

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

In the arbitration proceeding between

**CORONA MATERIALS, LLC**

Claimant

and

**DOMINICAN REPUBLIC**

Respondent

**ICSID Case No. ARB(AF)/14/3**

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**AWARD ON THE RESPONDENT'S EXPEDITED PRELIMINARY OBJECTIONS IN  
ACCORDANCE WITH ARTICLE 10.20.5 OF THE DR-CAFTA**

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*Members of the Tribunal*

Prof. Pierre-Marie Dupuy, President

Mr. Fernando Mantilla-Serrano

Mr. J. Christopher Thomas, QC

*Secretary of the Tribunal*

Ms. Mercedes Cordido-Freytes de Kurowski

*Date:* May 31, 2016

## REPRESENTATION OF THE PARTIES

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and

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Representing the **Dominican Republic:**

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Directora General de Comercio Exterior  
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and

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Directora de Comercio y Medio Ambiente  
Dras. Claudia Adames y Johanna Montero  
Asesoras  
Dra. Marisol Castillo  
Consultora Jurídica  
Ministerio de Medio Ambiente y Recursos  
Naturales  
Av. Cayetano Germosen Esq. Gregorio Luperón,  
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and

Mr. Paolo Di Rosa,  
Mr. Raúl Herrera,  
Mr. José Antonio Rivas,  
Ms. Mallory Silberman  
Ms. Catherine Kettlewell,  
Mr. Pedro Soto,  
Ms. Natalia Giraldo  
Ms. Claudia Taveras and  
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## **I. INTRODUCTION AND PARTIES**

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID, as amended effective April 10, 2006 (the “Additional Facility Rules”), on the basis of Chapter Ten of the Dominican Republic-Central America-United States Free Trade Agreement, (the “DR-CAFTA”), which entered into force for the United States on March 1, 2016, and for the Dominican Republic on March 1, 2007.
2. The Claimant is Corona Materials, LLC (“Corona” or “Claimant”), a limited liability company incorporated under the laws the State of Florida of the United States. The Respondent is the Dominican Republic (“Dominican Republic”, “DR” or the “Respondent”).
3. The Claimant and the Respondent are hereinafter collectively referred to as the “Parties.”
4. The present award (the “Award”) contains the Tribunal’s decision on the Respondent’s *Expedited Preliminary Objections in accordance with Article 10.20.5, DR-CAFTA*, dated December 3, 2015 (the “Preliminary Objections”). Through its Preliminary Objections the Respondent requests the Tribunal, among other things, to declare that it lacks jurisdiction to hear this dispute given that the Claimant’s claims allegedly fall outside the three-year period stipulated by Article 10.18.1 of the DR-CAFTA.

## **II. PROCEDURAL HISTORY**

### **A. Request for Arbitration**

5. On June 10, 2014, ICSID received a request for arbitration from Corona Materials, LLC against the Dominican Republic (the “Request” or “RFA”).
6. In its RFA, the Claimant submitted that the DR discriminated against Corona as a foreign investor, and deprived Corona of the value of its mining project as a result of the following

measures: (i) the DR Secretary of the Environment's passing Resolution 17-2008 cancelling the administrative procedure for obtaining permits to export aggregate, when to Corona's knowledge no other party was considering exporting construction aggregate out of the DR at that time<sup>1</sup>; (ii) the DR Secretary of the Environment's passing Resolution 21-2009, which unfairly and disproportionately imposed a discriminatory tax of \$2.00 per cubic meter on aggregate exports<sup>2</sup>; (iii) denying Corona the environmental approval for the Joama Exploitation Concession when on August 18, 2010 the DR Environmental Ministry ruled that Corona's proposed project was "*not environmentally feasible*"<sup>3</sup>; and (iv) the Ministry's failing to reconsider the denial, when the Sub-Secretary of Environmental Management had agreed to do so. According to the RFA, on October 5, 2010, Corona submitted a letter requesting the Environmental Ministry to reconsider its conclusion that the project was "not environmentally feasible", but never received any written response.<sup>4</sup>

7. Corona further asserted in its RFA that the above measures allegedly breached the DR-CAFTA Articles **10.3** (National Treatment); **10.5** (Minimum Standards of Treatment, including fair and equitable treatment and full protection and security); and **10.7.1** (Expropriation and Compensation)<sup>5</sup>.
8. Subsequently, in accordance with Article 4(1) of the Additional Facility Rules, on June 24, 2014, the Claimant submitted an Application for Access to the Additional Facility, and expressly consented to the Centre's jurisdiction over the dispute if the Convention enters into force in the Dominican Republic at any point in the future.
9. Corona supplemented its RFA with letters dated June 24, 2014, July 14 and 29, 2014 in response to questions posed by the Centre in the course of its review of the RFA.
10. On July 14, 2014, the Claimant confirmed that its claims against the Dominican Republic were asserted in a timely manner in compliance with the condition set forth under DR-

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<sup>1</sup> RFA, ¶¶ 65-67.

<sup>2</sup> RFA, ¶¶ 68-73.

<sup>3</sup> RFA, ¶¶ 75-76.

<sup>4</sup> RFA, ¶¶ 79-82.

<sup>5</sup> RFA, ¶ 29.

CAFTA Article 10.18.1, which requires that “*No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) [...] has incurred loss or damage.*” By letter of July 28, 2014, the Claimant confirmed that in accordance with DR-CAFTA Article 10.18(2)(b)(i) it waived “*any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.*”

11. On July 30, 2014, the Secretary-General of ICSID registered the Request in accordance with Article 4 of the Arbitration (Additional Facility) Rules and notified the Parties of the registration. In the Notice of Registration, the Secretary-General pursuant to Article 5(e) of the Arbitration (Additional Facility) Rules, invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Chapter III of those Rules.

**B. Tribunal Constitution**

12. In accordance with DR-CAFTA Article 10.19, unless the disputing parties agree otherwise, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each party, and a presiding arbitrator appointed by agreement of the parties.
13. Pursuant to DR-CAFTA Articles 16.6 and 10.19, the Claimant appointed Mr. Fernando Mantilla-Serrano, a national of Colombia, and the Respondent appointed Mr. J. Christopher Thomas QC, a national of Canada, as arbitrators in this case. Both arbitrators accepted their appointments.
14. By letter of September 7, 2015, the Claimant requested the Chairman of the Administrative Council to appoint the President of the Tribunal, pursuant to Article 38 of the ICSID Convention, and Rule 4 of the ICSID Arbitration Rules. In response to a request for clarification from the Centre of September 8, 2015, by email of September 9, 2015, the Claimant confirmed that its request of September 7, 2015 was made pursuant to DR-

CAFTA Article 10.19(3), according to which, “[i]f a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.”

15. On October 6, 2015, the Secretary-General transmitted a list of potential candidates for a presiding arbitrator to the Parties, and invited the Parties to consider them and provide their views by October 16, 2015, by way of a ballot form. As a result, on October 16, 2015, the Parties agreed on the appointment of Professor Pierre-Marie Dupuy, a French national, as the presiding arbitrator.
16. On October 19, 2015, the Secretary-General, in accordance with Article 13(1) of the ICSID Arbitration (Additional Facility) Rules 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. Ms. Mercedes Cordido-Freytes de Kurowski, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

**C. The Respondent's Expedited Preliminary Objections in Accordance with DR-CAFTA Article 10.20.5.**

17. On December 3, 2015, the Respondent filed “*Expedited Preliminary Objections in Accordance with Article 10.20.5, DR-CAFTA*” (the “PO Memorial”), together with accompanying factual and legal exhibits.

**D. First Session**

18. The Tribunal held a first session with the Parties on December 9, 2015, by telephone conference. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed *inter alia* that the proceedings would be conducted in accordance with the ICSID Additional Facility Rules in force as of April 10, 2006; and the DR-CAFTA; that the procedural languages would be English and Spanish; and that the legal seat of the proceeding would be Washington, D.C. A procedural timetable was fixed for



the Parties' submissions concerning the Preliminary Objections under DR-CAFTA Article 10.20.5, and for the submissions on the Merits (and Jurisdiction, if applicable). It was noted that the Non-Disputing DR-CAFTA Parties shall be entitled to make oral and written submissions to the Tribunal within the meaning of Article 10.20.2, and that pursuant to DR-CAFTA Article 10.21.2, the Tribunal shall conduct hearings open to the public and shall determine, in consultation with the parties, the appropriate logistical arrangements. The agreement of the Parties was embodied in Procedural Order No. 1 signed by the Members of the Tribunal and circulated to the Parties.

**E. Invitation to Non-Disputing Parties**

19. On January 12, 2016, pursuant to DR-CAFTA Article 10.20.2, and in view of the expedited procedure for Preliminary Objections, the Tribunal fixed a schedule for any Non-Disputing Party that wished to file an intervention on interpretation.

**F. The Claimant's Counter-Memorial on Preliminary Objections**

20. On January 29, 2016, the Claimant filed a Counter-Memorial on the Respondent's Preliminary Objections (the "PO Counter-Memorial"), pursuant to DR-CAFTA Article 10.20.5, together with accompanying factual and legal exhibits, and the first witness statements of Alain Stanley French and Randolph Howard Fields.

**G. Fixing the Date for the Hearing on Preliminary Objections**

21. On February 3, 2016, the Tribunal, in consultation with the Parties, scheduled the Hearing on Preliminary Objections (the "Hearing") to be held at the World Bank Conference Centre in Paris on April 11-12, 2016.

**H. Disclosure Request**

22. On February 3, 2016, the Respondent requested the Tribunal to direct the Claimant to indicate whether it had received funds from any third-party funder to cover the costs of this arbitration, and if so, to disclose its/their name(s), and the date when such funding started. On February 4, 2016, the Tribunal invited the Claimant to provide the requested information within five working days from its receipt of the English translation of the Respondent's letter. The Respondent provided the English translation on February 5, 2016, and the Secretary of the Tribunal confirmed that the Claimant's observations to the Respondent's Disclosure Request of February 3, 2016 were due by February 12, 2016. As scheduled, the Claimant filed its observations on February 12, 2016, and provided the name of the funder. On the same date, the Tribunal invited comments from the Respondent, which were filed, together with an English translation on February 16, 2016. In its letter, the Respondent requested the Tribunal to direct the Claimant to state the date when the external funding began, as such information might be relevant to the Respondent's Reply on Preliminary Objections due by February 19, 2016. On February 17, 2016, the Claimant offered to respond by February 29, 2016, but the Tribunal, after considering the Parties' respective positions on the matter, and the due date of the Respondent's Reply, directed the Claimant to state the requested date by noon (Washington, D.C. time) of February 18, 2016, with any other comments to follow by February 29, 2016. On February 18, 2016, the Claimant informed that the date of the Funding Agreement was November 19, 2015.

**I. Subsequent Submissions on Preliminary Objections**

23. On February 19, 2016, the Respondent filed a Reply on its Preliminary Objections (the "PO Reply"), pursuant to DR-CAFTA Article 10.20.5, together with accompanying factual and legal exhibits; the witness statements of Rosa Urania Abreu, Lina Beriguette, Jaime David Fernández Mirabal, and Ernesto Reyna Alcántara; and the Expert Report of Prof. Eduardo Jorge Prats.

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24. On March 11, 2016, the Claimant filed a Rejoinder on the Respondent's Preliminary Objections (the "PO Rejoinder"), pursuant to DR-CAFTA Article 10.20.5, together with accompanying factual and legal exhibits; the Second Witness Statement of Alain Stanley French, the Expert Report of Professor Gustavo José Mena García; and the Expert Report of Fabiola Medina Garnes.
25. On March 11, 2016, the United States of America filed a written submission as a non-disputing State Party pursuant to DR-CAFTA Article 10.20.2 (the "U.S. NDSP Submission").
26. On March 14, 2016, in accordance with section 18.1 of the Tribunal's Procedural Order No. 1 of December 16, 2015, the Parties were invited to provide their comments on the U.S. NDSP Submission by March 18, 2016, with the translation into the other procedural language to follow by Friday, March 25, 2016.
27. On March 18, 2016, the Claimant filed its comments on the U.S. NDSP Submission. The Respondent did not take the opportunity to comment on the Submission at that time.
28. On March 22, 2016, the Parties submitted and agreed on the proposal for the scheduling and organization of the hearing (the "Procedural Agreements"), which was followed by the Parties' letters of March 23, 2016, stating their respective positions on the points of disagreement.
29. At the request of the Parties, and Organizational Meeting was held on March 29, 2016, by telephone conference, between the President of the Tribunal, on behalf of the Tribunal, and the Parties to discuss the outstanding procedural matters for the Hearing.
30. On March 30, 2016, the Tribunal issued Procedural Order No. 2, concerning the Tribunal's decisions on the outstanding procedural matters for the Hearing.

**J. The Hearing on Preliminary Objections**

31. The Hearing took place at the World Bank Conference Center in Paris on April 11-12, 2016. In addition to the Members of the Tribunal and the Secretary of the Tribunal<sup>6</sup>, present at the Hearing were:

For the Respondent:

Director Katrina Naut	Dirección de Comercio Exterior, Ministerio de Industria y Comercio
Director Rosa Otero	Ministerio del Medio Ambiente
Ms. Leslie Marmolejos	Dirección de Comercio Exterior, Ministerio de Industria y Comercio
Mr. Ariel Gauteaux	Dirección de Comercio Exterior, Ministerio de Industria y Comercio
Ms. Marisol Castillo	Dirección de Comercio Exterior, Ministerio de Industria y Comercio
Mr. Paolo Di Rosa	Arnold & Porter LLP
Mr. Raúl Herrera	Arnold & Porter LLP
Mr. José Antonio Rivas	Arnold & Porter LLP
Ms. Mallory Silberman	Arnold & Porter LLP
Ms. Catherine Kettlewell	Arnold & Porter LLP
Ms. Claudia Taveras	Arnold & Porter LLP
Ms. Ana Pirnia	Arnold & Porter LLP

For the Claimant:

Mr. Ian Meredith	K&L Gates LLP
Mr. Wojciech Sadowski	K&L Gates LLP
Ms. Ania Farren	K&L Gates LLP
Mr. Jake Ferm	K&L Gates LLP
Ms. Malgorzata Judkiewicz	K&L Gates LLP
Mr. Randolph Fields	Corona Materials, LLC
Mr. Alain French	Corona Materials, LLC
Mr. John Elliott	Corona Materials, LLC

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<sup>6</sup> By consent of the Parties, Ms. Christine Sim Hui Ling, a Practice Fellow of the National University of Singapore's Centre for International Law and assistant to Mr. Thomas, was permitted to attend the Hearing as an observer.

32. The following persons were examined:

On behalf of the Respondent:

Ing. Ernesto Reyna  
Ing. Lina Beriguette  
Minister Jaime David Fernandez Mirabal  
Ing. Rosa Urania Abreu  
Prof. Eduardo Jorge Prats

On behalf of the Claimant:

Mr. Alain French  
Ms. Fabiola Medina Garnes  
Prof. Gustavo José Mena García

33. During the Hearing and at the Tribunal's proposal, the parties reached the following agreement: *"The parties agree that the Members of the Tribunal may agree on the text of the award by correspondence or other means of communication and sign the final text without meeting in person at the place of arbitration. The parties agree that wherever the award is signed by each arbitrator, it is deemed to have been made at the place of arbitration (Washington, D.C.)."* Said agreement was recorded in Procedural Order No. 3 dated April 19, 2016.

**K. Post-Hearing Submissions**

34. Pursuant to the directions given by the Arbitral Tribunal at the Hearing as complemented by a letter dated April 20, 2016, the Parties submitted simultaneous Post-Hearing Briefs on April 26, 2016 and Costs Submissions on May 6, 2016.
35. In accordance with the section 22.4 of Procedural Order No. 1, on May 5, 2016, the Secretary of the Tribunal transmitted the Final Revised Transcripts of the Hearing on Preliminary Objections held on April 11-12, 2016 to the Parties, incorporating the agreed corrections to the transcripts submitted by the Parties on April 25, 2016, as confirmed by the Tribunal by email of April 26, 2016. At the invitation of the Tribunal, on May 13,

2016, each party filed an updated Post-Hearing Brief, incorporating the references to the Final Revised Hearing Transcripts.

36. On May 31, 2016, the Tribunal declared the proceeding closed in accordance with Article 44 of the ICSID Arbitration (Additional Facility) Rules.

### III. FACTUAL BACKGROUND

37. To the extent relevant for the purposes required by the Tribunal to address the Respondent's DR-CAFTA Article 10.20.5 Preliminary Objections, and for that limited purpose only, the Tribunal summarises the factual background to the dispute. The summary of facts does not reflect any finding of fact or conclusion of law by the Tribunal in this Part of the Award.
38. The case concerns a mining project to build and operate a mine in the DR from which Corona would export construction aggregate materials to Florida and elsewhere (the "**Project**").<sup>7</sup>
39. In May 2007, Corona through its 99% owned Dominican subsidiary, Walvis Investments, S.A. ("Walvis"), submitted an application to the DR Mining Office to operate the Joama Exploitation Concession (the "**Exploitation Concession Application**").<sup>8</sup>
40. In September 2007, the Claimant submitted an application for an Environmental License (the "**Environmental License Application**"), required to operate the aggregates mine, to the Respondent's Ministry of Environment and Natural Resources (the "**Environmental Ministry**").<sup>9</sup>
41. The Claimant asserts that **Joama Exploitation Concession** was granted in 2009 for a period of 75 years<sup>10</sup>, and that the only remaining approval needed to make full use of it

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<sup>7</sup> RFA, ¶26; PO Counter-Memorial, ¶10.

<sup>8</sup> PO Counter-Memorial, ¶11.

<sup>9</sup> PO Counter-Memorial, ¶¶11, 30, 31; PO Reply, ¶10.

<sup>10</sup> PO Counter-Memorial, ¶12.

was to obtain the Environmental License, for which an Environmental Impact Assessment (the “EIA”) was required.<sup>11</sup>

42. The Claimant submits that there were delays in processing Corona's Environmental License Application,<sup>12</sup> in issuing the amended terms of reference,<sup>13</sup> and in issuing Corona's EIA.<sup>14</sup> In the Respondent's view, it was the Claimant that delayed the proceeding by omitting or delaying its response to the Ministry's requests for documents and information, and by modifying the scope of the project several times during the assessment process.<sup>15</sup>
43. On August 18, 2010, the Environmental Ministry, through Communication No. DEA-3867-10, informed Corona that the Joama Project was “*not environmentally viable*” (the “**Negative Environmental Decision**” or the “**Communication No. DEA-3867-10**”).<sup>16</sup> The Negative Environmental Decision was taken by Resolution 737-10 of the Environmental Ministry's Technical Evaluation Committee (“**TEC**”) following a meeting of July 28, 2010 (“**Resolution 737-10**”).<sup>17</sup> According to the Claimant, the Negative Environmental Decision failed to proffer actual reasons, was only two pages long, did not provide explanations, nor set out any procedure by which the decision could be appealed or could be submitted to reconsideration.<sup>18</sup> The Claimant further submits that Resolution 737-10 was never served on the Claimant.<sup>19</sup> The Respondent, on the other hand, argues that the communication not only informed Walvis of the Ministry's decision to reject the license application, but also of the reasons why such decision was made, as it indicated that the rejection was based on Articles 118, 120, 126, 129, and 8 of Law No. 64-00 on the Environment and Natural

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<sup>11</sup> PO Counter-Memorial, ¶¶13, 20, 41, 42; PO Reply, ¶11.

<sup>12</sup> PO Counter-Memorial, ¶¶45-49.

