INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ADDITIONAL FACILITY

CORONA MATERIALS, LLC

Claimant

-against-

DOMINICAN REPUBLIC

Respondent

ICSID CASE No. ARB(AF)/14/3

CLAIMANT'S COUNTER-MEMORIAL ON PRELIMINARY OBJECTIONS

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GLOSSARY

Concession	The Joama exploitation concession, granted on 1 June 2009
Corona	The Claimant
Counter-Memorial	This Counter-Memorial on Preliminary Objections submitted by the Claimant in response to the Respondent's Preliminary Objections
DICOEX	The Department of Foreign Trade of the DR
DR	The Respondent
DR-CAFTA	The Dominican Republic - Central America - United States Free Trade Agreement
ECP	Environmental Cooperation Program
EIA	Environmental Impact Assessment
Environmental License	The environmental license relating to the Exploitation Concession
Environmental License Application	Application for the Environmental License submitted by Walvis on 18 October 2007
Environmental Ministry	The Ministry of Environment and Natural Resources of the DR
Expedited Procedure	The expedited procedure set out in Article 10.20.5 DR-CAFTA
Exploitation Concession	The Concession
Exploitation Concession Application	Application for the Exploitation Concession submitted by Corona in May 2007
FET Standard	Fair and equitable treatment standard
Motion for Reconsideration	Motion of 5 October 2010 for reconsideration of the alleged refusal to grant an Environmental License for the Project

Negative Environmental Decision	The decision to reject the Environmental License Application taken by the Environmental Ministry
Preliminary Objections	Preliminary Objections, submitted by the Respondent under Article 10.20.5 of DR-CAFTA on 3 December 2015
Project	Project to open and operate an aggregates mine in the Joama area designated under the Exploitation Concession of the Samana region of the DR
RFA	Request for Arbitration dated 10 June 2014
TEC	Technical Evaluation Committee
Resolution 737-10	Resolution 737-10 made following a meeting of the TEC on 28 July 2010, referred to in the Negative Environmental Decision but not served
Terms of Reference	Terms of reference for the study and the Management Plan EIA
Walvis	Walvis Investments, S.A., a Dominican subsidiary of Corona

I. INTRODUCTION

1. Corona Materials LLC (**"Corona"** or the **"Claimant"**)[1] hereby submits this Counter-Memorial on Preliminary Objections (the **"Counter-Memorial"**) in response to the Preliminary Objections, submitted by the Dominican Republic (the **"DR"** or the **"Respondent"**) under Article 10.20.5 of the Dominican Republic-Central America-United States Free Trade Agreement (**"DR-CAFTA"**) on 3 December 2015 (the **"Preliminary Objections"**),[2] pursuant to the Arbitral Tribunal's Procedural Order No. 1 dated 16 December 2015.

2. The Respondent's submission in its Preliminary Objections is that all the Claimant's claims in this arbitration are allegedly time-barred under Article 10.18 DR-CAFTA.[3] Such defence is:

   (a) ill-founded as a matter of principle (i.e. whether dealt with under the expedited or standard procedure); and

   (b) ill-suited for a decision under the expedited procedure set out in Article 10.20.5 DR-CAFTA (the **"Expedited Procedure"**).

3. Under the Claimant's case, the principal violation of its rights under DR-CAFTA at the hands of the Respondent relates to the conduct of the Environmental Impact Assessment (**"EIA"**) of the Project (as defined at paragraph 10 below). Specifically, the Respondent conducted the EIA proceedings in an arbitrary, non-transparent and inadequate manner that falls short of the fair and equitable standard of treatment (the **"FET Standard"**) required under Article 10.5 DR-CAFTA.

4. In particular, the Respondent has not yet decided on the Claimant's motion of 5 October 2010 for Reconsideration (the **"Motion for Reconsideration"**) of the alleged refusal to grant the environmental license for the Project (the **"Environmental License"**), which was *de facto* equivalent to an appeal from the alleged Negative Environmental Decision (as defined at paragraph 55 below). The proceedings concerning the Motion for Reconsideration can still be nominally regarded as pending, although it is clear from a practical perspective that the Respondent has no inclination to proceed to rule on that motion in any manner. It is the Claimant's case that this constitutes a clear denial of administrative justice on the grounds of excessive delay.

5. The time-limit of three years provided for under Article 10.18 DR-CAFTA cannot be considered as having started to run before the Respondent's failure to issue a ruling on the Motion for Reconsideration became so extravagant that it could not be confused by

[1] Corona's applications for concessions and licenses in the DR were conducted primarily through its Dominican subsidiary, Walvis Investments, S.A. (**"Walvis"**), of which Mr French acted as chairman. In this Counter-Memorial, where applicable, a reference to Corona is also a reference to Walvis.
[2] **CL-1**, DR-CAFTA, Chapter 10 on Investment (English), in force since 1 March 2007.
[3] *Ibid*.

the Claimant with mere delay. In that respect, the Claimant submits it still reasonably believed in June 2011 (and thereafter) that its Motion for Reconsideration would be dealt with by the relevant DR authorities. It was only in the second half of 2011 (at the earliest) that the Claimant finally lost all hope that the Negative Environmental Decision would be reconsidered. The Request for Arbitration (**"RFA"**) was accordingly filed within 3 years of that date.

6. It is the Claimant's case that in these proceedings, the Respondent cannot either claim that the Motion for Reconsideration of the Negative Environmental Decision was filed late nor be allowed to rely on the doctrine of *negative administrative silence* for the following reasons:

   (a) as a matter of DR law, there was no time limit to bring the Motion for Reconsideration of the Negative Environmental Decision, and in any event Resolution 737-10 of 28 July 2010 (**"Resolution 737-10"**) was never served upon the Claimant (neither with the letter dated 18 August 2010 communicating the Negative Environmental Decision nor by any other means), so no time limit (if there had been one) could have started to run;

   (b) the Respondent has not provided any source of law confirming that the doctrine of *negative administrative silence* could operate within the framework of an EIA procedure to the effect that the lapse of two months amounts to a Negative Environmental Decision. Given the subject, nature and the complexity of the EIA proceedings and their fundamental principles, including transparency, public participation and the right to effective remedies, the doctrine simply cannot be deemed to apply in such a way, and if it were so allowed this would be tantamount to a breach by the Respondent of its own Constitution, as well of its international law commitments, including under DR-CAFTA; and

   (c) further, the purpose of the *negative administrative silence* doctrine is the protection of an individual vis-à-vis the administration. It has been repeatedly underlined, including by DR scholars on which the Respondent relies in the present case, that the doctrine can never be used by the state against an individual.[4] In the present case, however, the Respondent purports to rely on that doctrine to deprive the Claimant of access to an effective remedy before an international Tribunal. It is a manifest example of an abuse of law.

7. For these reasons, the Respondent's jurisdictional objection should fail, whether determined under the Expedited Procedure or at a later stage of this Arbitration. The Claimant filed the RFA within three years from the moment when it could have first reasonably concluded that the Respondent had committed an internationally wrongful act

[4] See in particular, Rafael Moreta Bello, *Reconsideration, administrative silence and hierarchy in the Land Courts Jurisdiction* (**R-6**), relied upon at paragraph 80 of the Respondent's Preliminary Objections, and paragraphs 201 - 209 below.

constituting a denial of justice, rather than merely delayed the Claimant's application. Moreover, the Respondent cannot be allowed to benefit from its own misconduct.

8. Furthermore, the three-year defence cannot succeed for the simple reason that the Respondent is in continuing breach of its obligation owed to the Claimant to afford the Claimant fair and equitable treatment. The Claimant is still the nominal holder of the aggregate mining exploitation concession at the Joama site, granted on 1 June 2009 (the **"Concession"** or the **"Exploitation Concession"**), but it cannot develop the Project in any meaningful way because it lacks the Environmental License. The Claimant can neither receive the final reasoned decision on its previous application, nor commence a new EIA process, as it does not know any valid or logical reasons for which the previous plan was rejected.

9. Ultimately, in addition to the Respondent's Preliminary Objections being ill-founded in principle, they are also so closely linked to the merits of the case that they are ill-suited for a determination under an Expedited Procedure in which neither the Parties nor the Tribunal have the benefit of access to the full arguments and evidence to be put forward by both Parties during the merits phase. Accordingly, the Claimant submits that the Preliminary Objections should be dismissed as falling outside the scope *ratione materiae* of eligible objections for determination under the Expedited Procedure established under Article 10.20.5 DR-CAFTA.[5]

II. RELEVANT FACTS

A. General Overview

10. In 2007, the Claimant devised a project to open and operate an aggregates mine in an area designated under the Joama Concession of the Samana region of the DR, principally for export to the Florida construction market, which was at that time experiencing a severe shortage of aggregates (the **"Project"**).

11. In 2006-2007, the Claimant first presented the key aspects of the Project to DR officials. In particular, in May 2007, the Claimant submitted an application to the Respondent's Department of Mining to operate the Joama Concession, and in September 2007, the Claimant submitted an application for an Environmental License, required to operate the aggregates mine, to the Respondent's Ministry of Environment and Natural Resources (the **"Environmental Ministry"**).

12. In 2009, the Claimant was granted an Exploitation Concession for the Joama deposit. This Exploitation Concession was granted for a maximum term of 75 years.

13. From that point, the only significant hurdle preventing Corona from making full use of the Exploitation Concession was the additional requirement to obtain the grant of an

[5] **CL-1**, DR-CAFTA, Chapter 10 (English).

Environmental License. An Environmental License can only be issued by the Respondent following full and proper compliance with the procedure for the EIA relating to the Project. The EIA procedure for the Project was initiated in 2007 and has never been formally closed by the Respondent.

14. As at the date of this submission, the Respondent, on the one hand, still considers the Concession to be in full force and effect and accordingly requires Corona to comply with its duties as the holder of the Concession. On the other hand, the Respondent is refusing to grant an Environmental License and/or explain the modifications that would need to be made to the Project in order to allow the Claimant to effectively benefit from its asset.

15. The situation constitutes a continuing violation of the FET Standard, which is equivalent in effect to a *de facto* expropriation.

16. It is also critical to note that the Respondent has not disputed in its Preliminary Objections any of the facts alleged by the Claimants in the RFA. This refers in particular to the meetings that Corona had throughout 2011 and 2012 with various officials within the DR administration, concerning the Motion for Reconsideration of the Claimant's application for an Environmental License (the **"Environmental License Application"**). Even though the Respondent raises allegations of the vagueness of the submissions contained in the RFA, it does not dispute that such meetings took place nor that the matters set out in the RFA were actually addressed at such meetings.

17. The above has far-reaching consequences for the fate of the Preliminary Objections:

    (a) Either the Respondent concedes that such meetings took place, which implies that the Respondent repeatedly assured the Claimant in 2011 and 2012 that the Motion for Reconsideration would be both heard and allowed on the merits, clearly implying that the Respondent cannot now rely on the alleged extemporaneousness of the Motion for Reconsideration, nor on the doctrine of *negative administrative silence*, necessarily leading to the dismissal of the Preliminary Objections for lack of merit; or

    (b) The Respondent contests that such meetings took place with the result that these central facts are contentious, and require the Tribunal to make a determination in that respect, having given both parties appropriate opportunities to adduce relevant evidence.

B. Corona Materials

18. Corona is a limited liability company formed under the laws of the U.S. State of Florida on 7 November 2005.[6] Corona's principals and members are Mr. Randy Fields, Mr. John Elliott and Mr. Alain French. All three have significant commercial business experience, as summarised briefly below.

19. Mr. Fields was a shareholder and co-chairman of Greenberg Traurig LLP (Orlando), an international law firm with nearly 2,000 attorneys worldwide. Whilst at Greenberg Traurig LLP he was elected to the Central Florida Innovation Corporation's Board of Directors. Mr. Fields is regularly recognised by the legal directories as one of the top lawyers in Florida and the U.S. as a whole. In 2015, Mr Fields was recognized as one of the Best Lawyers in America and Lawyer of the Year by the annual publication Best Lawyers. In 2009, Mr Fields was recognized as one of the Most Influential Businessmen by the Orlando Business Journal. Mr. Fields is presently Of Counsel with Gray Robinson, a full-service commercial law firm based in Florida. Mr. Fields has extensive experience in all aspects of corporate and commercial law across a wide range of industries.

20. Mr. Elliott served as Executive Vice-President of Gencor Industries, Inc. (a public company headquartered in Florida engaged in the manufacture of asphalt plants) for several years. Over recent years, he has been engaged in various business ventures across a range of sectors including mining, construction and construction materials.

21. Mr. French was based in the DR, managing Corona's Project's day-to-day operations. A former pilot, and a real estate and mining entrepreneur, Mr French has expertise and experience in the mining and construction industries in the USA and the UK. Mr French has also been involved in delivering large-scale projects in the DR since 1999, when he was contracted by OPI-RD (now CEI-RD) to be the developer for the master planning of a cyberpark and the design and construction of the Westport and Eastport office facilities.

