International Centre for Settlement of Investment Disputes
ICSID Case No. ARB/18/43

In the proceeding between

DANIEL W. KAPPES

and

KAPPES, CASSIDAY & ASSOCIATES

("Claimants")

C.

REPÚBLICA DE GUATEMALA

("Respondent")

GUATEMALA'S REJOINDER MEMORIAL

October 15, 2021

Members of the Tribunal

Jean Kalicki, *President*
John M. Townsend, *Arbitrator*
Prof. Zachary Douglas QC, *Arbitrator*

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I. EXECUTIVE SUMMARY

1. In this Rejoinder, the Republic of Guatemala ("Guatemala") had to reply to two different cases: the case that the Claimants presented in their Memorial and the case they presented in their Reply. Claimants' case is a fishing expedition, constantly mutating, and through the confusion created through the varied and contradictory accusations, they hope that it may result in some type of liability for the State under the CAFTA-DR. These series of contradictions cannot withstand basic scrutiny. Neither Guatemala nor its courts have acted in a manner that breaches or contradicts the obligations the State assumed under the CAFTA-DR and there are many reasons to reach to this conclusion. If Claimants have sustained any damages, it is merely the consequence of their own improvisation and lack of due diligence.

2. Claimants did not perform any due diligence before making their investment in Guatemala, and in particular, they did not carry out any legal, social and human rights due diligence. Otherwise, they would have found that there are indigenous communities in the area of the mine and that those communities represent 67% of the population of San Pedro Ayampuc. Moreover, the ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries ("ILO Convention 169") that regulates the consultation right has formed part of the Constitution of Guatemala since 1997. As Claimants should have become aware, Guatemala is a country which incorporates international human rights law solely upon the ratification of Conventions and Treaties, which thereby become part of the Guatemalan legal system and the Political Constitution of the Republic of Guatemala. In other words, treaties such as the ILO Convention 169 automatically become the supreme law of the State and do not require a law enacted by the Congress of the Republic for its provisions to benefit all citizens and bind public authorities.

3. Moreover, if Claimants had carried out a legal and social due diligence, they would have known that: (i) since the turn of the century (and even before), as numerous news of the local press have shown, Indigenous Peoples and the institutions representing them have been constantly requesting that consultations of Indigenous Peoples be carried out, especially in those areas where projects affect natural resources and Indigenous Peoples' living conditions; (ii) Guatemala has since been divided into those who support mining and those who are against it, and the opposition is such that many social and sociological scientific works have been prepared by the most important universities of the world on this topic, mainly during the first decade of the XXI century; and (iii) the reality in Guatemala during the first 10 years of this century has been marred by social conflicts, confrontations, strikes and blockades among those who are for and those who are against mining.

4. As a result, it is surprising that Mr. Kappes, despite having worked for the Marlin Project and other mining

projects in Guatemala, has not known or become aware of this social tension and of the conflicts, which are the same types of conflicts that emerged in response to the Progreso VII Derivada project. Here it is only possible that, in addition to having violated a minimum requirement of caution of any prudent investor, whether domestic or foreign, he has opted to deliberately and openly ignore any existing social tensions to then make claims arising as a result of such social tension, and that in most cases were the result of Indigenous Peoples' demands to carry out the consultation required under ILO Convention 169 before any project that may affect their way of life.

5. If Mr. Kappes and his companies decided to ignore this social situation in Guatemala and failed to take the most minimum and essential steps to understand the particularities and needs of the place where they were investing, they cannot now require the State to pay for the consequences. Indeed, the completion of the investment in September 2012, at a time when the social conflict of La Puya was at its peak, is simply negligence. It is a strongly consolidated principle in international investment arbitration that Bilateral Investment Treaties are not an insurance policy against bad business decisions.

6. It has been proved by abundant evidence on the record of this arbitration that the social problems raised by La Puya, the legal complaints filed regarding the lack of construction permit, and the legal cases submitted by the Kaqchiquel community to comply with the (prior) consultation of Indigenous and Tribal Peoples are the consequence of these preexisting social conflicts that Mr. Kappes and his companies decided to ignore. Moreover, the record of this case proves that Claimants did only the minimum necessary to comply with their application submission to the Ministry of Natural Resources (MARN) and the Ministry of Energy and Mines (MEM) and ignored the needs and expectations of surrounding communities, while aggravating the issues by hiring a company formed by former military officers (groups accused of human rights abuses against agricultural workers and peasants such as the members of La Puya) in order to "impose a mining project" on surrounding communities. This did not only fail to ease the worries of the community but also, given the physical and moral violence exerted, the social conflict grew and consolidated and finally marked the fate of the project, in spite of all the efforts made by the State to mediate and protect the company in accordance with the standards regulated under CAFTA-DR and, even, to support the project when it was being openly rejected by the surrounding communities.

7. Based on the above, Claimants have been exclusively liable for the failure of their mining project, by using physical and moral violence, lies and misinformation to operate in Guatemala. Claimants did nothing to obtain the social license required to operate the Project. Whether it is a legal obligation or not, a social license to operate is *sine qua non* requirement and internationally recognized in practice for a mining project to operate, one either has it or does not, and Claimants never obtained it as a result of the deep social harm

caused to the inhabitants of the area. This lack of social license, which apart from being obvious, is also proved by the irrefutable opinion of experts, Ana María Estévez and Lloyd Lipsett, who are renown experts in the mining and natural resources sector and whose expert opinions accompany this submission.

8. This same indifferent and reckless attitude is the one adopted by Exmingua and Claimants as it relates to compliance with Guatemalan law. It is clear now that Exmingua never obtained or never legally obtained a valid construction license. It has also been proved that it continued construction after the Courts ordered it suspended, and finally that Exmingua continued producing after Guatemalan Courts, the Supreme Court of Justice and the Constitutional Court granted the *amparo* for lack of Consultation to Indigenous and Tribal Peoples. The documents attached to this submission show that Mr. Kappes and Exmingua's officers acted wilfully and in flagrant violation of local laws in relation to their investment.

9. Based on the foregoing, no organ of the State violated any provision of the investment chapter of CAFTA-DR. To the contrary:

    a. The State always assisted the company, protected its interests, its officers and property, from the start of the conflict to date. Under no circumstances may the State be accused of failing to provide the necessary protection and security to Exmingua, its officers, property, or authorities.

    b. The fair and equitable treatment under the CAFTA-DR is undoubtedly the customary international law minimum standard of treatment, and a violation of that treatment occurs only if the State's conduct is found to be "outrageous, a deliberate neglect of duty in bad faith, or equivalent to insufficient government action far below the international standards that any reasonable and impartial person would immediately recognize its insufficiency." In all instances, the Guatemalan State acted in accordance with due process of law and with respect of the rule of law. In no way was there a violation of the fair and equitable treatment standard under article 10.5 of CAFTA-DR.

    c. Furthermore, it is clear, and it has been repeatedly held by tribunals and legal authorities, that the article of CAFTA-DR does not include the so-called "legitimate expectations of investors" or any equivalent or variation thereof such as legitimate reliance, legal security, transparency, or good faith as an independent concept, etc. Claimants have not proved, nor can they, that the MST of customary law has evolved to include such obligations.

    d. But, in any case, and ratifying that the only standard to be applied is a minimum international standard of treatment, none of Guatemala's acts in connection with this case has violated FET in any form

10. Finally, it is important to state, that in order to prove a violation of any standard under the Treaty for acts taken by the judiciary, a denial of justice must be proved, which means that the Arbitral Tribunal is not permitted to act as an appellate body of the decisions of the sovereign Courts of Guatemala. The Constitutional Court, for the reasons explained herein, neither incurred in unnecessary delay or conspired with other bodies of the State, or violated in any manner the standard of denial of justice.

11. As a result of the above, the acts of the Judicial Branch in Guatemala in no way violated the standard of denial of justice, and the judiciary acts may only violate the Treaty, in any of its forms, through a denial of justice.

12. The State did not discriminate against Claimants either under the National Treatment Standard or the Most Favored Nation Treatment Standard. Not only can acts of the Judicial Branch not be controlled under this standard without the existence of a denial of justice, but also the proceedings of each case depend on the specific circumstances, the defenses invoked by the multiple parties and other external factors. A similar explanation applies in connection with the implementation of the Consultation to Indigenous and Tribal Peoples, which depends on the specific circumstances of each case that the State cannot control and events involving external actors (indigenous authorities, groups of interest and protest, etc.), as well as the circumstances of each project with respect to level of acceptance by the surrounding communities and the granting of a social license to operate from each of them.

13. Certainly, there can be no expropriation of the investment where there is only a suspension of the project and the shareholders can fully exercise all the rights inherent to their status as shareholders, such as presenting legal filings before the local authorities on behalf of the company, exercising the rights inherent to shareholder internally as well as manage the business. Nothing in this record has the minimum appearance of an expropriation of Exmingua.

14. Through this submission, Guatemala also respectfully argues that the Tribunal should not have allowed the submission of a case of indirect damages under article 10.16.1(a). The Non-Disputing Party Submission of the United States, the country of nationality for Claimants, provided a clear explanation on this point and that is as close as we can get to an authentic interpretation of the Treaty. Notwithstanding, it is clear that Claimants have abused the process and now submit to the Tribunal a claim for direct damages, while continuing a claim for indirect or reflective loss, without providing any evidence of the damage sustained by shareholders. The Tribunal also lacks jurisdiction because the investor violated the law both when it made and carried out the investment, and jurisdiction has also been excluded by the reservations made by Guatemala to the Treaty.

15. Claimants' damages case also grossly fails mainly because they intend to apply a standard for compensation based on total compensation, which proved to be contrary to the express provisions of the Treaty, the interpretation of its parties and the subsequent practice of arbitral tribunals in this regard. This misinterpretation of the Treaty gives rise to serious flaws such as an ex-post facto valuation framework, which Claimants abuse, and an interest calculation that is not commercially reasonable or accepted by

international law.

16. In addition, Claimants allege damages that do not comply with the causation standards established by this Tribunal at the Preliminary Objections stage. This causation chain was, in any case, interrupted by Claimants' own negligence, as they are the only parties liable for the damages sustained due to a lack of social license for the project. As the valuation experts have proved, Claimants' damages model tries to transform a small, risky, and low-profit project into a large project that would have yielded millions of dollars of profits and exploited large amounts of mineral resources, based on highly speculative assumptions and with serious flaws in their calculation methodology.

17. To conclude, this introductory section only seeks to outline the contents of this Rejoinder, and any issue that has not been expressly discussed here is only due to a lack of space and considering the summary nature of this introduction and should not be interpreted in any way as an omission or recognition that an issue is of less relevance. To the contrary, each page of this Rejoinder will help clarify the facts and law applicable to this dispute and, undoubtedly, will lead the Tribunal to issue a decision favorable to Guatemala, with costs imposed against Claimants in this case.

18. We kindly request this Tribunal to find for Guatemala and fully reject the Claimants' case, imposing all legal costs and fees on Claimants. **In doing so, justice will be done**.

II. RELEVANT FACTS

A. Claimants developed the project in an irresponsible manner, disregarding the rule of law while creating and fueling the conflict

1. From the beginning, Claimants willfully turned a blind eye to the social, legal, and political environment in Guatemala

a. Claimants failed to conduct the appropriate due diligence before making their purported investment in Guatemala

19. According to Mr. Kappes, KCA began looking to invest in a project in 2003,[1] and by 2008, both he and KCA "were ready to invest in and develop a mining project."[2] During this time, there is no indication that Mr. Kappes visited the mine site or did any further due diligence prior to investing, outside of perhaps reviewing technical reports.[3]

20. The entire transaction—from the initial expression of interest to committing USD 6.5 million to earn a 51%

[1] Kappes Statement I, ¶ 29.
[2] Kappes Statement I, ¶ 36.
[3] Kappes Statement I, ¶¶ 29-37. Surprisingly, despite having claimed to have worked on other feasibility studies for projects in Guatemala, Claimants never prepared their own feasibility study for this project nor was any feasibility study prepared by anyone else. Kappes II Statement ¶ 16.

interest in the El Tambor Project—took less than two months and a one-day visit to the site.[4] In that short time, Mr. Kappes alleges that "KCA carried out due diligence, advised by Guatemalan lawyers, in order to understand and comply with the necessary requirements to be able to acquire the rights and carry out the mining activities in Guatemala."[5] But there is no documentary evidence of this due diligence or the results of that due diligence to corroborate Mr. Kappes's statement. There is no report from outside advisors, including Guatemalan lawyers, that would indicate any level of due diligence, even though there was extensive evidence of conflict between the community and other nearby mining operations.[6]

21. During the disclosure phase of these proceedings, Guatemala requested copies of any due diligence performed prior to the acquisition of Exmingua.[7] But Claimants produced nothing. There is not a single document on the record of this case that shows any level of due diligence by Claimants before completing their investment in Guatemala. Without any documentation, there is no way to confirm the level of due diligence carried out, if at all.

22. Outside of a few technical reports and mining data, [8] Kappes points to two emails, neither of which show any level of due diligence prior to the start of the investment.[9] Both emails refer to events that took place *after* the initial investment.[10] One email is an internal communication requesting to arrange a meeting with the managers of the Marlin Mine in March 2011;[11] the other reflects email exchanges regarding a visit to the nearby mine, El Sastre in June 2009.[12] Neither e-mail explains the specific purpose for visiting the other mines.[13] From the email, there is no indication that Claimants visited the Marlin Mine.[14] While Claimants may have paid a visit to El Sastre, there is no indication of the scope of the visit or any observations made.[15]

23. Rather than confirm due diligence, the emails show the opposite. The email about the Marlin Mine in 2011

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[4] Kappes Statement I, ¶ 37–39.
[5] Kappes Statement I, ¶ 40.
[6] Guatemala's Counter-Memorial, ¶¶ 35-36.
[7] *See* Procedural Order No. 6, Annex B, Decision on Respondent's Document Requests, Request No. 15.
[8] Kappes Statement II, ¶¶ 14-21 (citing to **C-0683,** online mining data for the Marlin mine; **C-0039**, CAM Technical Report; **C-0046** – Maynard, Tambor JV, Summary of Exploration Potential, Nov. 18, 2003, and **C-0040**, Gregory F. Smith.
[9] Kappes Statement II, ¶¶ 14-21 (citing to **C-0682**, an email from KCA to Exmingua requesting meetings dated March 18, 2011; **C-0684**, an email from David Croas to Daniel Kappes dated June 18, 2009).
[10] *See* Claimants' Reply, ¶ 45 (Claimants had acquired Minerales KC in January 2009, through which they proceeded to acquire 51% of Exmingua in June 2009, and later, on September 4, 2012, purchased the remaining shares in Exmingua).
[11] Email from David Croas (KCA) to Pedro Garcia (Exmingua), dated March 18, 2011 (**C-0682**)
[12] Email from David Croas to Daniel Kappes dated June 18, 2009 (**C-0684**).
[13] *See, e.g.,* Exhibits **C-0682** and **C-0684**.
[14] Email from David Croas (KCA) to Pedro Garcia (Exmingua), dated March 18, 2011 (**C-0682**) ("Pedro, Would you please ask Lupita to try to set up appointments for Dan and me to visit Goldcorp. We need to talk to the manager of the Marlin Mine (if possible) and with Eduardo Villacorta in the Goldcorp office in Guatemala City.").
[15] Email from David Croas to Daniel Kappes dated June 18, 2009 (**C-0684**) ("I want to thank you for arranging for our visit to your mine site El Sastre. Selvin Subuyukj is a very personable and informative young man. He was a very gracious host and is an asset to your operations. Thank you again").

confirms that Mr. Kappes had little knowledge of the area or the surrounding communities almost *three* years *after* signing the agreement with Radius. Kappes states in that email that he "would also like to go to visit Ayampuc, *which I have never seen*, and then *drive through* the district of Choleña, just to *get a better feel* for the overall layout."[16] Clearly, Mr. Kappes had never visited the surrounding communities before investing. While the other email shows that another KCA employee, Mr. David Croas [17] visited El Sastre on June 18, 2009, with the project's geologists, there is no indication of any further exchange with the project.

24. Based on the lack of evidence, there can be no doubt that Claimants never obtained a written due diligence report, nor any written documentation of any analysis concerning the regulatory framework in Guatemala or the social political investment environment. Other than Mr. Kappes' bald, self-serving assertions, there is no evidence that a team of advisors was involved to advise on issues of tax, legal and other issues, or that any risks to the investment were properly assessed prior to the start of the investment.

b. Claimants were on notice of the likelihood of social conflict at the time of investment

25. Claimants assert that the social context surrounding mining in Guatemala before the investment "looked promising," and that social conflicts were not inherent to mining projects in Guatemala.[18] This is certainly not true. Anyone paying attention to the mining industry in Guatemala would have seen that the anti-mining movement began to consolidate at the start of the Marlin mine construction in late 2004/ 2005.[19] By 2005, calls for mining law reform and application of ILO 169 began to form in various communities and organizations.[20] These were not hidden issues. They were featured prominently in local newspapers of wide circulation in Guatemala since 2003,[21] when KCA and Kappes were working in Guatemala.[22]

26. Claimants believe that their involvement in the Glamis Cerro Blanco and Glamis/Entre Mares Marlin mining projects gave them sufficient experience to consider the socio-political situation in Guatemala.[23]

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[16] Email from David Croas (KCA) to Pedro Garcia (Exmingua), dated March 18, 2011 (**C-0682**) (emphasis added).
[17] In 2008, Mr. David Croas is referred to as "an independent mining engineer employed to be the field project manager." *See* Claimants' Memorial ¶ 15. In 2009, his emails are sent using a KCA email address. *See, e.g.,* Exhibits **C-0682**; **C-0684**.
[18] Claimants' Reply ¶38. *See* Michael L. Dougherty, *Entanglements of Firm Size and Country of Origin with Mining Company Reputational Risk in Guatemala* (2017), p. 1 ("Dougherty") (**R-0172**) (noting that in 2008 mining grew "riskier" in Guatemala).
[19] *Goldcorp's Marlin Mine: A Decade of Operations and Controversy in Guatemala,* (May 3, 2015) (**R-0173**).
[20] *See, e.g.,* Episcopal Church Conference, Press Release issued on January 27, 2005 (**R-0219**). http://www.iglesiacatolica.org.gt/enero2005 htm; *see also,* MAC/20: Mines and Communities, *The People of Sipacapa Reject Mining Activities in their Territory,* June 21, 2005 (**R-0220**).
[21] *See* Compilation of articles on ILO 169 and issues with extractive issues reported in Prensa Libre in the years 2004 to 2007 (**R-0218)**.
[22] Kappes Statement II, ¶16.
[23] Claimants' Reply, ¶37.

But these projects could not have provided assurances to Claimants because Cerro Blanco was only in the exploratory phase at the time,[24] and the Marlin Mine had, by 2008, been suffering from three years of social-conflict issues. Moreover, Claimants had a limited role in those projects that would not have provided a full appreciation of the socio-political situation, especially in 2008. For Cerro Blanco, Claimants had only prepared cost evaluation studies. For Marlin, Claimants assert that they worked on a feasibility study in 2002-2003.[25] Notably, a year later, the project began to suffer one of the worst social conflicts in the country.[26]

27. The Marlin Mine was a prime example of a project owner failing to adequately consult with host communities *prior* to the onset of mine construction, as well as failing to adhere to its environmental obligations. It was hardly an example to follow in 2008. That same year, it was removed from the list of social and environmentally responsible Canadian firms to trade in the Toronto Stock Exchange, citing growing opposition and the fact that Goldcorp faced the highest total of fines for environmental issues at the time of any firm listed in the Toronto Stock Exchange.[27] In a referendum held in June 2005, 13 indigenous groups in the municipality of Sipacapa, where the Marlin Mine was located, voted overwhelmingly in opposition against open-pit mining.[28]

28. Claimants allege to have "continued following the situation at the Marlin mine and that Mr. Kappes met with "Marlin's mine managers in Guatemala City" "to learn more about their operations and then subsequently stayed in touch during later visits."[29] Claimants cite to a single email to support their engagement with the Marlin Mine.[30] But that email fails to confirm whether those meetings took place in 2011 much less in 2008, or whether any of the discussion (if it occurred) was related to the social aspects of the project. The e-mail only indicates that Mr. Kappes wanted to talk to Goldcorp to discuss "them taking the concentrate."[31]

29. Despite Mr. Kappes claiming to have closely followed the social issues at the Marlin Mine, he dismisses them as irrelevant. He did not believe those issues would affect Exmingua since the project was much

[24] *Bluestone Provides Update on Progress at Cerro Blanco,* Press Release dated June 28, 2021 (**R-0221**).
[25] Kappes Statement II, ¶ 16.
[26] *See, e.g.,* Compilation of newspaper articles from 2004-2012, (**R-0218**).
[27] Zarsky and Stanley, *Can Extractive Industries Promote Sustainable Development? A Net Benefits Framework and a Case Study of the Marlin Mine in Guatemala,* Journal of Environmental and Development 22(2), pp. 143-144 (**R-0278)**
[28] *Mining Referendum Called by Guatemalan Indigenous Communities,* OXFAM, Press Release dated July 8, 2005. (**R-0222**).
[29] Kappes Statement II, ¶ 17.
[30] *Id.* (citing Email from KCA to Exmingua (**C-0682**).
[31] Email from Daniel Kappes to Davis Croas dated March 17, 2011 (**C-0682-ENG**).

smaller and KCA a "smaller company" less likely to attract the attention of "anti-mining NGOs."[32] Claimants were apparently more concerned with opposition from NGOs, when they should have been concerned with local populations, as the Marlin Mine showed.[33]

30. Besides the well-known conflict at the Marlin mine, there were a number of other events showing social tension between the extractive industry and surrounding communities in Guatemala as a growing risk.

31. Both the administrations of President Oscar Berger (2004-2008) and Álvaro Colom (2008-2012) had announced moratoriums on mining due to social-conflict issues.[34] These moratoriums were triggered by social tensions surrounding mining projects, including the Marlin project, which included calls for consultations to take place as well as amendments to the existing Mining Law.[35] In other words, the legal framework was in a state of flux before Claimants made their initial investment.