<sup>13</sup> PO Counter-Memorial, ¶¶50-51.

<sup>14</sup> PO Counter-Memorial, ¶¶52-55.

<sup>15</sup> PO Respondent's Reply, ¶13.

<sup>16</sup> PO Counter-Memorial, ¶56. Communication from Reyna Ernesto to Walvis Investments, S.A. No. DEA-3867-10 (C-14) (R-4). First Witness Statement of Alain Stanley French, ¶10 (“**French 1<sup>st</sup> Statement**”). PO Respondent's Reply, ¶14.

<sup>17</sup> PO Counter-Memorial, ¶60; (C-14) (R-4). Resolution 737-2010 was filed with the Respondent's Reply, (R-8).

<sup>18</sup> PO Counter-Memorial, ¶¶57-58.

<sup>19</sup> PO Counter-Memorial, ¶¶ 6(a), 60, 112, 127(b), 199.

Resources. According to the Respondent, those articles from Law No. 64-00 refer to the State's power to limit resource use for public interest reasons.<sup>20</sup> The Claimant argues that Resolution 737-2010, submitted by the Respondent with its Reply (but not served to the Claimant), if read jointly with Communication No. DEA-3867-10, establishes beyond doubt that the Respondent's refusal to grant Corona an Environmental Permit for the Project was an arbitrary act.<sup>21</sup>

44. According to the Respondent's witness, Ms. Beriguette, in her role of Environmental Assessment Director at the Environment Ministry at the time, she participated in the TEC for the Joama Project, and in particular in the July 28, 2010 meeting, during which various members of the committee offered technical reasons why the project should be rejected. She further submits that after the meeting, the project representative and its consultants, who were waiting outside of the room, as they could not be present during the deliberation, were invited into the room, and were informed orally of the decision and the reasons for it. This was followed by a written notification dated August 18, 2010.<sup>22</sup> To the contrary, the Claimant's witness, Mr. French, submits that none of Corona's representatives or consultants were invited to the TEC meeting on July 28, 2010. Mr. French further asserts that between the July 28, 2010 meeting and the receipt of the Communication No. DEA-3867-10 of August 18, 2010, he was informed by one of Corona's environmental consultants that TEC had approved the Environmental License Application, but that it was not signed. Mr. French also submits that he had not seen Resolution 737-10 prior to reading the Respondent's Reply.<sup>23</sup>
45. On October 5, 2010, the Claimant submitted a letter to the Environmental Ministry. According to the Claimant, the letter was a Motion for Reconsideration of the Negative Environmental Decision (the "**Motion for Reconsideration**"), to which it has never received a formal response.<sup>24</sup> According to the Respondent, although it seems from the

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<sup>20</sup> PO Reply, ¶15.

<sup>21</sup> PO Rejoinder, ¶2.

<sup>22</sup> Witness Statement of Ms. Lina Beriguette, ¶¶15-16 ("**Beriguette Statement**").

<sup>23</sup> Second Witness Statement of Alain Stanley French, ¶7-10 ("**French 2<sup>nd</sup> Statement**").

<sup>24</sup> PO Counter-Memorial, ¶62. The Claimant's Motion for Reconsideration, October 5, 2010 (C-15)(R-1).



letter that is was a motion for reconsideration, since the deadline for seeking a reconsideration of the August 18, 2010 notification had expired, it could not be considered to be such a motion.<sup>25</sup>

46. It is disputed whether the environmental assessment proceedings have been closed or not. According to the Claimant, it has never been formally closed by the Respondent.<sup>26</sup> However, the Respondent asserts that Communication No. DEA-3867-10 expressly stated that the file was closed.<sup>27</sup>
47. The Claimant submits that at a meeting held in January 2011 (the “**January 2011 Meeting**”) between company representatives and the Sub-Secretary of Environmental Management, Mr. Reyna, and other government officials regarding the Negative Environmental Decision, the Claimant was told that the Decision would be reconsidered. A further meeting was allegedly held in mid-June 2011 (the “**June 2011 Meeting**”), also regarding the status of the Environmental License and the reconsideration of the Negative Environmental Decision. The Claimant also refers to its various written communications to Government officials,<sup>28</sup> and claims to have been told on several occasions by DR officials, among them, Ms. Beriguette of the Environmental Ministry, that the Negative Environmental Decision was under reconsideration.<sup>29</sup> With regard to the June 2011 Meeting, Mr. Alain Stanley French, a principal of the Claimant, asserts that environmental consultants, including Mario Mendez of Empaca, met with Secretary Jaime David of the Environmental Ministry and Sub-Secretary Reyna in relation to the Environmental License. Mr. French submits that based on what he was told he still believed that there was a possibility that the Environmental Ministry may reconsider its Negative Environmental Decision and issue an Environmental Decision for the Project.<sup>30</sup> According to the Respondent, the June 2011 Meeting between former Minister Jaime David Fernández,

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<sup>25</sup> PO Reply, ¶19.

<sup>26</sup> PO Counter-Memorial, ¶13.

<sup>27</sup> PO Reply, ¶¶16, 20.

<sup>28</sup> PO Counter-Memorial, ¶¶61-75.

<sup>29</sup> PO Counter-Memorial, ¶76.

<sup>30</sup> French 1<sup>st</sup> Statement, ¶13.

Vice-Minister Ernesto Reyna, and Corona's consultant Mr. Mario Mendez never took place. The Respondent submits that the Claimant has not provided any evidence that such a meeting was held in June 2011, that the Claimant's accounts of the June 2011 meeting are inconsistent, and that this strongly suggests that the Claimant and/or its witness Mr. French chose to refer to "an alleged (but non-existent) June 2011 meeting for the sole purpose of avoiding the consequences of DR-CAFTA Article 18.10.1."<sup>31</sup> The Respondent further rejects any allegation that the former Minister and Vice-Minister created expectations or made promises that the rejection of the environmental license would be reconsidered and annulled and/or that an environmental license could be granted.<sup>32</sup> The Respondent's submissions were supported with the witness statements of Ms. Lina Beriguette, Mr. Ernesto Reyna, Minister Jaime David Fernández, and Ms. Rosa Abreu, who also indicated in their respective statements that no individual official was legally empowered to annul the Negative Environmental Decision.<sup>33</sup>

48. On February 23, 2011, the Claimant wrote a letter to Vice-Minister Reyna<sup>34</sup> to complain about the lack of progress [of the Motion for Reconsideration] (the "**February 23, 2011 letter**").<sup>35</sup> The Respondent submits that it is evident from the express language of the letter that its real purpose was to warn the Dominican Republic of Corona's intent to proceed to arbitration under DR-CAFTA unless Corona's demands were met.<sup>36</sup>
49. Since the Parties have extensively debated the February 23, 2011 letter, the Arbitral Tribunal considers important to transcribe said letter in its entirety:

*"23 February 2011*  
*Engineer Ernesto Reyna Alcántara*  
*Vice-Minister of Environmental Management*  
*Ministry of State of Environment and Natural Resources*

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<sup>31</sup> PO Reply, ¶31.

<sup>32</sup> PO Reply, ¶32.

<sup>33</sup> PO Reply, ¶¶21, 27-28, 32-33. Beriguette Statement, ¶¶17-18; Witness Statement of Mr. Ernesto Reyna, ¶19 ("**Reyna Statement**"); Witness Statement of Dr. Jaime David Fernández, ¶17 ("**Fernández Statement**"); Witness Statement of Ms. Rosa Urania Abreu, ¶¶12-17 ("**Abreu Statement**").

<sup>34</sup> Letter from A. French to the Ministry, February 23, 2011 (**R-2**).

<sup>35</sup> PO Counter-Memorial, ¶68.

<sup>36</sup> PO Reply, ¶23.

*Present. –*

***Reference: ISSUANCE OF THE ENVIRONMENTAL PERMIT FOR THE JOAMAEXPLOITATION CONCESSION CODE 3378/3263: WALVIS INVESTMENTS, S.A.***

*Distinguished Engineer,*

*This past Thursday, 17 February 2011, we visited the offices of Environmental Management to determine the status of the Reconsideration of the JOAMA Environmental License. Several people at Management tried to assist us, but no one was able to provide any information about JOAMA. Finally, after two hours speaking with five people, we were informed that after the meeting with the delegates from Sanchez in their office on January 2011, personal [1] from Environmental Management had not worked or advanced on the reconsideration of the application for JOAMA Environmental License. It is true we are very disappointed but not surprised. For more than three years, the modus operandi of Environmental Management seems to stay the same without changes. During this time, we have been subjected to continuous delays, excuses, unfulfilled promises, questionable competence and, in several instances, rudeness.*

*We invested in the Dominican Republic for the following reasons. In 2006, high ranking officials from President Fernández's administration convinced us that our investment of 80 million dollars in an export company would be safe in Sánchez. Also, all the partners met with you and the Minister of Environment, Minister Omar Ramirez, in your offices and your personal expressed enthusiasm about JOAMA. On the basis of these guarantees, we proceeded to invest in good faith in the JOAMA project at World Level. Now, after our frustrating experience we have arrived at the conclusion that Environmental Management, for unknown reasons, does not want to or cannot process for JOAMA's Environmental License Application diligently and in good faith.*

*We recognize that the Dominican Government has correct and appropriate means to allow or deny mining activities, and must do so through administrative proceedings that are found in the environment in Mining Law 146-00, and the Environmental Law 64-00, nothing in this letter should be interpreted as a request for a special favor. However, the Dominican Government is also a Party to the DR-CAFTA Treaty and is required to respect its provisions.*

*The Partners of Corona in Florida believe that Environmental Management may be unaware of the substantive obligations of Article 10*

*of the DR-CAFTA that protects foreign investors like us. According to them, Environmental Management has seriously violated these protection provisions on various occasions. One Corona partner is also a lead partner in the prestigious international law firm Greenberg Traurig, which are specialists in the area of investor-state disputes and have successfully represented investors before arbitration tribunals as they did in the first DR-CAFTA case. This Arbitration Process in Investor-Dominican State disputes does not go before the Dominican courts but rather before an arbitral tribunal in Washington, DC. Generally, the Investor-State dispute tribunals are not indulgent to States and their interpretation of "Fair and Equitable Treatment" is much broader than in Dominican courts. The International Law Association (ILA) over the Committee on Foreign Investment last interpretation of the "Fair and Equitable Treatment" in Article 10 requires of very important obligations for the guest (Dominican) State: now it is well established that the rule requires certain level of rule of law within the host country which encapsulates the obligation to act in a coherent manner, without ambiguity and with total transparency, not arbitrary and in accordance with the principle of good faith.*

*Also, the investors may expect due process in processing their claims and that authorities' actions are taken in a non-discriminatory manner and proportionate to the political objectives involved. Among these features the need to respect the objective of creating favorable conditions for the investment, complying with legitimate commercial expectations of the investors and without any drastic changes in the tax regime.*

*For your reference, some of the specific violations to DR-CAFTA obligations are listed below:*

- 1. The Minister has issued public statements in the press that environmental licenses are processed in 30-60 days, while we have been waiting more than thirty six months.*
- 2. After having been granted the Terms of Reference of the Mine and private Marine Port, the Minister signed Resolution No. 18 at the end of 2008, which effectively canceled the authorization procedure to export construction aggregates.*
- 3. Since we had already made a considerable investment and entered into the future commitments required, the Terms of Reference were divided in two: one Terms of Reference for the Quarry and another for the Marine Port so that at least the licensing process for the Quarry could continue, the original Terms of Reference were no longer valid. After a considerable delay, the Ministry issued a new Term of Reference only for the Quarry with a strict limitation that aggregate materials could not be exported.*

4. *After industry pressure, the Minister signed Resolution #21 at the beginning of 2009 reinstating the authorization process to export aggregates. Nevertheless, for reasons unknown to us . . . the Ministry continued denying the Terms of Reference for the Private Marine Port and continues not to permit the export construction aggregates notwithstanding Resolution #21. We have noted that Resolution 21 does not appear that they have distributed it within the Ministry and has not been published in the Ministry's website.*

5. *Resolution #21 includes a new tax of \$2.00 per square meter on exports for construction aggregates however the domestic tax was kept in \$0.30 per square meter. We consider that this tax is arbitrary and unfair and in violation of the obligations and spirit of the DR-CAFTA agreement.*

6. *The Ministry on repeated occasions has asked us for copies of the same information related to issues that are obsolete and not relevant anymore. For example, they have asked three times for copies of the "No Objection Letters" of the plot owners indicating that they allow us to have exploration activities on their land. The exploration phase was completed 30 months ago and the "No Objection Letters" have been replaced with sales and leasing contracts. We can only conclude that the technical staff that is working on the request does not completely understand the project or Environmental Management is deliberately blocking our request.*

7. *On November of 2010, the Ministry sent a notice that the project was "not environmentally viable," citing six extracts of environmental provisions... none of which we were in violation. For example, it declared that the project required a 30 meter buffer from all bodies of water when we are at a distance of 700 or more meters. In conclusion, the letter does not include a specific reason to deny the license.*

8. *The Minister can has recently declared that he is not going to any new mining operating license.*

9. *The Mining Director and the Minister of Foreign Relations of the Investment office (CEIRD) promoted the DR to us in Florida in 2005 and 2006 and, based on their guarantees in which we have invested in the good DR faith and now Corona's partners believe that we could have been cheated and could have been defrauded by the Dominican State.*

*In accordance with the instructions of the Partner of Corona, I have contacted the Dominican CEI-RD offices and the International Commerce Direction (DICOEX) to try to negotiate an amicable solution. To this meeting scheduled for 2 March 2011 at 9:30, the Director of DICOEX, a representative of CEI-RD and the Mining Director, Corona has invited a representative of the Commercial Representation of the US and the*

*Executive Director of ASIEX (Dominican Foreign Investors Association) to participate.*

*According to the administrators of Corona, express if the Environmental License and the Terms of Reference for the Private Port are not issued the damages to Corona arising directly from the violations of Management would be USD 342 million. However, we can accept lesser losses and injuries and damages for the three years that JOAMA is paralyzed we can reach a settlement on 2 March 2011 during the meeting at DICOEX, subject to Corona receiving the Environmental License and the Terms of Reference for the Private Marine Port and the Conveyor Belt.*

*We sincerely hope that you or your colleagues also can participate in this meeting so that we have the opportunity to avoid an Arbitral Tribunal in Washington, DC...*

*Sincerely,*

*[Signature]*

*Eng. A. French,  
Managing Partner  
Corona Materials, LLC  
Cell 809-769-8080  
Email: coronamaterials@gmail.com*

*Cc:  
Jaime David Mirabel, Minister of Environment and Natural Resources  
Congressman Miguel Ángel Jazmin  
Ms. Yahaira Sosa, Director of Foreign Trade and Administration of  
Commercial Treaties  
Mr. Octavio López, Mining Director  
Andria Malito, DR-CAFTA Specialist US Trade Representative Office,  
Washington DC  
Mr. Mario Méndez, EMPACA Redes, Environmental Consultant  
Mr. Salvador Demallistre, Executive Director ASIEX”*

#### **IV. THE PARTIES' REQUESTS**

##### **A. The Respondent's Requests**

50. The Respondent's PO Memorial, contains the following petition:

*“The Dominican Republic hereby respectfully requests this Tribunal that:*

- a. *This Preliminary Objection be deemed to have been submitted in due time and in proper form in accordance with Article 10.20.5 of the DR-CAFTA; Substantive proceedings be suspended;*
- b. *The processing of this Objection be expedited in accordance with Article 10.20.5 of the DR-CAFTA;*
- c. *The Tribunal declare that the Tribunal lacks jurisdiction to hear this dispute given that the Claimant's claims fall outside the three-year period stipulated by Article 10.18.1 of the DR-CAFTA;*
- d. *The Claimant be ordered to pay the costs incurred by the Dominican Republic owing to this Arbitration, in accordance with Article 10.20.6 of the DR-CAFTA.”<sup>37</sup>*

51. In its PO Reply, the Respondent requested *“that the Tribunal issue an award in which it:*

- a. *dismisses Claimant's claims in their entirety, on the basis of DR-CAFTA Article 10.18.1; and*
- b. *orders that Claimant bear the entirety of the costs and fees of the present arbitration, including the Dominican Republic's attorney fees, and any other fees and expenses.”<sup>38</sup>*

**B. The Claimant's Requests**

52. The Claimant's PO Counter-Memorial includes the following request for relief:

*“The Claimant therefore respectfully requests that:*

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<sup>37</sup> PO Memorial, ¶135.

<sup>38</sup> PO Reply, ¶108.

- a. *the Tribunal dismiss the Respondent's Preliminary Objections in their entirety;*
- b. *the Tribunal declare that it has jurisdiction to hear this dispute given that the Claimant's claims fall within the three-year period stipulated by Article 10.18.1 of DR-CAFTA;*
- c. *the Respondent be ordered to pay the costs of the determination of the Preliminary Objections, including reasonable counsel's fees; and*
- d. *the Tribunal confer such other relief as is just and warranted.*<sup>39</sup>

53. The Claimant ratified the above request for relief in its PO Rejoinder.<sup>40</sup>

## **V. SUMMARY OF THE PARTIES' SUBMISSIONS**

### **A. The Respondent's Memorial on Preliminary Objections**

54. In its PO Memorial, the Respondent claims that the Tribunal lacks jurisdiction to hear the Claimant's claims because the alleged acts and omissions on which the Claimant's claims are allegedly based took place outside the three-year period required under DR-CAFTA Article 10.18.1 for a Tribunal to have jurisdiction over the claims.<sup>41</sup>

#### ***(1) Legal Framework and Legal Standard***

55. According to the Respondent, the legal framework that applies to preliminary objections can be found in Paragraphs 4, 5 and 6 of DR-CAFTA Article 10.20.<sup>42</sup>

56. The Respondent submits that the legal standard applicable to DR-CAFTA Article 10.20.5 is the one adopted by the *Renco v. Peru*<sup>43</sup> tribunal, which after analysing Article 10.20.5 of

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<sup>39</sup> PO Counter-Memorial, ¶232.

<sup>40</sup> PO Rejoinder, ¶197.

<sup>41</sup> PO Memorial, ¶¶2-3.

<sup>42</sup> PO Memorial, ¶4.



the United States-Peru FTA (analogous to DR-CAFTA Article 10.20.5)<sup>44</sup>, asserted (i) that the expedited procedure comprises both objections of law under paragraph 4 as well and any objection that the dispute is not within the tribunal's competence;<sup>45</sup> and (ii) that claimant's factual allegations relating to tribunal jurisdictional issues under Article 10.20.5, unlike Article 10.20.4, are not required to be "assumed to be true" for the filing of preliminary objections.

***(2) Claims Lie Outside of the DR-CAFTA Article 10.18.1 Three-Year Period***

57. The Respondent submits that in accordance with the two elements comprised in DR-CAFTA Article 10.18.1, a tribunal would lack jurisdiction *ratione temporis* if the claim brought under DR-CAFTA Article 10.16 is not submitted to arbitration within three years following the date on which the claimant (a) acquired, or should have acquired, knowledge of the alleged breach; and (b) acquired, or should have acquired, knowledge of the loss or damage incurred.<sup>46</sup>
58. In analyzing the elements of the statute of limitations set out in DR-CAFTA Article 10.18.1, the Respondent notes that certain steps need to be followed.
59. First, the Tribunal should define the relevant measure(s) that allegedly gives rise to the alleged breach<sup>47</sup>.
60. Second, the Tribunal should determine the relevant critical date in order to determine the end of the three-year limitation period. The Respondent submits that tribunals have uniformly taken the date of receipt by the Secretary-General of ICSID of the Request for

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<sup>43</sup> *The Renco Group, Inc. v. Republic of Peru*, UNCT-13-1, Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4, dated December 18, 2014 ("*Renco v Peru*") (**RA-3**).