C. The Joama Concession

22. Corona began searching for suitable sources of aggregate as early as 2005 prompted by a projected shortage of aggregate in Florida's construction market. Corona investigated and assessed a number of potential options for obtaining aggregates from mines in the Caribbean for supply to the Florida market, including the possibility of purchasing aggregates from existing mines.

23. Corona mainly carried out its local operations in the DR through Walvis Investments, S.A (**"Walvis"**), its DR-incorporated subsidiary.

[6] **C-1**, the Claimant's corporate registration with the U.S. State of Florida, 9 June 2014 (English).

24. During its investigations, Corona's principals identified three suitable concession sites in the DR, known as Perla, Joben and Joama. In 2006, Walvis purchased three existing applications for Exploration Concessions at the Perla, Joben and Joama sites.

25. Following further consideration of the three sites, Corona decided to start operations by firstly developing the Joama Concession in the DR's Samana province, near Sanchez. The Joama Concession had a number of key advantages meeting Corona's specific criteria,[7] including:

(a) proven reserves of 368,471,627 mt of high quality marble-like deposits with total reserves estimated at over 2 billion mt[8], sufficient for at least fifty years of operation;[9]

(b) high-quality re-crystallized limestone;

(c) a nearby deep water port that was capable of accommodating 70,000 ton panamax-class ships;[10] and

(d) a protected harbour with calm waters.[11]

26. Corona also chose to commence operations at the Joama Concession on the basis of encouragement from senior officials from the DR government, including, among others, Director of Mining Octavio Lopez, Secretary of Industry and Commerce Francisco Javier Garcia, Secretary of Environment Omar Ramirez, and Environmental Sub-Secretary Ernesto Reyna, provided in the course of meetings attended by Mr. French, Mr. Fields and Mr. Elliott.[12]

27. Following the purchase of the Joama Exploration Concession application, Corona commissioned a series of feasibility studies to examine the Project's environmental, economic, political, and legal viability. In particular, Empaca, a leading consulting company, was engaged to conduct an environmental feasibility study in February 2007. Empaca concluded that the Project was "*viable environmentally*" and that "*the project will be able to obtain the corresponding Environmental License for the phases of construction, operation, and closing*." [13] Similarly, Walvis received comfort from respected DR attorney, Lic. Manual Tapia, who upon review of the relevant laws and regulations, advised that the Project had excellent prospects of receiving the necessary legal entitlements for the mine and port operations from the relevant DR authorities.

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[7] **C-5**, draft business plan prepared by the Claimant relating to the Project, 1 July 2007 (English) (Spanish), page 6.
[8] **C-5** (English) (Spanish), page 34.
[9] On the basis of proven reserves at a production rate of 7,000,000 MT per annum, assuming no wastage.
[10] **C-5** (English) (Spanish), pages 6 and 8.
[11] **C-5** (English) (Spanish)**,** page 6.
[12] **C-6,** letter from Mr. Fields to President Reyna, 25 March 2008 (English) (Spanish).
[13] **C-7**, study of environmental feasibility prepared by Empaca relating to the Project, February 2007, page 4 (English) (Spanish).

28. The Joama Exploitation Concession was subsequently granted on 1 June 2009.[14] The Concession conferred upon Walvis the following rights, amongst others, under Dominican Mining Law No. 146-71:

(a) the right to conduct mining activities within the perimeters of the Concession;[15]

(b) the right to extract mineral substances of mining sites for economic gain;[16]

(c) the exclusive right to exploit and benefit from the mineral substances extracted within the perimeters of the concession for a period of up to 75 years, in conformance with the requirements established by law;[17] and

(d) the right to construct and establish various types of infrastructure in connection with the mining operations.[18]

29. Use of the Concession was subject to the positive evaluation of the EIA, under the procedures set out in Dominican Law 64-00 on the environment and natural resources, and the obtainment of an Environmental License or Permit.[19]

D. Corona's Efforts to Obtain the Concession and Environmental License

(a) Corona Applied for an Exploitation Concession to Mine Aggregates and a Corresponding Environmental License

30. Walvis submitted its application for the Exploitation Concession (the **"Exploitation Concession Application"**) to the Secretary of Industry and Commerce in May 2007. On 12 September 2007, the Municipal Government of Sanchez issued a Certificate of No Objection to the Project.

31. On 18 September 2007, Walvis submitted an Environmental License Application to the Environmental Ministry.[20] Once granted, this Environmental License would permit Walvis to begin constructing and operating.

32. Following the submission of both the Joama Exploitation Concession Application and the Environmental License Application, Mr. French, Mr. Fields, Mr. Elliot and Ing. Jose Amado Bencosme (at that time an associate of Walvis) met with Secretary of Industry and Commerce Melanio Paredes and Environmental Sub-Secretary Ernesto Reyna and

[14] **C-4**, the Joama Exploitation Concession, 1 June 2009 (English) (Spanish).
[15] **CL-1A**, Article 37, Mining Law No. 146-71 (Spanish).
[16] **CL-1A**, Article 42, Law 146-71 (Spanish).
[17] **CL-1A**, Article 49, Law 146-71 (Spanish).
[18] **CL-1A**, e.g. Article 64, Law 146-71 (Spanish).
[19] **C-4,** page 5 (English) (Spanish).
[20] **C-8**, letter from Mr. French, on behalf of Walvis, applying for an Environmental License, 17 September 2007 (English) (Spanish).

numerous other representatives from the DR and local government, the vast majority of whom expressed support for the Project. [21]

33. Progress was continually frustrated by delays and obstructive actions taken by the DR authorities, and repeated requests were made for information by government bodies which had already been supplied on prior occasions.

(b) Delays in Approving the Exploitation Concession Application

34. The Joama Exploitation Concession Application was submitted on 14 May 2007 and the economic study relating to the Joama Concession was submitted to the Department of Mining and the Department of Industry and Commerce on 15 August 2007. Despite repeated requests by Mr. French and Corona's and Walvis' advisers for the Exploitation Concession to be signed, there were continual delays.

35. In January 2008, although all the necessary information had been provided, Walvis was still awaiting a certificate from the Department of Mining in relation to the Joama Concession.

36. Following a meeting with Secretary Paredes in Santo Domingo, on 3 January 2008, Mr. Fields wrote to Secretary Paredes on behalf of Corona to request that the Joama Exploitation Concession be granted.[22] Mr. Fields did not receive a response to these letters.[23]

37. In March 2008, Mr. Fields, Mr. Elliott and Mr. French met with Ing. Manuel de Jesus Perez Gomez (known as Freddy), one of the President's advisers, at the National Palace, seeking an explanation for the delay in processing the Joama Exploitation Concession Application by the Department of Industry and Commerce. Mr. Fields also wrote to President Fernandez on behalf of Corona to request that the process be expedited.[24] Mr. Fields did not receive a response to his letter.[25]

38. On 24 June 2008, Secretary Paredes informed Mr. French that the Joama Exploitation Concession would be signed on the afternoon of 25 June 2008. Secretary Paredes did not sign the Exploitation Concession and rescheduled the signing for 30 June 2008.

39. Secretary Paredes later stated that he could not sign the Joama Exploitation Concession until INAPA, the DR water authority, confirmed that the Project would not adversely affect

[21] **C-6**, pages 6-7 (English) (Spanish).
[22] **C-9**, Letter from Mr. Fields, on behalf of the Claimant, to Secretary of State of Industry and Commerce Melanio Paredes, 3 January 2008 (English) (Spanish).
[23] First witness statement of Randolph Howard Fields, paragraph 9 (English) (Spanish).
[24] **C-6**.
[25] First witness statement of Randolph Howard Fields, paragraph 10 (English) (Spanish).

any river or water sources. A letter of No Objection was issued by INAPA on 29 July 2008 and received by the Department of Industry and Commerce on the same day.[26]

40. Secretary Paredes left office without ever signing the Joama Exploitation Concession and was replaced by Jose Ramon Fadul on 16 August 2008. Following Secretary Fadul's arrival in office, Mr. French contacted DR government officials to arrange meetings to organise the signature of the Joama Exploitation Concession.

41. On 1 October 2008, Secretary Fadul signed the Joama Exploitation Concession, sixteen months after Corona originally submitted its application. It is Corona's understanding that this process should ordinarily take around four months. On 28 October 2008, President Fernandez authorised the award of the Joama Exploitation Concession. A signed version of the Joama Exploitation Concession dated 18 November 2008 was issued to Walvis, although it was not formally granted until 1 June 2009.[27]

42. Thus, in spite of the delays and obstructions brought about by the actions of the DR, the Claimant had nevertheless been awarded an Exploitation Concession to enable it to exploit aggregates obtained from the Joama site for the maximum term of up to 75 years.[28]

43. At this point, Corona was also at an advanced stage of negotiations to enter into a joint venture with one of several major natural resources companies including Aggregate Industries and Titan America, major leading institutions in the Florida aggregates market, to secure investment to fund the development of the mine, port and conveyor belt and proceed to export aggregates to the Florida market.[29] In March 2008, David Hopkins from Aggregate Industries and John Hoyer from Titan visited Samana to inspect the Joama Project site. Discussions between KPMG Corporate Finance LLC (acting for Corona), representatives from Aggregate Industries and representatives from Titan were subsequently held in relation to securing investment for the site through a joint venture. A draft Letter of Intent was subsequently issued to Aggregate Industries. The interest of these key players demonstrates the commercial viability of the Project and the confidence in Corona's ability to develop it into a viable commercial operation.

44. However, before the Project could commence, Corona and Walvis still required an Environmental License to be granted by the Environmental Ministry.

[26] **C-10**, letter of no objection from INAPA, the DR water authority, to Secretary Paredes, 29 July 2008 (English) (Spanish).
[27] **C-4**, (English) (Spanish).
[28] **CL-1A**, pursuant to Article 47 (Spanish).
[29] The Claimant also engaged in negotiations with Lafarge, Martin Marietta, Florida Rock and Conrad Yelvington in relation to securing a joint venture for the Project.

(c) Delays in Processing Corona's Application for an Environmental License

45. As stated, on 18 September 2007, Walvis submitted an Environmental License Application to the Environmental Ministry.[30]

46. On 1 November 2007, the Environmental Ministry sent Walvis a letter requesting additional information. Corona duly submitted the requested information on 9 November 2007.

47. On 28 November 2007, the Environmental Ministry sent another letter requesting additional information including requests for topographical maps, surveys, and authorizations from various governmental bodies. Around this time, Ing. Jose Ariza Duran, an environmental consultant retained by Corona, liaised with DR environmental officials in relation to the issuance of the terms of reference for the Environmental Study (the **"Terms of Reference"**). Following a visit to the site with environmental officials, Sub-Secretary Reyna was due to sign the Terms of Reference. At the point of signature, Sub-Secretary Reyna, Ing. Ariza was informed that the Project would be characterized as a "*megaproject*" which necessitated the development of a distinct type of Terms of Reference. Corona's environmental consultants attended three subsequent meetings at the Environmental Ministry to discuss these new Terms of Reference. The Environmental Ministry also requested a site visit. Corona hosted representatives from the Environmental Ministry on site, and supplied all of the requested information on 29 February 2008.

48. A meeting with environmental officials took place on 3 April 2008 at which additional information was requested. Mr. French submitted the requested information on 7 April 2008.

49. On 6 May 2008, the Environmental Ministry issued the Terms of Reference for the mine, conveyor belt, and private port, nearly eight months after Walvis had originally submitted its application. The Terms of Reference did not mention any particular existing environmental issues, suggesting that none had been deemed worthy of note by environmental officials.

(d) Delays in Issuing the Amended Terms of Reference

50. On 9 October 2008, in anticipation of rumours that the DR government was considering passing a resolution forbidding the export of aggregates (which was eventually passed on 18 November 2008 in the form of Resolution 17-2008[31]), Mr. French, on behalf of Corona and Walvis, requested that the Terms of Reference be bifurcated in order to separate the mine from the port and conveyor belt. Exporting aggregates to the United States was central to Corona's business plan. Nonetheless, Corona made this request as

[30] **C-8**, (English) (Spanish).
[31] **C-11**, Resolution 17-2008 (English) (Spanish).

it intended to maintain momentum for the Project, with the aim of commencing operations for sales locally in the DR and to increase production at such later point as the ban on exports was lifted. Mr. French met with Sub-Secretary Reyna and Director of Mining Sr. Lopez in relation to Corona's Request for a Bifurcation. Mr. French submitted a Request for Bifurcation to the Environmental Ministry on 20 January 2009, on behalf of Corona and Walvis.

