article 10.18.1, which “shall be taken into account” as per Article 31(3)(b) of the VCLT, is also fully consistent with past tribunals’ reading of the provision. For instance, in *Corona*, the United States argued in its non-disputing State Party submission that “Article 10.18.1 refers to knowledge of the alleged breach and loss first acquired as of a particular ‘date.’ Such knowledge cannot be acquired at multiple points in time or on a recurring basis.”<sup>254</sup> The United States put forth the same argument in *Berkowitz*, and the Dominican Republic has also endorsed this same interpretation.<sup>255</sup>
209. *Finally*, Respondent argues that allowing Claimants to evade the three-year limitation period by basing its claim on the most recent alleged transgression in a series of similar and related actions would run counter to VLCT rules of interpretation, and would effectively deprive the limitation clause of its essential purpose, namely to “draw a line under the prosecution of historic claims,” as the *Berkowitz* and *Corona* tribunals rightly noted.<sup>256</sup> Allowing claims such as this to be asserted would also, Respondent contends, result in uncertainty and instability, which does not comport with the objectives of DR-CAFTA.

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<sup>253</sup> Respondent’s Preliminary Objections Reply ¶ 183.

<sup>254</sup> Respondent’s Preliminary Objections Memorial ¶ 133 (referring to *Corona*, Submission of the United States of America, 11 March 2016, ¶¶ 3-5, RL-0042-ENG).

<sup>255</sup> Respondent’s Preliminary Objections Memorial ¶¶ 134-135 (referring to *Berkowitz*, Submission of the United States of America, 17 April 2015, ¶¶ 4-7, RL-0043-002-002).

<sup>256</sup> Respondent’s Preliminary Objections Reply ¶ 179 and Respondent’s Preliminary Objections Memorial ¶ 138 (quoting *Berkowitz*, ¶ 208.).

**b. Claimants' Position**

210. Claimants submit that their claim for lack of full protection is timely. They argue that Respondent misconstrues the nature of their claim and misstates the law to support its objection.<sup>257</sup> Moreover, Claimants contend that, even if Respondent were correct that the relevant protests began in 2012, the claim still would not be time-barred, because the prescription period only begins to run from the date a continuous breach ceases, not from when it commences.

*A. The characterization of Claimants' full protection and security claim*

211. According to Claimants, their full protection and security claim is not based on a single continuing breach, nor does it arise out of events that occurred in 2012. Rather, this claim concerns Respondent's specific failure to provide full protection and security in connection with protests and blockades that erupted in early 2016, nearly two years after operations had commenced at Progreso VII, following the Guatemalan Supreme Court's decision on 11 November 2015 to grant an *amparo* against the MEM.<sup>258</sup> Claimants therefore did not acquire knowledge of Respondent's breach and their resulting damage until early 2016. 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.

212. Claimants maintain that the Notice of Arbitration's description of the 2012 protests and Guatemala's associated failure to protect Claimants' investment was provided for factual background, and not as an element of their claim. They emphasize that, although the 2012 protests delayed the start of exploitation activities at the *Progreso VII* site for more than two years, Claimants have not alleged and are not alleging any breach and are not seeking any damages in respect of that delay. The protests and blockades that started in 2012 ended

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<sup>257</sup> See Claimants' Preliminary Objections Rejoinder ¶¶ 134 *et seq.* and Claimants' Preliminary Objections Counter-Memorial ¶¶ 104 *et seq.*

<sup>258</sup> Claimants' Preliminary Objections Counter-Memorial ¶ 116.

in 2014, following Respondent's intervention, which is an undisputed fact.<sup>259</sup> Moreover, the use of the word "continuous" in the Notice of Arbitration, upon which Respondent has placed a great deal of emphasis, was intended merely to show the ongoing nature of the blockades while they lasted.<sup>260</sup> In any event, should the Tribunal consider there is anything unclear concerning the timing of these different protests, that would be for the merits phase.<sup>261</sup>

213. Claimants state that the loss or damage for which they assert a full protection and security claim is the loss of an opportunity to obtain an exploitation license for the *Santa Margarita Project*, as a result of the new wave of protests that occurred in early 2016 and Respondent's failure to intervene. Claimants are not seeking full protection and security damages in relation to Progreso VII, because Exmingua was already prohibited from engaging in mining activities there as a result of the Supreme Court's amparo ruling and the MEM's suspension order. Claimants thus did not suffer any additional or distinct loss or damage as a consequence of Respondent's full protection and security breach in connection with the Progreso VII project. The relevant damages for that project already were suffered as a result of Respondent's breaches in arbitrarily and unlawfully suspending Exmingua's exploitation license for Progreso VII.<sup>262</sup>

214. Claimants further state that the factual exhibits they submitted with their Counter-Memorial simply confirm the facts set forth in their earlier Notice of Arbitration and provide context to the factual allegations underlying their claim.<sup>263</sup> In any event, the Tribunal is empowered to consider facts beyond those set forth in Claimants' Notice of

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<sup>259</sup> Tr-E, 16 December 2019 Hearing, pp. 218:10-220:8.