<sup>44</sup> PO Memorial, ¶¶13-14.

<sup>45</sup> PO Memorial, ¶13.

<sup>46</sup> PO Memorial, ¶24.

<sup>47</sup> PO Memorial, ¶¶25-26. DR-CAFTA Article 2.1 defines "measure" as including "any law, regulation, procedure, requirement, or practice...." (**RA-1**).

Arbitration from which the three-year period is calculated backwards<sup>48</sup>. The Respondent initially asserted that in the present case, the date of the RFA, as supplemented, is July 28, 2014, and that consequently, July 28, 2014 would be the date prior to which the Claimant must have acquired knowledge of the alleged breaches, and of the alleged resulting damage<sup>49</sup>. However, during the Hearing, the Respondent agreed to take June 10, 2014 (*i.e.* date of receipt of the RFA by ICSID) as the effective date of the RFA and, therefore, **June 10, 2011** as the critical date for DR-CAFTA Article 10.18.1, after deducting the DR-CAFTA three-year limitation period.<sup>50</sup>

61. Relying on the interpretation given by several North American Free Trade Agreement (“NAFTA”) tribunals to a provision included in Articles 1116(2) and 1117(2) of NAFTA, which is similar to DR-CAFTA Article 10.18.1, the Respondent asserts that the three-year period set out in Article 10.18.1 does not permit suspensions, extensions or other modifications,<sup>51</sup> and that it is not necessary for the claimant to know the exact amount of loss or damage in order for time to begin to run.<sup>52</sup>
62. The Respondent includes a table with a compilation of (1) the Claimant's claims; (2) the measures which, according to the Claimant, constitute the breaches on which the Claimant's claims are based; (3) each of the dates of the measures invoked; and (4) the time period that elapsed from the date of the measure to the date of the RFA.<sup>53</sup>
63. According to the Respondent, the Claimant acquired knowledge of the existence of the measures on each of the dates when the measures were passed, or alternatively on dates very close to such dates and, in each case, on dates prior to June 10, 2011.

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<sup>48</sup> PO Memorial, ¶27. See *Mondev International Ltd. v United States of America*, ICSID Case No. ARB(AF)99/2 (“*Mondev v. USA*”) (RA-9).

<sup>49</sup> PO Memorial, ¶¶ 29-30.

<sup>50</sup> Tr.27:22-30:6.

<sup>51</sup> See Respondent's Post-Hearing Brief, ¶¶ 3-4.

<sup>52</sup> PO Memorial, ¶30. *Mondev v. USA* (RA-9).

<sup>53</sup> PO Memorial, ¶31.

64. As for the loss or damage claimed to have been suffered, the Respondent submits that in the Claimant's Notice of Intent<sup>54</sup>, reference was made to a letter of February 16, 2011 to Mr. Ernesto Reyna Alcántara, Deputy Minister of Environmental Management at the Environmental Ministry<sup>55</sup>, which evidences that the Claimant "*had clearly acquired knowledge of the damages supposedly caused by the alleged breaches of the DR-CAFTA*", 3 years, 5 months and 6 days before the RFA.<sup>56</sup>
65. The Respondent then analyses the Claimant's claims for alleged breaches of DR-CAFTA Articles 10.3 (National Treatment), 10.5 (Minimum Standard of Treatment), 10.7 (Expropriation), under the perspective of its objection under DR-CAFTA Article 10.18.1, and concludes that they were all submitted outside of the three-year relevant time limit, and must therefore be dismissed.
- a. **The Dominican Republic has not consented to arbitration to settle the claim made by Corona regarding the alleged breach of Article 10.3 (National Treatment) of the DR-CAFTA**
66. The Respondent notes that Corona invokes the Environmental Ministry Resolution No. 17-2008 dated November 18, 2008 ("**Resolution No. 17-2008**"), and Resolution No. 21-2009 dated May 25, 2009 ("**Resolution No. 21-2009**"), as measures that allegedly breached DR-CAFTA Article 10.3 by being discriminatory, designed to unfairly and disproportionately tax any party, seeking to export aggregate outside the Dominican Republic, in particular Corona.<sup>57</sup>
67. According to the Respondent, the Claimant acquired, or should have acquired knowledge of Resolution 17-2008, and of Resolution No. 21-009, on the date of the respective

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<sup>54</sup> PO Memorial, ¶32.

<sup>55</sup> The Respondent understands that this letter might in fact be one dated February 23, 2011 from Mr. A. French, representing Corona Materials, LLC to Mr. Ernesto Reyna Alcántara. (R-2)

<sup>56</sup> PO Memorial, ¶33.

<sup>57</sup> PO Memorial, ¶¶36-38.

adoption of these measures, over five years before the RFA, thus the claim based on those measures is outside the relevant three-year period.<sup>58</sup>

68. The Respondent also refers to Communication No. DEA-386710, issued by the Environmental Ministry on August 18, 2010, which notified Walvis that the Joama Exploitation Concession project had been declared environmental unfeasible.<sup>59</sup> The Claimant argues that this Communication, which rejected the request for an environmental license, breached DR-CAFTA Article 10.3 by allegedly applying environmental regulations to Corona differently than that applied to domestically owned mining operations.<sup>60</sup>
69. The Respondent claims that the Claimant acquired knowledge of this measure on August 18, 2010, 3 years, 11 months and 11 days before the RFA, and that consequently, the claim based on this measure was submitted outside the relevant three-year period.<sup>61</sup>
70. Further, the Respondent, referring to decisions rendered under the NAFTA, submits that given that the DR-CAFTA does not allow a suspension or interruption to the limitation period established in Article 10.18.1, it is irrelevant whether Corona submitted any appeal for reconsideration or not.<sup>62</sup>
71. With regard to the alleged damages caused by the above-indicated measures, namely: (i) the termination of the possibility of Corona pursuing its mining project (Resolution No. 17-2008); (ii) imposing a tax of US\$2.00 per cubic meter on aggregate exports, which was alleged to have a severe impact on Corona's future profit margins (Resolution No. 21-2009); and (iii) the denial of the request, the Respondent submits that the Claimant also acquired, or should have acquired, knowledge of the alleged damages caused by the above-

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<sup>58</sup> PO Memorial, ¶¶40-42.

<sup>59</sup> (R-4).

<sup>60</sup> PO Memorial, ¶¶45-46.

<sup>61</sup> PO Memorial, ¶48.

<sup>62</sup> PO Memorial, ¶¶49-51. *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL Arbitration, Decision on Objections to Jurisdiction, July 20, 2006, ¶29 (“*Grand River v. USA*”) (RA-7). *Marvin Roy Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶63 (“*Feldman v Mexico*”) (RA-8).

indicated measures, on the same dates as each of such measures were adopted. That is, over three years prior to filing the RFA.

72. Furthermore, the Respondent submits that such knowledge is evidenced by the February 23, 2011 letter from Mr. A. French, Corona's representative, to the Deputy Minister of Environmental Management, where the company estimated the amount of damages it had sustained as a consequence of the measures just listed, which allegedly resulted in the violation of DR-CAFTA Article 10.3, at some US\$342 million.<sup>63</sup>

b. **The Dominican Republic did not Consent to Arbitration to Submitting the Claim Concerning the Alleged Violation of Article 10.5 (Minimum Standard of Treatment) of the DR-CAFTA.**

73. The Respondent refers to the measures which, according to the Claimant, allegedly violated DR-CAFTA Article 10.5. by (i) displaying arbitrary and discriminatory conduct, unfairly targeting Corona's investment, or to Corona's detriment as a foreign investor<sup>64</sup>; (ii) by violating the fair and equitable treatment and full protection and security owed to Corona; (iii) by discriminating against Corona as an investor, denying it the right to due process as part of the environmental licensing procedure, and not granting the minimum standards of due process in the reconsideration process.<sup>65</sup>
74. First, with regard to Resolution No. 17-2008 (subsequently revoked) and Resolution No. 21-2009, already identified *supra*, the Respondent submits that the Claimant was, or should have been aware of both resolutions on the dates on which they were issued (over five years before the RFA).

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<sup>63</sup> PO Memorial, ¶¶53-57. See, Letter dated February 23, 2011 written by Mr. A. French, representing Corona Materials, LL.C. (R-2).

<sup>64</sup> RFA, ¶107.

<sup>65</sup> PO Memorial, ¶59. RFA, ¶107.

75. Second, with regard to the *administrative procedure regarding the environmental license application*, the Respondent argues that the Claimant has not elaborated or provided data to support its allegations of violations of the right to due process.<sup>66</sup>
76. The Respondent asserts that the relevant administrative procedure ended with the denial of the license application, which according to the Claimant's Notice of Intent, was communicated to the Claimant on August 18, 2010.<sup>67</sup> As a result, the Claimant would have been aware of the alleged violations of due process during the environmental license application procedure prior to August 18, 2010.
77. Third, regarding the *denial of the environmental license*, the Respondent submits that as stated in its preceding arguments *supra*, the Claimant was aware of such denial (3 years, 11 months and 11 days prior to the submission of the RFA).<sup>68</sup>
78. Fourth, with reference to the *absence of any response to the "Request for Reconsideration"*, the Claimant claims that its application for reconsideration was submitted on October 5, 2011.<sup>69</sup> The Respondent argues that it was untimely, because in the Dominican Republic, administrative actions become final and unchallengeable thirty (30) days after their notification.<sup>70</sup> Corona would have had up till September 17, 2010 to request a reconsideration of the denial decision, but submitted it only on October 5, 2010, after the statutory time limit had expired. As a result, the Ministry's decision denying the license became final on September 17, 2010 (3 years, 10 months and 12 days prior to the RFA).<sup>71</sup>

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<sup>66</sup> PO Memorial, ¶¶66.

<sup>67</sup> PO Memorial, ¶¶69. See, Notice of Intent, ¶12.

<sup>68</sup> PO Memorial, ¶72.

<sup>69</sup> PO Memorial, ¶¶73-74. RFA, ¶¶105-106.

<sup>70</sup> Rodríguez Huertas, Olivo A, Dominican Administrative Law and General Principles, (University of Montevideo Law Review, Year VIII (2009) No. 16), ("Rodríguez, Administrative Law") p.119, ¶83 (**RA-11**).

<sup>71</sup> PO Memorial, ¶¶73-79.

79. The Respondent notes that ‘negative administrative silence’ is a legal principle according to which an administrative authority shall be deemed to have denied an application when a specific statutory period has expired without its having responded to the application.
80. The Respondent submits that Corona cannot therefore assert that it did not receive a response to its application of October 5, 2010. Once two months had elapsed without a response from the Ministry, the Claimant should have concluded that its request for reconsideration had *de facto* been denied by operation of negative administrative silence.<sup>72</sup>
81. In the event that it is still argued that this silence constitutes a violation of the Minimum Standard of Treatment under DR-CAFTA, the Respondent submits that the date to be considered for the purposes of DR-CAFTA Article 10.18.1, would be December 5, 2010, when the Ministry’s decision was deemed confirmed by operation of the negative administrative silence. Arguably, that date could be extended to January 5, 2011, up to when the Claimant could have resorted to the administrative courts. Even that date would fall outside of the relevant three-year time limit.<sup>73</sup>
82. The Respondent then refers to the Claimant’s claim of alleged violations of the DR-CAFTA by the Dominican Republic’s absence of a response to Corona’s communication of February 16, 2011<sup>74</sup> to the Sub-Secretary of Environmental Management, whereby the Claimant allegedly requested, inter alia, an environmental license to commence operations in the Joama Exploitation Concession<sup>75</sup> (*the alleged “New License Application”*). The Respondent rejects the contention that this letter was a license application; rather, it was a threat with the initiation of arbitration proceedings to seek compensation for damages estimated to be US\$342 million, unless the environmental license and the terms of reference for the private seaport and the conveyor belt were issued, and submits that such letter did not require a response.<sup>76</sup> Nevertheless, the Respondent argues that in the event

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<sup>72</sup> PO Memorial, ¶¶83-84.

<sup>73</sup> PO Memorial, ¶¶85-86.

<sup>74</sup> The Respondent understands that this letter is actually the letter dated February 23, 2011 from Mr. A. French to Ernesto Reyna Alcántara. (R-2)

<sup>75</sup> PO Memorial, ¶87.

<sup>76</sup> PO Memorial, ¶¶87-100.

that this Tribunal determines that a response was required, in the absence of a written response, by virtue of the negative administrative silence doctrine, the adduced application is deemed to have been denied once two months had elapsed from its filing.<sup>77</sup>

83. According to the Respondent, the Claimant was or should have been aware of any violation or damage caused by virtue of negative administrative silence concerning the alleged “New License Application” not later than March 23, 2011 (or April 23, 2011, if considering the date of expiration of the Claimant’s right to resort to the administrative courts following the authority’s silence and of the implicit refusal arising therefrom). Either of these dates would still be prior to the July 28, 2011 critical date.<sup>78</sup>
84. The Respondent submits that in the event that the Claimant attempts to argue that this “License Application”, and the alleged lack of response interrupt or suspend the prescription period set forth under DR-CAFTA Article 10.18.1, it should be recalled that (i) DR-CAFTA Article 10.18.1 does not provide for any suspension of the relevant three-year period; and (ii) that in accordance with the general principles of law applied by international courts, a suspension of this nature only applies in cases of force majeure or when a right-holder is fraudulently prevented from bringing proceedings.<sup>79</sup> According to the Respondent, this is not the case here, and the prescription period under DR-CAFTA Article 10.18.1 cannot be deemed to have been suspended or interrupted.
85. The Respondent also disputes the Claimant’s submissions concerning the alleged January 2011 and June 2010 Meetings with officials of the Environmental Ministry following the denial of the environmental license application, as no evidence has been provided as to whether they took place or what was allegedly discussed in them. The Respondent also points to some inconsistencies in the RFA.
86. In its letter of July 14, 2014, in response to ICSID’s request for a confirmation of whether the condition set forth under DR-CAFTA Article 10.18.1 had been met, the Claimant

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<sup>77</sup> PO Memorial, ¶101.

<sup>78</sup> PO Memorial, ¶102.

<sup>79</sup> PO Memorial, ¶¶103-104. *Feldman v Mexico (RA-8)*.



confirmed that the claims were filed in time, as this was done during the three years from the mid-June 2011 Meeting during which the Dominican Republic promised to reconsider the application for the issue of a license.

87. The Respondent rejects the contention that any alleged promise made in any such alleged meeting would suspend the prescription term. Relying on *Feldman v. Mexico*, the Respondent submits that for conduct to interrupt or suspend the prescription periods, it must have been prolonged, uniform, consistent and effective and must originate from an administrative authority competent to acknowledge the viability of a claim against the State and its amount. The holding of meetings with representatives of the Dominican Republic cannot be considered as a continuing act resulting from the denial of environmental permit or as a suspension of the prescription. Finally, according to the Respondent, Corona had access to and could have appealed the environmental permit denial before the Dominican Republic's administrative or judicial authorities, but did not.<sup>80</sup>
88. As for the loss or damage, the Respondent, relying on its previous arguments *above*, submits that Corona was or should have been aware of the loss or damage it would sustain as a result of the measures it cites as violating DR-CAFTA Article 10.5, at least as of February 23, 2011<sup>81</sup>. Such measures all occurred over three years prior to the submission of the RFA.<sup>82</sup>

c. **The Dominican Republic did not Consent to Arbitration by Submitting the Claim Concerning the Alleged Violation of Article 10.7 (Expropriation) of the DR-CAFTA.**

89. The Respondent argues that the facts cited by Corona as grounds for the alleged violations of DR-CAFTA Article 10.7, namely (i) the denial of the environmental license application;

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<sup>80</sup> PO Memorial, ¶¶109-112. *Feldman v Mexico*, ¶63 (RA-8).

<sup>81</sup> Letter dated February 23, 2011 signed by A. French, representing Corona, to Ernesto Reyna Alcántara. (R-2).

<sup>82</sup> PO Memorial, ¶¶113-115.

and (ii) the absence of any response to the “request for reconsideration”, all took place prior to July 28, 2011, and therefore, outside of the three-year prescription period.<sup>83</sup>

90. According to the Claimant, the alleged expropriation is a direct consequence of the denial of the environmental license application. The Respondent submits that the Claimant became aware of such denial, when it was issued on August 18, 2010, over three years prior to the filing of the RFA.<sup>84</sup>
91. As to the alleged “Motion for Reconsideration”, the Respondent, once again submits that it was untimely, without effect, and that by virtue of negative administrative silence, no claim can be made of an absence of response.<sup>85</sup>
92. The Respondent reverts to its previous arguments with respect to the Claimant's contention that the Dominican Republic's inaction with respect to the alleged pledge to reconsider its application suspended any prescription period that was applicable.<sup>86</sup>
93. According to the Respondent, the Claimant was, or should have been, aware of the alleged damages caused by the alleged expropriation, more than three years prior to the filing of the RFA. At least on February 23, 2011, when Mr. A. French, in his letter on behalf of Corona to Mr. Reyna Alcántara, estimated that the denial of the license had caused Corona damages of US\$342 million.<sup>87</sup>

## **B. The Claimant's Counter-Memorial on Preliminary Objections**

### ***(1) Introduction and Relevant Facts***

94. The Claimant asserts that the Respondent's Preliminary Objections are ill-founded as a matter of principle; and too closely linked to the merits to be decided in an expedited

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<sup>83</sup> PO Memorial, ¶¶116-118.

<sup>84</sup> PO Memorial, ¶¶119-121.

<sup>85</sup> PO Memorial, ¶123.

<sup>86</sup> PO Memorial, ¶¶125-127.

<sup>87</sup> PO Memorial, ¶¶128-130. See letter dated February 23, 2011, signed by A. French (R-2).

preliminary objections proceeding. As a result, they should be dismissed as falling outside the scope *ratione materiae* of eligible objections for determination under the DR-CAFTA Article 10.20.5 Expedited Procedure.<sup>88</sup>

95. The Claimant submits that its “Motion for Reconsideration” of October 5, 2010, of the denial of the environmental license, which is equivalent to an appeal, is still pending and has not yet been decided, and in the Claimant’s view, this is a denial of administrative justice on the grounds of excessive delay.<sup>89</sup>
96. The Claimant submits that it was only in the second half of 2011, when the Claimant lost hope that the Negative Environmental Decision would be reconsidered. The Claimant notes that the RFA was filed 3 years from that date.<sup>90</sup>
97. The Claimant gives a general overview of the facts, noting that although the Exploitation Concession was granted in 2009, the Respondent has refused to grant the Environmental License and/or explain how the Project should be modified for the Claimant to benefit from its asset. In the Claimant’s view, this constitutes a continuing violation of the Fair and Equitable Treatment standard (“**FET Standard**”), equivalent in effect to a *de facto* expropriation.<sup>91</sup>
98. According to the Claimant, the Respondent’s Preliminary Objections did not dispute the facts alleged in the Claimant’s RFA, in particular the meetings held in 2011 and 2012 with the DR authorities concerning the Motion for Reconsideration of the Claimant’s Environmental License Application.<sup>92</sup>
99. The Claimant referred to Corona’s corporate registration on November 7, 2005, as a limited liability company under the laws of the U.S. State of Florida, and summarised the commercial business experience of its principal members: Messrs. Randolph Fields, John

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<sup>88</sup> PO Counter-Memorial, ¶¶2, 9.