51. On 25 May 2009, the Environmental Ministry issued Resolution 21-2009, which repealed Resolution 17-2008 and reinstated the administrative procedure to export aggregates.[32] The Environmental Ministry did not issue new Terms of Reference until 24 June 2009.[33] These Terms of Reference restricted Corona and Walvis to only local sales, despite the fact that by then Resolution 17-2008 had been repealed by Resolution 21-2009 and exports of aggregates were now again permissible. Also, these Terms of Reference only related to the mine. Corona and Walvis did not receive separate Terms of Reference for the port or conveyor belt, and such Terms of Reference have never been issued. In fact, on 20 June 2009, Sub-Secretary Reyna and Lena Beriguette, the Director of Environmental Management, told Mary Fernandez, Corona's attorney, that they would not grant Terms of Reference for the port because Resolution 17-2008 made it impossible to export aggregates. By this point, it had been over a month since Resolution 21-2009 had repealed Resolution 17-2008 allowing for the export of aggregates, so the basis for the Environmental Ministry's stance was not apparent.

(e) Delays in Issuing Corona's Environmental Impact Assessment Study

52. At the same time, Corona continued to press forward with the Environmental License Application. On 1 August 2009, a public meeting was held presenting the Joama Project's EIA study, (required as part of the procedure to obtain an Environmental License). Walvis submitted the EIA study and the Management Plan (PMAA), prepared by Ing. Ariza, to the Environmental Ministry on 28 September 2009.[34]

53. A site visit took place in February 2010 attended by four inspectors from the Environmental Ministry. During the site visit, the inspectors told Mr. French that they were completely satisfied that the mine would not affect the water quality of local rivers and water sources.

54. Shortly afterwards, on 30 March 2010, one of the inspectors from the Environmental Ministry told Mr. French that they had completed their work and that the Environmental License would shortly be granted.

55. Contrary to that indication, Mr. French instead received a request from the Environmental Ministry on 14 May 2010 for additional information in relation to the Project, much of which Mr. French had already submitted on more than one occasion. Despite the

[32] **C-12**, Resolution 21-2009 (English) (Spanish).
[33] **C-13**, EIA and Management Plan (PMAA), September 2009, pages 31-38 (English) (Spanish).
[34] **C-13**, (English) (Spanish).

repetitious nature of these requests, Corona submitted the requested information on 11 June 2010. Mr. French and Corona's environmental consultants continued to meet with DR officials to inquire as to the status of the Environmental License Application.

(f) The DR Denies Environmental Approval for the Joama Exploitation Concession

56. On 18 August 2010, the Environmental Ministry informed Corona that the Joama Project was not environmentally feasible, exactly two years and eleven months after Corona had originally submitted its Environmental License Application (the **"Negative Environmental Decision"**).[35] Corona understands that the process ordinarily takes up to 190 days. This rejection came as a complete surprise to Corona because the Environmental Ministry had not previously indicated that DR officials held any environmental concerns about the Project. To the contrary, Corona had been assured on several occasions, including in both sets of Terms of Reference, that there were no such concerns and had been encouraged to believe that an Environmental License was to be granted.

57. In addition, the Environmental Ministry failed to proffer actual reasons for the Negative Environmental Decision. The letter of 18 August 2010 is two pages long. It opens with two introductory paragraphs informing Corona that the Project is not environmentally viable, followed by several quotations of provisions of DR law with no application to the facts. The last paragraph reads:

> *"Among other things, it is noted that in the corresponding documents there is a dispute and/or opposition presented with respect to the right of use of some of the land properties included in the development area of the mining project."*[36]

58. There is no explanation in the letter as to which particular properties are affected by such concerns, nor what specific problems arise with respect to them. Further, there appears to be no connection between these purported land use issues and the text of the provisions of DR law quoted as the alleged substantive legal basis for the Negative Environmental Decision.

59. In addition, even though the Environmental Ministry's inspectors had told Corona that the Project would not have any impact on nearby rivers or water sources just six months previously during a site visit, the letter cited a provision suggesting that the Project was not viable because it was located within 30 meters of bodies of water. This was factually inaccurate. The closest body of water was actually 700 meters away, and Corona was aware of other domestically-owned mines that were less than 30 meters from bodies of water. The Claimant notes that INAPA, the DR water authority, confirmed in 2008 that it

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[35] **C-14**, letter from Environmental Ministry communicating the Negative Environmental Decision, 18 August 2010 (English) (Spanish).

[36] *"Entre otras cosas, se observa en los documentos correspondientes al expediente del citado proyecto la litis y/u oposición presentada por derecho de usos de algunas de las parcelas incluidas en el área de desarrollo del proyecto minero."*, **C-14**, page 2 (English) (Spanish).

did not have any objection to the Project (see paragraph 39 above). On that basis, the Negative Environmental Decision appears incomprehensible, unjustified, and indeed, arbitrary.

60. The letter dated 18 August 2010 setting out the basis of the Negative Environmental Decision referred to Resolution 737-10, which was made by the Technical Evaluation Committee (the **"TEC"**) following a meeting on 28 July 2010. It indicated that it was the TEC which determined that the Project was not environmentally viable. No copy of Resolution 737-10 was ever provided to the Claimant. In addition, the letter communicating the Negative Environmental Decision did not set out any procedure by which the decision could be appealed or could be submitted for reconsideration.[37]

(g) Corona Seeks a Reconsideration of the Negative Environmental Decision

61. Mr. French attempted to meet with officials within the Environmental Ministry to discuss a reconsideration of the Negative Environmental Decision. In the course of his meetings with relevant DR officials, he was simply asked to supply some documents which had already been supplied on three separate occasions. Given however that DR environmental officials were still requesting documents relating to the Joama Environmental License Application, Corona reasonably understood that the decision could be reconsidered. Corona was further reassured that reconsideration was possible by its consultants and a number of DR politicians.

62. On 5 October 2010, Corona wrote to the Environmental Ministry formally bringing a Motion for Reconsideration of the decision that the Project was not environmentally viable.[38] Corona never received a formal response to that letter.[39]

63. Mr. French and Corona's representatives, including Mario Mendez, one of its environmental consultants, continued to make visits to the Environmental Ministry to attend meetings with DR government officials and to inquire as to the status of the Motion for Reconsideration in late 2010 and 2011. In addition, local leaders wrote letters to Sub-Secretary Reyna asking him to reconsider his decision, including Dr. Fausto Forchue, the Governor of Samana.

64. On 9 December 2010, Sr. Mendez was told by Sra. Beriguette of the Environmental Ministry that a decision had been taken to send the file to the Secretary of the Environmental Ministry Jaime David for a final decision. Corona reasonably viewed this as confirmation that its Motion for Reconsideration was being actively considered.

65. In January 2011, Mr. French visited the Environmental Ministry. During this visit, he spoke to Sra. Beriguette, a member of the TEC. She told Mr. French that she had decided to render the Environmental Ministry's Negative Environmental Decision null and

[37] **C-14**, (English) (Spanish).
[38] **C-15**, the Claimant's Motion for Re-consideration, 5 October 2010 (English) (Spanish).
[39] Witness statement of Alain Stanley French, paragraph 10 (English) (Spanish).

void and that she would send the Joama Environmental License Application to Secretary David for reconsideration and a final decision.

66. Mr. French requested a meeting with environmental officials to discuss the Negative Environmental Decision. On 20 January 2011, Mr. French attended a meeting with Sub-Secretary Reyna and other government officials (including members of staff concerned with the Negative Environmental Decision) at which he was told that the Negative Environmental Decision would be reconsidered.

67. On 17 February 2011, Mr. French visited the Environmental Ministry and was told that no one, including none of the members of staff concerned with the Negative Environmental Decision, had worked on the Reconsideration of the Negative Environmental Decision since the January 2011 meeting, as the file had not been sent to the relevant senior environmental personnel responsible.[40]

68. On 23 February 2011, Mr. French wrote to Sub-Secretary Reyna to complain about the lack of progress and Mr. French subsequently wrote to request the issuance of the Environmental License.[41]

69. A meeting was scheduled with Environmental officials and the DR Department of Foreign Trade (**"DICOEX"**) on 2 March 2011.[42] The meeting did not go ahead because officials from the Environmental Ministry were not sufficiently prepared and Mr. French had to visit the United Kingdom for personal reasons.

70. On 7 March 2011, Mr. French wrote to the Department of Mining to provide a semi-annual update on the status of the Joama Exploitation Concession (required under DR law). Mr. French explained that operations had not yet commenced, as Corona was still waiting for its Environmental License Application to be approved by the Environmental Ministry.

71. On 23 March 2011, Dr. Katrina Naut of DICOEX wrote to Mr. French to invite him to a meeting to be held on 31 March 2011 at DICOEX's offices. Mr. French replied to Dr. Naut's email on 25 March 2011 to insist that officials from the Environmental Ministry also attended that meeting. On 31 March 2011, Mr. French met Yahaira Sosa Machado of DICOEX. Despite Mr. French's earlier request, no officials from the Environmental Ministry were in attendance at that meeting. Lic. Sosa Machado informed Mr. French that she was attempting to arrange a mediation with Secretary David and the new Minister of Industry and Commerce in relation to the Project and the Negative Environmental Decision.

72. On 8 April 2011, Mr. French wrote to Lic. Sosa Machado requesting an update regarding the Environmental License. Lic. Sosa Machado said that DICOEX had met with various

[40] **R-2**, page 1.
[41] **R-2**.
[42] **R-2**, page 4.

DR government departments, including the Environmental Ministry, and explained that DICOEX would soon arrange a meeting with Mr. French at which officials from the Environmental Ministry would be in attendance.

73. On 18 April 2011, Mr. French wrote to Lic. Sosa Machado to ask when a meeting regarding the Project and the Negative Environmental Decision would take place. On 20 April 2011, Dr. Naut advised Mr. French that a meeting would be scheduled prior to 10 May 2011 and that officials from the Environmental Ministry would on this occasion be in attendance.

74. On 17 May 2011, Lic. Sosa Machado wrote to Mr French requesting certain corporate documentation relating to Walvis, stating that a meeting would be arranged once the information had been supplied, but no such meeting took place. Corona was not at that time in a position to provide the requested information to DICOEX due to a technical change in DR company law, which required Walvis to make certain elections as to whether the company should remain an S.A. or elect to become an S.R.L. This procedure took several months to finalize.[43]

75. Environmental consultants retained by Corona, including Mario Mendez of Empaca, continued to meet with Environmental Ministry officials into June 2011, including Secretary David and Sub-Secretary Reyna, regarding the status of the Environmental License and the reconsideration of the Negative Environmental Decision. Mr. French himself also visited the Environmental Ministry to inquire as to the status of the Environmental License and the Motion for Reconsideration around this time.[44]

76. Following repeated attempts to persuade DR officials to reconsider the Negative Environmental Decision, and having been told on several occasions that it was under reconsideration, the Claimant finally concluded in the second half of 2011 (at the earliest) that there was no realistic prospect of the DR in fact carrying out a reconsideration of its decision. Accordingly, on 15 March 2012, Corona sent DICOEX a Notice of Violations under DR-CAFTA.[45]

77. Corona filed the RFA on 10 June 2014.

78. Corona, having been refused the opportunity to make any requests for the production of documents during the course of the Expedited Procedure, is reliant upon such documents as it holds and such documents as the DR elects to produce to further evidence the key event chronology.

[43] Witness statement of Alain Stanley French, paragraph 12 (English) (Spanish).
[44] Witness statement of Alain Stanley French, paragraph 13 (English) (Spanish).
[45] **C-2**, authorization from the Claimant empowering K&L Gates LLP to act on its behalf in this Arbitration, 10 June 2014 (English).

III. ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

A. General Remarks

79. The Claimant's central claim in this arbitration is that the Respondent failed to provide and follow an adequate regulatory framework for an EIA process with respect to the Project, as a result of which it committed a continuing violation of its FET Standard obligations under Article 10.5 DR-CAFTA, with expropriatory effect on the Claimant's investment.[46] For this reason, it is important to provide the Tribunal with the relevant summary of the EIA procedure regarding:

(a) the nature and purpose of the process; and

(b) internationally accepted standards for the EIA process.

B. Environmental Impact Assessment

(a) Concept and significance

80. In international law, the EIA is widely regarded as an indispensable element of the permitting process with respect to any Project that could threaten environmental conditions.

81. The EIA has been defined as:

> *"a process used to identify and gather information about the expected future consequences of a proposed project before a decision is made as to whether it should proceed. It involves consideration of biophysical factors as well as social, cultural and aesthetic factors. It relies on tools found in the physical, social and natural sciences to predict the effects of a proposed project and considers the knowledge of potentially affected citizens and the values they place on the existing environment."*[47]

82. The International Court of Justice has held that:

> "*it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the*

[46] **CL-1**, DR-CAFTA, Chapter 10 (English).
[47] **CL-2**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04 (Expert Report of Robert G. Connelly), 2 December 2011, paragraph 16 (English).

proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource."[48]

83. Even though these principles have been asserted in the context of transboundary projects (which obviously are the ones that most directly concern international law), the EIA has nevertheless become a standard procedural requirement also with respect to projects which do not have transboundary implications.