32. In June 2008, around 3 weeks after Claimants signed a letter of intent with Radius, social unrest over the lack of ILO 169 consultations relating to the construction of a concrete plant and related mining permits in the Municipality of San Juan Sacatepéquez, just over 70km away, was sufficiently serious for the President to declare a state of alert in that municipality.[36]

33. Mr. Kappes states that there were other successful mining operations in the area, pointing only to El Sastre. Claimants have already conceded, however, that El Sastre suffered from social conflict in 2011, a year *before* Claimants completed their investment in Exmingua.[37]

34. Other indications of conflict between communities and mining companies existed. Servicios Mineros del Centro de America ("SMCA ") noted in its report that the area was *historically* known as a conflict area.[38] SMCA also advised Claimants that the mining problems in western Guatemala arose after the signing of the "Lasting Peace Agreement" in 1996 "due to the fact the ILO's [sic] Convention 169 indicates that

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[32] Kappes II Statement ¶ 18.
[33] *Mining Referendum Called by Guatemalan Indigenous Communities,* OXFAM, Press Release dated July 8, 2005. (**R-0222**).
[34] A. Bunch and C. Loarca, *Mining Conflict and Indigenous Consultation in Guatemala,* AMERICAS QUARTERLY, March 13, 2013 (**R-0223)**.
[35] Luis Solano, Ellen Moore, and Jen Moore, *Mining Injustice Through International Arbitration: Countering Kappes, Cassiday & Associates' Claims Over a Gold-Mining Project in Guatemala*, EARTHWORKS, p. 13 (**R-0130-ENG**).
[36] *See* The Observatory for the Protection of Human Rights Defenders, *Guatemala—"Smaller than David: The Struggle of Human Rights Defenders"* (February 2015), p. 22, fn. 93 **(R-0152-ENG)**; *see also,* Mining Conflicts in Latin America, the Consultation of Juan Sacatepéquez, Guatemala on May 13, 2007 (based on a 2007 survey only 4 of the 8950 inhabitants were in favor of that project in San Juan Sacatepéquez (**R-0224**).
[37] Kappes Statement II, ¶ 19.
[38] SMCA Report on the Social Programs (Jul-Dec 2014) (**C-0708-ENG**) ("The Progress VII Derivative project is in an area of historical conflict, as it has a population considered politically left-wing…this has created the ideal framework for a strong opposition…").

indigenous communities should be consulted regarding their opinion on the extraction of natural resources."[39] Claimants performed no due diligence with regards to the application of ILO.[40] During their own EIA process even, the team observed prior sources of tensions at another mine nearby.[41]

c. Claimants cut corners during the EIA process which was central to understanding the social political environmental and addressing the concerns of the surrounding communities

35. In June 2009, a year after Claimants´ decision to invest in the Project, Grupo Sierra Madre ("GSM") submitted separate proposals to develop the environmental impact assessments for Progreso VII and Santa Margarita Derivada, respectively.[42] The estimated fees to develop each EIA was only around USD 47,893.27.[43] The EIA for Progreso VII was estimated to take only 18 weeks.[44]

36. Claimants wasted another opportunity to better understand the environment in which the mine would operate during the EIA process. The EIA is central to understanding the social and environmental risks of the project and mitigating those risks. Because Claimants cut corners on the EIA process, they failed to mitigate many of the risks the Project later would face.

37. Despite Claimants' assertion that it "conducted thorough environmental assessments," [45] the EIA had many studies that were either missing, incomplete or done only at a basic level. Without proper baselines studies, the data collected is unreliable and therefore the impacts of the Project are difficult to ascertain. Guatemala's experts identified 88 out 104 components missing in the EIA.[46] On the social aspects of the Project, there was no study conducted on the indigenous population or mention of the ILO Convention 169. There was insufficient study of the political and social context of the area as pointed by Exmingua's consultants.[47]

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[39] SMCA Report and power point slides dated December 9, 2011 (**C-0702 ENG**).
[40] *Supra,* Section I.A.1.a
[41] Second Phase Report, p. 3 (**C-0742**)(" Directly related to mining activity, the municipality expresses concern with regards to *what happened before*, it was mentioned that the mining company active in the municipality (La Joaquina estate) had given money to the municipality to allow its works, and offered doctors and other benefits to the community, but they did not comply with it, provoking unfavorable comments against the municipal authorities for allegedly appropriating funds, as well as problems between the people and the municipality. They therefore insist on the importance of informing the community and complying with the offerings made by the company in charge of the Progreso VII project").
[42] Economic and Technical Proposal for Santa Margarita Derivada (**C-0079**) and Proposal for EIA for Progreso VII **(C-0080)**.
[43] Proposal for EIA for Progreso VII, Annex 4, p. 27 (**C-0080-ENG**). *See also,* SLR II Report, ¶ 144 (observing that the cost to carry out an EIA is at least an order of magnitude (10x) more than what was charged by GSM)
[44] *Id.*
[45] Claimants' Reply, p. 22.
[46] SLR II Report, ¶ 31.
[47] *See, e.g.,* CEDER 2013 Report, p. 20 (**C-0716-ENG**) (citing the "lack of foresight to develop in parallel with the exploration studies a deep study of the political and social context of the region.'

38. The EIA consultation process was also bare bones.[48] The initial consultation process in 2010 involved 8 separate meetings over the course of 5 days.[49] Five of those meetings were with institutional or government officials, the other 3 meetings were with alleged community leaders of three nearby villages.[50] The meetings with institutional or government officials took the form of presentations except for one session where 3 municipal authorities were interviewed using a one page questionnaire.[51] Claimants repeated the same meetings with mostly the same individuals from the surrounding three villages in 2011, without including the wider community or other stakeholders.[52]

d. Claimants proceeded with the investment even after the social conflict arose surrounding the project

39. There is no dispute that the social conflict came to a head in March 2012 when the community began to blockade the entrance of the mine.[53] Despite over six months of enduring the community blockade, Claimants pressed forward and purchased the remaining 50% of the project at a steep discount, allowing Radius Gold to exit the project.[54]

40. Claimants deny that the social conflict fueled Radius' exit. But their denial is completely at odds with the reasons expressed by Radius Gold. In the words of Mr. Ralph Rushton, President of Radius Gold, "[t]he sale of our interest in the Tambor Project is part of our corporate strategy to divest *problematic assets,* allowing [Radius] to concentrate capital and expertise in *areas less conflicted* regarding development in the region."[55]

41. Radius was so quick to distance itself that it not only sold the project for the minimal amount of a guaranteed USD 100,000, but also excluded itself from any liability.[56] In his same statement, Mr. Rushton also emphasized in bold that it had "*no input* in the day-to-day management of the project, and has *no influence* on the permitting of the proposed mine, its construction, its operation or any decisions concerning access

[48] Gonzalez ¶ 22 (in the year 2015, MARN indicated being a "bit dubious about how the company had done the consultation with the surrounding communities").
[49] EIA, Table 78, Schedule of Activities, p. 289 (**C-0082**).
[50] *Id*.
[51] *See* EIA, Table 81, Results of inspections with municipal staff, p. 297 (**C-0082-ENG**).
[52] *Compare* EIA Amendments, Annex 7, pp. 1179-1226 (**C-0089-SPA-R**) with EIA, Annex 15, pp. 852-868 (**C-0082-ENG**).
[53] Claimants' Memorial, ¶ 43 ("[I]n early March 2012, approximately 25 to 30 people formed a human blockade preventing entry of equipment and materials into the Progreso VII site. In the following days, the protesters set up a camp along the road leading to the site … where they stayed day and night").
[54] The sale involved payment of USD 100,000 upon signing and approximately another USD 300,000 upon the first shipment of gold produced from the property. *See* Press Release, *Radius Gold Sells Interest in Guatemala Gold Property,* August 31, 2012 (**R-0001-ENG)**
[55] Press Release, *Radius Gold Sells Interest in Guatemala Gold Property,* August 31, 2012 (**R-0001)** (emphasis added).
[56] *Id.* (**R-0001)** ("Radius sold 100% of its interest in the Tambor gold project to KCA in August 2012 for a deferred payment to made if, and only if, the project ever reaches commercial production").

to the project." Nonetheless, by September 4, 2012, six months after the community blockade began, KCA and Kappes had purportedly completed their acquisition of Exmingua.[57]

2. Claimants' inexperience coupled with hiring the wrong people created the foundation for social conflict

a. Claimants lacked sufficient experience to supervise the environmental and social aspects of the project

42. Despite an attempt to prop up Claimants' experience in the management of mining operations, the fact remains that Claimants did not have experience in managing and operating a mine on their own, especially when it came to the environmental and social matters.[58] Nothing presented in their Reply changes this.

43. Mr. Kappes asserts that Guatemala ignores that KCA provides a "vast array of services encompassing project management, process engineering, laboratory testing, and designing and providing plants and equipment."[59] It is not this technical expertise that Guatemala takes issue with, but rather the lack of experience operating a mine on their own and being able to manage and effectively address the environmental and social aspects of the project. Nothing in Claimants' response gives reassurances that Claimants had anything beyond some technical expertise related to the mining operations.

44. Claimants refer to a list of other projects they have worked on, but their role in each is limited to the largely irrelevant technical aspects of those projects.[60] The preparation of feasibility studies in other projects or the design, procurement, and management of construction of other mines[61] fails to demonstrate the experience needed to manage an entire mining operation, including supervising the social and environmental aspects of the project.[62]

45. In any event, some of Claimants' other projects suffered from their own issues. A year after KCA claims to have been involved in the design, construction and start-up of the Ocampo Gold mine, the project was marred with controversy for mismanagement, overstated production targets, cost-overruns, and generally

[57] Claimants' Memorial, ¶ 26 (citing to Purchase Agreement between Radius, Minerales KC, and KCA dated August 29, 2012 (**C-0073**).
[58] *See, e.g.,* Statement of Qualifications ("KCA's Statement"), *Key Personnel,* p. 3, 7-11 (**C-0019**) (which details specific technical expertise in the areas of engineering services, laboratory testing and process equipment; none of the key personnel demonstrates experience in social or environmental aspects of mining projects).
[59] Kappes II Statement ¶ 6.
[60] Kappes Statement II, ¶¶ 5-13. KCA oversaw feasibility studies and engineering, procurement, and construction management of Ocampo (**C-0029**) and Pinos Altos Projects (**C-0032**). Similarly, KCA provided detailed engineering, fabrication, installation, and startup of the plants for the Ivrind Project in Turkey (**C-0681**) and Soledad (**C-0682**).
[61] Kappes Statement II, ¶¶ 7-10 (describing that KCA "was fully in charge of the design, construction and start-up"
[62] KCA only claims to have experience conducting environmental work related to the closure of the mines. Kappes Statement II, ¶ 11.

having "more problems than usual" in its start-up operations.[63] Part of the issue was attributed to a leach pad, crusher and mill that was operating at less than 70% capacity in the latter part of 2007.[64]

46. Other projects cited fail to provide the confidence that Mr. Kappes and KCA could run a full mining operation. In the case of the Berenguela mine, KCA's role appears limited to metallurgical sampling in the mid to late 90s, but the project has yet to go into production.[65] The Wassa mine did not achieve forecast gold recovery and was later purchased by Golden Star Resources who had to completely revise the processing plan.[66]

b. The social studies for the Progreso VII were carried out by persons who did not have the necessary experience to identify and mitigate the social risks

47. Claimants' attempt to prop up the professional experience of the team that prepared the EIA, but a review of their credentials shows that their experience was mostly related to the geological aspects of the Project.[67] They were architects, engineers and geologists, yet there was a lack of experience with regard to hydrology and social issues.[68] The only individual that claims to have some experience in the social aspects is someone who holds a degree in anthropology and a post-graduate degree in international economics.[69] Moreover, one individual is insufficient to carry out the work[70] and remarkably the one individual who claimed experience in the social aspects was absent from most of the consultation process.[71] In any event, it is not evident in any of the team members' profiles that they had experience in conducting social impact assessments in mining at the time. [72]

c. Claimants' decision to hire ex-military members for social outreach demonstrated their failure to appreciate the area's historical context, creating further mistrust and tension

48. Claimants do not deny that they hired ex-military members to lead their social outreach efforts,[73] a decision that further exacerbated mistrust in the community. Instead, they downplay the significance of SMCA's

[63] *Honeymoon over for Gammon Gold,* THE NORTHERN MINER, August 20, 2007 (**R-0225**).
[64] *Id.*
[65] SLR II Report, ¶ 182
[66] SLR II Report, ¶ 183
[67] EIA, p. 48-51 **(C-0082)**.
[68] SLR II Report, ¶ 143.
[69] *See* Professional Experience of Magdalena Valenzuela, p. 51 (**C-0082-ENG**).
[70] CIG Report, ¶ 71.
[71] Magdalena Valenzuela only appears to have attended two meetings during the consultation process carried out in 2010 and 2011. *See* EIA Amendments, Annex 7, pp. 1187 – 1220 (**C-0089-SPA**) (noting only her presence at the meetings with the Village of Guapinol and the presentation before the Municipal Council in San Pedro Ayampuc in 2010 (pp. 1195,1197). Claimants point to a what appears to be a reason printout of the services provided by GSM (C-1024), but there is no indication of this experience at the time in the EIA related documents
[72]. CIG Report, ¶ 71.
[73] Claimants' Reply, ¶ 181.

leaders being ex-military.[74] By ignoring the relevance of SMCA's military ties to whether they were able to engage in community outreach, Claimants show a lack of basic understanding of the social political environment in which they had decided to operate a mine.[75]

49. Controversial military rule in Guatemala came to an end in 1996, just over a decade before Claimants' investment.[76] It is a notorious fact that the 1996 Peace Accords ended a 36-year long internal armed conflict, where thousands died and many others disappeared mainly in the indigenous and rural areas of Guatemala.[77] The Peace Accords resulted in Guatemala making a series of commitments to adopt legislative measures to strengthen its human rights framework, among them, it ratified the ILO Convention 169 and approved the draft Declaration on the Rights of Indigenous Peoples at the United Nations.[78]

50. Against this historical background, Claimants hired SMCA led by ex-military officers, Ret. Col. Arias Méndez, and Selvyn A. Morales.[79] There is no indication on the record that SMCA or its employees had any experience in developing social programs. Claimants' reliance on Morales' previous position as Director General of Mining at MEM only calls into question the legitimacy of Exmingua's permitting process,[80] which he was asked to assist with just two months after leaving his position at MEM.[81]

51. While Claimants brush off any issues with SMCA's military ties, it is apparent that they had realized their errors by 2013. According to their own consultants, Claimants recognized that "[i]t was a mistake to have hired military personnel" because "it is an area organized during the armed conflict."[82] Claimants further claimed that "it was difficult to identify or verify the erroneous actions of Mining services [SMCA]" and that it was "unable to verify if Selvyn [one of the leaders of SMCA] has contacts in the area."

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[74] *Id.*
[75] *Id.*
[76] Irenees net, "*Guatemala, the imperfect post-conflict and the new threats to peace"* (Nov. 2007) **(C-0750)** (the Peace Accords, which took about two years to negotiate, faced many obstacles, including "the deep distrust of the military."
[77] In 2009, Felipe Cusanero became the first ex-military convicted of crimes that occurred during the internal armed conflict, which in his case involved the disappearance of 6 peasant farmers. Thereafter, there have been other trials involving crimes committed by ex-military leaders in Guatemala during the long internal armed conflict. *See Guatemala makes landmark civil war conviction,* REUTERS (August 31, 2009) (**R-0226)**.
[78] Agreement on the Identity and Rights of Indigenous Peoples: Advances and Challenges: 20 years after the signing of the Peace Accords, United Nations Development Program (2016), p. 15 (**R-0006**).
[79] Claimants Reply, ¶ 181; Luis Solano, Ellen Moore, and Jen Moore, *Mining Injustice Through International Arbitration: Countering Kappes, Cassiday & Associates' claims over a gold-mining project in Guatemala*, INSTITUTE FOR POLICY STUDIES AND EARTHWORKS (August 24, 2020), p.20-21 **(R-0130)**
[80] In 2011, Exmingua was the only mining company to obtain an exploitation license during the declared moratorium. *See* MEM Annual Statistics 2013 (**C-0458-ENG**).
[81] MEM Termination of Contract with Mr. Selvyn Morales (showing that he had held various positions at MEM since 2004 until the January 28, 2011 **(R-0227)**; *see also*, Email from Daniel Kappes to Selvyn Morales dated March 27, 2011, (**C-0700)** ("…I am much more comfortable that you are involved and can help us to keep the permitting process moving forward so that we can get the permits before politics intrudes too heavily").
[82] CEDER 2013 Report, p. 13 (**C-0716-ENG**).

52. Claimants' own contractors faulted SMCA, specifically stating that "the intervention of Central American Mining Services [sic] was not good, allowing the conflict to grow."[83] Exmingua's geologists state that the "situation was complicated by the recruitment of military personnel" and that SMCA "deceived people"[84] and "its not known what they offered" to the community.[85]

53. As would be expected, SMCA employed military style tactics. They used helicopters to intimidate the community and dropped flyers with pro-mining leaflets.[86] One such occasion was captured on video, and photographs of the event show individuals in blue helmets being led by ex-military leader and Exmingua employee, Pablo Silas Orozco, acting in a threatening manner to gain access to the mine site.[87] Overhead a helicopter was used to attempt to intimidate the community opposition.[88] Claimants criticize Guatemala for using sources of purported misinformation to show that SMCA used military tactics.[89] Apparently, Claimants did not read their own documents. CEDER, Claimants' consultant, recognized that one of the sources fueling the social tensions was the fact that military personnel had been employed to carry our social and community relations "using counterinsurgency practices such as community monitoring, surveillance and control."[90]

54. It thus became clear from the interviews that Exmingua's consultant carried out, that SMCA's efforts were counter-productive and further solidified the opposition to the project.[91] Despite SMCA's unsupported conclusions that public perception of the project was favorable,[92] by mid-to late 2014, three years after SMCA began to conduct its activities,[93] Exmingua's own survey revealed that "the project's credibility

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[83] CEDER 2013 Report, p. 14 (**C-0716-ENG**).
[84] Sandoval Statement, ¶¶ 6-7(explaining that Ret. Col. Arias Mendez initially purported to support the community opposition, while hiding his actual role in the Project. When asked what he was doing in the community, Ret. Col. Mendez responded that he was conducting a socio-economic study in the municipality so that he could sell it to anyone who had an interest in the area. Months later, Ret. Col. Arias Mendez and other ex-militaries established an office for the mining project in San Jose del Golfo, referred to as "El Ranchón.").
[85] CEDER 2013 Report, p. 8 (**C-0716-ENG**).
[86] Sandoval Statement ¶ 17; Oswaldo Hernandez and José Andrés Ochoa, *Gold so Close to the Capital*, PLAZA PÚBLICA (June 22, 2012), p. 4 (**R-0039-ENG**); Copies of Flyers distributed with Exmingua's logo) **(R-0216)**.
[87] Sandoval Statement ¶ 24; Oliva Statement ¶ 20 .*See also,* You Tube Video "*Personeros de Exmingua amenazaron a comunicadores en la Puya," https://www.youtube.com/watch?v=0nYwlTR9vog* (**R-0144-SPA**).
[88] News Release, GoldCorp Out News, *Guatemala, Blue Helmets organized by companies for conflict, not peace* (November 12, 2012) (**R-0041**).
[89] Claimants' Reply ¶ 180.
[90] CEDER 2013 Report, p. 20 (**C-0716-ENG**).
[91] *See generally* CEDER 2013 Report (**C-0716-ENG**).
[92] *See, e.g.,* SMCA Executive Report October 14, 2011, p. 4 (**C-0703**); SMCA Executive Summary of Activities in San Jose del Golfo (**C-0709**).
[93] *See, e.g.,* SMCA Strategic Plan to Achieve Balance in Public Opinion in the Area of Influence of Progreso VII dated August 2011 (**C-0701**).

stood at just 6%."[94]

d. Claimants' lack of transparency from the start with the affected communities created the social conflict

55. Claimants' actions from the start failed to show any intent to properly consult or obtain approval from the community. Instead, they show deceit in an attempt to trick the community into acceptance.