<sup>89</sup> PO Counter-Memorial, ¶4.

<sup>90</sup> PO Counter-Memorial, ¶5.

<sup>91</sup> PO Counter-Memorial, ¶¶14-15.

<sup>92</sup> PO Counter-Memorial, ¶16.

Elliott and Alain Stanley French. The Claimant submitted witness statements from Mr. Fields and Mr. French with its PO Counter-Memorial.<sup>93</sup>

100. Regarding the Joama Concession, the Claimant referred to its early search in 2005 for potential options to obtain aggregates from mines in the Caribbean to supply the Florida market, noting that it carried out its operations in the DR through Walvis Investments, S.A. (“Walvis”), its DR-incorporated subsidiary. In 2006, Walvis purchased three existing applications for Exploration Concessions at the DR sites of Perla, Joben and Joama. The Claimant asserts that after considering its key advantages, and encouragement from senior officials from the DR government, it decided to start with the Joama Concession, and commissioned a series of feasibility studies, including an environmental feasibility study conducted by Empaca in February 2007, which concluded that the Project was “viable environmentally”.<sup>94</sup>
101. The Joama Exploitation Concession was granted to Walvis on June 1, 2009, conferring, among others, the rights (i) to conduct mining activities within the perimeters of the Concession; (ii) to extract mineral substances of mining sites for economic gain; (iii) to exploit and benefit from the mineral substances extracted within the perimeters of the concession for up to 75 years; and (iv) to construct and establish various types of infrastructure in connection with the mining operations.<sup>95</sup>
102. However, the Claimant notes that the use of the Concession was subject to the positive evaluation of the EIA, and the obtainment of the Environmental License or Permit.<sup>96</sup>
103. The Claimant thus sought to obtain the Concession and requisite Environmental License. Reference is made, in particular, to (i) Corona’s Application for an Exploitation Concession to Mine Aggregates and a Corresponding Environmental License; (ii) the delays in approving the Exploitation Concession Application; (iii) the delays in processing Corona’s Application for an Environmental License; (iv) the delays in issuing the

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<sup>93</sup> PO Counter-Memorial, ¶¶18-21.

<sup>94</sup> PO Counter-Memorial, ¶¶22-27.

<sup>95</sup> PO Counter-Memorial, ¶28.

<sup>96</sup> PO Counter-Memorial, ¶29.

Amended Terms of Reference; (v) the delays in issuing Corona's Environmental Impact Assessment Study; (vi) the denial by the DR of the Environmental Approval for the Joama Exploitation Concession; and (vii) Corona's application for reconsideration of the negative environmental decision.<sup>97</sup>

***(2) Environmental Impact Assessment Process***

104. After providing an overview of generally accepted international principles of modern environmental law, and of the international law commitments assumed directly by the Respondent under DR-CAFTA, the Claimant concludes that a modern EIA process imposes enhanced obligations upon states with respect to transparency, access to justice and due process<sup>98</sup>. The Claimant submits that the conduct of the EIA process carried out by the Respondent with respect to the Project was inconsistent with such principles and international law, and protracted from the outset.<sup>99</sup>
105. According to the Claimant, the Respondent failed to achieve a balance of three fundamental rights (i) the Respondent's sovereign right to form its environmental and economic policies; (ii) the Claimant's rights (prevalingly economic in nature) under DR-CAFTA; and (iii) the right of the public (including Corona and Walvis) to receive reliable, transparent information concerning the environment and decisions concerning the conduct of EIAs in the DR.<sup>100</sup> In late July 2010, the Respondent took a secret decision to discontinue the EIA of the Project on murky grounds. Corona submits that the decision, (allegedly in TEC Resolution 737-10) as described in the letter of August 18, 2010, was arbitrary, and did not follow due process. It was never published nor served on the Claimant, who only became notified of the decision by way of a two-page letter of August 18, 2010, which according to the Claimant did not provide specific reasons for the

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<sup>97</sup> PO Counter-Memorial, ¶¶ 30-78.

<sup>98</sup> PO Counter-Memorial, ¶¶ 79-102.

<sup>99</sup> PO Counter-Memorial, ¶¶ 104-105.

<sup>100</sup> PO Counter-Memorial, ¶¶ 111-112.

discontinuance of the environmental assessment, nor any information concerning the legal remedies available to it.<sup>101</sup>

106. The Claimant asserts that the Dominican authorities had several meetings and exchanges with the Claimant which led it to believe that the Motion for Reconsideration of October 5, 2010 was being processed.<sup>102</sup>

a. **Violation of DR-CAFTA Article 10.5**

107. DR-CAFTA Article 10.5.1 states:

*“Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”*

108. Pursuant to DR-CAFTA Article 10.5.2, the treatment accorded to covered investments is the customary international law minimum standard. The Claimant notes that in accordance with the FET standard, the Host State is obliged, among other things, not to deny administrative justice. The Claimant submits that in its conduct of the EIA process with respect to the Project, the Respondent committed numerous breaches of the FET Standard as defined in DR-CAFTA Article 10.5, as it failed to conform to the international law requirements of transparency and due process, with the result that it committed a denial of administrative justice.<sup>103</sup>
109. According to the Claimant, the **Negative Environmental Decision**, taken by Resolution 737-10, in a session of the Environmental Ministry's TEC of July 28, 2010, without the participation of the Claimant, deprived the Claimant's right to be heard, had an expropriatory effect on the Exploitation Concession, did not comply with the due process requirements prescribed under DR-CAFTA Article 10.7, and was never served on the Claimant, who only received a two-page notification letter with inadequate reasons. The Respondent claims that the **Motion for Reconsideration** was practically the only legal

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<sup>101</sup> PO Counter-Memorial, ¶¶112-113, 127.

<sup>102</sup> PO Counter-Memorial, ¶118. French 1<sup>st</sup> Statement, ¶13.

<sup>103</sup> PO Counter-Memorial, ¶¶122-123, 128.

remedy available to Corona at that time, and the failure to rule on it implied a denial of administrative justice.

110. Relying on the writings of international law scholars, the Claimant submits that the minimum standard of treatment has developed as an independent standard that affords foreigners certain procedural guarantees, such as due process and transparency, that must be respected by the Host State, regardless of the treatment it affords to its own nationals, and regards the denial of justice as a breach of international law.<sup>104</sup>
111. The Claimant submits that as held by numerous arbitral tribunals (i.e., *Bayindir v. Pakistan*, *Lemire v. Ukraine*, and *Metalclad v. Mexico*), and concluded in *Redfern and Hunter on International Arbitration*, “the failure to ensure **due process, consistency, and transparency in the functioning of public authorities, and the lack of a predictable and stable framework for investment [...] are breaches of fair and equitable treatment standards**”.<sup>105</sup> [Bolding in original.]
112. According to the Claimant, by having a deficient system of administrative law, and thus failing to guarantee due process, the Respondent is in breach of the FET Standard, and thus of its treaty obligations under DR-CAFTA. Further, the Claimant relying on the approaches from the tribunals taken by tribunals in *Azinian v. Mexico* and *Hochtief v. Argentina*, submits that the excessively lengthy proceedings that the Claimant faced in relation to the Motion for Reconsideration of the Environmental License was ruinous, and amounted to a denial of justice by the Respondent's administration.<sup>106</sup>
113. Finally, relying on various transnational sources of laws and standards, the Claimant asserts that the international law requirements with respect to the conduct of EIA proceedings are higher than in other cases.<sup>107</sup>

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<sup>104</sup> PO Counter-Memorial, ¶¶129-133.

<sup>105</sup> PO Counter-Memorial, ¶¶135-139 (footnotes omitted). See, Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration*, 6th edition (Kluwer International; Oxford University Press 2015), Chapter 8 (CL-19).

<sup>106</sup> PO Counter-Memorial, ¶¶140-146 (footnotes omitted).

<sup>107</sup> PO Counter-Memorial, ¶¶148-149.

**b. Violation of DR-CAFTA Article 10.7**

114. DR-CAFTA Article 10.7 provides:

“[N]o Party may expropriate or nationalize a covered investment either directly or *indirectly* through measures equivalent to expropriation or nationalization.”<sup>108</sup>

115. According to the Claimant, the Respondent's violations of the FET standard also equates to *de facto* expropriation of the Claimant's investment.

116. The Claimant states that according to a number of arbitral tribunals, to find *de facto* expropriation, a requirement of substantial deprivation has to be met. This has been defined by the tribunal in *Telenor v. Hungary* as a substantial interference with the investor's rights that deprives the investor of the economic value, use and enjoyment of its investment. Further, and as indicated by the tribunal in *Tecmed v. Mexico*, the government's intention or the form of the deprivation is less important than the actual effects of the measures.<sup>109</sup>

**c. Continuing Nature of the Breach**

117. The Claimant, relying on Article 14(2) of the ILC Articles on State Responsibility for Internationally Wrongful Acts<sup>110</sup>, submits that the Respondent's actions form a continuous violation of the DR-CAFTA protection standards. As a result, in the Claimant's view, the three-year limitation period provided for under DR-CAFTA Article 10.18 was renewed, and the Claimant's claims are not time-barred.<sup>111</sup>

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<sup>108</sup> PO Counter-Memorial, ¶151. DR-CAFTA, Chapter Ten (CL-1).

<sup>109</sup> PO Counter-Memorial, ¶¶153-154. *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, September 13, 2006 (CL-27). *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 (CL-30).

<sup>110</sup> Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001. Article 14(2) provides: “The breach on an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligations.”

<sup>111</sup> PO Counter-Memorial, ¶¶155-157.



118. Such was the case in the *UPS v Canada*, submits the Claimant, where the tribunal held that “*continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly.*”<sup>112</sup>
119. The Claimant also submits that the Tribunal should consider whether there is any legal recourse available under domestic laws against the relevant measures.<sup>113</sup>

***(3) The Respondent's Jurisdictional Objection is Without Merit***

120. The Claimant notes that the Respondent's Preliminary Objections are limited to the contention that the Claimant's claims are time-barred pursuant to DR-CAFTA Article 10.18.1.<sup>114</sup>
121. The Claimant submits that, from the clear language of DR-CAFTA Article 10.18.1, to calculate the three-year period stipulated therein: (i) the relevant date is the date of the breach (not of the measure); (ii) the *dies a quo* is the date of the knowledge or presumed knowledge (not the date of the breach); and (iii) the *dies ad quem* is the date of the initial effecting of service of the RFA on ICSID.<sup>115</sup>
122. According to the Claimant, in the present case, the breach is the Respondent's continuing failure to react to the Motion for Reconsideration, and the cumulative impact of many months without a decision amounts to denial of justice.<sup>116</sup>
123. Regarding the relevance of the requisite knowledge, the Claimant recalls that according to the Respondent two requirements have to be met to trigger the three-year time limit: (i) the actual knowledge of the breach by the investor, and (ii) the knowledge of loss or damage resulting from the breach. The Claimant submits that the major difficulty in the present case is that the international wrong committed by the Respondent consists of an arbitrary

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<sup>112</sup> PO Counter-Memorial, ¶160.

<sup>113</sup> PO Counter-Memorial, ¶159.

<sup>114</sup> PO Counter-Memorial, ¶164.

<sup>115</sup> PO Counter-Memorial, ¶167.

<sup>116</sup> PO Counter-Memorial, ¶169.

omission. As a result, it is only based on the subsequent, external manifestations of that decision that the Claimant could have realized that the wrong had been committed. Between 2010 and 2012, the Claimant received mixed signals from the Respondent that led it to believe that the Negative Environmental Decision would be re-considered.<sup>117</sup>

124. As a result, the Claimant submits that the Respondent should be estopped from arguing that the Claimant should have had knowledge of the denial of justice before June 2011.<sup>118</sup>

125. According to the Claimant, the critical date for determining the relevant three-year period is **June 10, 2014**, when the Claimant's RFA was submitted, and not when the RFA was supplemented, as the Respondent contends.

126. In this respect, the Claimant recalls that pursuant to DR-CAFTA Article 10.16.4(b)

*“A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration (“notice of arbitration”): referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General.”*

127. Further, the Claimant notes that the tribunal in *Feldman v Mexico*, when analyzing whether the investor's claims in that case were time-barred, confirmed that:

*“the time at which the notice of arbitration has been received by the Secretary General rather than the time of delivery of the notice of intent to submit a claim to arbitration is apt to interrupt the running of limitation period under NAFTA Article 117(2).”<sup>119</sup>*

128. According to the Claimant, the Respondent's Preliminary Objections are ill-founded and should therefore be dismissed on the facts of the case, since the RFA was filed within three years from the date when Corona first acquired knowledge of the denial of justice by the Respondent.<sup>120</sup>

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<sup>117</sup> PO Counter-Memorial, ¶¶172-177.

<sup>118</sup> PO Counter-Memorial, ¶178.

<sup>119</sup> PO Counter-Memorial, ¶186. *Feldman v Mexico* (CL-38).

<sup>120</sup> PO Counter-Memorial, ¶188.

129. The Claimant rejects the Respondent's arguments based on the doctrine of *negative administrative silence*, claiming that this would allow the Respondent to benefit from its own wrongdoing. Further, the Claimant argues that the Respondent should be estopped from arguing that the Claimant ought to have submitted its claim earlier, given that the Respondent's officials induced the Claimant to believe that they were going to respond to the Reconsideration Request.
130. At the time when the Motion for Reconsideration was submitted, the Dominican Republic's administrative procedural laws were not codified. This happened only in 2013, when the DR Parliament enacted the general administrative law which entered into force in 2015 as **Law 107-13**.<sup>121</sup>
131. The Claimant also notes that under DR Law, following the entry into force of **Law 13-07**, an administrative act could be challenged in parallel by both a motion for reconsideration and a judicial action.<sup>122</sup> The two bases of challenge were subject to different sets of rules. A judicial challenge had to be brought within 30 days, whereas a motion for reconsideration did not. As a result, the Claimant submits that the Respondent's argument to the contrary is without merit.<sup>123</sup>
132. According to the Claimant, its Motion for Reconsideration was directed against the Negative Environmental Decision, and not against the letter of August 18, 2010. As a result, even if the 30-day rule applied to the Motion for Reconsideration, which the Claimant refutes, the time period could not start to run from August 18, 2010, because the Negative Environmental Decision was never served upon the Claimant.<sup>124</sup>
133. The Claimant submits that the *doctrine of negative administrative silence* on which Respondent relies cannot be applied to the Claimant, for the following reasons: (i) The purpose of that doctrine in DR law "*is to guarantee due process as by this rule, subjects of administrative actions do not need to wait indefinitely for a response from the*

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<sup>121</sup> PO Counter-Memorial, ¶¶191-192. Law 107-13 of the DR (Spanish) (CL-39).

<sup>122</sup> PO Counter-Memorial, ¶198. Law 13-07 of the DR, (Spanish) (CL-40A).

<sup>123</sup> PO Counter-Memorial, ¶198.

<sup>124</sup> PO Counter-Memorial, ¶¶199-200.

*administrative authority*”;<sup>125</sup>(ii) it always acts in favor of the individual;<sup>126</sup> (iii) it would deprive the Claimant of such an effective remedy before the DR-CAFTA Tribunal; (iv) it would be unreasonable to assume that the environmental administration would be able to complete the review of the application within such a short period of time; and (v) the application of that doctrine to the EIA process in such a way as alleged by the Respondent, would result in the Motion for Reconsideration of the negative decision not being an effective remedy, which would be equivalent to a breach of the Respondent's international law obligations, including under DR-CAFTA, the violation of the FET Standard, and a breach of Articles 68 and 69 of the DR Constitution.<sup>127</sup>

134. The Claimant once again challenges the Respondent's contention that the Claimant could have brought an international claim for denial of justice against DR after December 5, 2010; reaffirms its position that no party should benefit from its own wrongs, and asserts that the Respondent is estopped from arguing that the Claimant should have submitted the claim earlier.<sup>128</sup>
135. Finally, the Claimant submits that the Respondent's objection is ill-suited for the expedited procedure; that the three-year period under DR-CAFTA Article 10.18.1 should be calculated from the moment when the Claimant should have realized the inertia on the part of the DR administration had transformed into a breach of DR-CAFTA; and that the Preliminary Objections should be joined with the merits of the case.<sup>129</sup>

### **C. The Respondent's Reply on Preliminary Objections**

136. The Respondent reaffirms that its preliminary objection is suited for resolution in the present expedited procedure, for the following reasons.

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<sup>125</sup> PO Counter-Memorial, ¶202, citing PO Memorial, ¶80.

<sup>126</sup> “*La teleología de la figura jurídica del silencio administrativo es operar siempre a favor del administrado[...]* (R-006).

<sup>127</sup> PO Counter-Memorial, ¶¶201-208.

<sup>128</sup> PO Counter-Memorial, ¶¶210-220.

<sup>129</sup> PO Counter-Memorial, ¶¶221-231.

137. First, Article 10.20.5 DR-CAFTA allows for the determination of issues of fact in the course of the Expedited Procedure.<sup>130</sup> Relying in *Pac Rim v. El Salvador*, the Respondent submits that a tribunal must view with a discerning eye claimant's characterization of events "as facts".<sup>131</sup> As in *Trans-Global v. Jordan*, a tribunal "need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith; not need a tribunal accept a legal submission dressed up as a factual allegation."<sup>132</sup>
138. Second, the Respondent, relying on an article from Professor Jan Paulsson, quoted by the *Renco v. Peru* tribunal, asserts that from a plain textual interpretation of DR-CAFTA Article 10.20.4, the Tribunal is also empowered to decide the merits of the case in this procedure.<sup>133</sup> Although, the Respondent notes, the Tribunal has not been asked to decide the merits of the case within this Expedited Procedure.<sup>134</sup>
139. Respondent submits that the Claimant's substantive arguments on the DR's preliminary objection are unsustainable. The Dominican Republic has demonstrated that the Claimant's claims are time-barred by virtue of DR-CAFTA Article 10.18.1, because the Claimant was aware, more than three years before the RFA's registration, of the refusal of the license by the Dominican authorities, and of its implications. In the Respondent's view, this was evidenced, in particular, by the Claimant's letter of February 23, 2011 to the Environmental Ministry.<sup>135</sup>
140. According to the Respondent, in an attempt to overcome the three-year limitation, the Claimant divided the application process in two parts in its Counter-Memorial: (i) the review and express rejection of the Claimant's environmental application, which lies

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<sup>130</sup> PO Reply, ¶35. PO Counter-Memorial, ¶222.

<sup>131</sup> PO Reply, ¶35. *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under DR-CAFTA Articles 10.20.4 and 10.20.5, August 2, 2010, ¶91 ("*Pac Rim*") (RA-6) (CL-47).

<sup>132</sup> PO Reply, ¶35. *Trans-Global Petroleum Inc. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, the Tribunal's Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, May 12, 2008, ¶105 (RA-12).

<sup>133</sup> PO Reply, ¶37. J. Paulsson (RA-13). See *Renco v. Peru* (RA-3) (CL-48).

<sup>134</sup> PO Reply, ¶38.

<sup>135</sup> PO Reply, ¶¶40-42 (footnotes omitted).

outside that limit, and, as indicated by the Claimant itself, is to be treated as background information; and (ii) the absence of a response by Dominican authorities to the “Motion for Reconsideration”, which the Claimant submits is a free-standing measure that falls within the three-year limit.