84. The conduct of EIA processes in connection with projects in different states has led to a number of investment treaty disputes in recent years.[49] In the *Bilcon v Canada* case, the claimants intended to invest in Nova Scotia by developing a quarry and a marine terminal. After several years of the claimants' efforts to obtain all the necessary permits, licenses and positive administrative decisions, the project was referred to a Joint Review Panel which was to determine the environmental impact of the quarry. The Joint Review Panel did not recommend the implementation of the project on account of, among other factors, the inconsistency with *"community core values"*. The claimants argued that that was a purely political decision. The Tribunal agreed, stating:

> *"The environmental process is intended to be part of the earlier stages of a planning process in which input can be used to improve the design of a project and mitigation measures in the interest of protecting the environment*."[50]

85. Although the duration and complexity of each EIA process depends on the particular circumstances of each project and the set of applicable regulatory provisions within the relevant state, they tend to be increasingly complex technical assessments, which require extensive research and study and are open to public scrutiny.[51] For these reasons, the duration of a typical set of EIA proceedings tends to be significant.

(b) International Standards

86. Although, in principle, it is for each state to develop its own internal rules for an EIA, international standards of best practice and international law commitments have emerged, contributing to the progressive development of new international standards in the field of the EIA.

87. The International Association for Impact Assessment ("IAIA"), the leading global network on best practice in using impact assessment for informed decision-making, has published

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[48] **CL-3**, *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, 20 April 2010, I.C.J. Reports 2010, page 14, para. 204 (English / French); **CL-4**, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) / Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, International Court of Justice, No. 2015/32 (Judgment of 16 December 2015), para. 104 (English).
[49] **CL-5**, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL (Award dated 8 June 2009) (English); **CL-2**; **CL-6**, *Emilio Augustin Maffezini v the Kingdom of Spain, ICSID Case No. ARB/97/7 (*Award dated 13 November 2000) (English) (Spanish).
[50] **CL-2**, para. 513 (English).
[51] See below at paragraphs 86-101.

guidelines on best practice for the EIA, which includes a list of basic principles for the EIA process. According to the guidance, the EIA should be, *inter alia*:

(a) purposive - the process should inform decision making and result in appropriate levels of environmental protection and community well-being;

(b) relevant - the process should provide sufficient, reliable and usable information for development planning and decision making;

(c) participative - the process should provide appropriate opportunities to inform and involve the interested and affected public, and their contribution and concerns should be addressed explicitly in the documentation and decision-making process;

(d) credible - the process should be carried out with professionalism, rigor, fairness, objectivity, impartiality and balance, and be subject to independent checks and verification; and

(e) transparent - the process should have clear, easily understood requirements for EIA content; ensure public access to information; identify the factors that are to be taken into account in decision-making; and acknowledge limitations and difficulties.[52]

88. These principles are embodied in the two best-known United Nations Conventions on environmental assessment, namely the Espoo Convention [53] and the Aarhus Convention[54], and the Rio Declaration on Environment and Development, adopted in 1992,[55] also offers valuable guidance.

(c) Espoo Convention

89. The Espoo Convention deals primarily with the transboundary implications of proposed projects, and draws out an inter-state consultation procedure. Notably, the Espoo Convention sets out in its appendix II the minimum requirements for the environmental impact documentation, which should include:

> "*(a) A description of the proposed activity and its purpose;*
>
> *(b) A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative;*

[52] **CL-7**, "Principles of Environmental Impact Assessment Best Practice", International Association for Impact Assessment in cooperation with Institute of Environmental Impact, UK, January 1999 (English).
[53] **CL-8**, Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention), 25 February 1991 (English) (Spanish).
[54] **CL-9**, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention), 25 June 1998 (English) (Spanish).
[55] **CL-10**, The Rio Declaration on Environment and Development, June 1992 (English) (Spanish).

(c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;

(d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;

(e) A description of mitigation measures to keep adverse environmental impact to a minimum;

(f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used);

(g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;

(h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis); and

(i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.)."[56]

90. The Espoo Convention then stipulates in Article 4(2) that:

> "*The Party of origin shall furnish the affected Party, as appropriate through a joint body where one exists, with the environmental impact assessment documentation. The concerned Parties shall arrange for distribution of the documentation to the authorities and the public of the affected Party in the areas likely to be affected and for the submission of comments to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin within a reasonable time before the final decision is taken on the proposed activity.*"[57]

91. Accordingly, the Espoo Convention requires that the EIA documentation be extensive and that it be open and available for international review, consultation and modification proposals.

(d) Aarhus Convention

92. The Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making And Access To Justice In Environmental Matters), deals with the procedural aspects of the EIA process, including access to information and justice and participation of the public.

[56] **CL-8**, *Espoo Convention,* appendix II, page 15 (English) (Spanish).
[57] **CL-8**, *Espoo Convention*, page 5 (English) (Spanish).

93. The Aarhus Convention establishes a number of rights for the public in relation to the environment. It requires that the legal provisions are construed so that public authorities at the national, regional or local level contribute to the effectiveness of those rights. Among those rights, the public is granted access to the environmental information held by the public authorities, the right to participation in the environmental decision-making process and access to justice. Under the right to access of environmental information, public authorities are obliged to provide the public with the requested information and the public does not have to substantiate its request. Thus, the public has every right to receive an answer and the public authorities have an obligation to reveal any reason standing behind their environmental decisions.

94. With respect to access to justice, the Aarhus Convention requires that:

> *"Article 9(2). Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention. […]*
>
> *3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*
>
> *4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.*
>
> *5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."*[58]

[58] **CL-9**, *Aarhus Convention*, page 12 (English) (Spanish).

(e) Rio Declaration

95. Principle No. 10 of the Rio Declaration on Environment and Development, adopted in 1992, sets out the following principles:

> *"Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."*[59]

96. Importantly, in 2012, the Governments of Chile, Costa Rica, the DR, Jamaica, Mexico, Panama, Paraguay, Peru and Uruguay adopted the Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development, thus making the following commitments:

> *"Twenty years on from the Earth Summit, we reiterate that, as recognized in Principle 10 of the Rio Declaration, environmental issues are best handled with the participation of all concerned citizens. To this end, each individual should have appropriate access to information, the opportunity to participate in decision-making processes and effective access to judicial and administrative proceedings. To comply with this Principle, States should facilitate and encourage public education, awareness and participation by making information widely available and providing effective access to the above-mentioned proceedings."*[60]

(f) DR-CAFTA

97. Moreover, DR-CAFTA itself has created a legal framework for enhanced protection of the environment. The entire Chapter 17 of DR-CAFTA is devoted to issues concerning the environment.[61] These provisions plainly form a part of international law that is directly binding on the Respondent.

98. Article 17.1 DR-CAFTA provides that:

[59] **CL-10**, The Rio Declaration on Environment and Development (English) (Spanish).
[60] **CL-11**, Declaration on the application of Principle 10 of the Rio Declaration on Environment and Development, June 2012 (English).
[61] **CL-12**, DR-CAFTA, Chapter 17 on Environment (English).

"*each Party shall ensure that its laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve those laws and policies*."[62]

99. Article 17.3 DR-CAFTA provides that:

> *"1. Each Party shall ensure that judicial, quasi-judicial, or administrative proceedings, in accordance with its law, are available to sanction or remedy violations of its environmental laws.*
>
> *(a) Such proceedings shall be fair, equitable, and transparent and, to this end, shall comply with due process of law and be open to the public, except where the administration of justice otherwise requires.*
>
> *(b) The parties to such proceedings shall be entitled to support or defend their respective positions, including by presenting information or evidence. […]*
>
> *3. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to proceedings referred to in paragraph 1.*
>
> *4. Each Party shall provide appropriate and effective access to remedies, in accordance with its law, which may include rights such as: […] (c) to request that Party's competent authorities to take appropriate action to enforce its environmental laws in order to protect the environment or to avoid environmental harm; or*
>
> *5. Each Party shall ensure that tribunals that conduct or review proceedings referred to in paragraph 1 are impartial and independent and do not have any substantial interest in the outcome of the matter."*[63]

100. Accordingly, based on the foregoing, the Respondent undertook to give effect to the following principles with respect to the conduct of environment-related proceedings:

(a) transparency, including access to the public;

(b) access to justice;

(c) fair and equitable treatment;

(d) due process of law; and

[62] **CL-12**, DR-CAFTA, Chapter 17 on Environment (English).
[63] **CL-12**, DR-CAFTA, Chapter 17 on Environment (English).

(e) effective remedies.

101. On 1 February 2005, the DR-CAFTA Environmental Cooperation Agreement was signed by the Parties to DR-CAFTA, including the United States and the Respondent. Pursuant to that agreement, the DR-CAFTA Environmental Cooperation Program was created. One of the main stated aims of the participants in the DR-CAFTA Environmental Cooperation Program (the **"ECP"**) is institutional strengthening for effective implementation and enforcement of environmental laws. To achieve that aim, the ECP is focusing *inter alia* on:

(a) strengthening environmental legislation, regulations and environmental policies, *inter alia* in the area of the EIA; and

(b) increasing public participation and transparency to support informed decision-making.[64]

C. Conclusions

102. It is clear from the foregoing overview of generally accepted international principles of modern environmental law, as well as the international law commitments assumed directly by the Respondent, that a modern EIA process imposes enhanced obligations upon states with respect to transparency, access to justice and due process.

103. The EIA should be conducted as an informed and transparent decision-making process which is subject to effective and transparent review, including judicial oversight. In particular:

(a) the assessment must be informed: i.e. it should be based on reliable information concerning both the anticipated project and its possible impact on the environment. In order to ensure that effect, extensive requirements concerning the minimum content of the dossier are imposed on an applicant. At the same time, in order to further reduce the risk of environmentally adverse decisions by the competent bodies, the position of the applicant is exposed to a scrutiny from the public. Hence, the pivotal role of transparency of the proceedings; and

(b) the assessment must follow due process. Necessary elements of that due process involve transparency of the conduct of the competent bodies handling the proceedings, access to information and access to remedies, including to the Courts. Obviously, given the highly technical and complex nature of the EIA process, neither access to remedies nor effective judicial review can be ensured if the body in charge of the proceedings fails to adequately explain why it took the decision in question.

[64] **CL-13**, Summary of the CAFTA-DR Environmental Cooperation Program, 2015 (English).

III. ANALYSIS OF THE RESPONDENT'S CONDUCT UNDER DR-CAFTA

A. What Happened in the Corona Case

104. Corona asserts that the conduct of the EIA process carried out by the Respondent with respect to the Project was antithetical to the aforementioned principles derived from and international law.

105. The process was protracted from the outset, as evidenced by the length of the proceedings leading to the drawing up of the Terms of Reference for the Project and subsequent document production requests (see paragraphs 45 to 55 above).

106. The prolonged duration of an EIA process in the case of a major project, however, is not uncommon. It is frequently the case that environmental permit procedures last for years, especially when complex scientific and/or technical assessment on the part of the state is required.

107. Furthermore, the Claimant's general experience with the DR administration was that the conduct of proceedings was frequently protracted and sub-standard. For example, the same documents were requested time and again, there was high rotation of officials responsible for handling the matters, the decision-making process was frequently extended or interrupted and so forth. All of that created an overall impression that the DR administration was taking its decision at a slow pace, subject to the vagaries of its own cultural and organizational traditions.

108. However, the events surrounding and following Resolution 737-10 are of a different calibre than the mere inefficiency of the state administration.

109. The Claimant does not dispute the fact that the Respondent had a sovereign right to take either a positive or a negative environmental decision with respect to the Project. Either way, however, such a decision should be informed, sufficiently reasoned, and transparent, providing sufficiently detailed information both to the Claimant and the public in general as to the specific reasons why the Project has been environmentally approved or rejected.

110. Only such a decision would make it possible for the interested party to form any type of appeal that would be an effective, and not merely a nominal, remedy.

111. It is of key importance for the present case that there are three different rights of a fundamental nature that need to be put in a form of a balanced equilibrium:

(a) the Respondent's sovereign right to form its environmental and economic policies;

(b) the rights (prevailingly economic in nature) of the Claimant under DR-CAFTA; and

(c) 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.

112. The DR clearly failed to achieve that balance. In late July 2010, it took a secret decision to discontinue the EIA of the Project on murky grounds. That decision (presumably manifested in the alleged TEC Resolution 737-10) was never published nor served upon the Claimant. Curiously, at the beginning of August 2010, the Claimant was informed on an informal basis that the Environmental Ministry had taken a positive environmental decision concerning the Project.[65] Hence, it is understandable that the Claimant was surprised to have received on 18 August 2010 the Negative Environmental Decision. The Claimant is unable to explain what actually happened between 29 July 2010 and 18 August 2010 and the Respondent's failure to serve Resolution 737-10 obviously does not assist in the determination of the material facts.