56. Before the start of mine construction, Claimants had purported to purchase the surface rights in the lands needed from local landowners under the guise that they would be utilizing the land for agricultural purposes.[95] Claimants dismiss the allegation because it is supported only by a local newspaper article, but community members and others further support this allegation.[96] This deceitful approach was also an issue with the Marlin mine years earlier.[97]

57. Moreover, because of the minimal consultation carried out, most of the community was unaware of the plan to construct a gold mine at Progreso VII until right before the permits were issued.[98] This is confirmed by SMCA's own outlined strategy of "MAKING PRESENCE" and "First Contact with People" in a report prepared for Exmingua *after* the issuance of the mining license.[99] Even before the mining license had been issued, but after consultations for the EIA had been completed, Exmingua acknowledged that it had not informed the communities. As Claimants acknowledge in the Reply, in August 2011, one month before getting their exploitation license, "Exmingua developed a strategic plan to *inform the surrounding communities about the Project and understand their concerns and needs."*[100]

58. The lack of transparency was even apparent in the consultations conducted during the EIA process. The community was never given sufficient information regarding the environmental impacts creating further concern.[101] The project was being developed in area of Guatemala that is subject to droughts and water scarcity.[102] Yet Claimants never made it clear to the community how much water would be needed for the

[94] SMCA – Consolidated Report – Social Responsibility (July – December 2014), p. 5 (**C-0527**).
[95] Oswaldo Hernandez and José Andrés Ochoa, *Gold so Close to the Capital*, Plaza Pública, p.1 (June 22, 2012) (**R-0039**).
[96] Oliva Statement, ¶ 7; Sandoval Statement, ¶ 5; Garcia Statement, ¶ 16; Guaré Statement, ¶ 7; Gonzalez Statement, ¶ 14.
[97] A. Bunch and C. Loarca, *Mining Conflict and Indigenous Consultation in Guatemala,* Americas Quarterly, March 13, 2013, (**R-0223**) ("One complaint is that inaccurate information has been presented to affected communities about the scope of the projects. During the exploratory phase of the largest mine operating in Guatemala—the Marlin Mine, owned by the Canadian company GoldCorp, Inc.—prospectors told the Maya-Mam indigenous community that their activities were aimed at establishing an orchid plantation").
[98] Sandoval Statement, ¶ 6; Oliva Statement, ¶ 9; Camey Statement, ¶ 5.
[99] SMCA Report and power point slides, p. 19 (p. 6 of slide deck) (**C-0702-ENG**).
[100] Claimants' Reply, ¶ 151 (citing to Strategic Plan developed by SCMA) **(C-0701**).
[101] Oliva Statement ¶¶ 10-11; Sandoval Statement ¶ 13; Garcia Statement, ¶ 10.
[102] Oliva Statement, ¶ 3; Sandoval Statement, ¶ 9; Camey Statement, ¶ 3.

mining operations or clearly identified the risks to the community's water supply.[103] Even more concerning, it was unclear how the mining operations would further increase the already existing arsenic levels in the local water supply.[104]

59. There were also misrepresentations and contradictions during the consultation process. In one meeting held on February 2, 2010, with the purported COMUDE of San Jose del Golfo, in response to concerns over opposition to open-pit mining in the country, Exmingua's manager, Pedro Garcia, stated that the "project is underground, which [sic] that causes less impact than open pit mining and these are not for metal extraction."[105] In the presentation given to allegedly seven members of the COCODE of La Choleña, the mining activity was described as "30 percent open-pit and the rest is underground."[106] In almost two years of mining a site with a five year life, Claimants had yet to construct any tunnels. And in 2017 Exmingua's representative, Mr. Vaides, stated that there was no intent to go underground once mining operations restarted due to the costs and the type of rock.[107] Exmingua also stated to the community that it would mine at the rate of 150tpd,[108] yet in practice Claimants allege to have mined over 200tpd.[109]

60. Responses to concerns regarding the environmental impacts were also misleading. In presentations made to the municipalities, GSM represented that "visual pollution" would be virtually "non-existent" and that industrial waters would not be discharged or "pour it [sic] into the groundwater table."[110] Neither of these is accurate. The EIA indicates that the project, since it involves an open-mine pit, "eliminates permanent vegetation existing in the areas" [111] and changes the existing landscape."[112] Moreover, the EIA states that "when the material remains in the storage for long periods, it can leach" to groundwater.[113]

61. Prior to operations, instead of obtaining the support of the project through an open and transparent exchange of information, Claimants continued to use deceitful tactics. For example, at the start of the project, SMCA

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[103] GSM Second Phase Report, p. 14 (**C-0742)** (Pedro Garcia, Exmingua's manager, states that the water consumption for the project would 154 cubic meters, but there is no indication if this is per day, per month, per year, but see p. 12 indicating 154.8 cubic meters per day from one well.
[104] Robinson Report, p. 2-3 (**R-0049**).
[105] Second Phase Report, p. 6 (**C-0742-ENG**).
[106] Second Phase Report, p. 7 (**C-0742-ENG**).
[107] MARN Inspection (October 30, 2017), p. 2 (**R-0243-SPA**); *See also,* MEM Inspection Report, p. 10, conducted on October 30, 2017 (**R-0281-SPA**) (Noting that there are no underground works, only a portal that allows access to one tunnel that was created for exploratory works).
[108] Second Phase Report, pp. 7 and 14 (**C-0742-ENG**) (The processing "will be 150 tons/day in relation to the 7 to 8 thousand tons are [sic] processed in the mining company Marlin.").
[109] Kappes Statement I, ¶ 109.
[110] Second Phase Report, p. 11 (**C-0742-ENG**).
[111] EIA, p. 340 (**C-0082-ENG**).
[112] EIA, p. 342, "Paisaje/Landscape" (**C-0082-ENG**).
[113] EIA, p. 337 "Underground Water/Agua Subterránea" (**C-0082-ENG**).

would hire four to six community members to go house to house and offer school scholarships and supplies. In return, they would ask the families to bring their children to play in front of the company's office in San Jose del Golfo so that it would appear that the project had community acceptance.[114] Once operations began, Exmingua's tactics led to confrontation and distrust rather than transparency in the information being provided as detailed below.

e. Claimants' alleged benefits to the community were minimal, preferring to aggressively mount a pro-mining campaign rather than invest in long-term sustainable social development

62. While Claimants argue that Exmingua provided "significant benefits to the neighboring communities and the region in general," [115] the record tells a different story. Any social programs created to provide health or educational benefits appear sporadic,[116] and any infrastructure projects appear to be minimal to non-existent in the direct area of influence.[117] The focus rather was on creating an information network to disseminate favorable information about the Project, without any clear vision on how to develop benefits for the project or how to distribute the benefits conferred.[118]

63. Claimants' budget for the project further supports this focus on information dissemination rather than on the development of social programs. In 2011, almost half the budget was spent on overhead,[119] and the remainder was spent mostly on providing "support" to strategic and institutional partners, including payments directly to MEM and the Municipality of San Jose del Golfo[120] as well as a payment to purchase a fuel pump and repair a police patrol car.[121] A minimal amount of less than USD 2,000 was spent on social support in the form of payments for "funerals" and payments to a "dental clinic."[122] In 2012, the focus continued largely on the dissemination of information regarding the Project and in creating community alliances. There were payments directly to community leaders and the municipality and "trainings with

[114] Sandoval Statement, ¶ 7.
[115] Claimants' Reply, ¶ 149.
[116] There is no indication that Exmingua continued its educational programs in 2014 or 2015. *See, e.g,* Consolidated Report of Social Responsibility (**C-0527**); Consolidated Report of Activities Carried out in the Field 2015, p. 2 (**C-0524**); Telma Garcia Statement, ¶ 29 (stating that her mother only received medication for *one* year).
[117] Exmingua Consolidated Report on Social Responsibility, pp. 6-28 (**C-0527**); Report on Activities carried out in the Field 2015, p. 2 (**C-0524**).
[118] SMCA Activities to be carried out until November 14, 2011 (**R-0236**).
[119] Oct-Nov 2011 budget allocated USD 18,262.47 to salaries, furniture, office rental, travel and vehicle expenses and office supplies. *See, e.g,* (**R-0242**).
[120] Email from Selvyn Morales to Daniel Kappes and David Croas ref. expenditures from October 10 to November 10, 2011. (**R-0242**).
[121] SMCA Activities carried out until November 14, 2011 (**R-0236)**.
[122] Email from Selvyn Morales to Daniel Kappes and David Croas ref. expenditures from October 10 to November 10, 2011. (**R-0242**).

salary"[123] as well as "hot dog parties and mine induction" events.[124]

64. The purpose of these trainings and hot dog parties appears to simply be a way to continue to disseminate project information while at the same time trying to gain support by paying information agents and providing refreshments in exchange for attendance.[125] Claimants allege that the hot dog parties were an opportunity for the community "to *learn more* about the *planned* mine."[126] These events appear to be unsuccessful. As CEDER noted in its 2013 report, these benefits of food delivery, medical days, and community celebrations were seen as tokens or patronage gifts by the community.[127] The budget line items fail to show any sustainable benefits conferred to the communities.

65. Once the blockade started, which Claimants were keen on ¨getting rid¨ of, Kappes entertained the idea of paying the opposition out of funds for social programs.[128] Regardless of Claimants attempts to distort Kappes' words,[129] there is no indication in the email that Kappes was against bribing those blocking the entrance.[130] The instructions he gives provides for this possibility, stating not to "agree to anything before discussing it" with him and that "any money we give them comes out of our general social program fund…"[131]

66. Claimants claim to have double-down on their social outreach efforts by hiring Centro para el Desarrollo Rural (CEDER),[132] who they claim was specialized in conflict-resolution.[133] But there is no indication that CEDER did much more than interview the various parties.[134] There is no evidence that they followed all the phases as set out in their January 2013 proposal.[135] CEDER's role appears to be more focused on

[123] Email from Selvyn Morales to Daniel Kappes and Ryan Adams dated October 13, 2012, attaching estimated budget for "extra activities according to what was discussed." (**R-0245**).
[124] Email from S. Morales to D. Kappes dated November 23, 2012 (**R-0284**); *see also,* Preliminary Report on the hot dog parties and mine induction (October 9, 2012) (**C-0712-ENG**) (including a series of photos with captions such as "people gathered to listen to the Project's information" and "people from La Choleña who are in training worked hard in the activity, many people showed up with their respective t-shirt"). The budget allocation for these hot dog parties included a funds for t-shirts and expenditures of Q10.50 per person in attendance. *See,* Email from S. Morales to D. Kappes dated October 12, 2012, attaching budget for hot dog parties (**R-0245**).
[125] *See, e.g.,* Report on Hot Dog Parties prepared by SMCA (**C-0712-ENG**) (noting that Ret. Lt. Silas Orozco was presenting the project, and "trained people worked hard during the activities, showing a strong spirit of belonging")
[126] Claimants' Reply, ¶ 155.
[127] CEDER 2013 Report, p. 20 (**C-0716-ENG**).
[128] Email from D. Kappes to S. Morales (SMCA) *et al*. dated March 11, 2012 (**C-0099).**
[129] *See* Claimants' Reply, ¶ 183.
[130] CGI Report ¶ 105.
[131] Email from D. Kappes to S. Morales (SMCA) *et al*. dated March 11, 2012 (**C-0099**).
[132] Ceder Proposal: Conflict Mediation and Community Relations Plan Tambor (Progreso VII) Project, January 29, 2013 (**C-0854-ENG**).
[133]Mendoza Yaquian Report, ¶ 36; *see also,* CEDER 2013 Report (**C-0716)**
[134] On January 29, 2013 and September 1, 2013, CEDER presented KCA-Exmingua with proposal of services to be provided. *See* Exhibits **C-0826** y **C-0854.**
[135] CEDER Propuesta de Servicios de 29 de enero de 2013 (**C-0854**).

carrying out a PR campaign.[136] As Mr. Kappes describes, CEDER was hired to launch "an extensive public awareness campaign, organizing a series of workshops…informing [the communities] of the benefits of the mine and addressing their concerns…".[137] In any event, there is no indication whether Exmingua followed through with the proposed communications and PR plan presented by CEDER in October 2013.[138]

67. Even in the years when the mine was in operations, there is no identifiable sustainable development in the community. In 2014, there were some minor road works performed, but most of the benefits were in the form of handing out metal roof sheets to families in villages outside of the area of influence.[139] Similarly, in 2015, it is hard to discern any sustainable benefits to the community. Exmingua stated that "it was a difficult year" and claims that coordination with local authorities to develop general actions for the benefit of the community were pending because of a change of local government.[140] Five years after having carried out its consultation process, Exmingua is still struggling to inform the population of its project[141]

68. Other mining projects in Guatemala, including those Claimants have chosen as comparators, were doing significantly more in terms of social development projects in the communities surrounding those projects. The two mining projects Claimants' used as comparators, Mina San Rafael and the CGN project carried out social programs that overshadow any efforts by Exmingua.[142]

f. Claimants' tactics only served to sow division in the community rather than to find consensus for a path forward

69. Regardless of any benefits that Claimants purport to have conferred on certain communities, the tactics employed by Exmingua and its contractors only served to further exacerbated the conflict. There were a number of occasions where Exmingua and its personnel used intimidation, threats, and violence in attempt to silence the members of the Pacific Resistance of La Puya ("La Puya"), and used strategies to pit

[136] Quarterly Report CEDER, October 1-11, 2013 (**C-0853**) (which outlines a PR campaign); *see also* CEDER 2013 Report, (**C-0716-ENG**) (which only refers to interviews made and an assessment by CEDER based on those interviews; there is no community development plan presented). *See also* Claimants' Memorial, ¶ 50 (which states that CEDER work between February and May 2014 was to hold meetings "*with a view* to establishing an open dialogue"— but there is no indication of further work on this front by CEDER)

[137] Kappes Statement I, ¶ 82.

[138] Quarterly Report CEDER, October 1-11, 2013 (**C-0853**) (which briefly outlines an educational PR campaign); There are no further quarterly reports presented on the record of these proceedings.

[139] *See, e.g.,* Exmingua Consolidated Report on Social Responsibility from July -December 2014 (**C-0527**) (indicating road ballasting in the village of Prados de San Pedro De Lagunilla, Drainage works in Village of La Lagunilla, and Delivery of Roof sheets to the villages of El Carrizal, Javillal, and San Antonio El Angel).

[140] Exmingua Consolidated Report, Social Responsibility January -December 2015, p. 4 (**C-0714-ENG**).

[141] *Id.* pp. 4-6 (**C-0714-ENG**) (finding that "it is evidence that the lack of knowledge on the part of the population about what is clean mining is one of the main elements of resistance.").

[142] *See,* Constitutional Court Decision in San Rafael Case, pp. 76-77(**C-0459**); Constitutional Court Decision in CGN case, pp. 65, 228 *et seq.*(**C-0496**). *See also,* Decision of Constitutional Court in Oxec case, pp. 64-67 (**C-0441**).

individuals in the community against each other.[143]

70. Personnel from SMCA (in many cases armed and uniformed) instructed members of the National Civil Police in an attempt to evict the community members on the evening of May 8, 2012.[144] Mr. Kappes described the situation as an attempt "to *force entry* with a convoy of twenty trucks carrying contractor supplies, supported by 150 national police," and conveniently claimed that while the newspapers reported violence, "there was no violence on either side."[145] This is a clear admission of the forceful tactics used.

71. In a June 2012 email, with the subject line "fun stuff," Daniel Kappes indicates that Radius is "getting a lot of pressure from the anti-mining groups" and that "[a]pparently Pedro [Exmingua's Manager] has passed along the idea (as he should have) that we are about to use *force* to break the blockade."[146] Radius apparently expressed to Mr. Kappes that "[t]hey want to hold off on opening the gate forcibly until they get a chance to get a few pro-mining groups involved who can publish our positive PR message – for example, that most of the people are in favor of the mine, etc."[147] At the end of the message, Mr. Kappes states that he told Radius that "we agree that swaying public opinion in our favor in advance of using any force, is our idea too—but we can't wait much longer to do this."[148]

72. Later that year, in November 2012, Exmingua organized individuals in "blue helmets" to break through the blockade.[149] Despite Claimants' assertion that it was peaceful,[150] Rt. Lt. Orozco, acting on behalf of Exmingua, led the group with the aim to threaten and intimidate those in opposition to the project as well as members of the press that were present.[151]

73. Videos of the event show Lt. Orozco yelling orders and enticing his followers through a megaphone while threatening reporters and community members.[152] In one rant, he yelled through his megaphone pointing to a specific journalist "Let them cut off the hand of this faggot, because if he continues recording it will be

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[143] *See, e.g.,* Email from D. Kappes to S. Morales and others dated July 19, 2012 (**R-0283**)
[144] *Mining Injustice through international arbitration ,* pp. 20-21 (**R-0130**); *see also* Photo of SMCA personnel along with PNC units (**R-0231**); Sandoval Statement, ¶ 14.
[145] Letter from Mr. Kappes to Bruce Williamson (US Embassy) dated May 14, 2012 (**C-0102-ENG**).
[146] Email from Daniel Kappes to S. Morales and R. Adams dated June 20, 2012 (**R-0247**) (emphasis added).
[147] *Id.*
[148] *Id.*
[149] Kappes Statement I, ¶ 81. *See also,* Email from S. Morales to D. Kappes and R. Adams attaching a report describing the "blue hat" brigade demonstration (**C-0112**).
[150] Email from S. Morales to D. Kappes and R. Adams attaching a report describing the "blue hat" brigade demonstration (**C-0112**).
[151] *The Military, the Mining Companies, and the freedom of expressions: Some lessons from the case of Silas Orozco,* Comunitaria Press (Oct. 20, 2013) (**R-0228**).
[152] YouTube Video, KCA Exmingua threaten members of the media in La Puya, November 22, 2012 (**R-0229**), *available at* https://www.youtube.com/embed/VZGamghY0Vc

him provoking that all this shit explodes right now."[153] He was eventually convicted for his actions.[154] His highly offensive and incendiary language was aimed at provoking conflict and division.[155]

74. An email, that preceded the events above, describes a "play book" outlined by Mr. Kappes in preparation for forcing the gate opening.[156] In that email, Mr. Kappes suggests that Exmingua needs to have a very active radio and newspaper campaign covering the event and that Exmingua needed to "publicize that there is violence happening" but to make sure "it does not come from us."[157]

75. On December 7, 2012, Exmingua again attempted to force open the blockade with the support of the national civil police.[158] Further violence ensued, and tear gas and batons were utilized, resulting in several women and children being injured.[159]

76. From the perspective of the community, there were also other incidents that raised suspicion and distrust. The community members of La Puya observed certain individuals that would purport to support them, and at the same promoted the use of violence against Exmingua.[160] La Puya rejected those tactics and had the feeling that those individuals were being purposefully sent by Exmingua to incite violence.[161] Members of La Puya would also receive flyers that were being distributed around the community which contained graphic language and insults aimed at disparaging the members of La Puya before the community.[162] The community also felt that these flyers were being distributed at the instruction of SMCA or Exmingua.[163]

77. Despite these tactics and Claimants' allegations to the contrary, the members of La Puya always maintained a policy of non-violence.[164] Knowing that Exmingua's aim was to provoke violence, the community always tried to remain peaceful in response.[165] Contemporaneous videos taken at the time show the distinction

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[153] *Id.*
[154] *The Military, the Mining Companies, and the freedom of expressions: Some lessons from the case of Silas Orozco,* Comunitaria Press (Oct. 20, 2013) (**R-0228**).
[155] *Id.*
[156] Email from D. Kappes to S. Morales and others dated November 10, 2012 (**R-0237**) (unfortunately the rest of the email was not provided by Claimants).
[157] *Id.*
[158] News Release*,* Guatemala Human Rights Commission, *Update from La Puya: New Alert as More Machinery Arrives,* (May 23, 2014) (**R-0046**); News Release, Gold Corp Out News, *Guatemalans Resist Invasion of North American Mines* (January 7, 2013) (**R0047**).
[159] News Release, Gold Corp Out News, *Guatemalans Resist Invasion of North American Mines* (January 7, 2013) (**R0047**).
[160] Sandoval Statement, ¶ 21.
[161] Sandoval Statement, ¶ 17; Oliva Statement, ¶ 18.
[162] Copies of flyers distributed to community members (**R-0215**); Flyers with Exmingua's logo (**R-0216-SPA**) **(**claiming that the opposition is "lying" to the community (p. 5); that the Project "protects the environment" and will not affect the "landscape" (p. 1); that there will "no environmental contamination" (p. 10))
[163] Sandoval Statement ¶ 17
[164] Sandoval Statement, ¶22; Camey Statement, ¶ 12; Garcia Statement, ¶ 14.
[165] *The Military, the Mining Companies, and the freedom of expressions: Some lessons from the case of Silas Orozco,* Comunitaria Press (Oct. 20, 2013) (**R-0228**); Gonzalez Statement, ¶ 13.

between the threatening tone of those in favor of the mine, with the singing voices of the community in opposition.[166] The video shows no indication of the community opposition being armed or threatening, which is consistent with the observations made by other third party observers in other instances.[167] They understood that these actions were to provoke them so that the mining company could later justify its violent or repressive actions as a response to a violent uprising from the community.[168]

78. Other acts of violence and unsubstantiated accusations against members of La Puya continued to undermine any possible social reconciliation. These included the shooting of Yolanda Oquelí,[169] a local community leader of the opposition, and a suppsedly accidental death of another supporter, Gregorio Catalan, who Exmingua accused of crimes along with other members of La Puya, but ultimately absolved of any liability.[170]

79. Despite Claimants' insistence that the members of La Puya were not peaceful, there was never any incident of damage to the mine or its property in the over nine years of community opposition. The judicial proceedings brought against members of La Puya by Exmingua's workers were seen by the community as a way to criminalize their peaceful resistance.[171] The instances where there were accusations made and charges brought against La Puya for threatening behavior or alleged "kidnapped" were ultimately determined to be without evidence.[172]

80. Eventually in the early hours of May 23, 2014, Exmingua succeeded in breaking through the blockade through the use of force.[173] This incident resulted in a number of injuries and caused a deeper rift and resentment against the Claimants' mining operation.[174]

3. Claimants' disregard for the law further fueled the social conflict

a. Claimants did not adequately consult the communities as part of the EIA process

81. Claimants acknowledge that they had an obligation to consult and claim to have complied with that

[166] *See, e.g.,* Video in Vimeo, *Hastigamiento en la Puya,* minutes 10-13*, available at https://vimeo.com/54258266*. (**R-0248)**.
[167] *See, e.g.,* Video *Hastigamiento en la Puya,* minutes 16-17*, available at https://vimeo.com/54258266* (**R-0248)**; Gonzalez Statement, ¶ 13.
[168] Sandoval Statement, ¶ 22; *The Military, the Mining Companies, and the freedom of expressions: Some lessons from the case of Silas Orozco,* Comunitaria Press (Oct. 20, 2013) (**R-0228**).
[169] Letter from Human Rights Ombudsman (December 20, 2012) (**R-0027**); News Release, Radius, *Radius Gold Updates on Recent Events at the Tambor Joint Venture, Guatemala* (June 20, 2012) (**R-0028**).
[170] Sandoval Statement ¶ 19; Juan Francisco Vasquez, *Member of the peaceful resistance "La Puya" Gregorio Catalán Morales dies*, Prensa Comunitaria Km. 169 (April 6, 2015) (**R-0249**).
[171] Sandoval Statement ¶ 19.
[172] *Id.;* Juan Francisco Vasquez, *Member of the peaceful resistance "La Puya" Gregorio Catalán Morales dies*, Prensa Comunitaria Km. 169 (April 6, 2015) (**R-0249**).
[173] News Release, *Violent eviction of the Pacific Resistance of La Puya*, PBI Guatemala (May 28, 2014) (**R-0238)**.
[174] Camey Statement ¶ 9; Sandoval Statement ¶ 27; Oliva Statement, ¶ 23.

obligation during the EIA Process. To carry out this process, Claimants allege to have consulted the community through the COMUDES and COCODES.[175] But their own documents belie that this was the case.

82. GSM failed to follow its own methodology during the EIA consultation process. The EIA sets out to "identify" and have a "meeting with each of the Community Development Councils [COCODEs] in the identified communities (La Choleña, Los Achiotes and El Guapinol)."[176] It also proposes to present the Project to the COMUDEs of the two municipalities. None of these things occurred.

83. Out of the three meetings held in the villages of Los Achiotes, El Guapinol and La Choleña, the attendance sheets reflect that COCODE representatives were only present for the meeting with the village of La Choleña in 2010. According to the attendance sheets,[177] the meeting at El Guapinol involved 21 individual community members, identified as "farmers" and the meeting a los Achiotes involved 11 community members, allegedly part of a not yet established COCODE.[178]

84. GSM recognized in its subsequent reports that it could not meet the methodology outline in the EIA. The Second Phase Report prepared by GSM observes that interviews with the local leaders of Los Achiotes "were not conducted" because it was "still in the process of forming the Community Development Council."[179] Similarly, the GSM observations indicate that "[i]n the case of Guapinol this process was not conducted either."[180] In other words, the only meeting held with an alleged COCODE was that in the village of la La Choleña.