141. In the Respondent's view, such a division is wholly arbitrary and self-serving. According to the Respondent, the absence of a response to the Motion for Reconsideration is not a stand-alone “measure” capable of creating jurisdiction. This, because (i) the claims regarding the absence of a response to the “Motion for Reconsideration” are no different from the claims concerning the Environmental License Application process generally; (ii) the absence of a response to the “Motion for Reconsideration” is not an “omission” capable of giving rise to a stand-alone claim under DR-CAFTA; and (iii) the “continuing violation” doctrine does not exempt the Claimant's claims from the time bar imposed by DR-CAFTA Article 10.18.1.<sup>136</sup>
142. Furthermore, the Respondent argues that even assuming *arguendo* that the absence of a response to the “Motion for Reconsideration” qualified as a stand-alone “measure”, the Claimant has failed to articulate a *prima facie* claim for denial of justice in connection with such measure.<sup>137</sup>
143. In light of the above, the Respondent concludes that (i) the Claimant failed to submit its claims to arbitration within the deadline contemplated by DR-CAFTA Article 10.18.1, and they should therefore be dismissed; (ii) the Claimant's claim with respect to the alleged failure to issue a ruling on the Motion for Reconsideration is neither different nor separate from its challenge to other parts of the application review process; (iii) it is manifest from the Claimant's February 23, 2011 letter that the Claimant was aware at that time of the alleged breach of DR-CAFTA, as well as of the corresponding damages; (iv) the Claimant deliberately delayed the filing of the RFA until June 10, 2014, because in Respondent's view, the Claimant was trying to obtain external financing, which it did not obtain until November 19, 2015. The Respondent characterizes such a delay for lack of funding as

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<sup>136</sup> PO Reply, ¶¶45-95 (footnotes omitted).

<sup>137</sup> PO Reply, ¶¶96-99.

negligent, and submits that the Claimant has also acted in bad faith by altering the formulation of its relevant claims for the sole purpose of trying to fit such claims within the limitations period established by Article 10.18.1.<sup>138</sup>

**D. The Claimant's Rejoinder on Preliminary Objections**

144. By way of introduction, the Claimant recalls that Resolution 737-2010, which had not been served upon the Claimant, was submitted by the Respondent together with its Reply. The Claimant submits that if read together with Communication No. DEA-3867-10, the Resolution establishes beyond doubt that the Respondent's refusal to grant Corona an Environmental Permit for the Project was an arbitrary act.<sup>139</sup>
145. The Claimant asserts that the original international wrong, consisting of the Respondent's arbitrary act taken in July 2010 in breach of due process, subsequently evolved into an international wrong of a different genre, i.e., a denial of justice, which did not come into existence until after July 2011. Thus, this cause of action falls within the three-year period leading up to the date of submission of the RFA on June 10, 2014.<sup>140</sup>
146. The Claimant submits that at the time of its February 23, 2011 letter, the Claimant still expected that, by way of the Motion for Reconsideration, the Negative Environmental Decision might be reversed, and reaffirms its position that the Respondent's Preliminary Objections are ill-suited for determination under DR-CAFTA Article 10.20.5.<sup>141</sup>
147. In its Rejoinder, the Claimant reaffirms that the case concerns a clear violation of DR-CAFTA by the Respondent comprising: (i) the Refusal of the Environmental License, and (ii) the Refusal to Entertain the Motion for Reconsideration as a separate breach of the DR-CAFTA<sup>142</sup>.

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<sup>138</sup> PO Reply, ¶¶100-105.

<sup>139</sup> PO Rejoinder, ¶2.

<sup>140</sup> PO Rejoinder, ¶¶4-5.

<sup>141</sup> PO Rejoinder, ¶¶6-7.

<sup>142</sup> PO Rejoinder, ¶¶8-68.

148. With regard to the **Refusal of the Environmental License**, the Claimant quotes the relevant paragraph of Resolution 737-2010, that reads as follows:

*“5. Exploitation Concession JOAMA (Code 3263)*

*Dismissed, the Province Director stated that the community is not in agreement with the installation of the project because of a dispute between the project-owner and the owners of real properties and that the entry into the project has not been clearly defined; Lic. Germán Dominici asserted that the project would affect coastal waters, Ing. Apolinar Suero noted that there is lack of information concerning the structure of the project and that it would have a negative impact on the community.”<sup>143</sup>*

149. The Claimant submits that Resolution 737-2010 contains an arbitrary decision falling manifestly short of the minimum standard of treatment required under DR-CAFTA Article 10.5.1. Resolution 737-2010 further violates domestic principles, in particular those under the DR regulatory framework of Environmental Licenses, *Reglamento del Sistema de Permisos y Licencias Ambientales* (Regulation of the System of Environmental Licenses and Permits) dated June 2004 ( the “**June 2004 Regulations**”)<sup>144</sup>. As shown in the Expert Report of Fabiola Medina Garnes, the flaws of Resolution 737-2010 – most specifically the lack of reasoning and the lack of competence of the body issuing it<sup>145</sup> – are of such nature that the Negative Environmental Decision in Resolution 737-2010 should be declared null and void.<sup>146</sup>
150. The Claimant then addresses the **Refusal to Entertain the Motion for Reconsideration**. The Claimant notes that a distinction should be drawn between the original international wrong resulting from the arbitrariness of the Negative Environmental Decision of July 2010, and the subsequent and distinct international wrong resulting from the Respondent's failure to redress that original wrong through its own system of domestic remedies. This, in

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<sup>143</sup> (R-8).

<sup>144</sup> (R-19).

<sup>145</sup> In accordance with Article 6 of the June 2004 Regulations, the exclusive competence to take decisions with respect to projects requiring an Environmental Licenses was granted to the Technical Validation Committee (not to the TEC). (R-19).

<sup>146</sup> PO Rejoinder, ¶¶11-38. Expert Report of Fabiola Median Garnes, ¶¶41-43. See also Expert Report of Gustavo José Mena García, ¶34.



the Claimant's view, is pivotal to the outcome of the Respondent's Preliminary Objections.<sup>147</sup>

151. The first, the Negative Environmental Decision, was an arbitrary act, in violation of due process, and a breach of the minimum standard of treatment under DR-CAFTA Article 10.5.1.<sup>148</sup>
152. According to the Claimant, faced with the Negative Environmental Decision, and after evaluating the recourses that were available locally and internationally, the Claimant opted for filing the Motion for Reconsideration of the Negative Environmental Decision with the Environmental Ministry. This was done as it was determined to move forward with the Project,<sup>149</sup> and also out of concern that an international tribunal might not find the Respondent liable in an eventual investor-state dispute settlement scenario, if the Claimant did not exhaust local remedies in the host state.<sup>150</sup>
153. The Claimant submits that the Respondent has prevented the Claimant from challenging the initial arbitrary act (the Negative Environmental Decision), by (i) failing to serve Resolution 737-2010 containing the Negative Environmental Decision upon the Claimant; and (ii) failing to respond to the Motion for Reconsideration.<sup>151</sup>
154. According to the Claimant, the Respondent's failure to respond on the Motion for Reconsideration violates Article 22.4 of the Dominican Constitution<sup>152</sup> and amounts to a breach of the state's obligations under DR-CAFTA to afford the Claimant "an adequate opportunity, **within a reasonable time**, to vindicate their legitimate rights" (emphasis added).<sup>153</sup>

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<sup>147</sup> PO Rejoinder, ¶39.

<sup>148</sup> PO Rejoinder, ¶41.

<sup>149</sup> PO Rejoinder, ¶¶42-44. French 1<sup>st</sup> Statement, ¶13; French 2<sup>nd</sup> Statement, ¶20.

<sup>150</sup> PO Rejoinder, ¶¶44-48.

<sup>151</sup> PO Rejoinder, ¶51.

<sup>152</sup> Expert Report of Fabiola Medina Garnes, ¶¶82 *et seq.*

<sup>153</sup> PO Rejoinder, ¶¶52-53. *Reinhard Hans Unglaube v Republic of Costa Rica* (ICSID Case No. ARB/09/20), Award, May 16, 2012, ¶272 (**RA-29**).

155. In the Claimant's view, the delay was caused solely by the Respondent's reluctance or refusal to respond to the Motion for Reconsideration. As a result, the Claimant submits that the Respondent has violated DR-CAFTA Article 10.5.1 by violating the Claimant's right to be heard within a reasonable time, and that such a breach produces effects tantamount to an expropriation of the Claimant's investment in the DR.<sup>154</sup>
156. The Claimant submits that the Respondent's Preliminary Objections are without merit, because they: (i) are misdirected, in that the Respondent fail to observe the distinction between the breach of DR-CAFTA resulting from the Negative Environmental Decision of July 2010 on the one hand, and the breach of DR-CAFTA resulting from the failure to address the Motion for Reconsideration from October 2010 to the present date; (ii) are based on a misreading of DR-CAFTA and misinterpretation of the Claimant's February 23, 2011 letter; (iii) are based on arguments rooted in non-existent or misinterpreted rules of DR law; (iv) are based on unreliable witness testimony; and (v) do not take into account important principles of international law, such as estoppel and the *nemo capere* rule.<sup>155</sup>
157. The Claimant asserts that its pleadings regarding the Respondent's Preliminary Objections are chiefly directed against the Respondent's failure to respond appropriately to the Motion for Reconsideration, which amounts to a denial of justice. For the purposes of DR-CAFTA Article 10.18.1, this internationally wrongful act took place at some point between August 2011 and the present date.<sup>156</sup>
158. With regard to the February 23, 2011 letter, the Claimant submits that the purpose of the letter was to attract attention, and to strengthen the negotiating position of the investor by highlighting the undesirable alternative in order to obtain a decision. The Respondent's reliance on that letter is inapposite and insufficient to found its Preliminary Objection because (i) the letter could not possibly refer to a breach of DR-CAFTA that did not exist

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<sup>154</sup> PO Rejoinder, ¶67.

<sup>155</sup> PO Rejoinder, ¶70 (footnotes omitted).

<sup>156</sup> PO Rejoinder, ¶75.

at the date of the letter; and (ii) the fact that the letter does not refer to the Respondent's failure to deal with the Motion for Reconsideration as a breach of DR-CAFTA.<sup>157</sup>

159. According to the Claimant, as part of its attempt to mischaracterize the Claimant's claim, the Respondent conflates the notion of the "breach" referred to in DR-CAFTA Article 10.18.1 with the concept of a "measure". After explaining the difference between these two concepts, the Claimant submits that if neither Party argues that a denial of justice existed in February 2011, it is not possible to assert that a non-existent breach of DR-CAFTA resulted in quantifiable losses.<sup>158</sup>
160. In the Claimant's view, the Respondent mischaracterizes the denial of justice as an individual act. In this regard, the Claimant argues that (i) DR-CAFTA recognizes the doctrine of continuous acts (a fact not contested by the Respondent), confirmed in the *Pac Rim* case;<sup>159</sup> and (ii) as recognized by the *UPS v. Canada* tribunal, it is a general rule that continuing breaches may renew the limitation period for claims under international law.<sup>160</sup>
161. The Claimant rejects the Respondent's allegations that the Claimant has in some manner manipulated the facts to present its claim as falling within the time-limit requirement under DR-CAFTA Article 10.18.1.<sup>161</sup>
162. According to the Claimant, the Preliminary Objections are based on incorrect arguments of DR Law, for the reasons that follow.
163. First, the Claimant submits that the suspensive condition of receiving a positive result of the EIA to which the Exploitation Concession was subject, means that until the condition is fulfilled, the legal effect in question does not arise. As a result, in the Claimant's view, under the terms of the Exploitation Concession, until the Claimant receives a positive EIA

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<sup>157</sup> PO Rejoinder, ¶¶79-86.

<sup>158</sup> PO Rejoinder, ¶¶88-94.

<sup>159</sup> *Pac Rim (CL-33) (RA-25)*.

<sup>160</sup> PO Rejoinder, ¶¶95-106.

<sup>161</sup> PO Rejoinder, ¶107.

and the Environmental License is granted, its Exploitation Concession remains suspended.<sup>162</sup>

164. Second, the Claimant, relying on the expert reports of its two legal experts, refutes the Respondent's argument that Resolution 737-2010 is a working paper, and that the Negative Environmental Decision dismissing Claimant's Environmental License Application was Communication No. DEA-3867-10.<sup>163</sup>
165. Third, the Claimant also refutes the Respondent's argument that DR law prescribes a time limit for the submission of the Motion for Reconsideration of 30 days from the date of service of the impugned administrative act (i.e., by September 17, 2010). The Claimant submits that there was no such 30-day time limit for the submission of the Motion for Reconsideration, and that in any event no such time limit could have started to run against the Claimant, since Resolution 737-2010, the proper administrative act disposing of the Environmental License Application, was never duly served by the Respondent upon the Claimant. According to the Claimant, the Respondent had the burden to prove its argument that the Motion for Reconsideration was extemporaneous, and failed to do so.<sup>164</sup>
166. Fourth, the Claimant rejects the alleged lack of duty on the part of the Respondent to respond to the Motion for Reconsideration. As shown by the Medina Legal Expert Report, under the Dominican Constitution and the Inter-American Convention of Human Rights, the DR administration has a general obligation to respond to all petitions received by the concerned parties, and to do so within a reasonable time.<sup>165</sup>
167. Fifth, with regard to the alleged applicability and effects of the Doctrine of Negative Administrative Silence, the Claimant submits that if such doctrine did apply to the Motion for Reconsideration, it entitled the Claimant to challenge the Respondent's inaction before the DR courts, but would not relieve the Environmental Ministry from its obligation to

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<sup>162</sup> PO Rejoinder, ¶¶114-116.

<sup>163</sup> PO Rejoinder, ¶117. Expert Report of Fabiola Medina Garnes ¶¶34-35; Expert Report of Gustavo José Mena García ¶37.

<sup>164</sup> PO Rejoinder, ¶¶125-142. Expert Report of Fabiola Medina Garnes, ¶44, second conclusion on page 32.

<sup>165</sup> PO Rejoinder, ¶¶143-147 (footnotes omitted).

respond within a reasonable time. The Claimant argues that the Respondent's failure to provide a response for the last five and a half years, absent any known mitigating circumstances, constitutes a denial of justice under DR Law and under DR-CAFTA.<sup>166</sup>

168. The Claimant argues that if the Tribunal accedes to the Respondent's request to look behind the facts set out by the Claimant, then the Respondent's jurisdictional challenge is unsuitable for determination within the Expedited Procedure, since highly relevant documents are missing from the record because the document production process has not yet taken place. The Claimant submits that the central procedural issue here is the degree to which an arbitral tribunal sitting under DR-CAFTA Article 10.20.5 should make its own determinations of the relevant facts and issues of domestic law, and what procedural guarantees of due process it should afford in that respect to the Parties. In the Claimant's view, this should be approached in a methodical and abstract manner, as a pure exercise in the interpretation of the treaty.<sup>167</sup>
169. According to the Claimant, the Tribunal should dismiss the Preliminary Objections, without prejudice at this stage of the Arbitration, on the grounds of a reasonable interpretation of DR-CAFTA Article 10.20.5, leading to the conclusion that the legal and factual questions involved are too complex to be decided within such a compressed time period. Such dismissal, in the Claimant's view, should be without prejudice to the Tribunal's right to re-examine the issue at a later stage of the proceedings, based on the full examination of the relevant facts and evidence.<sup>168</sup>
170. Alternatively, the Claimant suggests the Tribunal to proceed with the Preliminary Objections on the basis of *pro tem* assumption that the facts as stated by the Claimant are correct, and dismiss the Respondent's Preliminary Objections for lack of merit.<sup>169</sup>

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<sup>166</sup> PO Rejoinder, ¶¶148-156.

<sup>167</sup> PO Rejoinder, ¶¶171-187.

<sup>168</sup> PO Rejoinder, ¶188.

<sup>169</sup> PO Rejoinder, ¶189.

171. Finally, the Claimant submits that third-party funding is irrelevant to the issues before the Tribunal. The Claimant was entitled to investigate alternative ways to finance its claims, in accordance with a standard practice in both commercial and investor-state arbitration.<sup>170</sup>

## **VI. SUBMISSION OF THE UNITED STATES OF AMERICA PURSUANT TO DR-CAFTA ARTICLE 10.20.2**

172. On March 11, 2016, the United States of America (“U.S.”) made its submission on questions of interpretation of the DR-CAFTA, pursuant to Article 10.20.2. In its submission the U.S. addressed the three issues relating to questions of interpretation of the DR-CAFTA: (i) the limitations period under Article 10.18.1; (ii) the waiver requirement under Article 10.18.2(b); and, (iii) the Minimum Standard of Treatment under Article 10.5.

173. On the issue of the limitations period, the U.S. interpretation of DR-CAFTA Article 10.18.1 is as follows:

- (i) Article 10.18.1 refers to knowledge of the alleged breach and loss first acquired as of a particular “date”, not at multiple points in time or on a recurring basis. As a result, a continuing course of conduct cannot renew the limitations period under Article 10.18.1;
- (ii) where a “series of similar and related actions by a respondent state is at issue, an investor cannot evade the limitations period by basing its claim on “the most recent transgression of that series”. Accordingly, once a claimant *first* acquires (or should have acquired) knowledge of the breach and loss, subsequent transgressions by the State Party arising from a continuing course of conduct, as opposed to a legally distinct injury, do not renew the limitations period under Article 10.18.1;
- (iii) the interpretation from the *UPS v Canada* tribunal, regarding the renewal of claims limitation period by continuing courses of conduct constituting continuing breaches, is misplaced;

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<sup>170</sup> PO Rejoinder, ¶¶191-196.

- (iv) the specific requirements of Article 10.20.1 operates as a *lex specialis*;
- (v) the knowledge of loss or damage incurred need not be of the full or precise extent of loss or damage; and
- (vi) claimant bears the burden of proof, and must prove the necessary and relevant fact to establish that its claims fall within the three-year limitation period.<sup>171</sup>

174. On the issue of the waiver requirement, according to the U.S. a claim cannot be submitted unless and until it is accompanied by a waiver that complies with Article 10.18.2(b). Thus, a Notice of Arbitration that is unaccompanied by a valid waiver does not constitute a claim pursuant to the provisions of Chapter Ten. Further, in the event that a valid waiver is filed subsequent to a Notice of Arbitration, the claim will be considered to have been submitted on the date of the waiver.<sup>172</sup>

175. Finally, on the issue of the Minimum Standard of Treatment, the U.S. submits that: (i) the applicable standard in DR-CAFTA Article 10.5 of fair and equitable treatment is the customary international law minimum standard of treatment (the “MST”); (ii) the MST includes the notion of denial of justice; (iii) to breach the standard, the denial of justice must arise from a final decision of a State’s highest judicial authority (unless an appeal would be futile or manifestly ineffective) that is “notoriously unjust” or “egregious” “which offends a sense of judicial propriety”.<sup>173</sup>

176. By email of March 18, 2016, the Respondent informed the Tribunal that the Dominican Republic had no comments on the Submission, reserving its right to discuss the Submission during the Hearing.

177. On the same date, the Claimant submitted its observations on the three aspects raised in the U.S. Submission.

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<sup>171</sup> Submission of the United States of America, dated March 11, 2016, (“U.S. Submission”) ¶¶2-7.

<sup>172</sup> U.S. Submission, ¶¶8-9.

<sup>173</sup> U.S. Submission, ¶¶10-13.