113. Neither does the letter of 18 August 2010 explain the specific reasons why the environmental assessment of the Project was discontinued. Clearly, the two-paged letter, consisting mostly of dry recital of various non-specific provisions of the DR law, cannot be seriously considered to be a written justification of an informed decision taken at the end of the 3-year long assessment of a complex mining project.

114. Neither the form nor the content of the letter meets the applicable international law standard that should apply to the communication of such a project-critical decision. In that respect, it should not be open to serious doubts that the justification of the Negative Environmental Decision should at least show the decision was not arbitrary, and that the level of specificity of the justification should take into account both:

(a) the high degree of complexity of the Project and the high level of requirements placed in front of the applicant (if the applicant for the Environmental License is expected to provide the administration with information at a certain level of detail, the same measure of detail should apply to the State's decisions); and

(b) the enhanced obligations of the Respondent with respect to the EIA process, resulting from both international and domestic law.

115. Viewed under any concept of 'arbitrariness',[66] the July 2010 decision - as described in the letter of 18 August 2010 - was arbitrary. Moreover, it did not follow due process.

[65] See paragraphs 54-55.
[66] See the discussion at **CL-14**, *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6 (Award dated 7 July 2011), paragraphs 186 *et seq*. (Spanish).

116. To begin with, the letter of 18 August 2010 did not provide any information concerning any legal remedies available to the Claimant.

117. Further, the Respondent never replied to the Motion for Reconsideration of 5 October 2010. The Respondent now alleges that the motion was made out of time. However, if the Respondent indeed regarded the Motion for Reconsideration as time-barred, it never said so before the Preliminary Objections were filed on 3 December 2015. Whereas, had the Motion for Reconsideration been deficient on formal grounds, this presumably would have been known to the DR already in October 2010. If this was in fact the case, it would have been incumbent upon the DR to send a formal written response to the Claimant explaining that the request was late, and refer to the principles of DR domestic law on which it relies.

118. No such step was taken. Instead, the DR engaged in various meetings and exchanges with the Claimant, leading the latter to believe that the Motion for Reconsideration was being processed with by the competent bodies within the DR administration.[67]

119. In hindsight, the Claimant now believes, based upon the presently available evidence, that for some time following the July 2010 decision, there was a diversity of views within the Environmental Ministry as how to proceed with the Claimant's Motion for Reconsideration of the Negative Environmental Decision. On the one hand, it seems that certain officials disagreed with the arbitrary approach, manifested in the 18 August 2010 letter. Those officials subsequently made statements to the Claimant, on which the Claimant relied, that the Negative Environmental Decision would be reconsidered and that Corona would be issued an Environmental License. On the other hand, however, there seems to have been a faction within the Respondent's administration, which ultimately prevailed, who opposed reversing the Negative Environmental Decision. The reasons for the split in approach and the true effect of the inconsistent signals are matters to be addressed during the merits phase of this Arbitration.

120. That struggle within the Respondent's administration lasted for some time, and it was only following a period of uncertainty that it became clear that the Respondent would not proceed to decide on the Claimant's Motion for Reconsideration.

B. Violation of Article 10.5 DR-CAFTA

121. Article 10.5.1 DR-CAFTA stipulates that:

> "*Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*"[68]

[67] First witness statement of Alain Stanley French, paragraph 13 (English) (Spanish).
[68] **CL-1**, DR-CAFTA, Chapter 10 on Investment (English).

122. Article 10.5.2 further clarifies that treatment accorded to covered investments is the customary international law minimum standard of treatment of aliens. The FET Standard, in turn, means that the Host State is obliged not to deny justice in, among others, administrative proceedings and has to abide by *"the principle of due process embodied in the principal legal systems of the world"*.[69]

123. Corona 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 Article 10.5 DR-CAFTA.

124. In that respect, it is important to distinguish between previous delays (i.e. those preceding the alleged Negative Environmental Decision of July 2010), and the continuing denial of administrative justice resulting from the treatment of the Claimant's Motion for Reconsideration of that Negative Environmental Decision.

125. By virtue of Article 10.18.1 DR-CAFTA, the Claimant will not pursue in this arbitration any claims based on the purported violations of DR-CAFTA that occurred more than three years before it brought the RFA.[70]

126. However, the circumstances surrounding the issue of the Negative Environmental Decision are relevant to the Tribunal's analysis of the subsequent breaches of DR-CAFTA relating to the conduct of the Motion for Reconsideration of that Negative Environmental Decision.

127. In that respect, it should be noted that:

(a) the session of the Environmental Ministry's TEC of 28 July 2010, at which Resolution 737-10 was issued, was carried out without notice to, and therefore without the participation of, the Claimant. The Claimant was effectively deprived of its right to be heard, even though the ensuing Negative Environmental Decision directly and critically affected the Claimant's rights, both under the DR domestic law and under DR-CAFTA. This is because the refusal to grant an Environmental License has an expropriatory effect on the underlying Exploitation Concession and Article 10.7 DR-CAFTA specifically requires that expropriation should be carried out in accordance with due process requirements;

(b) Resolution 737-10 was never served on the Claimant. The Claimant only became notified of that decision by way of a two-page letter that was sent three weeks after the decision was taken. The brevity of the letter made it virtually impossible for the Claimant to learn the exact factual and/or technical reasons forming the basis for the Negative Environmental Decision. Moreover, such arguments as the Claimant is able to discern in that letter were ostensibly false;

[69] *Ibid*.
[70] **CL-1**, DR-CAFTA, Chapter 10 on Investment (English).

(c) the conduct of the Environmental Ministry also made it impossible for the Claimant to file any request for judicial review of the measure, since:

(i) the Claimant was not served with the actual document constituting the Negative Environmental Decision; and

(ii) the reasons provided for the Negative Environmental Decision given in the letter of 18 August 2010 were clearly inadequate;

(d) accordingly, the Motion for Reconsideration was the only legal remedy practically available to Corona in the fall of 2010; and

(e) by refusing to entertain the Motion for Reconsideration, the Respondent harmed the Claimant in three ways:

(i) it denied administrative justice to the Claimant;

(ii) it delayed the process so as to result in the Claimant being out of time to file any request for judicial review of the Negative Environmental Decision; and

(iii) by failing to rule on the Claimant's motion, the Respondent has maintained an illusion of the proceedings being formally ongoing.

128. It is the Claimant's case that this situation can be properly characterized as a violation of the FET Standard under Article 10.5 of DR-CAFTA.[71] It fails to conform to the international law requirements of:

(a) transparency;

(b) due process; and

(c) constitutes a denial of administrative justice.

129. The proposition that the DR's administrative law was sub-standard and in violation of Article 10.5 of DR-CAFTA is supported by public international law principles. As explained by Borchard:

> *"international law imposes upon states the duty of according aliens certain rights and of assuring them of certain administrative and judicial protection*".[72]

[71] **CL-1**, DR-CAFTA, Chapter 10 on Investment (English).
[72] **CL-15**, Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims*, 1925, The Banks Law Publishing Co., Chapters IV and VII, p. 178 (English).

130. Further, aliens submit to the local law, and as long as they are treated without discrimination by the Host State, they cannot invoke international responsibility for incurred damage, unless the local law and its administration:

> *"fall below the standard of civilized justice established by international law".*[73]

131. According to Borchard:

> "*The foreigner who has contracted with the government has not elected to place himself at its mercy, and the rule of equal treatment with nationals requires that he shall have* ***the full benefit of the established procedure, while if in a rare instance there is no such established procedure, or it proves to be a mockery, the other rule of protecting subjects against a flagrant denial of justice also comes in***"[74] (emphasis added).

132. Elihu Root identified as a definitively settled rule of international law for the protection of aliens that:

> *"Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization"*. [75]

133. Accordingly, the minimum standard of treatment has developed as an independent standard, affording foreigners certain procedural guarantees that need to be respected by the Host State, regardless of the treatment it affords to its own nationals. Those guarantees include elements such as due process and transparency, and regard the denial of justice as a breach of international law.

134. Those principles have been further explained by investment treaty Tribunals.

135. In *Bayindir v Pakistan*, the Tribunal held that it:

> *"… agrees with Bayindir when it identifies the different factors which emerge from decisions of investment tribunals as forming part of the FET standard. These comprise the obligation to act transparently and grant due process [Metalclad v. Mexico], to refrain from taking arbitrary or discriminatory measures [Waste Management v. Mexico II, Lauder v. Czech Republic], from exercising coercion [Saluka v. Czech Republic] or from frustrating the investor's reasonable*

[73] **CL-15**, Borchard p. 179 (English).
[74] **CL-15**, Borchard p. 283 (English).
[75] **CL-16**, Elihu Root, "*The Basis of Protection to Citizens Residing Abroad*", (1910) 4 Am. J. Int'l L. 521, page 521 (English).

expectations with respect to the legal framework affecting the investment [Duke Energy v. Ecuador]."[76]

136. In *Lemire v. Ukraine*, the Tribunal dealt with a similar set of deficiencies concerning the licensing proceedings. Under facts which were similar to a certain extent with the facts of this case, the Tribunal held that:

> "*309. The absence of reasoning of the decision represents a significant weakness in the administrative procedure for the issuance of licences.*
>
> *310. Thus, a participant who has lost cannot ascertain why his application was rejected, how he was ranked with regard to other participants, and what he could do to improve his chances to be successful in the next bidding.*
>
> *311. The absence of reasoning also jeopardizes the possibilities of public scrutiny and of judicial review."*[77]

137. It was also reiterated in *Redfern and Hunter on International Arbitration*, a leading treatise on the subject, that:

> *"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 contrary to the legitimate expectations of the investor and commitments made by the host state, are breaches of fair and equitable treatment standards"*[78] (emphasis added).

138. In the *Metalclad v Mexico* case the Tribunal found breach of Article 1105 of NAFTA, which has a similar wording concerning the minimum standard of treatment as DR-CAFTA. In that case the Host State *"failed to ensure a transparent and predictable framework for Metalclad's business planning and investment"*[79] by not providing clear rules as to the requirements concerning a municipal permit. The denial faced by the investor was full of substantive and procedural deficiencies,[80] and the failure of the internal law amounted to a failure to perform the NAFTA treaty.[81]

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[76] **CL-17**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, (Award dated 27 August 2009), paragraph 178 (English).
[77] **CL-18**, *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18 (Decision on Jurisdiction and Liability 14 January 2010) (English).
[78] **CL-19**, Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration*, 6th edition (Kluwer International; Oxford University Press 2015), Chapter 8 paragraph 8.102 (English).
[79] **CL-20**, *Metalclad Corporation v The United Mexican States*, ICSID CASE No. ARB(AF)/97/1 (Award dated 30 August 2000), paragraph 99 (English) (Spanish).
[80] **CL-20**, *Metalclad*, paragraph 97 (English) (Spanish).
[81] **CL-20**, *Metalclad*, paragraph 100 (English) (Spanish).

139. The above-mentioned cases reflect what the international standard is and what level of development of administrative procedure the Respondent should seek to achieve. It has been held by numerous Arbitral Tribunals that:

> *"[…] 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."*[82]

140. By having deficient administrative law, not guaranteeing due process, the Respondent is in breach of the FET Standard, and thus of its treaty obligations under DR-CAFTA.

141. Furthermore, an excessive delay in dealing with the Motion for Reconsideration also forms part of the breach of minimum standard of treatment. Continued meetings between the Claimant and officials from the Environmental Ministry led the Claimant to believe that the Environmental License would finally be granted. This was especially the case in light of previous lengthy administrative proceedings, such as those relating to the grant of the Joama Exploitation Concession, which had taken almost a year and a half.

142. However, the delay in issuing a decision concerning the Motion for Reconsideration was too excessive. It exceeded mere bureaucratic delay, and it became a failure of the public administration infringing the Claimant's rights under the minimum standard of treatment. Even though international law *"does not impose a duty on states to treat foreigners fairly at every step of the legal process"*,[83] it nevertheless imposes a duty *"to create and maintain a **system of justice** which ensures that the unfairness to foreigners either does not happen, **or is corrected**"*[84] (emphasis in the original). Such a system did not prove to be in place in DR.

143. The delay that the Claimant faced was ruinous. As early as 1758, such delay was considered by Vattel to be one of the three types of "*refusal of justice*", and this remains uncontested by *"no serious international lawyer"*.[85]

144. This approach was also confirmed by Arbitral Tribunals in investment cases. In the *Azinian v Mexico*[86] case, the arbitrators repeated Vattel's concept, stating that:

> *"A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way"*.[87]

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[82] **CL-19**, *Redfern and Hunter*, paragraph 8.102 (English).
[83] **CL-21**, Jan Paulsson, Denial of Justice in International Law (Cambridge University Press, 2005), Chapters 1 and 4, p. 7 (English).
[84] **CL-21**, Paulsson p.7 (English).
[85] **CL-21**, Paulsson p. 65 (English).
[86] **CL-22**, *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, (Award dated 1 November 1999) (English) (Spanish).