85. In 2011, Exmingua appears to have conducted a second round of consultations with largely the same people, but this time Los Achiotes had allegedly formed a COCODE.[181] There was no meeting with a COCODE for El Guapinol.[182]

86. In any event, community members from La Choleña claim that in 2010 there had been no democratically elected leader of the COCODE at the time of the consultation.[183] Claimants' own consultant on social outreach confirms in December 2011 that formal leaders of COCODES "are designated by the mayor's

[175] Mendoza Report, ¶¶40-41.
[176] EIA, Annex 15, p. 845 (**C-0082-ENG**); EIA Amendments, Annex 7, p. 1181 (**C-0089-SPA-R**).
[177] EIA, Annex 15, Methodology, p. 845 (**C-0082-ENG**); same methodology provided in the later clarifications to the EIA, Annex 7, Methodology, p. 1181 (**C-0089-SPA-R**).
[178] EIA (Supplement), Annex 7, List of those attending meetings at Los Achiotes on February 9, 2010, pp. 1201-1202 (**C-0089-SPA-R)**
[179] Second Phase Report, p. 11 (**C-0742**).
[180] *Id.* (**C-0742**).
[181] EIA Amendments, Annex 7 p 1217 (**C-0089-SPA-R**)
[182] EIA Amendments, Annex 7 pp. 1218-1219 (**C-0089-SPA-R**)
[183] Sandoval Statement, ¶ 5.

office" and "often they do not represent the interest of the population…."[184]

87. As far as the COMUDEs are concerned, there is no evidence that all the required members attended the presentations made in San Pedro Ayampuc or San Jose del Golfo.[185] Moreover, there was no inclusion of Indigenous Advisory Councils in these meetings, considering that the population of the municipality was 67% indigenous.[186]

b. Claimants failed to obtain all the necessary permits from the project

88. Claimants certainly recognized at the time of developing the EIA that the construction of all the related infrastructure needed to carry out the mining operations would require, among other authorizations, a permit from the Municipality of San Pedro Ayampuc.[187] Despite this, Claimants failed to obtain a valid permit.

89. In their Reply, Claimants continue to allege that they obtained a valid construction license.[188] As proof, Claimants rely on a certification of the minutes from the Municipality of San Pedro Ayampuc (the "Certification")[189] and a subsequent receipt of a payment made over a month after this Certification[190] to allege that they had the proper construction permit to erect their processing plant, dormitories, storage room, office, bathrooms, etc. at Progreso VII.[191] Claimants' reliance on these documents is futile. As indicated in Guatemala's Counter Memorial,[192] there is no valid proof that Claimants obtained the necessary construction license from the municipality of San Pedro Ayampuc.

90. These proceedings are not the first to engage with the validity of the Certification or the existence of a valid construction permit. Upon the community's discovery that the Project did not have a valid construction permit, two assistant mayors of the communities of El Guapinol in San Pedro Ayampuc and El Carrizal in San Pedro Ayampuc filed an amparo lawsuit on October 22, 2014, requesting that the Municipality suspend

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[184] SMCA Report and PowerPoint Presentation dated December 9, 2011 (**C-702-ENG**).
[185] EIA Amendments, Annex 7, p. 1188-1193;1195-1196 (**C-0089-SPA-R**) (only indicating the presence of some COCODE representatives). Under Article 11 of the Law of Urban and Rural Development Councils (the COMUDE is made up of: a)the municipal mayor that coordinates; b) the trustees and councilors that the municipality determines c) the representatives of the COCODES, up to twenty (20), designated by the coordinators of the Community Councils for Development d)representatives of public entities with local presence; and) representatives of civil organizations that are invited to participate. *See also,* Camey Statement, ¶ 17 (explaining that the Presidents of the COCODES all form part of the COMUDE).
[186] EIA Table 63, page 271 (**C-0082-ENG**).
[187] EIA, Section 2.6.2, Construction Phase, p. 63 (**C-0082-ENG**).
[188] Exhibit **C-0092** purports to be *both* the construction license *and* the Minutes of the Municipal Council of San Pedro Ayampuc authorizing the issuance of the license.
[189] Kappes Statement II, ¶ 30 (citing to **C-0092**) as the construction permit, but also referring to it as the minutes of San Pedro Ayampuc Municipal Council Meeting dated 15 November 2011. *See* Reply Memorial, *Compare* fns 1031 and 1032.
[190] Receipt for payment of fee for construction license issued on December 21, 2011 by the Municipality of San Pedro Ayampuc to Exmingua (**C-0093**);
[191] Copy of document Claimants present as the purported valid construction license (**C-0092)**.
[192] *See* Counter Memorial, Section V.A.7, The mine lacked a valid municipal construction permit.

the construction works because there was no valid construction permit and to require that the required community consultations take place.[193] In this amparo proceeding, the Mayor of San Pedro Ayampuc's confirmed that there was no record of any document approving Exmingua's construction license in the relevant time period.[194] The Court analyzed the evidence submitted and found that the Certification did not coincide with the official books of the municipality. In other words, there was no act approving the construction license, and therefore the Certification referred to an inexistent document or act.

91. Unsurprisingly, the Court declared that Exmingua did not have a valid construction permit and ordered the Municipality of San Pedro Ayampuc to suspend all construction work until the consultations are conducted pursuant to the Municipal Code and Exmingua obtains a construction license.[195] As a result of the decision issued by the Third Court of First Instance in Civil Matters of Guatemala,[196] the Prosecutor's Office of Administrative Infractions initiated an investigation for the alleged abuse of authority and failure comply with the duties of a public official. [197]

92. Following a similar pattern of flouting the law, Claimants ignored the Court's decision, claiming that construction had already been completed so there was nothing to suspend at the time of the decision.[198] But community members[199] and other independent observers[200] did witness what appeared to be construction works after the issuance of the decision. In any event, there was never an attempt by Claimants to obtain a valid construction permit, even *ex post facto*, nor any intent to ensure that the required consultations took place as required by the Municipal Code.[201]

93. Independent of the court's decision, the subsequent investigations promoted by both the Prosecutor's

[193] Amparo Complaint submitted by the Assistant Mayors, File 01050-2014-00871, dated October 21, 2014 (**R-0269**).
[194] Judgment of the Third Civil Court of First Instance of Guatemala, issued on July 13, 2015, File 01050-2014-00871, p. 3 (**R-0064**) (Mayor submitted that there was no record of an approved construction license in the time period between November 4, 2011, and January 12, 2015, and between January 16, 2012, and March 14, 2012).
[195] *Id*. page 32 **(R-0064)**.
[196] Judgment of the Third Civil Court of First Instance of Guatemala, issued on July 13, 2015, File 01050-2014-00871, p. 32 ("Notify the Prosecutor's Office to initiate the respective investigation to establish whether a criminal infractions was committed based on Minute 45-2011of the Municipal Board of San Pedro Ayampuc, Guatemala Department that was submitted by Exploraciones de Guatemala, S.A") (**R-0064**).
[197] Judgment of the Third Civil Court of First Instance of Guatemala, issued on July 13, 2015, File 01050-2014-00871, p. 32 (**R-0064**)
[198] *Id. See also* Dispatch of Verification of Compliance with Precautionary Measures carried out by the Justice of Peace of San Pedro Ayampuc (August 10, 2015), p. 2 **(R-0119)**.
[199] Sandoval Statement, ¶ 29; Oliva Statement, ¶25.
[200] Gonzalez Statement, ¶ 21; Sentencia del Juzgado Tercero de Primera Instancia Civil de Guatemala, dictada el 13 de julio de 2015, Expediente 01050-2014-00871, pág. 32 (**R-0064**).
[201] *See* Municipal Code, Articles 63 and 65 (**RL-0301)**.

Office[202] and the Office of the General Controller of Accounts ("GCA")[203] revealed a series of irregularities that further undermine the validity of the Certification and the significance of the subsequent payment made.

94. *First*, the signatures on the document do not pertain to the individuals identified in the document. The Municipal Secretary at the time, Ms. Vilma Irlanda Zavala Rosales, denies that the signature reflected in the document is hers. A look at the Spanish version of the construction permit there is an "x" located before the signature which indicates that someone is signing on behalf of someone else. [204] The issue here is that there is no record that the person signing was properly authorized to sign on behalf of the Municipal Secretary.

95. *Second*, the document contains reference to having received payment for the permit,[205] when in fact no payment was allegedly made until December 21, 2011.[206] There is also no indication that the payment received in December 2011 was actually linked to the purported issuance of a permit in November 2011. The fact that this payment was received in and of itself provides no support that Claimants had a valid license.

96. [redacted] Various requests have been made to the municipality and the municipality consistently maintains that no construction permit file exists for the Project.[208]

97. *Fourth*, Claimants never presented to the municipal authorities the construction plans that were allegedly submitted with the application for the construction permit and later provided by Claimants during the disclosure phase in these proceedings. [209] There is no record in the municipality of those plans and these plans were never presented as evidence in the underlying court proceedings.[210] They also fail to match any

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[202] [redacted] p. 2 (**R-0270**).
[203] Report of the Controller General of Accounts dated September 30, 2021, p. 29 (**R-0271**).
[204] [redacted] p. 2 (**R-0272**)
[205] "Construction Permit – Minutes of San Pedro Ayampuc Municipal Council Meeting" ("Certification") **(C-0092)** (stating that authorization is granted "proving payment of the License fee at the Municipal Treasury").
[206] Kappes Statement II, ¶ 30.
[207] [redacted] p. 2 (**R-0270**).
[208] *Id.*
[209] *Compare* the application for a construction permit provided by Claimants during the disclosure phase in response to Request No. 44 (**R-0273**) *with* **C-0091** presented as the request for construction filed by Exmingua on November 8, 2011.
[210] Report of the Controller General of Accounts dated September 30, 2021, p. 14 (**R-0271**).

plans contained in the EIA.[211] It is beyond curious that these plans appear only now.

98. [redacted].[212]

99. Claimants disregard for the court's order suspending construction was so egregious that 12 U.S. Representatives wrote to the President of Guatemala, urging him to act to ensure Claimants' respect of the rule of law. In the letter, the U.S. representatives described the situation as follows:

> KCA and EXMINGUA were given 15 days to cease construction work, however, mining operations have continued. Throughout August and September, these ongoing operations, a direct violation of the July injunction, have been well documented. Residents affected by the project have been peacefully protesting at the mine entrance since 2012, and have been the victims of intimidation and abuse, including an assassination attempt against La Puya community leader Yolanda Oquelí.[213]

100. The U.S. Representatives requested, among other things, that President Aguirre "ensure that KCA and EXMINGUA immediately comply with the July 15, 2015 court ruling and cease all illegal operations" and that he also ensure that "a fair and transparent Environmental Impact Assessment is completed."[214]

c. Claimants failed to abide by their environmental obligations

101. Claimants allege that their environmental practices were "more precautionary than usual" and that it took "its obligations seriously from the outset of its activities."[215] This is simply not correct.

102. *First,* Claimants made a series of representations and promises in their EIA for which they fell short as Guatemala has already established in its Counter-Memorial. Claimants repeatedly mentioned that they would "implement the best environmental management practices"[216] and that the project "will be developed according to mining and environmental management standards that are accepted at international *and* national level."[217] Despite these promises, the Project was not developed to these standards as contemporaneous documents and Guatemala's experts show.[218]

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[211] EIA, p. 664-570, Annex III (**C-0082-ENG**).
[212] [redacted] 2 (**R-0274**)
[213] Letter from US Congressmen addressed to President Alejandro Maldonado Aguirre dated October 26, 2015 **(R-0066)**.
[214] *Id*.
[215] Claimants' Reply, ¶¶ 135-136.
[216] EIA, p. 46 (**C-0082**).
[217] EIA, p. 59 (**C-0082-ENG**). *See also,* Section 12.3 at p. 437 ("our activities will be planned and executed with the highest standards of environmental and social management").
[218] *See* SLR II Report, Annex II; Claimants only state that "the EIA complied with the *spirit* of these standards and principles." *See* Claimants' Reply, ¶¶ 71.

103. *Second*, Claimants disregarded a significant number of obligations that were conditions of their environmental license. Five months after operations had begun, an inspection of the site and relevant documentation revealed that Exmingua had failed to comply with almost 50% of its environmental obligations.[219] Claimants main criticism is that Guatemala made the assertion in its Counter-Memorial without citation to any document.[220] But as Claimants acknowledge the February 2015 MARN found environmental breaches.[221]

104. In response, Claimants assert that they took their environmental obligations seriously from the start and that in 2012, shortly after construction began, they hired a sixteen person team to ensure environmental compliance.[222] In support, Claimants cite to the contract to develop the Santa Margarita EIA and the team that allegedly carried out the EIA work for both Santa Margarita and Progreso VII.[223] There is no indication in those documents that the team mentioned in the EIA contracts continued to work on environmental issues after the license had been issued in 2011.

105. Similarly, Claimants assert that they hired an independent consultant, ARNC to monitor water and air quality, as well as noise pollution, around the Project site, and that it determined that Exmingua was in compliance.[224] This is at the very least misleading. Claimants only point to two reports that show any monitoring, which occurred on June 24 to 27, 2014[225] and September 17-19, 2014, respectively. There is no indication that here had been any subsequent monitoring once operations commenced in October 2014.[226] The only other document Claimants point to is a "proposal" to do work in April 2016, but no indication that the biological monitoring was carried out.[227] This is hardly a basis to allege compliance since no monitoring appears to have been caried out once operations commenced as required.[228]

106. During the construction phase, Claimants also disregarded their obligations to provide advance notice

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[219] MARN Technical Inspection Report dated February 23-27, 2015 (**R-0105**); *See also,* Exmingua's List of Findings of the MARN and MEM inspections (**C-0699**).
[220] Claimants' Reply, ¶ 349.
[221] Claimants' Reply, ¶¶ 349-350.
[222] Claimants' Reply, ¶ 349.
[223] Kappes Statement II, fn. 49; Claimants' Reply, fn. 1055.
[224] Claimants' Reply, ¶ 349.
[225] ARNC Report on Water and Air Monitoring for the Second Trimester (July 2014), p. 1 (**C-0844**); ARNC Report on Air, Sound, and Water **(C-0845)**
[226] Claimants' Memorial, ¶ 60 (Claimants allege to have started open-pit mining operations in October 2014); Gonzales Statement, ¶ 22 (MARN indicated that they had not been submitting reports periodically or they were submitted incomplete or incorrectly).
[227] Email from H. Vaides to D. Kappes, attaching Proposal of Dr. Hix (April 19, 2016) (**C-0843-ENG)**; *see also,* MARN Inspection February 23-27, 2015, XXII, p. 11 (**R-0105-SPA**)
[228] As ARNC admits in its 2014 report, monitoring was carried out "in compliance with the environmental commitments acquired[sic] before MARN." In other words, Exmingua needed to carry out monitoring to comply with its environmental commitments set forth in the EIA. (**C-0844) (C-0845)**.

when bringing in heavy machinery and equipment, to avoid and minimize nuisance from noise and fine particulate.[229] According to Exmingua's own geologists, machinery had been entered "on inappropriate days (Sundays, when all people are in the area)."[230] The inspector also noted the lack of a clear route for heavy machinery or a schedule to avoid disruption to the communities and failure to maintain the material and trucks wet to avoid dust particles.[231]

107. Most of the other breaches included basic precautionary measures such as ensuring a perimeter fence around the tailing ponds;[232] ensuring security measures to avoid erosion or a collapse of the slope pits in and around the area of exploitation; [233] properly disposing of waste including proper storage of toxic chemicals, measures to contain spills;[234] building proper areas to store the sediments that avoid contamination to surface waters or measures to control water run-off;[235] and having proper safety equipment for its workers or proper safety training.[236] On this last issue, there seems to be a complete lack of concern for basic measures to ensure workers' safety. Most of the safety measures and required trainings were not complied with.[237] There is no indication why Exmingua could not have had these measures in place at the start of mining operations.

108. Claimants also disregarded their reporting obligations.[238] For example, there was no information on the biological monitoring presented in their latest report.[239] There was incomplete information on the medical assistance allegedly provided to the nearby communities;[240] no recent mining data had been provided;[241] no documentation of issues as a matter of course, and [242] no monitoring of the sub-soil.[243]

109. Some of the most serious violations involved lack of compliance with mitigation measures as established in the Environmental Management Plan to avoid water contamination. There was no monitoring of the

[229] MARN Environmental Impact License (May 26, 2011), Section (2)(viii) p. 7 (**C-0084**)
[230] CEDER 2013 Report, p. 9 **(C-0716)**.
[231] MARN Inspection February 23-27, 2016, numeral VII p. 8, numeral 12 p. 18 (**R-0105**).
[232] MARN Inspection February 23-27, 2015, numeral XXIV, p.20 (**R-0105-SPA)**.
[233] MARN Inspection February 23-27, 2015, numeral XI, p. 8 (**R-0105-SPA**).
[234] MARN Inspection February 23-27, 2015, numeral XIII p. 9, numerals 34 and 36, p. 21, numeral 63 p. 26, numeral 72 p.28 (**R-0105-SPA**).
[235] MARN Inspection February 23-27, 2015, numerals 1 through 5, p. 17 (**R-0105-SPA**).
[236] *Id.* numerals 9 and 15, p. 18, and numeral 20 p. 19, numeral 59 p. 25, numeral 61 p. 25, numeral 62, 63 and 66 p. 26 (**R-0105-SPA**)
[237] MARN Inspection February 23-27, numerals 109 to 116 (pp. 34-35 (**R-0105**).
[238] *See, e.g.,* MARN Inspection, February 23-27, 2015, numerals 48 to 51 p. 23 (**R-0105-SPA**).
[239] MARN Inspection February 23-27, 2015, numerals XVII, XIX, and XXI p. 10-11 (**R-0105-SPA**).
[240] MARN Inspection February 23-27, 2015, numeral XXIV, p. 12 (**R-105-SPA**)
[241] MARN Inspection February 23-27,2015, numeral XXV, p. 12 (**R-105-SPA**).
[242] MARN Inspection February 23-27, 2015, number 55, p. 24 (**R-105-SPA**)
[243] *Id.* at number 88, p. 30 (**R-0105-SPA**).

waters or sludge in the tailing ponds to determine whether they needed treatment, [244] a lack of sedimentation pits to prevent sediments from reaching water sources,[245] no drainage systems to control water run-off,[246] and no neutralization of oxides and acids present in the sediments.[247]

110. Contrary to Claimants' assertion, a follow up inspection completed ten months later revealed existing and additional violations.[248] In the November 2015 inspection report, it was discovered that the project also lacked a permit from MEM for the fuel tank and "that leaks were observed without containment measures."[249]

111. Claimants conveniently fail to identify the non-compliances identified as a result of the November 2015 inspection. Most of the observations reiterated the continuation of the previously identified breaches. It was noted that there were no bypass or run-off channels installed or other measures to prevent erosion,[250] that the central pond has a propensity for overflowing and the tailings are filtering through to the ground;[251] that solid waste was not being disposed of correctly as well as no measures of contention or spill prevention of toxic chemicals observed.[252]

112. In February 2016, MARN initiated sanction proceedings against Exmingua arising from its environmental lack of compliance as identified in *both* the February 2015 and November 2015 inspections. [253] Claimants' dispute this point on the basis that the one-page document cited by Guatemala "had no indication that it was ever provided to Exmingua"[254] that "no hearing in this alleged administrative proceeding was ever held."[255] Despite Claimants' desire to wish away these proceedings, the proceedings are ongoing.[256] Exmingua was notified on May 2, 2016[257] and has participated in these proceeding and

[244] *Id.* at number 120, p. 36 (**R-0105-SPA**).
[245] *Id.* at number 2, p. 17 (**R-0105-SPA**).
[246] *Id.* at number 1 and 3 p. 17 (**R-0105-SPA**).
[247] *Id.* at number 4, p. 17 (**R-0105-SPA**).
[248] *See generally,* MARN Inspection November 26, 2015, p. 20 (**C-0629-ENG**) Claimants attempt to make a big deal about Guatemala's omission of this inspection in its Counter-Memorial. There is nothing disingenuous here. Both the February and November Inspection report formed the basis of the administrative proceedings commenced against Exmingua in February 2016. The November Inspection rather further supports Guatemala's position, undermining any assertion that Guatemala's omission was misleading.
[249] MARN Inspection November 26, 2015, numeral 4.3, p. 20 (**C-0629-ENG**)
[250] *Id.* p. 3 (**C-0629-ENG)**
[251] *Id.* p. 7 (**C-0629-ENG)**.
[252] *Id.* p. 9 (**C-0629-ENG)**.
[253] MARN Document No. 475-2016/DCL/EOGP/mirf, dated 24 Feb. 2016 (**R-0187**).
[254] Claimants' Reply, ¶ 147.
[255] Claimants' Reply, ¶ 350.
[256] MARN Case File 1043-2015, Resolution No. 01-2021/DCL/KOCR mh, notified August 13, 2021 (**R-0295**)
[257] MARN Case File 1043-2015, Notification to Exmingua, p. 249 (**R-0292**).

sought relief,[258] which was rejected on procedural grounds.[259] Although Exmingua has not yet been fined, this is only because the final resolution that will establish the fine is pending issuance.[260]

113. Claimants cite to Exmingua's own self-assessment reports allegedly made in April and May 2016[261] to address issues raised by *MEM* to confirm that they largely complied with the issues identified by MARN.[262] In any event, those reports continued to show deficiencies a year after MEM's inspection,[263] and in the months and years that followed Exmingua continued to breach its environmental obligations.