178. First, with respect to the limitation period under Article 10.18.1, the Claimant submits that the arguments advanced by the U.S. are internally contradictory, irrelevant to the factual matrix in the present case, and unfounded under principles of treaty interpretation. The Claimant submits (i) that in the present case the Respondent's failure to respond to the Motion for Reconsideration gives rise to legally distinct injury (a denial of justice) to the original wrongful act (the arbitrary refusal of the Environmental License), even though both breaches are to a certain degree related to each other; (ii) its disagreement with the U.S. interpretation that DR-CAFTA should be considered as a *lex specialis* with respect to admissibility *rationae temporis* of claims for continued violations of an international obligation; and (iii) its continued reliance on the *UPS* tribunal's interpretation that "*continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly.*"<sup>174</sup>
179. Second, regarding the waiver requirement under Article 10.18.2(b), according to the Claimant, the U.S. submission in such regard manifestly exceeds the scope *ratione materiae* of the Preliminary Objections, and disregards the fact that the waiver was submitted in the present case. The Claimant also notes that Corona has not resorted to other domestic or international remedies with respect to the matters at stake in this arbitration, and that the Motion for Reconsideration was submitted by the Claimant's wholly-owned subsidiary, Walvis, which has a separate legal personality under DR law.<sup>175</sup>
180. Third, with regard to the third aspect of the Minimum Standard of Treatment under Article 10.5.1, the Claimant agrees with the U.S. general description that a denial of justice would be considered a breach of DR-CAFTA Article 10.5.1, but takes a different position on the following: (i) a denial of justice can also be committed by the administrative branch under international law<sup>176</sup>; (ii) the exhaustion of local remedies requirement is a matter of substance and not of jurisdiction/admissibility under investment treaty law; and, (iii) the

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<sup>174</sup> Claimant's Observations to the U.S. Submission, dated March 18, 2016 ("**Claimant's Observations**"), ¶¶6(a), 18-25 (footnotes omitted).

<sup>175</sup> Claimant's Observations, ¶¶6(b), 26-38 (footnotes omitted).

<sup>176</sup> Claimant's Observations, ¶¶6(c); *see also Amco Asia Corp., Pan American Development, Ltd. and PT Amco Indonesia v. Republic of Indonesia*, Award in Resubmitted Proceeding, 5 June 1990, 1 ICSID Reports 569, ¶137.



question of denial of justice must be analysed in each case considering the particular remedies available to an injured party.<sup>177</sup>

## **VII. THE TRIBUNAL'S ANALYSIS**

### **A. The Relevant DR-CAFTA Provisions**

181. DR-CAFTA Article 10.20, *Conduct of the Arbitration*, provides at subparagraph 4:

*“Without prejudice to a tribunal’s authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26. [...]”*

182. DR-CAFTA Article 10.20.5 states that:

*“In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal’s competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.”*

183. DR-CAFTA Article 10.20.6 provides:

*“When it decides a respondent’s objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney’s fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant’s claim or the respondent’s objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.”*

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<sup>177</sup> Claimant’s Observations, ¶¶6(c), 39-46.

184. DR-CAFTA Article 10.18.01 provides:

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

**B. The Applicable Law**

185. The Respondent's Preliminary Objections filed according to Article 10.20.5 of the DR-CAFTA are to be considered on the basis of the pertinent provisions of this very Agreement. Article 10.22, *Governing Law*, sets out the governing law for a claim of this type; the Tribunal “shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law”. This means that the law to be applied by the Tribunal is public international law, constituted primarily by the specific source provided by the DR-CAFTA as *lex specialis*, but also interpreted and completed as the case may be by general international law (i.e. customary international law)<sup>178</sup>.

186. In their respective written pleadings as well as during the Hearing, both Parties have introduced a considerable amount of legal analysis of the DR's municipal law. It is then all the more important for the Tribunal to state that, as far as the examination of a Preliminary Objection filed under the DR-CAFTA is concerned, the municipal law of the Respondent, as such, cannot be considered as part of the law applicable to the examination of these objections.

187. As the case may be, municipal law might provide some pertinent elements of consideration to the Tribunal, but the instruments, rules and provisions of this *non*-international law are no more than mere facts in the context of the current proceeding which may inform the Tribunal in its application of the governing international law. Such is the case, even if the elements provided by this municipal law can be characterized as “*legal*” facts, in the sense that they may have some legal significance for the application of the pertinent rules of

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<sup>178</sup> This includes the customary rules of interpretation of treaties as codified in the Vienna Convention on the Law of Treaties at Articles 31 and 32.

public international law. As it will be seen later in this Award, whatever the importance devoted to DR municipal law by the Parties, and in particular by the Claimant, both in its written pleadings and during the Hearing as well as in its Post-Hearing Brief, the DR's Law plays nothing but a marginal or subsidiary role, including when the Tribunal addresses the issue of an alleged denial of justice committed by the Respondent against the Claimant.

### **C. The Basis for Consent to Arbitration**

188. The DR-CAFTA's "*Investor-State Dispute Settlement*" section (Section B) contains the consent of each DR-CAFTA Party to this form of arbitration. Article 10.17, "*Consent of Each Party to Arbitration*", provides in relevant part:

*"1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement [...]."* [Emphasis added.]

Consent is thus expressly conditioned on the claimant's submission of the claim in accordance with the terms of the Agreement. In this respect, the invocation of the investor-State arbitration clause is governed by a *lex specialis*.

189. The precise contours of the State Party's consent are addressed in the next article, Article 10.18, "*Conditions and Limitations on Consent of Each Party*", which among other things contains a limitation period stating that:

*"1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimants first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.1 6.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage."*

190. Article 10.18 sets out two other conditions and limitations, specifically the requirements: (i) that no claim may be submitted to arbitration unless the claimant consents in writing to arbitration in accordance with the procedures set out in the Agreement; and that (ii) the notice of arbitration must be accompanied by a written waiver from the claimant and/or its enterprise, as the case may be. The claimant must waive "the right to initiate or continue

before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.”<sup>179</sup>

191. Having regard to the ordinary meaning of the terms, read in their context and in light of the Agreement's object and purpose, the DR-CAFTA Parties have plainly conditioned their consents to arbitration. If a claimant does not comply with the conditions and limitations established in Article 10.18, its claim cannot be submitted to arbitration.
192. The present proceeding concerns the Claimant's compliance, or not, with the three-year limitation period prescribed by Article 10.18.1. The limitation period clause is written in plain terms and does not contemplate the suspension or “tolling” of the three-year period. In this regard, it is consistent with the approach taken in other treaties such as the North American Free Trade Agreement. The relevant subparagraphs of Articles 1116 and 1117 of that Agreement are worded similarly<sup>180</sup> and, as pointed out by the Respondent<sup>181</sup> and by the intervenor, the United States of America<sup>182</sup>, NAFTA tribunals have described NAFTA's limitation period as “clear and rigid” and not subject to any “suspension, prolongation, or other qualification.”
193. Article 10.18.1 contemplates two forms of knowledge of breach and loss or damage, namely, *actual* knowledge (*viz.* “No claim may be submitted to arbitration...if more than three years have elapsed from the date on which the claimant *first acquired*... knowledge

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<sup>179</sup> This waiver requirement is not absolute; subparagraph 3 permits a claimant to initiate or continue an action that seeks “*interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.*” Accordingly, it is possible for a DR-CAFTA claimant to commence an international claim for damages whilst pursuing non-monetary injunctive relief before the respondent Party's tribunals.

<sup>180</sup> Article 1116(2) provides: “*An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.*” Article 1117(2) is worded similarly.

<sup>181</sup> “*The three-year period set out in Article 10.18.1 does not permit suspensions, extensions or other modifications, as several arbitration tribunals have confirmed. Articles 1116(2) and 1117(2) of NAFTA, for example, include a provision similar to Article 10.18.1, which also sets out a time period for investors to file their claims. NAFTA tribunals have interpreted that the period of limitations is “clear and fixed” and that “it is not subject to suspension, extension or other modifications.”* Respondent's Memorial on Objections, ¶ 28.

<sup>182</sup> *Grand River v. USA (RA-7)*, ¶ 29. See also *Feldman v. Mexico (RA-8)*, ¶ 63.

of the breach... and knowledge that the claimant... has incurred loss or damage”) and *constructive* knowledge (*viz.* “No claim may be submitted to arbitration ...if more than three years have elapsed from the date on which the claimant...*should have first acquired*... knowledge of the breach... and knowledge that the claimant... has incurred loss or damage”). [Emphasis added.]

194. It warrants emphasising that knowledge of the breach in and of itself is insufficient to trigger the limitation period's running; subparagraph 1 requires knowledge of breach *and* knowledge of loss or damage. That said, in order for the limitation period to begin to run, it is not necessary that a claimant be in a position to fully particularize its legal claims (in that they can be subsequently elaborated with more specificity<sup>183</sup>); nor must the amount of loss or damage suffered be precisely determined. It is enough, as the *Mondev* tribunal found when applying NAFTA's limitation clause, that a “*claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear...*”<sup>184</sup>
195. Applying Article 10.18.1 to the facts of the present case, in the Tribunal's view, it is logical to proceed by first considering any evidence of the Claimant's actual knowledge; only if such an inquiry does not establish such knowledge is it necessary to then engage in an objective determination of whether in light of all the circumstances it can be held that the Claimant should have first acquired knowledge of breach and loss or damage at a particular point in time.

#### **D. The Tribunal's Approach**

196. The Tribunal shall thus proceed in two steps: First, it shall determine the earliest possible date on which the Claimant would be permitted to have acquired actual or constructive

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<sup>183</sup> As discussed below at paragraphs 210 *et seq.*, the Tribunal notes that one of Claimant's contentions is that it could not be aware of the denial of justice prior to June 11, 2011 because it did not manifest itself until “after July 2011” (PO Rejoinder, ¶ 5). As discussed below, the Tribunal considers that this attempt to differentiate between the initial license denial and the closure of the file on August 18, 2010, on the one hand, and the alleged denial of justice resulting from the failure to respond to the Motion for Reconsideration, on the other, is unavailing. Thus, for the Tribunal, the limitation period began to run as of August 18, 2010.

<sup>184</sup> *Mondev v. USA*, (RA-9), ¶ 87 and at ¶ 88 (“*The present proceedings were commenced within three years from the final Tribunal decisions.*”)

knowledge of the alleged breach of the Treaty and of the incurred loss or damage for the Claimant's claims to have been submitted within the time limit for the purpose of Article 10.18.1. That date has been referred to by the Parties as the "critical date". Once the critical date has been established, the Tribunal shall, in a second step, verify whether or not, on that very date, the Claimant already had, or should have had such knowledge.

**(I) Determination of the critical date**

197. DR-CAFTA Article 10.18.1 sets a time limit for the submission of claims to arbitration which starts to run on the day that the Claimant acquires or should have acquired knowledge of the alleged breach of the Treaty and of the incurred loss or damage.
198. The Tribunal's first task is thus to determine the earliest possible date on which the Claimant would have obtained knowledge of the alleged breach of the Treaty and of the incurred loss or damage for the Claimant's claims to have been submitted within the time limit for the purpose of Article 10.18.1. That date is three years before the Claimant submitted a claim to arbitration under Section 10 of DR-CAFTA.
199. There is little room for discussion about what is the critical date; as agreed by both Parties<sup>185</sup>, it is uncontroversial that the Claimant submitted its claims to arbitration when it initiated the present proceedings, *i.e.*, by way of its Request for Arbitration which was dated June 10, 2014. The application of Article 10.18.1 leads to the conclusion that the critical date is three years earlier, *i.e.* June 10, 2011.<sup>186</sup> As indicated above, the three-year period is a strict one, no suspension or "tolling" of the three-year period is contemplated by the Treaty. Both Parties agree on this date and there is no need for the Tribunal to postpone its determination in this respect by going into further discussion and analysis.

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<sup>185</sup> PO Rejoinder, ¶72, footnote 80.

<sup>186</sup> The Tribunal leaves to one side the United States' submission that a request for arbitration is not perfected until it is filed with a DR-CAFTA-compliant waiver. This point was not advanced by the Respondent, which was content to proceed on the basis of the ICSID's receipt of the RFA.

**(2) Determination of the date when the Claimant acquired knowledge of the alleged breach and of the damage**

200. The second step in applying DR-CAFTA Article 10.18.1 requires the Tribunal to determine the date on which the Claimant “*first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.1 6.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.*” A comparison of that date with the ‘critical date’ will then enable the Tribunal to decide whether it is competent to hear the claims in this proceeding: Should the date on which the Claimant acquired actual or constructive knowledge of the alleged breach and of the corresponding damage be earlier than the critical date, the Tribunal would have to conclude that the Claimant’s Request for Arbitration was submitted after the expiration of the limitation date and, as a consequence, the Tribunal would have no jurisdiction to hear the Claimant’s claims.

a. One or several breaches?

201. As a preliminary matter, the Parties disagree on whether the Claimant’s claims, as set out in its Request for Arbitration, must be treated as relating to one or several alleged breaches of DR-CAFTA by the Respondent. In particular, the Claimant contends that, given that the DR’s failure – in contradiction with its own law – to respond to the Claimant’s Motion for Reconsideration constitutes a denial of justice, the relevant date of knowledge for the purpose of Article 10.18.1 is the date of the alleged denial of justice and related loss or damage. The question whether the omission complained of by the Claimant amounts to a denial of justice is primarily one of substance, rather than jurisdiction. For the sake of completeness of the Tribunal’s analysis, it will nevertheless be addressed in the following section<sup>187</sup>.

202. At this stage, the Tribunal only needs to decide whether the failure to respond to the Claimant’s Motion for Reconsideration would, if found to amount to a denial of justice, constitute a breach of the Treaty that is separate from the non-issuance of the license. The Claimant’s case on the merits, as set out in the Request for Arbitration, is built on the

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<sup>187</sup> See *infra*, at ¶238 ff.

premise that one measure adopted by the DR frustrated Corona Materials' efforts to build and operate a construction aggregate mine in the DR in such a drastic way so as to amount to a breach of the DR's Treaty obligations.

203. The measure that is complained is described in paragraph 27 of the Request for Arbitration:

*“Despite repeated assurances and formal approvals from senior DR government officials, including the President, that Corona Materials would be permitted to construct and operate the proposed aggregate mine, the DR ultimately denied Corona Materials a final environmental license for the project for reasons that are empirically false and objectively discriminatory.”*

204. Nevertheless, the Claimant argues that the DR's violations of the Treaty did not stop with the official decision not to grant the environmental license for the project. The fact that the DR never responded to a Motion for Reconsideration of said decision is alleged to constitute a further, separate breach in the form of a denial of justice, of which the Claimant only gained knowledge *after* the critical date.

205. The Tribunal notes that, in this respect, the Claimant's position is not free of an inherent contradiction. On the one hand, the Claimant defends the idea of a continuing violation by the Respondent of its substantive obligations under DR-CAFTA; on the other hand, the Claimant, at least at the stage of its Counter-Memorial, and further in the proceedings, has tried to sustain that the absence of response by the DR Environmental Ministry to its “Motion for Reconsideration” is to be treated as a *specific* measure (or absence of measure) which in itself would be constitutive of a separate violation of DR-CAFTA Article 10.5, as it would be a denial of justice.

206. The first of these two options, a unified presentation of the DR's breach of its obligation was asserted in the Claimant's Request for Arbitration:

*“The DR failed to accord Corona Materials' investment fair and equitable treatment, as well as full protection and security, by repeatedly discriminating against Corona Materials as foreign investor, denying Corona Materials due process in the environmental licensing process and*



*by then failing to follow minimum due process standards in the reconsideration process”<sup>188</sup>*

207. It was actually the same position that Mr. French, the Principal of Corona Materials present in the DR, had also taken in a letter of February 23, 2011 to the DR's Environmental Ministry where he did not differentiate between the negative answer given on August 2010 to Corona Materials' request for issuance of an environmental license and the persistent absence of response to the Motion for Reconsideration addressed to the same Ministry and submitted by Corona almost two months later, on October 5, 2010<sup>189</sup>.
208. Still in its Counter-Memorial, the Claimant persisted in treating the environmental application process as a single, uninterrupted event, arguing that “*the Environmental Impact Assessment procedure for the Project was initiated in 2007 and has never been formally closed by the Respondent*”<sup>190</sup>.
209. Nevertheless, and in clear contrast with the preceding view, also in its Counter-Memorial, the Claimant adopted another analysis. According to this second analysis, the very absence of response to the Motion for Reconsideration should be treated as an autonomous breach of international law, constitutive in itself of a denial of justice<sup>191</sup>. This articulation is even more clearly sustained in the Claimant's Post-Hearing Brief which declares that:

*“[...] The Claimant's case is a simple one. For over five-years-and-a-half, the DR has failed to respond to the Claimant's Motion for Reconsideration, as it was obliged to under its own law.”*

*“That failure amounts to a denial of justice and a breach of the FET Standard in Article 10.5. of CAFTA-DR. That breach is a separate and distinct breach from (i) the Negative Environmental Decision [...] and (ii) the other breaches of CAFTA-DR outlined in the Request. The elements of Article 10.18.1 CAFTA-DR must be applied separately to each individual breach, rather than to a conflation and aggregation of breaches, as the DR purports”<sup>192</sup>.*

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<sup>188</sup> RFA, ¶106.

<sup>189</sup> (R-2). See also PO Reply, ¶54.

<sup>190</sup> PO Counter-Memorial, ¶14-15.

<sup>191</sup> *Ibid*, ¶62.

<sup>192</sup> Claimant's PHB, ¶¶2 and 3.

210. The Tribunal does not accept this position. As correctly stated by the Respondent, the absence of a response to the Motion for Reconsideration cannot be considered as a stand-alone “measure”, or a separate breach of the Treaty. The Tribunal agrees with the Respondent’s analysis in that respect:

*“[A]ll of the alleged breaches relate to the same theory of liability, which is predicated on the notion that “the DR refused to permit Corona Materials to proceed with its mining project for reasons that are not legitimate and which are unrelated to the merits of that project,” and that “[d]ue to the refusal of the Environmental License by the Respondent, the Claimant cannot enjoy any meaningful benefit from the Joama Exploitation Concession . . . .”. Even the claim relating to the absence of a response to Claimant’s reconsideration request rests on this theory of liability.”<sup>193</sup>*

211. In this context, the Respondent’s failure to reconsider the refusal to grant the license is nothing but an implicit confirmation of its previous decision. As will be seen when the Tribunal examines the issue of a denial of justice, the filing of a Motion for Reconsideration cannot be considered as a separate action. There was no administrative adjudicatory proceeding in existence at the time of the Motion’s submission. Indeed, the very purpose of the Motion for Reconsideration was to have the Ministry re-open the proceeding and render a different decision. In the Dominican Republic’s administrative law as well in French administrative law, which the former took as a model, such an initiative is a “*recours gracieux*” *i.e.*, a non-contentious action, only aimed at having the same administration review its own decision.<sup>194</sup> There is therefore no basis to consider that there was a continuing breach.

212. As recognized by Mr. French in his letter dated February 23, 2010 to the Environmental Ministry<sup>195</sup>, the DR’s failure to respond to the Claimant’s Motion for Reconsideration was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision. Under the

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<sup>193</sup> Respondent’s PHB, ¶10.

<sup>194</sup> See Expert Report of Professor Eduardo Jorge Prats, ¶54 and Tr. 346:9-22.

<sup>195</sup> (R-2), and *supra* ¶202.

circumstances, the State's inaction following the Claimant's efforts to have that very same measure reconsidered cannot be considered a separate breach of the Treaty.