<sup>260</sup> Tr-E, 16 December 2019 Hearing, p. 130:11-15.

<sup>261</sup> Tr-E, 16 December 2019 Hearing, pp. 130:16-132:6.

<sup>262</sup> Tr-E, 16 December 2019 Hearing, pp. 216:14-217:14.

<sup>263</sup> Claimants' Preliminary Objections Rejoinder ¶ 143.

Arbitration, because DR-CAFTA Article 10.20.4(c) does not apply to Respondent's objection as to the timeliness of Claimants' full protection and security claim.<sup>264</sup>

B. *The applicable legal standards*

215. Claimants assert that Respondent misstates the provisions and rulings upon which it seeks to rely.

216. *First*, Claimants consider that for purposes of assessing the timeliness of a claim, it is "possible and appropriate ... to separate a series of events into distinct components ...," as the *Clayton v. Canada* tribunal found.<sup>265</sup> That was also the approach adopted by the tribunal in *Grand River*, a case which (contrary to Respondent's assertion) does not contradict Claimants' position in this case.<sup>266</sup> That is because this case does not involve a situation relating to the "implementation" of a pre-critical date measure; instead, in early 2016 there were new protests and a new blockade, triggered by a new event. Nor do Respondent's other cases – namely *Corona*, *Berkowitz* and *Ansung* – detract from this conclusion.<sup>267</sup> Unlike this case, those cases involved a singular measure which gave rise to a breach and damage outside of the limitations period. The additional conduct or inaction upon which the claimants sought to rely after the cut-off date did not result in new damage or loss to the claimants, separate from the loss that it had already incurred.<sup>268</sup> The situation is entirely different in this case, Claimants contend.

217. *Second*, Claimants assert that tribunals can take into account pre-critical date measures as factual background and context, without running afoul of the Treaty's limitation period. The awards in *Eli Lilly* and *Mondev* confirmed this.<sup>269</sup> Moreover, contrary to Respondent's

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<sup>264</sup> Claimants' Preliminary Objections Rejoinder ¶ 144.

<sup>265</sup> Claimants' Preliminary Objections Counter-Memorial ¶ 107 (quoting *Clayton, Award on Jurisdiction*, ¶¶ 266-269).

<sup>266</sup> Claimants' Preliminary Objections Rejoinder ¶ 146 (quoting *Grand River*, ¶¶ 86-87).

<sup>267</sup> Claimants' Preliminary Objections Counter-Memorial ¶ 107 (citing *Grand River*, ¶ 81).

<sup>268</sup> Claimants' Preliminary Objections Rejoinder ¶¶ 149-150.

<sup>269</sup> Claimants' Preliminary Objections Counter-Memorial ¶ 109 (citing *Eli Lilly*, ¶ 172, *Mondev*, ¶70).

suggestion, there is no requirement under the DR-CAFTA for Claimants to designate certain facts in their Notice of Arbitration as “background facts.”<sup>270</sup> In any event, in their submissions in response to Respondent’s Preliminary Objections, Claimants have clarified the factual basis for their full protection and security claim, and the background facts that the Tribunal may consider in determining their claim.<sup>271</sup>

218. *Third*, Claimants submit that the DR-CAFTA prescription period does not begin to run until a claimant has first acquired (or should have acquired) knowledge of the loss or damage suffered as a consequence of the specific measure which it alleges constitutes the breach. As the tribunals in *Mobil*, *UPS* and *Nissan* explained, knowledge entails more than just a suspicion, and a continuing course of conduct may well generate losses of different dimensions at different times.<sup>272</sup> Thus, the tribunals found that claimants’ claims had crystallized within the applicable limitation periods. Furthermore, and contrary to Respondent’s contention, the NAFTA Parties have not disregarded *UPS*’s interpretation by subsequent practice. In any event, Respondent has failed to demonstrate that the subsequent practice of all of the DR-CAFTA Parties (which extend beyond the NAFTA Parties) establishes an agreement regarding the interpretation of DR-CAFTA Article 10.18.1.<sup>273</sup>

219. *Finally*, Claimants argue that even if the Tribunal were to consider that the relevant breach for which they claim loss and damage was a continuous breach which began in 2012, Claimants’ claim still would not be time-barred, because the limitations period was renewed by the continuing breaches that occurred in 2016 and thereafter.<sup>274</sup> Claimants refer to the Award in *UPS* that “continuing courses of conduct constitute breaches of legal

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<sup>270</sup> Claimants’ Preliminary Objections Rejoinder ¶ 151 (referencing Respondent’s Preliminary Objections Reply ¶ 174).