114. A few weeks after Claimants stopped their illegal exploitation, MEM emphasized that it was necessary, despite the suspension, that Exmingua continue to carry out maintenance and mitigation measures immediately.[264] MEM noted that maintenance works and implementation of preventative measures in the area of the tunnel, exploitation areas, storage yards, sediment pits, tailings, dumps needed to be performed to prevent collapse.[265] Stockpiles were not covered, chemicals were not properly stored creating risks for spills, roads and drainage were in need of immediate maintenance,[266] solid waste was continuing to pile up posing a risk to the health and safety of the environment.[267] The possibility of rupture and contamination of the water table from the material collected in the tailing ponds is the most serious risk observed in late 2017.[268]

115. The continuing inspections reports further justify the concerns the community had with the Project. A 2017 inspection report indicated that the almost overflowing tailing ponds had to be pumped out to avoid a serious risk.[269] Any breach of the tailing ponds would cause a potential health crisis considering that

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[258] MARN Case File 1043-2015, Request for Revocation, pp. 250-256 (**R-0293)**.
[259] MARN Case File, Resolution No. 0001-2016/SASM/mecv/cs, notified to Exmingua June 13, 2016 (**R-0294**).
[260] In these proceedings, there is no hearing as all submissions are made in writing, as evidenced by Exmingua's own defense and requests for relief in the exercise of its rights. *See* MARN Case File. 1043-2015, Exmingua's Briefs, pp. 275-277, 317 (**R-0296**).
[261] *See* Claimants' Index indicating 2016 dates for Exhibit **C-0847** and **C-0848**. The exhibits themselves do not show what date they were drafted.
[262] Exmingua's Draft List of Issues dated April 29, 2016 (**C-0847-ENG**); Exmingua's Draft List of Issues dated May 25, 2016 (**C-0848-ENG**).
[263] Both Draft Reports refer to the date of report as March 12, 2015; Exmingua's Draft List of Issues (April 29, 2016), pp. 5, 11, 28 (**C-0847-ENG**) (It is noted that the perimeter mesh fence is not yet installed; safety signaling missing; lack of measures to handle collecting liquid waste; lack of security measures around the largest tailing pond, El Jícaro); Similar issues noted in the Exmignua's Draft List of Issues (May 25, 2016) pp. 4, 14, 28 (**C-0848-ENG**).
[264] MEM Inspection Report June 6, 2016, p. 19 **(R-0279)**.
[265] MEM Inspection Report June 30, 2016, p. 8 **(R-0280-SPA)**.
[266] Mem inspection Report conducted on October 30, 2017, pp. 10, 14, 20 **(R-0281)**.
[267] Mem inspection Report conducted on October 30, 2017, pp. 27 **(R-0281)**.
[268] Mem Inspection Report conducted on October 30, 2017, p. 24 **(R-0281)**.
[269] MARN Inspection Report, August 22, 2017, p. 3 (**R-0297-SPA**) (observing the risk of spill over from tailing ponds, and a constant run-off that they were unable to source and that "in the worst of cases could mean a fissure from El Jicaro tailing pond").

samples taken in 2016 showed that the arsenic in at least two of those tailing ponds was "extremely high," citing that in one it was 245 times the applicable limit and the other tailing pond was approximately 70 times the limit.[270] It was therefore noted, that any spillage or overflow would pose a huge health risk, considering that arsenic is considered a carcinogen.[271]

116. Over six years later, Exmingua continues to be in breach of its environmental obligations. A recent inspection conducted in September 2021 reveals that Exmingua is failing to put into place the required mitigation measures.[272] These violations, among other things, includes a lack of proper drainage systems along the roadways; lack of proper storage of chemicals; piled up waste; and lack of contained measured for piled up mined material.[273]

d. Claimants failed to comply with the orders of the Guatemalan courts

i. Claimants continued construction work after being ordered to stop

117. After having received an order to halt construction on July 15, 2015, Claimants cavalierly continued operations in complete defiance of the court order. An independent reporter for CGTV recorded Claimants' machinery conduction construction works after the order was issued.[274] MEM official viewing that video confirmed that in effect Exmingua was carrying out construction works.[275] Other news outlet similarly reported that construction works continued.[276]

118. Community members felt dismayed at Claimants' failure to abide by the order, and the fact that no consultation of the community had taken place in accordance with the Municipal Code.[277] Kappes' response after the issuance of the Court's decision was simply to carry on with operations since he claimed

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[270] Letter from Department of Regulations on Health and Environmental Programs to Office of the Prosecutor (**R-0246**)
[271] *Id.*
[272] MARN Inspection Report (Sept. 1, 2021) (**R-0285**).
[273] *Id.*
[274] Gonzalez, ¶ 21; Sandoval, ¶ 29 ("Exmingua continued constructing the largest tailing pond they have"). Video of CGTN America, "La Puya Activists Rise Up to Oppose Guatemala Gold Mine" January 15, 2016, *available at* https://www.youtube.com/watch?v=sN2M4oiDpoo (**R-0217-SPA/ENG**).
[275] *Id.*, Minute 3:09-3.11 (**R-0217-SPA/ENG**) (Reporter: "I mean, those machines were working all day yesterday, so they are actually building? MEM Interim-Director: "Yes, obviously, they are settling the terrain to build some sort of building. It has nothing to do with the mine."); *see also,* Gonzalez Statement, ¶ 21.
[276] *Obnoxious Protestors Will Not Make Guatemalan Gold Mine Go Away CEO Says,"* VICE NEWS, August 25, 2015 (**R-0061**). ("Long-standing tensions between the firm and the community were reignited this weekend with the arrival of more construction equipment and materials to the site. Early on Monday, anti-riot units from the Guatemalan National Police were deployed to protect the construction materials.").
[277] Municipal Code, Article 63: "Neighbor Consultation: When the importance of a matter advises the convenience to consult the opinion of the neighbors, the Municipal Council, with the vote of two thirds (2/3) of the total of its members, may agree that such consultation is held taking into account the modalities indicated in the following articles" *See also* Article 65: "Consultations with the indigenous communities or authorities of the municipality. When the nature of a matter affects in particular the rights and interests of the indigenous communities of the municipality or of their own authorities, the Municipal Council will carry out consultations at the request of the indigenous communities or authorities, even applying criteria specific to the customs and traditions of indigenous communities" (**RL-0301**).

that construction had already been completed.[278] But as previously mentioned, this was contradicted by observers on the ground.

ii. Claimants continued illegally exploiting the site after license was suspended

119. Claimants admit to having continued to exploit the mine for over six months after the court's order in November 2015 and almost three months after MEM issued its resolution suspending the license.[279]

120. Contemporaneous reports also evidenced continued operations, in a manner aimed to defy the court's orders and MEM's resolution suspending the license. The authorities report having conducted site visits where the mining equipment appeared to be idle during the visit, only to be restarted upon the inspectors leaving the site.[280] MEM also noted bags of gold concentrate stamped with recent production dates.[281]

121. There were also numerous reports of helicopters seen flying in fuel and taking out gold concentrate.[282]

[redacted][283][redacted][redacted][redacted][284].

122. Claimants' continuous activities in the mine were also confirmed by administrative and criminal investigations. On April 28, 2016 (more than a month after the issuance of MEM's 1202 Resolution formally suspending Exmingua's operations) a joint commission of MEM, PDH and MARN went to the mine to confirm if the mine was still operating. In that inspection, the authorities were informed by Exmingua's employees that they were only instructed to suspend operations that very same morning, but

[278] Decision of the Third Civil Court of First Instance, dated July 13, 2015 Civil Case No. 1050-2014-871 (**R-0064**). *See also,* Office of Verification of Compliance with Precautionary Measures carried out by the Justice of the Peace of San Pedro Ayampuc, dated August 10, 2015, p. 2 (**R-0119**).

[279] Claimants' Reply, ¶ 13. Claimants exploited the mine until May 2016.

[280] MEM Inspection May 2, 2016, p. 10 (**R-0121-ENG**) ("a member of the protesters and one of the representatives of COPREDEH, reported that after the commission that carried out the inspection left the mine facilities, they resumed general operating activities. They told us that at 500 meters, on the dirt road that leads from La Puya to San Pedro Ayampuc, it could be clearly observed that the activities had been restarted, so we proceeded to verify the information, confirming that the work was indeed within the mine facilities restarted normally")

[281] MEM Inspection May 2, 2016, p. 10 (**R-0121-ENG**)

[282] Sandoval Statement, ¶ 30, Oliva Statement, ¶ 28; *See also,* photos posted in Twitter March 20, 2016, *available at* https://twitter.com/cmiguate/status/711582528172220417?lang=es (**R-0286**); *see also,* Twitter post reporting seeing 4 different helicopters on March 20, 21, 22, 25, 27 and 29 with concentrate being taken out (**R-0286**).

[283] [redacted]

[284] [redacted].

that they were unaware if they would restart operations later on. MEM's report of the inspection concluded with a formal declaration noting that the mine was still operational and ordered the opening of an administrative procedure to sanction Exmingua for its breach of Resolution 1202.

123. [redacted][285][redacted][286]

124. As a result, administrative proceedings were commenced against Claimants and ultimately Claimants were fined for having violated the suspension of exploitation. Claimants [redacted].[288] [redacted][289]

B. The community opposition grew out of local concerns, not outside influences

1. The Peaceful Resistance of La Puya represented local residents and was peaceful

125. There is no support for Claimants' insistence that the opposition came from outsiders.[290] Contemporaneous reports and third-party observers consistently have identified the opposition as community residents living in the areas around the mine site.[291] There is no indication that the Peaceful Resistance of La Puya was initiated by outsiders or NGOs. To the contrary, it was a grassroots community effort led by concerned local citizens, including residents from La Choleña, El Guapinol, El Carrizal and others.[292]

126. While local and other NGOs may have provided occasional moral support to the opposition,[293] there is

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[285] [redacted] (**R-0287**).
[286] [redacted]
[287] MEM, Administrative Resolution No. 3991, dated October 22, 2016 (**R-0275**).
[288] [redacted] (**R-0300**).
[289] [redacted]
[290] Mendoza Report, ¶ 42 *et seq.*
[291] Video of CGTN America, "La Puya Activists Rise Up to Oppose Guatemala Gold Mine" January 15, 2016, *available at* https://www.youtube.com/watch?v=sN2M4oiDpoo (English/Spanish) (**R-0217**); Gonzalez Statement, ¶ 12. *See* also Photos of La Puya (**R-0276**).
[292] Garcia Statement, ¶¶ -8-9; Guaré Statement, ¶ 9.
[293] Sandoval Statement, ¶ 12; Oliva Statement, ¶ 14.

substantial documentation and witnesses that supports that the opposition was comprised of locals.[294] In any event, local NGOs like Madre Selva and CALAS[295] are undeniably part of the local community and therefore key actors that Claimants should have considered in developing their Project.

127. Exmingua's own documents support that it was local people who formed the opposition.[296] Mr. Kappes in addressing the blockade situation to the U.S. ambassador to Guatemala called them "simply local people."[297] In an earlier letter, Mr. Kappes also recognizes opposition from the urban center of San Pedro Ayampuc.[298]

128. Claimants' insistence that it was NGO driven relies on the simple fact that some of the banners photographed at the site had NGO logos and that press releases issued by NGOs supported the Resistance.[299] All of these signs of support post-date the establishment of the local opposition, simply showing that the movement was recognized by local and other NGOs who expressed their support. And some of the documents Claimants cite even support that the opposition was not created by an NGO.[300] None of these documents changes the fact that the opposition was local.

2. <u>The local community had valid concerns with Claimants' mining operations</u>

129. Unlike other mining projects, Progreso VII is in very close proximity to the affected communities and less than 30 km (20 miles) from Guatemala City.[301] It is located about 1.2 km (0.75 of a mile) from the village of El Guapinol,[302] and the licensed area surrounds the villages of La Choleña and the municipal center of San Jose del Golfo.[303] Other villages are located within a 7km radius (just over 4 miles) away although not classified as part of the Project's direct area of influence, despite their geographical

[294] Garcia Statement, ¶¶8-9; Guaré Statement, ¶ 9; Gonzales Statement, ¶ 12.
[295] Claimants Memorial, ¶ 41 (refers to only local NGOs, yet in the Reply, Claimants allege that Mining Watch Canada was also involved because of the appearance of their logo in one banner photographed. *See* Claimants' Reply, ¶ 77.
[296] *See, e.g.,* Progreso VII- Summary of Work 2012 submitted by Daniel W. Kappes, p. 2 (**C-0521**) (identifying opposition as "*local people* associated with groups who are opposed to the development of mining in Guatemala").
[297] Letter from Daniel Kappes (KCA) to Bruce Williamson (U.S. Embassy in Guatemala) dated May 24, 2012, point 8 at p. 3 (**C-0106**).
[298] Letter from D. Kappes to B. Williamson (U.S. Embassy) dated May 14, 2012 **(C-0102)** (citing that the "people in the largest town in the area – San Pedro Ayampuc, are somewhat negative because they are farther away and we have not spent a lot of time there").
[299] *See* Claimants' Reply, ¶¶ 74-77 (relying on photographs of banners **(C-1032) (C-0829)** or press releases issued by NGOs on their respective webpages (**C-0831**) (**C-0832**)(**C-0833**). Some of the press releases did not have anything to do with La Puya. *See, e.g.,* **C-0821**; **C-0823**; **C-0825**.
[300] *See, e.g.,* Madre Selva News Release "A little History" dated August 12, 2020 (**C-0823-ENG**) (there is no mention of Claimants' Project in the list of projects Madre Selva lists as having participated).
[301] EIA, p. 54 **(C-0082-ENG)**.
[302] *Id.*, p. 46 (**C-0082-ENG**).
[303] *Id.*, p. 54 (**C-0082-ENG**); *See also,* Map of Deposits **(C-0049)**.

proximity.[304] The municipality of San Pedro Ayampuc, where the Project is located, is almost 67% indigenous.[305]

130. Although largely agricultural,[306] this part of Guatemala is located in a dry belt and suffers from increasing drought,[307] although at times is it prone to a very high risk of flash floods.[308] A fault also runs along the area making it prone to seismic activity.[309]

131. Water contamination and availability are among the main concerns for this largely agricultural area. Exmingua presented a threat to their agricultural way of life and their water sources. Listed among the biggest concerns for the community are the lack of water and drought.[310] Residents receive very little water for daily use.[311] Mining tends to require enormous amounts of water, which is seen as a threat not only to water availability, but also a source of contamination.[312] While the more urban centers of the municipalities obtain water from mechanical wells, some of the more rural villages such as Los Achiotes and El Guapinol obtain water from capturing springs.[313]

132. The communities felt that Exmingua was not taking its environmental obligations seriously, an eminently reasonable conclusion in light of the consistent disregard for regulations, court orders, and administrative findings illustrated above. Independent reviews of the EIA completed by two experts, Robert Robinson and

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[304] Telma Garcia Statement, ¶ 4 (noting her village of Prados de San Pedro de Lagunilla is approximately 7 km away); Rivera Statement, ¶ 3 (stating that his home is 3km from the mine); Carraza Muralles Statement, ¶ 3 (noting that his village of Lo De Reyes is located 7 km away from the mine) EIA did not include the villages of Lo De Reyes and Prados de San Pedro de Laguinilla in the EIA as well as other villages such as el Carrizal which is only 5km away. *See* Oliva Statement, ¶ 1; EIA p. 269, Table 61 (**C-0082-ENG**); Gonzalez Statement, ¶ 11 (observing that the mine was located very close to community members' homes).

[305] EIA, Table 63, p. 271 (**C-0082-ENG**).

[306] EIA, Section 6.1.1., p. 246 (**C-0082-ENG**) ("In the area surrounding the Project area, agriculture has been developed subsistence [sic]…")

[307] *See, e.g., Fifth Straight Year of Central American Drought Helping Drive Migration,* Scientific American (December 23, 2019) (**R-0230**).

[308] EIA, p. 414, Table 80, p. 292 Table 81, p. 297 (**C-0082-ENG**); *see also* EIA, p. 246 (**C-0082-ENG**) (noting that "[i]n 2009 it was a dry year and due to the drought, there was a loss of crops").

[309] EIA, pp. 412-413 (**C-0082-ENG**) (The risk of earthquake "affecting the project facilities is greater than in the rest of the country, so you should consider this aspect when making the contingency plans. The consequences of a seismic event of moderate to high magnitude can be serious. An earthquake that affects the facilities and/or camps of the project may result in loss of life and /or serious damage to facilities." *See also,* EIA, p. 242 (C-0082) ("the mine has a high potential to be affected by earthquakes") Moran Report p. 6 (**R-0051**) ("The Progreso project is located in one of the most seismically-active regions in the western hemisphere, yet the EIA authors have failed to present a detailed history of the actual earthquakes that have been recorded in the region").

[310] Sandoval Statement ¶ 9, Camey Statement, ¶ 5; Garcia Statement, ¶ 10, Guaré Statement, ¶ 10, Gonzalez Statement, ¶ 12. This also coincides with the concerns addressed during the EIA process. *See* EIA pp. 292, 297 (**C-0082-ENG**).

[311] Sandoval Statement, ¶ 9; Oliva Statement, ¶ 3.

[312] Garcia Statement, ¶¶ 9-10.

[313] EIA, p. 285 (**C-0082-ENG**).

Robert Moran, in 2012 and 2014, respectively, validated the communities' sentiments.[314]

133. Both concurred that the hydrology studies of the EIA were missing analysis of impacts on groundwater and surface water quality.[315] There was also no manner of evaluating the volumes of water presently available within and around the project area.[316] Significantly, there were no actual wells or boreholes constructed to evaluate the quality or quantity of the ground water and no data otherwise included in the EIA.[317] Moran thus concluded that "pumping GW [groundwater] during mine operations will cause depletions in stream-flows, will *likely cause declines* in water levels of local wells*, and will likely cause* most local springs to dry up."[318] Because of the unreliability of the water baseline data, Moran concludes that "it will not be possible for the operating company to held *legally responsible* for most water-related impacts that may occur" and that the "proposed water usage will generate increased competition with the other water users in this [sic] driest area of Guatemala, *likely* generating significant negative impacts."[319]

134. While Claimants now attempt to disparage Moran and Robinson's credibility and reputation,[320] and knowing that the community felt further vindicated by their findings,[321] Claimants never previously disputed these findings nor addressed them with the community despite acknowledging a need to do so.[322] Claimants continue to fail to engage with the details of the findings made, preferring instead to focus on disparaging the reputations of these experts who independently reached a conclusion that the EIA contained a number of critical omissions. As Guatemala's independent experts confirm, those findings were not unsubstantiated.[323] Claimants have no expert to contradict them.

C. There is no proven impediment to Claimants' ability to proceed with the Santa Margarita Derivada project

135. Claimants allege that the "State has refused Exmingua's pleas for assistance in dispersing the protesters and dismantling the blockade so as to allow Exmingua and its consultant to conduct the social studies necessary for completing the Santa Margarita EIA."[324] In particular, Claimants allege that "[i]n early 2016" there was "a new wave of protests" that "precluded Exmingua's consultants from conducting the social

[314] Sandoval Statement, ¶ 13.
[315] Robinson Report, p. 5 (**R-0049-ENG)**; Moran Report, pp. 3-5 (**R-0051-ENG**).
[316] Moran Report, p. 1 (**R-0051-ENG**).
[317] Moran Report, p. 2 (**R-0051-ENG**).
[318] Moran Report, p. 2 (**R-0051-ENG)** (emphasis added).
[319] Moran Report, pp. 3 and 6 (**R-0051-ENG)**(emphasis added).
[320] Claimants' Reply, ¶¶ 78-79.
[321] *See, e.g.,* CEDER 2013 Report, pp. 11 and 16 (**C-0716-ENG**).
[322] CEDER 2013 Report, p. 13 (**C-0716-ENG**)(indicating that Claimants ("owner") acknowledged that "response to EIA analysis needs to be prepared").
[323] SLR II Report, ¶¶ 36-38.
[324] Claimants' Reply, ¶ 12.

studies required for the EIA to obtain an exploitation license for the Santa Margarita area."[325] There is no evidence that Exmingua was impeded from concluding its social studies.

136. As a starting point, the timeline does not stand up to scrutiny. Exmingua applied for an exploitation license on January 19, 2009.[326] On June 23, 2009, Exmingua contracted GSM to prepare the Environmental Impact Study for Santa Margarita.[327] According to Mr. Kappes, both EIA studies for Progreso VII and Santa Margarita were being carried out *in parallel*, and that GSM had finalized the environmental sections of both EIAs "at about the same time, in early 2011."[328] There is no indication on the record why Claimants were unable to carry out the social studies for Santa Margarita around the same time as those carried out for Progresso VII in early 2010. The timing of Claimants' alleged decision to carry out the social studies in 2016 is at the very least suspect when it could have easily done these studies in 2011

137. Claimants then allege that the blockade from 2012 to 2014 "made it impossible for Exmingua to engage with the local community to complete its EIA for the Santa Margarita area."[329] This is despite the fact that Claimants allege that they enjoyed community support[330] and that the blockade was only a small number of people.[331] Both things cannot be true at the same time. After the blockade was lifted in May 2014 until early 2016, Claimants provide no reason why the social studies for Santa Margarita could not be carried out. Mr. Kappes admits that once the first blockade was lifted through early 2016, the number of protestors "was relatively small (between five and ten people)…".[332] During this time period, Progreso VII's operations carried on with little to no confrontations with the local community, even though Claimants flagrantly violated numerous laws and regulations. If Claimants could mine, they could certainly carry out the social studies needed for the Santa Margarita EIA.

138. Separately, Claimants attempt to blame the President's declaration of a two-year moratorium in 2013 as a reason why its exploitation license for Santa Margarita was never granted.[333] But this is factually inapposite. First, Claimants never applied for the exploitation license because they had not completed the

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[325] Claimants' Reply, ¶ 197.
[326] Application for Exploitation License for Santa Margarita Derivada, dated January 19, 2009 (**C-0070**).
[327] Contract for the EIA for Santa Margarita, attaching the Economic Technical Proposal (**C-0079**).
[328] Kappes Statement I, ¶ 49.
[329] Kappes Statement I, ¶ 93.
[330] Mendoza Report, ¶ 71; *see also,* Reply, ¶ 168 (claiming that "approximately 80 to 90 percent of the community supported the project").
[331] Mendoza Report, ¶¶ 42-49 (referring to the opposition repeatedly as a "small group").
[332] Kappes Statement II, ¶ 75.
[333] Memorial, ¶ 124; Kappes Statement I, ¶ 143 ("..it was widely reported that Guatemala has adopted an unofficial moratorium on mining by refusing to issue new exploration and exploitation licenses. In accordance with this policy, the Ministry has failed to grant Exmingua an exploitation license for the Santa Margarita area.").

social studies, despite having completed the environmental section of the EIA in early 2011.[334] Second, the moratorium was never officially implemented into law and thus MEM was still issuing licenses in 2013 through 2015.[335] Claimants acknowledge this by stating simply that the licenses granted "markedly decreased" as reflected in the stats Claimants cite, not that MEM actually stopped granting licenses.[336] Third, Claimants' exploitation license for Progreso VII was issued during a prior *de facto* moratorium.[337] As the statistic of MEM reveal, the license for Progreso VII was the only exploitation license issued in 2011 and no exploitation licenses were issued the year prior.[338] The moratorium excuse is nothing more than a red herring.

139. Without further explanation for the delay in carrying out the social studies, Claimants conveniently focus in on early 2016 as the time period in which they had decisively tried to carry out the social studies but were impeded by the blockade. Mr. Kappes without factual evidence simply claims that this "new wave of protests" "vastly exceeded" the prior protests and blockade, neglecting to mention the five years that had passed when Claimants could have admittedly conducted their studies.

140. In any event, it was clear that the protests had been fueled by Claimants' disregard for the Supreme Court's issuance of a provisional amparo suspending operations in November 2015.[339] As Mr. Kappes states, "[t]he protestors wanted the MEM to shut down the mining operations at the Progresso site."[340] In other words, it was Claimants' disregard for the court's ruling that frustrated the community into continued protests. Nevertheless, the protests seemed to have little effect because Progreso VII continued its operations "producing up to 250tpd with a staff of 180 people."[341] Under those circumstances, it is again difficult to understand how Claimants were impeded from carrying out their social studies for an entirely different project.