213. The discussion about the non-issuance of the license and the discussion about the failure to respond to the Claimant's Motion for Reconsideration did both relate to the exact and same alleged breach of the Treaty. This was the conviction expressed by Mr. French himself, still in his letter of February 23, 2011 to the Environmental Ministry, when he stated:

*"After two hours speaking with five people, we were informed that after the meeting with the delegates from Sanchez in their office on January 2011, personnel from Environmental Management had not worked or advanced on the reconsideration of the application for JOAMA Environmental License"*<sup>196</sup>

214. The Tribunal concludes that there is no valid basis for treating the alleged denial of justice as distinct from the non-issuance of the environmental license.

215. In any event, even hypothetically assuming that the DR administration's silence in reply to the Motion for Reconsideration would amount to a denial of justice, which the Tribunal does not consider to be the case here, it would remain, as rightly pointed out by the United States in their submissions on questions of interpretation of the DR-CAFTA, that:

*"Where a 'series of similar and related actions by a respondent State' is at issue, an investor cannot evade the limitations period by basing its claim on 'the most recent transgression in that series'*<sup>197</sup>. *To allow an investor to do so would, as the tribunal in Grand River recognized, 'render the limitations provisions ineffective'*<sup>198</sup><sup>199</sup>.

216. In light of the above considerations, the Tribunal concludes that the relevant date of knowledge for the purpose of Article 10.18.1 is the date on which the Claimant first

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<sup>196</sup> (R-2), p. 1.

<sup>197</sup> *Grand River v. USA*, ¶81 (interpreting the claims limitation language in NAFTA Chapter Eleven which is identical to DR-CAFTA Article 10.18.1. for all relevant purposes).

<sup>198</sup> *Ibid.*

<sup>199</sup> U.S. Submission, ¶5.

acquired, or should have first acquired, knowledge of the Respondent's decision not to grant the environmental license for the Claimant's project.

b. "Actual" or "constructive" knowledge?

217. As already noted above, DR-CAFTA Article 10.18.1 contemplates two forms of knowledge of breach and loss or damage: actual knowledge – what the Claimant did in fact know at a given time – and constructive knowledge – what the Claimant should have known at a given time. For the running of the three-year period to be triggered, it is sufficient that the Claimant acquired either actual or constructive knowledge. The Tribunal shall first consider any evidence of the Claimant's actual knowledge of the Respondent's decision not to grant the environmental license for the Claimant's project; only when such an inquiry would lead to the conclusion that actual knowledge was not acquired by the Claimant before the critical date, would the Tribunal then need to engage in an objective determination of whether in light of all the circumstances it can be held that the Claimant should have first acquired knowledge of the breach and loss or damage at a particular point in time.

c. Did the Claimant acquire actual knowledge of the breach?

218. The Tribunal thus turns to the evidence on the record, which is sufficient to answer this question. The Claimant alleged in its Request for Arbitration that the DR breached several provisions under Chapter 10 of the DR-CAFTA, in particular, Article 10.3 on National Treatment, Article 10.5 on the requirement that covered investments be treated in accordance with the Minimum Standard of Treatment under customary international law, and Article 10.7 forbidding illegal expropriation.<sup>200</sup>

219. As noted above, however, with the exception of the export tax claim, the alleged breaches relate to one central measure adopted by the Respondent: the Environment Ministry's refusal to grant the environmental license. Considering the documentary evidence on record, that particular measure must be considered to have occurred on August 18, 2010,

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<sup>200</sup> RFA, ¶29

which is the date on which the Environmental Ministry advised the Claimant of the decision already taken on July 28, 2010 by the Technical Evaluation Committee of the same Ministry. As of that date, Claimant knew that its license application was formally rejected<sup>201</sup>; the letter was sent by Vice-Minister Reyna to the Claimant's Principal present in the DR, Mr. French, and it stated that the Joama environmental assessment resulted in a finding by the Environment Ministry's Technical Evaluation Committee that the project was not environmentally viable; as a consequence, the letter indicated the Committee's formal decision to deny the Claimant's license application.

220. In its relevant part, the August 18 letter reads as follows:

*"We cordially write to you in regards to the "JOAMA Exploitation Concession" Project . . . we hereby inform you of the results of the evaluation of the information contained in the file, the review of the study, and the technical evaluation visits made to the proposed area for the development and operation of the mining exploitation Project.*

*The Technical Evaluation Committee met on 28 July 2010 and, as per Resolution 737-10, evaluated the Technical Review Report (ITR) and the file submitted for the above referenced project; it has been determine [sic] that this project is not environmentally viable ....*

*[ . . . ]*

*Therefore, this Ministry hereby informs you of the closure of your file, allowing the company to have an opportunity to select a new alternative site for the development of its proposal."*<sup>202</sup>

221. As Mr. French is one of Corona's three principals, there is no doubt that the day on which he received that letter must be considered to be the date on which the Claimant first gained *actual* knowledge of the non-issuance of the license.

222. It is worth mentioning that the August 18, 2010 letter is not a mere notification of the decision; it further sets out a clear indication of the decision's final character insofar as the environmental authorities were concerned, by their indicating the "closure of [Corona's] file".

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<sup>201</sup> (R-4) and PO Counter-Memorial, ¶56.

<sup>202</sup> (R-4), p.2.

223. The Claimant's actual knowledge of the Environment Ministry's measure and of its definitive character is confirmed by its own letter to the Environment Ministry dated October 5, 2010, in which it complained about the decision and asked the Ministry to reconsider it. In this letter, the Claimant acknowledges receipt of the August 18, 2010 letter, thereby confirming its actual knowledge of the Committee's decision and of the closure of its file:

*"We respectfully address you for you to **reconsider and open the file** of the project "Joama Exploitation Concession," Code 3378.*

*This Project was considered not environmentally viable, as from the Decision of the Technical Evaluation Committee that evaluated the Project, **which was informed to us in the letter DEA-3867-10, dated August 18, 2010.**"<sup>203</sup> (emphasis added)*

224. At the Hearing, Mr. French confirmed that he understood the file as having been closed as of August 18, 2010<sup>204</sup>.

225. The evidence further shows that, in January/February 2011, the Claimant already considered the DR's refusal to grant the license amounted to a violation of its obligations under DR-CAFTA. In particular, at the Hearing, Mr. French confirmed that he had already begun exploring the possibility of a DR-CAFTA arbitration in January 2011.<sup>205</sup> Having made this view known to the Environmental Ministry, Claimant was told by CEI-RD that if it decided to pursue the DR-CAFTA arbitration option, it should contact the Directorate of Foreign Trade (DICOEX)<sup>206</sup>.

226. On January 21, 2011, Mr. French sent an e-mail to his partner in which he wrote:

*"the timing may be ripe to formally lodge an investor-state dispute notice with CEI the office of exportation and foreign investments for an obscene amount of damages."<sup>207</sup>*

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<sup>203</sup> (C-15), p. 2

<sup>204</sup> Tr. 238:15-20; Tr. 239:3-5.

<sup>205</sup> Tr. 259:11-16.

<sup>206</sup> (C-74), Email from CEI-RD to A. French, February 4, 2011.

<sup>207</sup> (C-73), Email from A. French to J. Elliott and R. Fields, January 7, 2011.

227. In this respect, a specific piece of evidence of the Claimant's own making demonstrates that, at the latest at the end of February 2011, the Claimant had without doubt acquired *actual* knowledge of the two elements required by DR-CAFTA Article 18.10.1 in order for the limitation period to start running: First, that a potential breach of the Treaty could be claimed against the Respondent; second, as it will be confirmed later in this Award, that this breach had caused serious loss or damage to Corona. This evidence, already referred to several times in the present Award, is the letter sent by the Claimant to the Environment Ministry on February 23, 2011<sup>208</sup> in which Mr. French tried to exert some pressure on the Minister in order to finally get a reconsideration of the decision notified on August 18 of the previous year. In this letter, Mr. French declared in particular:

*“The Partners of Corona in Florida believe that Environmental Management may be unaware of the substantive obligations of Article 10 of the DR-CAFTA that protects foreign investors like us. According to them, Environmental Management has seriously violated these protection provisions on various occasions”*<sup>209</sup>

228. Mr. French became even more precise in terms of identifying the substantive obligations that the Dominican Republic could be reputed to have violated. He added:

*“The ‘Fair and Equitable Treatment’ in Article 10...requires certain level of rule of law within the host country which encapsulates the obligation to act in a coherent manner, without ambiguity and with total transparency, not arbitrary and in accordance with the principle of good faith. Also, the investors may expect due process in processing their claims and that authorities actions are taken in a non-discriminatory manner and proportionate to the political objectives involved”*<sup>210</sup>

229. The Claimant's repeated reference to the rights it enjoys as a foreign investor under DR-CAFTA and to the numerous alleged Treaty violations by the DR shows that Corona Materials not only was aware of the alleged breach, and set out a non-exhaustive list of nine such breaches in the same letter, but it was already explicitly considering resorting to

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<sup>208</sup> (R-2). See *supra*, ¶ 49.

<sup>209</sup> *Ibid*, p. 2

<sup>210</sup> *Ibid*.

arbitration<sup>211</sup>. Already on February 4, 2011, in an e-mail sent to the DR Export and Investment Agency (CEI-RD), Mr. French had declared:

*“If you would like to see the other 11 reasons why we believe this department has treated us unfairly and inequitably, I am tempted to forward the draft of the ‘Notice of Arbitration’ prepared in Washington which I am sitting on...”*<sup>212</sup>.

230. It is equally plain that, at the same time, Mr. French had already acquired the conviction that Corona's Motion for Reconsideration of the refusal of the environmental license would not receive any positive response. At the Hearing, Mr. French declared:

*“We felt completely let down after the meeting on the 20<sup>th</sup> [of January 2011] with the community where they [the Ministry officials] said they were going to reconsider, and nothing happened, so we felt we'd been lied and cheated”*<sup>213</sup>.

231. The Tribunal furthermore notes that the Claimant itself stated in its Rejoinder that:

*“There can be no doubt that apart from the (i) lapse of time, combined with (ii) the Respondent's inaction, there have been no material developments concerning the factual background of the case since early 2011”.*<sup>214</sup>

232. As for any meetings alleged to have taken place in June 2011, the Tribunal notes that Claimant neither submitted any direct testimony from the Corona consultant(s) who allegedly attended the meeting<sup>215</sup>, nor gave any undisputed date on which such a meeting would have taken place; more generally, nor was any documentary evidence provided to the Tribunal in relation with the effective realization of any meeting in June 2011.

233. The Tribunal must now turn to the issue whether the Claimant also had actual knowledge of the fact that it had incurred loss or damage from the DR's measure

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<sup>211</sup> *Ibid*, ¶¶2-3.

<sup>212</sup> (C-74), p. 5.

<sup>213</sup> Tr. 256:15-256:20; Tr. 257:19-258:1.

<sup>214</sup> PO Rejoinder, ¶109.

<sup>215</sup> Tr. 249: 20-250:7; Tr. 251:20-252:1.



d. Did the Claimant acquire actual knowledge of the loss or damage?

234. The answer to this question cannot be other than positive, as the Claimant, during the same period, proved not only to be conscious of the reality of damage caused by the DR refusal to grant the environmental license but was even able to evaluate it. Still in the letter of 23 February 2011 referred to above, Mr. French stated, inter alia, that:

*“[I]f the Environmental License and the Terms of Reference for the Private Port are not issued the damages to Corona arising directly from the violations of [Environmental] Management would be USD 342 Million.”*<sup>216</sup>

235. The same was confirmed by Mr. French at the Hearing.<sup>217</sup>

### **(3) Conclusion**

236. To sum up, the Tribunal is able to observe that a number of elements, and in particular the February 23, 2011 letter constitutes clear evidence of the fact that, on that date at the latest, the rejection of the application for an environmental license and the failure to address the Motion for Reconsideration (among other alleged acts and omissions by the Dominican Republic) was considered by the Claimant to amount to a violation by the DR of several provisions of DR-CAFTA Chapter 10, and that such alleged breaches caused loss or damage that the Claimant quantified in specific terms.

237. Considering that (i) the DR's act constituting the alleged breach occurred at the latest, August 2010, (ii) the Claimant gained knowledge of that act on August 18, 2010, (iii) the Claimant manifested its opinion that said act constituted a breach of the Treaty in January and February 2011, (iv) the Claimant manifested its awareness in February 2011 that it would suffer harm as a result, and (v) all these dates are prior to the “critical date” of June 10, 2011, the Tribunal concludes that the Claimant failed to submit its claims to arbitration within the time limit set out in DR-CAFTA Article 10.18.1.

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<sup>216</sup> (R-2), p.4.

<sup>217</sup> Tr. 254:22–255:8.

238. The record shows that the Claimant had actual knowledge of the alleged breach and of the corresponding damage or harm before the critical date. It derives from the evidence reviewed above that Claimant concluded well before the critical date that DR-CAFTA had been effectively breached and that such breach had produced substantial loss or damage. As a matter of fact, the Claimant did not submit its Request for Arbitration until June 10, 2014, which is 3 years, 3 months, and 19 days later. As a consequence, its claims are time-barred by DR-CAFTA Article 10.18.1.

**E. The issue of a Denial of Justice**

239. The Tribunal could simply end its task at this juncture and consider that it has already fulfilled its task, having firmly reached the conclusion that, in application of DR-CAFTA Article 10.18.1, it has no jurisdiction over the case filed by the Claimant. It is even more so that there is no difference between the non-issuance of the license and the absence of answer to the request for its reconsideration. The two are parts and parcel of the same conduct, contrary to the Claimant's allegations.

240. That said, although the claim could be disposed of based on the Tribunal's prior findings, the Tribunal considers it appropriate to address what increasingly took a more prominent position in the Claimant's claim as the proceeding unfolded, namely that the Dominican Republic committed a denial of justice against it. During the Hearing as well as in its Post-Hearing Brief, this was identified by the Claimant as the "central issue"<sup>218</sup>.

241. Particular emphasis was placed on this argument because, whilst the letter sent to the Environmental Ministry asking for reconsideration of the refusal of environmental license to the Joama Project was dispatched to Vice-Minister Reyna on October 5, 2010, *i.e.*, well before the critical date of June 10, 2011, there was no written response to it. As seen above, this alleged failure to respond is submitted by the Claimant to constitute a continuing act that both falls within the Tribunal's temporal jurisdiction and, having allegedly persisted to the present day, constitutes a denial of justice in breach of DR-CAFTA Article 10.5.1. To quote again the Claimant's Post-Hearing Brief:

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<sup>218</sup> Tr. 70:22-71:14 and Claimant's PHB, ¶¶2 and 3.

*"The Claimant's case is a simple one. For over five-and-a-half years, the DR has failed to respond to the Claimant's Motion for Reconsideration, as it was obliged to under its own law."*<sup>219</sup>

**(1) DR-CAFTA Article 10.5: Minimum Standard of Treatment**

242. DR-CAFTA Article 10.5.1 entitled, *Minimum Standard of Treatment*, states:

*"Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."*<sup>220</sup>

243. DR-CAFTA Article 10.5.2 elaborates upon the preceding subparagraph as follows:

*"For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*

*(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.*<sup>221</sup> [Emphasis added.]

244. Having regard to the foregoing, the Claimant submits that a denial of justice can arise from "any judicial or *administrative act* which deprives a citizen of any of the essential guarantees granted to him by law."<sup>222</sup> [Emphasis added.] DR-CAFTA Article 10.5.2 prescribes the "*customary international law minimum standard of treatment*" as the applicable standard of treatment.<sup>223</sup> The minimum standard of treatment's fair and

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<sup>219</sup> Claimant's PHB, ¶2.

<sup>220</sup> DR-CAFTA Article 10.5.1.

<sup>221</sup> DR-CAFTA Article 10.5.2 [Emphasis added].

<sup>222</sup> Claimant's Observations, ¶¶42-44 [Emphasis added].

<sup>223</sup> In this respect, it echoes the NAFTA's *Minimum Standard of Treatment* provision, Article 1105, as interpreted by the NAFTA Free Trade Commission in its Note of Interpretation of July 31, 2001[Available at [http://www.sice.oas.org/TPD/NAFTA/Commission/CHI1understanding\\_e.asp](http://www.sice.oas.org/TPD/NAFTA/Commission/CHI1understanding_e.asp)].

The "for greater certainty" phrasing of Article 10.5.2 likewise tracks the NAFTA Note of Interpretation, but adds a further clarification not found in the Note: the customary international law minimum standard of

equitable treatment standard is expressly stated to include the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.

245. As recounted in the procedural history above, acting in its capacity as a DR-CAFTA Party, the United States expressed its view that the minimum standard of treatment “is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law”<sup>224</sup>
246. The Claimant characterized the US Submission as “*an amalgamation of passages taken verbatim from various earlier submissions made by the United States of America in various DR-CAFTA and NAFTA cases*” and thus was not a position formulated specifically for this case concerning the particular facts before this Tribunal.”<sup>225</sup> Since it did not address the facts, the submission was, in Corona’s view, an “abstract and theoretical” view of a Non-Disputing Party.<sup>226</sup> That said, the Claimant did state its agreement “with the United States’ general description of a denial of justice” in paragraphs 12 and 13 of the US Submission, while adding three qualifications: (i) a denial of justice can be committed under international law by the administrative branch of the State;<sup>227</sup> (ii) the requirement of exhaustion of local remedies under international investment treaty law is a matter of substance and not of jurisdiction/admissibility;<sup>228</sup> and (iii) the question of whether there has been a denial of justice should be analyzed in each case with regard to the particular remedies available to an injured party.<sup>229</sup>
247. The Respondent did not comment on the US Submission at the time, but did advert to it in its Post-Hearing Brief.<sup>230</sup>

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treatment’s fair and equitable treatment standard is expressly stated to include the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.

<sup>224</sup> U.S. Submission, ¶¶12-13 [Footnote references omitted].

<sup>225</sup> Claimant’s Observations, ¶2.

<sup>226</sup> *Ibid*, ¶4. The point is also made at ¶13.

<sup>227</sup> The point is also made at Claimant’s Observations, ¶¶42-44.

<sup>228</sup> The point is also made at Claimant’s Observations, ¶45.

<sup>229</sup> *Ibid*, ¶6(c). The point is also made at ¶45.

<sup>230</sup> Respondent’s PHB, ¶¶4 and 19.

**(2) The Tribunal's Analysis**

248. The Tribunal begins by noting the Claimant's observation that a denial of justice can arise under international law by an act of the administrative branch of the State. To the extent that a denial of justice can originate in a State's administrative act, the Tribunal agrees that this is the case. However, as discussed further below, the Tribunal does not believe that an administrative act, in and of itself, particularly as the level of a first instance decision-maker, can constitute a denial of justice under customary international law, when further remedies or avenues of appeal are potentially available under municipal law.
249. With respect to the Claimant's third qualification of its general approval of the United States' position, articulated at paragraphs 12-13 of the US Submission, the Tribunal agrees that the question of whether there has been a denial of justice should be analyzed in each case with regard to the particular remedies available to an injured party. In addition, while it agrees with the Claimant's observation that the requirement of exhaustion of local remedies under international investment treaty law is a matter of substance and not of jurisdiction/admissibility, that condition does not preclude the Tribunal's consideration of the denial of justice claim at this stage of the proceedings. DR-CAFTA Article 10.20.4 refers to the Tribunal's "authority to address other objections as a preliminary question."<sup>231</sup> Further, DR-CAFTA Article 10.20.5 directs that the Tribunal "shall decide on an expedited basis an objection under paragraph 4."<sup>232</sup> DR-CAFTA's expedited procedure does not preclude a tribunal from considering an issue going to the substance of a case if the tribunal finds that it is appropriate to consider such an issue based on the facts as pleaded by the Claimant. In the present circumstances, the Tribunal considers that it is in a position to consider the issue, which, in any event, turns on an interpretation of the DR-CAFTA and the rules of international law.
250. Although the Claimant asserted that a denial of justice can result from "any judicial or *administrative act* which deprives a citizen of any of the essential guarantees granted to

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<sup>231</sup> DR-CAFTA Article 10.20.4.