<sup>271</sup> *Id.*

<sup>272</sup> Claimants’ Preliminary Objections Counter-Memorial ¶¶ 110-112 (citing *Mobil*, ¶ 155; *UPS*, ¶ 30; and *Nissan*, ¶¶ 57, 285, 329).

<sup>273</sup> Claimants’ Preliminary Objections Rejoinder ¶ 155.

<sup>274</sup> Claimants’ Preliminary Objections Counter-Memorial ¶ 128.

obligations and renew the limitation period accordingly.”<sup>275</sup> This is consistent with the decision in *Feldman v. Mexico*, where the tribunal acknowledged under this logic the claimant’s claim for lost profits after NAFTA’s entry into force, even though the claim related to measures Mexico had adopted before NAFTA’s entry into force.<sup>276</sup> It is also in line with other sources of international law as reflected in the European Commission on Human Rights’ decision in *Agrotexim v. Greece*, where the Commission stated that in a “continuing situation,” any time limit “runs from the termination of the situation concerned.”<sup>277</sup>

### c. The Tribunal’s Analysis

220. Respondent’s third objection is presented under DR-CAFTA Article 10.20.5, which envisions an expedited decision on objections that “the dispute is not within the tribunal’s competence.”<sup>278</sup> Unlike objections under Article 10.20.4, jurisdictional objections do not require a tribunal to assume as true all facts alleged in the notice of arbitration.<sup>279</sup> Nonetheless, just as an Article 10.20.4 objection requires a threshold determination of *what claim was actually submitted*, in order to determine whether “a claim submitted is not a claim for which an award in favor of the claimant made be made,”<sup>280</sup> Respondent’s particular Article 10.20.5 objection requires a similar threshold determination. That is because, under Article 10.18.1, the time-limitation provision that Respondent invokes as the basis for its jurisdictional objection, the relevant inquiry is whether “more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of *the breach alleged* under Article 10.16.1 and knowledge that the

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<sup>275</sup> Claimants’ Preliminary Objections Counter-Memorial ¶ 113 (quoting *UPS*, ¶ 28)

<sup>276</sup> *Id.* ¶ 114 (quoting *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award on the Merits, 16 December 2002, ¶ 199, CL-0093-ENG/SPA)

<sup>277</sup> *Id.* ¶ 115 (quoting *Agrotexim Hellas S.A. and Others v. Greece*, Commission decision dated 12 February 1992, DR 72, at 5, 9 CL-0095-ENG)

<sup>278</sup> DR-CAFTA Article 10.20.5 (CL-0001-ENG); see Respondent’s chart reproduced in ¶ 55 above (invoking Article 10.20.5).

<sup>279</sup> *Cf.* DR-CAFTA Article 10.20.4(c) (CL-0001-ENG).

<sup>280</sup> DR-CAFTA Article 10.20.4 (CL-0001-ENG); see *supra* Section V.1.c (discussing the need to determine what claim was submitted).

claimant ... has incurred loss or damage” by reason of that breach.<sup>281</sup> This determination cannot be made without a predicate determination of *what particular breach has been alleged*.

221. In making the latter determination, a tribunal necessarily starts with the operative pleading setting out the allegations (*i.e.*, the notice of arbitration). But as discussed in Section V.1.c above, in the context of Article 10.20.4, this does not mean that, in the event of an ambiguity in that document, a tribunal must ignore subsequent clarifications as to what breaches *actually* are being alleged and in fact pursued. It would make no sense for a tribunal to determine its jurisdiction over a putative breach that a claimant insists it has not alleged or in any event is not pursuing.
222. That point takes on importance here, because Respondent’s time-bar objection in large part appears aimed at an alleged full protection and security breach that Claimants insist they are not actually claiming, or at least are no longer pursuing. Respondent points to certain language in Claimants’ Notice of Arbitration which refers to popular protests and blockades in 2012 that prevented access to Exmingua’s Progreso VII Project, and correctly notes Claimants’ statement with respect to those events that “KCA and Exmingua sought assistance from various local and national government authorities, but the State failed to take meaningful or effective action to stop the ongoing, unlawful blockage of the Progreso VII Project.”<sup>282</sup> Claimants, however, point to subsequent passages in the Notice of Arbitration which state that following the grant of an *amparo* in Exmingua’s favor, “on May 2014, the exploitation activities at Progreso VII resumed, and by year-end, Exmingua made its first concentrate shipment.”<sup>283</sup> While Claimants noted that “[i]rregular blockades continued, however, without effective responses from the State,”<sup>284</sup> a key word here is “irregular,” which does not imply a breadth or constancy as to shut down operations. To the contrary, the Notice of Arbitration indicates that operations continued at the Progreso