145. Another example of excessively lengthy proceedings leading to a breach of the FET standard can be found in *Hochtief v Argentina*[88]. Following the *pesification* in Argentina, the Emergency Law established a procedure of renegotiation for all public works contracts, and UNIREN was created as an agency in charge of that process.[89] The Host State's failure to renegotiate the contract with the Claimant:

> *"in a timely and final fashion does amount to a breach of the FET standard, for which reparation is due"*.[90]

146. The Claimant submits that the excessively lengthy proceedings in relation to the Motion for Reconsideration of the Environmental License amount to a denial of justice by the Respondent's administration.

147. The Constitutional Court of the DR has stated the following with respect to this principle:

> *"[…] the effectiveness in the administration actions is one of the principles that guarantee the well-being of the citizens of a state and the protection of their fundamental rights, so that it is undeniable that the unnecessary delay in answering requests could be perceived as a violation to fundamental rights […]."*[91]

148. Ultimately, the Claimant contends that the decision as to whether the minimum standard of treatment was afforded to investors needs to be made in the context of the facts of the case and the type of proceedings in question. In this regard, the Claimant submits that with respect to the EIA procedure, procedural guarantees expected from the state are greater than in the case of most other administrative proceedings. This argument is substantiated in Section III of this Counter-Memorial with references to various transnational sources of laws and standards, which are applicable to the Respondent.

149. Accordingly, the international law requirements with respect to the conduct of EIA proceedings are higher that in most other cases. Those requirements were clearly not complied with by the Respondent.

C. Violation of Article 10.7 DR-CAFTA

150. The Claimant submits that the violation by the Respondent of its FET commitments towards the Claimant also equates to a *de facto* expropriation of the Claimant's investment in the Respondent state. Due to the refusal of the Environmental License by the Respondent, the Claimant cannot enjoy any meaningful benefit from the Joama

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[87] **CL-22**, *Azinian*, para. 102 (English) (Spanish).
[88] **CL-23**, *Hochtief AG v Argentine Republic*, ICSID Case No. ARB/07/31 (Decision on Liability dated 29 December 2014) (English) (Spanish).
[89] **CL-23**, *Hochtief* paragraphs 116-117, (English) (Spanish).
[90] **CL-23**, *Hochtief* , paragraph 210, (English) (Spanish).
[91] **CL-24**, Sentencia TC/0202/13, Constitutional Court of the Dominican Republic, 13 November 2013 (Spanish).

Exploitation Concession, even though that right is still considered as being in force and could remain in force for the next 68 years.

151. DR-CAFTA explicitly provides protection against either direct and indirect expropriation. Article 10.7.1 of DR-CAFTA explicitly states that:

> "*no Party may expropriate or nationalize a covered investment either directly or* ***indirectly*** *through measures equivalent to expropriation or nationalization*" (emphasis added).[92]

152. The *CME* Tribunal defined a *de facto* expropriation as follows:

> *"De facto expropriations or indirect expropriations, i.e. measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims."*[93]

153. In case of an indirect expropriation, the legal title would remain with the original owner.[94] In order to find *de facto* expropriation, there is consensus among investment Arbitral Tribunals that a requirement of substantial deprivation has to be met.[95] The requirement of substantial deprivation has been defined by the *Telenor* Tribunal as follows:

> *"the interference with the investor's rights must be such as substantially to deprive the investor of the economic value, use of enjoyment of its investment."*[96]

154. Simultaneously, the intention of the Host State is irrelevant in the course of the assessment whether or not the requirement of the substantial deprivation has been met in a given case (sometimes referred to as the "sole effect doctrine").[97] The *Tecmed* Tribunal explained that:

> *"The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects."*[98]

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[92] **CL-1**, DR-CAFTA, Chapter 10 on Investment (English).
[93] **CL-25**, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, (Partial Award dated 13 September 2001), paragraph 604 (English).
[94] **CL-26**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Award of 27 August 2008), paragraph 191 (English).
[95] **CL-27**, *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15 (Award dated 13 September 2006), paragraph 65 (English); **CL-28**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 (Award dated 12 May 2005), paragraph 262 (English); **CL-20**, *Metalclad*, paragraph 103 (English) (Spanish).
[96] **CL-27**, *Telenor*, paragraph 65 (English).
[97] **CL-29**, R. Dolzer, Ch. Schreuer, *Principles of International Investment Law*, 2nd ed., 2012, Chapter VI Expropriation, page 114 (English).
[98] **CL-30**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2 (Award dated 29 May 2003), paragraph 116 (English) (Spanish).

D. Continuing Nature of the Breach

155. The Claimant submits that the Respondent's actions form a continuous violation of the DR-CAFTA protection standards. Therefore, the three-year limitation period was renewed, and the Claimant's claims are not time-barred.

156. According to Art. 14(2) of the ILC Articles on State Responsibility for Internationally Wrongful Acts:

> *"The breach of 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 obligation."*[99]

157. Therefore, a continuous violation of an international obligation occurs where the state preserves a situation of an internationally wrongful act for a given period of time, for instance, by maintaining in effect legislative provisions incompatible with that state's treaty obligations. Since states may breach international law by acts or omissions, lack of necessary state action (such as legislative or administrative inertia) may amount to a violation of international law.

158. The concept of a continuous breach is well-recognized in the jurisprudence of international Courts and Tribunals, where it often constitutes an underlying issue in the jurisdictional phase of the proceedings. For instance, in the European Court of Human Rights *Papamichalopoulos* case, the Court used the notion of a continuous violation to assert its jurisdiction over a claim of expropriation, which had commenced 8 years before the respondent state (Greece) recognized the Court's competence.[100] Thus, the nature of the breach of international obligations (most importantly, whether the breach can be regarded as a continuous act or not) is relevant to the Tribunal's decision as to whether to admit a claim. For instance, the *Pac Rim Cayman* Tribunal determined that continuing policies of CAFTA member states[101] may be regarded as "*measures*", and thus fall under the scope of jurisdiction of an investment Tribunal.[102]

159. Likewise, it is relevant whether the claimant had any effective means of reacting to the state's continuous violation of international standards of protection. Tribunals should take

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[99] **CL-31**, Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001 (English).
[100] **CL-32**, *Papamichalopoulos and Others v. Greece*, Judgment of 24 June 1993, No. A260–B, paragraph 40 (English).
[101] **CL-33**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12 (Decision on the Respondent's Jurisdictional Objections of 1 June 2012). In this particular case, as pleaded by the claimants, "*a continuing practice of the Respondent to withhold permits and concessions in furtherance of the exploitation of metallic mining investments*" (at paragraph 3.43) (English).
[102] **CL-33**, *Pac Rim*, paragraph 3.43, (English).

into account whether domestic laws permit effective recourse for reconsideration or other remedies that provide means of challenging states' decisions.[103]

160. In the case of continuous breaches of international law, the three-year limitation period operates differently than in case of one-off actions. Namely, the limitation period is subject to appropriate renewal, and begins to run only after the continuous act ends. This issue has been characterized by the *UPS* Tribunal in the following words:

> *"We put aside for the moment the question of when it first had or should have had notice of the existence of conduct alleged to breach NAFTA obligations and of the losses flowing from it. The generally applicable ground for our decision is that, as UPS urges,* ***continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly****. This is true generally in the law, and Canada has provided no special reason to adopt a different rule here"* (emphasis added).[104]

161. In order to trigger the three-year limitation period in the first place, the investor has to acquire a certain level of knowledge of the breach. As provided by the *Bilcon* Tribunal,

> *"Even if a distinct act has been completed, however, the three-year period does not begin to run until that investor "first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage".*[105]

162. Therefore, if the investor is faced with ambiguous state action, such that it is not certain whether there is any breach of international law on the state's part, the requirement of knowledge is not satisfied, and the limitation period is not yet triggered. Likewise, the investor has to be aware of the fact that the breach causes loss or damage to its investment, even if the exact amount of such loss or damage cannot yet be determined.

163. In the light of the above, the Claimant submits that it could not have been the purpose behind the limitation period that an investor be expected to pursue claims where there is still hope of reconsideration or where that investor cannot be certain of whether any act of the state has even been adopted (let alone whether this act constitutes a breach of international law or not).

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[103] **CL-34**, *Erkner and Hofauer v. Austria*, ECHR, 1987, Judgment on the merits of 23 April 1987, paragraph 45 (English).
[104] **CL-35**, *United Parcel Service of America Inc. v. Government of Canada* (Award on the Merits of 24 May 2007), paragraph 28 (English).
[105] **CL-36**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, Permanent Court of Arbitration (PCA) Case no. 2009-04, Award on Jurisdiction and Liability of 17 March 2015, paragraph 271 (English).

IV. THE RESPONDENT'S JURISDICTIONAL OBJECTION IS WITHOUT MERIT

A. Analysis of the Objections

164. The Respondent's Preliminary Objections are limited to a single contention, rooted in Article 10.18.1 DR-CAFTA that all facts underlying the Claimant's claims in this arbitration are time-barred.[106]

165. With respect to the operation of this provision, the Claimant submits that:

(a) the three-year rule under Article 10.18 DR-CAFTA, should be counted from the moment of the investor's reasonable knowledge of the violation of DR-CAFTA;

(b) given the fact that the claim is made against an arbitrary omission on the part of the Respondent (i.e. failure to proceed with the Claimant's Motion for Reconsideration), the moment of the knowledge should be calculated not from the moment when the Respondent took the decision not to proceed with the application further, but from the time when the Claimant could have first reasonably understood it was subject to a case of denial of justice and not mere procedural delay; and

(c) in such situation, the Claimant should be given the benefit of doubt, otherwise the Respondent would benefit from its own wrong.

B. Calculation of the Three-Year Period Under Article 10.18.1 DR-CAFTA

166. Article 10.18.1 DR-CAFTA stipulates:

> *"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"* (emphasis added).[107]

167. Based on the clear language of this provision, the Claimant submits that the following three conclusions necessarily follow:

(a) the relevant date is not the date of the **measure** but the date of the **breach**;

(b) the *dies a quo* is not the date of the breach but the date of the knowledge (or presumed knowledge) of the breach; and

[106] **CL-1**, DR-CAFTA, Chapter 10 on Investment (English).
[107] **CL-1**, DR-CAFTA, Chapter 10 on Investment (English).

(c) the *dies ad quem* is the date of the initial service of the RFA to ICSID.

(a) Relevance of the date of the breach

168. The Claimant disputes the Respondent's implied contention made in paragraph 22 of the Preliminary Objections that the date of the measure (act or omission) taken by the state has decisive importance for the commencement of the time period laid down in Article 10.18.1 DR-CAFTA.[108]

169. While it will often be the case that a particular act or omission can be regarded in itself as a breach of DR-CAFTA, that is not always the case, and it is not the case in this Arbitration, where the breach is the continuing failure to react to the Motion for Reconsideration. The Respondent's failure to act can be determined on each and every day between 5 October 2010 and the date of this submission, since no decision on the Motion for Reconsideration was made on any of these dates. However, the Respondent's failure to act must necessarily be deemed to have taken place at a certain point of time, and the cumulative impact of many days without a decision amounts to a denial of justice. A similar example could be given with respect to the notion of creeping expropriation, analogous with the concept of the last straw which breaks the camel's back.

170. Likewise, the Claimant disputes the Respondent's contention that the Claimant knew about the alleged damage already in early 2011. Obviously, the Claimant knew at that time that certain measures taken before that date by the Respondent - such as, for example related to the exportation of aggregates or the denial of the Environmental License - would cause some damage to the Claimant. Such damage would be related to the limited profitability of the enterprise or the costs of delay.

171. However, that damage is not the same as the damage which occurred because of the refusal to entertain the Motion for Reconsideration of the Negative Environmental Decision.

(b) Relevance of the requisite knowledge

172. *Secondly*, the Respondent submits that two requirements have to be met for the limitation period to commence running:

(a) actual or constructive knowledge of the breach by the investor; and

(b) knowledge of loss or damage as a result of the breach. However, the commencement of the time-bar period may differ when the respondent state breaches its international obligations through continuous conduct.

[108] *Ibid*.

173. As summarized by the Tribunal in the *Bilcon* case:

> "*Even if a distinct act has been completed, however, the three-year period does not begin to run until that investor "first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."*[109]

174. The knowledge of the exact amount of loss or damage is not a necessary prerequisite, since it suffices that the investor knows (or could have known) that the state's conduct will cause damage to its investment.[110]

175. Knowledge of the breach itself can either be actual (when the investor knows that the breach has occurred) or constructive (when the circumstances are so that the investor should have known about the breach).[111] However, a continuing breach of international standards of protection may serve to renew the limitation period. As one eminent Tribunal observed:

> *"We put aside for the moment the question of when it first had or should have had notice of the existence of conduct alleged to breach NAFTA obligations and of the losses flowing from it. The generally applicable ground for our decision is that, as UPS urges, continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly. This is true generally in the law, and Canada has provided no special reason to adopt a different rule here. The use of the term "first acquired" is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquires further information confirming the conduct or allowing more precise computation of loss."*[112]

176. The major difficulty with this case is that the nature of the international wrong committed by the Respondent consists of an arbitrary omission, i.e. an arbitrary decision not to proceed with the Motion for Reconsideration of the Negative Environmental Decision. Obviously, the Claimant cannot know whether such decision was taken expressly or implicitly, nor when. It is only based on the subsequent, external manifestations of that decision that the Claimant could have realized that the wrong had been committed.