141. The facts also do not show any impediment to any team carrying out social studies in an area that would

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[334] Kappes Statement I, ¶ 49.
[335] *See* MEM's Statistical Yearbook, 2014, p. 9 (**C-0531**); MEM's Statistical Yearbook, 2015, p. 10 (**C-0532**)(showing that in 2012-12 exploitation licenses were issued; 2013: 5 exploitation licenses were issued; 2014: 4 exploitation licenses were issued, and 2015: 2 exploitation licenses were issued).
[336] MEM's Statistical Yearbook, 2014, p. 9 (**C-0531**).
[337] MEM's Statistical Yearbook, 2013 (**C-0458-ENG**) (noting that "In 2011, a license was granted for the exploitation of metal ores, called Progreso VII Derivada. ….[i]n 2012 license granting resumed").
[338] MEM's Statistical Yearbook, 2013 (**C-0458-ENG**) (noting that "in 2012 license granting resumed"), MEM's Statistical Yearbook, 2014, p. 9 (**C-0531**).
[339] *See, e.g.,* MEM Inspection March 30, 2016, p. 2 **(R-0289)** (noting that the blockade was as a result of the mining company's continued operations, because they were disrespectful of the laws of Guatemala and were causing damage to the nearby communities).
[340] Kappes Statement I, ¶ 138.
[341] *Id.*

not have been in front of the mine. The protests were at the main gate of Progreso VII or at the entrance of the Ministry of Energy and Mines,[342] and Claimants have provided nothing to support the improbable conclusion that these limited protests prevented Claimants from assessing the Santa Margarita site or the nearby communities, which could be easily accessed via a separate route.[343] Presumably, Exmingua would need to carry out the social studies in the surrounding communities not at the mine site itself.[344] By Claimants' own description of the projects' locations in their respective EIAs, the access route to Santa Margarita was not the same as that for Progreso VII.[345] Guatemala has also independently verified that a different route exists to reach the Santa Margarita project site and the surrounding communities.[346] In view of the timeline discussed above and the location of the Santa Margarita project, there is no plausible explanation for Claimants' inability to carry out the social studies for the project on or before 2016 or thereafter.

D. The Guatemalan Courts did not violate Exmingua's Fundamental Procedural and Due Process Rights

142. The lack of proper consultation and transparency with the surrounding communities eventually led these communities so seek recourse before the courts of Guatemala. The communities filed two main judicial proceedings involving Claimants' mining operation. The *first* judicial proceedings dealt with Exmingua's exploitation license and the lack of prior consultations to indigenous peoples in accordance with ILO Convention 169 and the Guatemalan Constitution.[347] The *second set* of judicial proceedings dealt with Exmingua's lack of construction permit and the lack of community consultation corresponding to that permit.[348]

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[342] Geovani Contreras, "*Locals from La Puya continue with the protest*", La Prensa Libre (March 13, 2016) (**C-0009)**; Jerson Ramos and Jose Rosales, "*Protesters of La Puya burn doll of the Minister of Energy*," La Prensa Libre (March 26, 2016 **(C-0010)**.

[343] *See* Area Map showing two distinct access points to Santa Margarita and the adjoining communities. Report of the on-site inspection of the Area of the Projects Progreso VII Derivada and Santa Margarita Derivada, dated September 20, 2021, p. 6-8 (**R-0277**).

[344] Claimants' Memorial, ¶ 31 (highlighting meetings taking place in village or municipal halls for Progreso VII. There is no indication that any community meetings for the social studies portion of the EIA took place at the mine site itself. *See also*, EIA, Annex 15 (**C-0082**); EIA Amendments, Annex 7 (**C-0089-R-ENG**).

[345] *Compare* Santa Margarita EIA, Section 3.2, p. 21 **(C-0081-SPA-R)** and Progreso VII EIA, Section 2.2., p. 54 (**C-0082**) (Option 1. The CA-9 north until km 17.5 where the viaduct leading to San José del Golfo, after passing the municipal capital of San José del Golfo you take the dirt road that leads to El Carrizal Village, approximately 2km until you reach the entrance of the project that is find on the right; Option 2. From the Mayan colony of Guatemala City you take the road that leads to the municipal seat of San Pedro Ayampuc, from where [sic]Take the dirt road that leads to San José del Golfo, approximately 12 km until you reach The Project].

[346] Notarial Act dated September 27, 2021 **(R-0282)** (confirming that "to access the area of the Santa Margarita Project it was not necessary to utilize any route which passes through the area where the Pacific Resistance of La Puya is located").

[347] *See* Constitutional Court of Guatemala, Case No. 3207-2016 and 3344-2016, p. 1 (**R-0137**).

[348] *See* Judgment issued by the Constitutional Court, File 3580-2015, p. 2 (**R-0120)**

143. All of these proceedings involved the use of a *writ of amparo*, which is a legal proceeding of longstanding tradition in Latin America,[349] specifically conceived to protect constitutional rights. The *writ of amparo* can be filed against actual or potential constitutional rights violations by acts or omissions by any public or private party.[350] It also "enables citizens to invoke the [amparo] action for the violation of any right protected either explicitly or implicitly by the Constitution or by any applicable international treaties."[351] The *writ of amparo* has also been used by other Indigenous Peoples across Latin-America as a way to obtain constitutional protection of their rights under the Convention 169 and other laws. The Tribunal should bear this in mind.

144. Despite the fact that Exmingua (not Claimants) was involved in at least 13 judicial proceedings,[352] Claimants focus their claim only on the Guatemala courts' decisions surrounding the lack of consultation under ILO Convention 169 ("CALAS amparo"). Claimants' litany of complaints surrounding these proceedings are without merit.

1. Guatemala respected Exmingua's procedural rights

145. Claimants allege that Guatemala's Supreme Court violated its right to be heard by (i) failing to serve timely notice of CALAS' amparo, and (ii) failing to timely serve court papers relating to the Supreme

[349] See Allan R. Brewer-Carías, "The Latin American "Amparo" A General Overview". Paper Written for the Latin American Workshop on Human Rights & Legal Theory, Leitner Center for International Law and justice, Fordham Law School, New York, April 4th, 2008, §2 (**R-0290 ENG**).
[350] *Id.* at ¶1 (**R-0290 ENG**).
[351] *See* Orrego Hoyos, Gloria. "The Amparo Context in Latin America: an approach to an empowering action." New York University, Hausler Global Law School Program (October, 2017), ¶ 2 (**R-0291 ENG**).
[352] In addition to the cases relating the alleged construction license and the lack of consultations under ILO 169, Exmingua was involved in the following cases: 1) Civil Case 1104-2002-3604; on April 02, 2002 Exmingua was sued on civil courts for breach of a lease, the suit was dismissed on April 15, 2002 (**R-0312**); 2) Civil Case 01047-2017-00091: On January 30, 2017 Exmingua filed a petition of consignment payment of several municipal taxes, duties and royalties, the petition was rejected on February 02, 2017 on procedural grounds (**R-0313**); 3) Civil Case 01049-2017-00225: On March 2, 2017 Exmingua filed a petition of consignment payment of several municipal taxes, duties and royalties. The petition was accepted on March 6, 2017 (**R-0314**); 4) Labor Case 01173-2016-10486: On September 14, 2016 Exmingua was sued by a former employee for wrongful termination. The case was settled on February 20, 2017 and the Court approved the agreement between the parties on February 22, 2017 (**R-0315**); 5) Labor Case 01173-2016-10519: On September 14, 2016 Exmingua was sued by a former employee for wrongful termination. The case was settled on February 20, 2017 and the Court approved the agreement between the parties on February 23, 2017 (**R-0316**); 6) Labor Case 01173-2016-10523: On September 14, 2016 Exmingua was sued by a former employee for wrongful termination. The case was settled on February 20, 2017 and the Court approved the agreement between the parties on April 6, 2017 (**R-0317**); 7) Labor Case 01173-2016-10696: On September 14, 2016 Exmingua was sued by a former employee for wrongful termination. The case was settled on February 20, 2017 and the Court approved the agreement between the parties on February 23, 2017 (**R-0318**); and 8) Labor Case 01173-2017-12301: On May 27, 2017 a former employee of Exmingua filed a complaint before the Guatemala's Department of Labor, for wrongful termination and lack of payments. The Department of Labor summoned Exmingua to a conciliation hearing scheduled for September 13, 2017. Exmingua did not appear, and the Department of Labor filed suit before the Labor Courts on behalf of Exmingua's former employee. The case was dismissed on November 14, 2017 on grounds of the entry in force of a new law benefiting Exmingua. The decision was appealed by the Department of Labor, the appeal was rejected by the Labor and Social Prevention Court of Appeals on July 18, 2018 (**R-0319**).

Court's 11 November 2015 *amparo provisional.*[353]

146. Claimants' contention of an 18-month delay is misleading. As Claimants recognize, the CALAS amparo of August 28, 2014, was *suspended* by the Supreme Court on September 5, 2014[354] (only 24 days after its filing date) and these proceedings were only reassumed on November 3, 2015.[355] This means that out of the 18-month delay Claimants allege, the proceedings were effectively *suspended* for almost 14 months.[356] Once the proceedings resumed, Exmingua took part in them (before any other interested party) starting on December 1, 2015[357] (merely 20 business days afterwards). This minor delay did not hinder Exmingua's ability to present its case in the amparo proceedings.[358]

147. In any event, Claimants' argument is further undermined by the fact that Exmingua did not complain about this procedural aspect during the course of the CALAS' amparo proceedings. In fact, at every step of the way, Exmingua remained silent on this issue. There was no complaint of a violation to the right to heard in any of its written or oral submissions, including its December 1, 2015 brief,[359] its February 23, 2016 appeal of the *amparo provisional*,[360] its March 18, 2016 independent writ of amparo against MEM's 1202 Resolution,[361] its April 29, 2016 revocation request,[362] its oral arguments at the May 16, 2016 hearing,[363] its June 30, 2016 appeal against the *amparo definitivo*,[364] its June 30, 2016 appeal brief and its oral argument before the Constitutional Court.[365] The reason for this is very simple, there was nothing to complain about.

148. Claimant´s argument also fails from a constitutional procedural law standpoint. There is nothing in the

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[353] Claimants Reply, ¶ 212; Claimants Memorial, ¶277 (Claimants assert that Exmingua "was not served with notice of the amparo action, by which CALAS challenged the validity of Exmingua's Progreso VII exploitation license, and the related court papers, including the Supreme Court's 11 November 2015 amparo provisional, until 22 February 2016, eighteen months after CALAS commenced the action on 24 September 2014").
[354] Claimants' Memorial, ¶ 73. *See also*, Supreme Court Ruling dated September 5, 2014 **(C-0466)**.
[355] *See* Claimants' Memorial, ¶ 73. *See also*, Constitutional Court Ruling dated November 3, 2015 **(C-0468)**.
[356] The proceedings were suspended 424 days, or 13 months and 29 days. It is also important to consider that during these 14 months Exmingua's right were not affected and its operations kept ongoing, hence there was no material harm to Exmingua.
[357] *See* Exmingua's Request to appear in amparo proceedings dated December 1, 2015 **(C-0469/ENG/SPA)**.
[358] *See* Richter II Report, ¶100: "…in the event of a suspension, notice is given only to plaintiffs and the challenged authority, due to the fact that there are no declaration of interested parties…".
[359] *Id*.
[360] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Appeal by Exmingua against the Ruling granting amparo provisional dated February 23, 2016, p. 2-3 where the notice served to Exmingua is discussed without raising any objection regarding it **(C-0005-SPA/ENG)**.
[361] *See* Exmingua's *Writ of Amparo* in case 587-2016, dated March 18, 2016 (**R-0322**).
[362] *See* Exmingua's *Amparo Provisional* Revocation Request in Case No. 1592-2014, dated April 29, 2016, p. 5, where can be seen that the reasons for the request did not relate to the notice given by the Supreme Court of Justice (**C-0483**).
[363] *See* Transcript of Exmingua's appearance at the oral hearing in in Case No. 1592-2014 dated May 16, 2016 (**R-0331**).
[364] Exmingua's Appeal against the Amparo Definitivo in Case No. 1592-2014, dated June 30, 2016, where there is no mention to any irregularity in the service of notice to Exmingua **(C-0475-ENG/SPA)**.
[365] *See* Transcript of Exmingua's appearance at the oral hearing in in Case No. 3207-2016 dated August 4, 2016 (**R-0332**).

Amparo Law restricting the Court's power to grant interim measures (*amparo provisional*) prior to service of notice to all parties and third interested parties. On the contrary, Article 27 of the Amparo Law provides that the court can order an amparo provisional in "its first resolution…when it deems that the circumstances justify so."[366] This is the *raison d'être* of any constitutional interim measure: the preservation of constitutional rights and minimization of any potential and continuous harm that any act or omission by the respondents might be causing. Furthermore, as Prof. Richter explains, Article 35 is inapposite to Claimants' position, since it provides that third interested parties are heard after receiving the administrative record by the challenged authority and the *confirmation or revocation* of the *amparo provisional*.[367] Hence, Exmingua's service in the CALAS amparo proceedings, was perfectly consistent with the law.

149. This is also confirmed by Exmingua's procedural conduct in the parallel proceedings. In its March 18, 2016 independent *writ of amparo* against MEM's 1202 Resolution,[368] Exmingua requested an *amparo provisional* to suspend the Resolution. Exmingua did not include CALAS as an interested party in its *writ of amparo* nor asked the Court to give them [CALAS] notice before considering its request for an *amparo provisional*.

150. Claimants also fail to explain how a 20-day delay in serving notice to Exmingua translates in any type of harm. The decision was not enforced until March 10, 2016, more than 3 months after Exmingua took part of the proceedings, and after it had already appealed the *amparo provisional* on February 23, 2016. Claimants also omit the fact that the Supreme Court did recognize Exmingua as an interested party in its November 11, 2015 amparo provisional decision, and that Exmingua was *formally* given service at the same time as CALAS, MEM, PDH and the Prosecutor's Office. As a result, the Supreme Court granted Exmingua access to the file and made it a party before the rest of the interested parties in the case.

151. The record clearly shows that Exmingua had a full opportunity to present its case before the Supreme Court of Justice and the Constitutional Court. By way of summary, Exmingua was given full opportunities

[366] *See* Amparo Law, Article 27: "The provisional suspension of the act complained of is appropriate both ex officio and at the request of a party. In any case, the court, in the first decision it issues, even if it has not been requested, will decide on the provisional suspension of the act, resolution or procedure complained of, when, at the Amparo Court's discretion, the circumstances of the case call for it" (**C-0416-R**).

[367] *Id.* at Article 35: "Once received the antecedents or the report, the court must confirm or revoke the provisional suspension decreed in the initial order of the procedure. The applicant, the Public Ministry, an institution that will act through the corresponding section according to the matter in question, will give a view of these antecedents or the report, to the persons included in the previous article and to those who in his opinion also have an interest in the subsistence or suspension of the act, resolution or procedure, who may allege within the common term of forty-eight hours." The Tribunal should note that Claimants failed to provide a full translation of this article. (**C-0416-R)**.

[368] *See* Exmingua's Writ of Amparo in case 587-2016, dated March 18, 2016 (**R-0322**).

as it filed its appeal against the *amparo provisional*,[369] filed its memorial opposing the *amparo definitivo*,[370] took part in the public hearings before both courts,[371] filed revocation requests[372] and filed its appeal against the *amparo definitivo*.[373] It even had the opportunity to file an independent writ of amparo against MEM's 1202 Resolution. [374] The proceedings show that Guatemalan courts always respected Exmingua's right to be heard, providing it a full opportunity to present its arguments and allowing it access to all procedural remedies available under the law.

152. Exmingua was also given a full opportunity to present its case in the amparo proceedings filed by members and representatives of the Kakchiquel indigenous community. Exmingua appealed the *amparo provisional* granted by the Supreme Court in that case,[375] filed its main submission opposing the *amparo definitivo*,[376] also filed a request for revocation of the *amparo provisional*,[377] and presented oral arguments at the hearing before the Supreme Court of Justice.[378] Finally, it is worth mentioning the Exmingua did not complain about its service in any of its briefs in the Kakchiquel indigenous community amparo proceedings. Although Claimants appear to have no concrete claims regarding this case, it is worth noting that the Supreme Court suspended the proceedings in favor of the CALAS *amparo*, due to the fact that they were analogous actions seeking the same purpose: defending the right to consultations of the Kakchiquel communities of San Pedro Ayampuc and San José del Golfo.

2. Guatemala's judicial decisions in the amparo proceedings were consistent with the applicable laws

153. Claimants mistakenly contend that Guatemala's judiciary engaged in a series of wrongdoings by (i) admitting the CALAS *amparo*, [379] (ii) granting the amparo provisional requested by CALAS,[380] and (iii) incurring in an unnecessary delay to finally resolve the amparo action. [381] The facts and the law, however,

[369] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Appeal by Exmingua against the Ruling granting amparo provisional dated February 23, 2016 (**C-0005-SPA/ENG**).
[370] *See* Exmingua's February 24, 2016 submission in Case No. 1592-2014 (**C-0494-ING/ESP**).
[371] *See* Transcript of Exmingua's appearance at the oral hearing in in Case No. 1592-2014 dated May 16, 2016 (**R-0331**). *See also* Transcript of Exmingua's appearance at the oral hearing in in Case No. 3207-2016 dated August 4, 2016 (**R-0332**).
[372] *See* Exmingua's *Amparo Provisional* Revocation Request in Case No. 1592-2014, dated April 29, 2016, p. 5, where can be seen that the reasons for the request did not relate to the notice given by the Supreme Court of Justice (**C-0483**).
[373] Exmingua's Appeal against the Amparo Definitivo in Case No. 1592-2014, dated June 30, 2016 **(C-0475)**.
[374] *See* Exmingua's Writ of Amparo in case 587-2016, dated March 18, 2016 (**R-0322**).
[375] Exmingua Appeal against the *amparo provisional* Case No. 1246-2016, dated November 24, 2016 **(C-0478)**.
[376] *See* Exmingua's November 24, 2016 submission in Case No. 1246-2016, (**C-0477**).
[377] *See* Exmingua's *Amparo Provisional* Revocation Request in Case No. 1246-2016, dated September 12, 2016, **(C-0483)**.
[378] See Supreme Court of Justice Minutes of the oral hearing held in Case No. 1246-201, dated September 25, 2017 (**R-0333**).
[379] Claimants Reply, ¶ 537.
[380] Claimants Reply, ¶¶ 540-542.
[381] Claimants Reply, ¶¶ 543-547.

show that the decisions under scrutiny are reasonable and sound, and that it was Exmingua that consistently violated and disregarded Guatemala's law.

154. As a preliminary issue, this Tribunal should dismiss *in limine* any discussion regarding the Supreme Court and Constitutional Court's interpretation and application of the *Amparo Law*. Claimants are trying to have the Tribunal engage in an inappropriate *de novo* appellate review of the decisions rendered by the State's highest courts of justice, which exceeds the Tribunal's competence in accordance with the Treaty.

155. In any event, Claimants' criticisms over the admission of the CALAS amparo by the Supreme Court and its confirmation by the Constitutional Court, are baseless. Claimants' complaints revolve around the alleged absence of the admissibility requirements provided in the *Amparo Law*, *i.e.*: (a) timeliness,[382] (b) exhaustion of remedies,[383] (c) standing to sue,[384] and (d) Standing to be sued.[385] All of these requirements are met in the CALAS amparo.

156. *First*, Claimants resent that the Supreme Court and the Constitutional Court held that the CALAS amparo *was timely* due to the fact that the 30-day period provided in Article 20 of the *Amparo Law*, does not apply to cases of continuous breach of a constitutional right that affects rights of third parties —like CALAS— that did not take part in the administrative process of the exploitation license.[386] Although Claimants and their expert try to argue differently, the legal authorities that Claimants and their expert cite concur with Prof. Richter and the Constitutional Court, regarding the non-applicability of the 30-day period to cases like the one of CALAS, who did not take part of the administrative procedure that led to the exploitation license and of a continuous breach of constitutional right, like the omission to conduct Convention 169 consultations.

157. *Second*, the exhaustion of remedies requirement *does not apply* to cases in which *the plaintiff in amparo proceedings did not take part in the administrative proceedings* involving the challenged act.[387] Guatemalan courts have consistently held this in cases involving the lack of consultation under Convention 169.[388] Claimants' argument that CALAS and the local indigenous communities *could have taken part in the administrative proceedings* is both flawed and tautological, since it remains undisputed that CALAS and the indigenous members of the communities did not participate in the administrative proceedings.[389]

[382] Claimants Reply, ¶ 214.
[383] Claimants Reply, ¶ 222.
[384] Claimants Reply, ¶ 232.
[385] Claimants Reply, ¶ 237.
[386] Richter II Report, ¶¶127-131.
[387] Richter II Report, ¶¶118-126.
[388] *Id*.
[389] Claimants and Fuentes simply state that "they could have been a party".

Once again, Claimants own exhibits confirm Guatemala's position.[390] This is also confirmed by Exmingua, who plead before the Constitutional Court that the principle of exhaustion of remedies: "…is not absolute, *i.e.*, does not operate in all cases nor in all subject matters; it has important exceptions for its application and efficacy."[391] As conceded by Exmingua and Claimants own authorities, the exhaustion of remedies principle admits exceptions, as was correctly established by the Constitutional Court in its June 11, 2020 decision. For these reasons, Claimants' arguments regarding this admissibility requirement lack any merit.

158. *Third*, NGOs like CALAS have standing to sue. Guatemalan courts have consistently held this based on the Court's precedent, including prior decisions involving CALAS.[392] This conclusion is also supported by Claimants legal expert's recent work, where he filed an amparo action against a decision rendered in a case where he was not a party.[393]

159. Finally, MEM had standing to be sued. As Prof. Richter noted,[394] the omission that is subject to analysis in the CALAS amparo relates to MEM, since MEM issued the exploitation license. Claimants try to confuse the Tribunal by arguing that the relevant authority to require the consultation of indigenous communities is Congress, but it would be illogical for Congress to consult an action that is not legislative in nature.[395]

E. The Guatemalan Courts did not discriminate Exmingua

160. Claimants allege that both the Constitutional Court and MEM discriminated against Exmingua, compared to other companies in similar circumstances, by allegedly: 1) rendering earlier rulings in other cases, and 2) allowing other companies to continue operations pending the completion of the consultations.[396] As explained in the Counter-Memorial and for the reasons set forth below, Claimants' assertions are false.

1. The alleged delay in the issuance of the Constitutional Court decision in the Exmingua appeal against the amparo definitivo

161. As Guatemala explained in its Counter-Memorial, several reasons impacted the Constitutional Courts ability to promptly resolve the case,[397] none of which involved a political maneuver motivated by Exmingua's nationality (the actual party in the amparo proceedings).