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<sup>281</sup> DR-CAFTA Article 10.18.1 (CL-0001-ENG) (emphasis added)

<sup>282</sup> Notice of Arbitration ¶ 42.

<sup>283</sup> Notice of Arbitration ¶¶ 44-45.

<sup>284</sup> Notice of Arbitration ¶ 45.



VII Project until the Guatemalan Supreme Court granted an *amparo* in November 2015 suspending its exploitation license, and the MEM thereafter issued a resolution in March 2016 suspending Exmingua’s exploitation rights.<sup>285</sup>

223. These passages support Claimants’ clarification that certain references in their Notice of Arbitration to “continuous” blockades were not intended to refer primarily to the Progreso VII Project, or in any event to allege that blockades at that site (as opposed to the Supreme Court and MEM actions) were the proximate cause of the damages Claimants allege with respect to that Project. Claimants therefore insist that they are *not* pursuing any claim for pre-2016 events with respect to the Progreso VII Project. They also insist that with respect to later events, they do not allege any separate damages as a result of subsequent protests and blockades at the Progreso VII site, since Exmingua’s license was suspended in any event. This explanation is credible in light of the Notice of Arbitration’s references to the resumption of operations prior to the license suspension. The Tribunal takes Claimants at their word regarding what breach they in fact are alleging, and what breach they are not alleging, with respect to the Progreso VII Project.

224. The Notice of Arbitration is somewhat more problematic with respect to the adjacent Santa Margarita Project, since it simply states that “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.”<sup>286</sup> The Notice of Arbitration does not indicate whether any access to the Santa Margarita site was restored during the interim period starting in May 2014 when Exmingua obtained access to the adjacent Progreso VII site; whether any efforts were made during this interim period to make progress on the EIA consultations for Santa Margarita; and whether any requests for assistance were made to Guatemala authorities during this period. These may be important factual questions for determining the timeliness of any full protection and security claim

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<sup>285</sup> Notice of Arbitration, ¶¶ 51 (referring to “the Progreso VII mine [being] already in production”), ¶ 52 (referring to the lifting of a gate blockade following which “Exmingua’s activities in Progreso VII resumed”), ¶¶ 54-55 (referring to the November 2015 Supreme Court decision and the March 2016 MEM decision).

<sup>286</sup> Notice of Arbitration ¶ 48.

related to the Santa Margarita Project, but they are not questions the Tribunal can determine simply on the basis of the short initial pleading in this case.

225. For purposes of the Preliminary Objection stage, the important point is that Claimants insist – despite any confusion that their Notice of Arbitration may have created – that they are *not pursuing* any full protection and security claim for events prior to the agreed “critical date” of 9 November 2015. On the basis of this statement, there is no longer (if there ever was) any “*breach alleged* under Article 10.16.1” with respect to the pre-critical date period.<sup>287</sup> In the view of the Tribunal, this suffices to clear the initial hurdle for the Preliminary Objections stage, which is focused on the Claimants’ allegations.

226. This does not mean that the time-bar issue is resolved for purposes of this case – only that the jurisdictional issue it presents is one that properly requires factual investigation, and cannot be resolved simply as a matter of the very first pleading. In due course, the evidence likely will be developed regarding any relevant blockades, any relevant site access notwithstanding the blockades, and any relevant appeals for State assistance. The Tribunal may be called upon to decide whether the post-2016 events Claimants now emphasize for purposes of their treaty claim involved new State actions or omissions, or merely continuations of (or effects emanating from) prior State actions or omissions, questions which could well be relevant to the time-bar question. It is simply premature, with hardly any evidence in the record, for the Tribunal to reach conclusions of fact regarding “the date on which the [Claimants] first acquired, or should have first acquired, knowledge of the breach” they now allege, as well as the date of Claimants’ actual or constructive “knowledge that [they] ... incurred loss or damage” by reason of that breach.<sup>288</sup>

227. The Tribunal also considers it premature for it to opine now on the jurisprudence the Parties have presented regarding “continuous acts” and other relevant doctrinal issues in investment law. Discussion of legal principles is best done against the backdrop of a

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<sup>287</sup> DR-CAFTA Article 10.18.1 (CL-0001-ENG) (emphasis added).