177. In this respect it is important to recall that between 2010 and 2012, the Claimant received mixed signals from the Respondent as to whether its Motion for Reconsideration would be accepted. Those signals were contradictory, leading the Claimant to believe that the Respondent was actively re-considering the Negative Environmental Decision.

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[109] **CL-36**, *Bilcon*, paragraph 271 (English).
[110] **CL-36**, *Bilcon* , paragraph 275 (English).
[111] **CL-37**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, (Decision on Objections to Jurisdiction of 20 July 2006) paragraphs 39, 42, 53 (English).
[112] **CL-35**, *UPS*, paragraph 28 (English).

178. As a consequence, the Respondent should be estopped from arguing that the Claimant should have had knowledge of the denial of justice on the part of the Respondent before June 2011.[113]

(c) The dies ad quem is the date of submission of the RFA

179. The Claimant's RFA was submitted on 10 June 2014, and that is the critical date for determining the relevant three-year period; it is the date the claim was "submitted"; tracking the wording of Article 10.18.1 DR-CAFTA.[114] It should be noted that the Respondent seeks to argue that the critical date is 28 July 2014, being the date on which the RFA was supplemented with additional information requested by the ICSID Secretariat.[115] There is no support for that position.

180. The rule laid down in Article 10.18.1 DR-CAFTA provides investors with the right to bring their respective claims within three years from the moment when they learn about the alleged breaches of the treaty by the respondent state.[116] That window of opportunity is given to investors so that they can decide, up until the very last day of that period, whether they wish to formally commence arbitral proceedings.

181. Accordingly, it must follow that if an investor submits a request for arbitration within the three-year period, the time limit laid down in Article 10.18.1 DR-CAFTA will have been complied with, even if that request is supplemented and/or served upon the respondent at a later point outside the three-year period. There are a number of arguments supporting this view.

182. Article 10.16.4(b) DR-CAFTA provides explicitly that: "*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*".[117] The provision does not mention the requirement of effective completion of possible further exchanges with the ICSID Secretariat, or registration of the claim. At the time the claim is received by the Secretary General of ICSID, it is still uncertain whether the claim will be allowed under the ICSID Additional Facility Rules. However, the time-limit under Article 10.18.1 CAFTA-DR would be effectively complied with.

183. The ICSID (Additional Facility) Arbitration Rules distinguish between the receipt of the request for arbitration by the Secretary General (Article 2) and the registration of the same (Article 4). It is for the purposes of registration of the request that the Secretariat may request additional explanations from the claimant, and so it did in the present case. Logically however, such additional explanations may be required only after the

[113] See paragraphs 201-209 below.
[114] **CL-1**, DR-CAFTA, Chapter 10 on Investment (English).
[115] See paragraph 102 of the Preliminary Objections.
[116] **CL-1**, DR-CAFTA, Chapter 10 on Investment (English).
[117] *Ibid*.

Secretariat **had received** the request, and that is all that matters under Article 10.16.4(b) DR-CAFTA.

184. It also logically follows that if the Respondent's position were to be accepted, the result would be that an otherwise valid arbitration claim may become time-barred for reasons entirely attributable to the ICSID Secretariat. Claimant investors have no influence over and cannot legislate for the reasonableness and number of the clarification requests from ICSID, nor the overall time needed for ICSID to register the case (which in practice could take up to several months, and may depend e.g. on the current workload of the ICSID Secretariat or the holiday period).

185. There can also be no valid basis to treat investors that bring DR-CAFTA claims under the aegis of ICSID differently in this respect from investors choosing UNCITRAL arbitration, where - by definition - their requests for arbitration would not be subject to clarification requests on the part of any arbitration institution.

186. In a similar context, the *Feldman* Tribunal was required to determine the respondent state's plea that the investor's claims were time-barred, because the request for arbitration was served upon the respondent state after the lapse of the three-year period. The *Feldman* Tribunal 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 1117 (2).*" [118]

187. Accordingly, it is submitted that it is the moment of service of the first request for arbitration that is relevant to stop the clock under Article 10.18.1 DR-CAFTA. The limitation period was stopped at the time the Claimant raised its claim, which was on 10 June 2014.

D. The Preliminary Objections Are Ill-Founded

188. As outlined in the preceding sections of this Counter-Memorial, the Respondent's Preliminary Objections should be dismissed on the facts of the case, since the RFA was brought within three years from the moment when Corona first acquired knowledge of the denial of justice by the Respondent.

189. The Claimant submits that the Respondent:

(a) cannot benefit from the obscurity and deficiency of its domestic administrative procedure, including the putative doctrine of *negative administrative silence*; as

[118] **CL-38**, *Marvin Roy Feldman Karpa v. United Mexican States*, ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues dated 6 December 2000, paragraph 44 (English) (Spanish).

(b) this would allow the Respondent to benefit from its own wrongdoing; and

(c) the Respondent should be estopped from arguing that the Claimant ought to have submitted its claim at an earlier point, the Respondent's agents having induced the Claimant to believe the request for Reconsideration would be proceeded with.

190. In its Preliminary Objections, the Respondent raises two arguments as to why it believes the Claimant is out of time to allege breaches related to the Negative Environmental Decision and the refusal to rule on the Motion for Reconsideration.

(a) *Firstly*, the Respondent claims that the Motion for Reconsideration of the Negative Environmental Decision was brought too late, as the alleged deadline to bring that legal recourse was 30 days from the date of the knowledge of the act in question, which - according to the Respondent - lapsed on 17 September 2010.[119]

(b) *Secondly*, the Respondent claims that even if that Motion were to be considered as having been submitted in a timely manner, it would still have to be considered as rejected after the lapse of a further two months, under the doctrine of *negative administrative silence*.

(a) Obscurity of the Dominican administrative procedural laws

191. The Claimant contests the validity of both contentions for the reasons more fully laid out below. Before outlining such bases of objection, it should be recalled that at the time when the Motion for Reconsideration was submitted, DR administrative law was not codified. It was a composition of various detailed proceedings governing various specific categories of matters, and not free from gaps or contradictions.

192. It was only in 2013 that the general administrative law was enacted by the DR Parliament and it entered into force in 2015 as the Law 107-13. Importantly for the present case, Law 107-13 was intended to remedy the perceived deficiencies of the pre-existing DR law. In that respect the Ninth Recital of the Law 107-13 reads:

> *"NINTH RECITAL* ***administrative proceedings in the 21st Century cannot be sustained in the antiquated forms of administrative activity****, since the context of the Social and Democratic State Rules by Law the role of the Public Administration has been broadened, it has assumed new roles in the relation State-Society, which generates the necessity to provide for new procedural*

[119] Paragraph 78 of the Preliminary Objections.

mechanism that allow to satisfy effectively those new commitments" (emphasis added).[120]

(b) The Motion for Re-consideration was not out of time

193. In accordance with the general rules on burden of proof, *eius incumbit probatio qui dicit, non qui negat.*[121] As a consequence, it is up to the Respondent to provide references to specific rules of DR law that would have applied in 2010 and required the Claimant to bring the Motion for Reconsideration within 30 days from the knowledge of the contested act.

194. The Respondent has failed to meet its burden of proof. Most curiously, the legal authority provided by Respondent in footnote 87 at page 32 of its Preliminary Objections expressly stipulates that "*[w]ith respect to the time limit for filing motions for reconsideration, the rule is that it is not time-limited."* [122] As a consequence, the Respondent cannot now credibly assert that the Motion for Reconsideration was out of time if there was, on the Respondent's own case, no time limit.[123]

195. The Respondent then relies on the second part of the quote from Prof. Rodríguez:

> "*However, to prevent an administrative action becoming final and unchallengeable, this motion must be filed within the time limit for filing administrative appeals, which under our laws is thirty (30) days from the notification of the action."*[124]

196. Yet again in this respect, the Respondent fails to pinpoint a specific provision in DR law that would support that opinion. The Respondent argues that the time period to bring the Motion for Reconsideration should be considered as 30 days, because that is the time limit allowed under Article 5 of Law 17-07 to bring a judicial challenge against an administrative act before the DR Courts.[125]

197. However, Article 5 of Law 17-07 deals with a different matter - the time-limit for bringing a judicial challenge against administrative acts. That is a different procedure to a Motion to Re-consider an administrative act. The differences are fundamental.

(a) *Firstly*, a judicial appeal is brought before Courts, whereas a Motion for Reconsideration is dealt with by the same administrative body which issued the first decision.

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[120] **CL-39**, Law No. 107-13 of the DR (Spanish).
[121] **CL-40**, *AAPL v. Sri Lanka*, ICSID Case No. ARB/87/3 (Final Award of 27 June 1990) (English).
[122] *"En lo relativo al plazo para la interposición del recurso administrativo de reconsideración, la regla de principio es, que no está sujeto a plazo."*
[123] Preliminary Objections, paragraph 77.
[124] **RA-11**, Rodríguez, Administrative Law, p. 119, ¶ 83.
[125] Preliminary Objections, paragraph 76.

(b) *Secondly*, the positive result of a judicial challenge of a Negative Environmental Decision would consist in the administrative act being quashed and the matter being remitted for Reconsideration, without a guarantee that the Environmental License would be issued. Whereas, when the Motion for Reconsideration is brought, the competent body (the Environmental Ministry) could reverse its previous decision and grant the Environmental License.

198. 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.[126] 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. The Respondent's argument to the contrary is without merit.

199. The Claimant further relies upon the fact that Resolution 737-10 was never actually served upon the Claimant. The Claimant remains at the date of this submission unaware of its content. The Motion for Reconsideration was directed against the Negative Environmental Decision and not against the letter of 18 August 2010.

200. Accordingly, even if the 30-day rule had applied to the Motion for Reconsideration (*quod non*), the time period could not start to run from 18 August 2010, since the actual Negative Administrative Decision was never served upon the Claimant.

(c) The principle of negative administrative silence cannot be applied against the Claimant

201. The Respondent fails to indicate the legal basis for the application of the doctrine of *negative administrative silence* to the EIA procedure. Even assuming there had existed a rule in DR law that would purport to apply that doctrine to the EIA process, the Claimant highlights the following arguments as to why the Respondent should not be allowed to rely on such rule.

202. *Firstly,* the Respondent itself admits that the purpose of the *negative administrative silence* 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 administrative authority"*.[127] The Respondent further relies on the dissenting view of one of the DR Constitutional Court judges that the *negative administrative silence* is *"a legal fiction that grants legal consequences [to] provide a solution to the lack of protection … with which a subject of administrative action may be faced when an administrative organ does not expressly decide on [an] application ... within the stipulated timeframe"*.[128]

[126] **CL-40A**, Law 13-07 of the DR, (Spanish).
[127] Preliminary Objections, paragraph 80.
[128] Preliminary Objections, paragraph 80.

203. The cynicism of the Respondent in this case is that it purports to rely on the legal doctrine aimed to equip individuals with an effective remedy against denial of administrative justice in order to effectively deprive the Claimant of such an effective remedy before the DR-CAFTA Tribunal. The rule which it asserts was developed to protect an entity against the state is now being used by the state against an entity.

204. Rafael Américo Moreta Bello expressly emphasizes at the end of the paper, on which the Respondent also relies, that *"the purpose of the legal figure of administrative silence is always to act in favour of the individual"*.[129] Here, the Respondent purports to use that principle against the individual.

205. *Secondly*, the applicability of the rule of *negative administrative silence* in the context of an EIA is an absurd proposition. No EIA proceedings can reasonably be expected to be completed within two months. Given the complexity of the process and the volume of documents typically submitted in such proceedings (often running into hundreds of pages) it is unreasonable to assume the environmental administration would be able to complete the review of the application within such a short period of time. Accordingly, the practical implication of the Respondent's argument would amount to the proposition that otherwise environmentally safe projects would be automatically rejected after the passage of time (a short two month period) for the mere reason that the officials did not find time to read the file.

206. Accordingly, it simply cannot be the case that whenever there is a Motion for Reconsideration of a Negative Environmental Decision, even with respect to the most complex projects, the issue needs to be reconsidered and a positive decision (reversing an earlier negative decision) has to be issued within two months, otherwise the negative decision will become final. If that were the case, no complex, controversial project could possibly be permitted in the DR.

207. It should also be recalled that judicial control over the EIA process cannot lead to the issuance of a positive decision by order of a DR court - the Environmental License needs to be issued by the Environmental Ministry.