<sup>232</sup> DR-CAFTA Article 10.20.5.

him by law”,<sup>233</sup> the DR-CAFTA is not drafted in such broad terms. Article 10.5.2(a)'s treatment of denial of justice focuses on different forms of “*adjudicatory* proceedings”, be they criminal, civil or administrative. The inclusion of the word “*adjudicatory*” assumes importance because it requires a tribunal to focus on the nature of the State's measure(s) at issue. That is, not all criminal, civil or administrative matters, acts or procedures fall within the scope of DR-CAFTA Article 10.5.1 such that they are capable of giving rise to an international claim for denial of justice.

251. Adjudicatory proceedings that do fall within the scope of DR-CAFTA Article 10.5.1 are governed by “the principle of due process *embodied in the principal legal systems of the world.*”<sup>234</sup> The precise wording of DR-CAFTA Article 10.5.2 immediately raises questions about the validity of the Claimant's claim because the administrative proceeding in respect of which the Motion for Reconsideration was made was, as the Respondent noted, and the Tribunal has agreed, completed on August 18, 2010 with the file closed as of that date.<sup>235</sup> As already indicated above with regard to the nature of the Motion for Reconsideration<sup>236</sup>, the Tribunal considers that there was no administrative adjudicatory proceeding in existence at the time of the Motion's submission. Indeed the very purpose of the Motion was to have the Ministry re-open the proceeding and render a different decision. In the Tribunal's view, it would be straining the meaning of the term “administrative adjudicatory proceeding” to treat the Ministry's receipt of such a motion and alleged inaction as in itself an “adjudicatory proceeding.” The Claimant certainly hoped that its Motion for Reconsideration would prompt the authorities to re-open the matter, but no action was taken on the request and no adjudicatory proceeding was launched.

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<sup>233</sup> Claimant's Observations, ¶¶42-44.

<sup>234</sup> Article 10.5.2(a) [Emphasis added].

<sup>235</sup> Respondent's PHB, Chronology, p. 2: Ministry sends a letter to the Claimant (**R-4**) “inform[ing] Corona that the Joama Project was not environmentally feasible . . . .” The Claimant admits that “at the point that it received this communication, it was obviously aware that a Negative Environmental Decision had been taken . . . .” The letter states, and the Claimant therefore understands as of receipt of this letter, that the license application file has been closed. Moreover, the Claimant apprehends that “the letter . . . d[oes] not set out any procedure by which the decision could be appealed or could be submitted for reconsideration.” [Footnote references omitted].

<sup>236</sup> See *supra*, ¶205.

252. In this regard, the Tribunal concurs with the Respondent's analysis of this aspect of the Claimant's case:

*“In the present case, there is no valid basis for treating the alleged denial of justice as distinct from the license denial. To proceed on the basis of such a distinction, Claimant would need to have asserted at least a plausible denial of justice claim. Yet, what Claimant attempts to label as a denial of justice — a failure by the State to respond to a one-page letter — simply cannot under any conception amount to a denial of justice under international law, no matter how much time may have elapsed. As Claimant acknowledged in its Rejoinder, the alleged denial of justice here is not like that alleged in any other investment treaty case in the record. “All the [other] cases involved legal proceedings which — in varying degrees of speed — moved forward.” Here, there simply was not any “proceeding” at all — just the absence of a response to Claimant’s letter.”<sup>237</sup>*

253. The Tribunal turns to the next point in the analysis. Even if the Motion for Reconsideration were considered to have triggered an administrative adjudicatory proceeding, as the Claimant itself acknowledged, the question of whether there has been a denial of justice *should be analyzed in each case with regard to the particular remedies available* to an injured party.<sup>238</sup> This is an important point because administrative adjudicatory proceedings typically do not take place in a legal vacuum; the acts of such adjudicators are typically reviewable in the local courts. Put another way, administrative decision-making is situated within a broader framework of a State's legal system.

254. The international delict of denial of justice rests upon a specific predicate, namely, the *systemic failure* of the State's justice system. When a claim is successfully made out at international law, it is because the international court or tribunal accepts that the respondent's legal system as a whole has failed to accord justice to the claimant. The Claimant itself noted in its comments on the US Submission:

*“In Unglaube, the Tribunal held (the Claimant submits, correctly) that a denial of justice is concerned not with whether a particular domestic*

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<sup>237</sup> Respondent's PHB, ¶11 [Emphasis added, footnote references omitted].

<sup>238</sup> Claimant's Observations, ¶¶6(c) and 45 [Emphasis added].

*decision was right or wrong, but with the systemic deficiency of the host state to render justice”.*<sup>239</sup>

255. The Claimant's Rejoinder also recognized the need for the investor's having taken domestic remedies if it wished to make out a claim for denial of justice:

*46. [. . .] [T]here remains a question as to whether a state can be held internationally liable for acts (judgments, decisions and so forth) of its organs (including courts and administrative bodies), which could have been — but were not — appealed by the investor.*

*47. The broad consensus, supported by a number of investment treaty cases, is that the state is not so liable if the investor failed to take such domestic remedies . . . .*<sup>240</sup>

256. The Claimant was correct on this point. Several other international law decisions support the conclusion that the State is not liable if the investor failed to take such domestic remedies. In *Apotex Inc. v. United States* the tribunal similarly noted that denial of justice claims:

*“[D]epend upon the demonstration of a systemic failure in the judicial system. Hence, a claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself.”*<sup>241</sup>

257. The tribunal in *Loewen v. United States* likewise expressed the view that the purpose of exhaustion of local remedies is to give the respondent State an opportunity to correct its alleged breach<sup>242</sup>. These cases, cited by the Respondent, are only two of a large number of cases that could be cited in support of the proposition, for instance the *Jan de Nul v. Egypt*

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<sup>239</sup> PO Rejoinder, ¶50.

<sup>240</sup> PO Rejoinder, ¶¶46-47.

<sup>241</sup>*Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, Award, June 14, 2013 (**RA-14**) (“*Apotex v. United States*”), ¶282 [Emphasis added].

<sup>242</sup>*Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, (**RA-21**) (“*Loewen v. United States*”), ¶132 : “The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision.”



Case,<sup>243</sup> or the *AMTO v. Ukraine* Case, in which the tribunal emphasized the need to consider the State's legal system as a whole, to assess the propriety of the act against the availability of means to address errors or injustices, and the importance of the investor's own responsibility for the outcome<sup>244</sup>. In the case of *Duke Energy v. Ecuador*, the tribunal took the view that the claimant "never challenged the final arbitral award before the Ecuadorian courts, and therefore "the Ecuadorian system never came into play on the award."<sup>245</sup>

258. Scholars have likewise described exhaustion of local remedies as a "prerequisite to a valid complaint that the alien has been denied justice."<sup>246</sup> Jan Paulsson, whose short but cogent treatment of the subject, *Denial of Justice*, was cited by the Claimant itself, is frequently quoted on the issue, stated:

*"For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself..."*

*[I]t is in the very nature of the delict that a state is judged by the final product – or at least a sufficiently final product – of its administration of justice. A denial of justice is not consummated by the decision of a court of first instance. Having sought to rely on national justice, the foreigner cannot complain that its operations have been delictual until he has given it scope to operate, including by the agency of its ordinary corrective functions."<sup>247</sup>*

259. The Tribunal shares this view. Exhaustion of local remedies is, as the Claimant correctly pointed out in its Rejoinder, typically not a jurisdictional prerequisite to an investor's submitting an international claim, but the exhaustion of local remedies is relevant in a consideration of the merits, as a substantive element of the alleged breach.

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<sup>243</sup> *Jan de Nul Dredging v. Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008, ¶258, where the tribunal defined a denial of justice as follows: "[T]he system as a whole has been tested and the initial delict remained uncorrected".

<sup>244</sup> *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, March 26, 2008, ¶¶76-78.

<sup>245</sup> *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, ¶¶394 and 398.

<sup>246</sup> U.S. Submission, ¶¶12-13.

<sup>247</sup> Jan Paulsson, *Denial of Justice* (2005) (CL-21), p. 108.

260. In order to exhaust local remedies, the general requirement (subject to the futility exception discussed below) is as expressed by the United States in its intervention: the investor “*must proceed to the highest court in the whole system, which may include more than one line of tribunals or courts where the legal system of the respondent or host state has a multiple hierarchy of fora which can provide redress.*”<sup>248</sup>
261. As recognized by the US Submission and by the Parties themselves, there is an exception to the requirement to exhaust local remedies, where seeking such an appeal domestically would be obviously futile or manifestly ineffective<sup>249</sup>, a position which finds support in a number of international investor/State arbitration awards, in particular in *Loewen v. United States*, where the tribunal found that the claimant's obligation to seek a remedy from higher courts was subject to “reasonable practical limitations”<sup>250</sup> or in *Apotex v. United States*, in which the tribunal similarly emphasized the importance of proving that the available recourse was “manifestly ineffective”<sup>251</sup>.
262. Having regard to the clear position at international law, as pleaded, the Claimant’s case on denial of justice must fail because it can point to no act or any administrative adjudicatory proceeding before any court or administrative adjudicatory body in the Dominican Republic beyond the unanswered Motion for Reconsideration which, as noted above, did not itself amount to an administrative adjudicatory proceeding. In this context, a mere failure to answer the Motion cannot by any objective measure be equated to a denial of justice at international law. In this respect, the Tribunal agrees with the Respondent’s characterization of the steps taken by Claimant:

*“Claimant has not adduced any evidence that it exhausted local remedies, either in connection with the license denial or the non-response to its reconsideration request. In fact, and to the contrary, Claimant conceded*

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<sup>248</sup> U.S. Submission, ¶13 and footnote 16, citing CF Amerasinghe, *Local Remedies in International Law*, (2004), p. 198 [Emphasis added].

<sup>249</sup> U.S. Submission, ¶13; PO Counter-Memorial, ¶82; Claimant’s Observations, ¶46; Claimant’s PHB, ¶5(b).

<sup>250</sup> *Loewen v. United States (RA-21)*, ¶167ff.

<sup>251</sup> *Apotex v. United States (RA-14)*, ¶¶284-285 [Emphasis added] citing C.F. Amerasinghe, *Local Remedies in International Law* 206 (2nd. ed. 2004) and E. Borchard, *The Diplomatic Protection of Citizens Abroad* (1916) p. 824.

*that it chose for tactical reasons to forgo a local litigation option.*"<sup>252</sup>

263. The Respondent submits that the Claimant chose not to bring a judicial challenge against the license denial because "the Claimant was resolutely determined to move forward with the Project."<sup>253</sup> After the Hearing, the Claimant sought to qualify its position in its Post-Hearing Brief, arguing that:

*"[T]he denial of justice arises out of an excessive delay in rendering the decision in response to the filed Motion for Reconsideration, and that the local remedies rule should not apply."*<sup>254</sup>

264. The Tribunal does not agree with this submission, because a finding of denial of justice under international law necessarily depends on the final product of the State's domestic legal system. Since, as the United States put it, the "responsibility [of a State] is engaged as the result of a definitive judicial decision by a court of last resort",<sup>255</sup> there can be no denial of justice without a final decision of a State's highest judicial authority.<sup>256</sup> In the instant case, not only is there no final decision of a State's highest judicial authority, there is no decision of an administrative adjudicatory body or judicial authority *at all*. In the end, faced with no official response to its Motion, the Claimant failed to take any step in proceedings for administrative or judicial review. Yet, as the Claimant itself recognized:

*"The lapse of two months enables the individuals to issue a complaint against administrative inaction by filing a claim before an administrative court. This, as recognised by the own DR's expert, is a presumption envisaged for the protection of an individual, to enable them to challenge decisions of the administration before the courts."*<sup>257</sup>

265. Based on the Claimant's allegations and the evidence submitted by the Parties in this arbitration, it has not been shown that taking a further step in the domestic legal system of the Dominican Republic would have been futile or manifestly ineffective.

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<sup>252</sup> Respondent's PHB, ¶13.

<sup>253</sup> Respondent's PHB, footnote 53.

<sup>254</sup> Claimant's PHB, ¶15.

<sup>255</sup> U.S. Submission, ¶¶12-13, *citing* Alwyn Freeman, *International Responsibility of States for Denial of Justice* (1938), pp. 311-12.

<sup>256</sup> U.S. Submission, ¶¶12-13, *citing* Christo G Pirocaco (*US v Turkey*), (1937) Nielsen's Opinions and Report, pp. 587, 592-93.

<sup>257</sup> Claimant's PHB, ¶44.

266. Finally, the Claimant is incorrect in contending that the waiver required to submit this international claim for damages barred it from challenging the alleged failure to act on the Motion for Reconsideration. In its Post-Hearing Brief, the Claimant submitted that it was prohibited from exhausting local remedies by the waiver required under DR-CAFTA Annex 10E:

*“Annex 10E of CAFTA-DR contains a “fork in the road” provision for claims brought against the DR. An investor must elect to either (i) submit its claim to arbitration or (ii) to bring its claim before a local court or administrative tribunal. It cannot do both. To require an investor to exhaust local remedies prior to submitting its claim to arbitration, the very consequence of which would be to prevent the investor from submitting that claim to arbitration, would make a mockery of the protections guaranteed under Chapter 10 CAFTA-DR.”*<sup>258</sup>

267. For its part, the Respondent submitted that:

*“Claimant misunderstands the Annex 10E requirement, as a claim by Walvis (rather than Corona) in a Dominican court, for asserted violations of Dominican law, would not have triggered the fork-in-the-road clause.”*<sup>259</sup>

268. In the Tribunal's view, the waiver required to submit a claim to international arbitration pursuant to DR-CAFTA Chapter 10 is clear in its terms. Article 10.18.2 first requires the claimant (whether claiming on its own behalf or on behalf of an enterprise) to waive “any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16”, this requirement is immediately qualified by the article's subparagraph 3 which provides:

*“3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of*

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<sup>258</sup> Claimant's PHB, ¶5(b).

<sup>259</sup> Respondent's PHB, footnote 53.

*preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.*" <sup>260</sup>

Thus, an action seeking interim injunctive relief not involving the payment of damages is available to a DR-CAFTA claimant (or its enterprise) while it pursues its DR-CAFTA claim for damages.

269. DR-CAFTA Article 10.18.4 then sets out the 'fork in the road' provision. But this applies only to claims of an alleged breach of an obligation under Section A of Chapter 10 in proceedings before a court or administrative tribunal of a Central American State Party or the Dominican Republic. Annex 10-E applies to claims by US investors only.<sup>261</sup> This 'fork in the road' is clearly intended to deal with the situation in certain civil law countries where international treaties have direct effect and thus an alleged breach of an international treaty can form a cause of action under the domestic law of such States. The Claimant would have fallen afoul of this provision if Walvis (or Corona) had submitted a claim in the local courts for the "same alleged breach" (*i.e.*, a breach of Section A of Chapter 10 of DR-CAFTA) as in the present proceeding.<sup>262</sup> If Walvis had submitted an administrative contentious proceeding which did *not* invoke DR-CAFTA's Chapter 10, it would not have run afoul of Article 10.18.4.
270. For all of the foregoing reasons, the Tribunal considers that Corona's denial of justice claim is "not a claim for which an award in favor of the claimant may be made under Article 10.26".<sup>263</sup> The Tribunal concludes by reiterating its statement already formulated above at paragraphs 237-238, according to which, the Claimant not having satisfied the conditions required under DR-CAFTA Article 18.10.1, its request for arbitration was time-barred, and the present Tribunal has no jurisdiction over the claims.

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<sup>260</sup> DR-CAFTA Article 10.18.3 [Emphasis added].

<sup>261</sup> DR-CAFTA Annex 10-E(1).

<sup>262</sup> DR-CAFTA Article 10.18.4.

<sup>263</sup> DR-CAFTA Article 10.20.5.

## VIII. COSTS

271. DR-CAFTA Article 10.20.6 provides:

*“When it decides a respondent’s objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney’s fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant’s claim or the respondent’s objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.”*

272. Article 58 of the ICSID Arbitration (Additional Facility) Rules provides:

*“(1) Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne. The Tribunal may, to that end, call on the Secretariat and the parties to provide it with the information it needs in order to formulate the division of the cost of the proceeding between the parties.*

*(2) The decision of the Tribunal pursuant to paragraph (1) of this Article shall form part of the award.”*

273. The Arbitral Tribunal has offered to the Parties the opportunity to express their comments on the possibility to award costs with respect to the decision on the Preliminary Objections. Both Parties have expressed comments in this regard.

274. The Claimant has filed a Cost Submission stating that its legal fees and expenses incurred in the arbitration amount to US\$1,121,972.79; the Respondent has also filed a cost submission stating that its legal fees and expenses incurred in the arbitration amount to US\$1,685,991.00. The Parties have advanced US\$200,000.00 each on account of the fees and expenses of the Members of the Tribunal and the ICSID administrative fees and expenses (the “Arbitration Costs”). Both Parties seek an award for the entirety of their respective legal fees and expenses and Arbitration Costs.

275. When deciding how the arbitral costs should be apportioned between the Parties, the Arbitral Tribunal notes its discretion to allocate costs and expenses in accordance both with

the DR-CAFTA and the Arbitration Additional Facility Rules. In determining the allocation of costs, the Arbitral Tribunal has taken into account all of the circumstances of the present arbitration.

276. The Respondent has prevailed entirely as a matter of jurisdiction. The question arises whether, as a consequence, the Claimant should bear more than half of the arbitration costs and/or pay the Respondent's legal fees and other arbitration costs.
277. Looking at DR-CAFTA Article 10.20.6, the immediate test for the Arbitral Tribunal is to determine whether the claim was "frivolous". The Arbitral Tribunal finds that the facts surrounding the dispute and the allegations made demonstrate that the Claimant – even if it was wrong in the construction and application of the DR-CAFTA to said facts – had a *bona fide* claim and did not act with such wanton disregard of the facts and the law as to permit this tribunal to consider that its claim was "frivolous".
278. Furthermore, in the present case, neither of the Parties has presented its case in a way justifying the shifting of arbitral costs against it. To the contrary, counsel for both Parties worked professionally and efficiently in pursuing their clients' interests.
279. Accordingly, each of the Parties shall be liable to pay half of the Arbitration Costs. Each Party shall also bear its own legal fees and expenses incurred in connection with presenting its case.

**IX. AWARD**

280. For the reasons set forth above, the Tribunal decides as follows:

- (1) The Tribunal decides that the Claimant not having satisfied the conditions required under DR-CAFTA Article 18.10.1, its request for arbitration was time-barred and the present Tribunal has no jurisdiction over the claims.
- (2) Each of the Parties shall be liable to pay half of the Arbitration Costs. Each Party shall also bear its own legal fees and expenses incurred in connection with presenting its case.



*Corona Materials, LLC v. Dominican Republic*  
*(ICSID Case No. ARB(AF)/14/3)*  
Award on the Respondent's Expedited Preliminary Objections

Made as at Washington, D.C.

[Signed]

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Mr. Fernando Mantilla-Serrano  
Arbitrator  
Date: May 24, 2016

[Signed]

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Mr. J. Christopher Thomas QC  
Arbitrator  
Date: May 10, 2016

[Signed]

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Prof. Pierre-Marie-Dupuy  
President of the Tribunal  
Date: May 26, 2016

Place of arbitration: Washington, D.C.