<sup>288</sup> DR-CAFTA, Article 10.18.1 (CL-0001-ENG).

developed evidentiary record, and nothing in DR-CAFTA requires the Tribunal to decide at the preliminary objections stage a particular jurisdictional objection that is intensely fact-dependent, prior to the submission of evidence regarding the relevant facts. The Parties remain free to return to these legal issues in their subsequent memorials, in the context of the fuller evidentiary record the Tribunal trusts they will present.

228. The Tribunal accordingly denies the Respondent's application pursuant to DR-CAFTA Article 10.20.5 to dismiss at the outset Claimants' claim for lack of full protection and security because it is time-barred, and reserves for the merits phase of this arbitration the issues presented by that application.

## **VI. COSTS**

229. DR-CAFTA Article 10.20.6 authorizes a tribunal, "if warranted," to award costs to the prevailing party at the preliminary objections stage, "[w]hen it decides a respondent's objection under paragraph 4 or 5." The Treaty provides that "[i]n determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous ...."<sup>289</sup>

230. Claimants request an award of costs in their favor, on account of "[t]he frivolous nature of Respondent's preliminary objections."<sup>290</sup> Respondent requests an award of costs in its favor, because Claimants' claims "fail as a matter of law" and "are frivolous."<sup>291</sup>

231. The Tribunal declines to exercise the discretionary authority granted under Article 10.20.6 to make a costs award at the preliminary objections phase. It has denied Respondent's first two objections, but does not consider either of those to have been frivolous by any means. The first objection in particular presented a novel issue of law under DR-CAFTA which deserved attention and which required considerable analysis to resolve. The second objection was less novel, but nonetheless arose on account of Claimants' own decision to

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<sup>289</sup> DR-CAFTA, Article 10.20.6 (CL-0001-ENG).

<sup>290</sup> Claimants' Submission on Costs of Preliminary Objection Phase, 14 February 2020, ¶ 2.

<sup>291</sup> Republic of Guatemala's Request for Costs, 14 February 2020, ¶ 5.

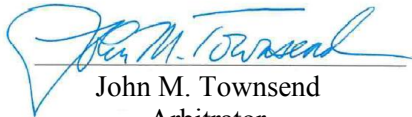
add an additional claim to their Notice of Arbitration, without flagging their intent to do so. Finally, the Tribunal has deferred the third objection for consideration together with the merits, given its fact-intensive nature. It is premature to determine at this stage which Party ultimately will prevail on the time-bar issue, and the Parties' and Tribunal's efforts in the meantime to this issue have not been wasted; the pleadings serve to educate all on the issues that ultimately will need to be resolved.

232. At this stage, therefore, the Tribunal simply takes due note of the Parties' positions and requests with respect to costs. It will deal with costs at the merits stage, which will allow it to make an overall assessment of the Parties' positions and conduct with respect to the preliminary objections in the context of the facts and the law developed during the remaining stages of this case.

## **VII. DISPOSITIF**

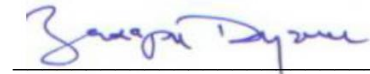
233. For the reasons set out above, the Tribunal:

- (1) Denies Respondent's application to dismiss this arbitration in its entirety on the basis of its first Preliminary Objection;
- (2) Denies Respondent's application to dismiss Claimants' Most-Favored-Nation claim on the basis of its second Preliminary Objection;
- (3) Denies Respondent's application to dismiss Claimant's Full Protection and Security claim on the basis of its third Preliminary Objection, only insofar as Respondent seeks resolution of its Article 10.18.1 jurisdictional objection as a preliminary matter, and defers that fact-intensive jurisdictional objection for further determination in conjunction with the merits of this case; and
- (4) Reserves decision on the Parties' respective requests for costs, for determination in conjunction with any subsequent such requests at the close of this proceeding.



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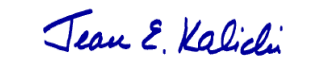
John M. Townsend  
Arbitrator



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Zachary Douglas  
Arbitrator

(subject to a Partial Dissenting Opinion)



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Ms. Jean Kalicki  
President of the Tribunal