208. Accordingly, if the *negative administrative silence* doctrine were to be applied to the EIA process in such a way as alleged by the Respondent, the Motion for Reconsideration of the negative decision would not be an effective remedy. That would be equivalent to a breach of the Respondent's international law obligations, including under DR-CAFTA, and the violation of the FET Standard. It would also amount to a breach of the Respondent's Constitution, in particular Articles 68 and 69 thereof. It is important to emphasize that in accordance with Article 46 of the DR Constitution:

[129] **Exhibit R-006**, p. 4, *"la teleología de la figura jurídica del silencio administrativo es operar siempre a favor del administrado[…]"* .

"The acts issued by usurped authority, and the actions or decisions of the public powers, institutions or persons that alter or subvert the constitutional order and any decision reached by requisition of armed force, are null of plain right".[130]

209. Furthermore, the Claimant submits that in the DR in practice, statutory time-limits for issuance of administrative decisions are frequently disregarded by the DR administration, and nevertheless, decisions favorable to individuals are still made with projects permitted. This happened in particular in the Claimant's case, building the Claimant's expectations that the Motion for Re-Consideration would receive full and proper consideration.

(d) Denial of justice did not start on 5 December 2010

210. Finally, the Claimant also challenges the Respondent's imprecisely advanced contention at paragraphs 84 and 85 of the Preliminary Objections. Insofar as the Claimant understands the Respondent's position, it seems to imply that the Claimant could have brought an international claim against the DR on the basis of the denial of justice immediately after 5 December 2010, when it appears to assert that a period of two months had elapsed following the submission of the Motion for Re-Consideration.

211. It would appear to be the Respondent's case that if no decision is issued with respect to the Motion for Reconsideration within two months, that silence amounts to an international wrong.[131]

212. The Claimant is simply unable to accept that proposition. A denial of justice does not occur by reason of the mere fact that two months have elapsed.

(e) No party should benefit from its own wrongs

213. The Claimant submits that the Respondent is precluded from deriving benefit from its own wrongdoings. The principle of *ex turpi causa non oritur actio* or *nullus commodum capere de sua injuria propria* is well-established in the jurisprudence of international Courts and Tribunals. Pursuant to this principle, states cannot plead their own omissions or negligence as a ground absolving them from performance of their international obligations. Consequently, states are also precluded from shifting the burden of liability for their own misconduct onto the other party, often the victim of such misconduct. To cite one application of the abovementioned principle in international jurisprudence, the Tribunal in the *Tattler Case* held that:

[130] **CL-40B**, Constitution of the DR, Article 73, *"Son nulos de pleno derecho los actos emanados de autoridad usurpada, las acciones o decisiones de los poderes públicos, instituciones o personas que alteren o subviertan el orden constitucional y toda decisión acordada por requisición de fuerza armada."* (English) (Spanish).
[131] Preliminary Objections, paragraph 85.

"It is difficult to admit that a foreign ship may be seized for not having a certain document when the document has been refused to it by the very authorities who required that it should be obtained."[132]

214. The principle of "*no one is allowed to reap advantage of its own wrongful act*" can also be applied to situations, whereby states attempt to rely on time-bars in order to effectively close the possibility of raising claims by diligent claimants. In the *Frances Irene Roberts Case*, the United States-Venezuelan Milted Claims Commission established that:

"The contention that this claim is barred by the lapse of time would, if admitted, allow the Venezuelan Government to reap advantage from its own wrong in failing to make just reparation to Mr. Quirk at the time the claim arose."[133]

215. The Claimant submits that the Respondent's reliance upon the three-year DR-CAFTA time-bar is inextricably linked to the Respondent's breach of the standards of protection granted to the Claimant.

(f) The Respondent is estopped from arguing the Claimant should have submitted the claim earlier

216. The Claimant submits that the DR should be estopped from relying on its objections, including the three-year time-bar rule, since these objections arise directly out of the Respondent's own wrongful conduct towards the Claimant. The principle of estoppel is directly connected to the abovementioned principle of *nullus commodum capere de sues injuria propria*.

217. As recognised by Judge Read in his dissenting opinion to the Advisory Opinion on the Interpretation of Peace Treaties (2nd Phase), *in any proceedings which recognised the principles of justic*e" no government would be allowed to raise an objection which would "*let such a government profit from its own wrong*"[134]. Thus, a party defaulting on its international obligations should be estopped from relying upon its own treaty violation in support of its own defence.

218. The principle of estoppel was famously adopted by the Permanent Court of International Justice in the *Chorzów Factory* case, where it was invoked by the Court to assert its jurisdiction over the case:

"It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not

[132] **CL-41**, *Owners of the Tattler (United States) v. Great Britain*, Reports of International Arbitral Awards, 1920, Volume VI, pp. 48-51 (English).
[133] **CL-42**, *Irene Roberts Case*, Reports of International Arbitral Awards, 1903-1905, Volume IX, pp. 204-208 (English).
[134] **CL-43**, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (2nd Phase)*, Dissenting Opinion of Judge Read, I.C. J. Reports 1950, p. 231 (English / French).

had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him."[135]

219. In the light of the above, the principle of estoppel would preclude state A from averring a particular fact against an investor if state A had previously, by words or conduct, unambiguously represented to the investor the existence of a different position, and if, on the faith of that representation, the investor had so altered his position that the establishment of the truth would cause injury to the investor. Therefore, in cases where states make particular representations *vis-à-vis* a foreign investor upon which the investor relies, the state may not then deploy as a basis of defence that the representation was inconsistent with national law or established practice. As stated by the Permanent Court of Justice in the *Eastern Greenland Case*:

> *"Norway reaffirmed that she recognised the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland."*[136]

220. Likewise, in the *Anglo-Norwegian Fisheries Case* the International Court of Justice established that a "*prolonged abstention*" effectively barred the United Kingdom from protesting against the Norwegian system of straight base lines in delimiting territorial waters.[137]

V. THE RESPONDENT'S OBJECTION IS ILL-SUITED FOR THE EXPEDITED PROCEDURE

221. Without prejudice to the Claimant's primary position that the Respondent's jurisdictional objection is ill-founded, the Claimant also contends that the objection is ill-suited for determination under the Expedited Procedure established under Article 10.20.5 DR-CAFTA.[138] This is because the issues that need to be addressed in relation to the Claimant's claim of the alleged violation by the Respondent of Article 10.5 DR-CAFTA and the Respondent's contention that the Claimant is out of time, are so closely connected that those issues should be decided jointly, following a full explanation of the Parties' respective arguments, after all relevant evidence has been put before the Tribunal. Clearly, this cannot be done under the tight time constraints of the Expedited Procedure.

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[135] **CL-44**, *Factory at Chorzów case (Jurisdiction)*, Judgment of 26 July 1927, Publications of the Permanent Court of International Justice, Series A, No. 9 (English / French).
[136] **CL-45**, *Legal Status of Eastern Greenland*, Judgment of 5 April 1933, Publications of the Permanent Court of International Justice, Series AB, No. 53 (Eastern Greenland case) (English / French).
[137] **CL-46**, *Fisheries (United Kingdom v. Norway)*, Judgment of 18 December 1951, I.C.J. Reports 1951, p. 116. (Anglo-Norwegian Fisheries case) (English / French).
[138] **CL-1**, DR-CAFTA, Chapter 10 on Investment (English).

222. In its Preliminary Objections, the Respondent heavily relied on *Renco v Peru*.[139] The preliminary objections in that case were based on Article 10.20.4 of the Peru - US Trade Promotion Agreement, not on Article 10.20.5 (both of which have similar wording to the provisions under DR-CAFTA).[140] The passage quoted by the Respondent is the only one in the whole decision referring to this interpretation of Article 10.20.5. The Claimant does not contest that the Preliminary Objections procedure as set out in Article 10.20.5 DR-CAFTA allows for the determination of the issues of fact in the course of the Expedited Procedure. Yet, as it was determined by the *Pac Rim* Tribunal, any action undertaken within the Preliminary Objections procedure under DR-CAFTA has its limits due to its preliminary nature and due to the strict time constraints.[141]

223. The *Pac Rim* Tribunal explicitly stated that the Expedited Procedure may not resemble a 'mini-trial':

> "*Given the tight procedural timetable and deadlines under CAFTA Article 10.20.5, as already indicated above, it is clear that* ***an expedited preliminary objection is not intended to lead to a "mini-trial."*** *A contrary conclusion would attribute to the CAFTA Contracting Parties a perverse intention to render investor-state arbitration even more expensive and procedurally difficult for the disputing parties, when it would seem from these provisions (read as a whole) that the actual intention of the Contracting Parties was, manifestly, the exact opposite*" (emphasis added).

224. The fact that the Expedited Procedure may not resemble a "*mini-trial*" also implies that the Tribunal is not empowered to decide the merits of the case within this procedure. The *Pac Rim* Tribunal held that it did not find itself competent to determine the merits of any claims raised by the claimant or of the responses made by the respondent, regardless of whether they are "*well-founded in law or fact*".[142]

225. For those reasons the *Pac Rim* Tribunal concluded that:

> "*The Tribunal concludes that the object and purpose of these two provisions* [Articles 10.20.4 and 10.20.5] *is to create under CAFTA,* ***an effective and flexible procedure for the swift and fair resolution of disputes*** *between claimant investors and respondent host states, to be exercised reasonably by a tribunal according to all the circumstances of the particular case*"[143] (emphasis added).

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[139] **RA-3**, **CL-48**, *Renco v Peru* (Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4 dated 18 December 2014) UNCT/13/1 (English).
[140] *Ibid*.
[141] **CL-47**, *Pac Rim Cayman LLC v The Republic of El Salvador*, (Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 dated 2 August 2010) ICSID Case No. ARB/09/12, paragraph 112 (English).
[142] **CL-47**, *Pac Rim*, paragraph 56 (English).
[143] **CL-47**, *Pac Rim,* paragraph 116 (English).

226. The Claimant submits that although Article 10.20.5 DR-CAFTA provides that the Respondent could request that *"any objection that the dispute is not within the Tribunal's competence"* is dealt with in the Expedited Procedure, certain types of objections are simply ill-suited to be determined in this way.[144]

227. In *Renco*, the Tribunal defined the object and scope of Article 10.20.5 of the US-Peru FTA as follows:

> *"215. […] both State Contracting Parties to the Treaty have traced the origins of the provisions contained in Articles 10.20.4 and 10.20.5 to the NAFTA case of Methanex v. United States.*
>
> *216. In Methanex, the United States was confronted with claims that it contended were without legal merit, even assuming the truth of the claimant's allegations. However, the tribunal ruled that it could not address such objections in a preliminary phase. Only after protracted and costly proceedings did the tribunal ultimately decide that it did not have jurisdiction and that the claims should be dismissed.*
>
> *217. In the light of Methanex, the United States and Peru agreed to include in the Treaty provisions which would allow a respondent State to assert preliminary objections in an efficient manner and thus avoid the unnecessary time and expense of adjudicating a legally meritless claim."*[145]

228. In *Methanex*, the United States raised a number of jurisdictional objections, none of which dealt with the issue of the Tribunal's jurisdiction *ratione temporis* nor created a close link between the temporal jurisdiction of the Tribunal and the merits of the case.[146]

229. In *Renco*, Peru objected to the Tribunal's *ratione temporis*, alleging some claims put forward by the investor were time-barred.[147] The *Renco* Tribunal decided that objection was beyond the scope of Article 10.20.4 of the US-Peru FTA, but declined to decide that issue under the Article 10.20.5 proceedings. Peru brought its jurisdictional objections in the course of the normal exchange of pleadings.

230. Apart from *Renco*, no decision to date under Article 10.20.5 DR-CAFTA (or equivalent provisions of other treaties), has dealt with a jurisdictional objection based on the time-limit rule laid down in Article 10.18.1 DR-CAFTA (or similar).[148]

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[144] **CL-1**, DR-CAFTA, Chapter 10 on Investment (English).
[145] **CL-48**, *Renco* (English).
[146] See **CL-49**, *Methanex Corporation v. United States of America*, UNCITRAL (Partial Award of 7 August 2002), paragraph 84 *et seq.* (English).
[147] **CL-48**, *Renco* paragraphs 48-51 (English).
[148] **CL-1**, DR-CAFTA, Chapter 10 on Investment (English).

231. Although admittedly, in certain situations, the application of the time-limitation rule under Article 10.18.1 DR-CAFTA could be clear-cut, possibly falling under the scope of Article 10.20.5 DR-CAFTA procedure, it is not the case where the alleged breach of the treaty is based on the theory of the denial of justice resulting from a failure to render a ruling. The three-year period under Article 10.18.1 DR-CAFTA 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.

For these reasons, the Claimant submits that the Preliminary Objections should be joined with the merits of the case.

VI. REQUEST FOR RELIEF

232. The Claimant therefore respectfully requests that:

(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.

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