162. Particularly, Guatemala explained that: (1) the Constitutional Court's composition changed in 2016,

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[390] See **C-0488 SPA**, p. 2 ("[i]deed the applicant or promoter of the process will not always be obliged to exhaust the ordinary judicial and administrative remedies or remedies through which matters are discussed in accordance with the principle of due process. There is a whole range of exceptions.").
[391] Exmingua's Writ of Amparo in case 587-2016, dated March 18, 2016, p. 4 (**R-0322**).
[392] Richter II Report, ¶¶ 132-133.
[393] Richter II Report, ¶ 135.
[394] Richter II Report, ¶¶ 138-141.
[395] Richter II Report, 138.
[396] Claimants Memorial, ¶¶396-311; see also Claimants Reply, ¶ 258.
[397] Claimants Memorial, ¶ 69.

which resulted in the integration of 3 three new magistrates who needed to familiarize themselves with a voluminous file and complex case such as the CALAS amparo;[398] (2) the Constitutional Court was faced with cases involving transcendental issues for Guatemala's society;[399] and (3) the Constitutional Court was faced with a docket of more than 6,000 cases in 2016, 2017, 2018 and 2019.[400]

163. Claimants do not engage in a discussion of these mitigating factors, limiting their analysis to a mere citation to their legal expert saying that none of this justifies delay.[401] However, Claimants' argument is fallacious, since Fuentes' Second Report made no analysis or consideration *vis-à-vis* the abovementioned mitigating factors.[402] In addition, Claimants also fail to refute the impact of the administrative work of the late Judge Bonerge Mejía Orellana on the rest of his judicial responsibilities.

164. Claimants continue to criticize the fact that other cases were decided before the Exmingua appeal, but their position lacks foundation and is unreasonable. *First*, Claimants' argument relies on an extremely narrow interpretation of Article 39 of the Amparo Law which provides for a 5-day period to render a decision, that is unreasonable and insults the intelligence of the Tribunal. The Amparo Law 5-day period was not envisaged for complex cases with voluminous dockets like the Exmingua appeal, since it would be physically impossible for all Constitutional Court Magistrates to read the entire file, conduct the pertinent research, prepare a draft decision, discuss the draft decision, and render a decision in that timeframe. This is precisely the reason why none of the decisions were rendered within the 5-day period provided in Article 39 of the Amparo Law.

165. *Second*, there is nothing in the Amparo Law or the Judiciary Law establishing a duty to decide cases on a *first come first served* basis, as Claimants intend to portray;[403] what dictates the prompt resolution of a case is its complexity and the procedural conduct of the parties, among other factors.

166. *Third*, Claimants' responses[404] to the observations made in Guatemala's Counter-Memorial concerning the *Minera San Rafael* case,[405] are yet another display of Claimants' profound misunderstanding of the social context that exists in Guatemala, arguing that it creates doubts as to the impartiality of the Constitutional Court.[406] Yet, Claimants' argument rests on the assertion that the *Minera San Rafael* and

[398] Claimants Memorial, ¶70.
[399] *Id*.
[400] Claimants Memorial note 142.
[401] Claimants Reply, ¶ 245.
[402] *See* Fuentes Report II ¶¶157-158.
[403] Claimants' Reply, ¶ 245-246.
[404] Claimants' Reply, ¶ 247.
[405] Guatemala's Counter-Memorial, ¶ 71.
[406] Claimants Reply, ¶ 247.

Exmingua cases were procedurally and substantively the same.[407] Guatemala countered this contention by demonstrating the factual and legal nuances involved in both cases, and justifying the prior decision in the *Minera San Rafael* case. Claimants, however, fail to meet their burden of proof. In fact, despite having access to a full copy of the *Minera San Rafael* case file shared by Guatemala during the document production phase of these proceedings, Claimants still fail to establish a concrete and material equivalence between these cases for the purposes of justifying their claim that they were procedurally and substantially the same.

2. The Constitutional Court did not discriminate against Exmingua by ordering the suspension pending the conclusion of the required consultations

167. Claimants argue that the Supreme of Court and the Constitutional Court of Guatemala incurred in a *nationality-based discrimination* against Exmingua, by allowing other projects "…to continue operating while social consultations were being conducted".[408] Claimants' assertions are deceitful.

168. It is worth reiterating that *Minera San Rafael*[409] and *CGN*[410] were both ordered to suspend their activities while consultations were conducted. It is equally important to reiterate that the decisions in *San Rafael*, *CGN* and *Exmingua/CALAS* have afforded all three mining companies the same treatment from a procedural standpoint, applying the same standard and with similar holdings.[411] As a result, the only relevant discussion is the treatment afforded by the Constitutional Court to Exmingua.

169. As Guatemala explained, *Oxec* and Exmingua are not in the same circumstances since they operate in different sectors.[412] Claimants remain completely silent on the impact of the constitutional urgency declared with respect to electrification in Guatemala, as reflected in Article 129 of the Guatemalan Constitution[413] and Article 1 of the Law on Incentives of Renewable Energy Projects,[414] and previous

[407] *Id*.
[408] Claimants' Reply, ¶ 258.
[409] See Decision dated 3 September 2018, issued in Case No. 4785-2017 by the Constitutional Court (*Minera San Rafael* case), pp. 544, 550 (**C-0459**).
[410] See Decision dated June 18, 2020, issued in Case No. 697-2019 by the Constitutional Court (*CGN* case), op. 275 (**C-0496**).
[411] Counter Memorial, **Annex A**.
[412] Counter Memorial, ¶¶ 134-137.
[413] Counter Memorial, ¶ 134; *see also* Political Constitution of Guatemala, Article 129 (**C-0414-R**): "*The electrification of the country, based on the plans formulated by the State and the municipalities, in which the private initiative may participate, is declared a matter of national urgency*."
[414] Counter Memorial, ¶ 134; *see also* Law of Incentives for the Development of Renewable Energy Projects, Art. 1: "The rational development of renewable energy resources is declared of urgency and national interest. The competent body will stimulate, promote, facilitate and create the appropriate conditions for the promotion of investments made for this purpose." (**RL-0304**).

Constitutional Court jurisprudence.[415] Claimants also fail to provide a response to Guatemala's argument regarding the similar treatment between *Oxec* and the hydroelectric projects *La Vega* and *RENACE*.[416]

170. Finally, Claimants' criticism of the Constitutional Court's holding that Exmingua will be able to resume operations once the consultations are completed and there is an assurance that the mine *does not threaten the existence of indigenous populations in the project's area of influence*[417] is astounding.[418] This "condition," as Claimants refer to the Court's safeguard of indigenous populations, should be uncontroversial. The Claimants have no right to compromise the existence of any indigenous people. Yet, Claimants' current posture regarding this "condition" further highlights their continual disregard for the communities impacted by their project. With this attitude, it is unsurprising that the Project suffered from social conflict and constitutional issues.

F. The Administrative Proceedings involving Exmingua were lawful

171. Claimants have unsuccessfully tried to create an illusion of malfeasance by MEM in the actions it took to comply with the *amparo provisional* and the subsequent decisions confirming it. Claimants also question the validity of the suspension of Exmingua's exportation license. These claims are doomed to fail, since Guatemala cannot be liable for actions taken in compliance with a court order.

1. MEM's Administrative Resolution No. 1202 suspending the exploitation license was issued in compliance with a court order

172. On March 10, 2016, MEM issued the Administrative Resolution No. 1202 (Resolution No. 1202), formally suspending the Exmingua exploitation license.[419] On the same day, the Ministry filed a request for clarification before the Supreme Court of Justice.[420]

173. Claimants argue that this suspension was illegal and arbitrary, since —according to their legal expert—[421] the only way a mining license can be suspended is through an administrative procedure provided in Article 51 of the Mining Law or a *Lesivo* Declaration by the President of the Republic.[422] The main flaw

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[415] See Counter Memorial, ¶¶ 11, 135. See also, Decision dated February 5, 2013, issued in Case 4419-2007 by the Constitutional Court (*Corrientes del Río* case) (**C-0537**), p. 7: "being electricity a product that, without going into economic policy considerations, is of national interest, it is also important to consider the importance of infrastructure works for its production, having an interest all of the nation inhabitants who, by a principle of solidarity, cannot be deprived from access to it."

[416] See Claimants' Reply, ¶ 262, were they limit to assert that the distinction "is not relevant".

[417] See Decision issued in Case No. 3207-2016 and 3344-2016, on June 11, 2020 by the Constitutional Court of Guatemala, p. 102 (**R-0137**).

[418] See Claimants Memorial, ¶ 141; Claimants Reply, ¶ 265.

[419] *See* Resolution 1202, issued by MEM on March 10, 2016 and served on Exmingua on March 18, 2016 (**C-0139**).

[420] *See* MEM's Request for Clarification, filed before the Supreme Court of justice in Case No. 1592-2014, on March 10, 2016, p. 5 **(C-0008)**.

[421] Fuentes Report I, ¶¶ 23-35.

[422] Claimants' Memorial, ¶184; *see also* Claimants' Memorial, note 454.

of Claimants' arguments lays in the fact that Article 51 and the *Lesivo* Declaration do not correspond with the factual scenario at hand: an act of the Executive Branch (MEM) in compliance with a binding order by the Judicial Branch (Constitutional Court). Article 51 of the Mining Law deals with administrative suspension of a mining license *by the Minister*.[423] The *Lesivo* Declaration "…is a measure adopted by the **executive branch** where the Government agrees to declare [an act] *lesivo* because it causes harm to the State".[424] As can be seen, Claimants refer to administrative procedures, i.e., actions by the Executive Branch exercising its rights and prerogatives in control over a given concession or license; here —on the contrary— we are dealing with a ***court ordered suspension***, hence the acts of the Executive Branch are done in compliance with an order from the highest court in the country. For these reasons, Claimants and their legal expert's arguments are completely baseless.

174. Now, Claimants[425] and their legal expert[426] argue that this was an "abrupt reversal" and portray MEM's conduct as inconsistent, and even worse, claim that Guatemala lacked sufficient time to create documents to justify this change.[427] However, a closer look at the record shows otherwise. In fact, MEM clearly stated that "[n]otwithstanding the foregoing [concerns expressed by MEM regarding the amparo provisional], while the decision of this Constitutional Court regarding this petition is still pending, this Ministry will suspend the effects of the mining license, for as long as the *amparo provisional* remains in force."[428]

175. Claimants and their legal expert chose to cite this document capriciously to raise false accusations against Guatemala. But the truth is that MEM was particularly aware of the implications of non-compliance with a court order and proceeded accordingly, despite its reservations. The implications referred by MEM in its request of clarifications are provided in Article 78 of the Amparo Law[429] and Article 420 of the Penal Code,[430] which provide that disobedience of an authority with an amparo is sanctioned with removal from

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[423] Richter II Report, ¶ 45-47.
[424] See *Railroad Development Corporation v. Republic of Guatemala*, ("*RDC v Guatemala*") ICSID Case No. ARB/07/23, Award (June 29, 2012), ¶ 85 (**CL-0068**) See also, Contentious Administrative Law, Article 20: "…If the process is raised by the administration for its acts or resolutions, it will not be necessary for the indicated requirements to be met, provided that the act or resolution has already been declared harmful [*lesiva*] to the interests of the State, in a Government Agreement issued by the President of the Republic in Minister council. This declaration can only be made within the three years following the date of the resolution or act that originates it." (**C-0424**).
[425] Claimants' Reply, ¶¶ 273-274.
[426] Fuentes Report I, ¶ 96.
[427] Claimants Reply, ¶274.
[428] *See* MEM's Request for Clarification, filed before the Supreme Court of justice in Case No. 1592-2014, on March 10, 2016, p. 5 **(C-0008)**.
[429] Amparo Law, Article 78 (**C-0416-R**): "Disobedience, delay or contempt of a functionary or public servant of the State or its decentralized and autonomous institutions with an order issued in an amparo process is cause for removal from office, in addition to other sanctions provided in the law".
[430] Criminal Code of Guatemala, Article 420 (**C-0511**): "The public official or employee who refuses to comply with

office and/or 1 to 3 years of prison. Hence, MEM and its officials were legally obliged to comply with the court's order. Claimants essentially argue that MEM should have disregarded an enforceable court order and faced administrative and penal reasonability; this is absurd.

176. Claimants' argument is nothing more than an attempt to justify Exmingua, who on the other hand remained oblivious to the Supreme Court's *mandamus* and kept operating the mine. Claimants do not deny that Exmingua continued its operations after the *amparo* provisional, despite the Constitutional Court's confirmation and Resolution 1202. In any event, and for the avoidance of doubt, the Tribunal need look no further than Mr. Kappes' own words, in a March 20, 2016 letter to Mr. Pellecer. As previously indicated, Exmingua hired helicopters to make "external cargo" flights from Progreso VII Derivada. The service provider raised concerns about the legality of their activities, as it was made aware of the *amparo provisional*. Mr. Kappes then wrote to Mr. Pellecer the following:

> "…It is true that MEM has revoked [*rectius:* suspended] our license, but this follows several days of statements by MEM that our license is completely valid….I will give the helicopter owner and you, my personal guarantee that what we are doing is legal and that he will get into no legal or reputational trouble by doing this work."[431]

177. On March 31, 2016, MEM's Mining Control Department conducted an inspection of Progreso VII Derivada, and found that the company had ongoing exploitation, processing and transformation operations on the site.[432] As a result, MEM issued Resolution No. 1677, ordering Exmingua to immediately comply with MEM's March 10, 2016 Resolution No. 1202, and warned the company that it would take all necessary legal actions in order to enforce it.[433] As a result of this inspection, MEM's Directorate General of Mining formally warned Exmingua of its duty to cease its operations.[434]

178. Additionally, MEM's Directorate General of Mining ratified Exmingua's mining license suspension, on April 12, 2016, and granted Exmingua a 30-day period to file comments.[435] Exmingua filed a memorial before MEM's Directorate General of Mining, claiming that: (1) no exploitation activities were carried on the site; and (2) that Resolution 1202 was not final due to the pending amparo Exmingua had filed against it.[436]Both claims were false. *First*, on April 28, 2016, MEM's Mining Rights Control Section conducted a

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judgments, resolutions or orders of higher authority issued within the limits of their respective competence and covered by the legal formalities, will be sanctioned with imprisonment of one to three years and a fine of two hundred to two thousand quetzals."

[431] *See* Letter from Mr. Kappes to Mr. Brayant Pellecer, dated March 20, 2016 (**R-0287**).
[432] *See* Inspection SCDM-INF-INS-EXT-012-2016, dated March 31, 2016 (**R-0323**).
[433] MEM's Resolution 1677, dated April 14, 2016 (**C-0442**).
[434] *See* Administrative Providence CM-SCDM-218-2016, dated April 11, 2016 (**R-0327**).
[435] *See* Administrative Providence 1411, dated April 12, 2016 (**R-0330**).
[436] *See* Exmingua's memorial in response to Resolution 1411, dated April 28, 2016 (**R-0334**).

follow-up inspection, to confirm whether Exmingua had ceased its mining activities.[437] MEM's inspectors were accompanied by representatives of the Human Rights Ombdusman (PDH), the UN High Commissioner for Human Rights and the Presidential Commission Coordinating Policy in issues of Human Rights (COPREDEH). The inspectors noted that exploitation activities were halted at the time of the inspection, but that there was clear evidence of exploitation and processing activities on the day prior to the inspection, and more shockingly, that once the inspectors left the site, the mining activities were resumed with total "normality".[438] And finally, recommended imposing a fine of 560 units, in accordance with Article 57 of the Mining Law.[439] *Second*, Exmingua's *amparo provisional* request against Resolution 1202 was rejected by the Supreme Court of Justice.[440] This is also confirmed by Exmingua's own memorial, filed on May 2, 2016, where it merely informs MEM that the amparo action was filed and admitted, without making any reference to an amparo provisional suspending Resolution 1202.[441]

179. After granting Exmingua a 10-day period to file comments[442] and confirming that there was no interim measure or *amparo provisional* suspending Resolution 1202,[443] MEM issued Resolution 384 where, after giving a detailed account of its actions, it sanctioned Exmingua with a fine of 280,000 quetzales, for its noncompliance with Resolution 1202.[444]

180. Exmingua filed a revocation request against the January 26, 2017 Resolution 384, which was denied due to the fact that it was filed after the statute of limitations had expired.[445] As previously stated, Exmingua's amparo against Resolution 1202 was also rejected by the Supreme Court and the Constitutional Court.

181. Exmingua failed to pay the fine. On October 7, 2020, MEM sent the relevant files to the Procuradoría General de la Nación ("Office of the Attorney General of the Nation"), in order to file a complaint for lack of payment before the competent courts, seeking to collect the fine in the amount of 280,000 quetzales that had been imposed on the company.[446] [redacted]

[redacted]

[437] *See* MEM's Inspection Results Report SCDM-INF-INS-021-2016 (**R-0335**).
[438] *See also* MEM's Mining Rights Control Section Dictamen CM-SCDM-167-2017, dated May 3, 2016, p. 1 (**R-0326**).
[439] *See* MEM's Inspection Results Report SCDM-INF-INS-021-2016, p. 14 (**R-0335**).
[440] *See* Decision of the Supreme Court of Justice of May 10, 2016, in Case No. 587-2016, p. 4 (**R-0336**).
[441] *See* Exmingua's memorial informing MEM of its writ on amparo filed in in Case No. 587-2016 (**R-0337**).
[442] *See* Administrative Providence 1516, dated May 3, 2016 (**C-0443**).
[443] *See* MEM's Legal Advisory Unit Administrative Providence No. 220-VII-2016, dated August 11, 2016 (**R-0338**).
[444] *See* MEM's General Mining Direction Resolution No. 384, dated November 16, 2016 (**R-0339**).
[445] *Idem*.
[446] See MEM's General Mining Direction Administrative Providence SG-PROVI-2705-2020, dated October 7, 2020 (**R-0340**).

[redacted][447]

182. Claimants' legal expert is completely silent on this matter, while Claimants make no particular challenge to the legality of the Attorney General of the Nation and MEM's decision to seek judicial enforcement of the fine imposed more than 3 years ago. They merely claim in one paragraph that it is "unreasonable and disproportionate."[448] These arguments are shallow and do nothing but show that Claimants have no respect for the laws and institutions of Guatemala.

2. MEM's Administrative Resolution 146 suspending, the exportation license did not violate Exmingua's rights

183. On May 3, 2016, MEM´s Directorate General of Mining issued Administrative Resolution 146 (Resolution 146) ordering the temporary suspension of Exmingua's exportation license.[449]

184. The resolution was issued pursuant to Article 85 of the Mining Law which provides that mining products destined for export must originate from an exploitation license and that mining exporters without an exploitation license shall request a separate exportation license.[450] Taking into account the Supreme Court's amparo provisional and MEM's Resolutions 1202[451] and 1677,[452] these suspended Exmingua's exploitation license and its right to dispose of said products for local sale, transformation and exploitation.

185. Exmingua filed a revocation request before MEM, on May 6, 2016.[453] On May 11, 2016, MEM's Directorate General of Mining sent the file to the Superior Ministry Dispatch.[454] On May 12, 2016, MEM granted Exmingua a five-day period to file its comments regarding the matter.[455] Exmingua filed it comments on June 13, 2016.[456] On October 10, 2016, MEM issued a decision revoking Resolution 146.

186. The facts clearly show that MEM afforded Exmingua due process and fully considered Exmingua's revocation request. MEM's conduct in this regard is perfectly lawful, and Claimants legal expert's silence on the issue is a clear indication of that.

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[447] [redacted] (**R-0300**).
[448] Claimants' Reply, ¶ 325.
[449] *See* MEM's Administrative Resolution No. 146, dated May 3, 2016 (**C-0140)**.
[450] See Mining Law, Article 85 (**C-0186**).
[451] *See* Resolution 1202, issued by MEM on March 10, 2016 and served on Exmingua on March 18, 2016 (**C-0139**)
[452] MEM's Resolution 1677, dated April 14, 2016 (**C-0442**).
[453] *See* MEM's Administrative Resolution No. 146, dated May 3, 2016 (**C-0140)**
[454] See Administrative Providence 1622, dated May 11, 2016 (**R-0341**).
[455] See Administrative Providence 2045, dated May 12, 2016 (**R-0342**).
[456] See Exmingua's brief filed in the Revocation Procedure of Resolution 146, dated June 13, 2016 **(R-0343)**

3. MEM's actions regarding the Santa Margarita exploitation license request are consistent with the law

187. Claimants complain about MEM's actions with regard to Exmingua's Santa Margarita exploitation license request of January 19, 2009.[457] Their line of argument is inconsistent with Guatemalan law.

188. Claimants and their legal expert falsely claim that Exmingua had a legitimate expectation of obtaining an exploitation license for Santa Margarita. There is nothing in the Mining Law and its Regulation that forces MEM to grant a request for an exploitation license that does not meet the requirements under the law.

189. *First*, the Santa Margarita exploration license does not entail an *automatic* right to exploit the mine. Article 6 of the Mining Law describes *mining exploration* as administrative; cabinet and site works needed to locate, study, and evaluate a mine;[458] this is further developed and confirmed by Article 24 of the Mining Law, which states that exploration licenses "…confer the exclusive right to locate, study, analyze and evaluate the deposits…"[459] As can be seen, there is nothing in the law recognizing an automatic right to obtain an exploitation license. In addition, as highlighted in Guatemala's Counter Memorial[460] and Prof. Richter's reports, legitimate expectations are not recognized under Guatemalan law.[461]

190. *Second*, Article 152[462] of the Guatemalan Constitution and the Legality Principle, stipulate that MEM can only grant an exploitation license if all legal requirements are met. Article 9 of the Mining Law is categoric in stating that all persons can become holders of mining rights "…as long as they comply with the rules of this [mining] law and its regulation."[463] Claimants and their legal expert concede that Exmingua was obliged to present an approved EIA, and this is also confirmed by the plain language of Article 20 of the Mining Law which provides that the EIA is "a requisite for the granting of the respective license."[464] This requirement is also confirmed in other norms, such as: (i) Article 7 of the Mining Law Regulations that provides that all mining operations must have a duly approved EIA;[465] (ii) Article 9 of the Mining Law Regulations, provides that once the duly approved EIA is presented, the license can be granted;[466] and (iii) Article 18 of the Mining Law Regulations, all mining rights request must comply with the requirements set

[457] Claimants Memorial, ¶ 179; Fuentes Report I, ¶78.
[458] Mining Law, Article 6 (**C-0186**).
[459] Mining Law, Article 24 (**C-0186**).
[460] Guatemala's Counter-Memorial, ¶ 392.
[461] Richter I Report, ¶ 59.
[462] Political Constitution of Guatemala, Article 152 (**C-0414-R**): "The power emanates from the people. Its exercise is subject to the limitations established in this Constitution and [in] the law. No person, sector of the people [pueblo], armed or political force, may arrogate its exercise."
[463] Guatemala's Mining Law, Article 9 (**C-0186**).
[464] Mining Law, Article 20 (**C-0186**).
[465] Mining Law, Article 7 (**C-0186**).
[466] Mining Law Regulations, Article 9 (**C-0186**).

forth in Article 41 of the Mining Law.[467] As a result MEM could only have granted the Santa Margarita exploitation license if a valid and approved EIA existed, since Exmingua did not comply with the legal requirement to have an exploitation license there is no *legitimacy* to any of its expectations.

191. *Third*, MEM´s request of December 2016 for an approved EIA within 30 days was not arbitrary. As previously mentioned, an approved EIA is a legal requirement for *all* exploitation license applications. As Prof. Richter reiterates, it was legally impossible for MEM to waive a legal requirement for Exmingua.[468] Furthermore, such a waiver would be a manifestly illegal act by MEM, since it would contravene the Mining Law and could be interpreted as a usurpation of MARN's public functions, exposing MEM´s officials to criminal charges under Article 335 of the Criminal Code.[469]

192. *Fourth*, Claimants' criticism regarding the 30-day period granted by MEM for the presentation of a valid and approved EIA, is plainly absurd.

193. The starting point should be article 25 of the Mining Law, which provides that MEM has 30 days to decide whether to issue or not an exploitation license,[470] hence Exmingua clearly knew that it had a 30-day period to file its EIA. As conceded by Claimants and Fuentes,[471] Exmingua deliberately chose not to conclude the EIA and meet all the legal requirements for its exploitation license because it gave "priority to the development of the Progreso VII Derivada." Guatemala cannot be held liable for Exmingua's questionable business decisions since it had more than 5 years to conduct all necessary studies for the approval of its EIA.

194. In addition, MEM's 30-day period for the presentation of an approved EIA was granted for the benefit of Exmingua, as prescribed by Article 43 of the Mining Law.[472]

195. Faced with the clarity of these provisions and Guatemala's Counter Memorial arguments, Claimants have once again pivoted on their argument, asserting that they were just asking for MEM's *assistance with conducting the consultations required for the EIA or to provide any guidance as to how it should do so in*

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[467] Mining Law Regulations, Article 18 (**C-0186**).
[468] Richter II Report, ¶ 87.
[469] Criminal Code, Article 335 (**C-0511**): "Whoever, without title or legitimate cause, performs acts proper to an authority or official, attributing himself to an official character, will be punished with imprisonment for one to three years."
[470] Mining Law, Article 25 (**C-0186**): "…When the holder of an exploration license, within its validity period, chooses to request the exploitation license, the term of the exploration license will be extended until the exploitation license is granted. **The Ministry will have a maximum period of thirty days to resolve**." (emphasis added).
[471] Fuentes Report I, ¶75.
[472] Mining Law, Article 30 (**C-0186**): "When an application is presented that does not comply with the requirements of this Law, the interested party will be granted a period of thirty days from the notification to correct them. In duly justified cases, the Directorate may grant an extension of time equal to the first. If the deadline has expired without the interested party correcting any omissions indicated, the request will be rejected, and it will be filed."

the face of the protests and blockades.[473] Claimants' new argument is equally unfounded, since Exmingua's March 22, 2017 letter to MEM makes no reference to a request for assistance from MEM on conducting consultations, but rather asks for the "…indefinite suspension."[474]

196. *Fifth*, Claimants have yet to provide a proper legal cause for the application of the Judiciary Law to an administrative mining license procedure.[475] Nevertheless, assuming *arguendo* that it applies, as Guatemala has already indicated,[476] Claimants' reliance on Article 50 of the Judiciary's Law is time barred. Article 50 provides for a *three-day period* to request and prove the existence of a legitimate superseding impediment, *starting from the moment when the impediment occurred*.[477] Fuentes attempts to justify Exmingua's delay on alleged requests for assistance made over many months by Exmingua to access the site and conduct social studies,[478]but this assertion does nothing further than prove Guatemala's point since Exmingua had prior knowledge of the alleged impediment and failed to ask for a suspension within the three-day period provided in Article 50. As a reminder, Exmingua had a continuous duty to file an approved EIA in accordance with Article 20 of the Mining Law.

197. *Sixth*, Claimants and Fuentes omitted to mention the high standard set forth in Article 50 of the Judiciary Law, which requires proof of a *legitimate qualified or notorious* impediment to conduct the social studies for the EIA. According to Exmingua's own draft of the Santa Margarita EIA, the area of socio-economic influence of the Project is San Pedro Ayampuc, not the mining site.[479] Hence the alleged blockades had no material impact on Exmingua's ability to conduct its social studies. Furthermore, it is quite hypocritical for Claimants to argue the existence of a *material impediment* to access the mining site due to alleged communities' blockades, when the record shows clearly that the company had no problems using helicopters to access the mining site when their business interests required it to do so.[480]

G. The criminal investigation involving Exmingua complied with the law

198. Claimants attempt to claim that Exmingua was unfairly targeted by Guatemala because it allegedly

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[473] Claimants Reply, ¶ 498.
[474] Letter from Exmingua to the MEM, attaching Notary Public's Certification (March 21, 2012) (**C-0013**). See also, Claimants Reply, ¶ 498.
[475] Guatemala's Counter Memorial, ¶ 360.
[476] *Id*.
[477] Judiciary Law, Article 50 (**C-0415)**: "The terms do not run due to legitimate qualified or notorious impediment, which has befallen the judge or the party. The term to allege and prove it when it affects the Parties is three days computed from the moment the impediment occurred."
[478] Fuentes Report II, ¶94.
[479] *See* Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ministry of Energy and Mines' submission in relation to compliance with *amparo provisional*, p. 30 **(C-0008).**
[480] Letter from Mr. Kappes to Mr. Brayant Pellecer, dated March 20, 2016 (**R-0287**).

pursued baseless criminal actions against Exmingua.[481] All the actions taken against Exmingua were lawful and a direct result of Exmingua's own illegal conduct.

1. The criminal investigations against Exmingua were initiated lawfully

199. The criminal actions began lawfully as a result of Exmingua's continuing exploitation of the mine after the suspension of activities had been ordered by the Supreme Court and subsequently reinforced by MEM's Resolution No. 1202.

200. [redacted]

201. These complaints include: [redacted]

202. [redacted][488][redacted].[489] [redacted].[490] This clearly shows that the criminal investigations were not only well founded, but that Exmingua was actually breaking the law.

203. Claimants try to exaggerate the circumstances in which Exmingua's four workers were apprehended, claiming that there was a targeted undercover operation against Exmingua. This is both false and irrelevant

[481] Claimants' Reply, ¶ 310 *et seq.*

[482] [redacted]

for the merits of this case.

204. *First*, Claimants lack standing to bring claims on behalf of the four workers for alleged wrongdoings during their criminal prosecution, and Guatemala requests the Tribunal to bear this in mind when assessing the admissibility of these claims. Nevertheless, these accusations have no bearing, since the four workers were detained during a routine traffic stop.[491] *Second*, Claimants fail to explain the *actual* impact of the Prosecutor's Office and the National Police investigative actions regarding Exmingua's illegal exploitation of the mine[492] and do not refer to any law prohibiting these investigative actions.

205. Furthermore, the four workers appeared before a judge and the Prosecutor's Office asked for their preliminary detention, which the judge rejected, who considered that the requirements for a preliminary detention and indictment were not present, and therefore issued a lack of merit order (*auto de falta de mérito*).[493]

206. Claimants continue to misrepresent [redacted][494] [redacted] s. [redacted]

2. <u>The gold concentrate was lawfully impounded</u>

207. Claimants criticize the actions taken by the Prosecutor's Office, arguing that it unlawfully impounded 19 bags of gold concentrate and that it unduly delayed their release. Once again, Claimants' allegations lack any merit.

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[491] *See* Guatemala's Counter Memorial, ¶ 354. This does not mean that Exmingua was/is not being investigated.
[492] *See* Claimants' Memorial, ¶ 125.
[493] *See* Lack of Merit Order (*auto de falta de mérito*) issued by the Fourth Criminal, Narcoactivity and Crimes against the Environment, dated May 10, 2016 (**C-0150**).
[494] *See* Claimants' Memorial, ¶ 237. See also Claimants' Reply, ¶ 314.
[495] *See* [redacted]

208. *First*, Claimants and their legal expert fail to point to any specific rule in the Code of Criminal Procedure prohibiting the sequestration of the gold concentrate. On the contrary, Fuentes refers to Article 198 of the Code of Criminal Procedure which provides that "objects and documents related to the crime or that *could be of importance for the investigation* and those subject to confiscation will be deposited and preserved in the best possible way."[498] In this case, the judge that ordered the lack of merit deemed the gold concentrate bags as *objects of importance* for the investigation carried by the Prosecutor's Office, and therefore refrained from releasing them.[499] Additionally, Article 202 of the Code of Criminal Procedure only requires prompt return of objects that are not subject to confiscation, here the gold concentrate bags are subject to confiscation in accordance with Article 346 of the Penal Code.[500]

209. [redacted]

210. [redacted]

[498] Code of Criminal Procedure, Article 198 (**C-0506**).
[499] *Id.* at Article 202 (**C-0506**): "Seized objects and documents that are not subject to confiscation, restitution or seizure will be returned, as soon as necessary, to the legitimate holder or to the person from whose power they were obtained. The return may be provisionally ordered as a deposit and the holder must be obliged to exhibit them."
[500] Criminal Code, Article 346 (**C-0511**): "Whoever exploits mineral resources, construction materials, rocks and natural resources contained in the territorial sea, underwater platform, rivers and national lakes, without having the respective license or authorization, or who having it, breaches or exceeds the conditions provided in the itself, will be punished with imprisonment for two to five years and the confiscation of supplies, tools, instruments and machinery that have been used in the commission of the crime."
[501] Fuentes Report I, ¶1 92.
[502] [redacted]

211. *Third*, Claimants have taken out of context the statements by the Prosecutor's Office during the March 25, 2020 hearing, that resulted in the release of the gold concentrate. Claimants and Fuentes have alleged that the prosecutor that attended that hearing stated that "no further proceedings are pending, and all necessary investigations have already been conducted in these proceedings"[506] and that the Court stated that three years "is more than enough time to conduct an investigation."[507]

212. [redacted]

213. *Finally*, the discussion about the alleged inability to dispose of the gold concentrate is moot since the gold concentrate was released under custody, and it cannot be freely disposed of, since the Court can order its presentation if the investigation so require. And, more importantly, Claimants make no claim for damages regarding the released gold concentrate.

H. Guatemala played a critical role in protecting Exmingua by acting as mediator and protector during the social conflict

1. <u>The State played a key role in mediating the social conflict</u>

214. Claimants generally criticize the State for failing to take action to get rid of the blockade, but fail to mention that the State was fully involved after the community's opposition arose. The State had various institutions seeking to mediate the conflict before resorting to force, including the Procurador de Derechos Humanos or Human Rights Ombudsman of Guatemala ("PDH"). [509]

215. As part of its mandate and through its Mediation Unit, PDH took a series of actions and measures aimed to verify, mediate, dialogue, and prevent violations of human rights at the project site. These actions were directed to protect the rights of all relevant actors involved in the conflict, including Exmingua.[510] Contrary to what Claimants allege, the authorities of Guatemala were always present during the conflict.[511] PDH was present at numerous events and promoted different actions to protect both the communities and

[506] Claimants' Reply, ¶ 321.
[507] Claimants' Reply, ¶ 322.
[508] [redacted]
[509] Law of the Human Rights Commission of the Congress of the Republic of Guatemala and the Human Rights Ombudsman, Article 8 (**RL-0427**). The PDH is a commissioner of the Congress of the Republic of Guatemala whose mandate is the defense of all human rights recognized in the Constitution, the Universal Declaration of Human Rights, Treaties, and International Conventions approved and ratified by Guatemala
[510] Guaré Statement, ¶ 6.
[511] Claimants' Reply, ¶ 49.

Exmingua's rights.[512] In one case, they assisted in facilitating the exit of machinery that was on site.[513] Throughout the years, PDH has made between 75 to 100 visits to the area to address the social conflict surrounding Progreso VII and was present in meetings between the key actors.[514]

216. Even early in 2016, PDH continued to monitor the situation at La Puya by holding different meetings and dialogues with the only objective to find common solutions to the conflict. Despite the clear evidence to the contrary,[515] Claimants insist on arguing that there was no presence of Guatemalan authorities in 2016.[516] It is clear that the State maintained a presence (as further described below) through 2016.[517]

2. Guatemala's police maintained a constant presence at the site and provided physical protection for project

217. Claimants' vague allegation that the State failed to take any action rings hollow when it refers to the involvement of the National Civil Police ("PNC").[518] The documents on the record demonstrate the permanent presence and assistance given to Claimants and their mining operation.

218. Contemporaneous documents[519] evidence that PNC has assisted Exmingua, its workers, and the communities, ever since the conflict started.[520] PNC has produced different reports that outline in detail all the events in which they provided assistance to both Exmingua and the communities.[521]

219. With respect to Claimants' allegations pertaining to 2016, there is no indication that PNC failed to provide assistance.[522] To the contrary, photos taken in early January show that the PNC tent continued to be in place at the entrance of the mine.[523] There is no indication that later in 2016 PNC stopped providing assistance or that Exmingua requested assistance and those requests were denied.[524]

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[512] *See* Counter Memorial, ¶442-451, Report of the Office of the Human Rights Ombudsman of Guatemala **(R-0056)**.
[513] See Email from CEDER to Exmingua, attaching report for 2013, dated March 24, 2014, p. 19 (**C-0716 ENG/SPA**).
[514] Guaré Statement, ¶ 9. *See* Letter from Human Rights Ombudsman dated December 20, 2012 (**R-0027 ENG/SPA**); Detailed Report regarding the Actions taken by the Ombudsman in the case of Exmingua and La Puya dated June 10, 2019, p. 1 (**R-0055 ENG/SPA**); Report "La Puya Conflict, Mining Project, San José del Golfo and San Pedro Ayampuc, Guatemala in opposition of mining company" from PDH dated December 1, 2020, p. 1, 5-7 (**R-0056 ENG/SPA**); Report on the meeting held on December 10, 2015, at the Presidential House between members of La Puya and authorities of the Government of Guatemala, p. 56-57 **(R-0301)**.
[515] Guaré Statement, ¶ 14; García Statement, ¶¶ 20-22.
[516] Claimants' Memorial, ¶ 259-260.
[517] *See* Respondent's Counter Memorial, ¶ 444.
[518] PNC is responsible for protecting the life, physical integrity, the security of all individuals and their property, the free exercise of rights and liberties, as well as responsible to prevent, investigate and combat crime, while preserving the public order and security. *See* Guatemalan National Civil Police Law, Article 9 (**C-0445-ENG/SPA**).
[519] The documents were disclosed to Claimants during the disclosure phase of these proceedings.
[520] *See* Report of PNC dated May 10, 2016 (**R-0117/R-0052-resubmitted**). García Statement, ¶ 15.
[521] *See* Report of PNC dated May 10, 2016, pp. 2-5 (**R-0052 resubmitted**)
[522] Guaré Statement, ¶ 14; García Statement, ¶¶ 20-22.
[523] Photos of PNC located in front of the mine in January 2016 (**R-0298**).
[524] Guatemala's Counter Memorial, ¶ 445.

220. On April 22, 2016, Exmingua filed an amparo action against the President of Guatemala, the Ministry of Interior, and the Director General of the National Civil Police for allegedly failing to remove a blockade that was preventing entry to and from the site.[525] [redacted][527] The latter describes in detail all the operations to be conducted starting January 7, 2016, until further notice, which included onsite police presence, the appointment of riot police staff to help with the operations, delimitation of the territory, increase of the amount of available police security to guard the mine's entrance to ensure free locomotion, among other rights.[528]

221. The Constitutional Court dismissed the application based on procedural deficiencies and noted that, on the basis of the evidence submitted, the Court was not convinced that the authorities had failed to provide the necessary protection to safeguard the public order. The Court specifically held:

> With regard to the "breach" referred to also as the act complained of, this Court has been able to determine from the analysis of the evidence in the case record, especially of the detailed reports submitted by the authorities complained of, that all measures necessary to safeguard public order in the Progreso VII Derivada mining project facilities and in areas adjacent thereto, specifically where the demonstrations have taken place, have been adopted, so as to ensure that the rights of those individuals that either have or have not taken part in the demonstrations are upheld. In view of this situation, this Court has no instruments of evidence that may actually convince this Court that the breach that has given rise to the request for protection has indeed occurred, much less convince this Court that the threat remains that constitutional rights and public order will not be guaranteed in and around the facilities of a mining project that, at the moment, remains suspended.[529]

222. As evidenced in the different reports, PNC took different measures since the inception of the conflict in compliance with domestic laws to protect the interests of both Exmingua and the communities, including to put into place a security plan to provide assistance and maintain public order in the area in front of the mine's entrance in 2016.[530]

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[525] Claimants' Memorial, ¶ 118.
[526] Report of PNC of May 10, 2016, p. 2 (**R-0052 resubmitted**).
[527] [redacted] (**R-0299**)
[528] *Id.* at pp. 13-17 (**R-0299**)
[529] Constitutional Court Ruling denying Exmingua's amparo against the president dated March 2, 2017, p.11 (**C-0147**).
[530] *See* Report of the National Civil Police of May 10, 2016, p. 6 (**R-0052**); Report of the National Civil Police of May 10, 2016 (**R-0303**); Constitutional Court Ruling denying Exmingua's amparo against the president of March 2, 2017, p. 11 (**C-0147 ENG/SPA**).

I. The State has and continues to act consistent with its obligations under the ILO 169 Convention and Guatemala law

1. The Executive Branch has taken measures to comply with the order from the Judicial Branch

223. The Supreme Court's *amparo provisional* ordered the suspension of Exmingua's exploitation license.[531] The Constitutional Court decision of May 5, 2016, confirming the *amparo provisional,* did not require MEM to conduct a consultation. It merely stressed that the mining license could regain validity once MEM conducted consultations under Convention 169,[532] confirming the temporary character of the suspension and the *amparo provisional*. Therefore, the *amparo provisional* did not order MEM to take any action regarding Convention 169 consultations, nor could it, since it would have been a prejudgment of the merits of the pending *amparo definitivo*.

224. On the other hand, the *amparo definitivo* issued by the Supreme Court on June 28, 2016, ordered MEM to carry out the consultations following both the law and the Court's rulings.[533] As was previously mentioned, MEM appealed the decision under the premise that it did not contain a clear mandate as to how MEM should conduct the consultations.[534]

225. Despite the aforementioned, MEM carried out a series of activities to prepare for the consultation of the communities surrounding the mine, as it was legally bound to comply with the Court's order.[535] The preliminary actions taken by MEM's Vice Ministry of Sustainable Development are described in its June 11, 2020 Report filed before the Supreme Court of Justice,[536] which included —among others— the following:

- On August 19, 2016, MEM held a meeting with the Mayors, Council Members, COCODES, residents of San Pedro Ayampuc, and San José del Golfo to begin the consultation process under the Supreme Court's *amparo definitivo* decision and explore possible work plans.[537]
- On October 31, 2016, MEM called a meeting with all COCODE members to present the technical team in charge of defining a work plan to gather trustworthy information regarding the representation of the communities who will take part in the consultations.[538]
- On November 25, 2016, MEM and the United Nations High Commissioner for Human Rights met with local authorities, members of La Puya, and other residents to introduce the Supreme Court's mandate and propose the creation of working groups to discuss and reach agreements regarding the

[531] Supreme Court of Guatemala, Case No. 1592-2014, Decision dated November 11, 2015(**C-0004**).
[532] Constitutional Court of Guatemala, Case No. 1592-2014, Decision dated May 5, 2016 (**C-0143**).
[533] Supreme Court of Guatemala, Case No. 1592-2015, Decision dated June 28, 2016, p. 33 (**C-0144**).
[534] *See* MEM's appeal against the Supreme Court's May 28, 2016 *amparo definitivo* decision (**C-0471**)
[535] *See* Article 53 of the Law on Amparo **(C-0416-R).**
[536] MEM Report submitted to the Constitutional Court on June 11, 2020 (**C-0872**).
[537] *Id.* at p. 6.
[538] *Id.* at p. 8.

consultations.[539]

- On March 29, 2017, MEM called a meeting with COCODE members of San Pedro Ayampuc, who did not attend.[540]
- On May 17, 2017, the Mayor of San José del Golfo informed MEM about the current list of communities included in the project's influence area of the mine.[541]

226. The Vice Ministry of Sustainable Development encountered resistance from groups of residents of the area of influence, particularly from members of La Puya, who claimed that the actual consultation should not take place until the Constitutional Court rendered a final decision on the matter.[542] This petition was accommodated by MEM, since the preliminary actions from the Vice Ministry of Sustainable Development had concluded and due to the lack of clarity in the Supreme Court *amparo definitivo*.

227. It is important to point out that the decision of the Constitutional Court on May 11, 2020, granted MEM's appeal, stating that it found that the Supreme Court *amparo definitivo* "did not describe in detail all the actions to be carried out as a result of the granting of the requested amparo"[543] and therefore proceeded to request that the consultation process be carried out by MEM. Hence any prior action taken by MEM in a good faith attempt to comply with the *amparo definitivo* may have been redundant or contradictory to the Constitutional Court's order.

228. Claimants erroneously place under bad light the Vice Ministry of Sustainable Development's cautious approach on the Progreso VII Derivada consultation process, arguing that MEM is acting in bad faith and for political reasons.[544] These are empty accusations that show Claimants' lack of understanding of the social conflict surrounding the project; additionally, Claimants fail to submit any evidence showing political reasons motivated MEM's conduct.

229. Furthermore, Claimants once again claim an alleged lack of knowledge of MEM's Report filed on June 11, 2020 before the Constitutional Court.[545] Nevertheless, Claimants had full access to the case file and could have accessed the report; Guatemala should not be responsible for Claimants' lack of diligence in reviewing the file. Another issue that Claimants insist on mischaracterizing is the timing of when MEM should comply with the Order of the Constitutional Court, alleging that MEM is unduly delaying the

[539] *Id.* at p. 9.
[540] *Id.* at p. 14.
[541] *Id.* at p. 16.
[542] *See* Constitutional Court of Guatemala, Case No. 3207-2016 and 3344-2016 (**R-0137**, p. 40/**R-0137** pp. 77-78)
[543] *Id.* at p. 42.
[544] Claimants' Reply, ¶ 495.
[545] Claimants' Reply, ¶¶ 495-496.

execution for political reasons.[546] This is false.

230. As the second statement of Vice Minister Pérez indicates, MEM cannot begin the consultation process until there is an execution order (*ejecutoria*) issued by the first instance amparo tribunal.[547] This is also confirmed by Prof. Richter's Second Report, where he states that the execution order (*ejecutoria*) plays a significant role in cases like this one, due to the fact that it marks the time when the Supreme Court returns all the administrative files relating to the case to the challenged authority (MEM).[548]

231. Claimants' position on the conduct by MEM in relation to the consultations contradicts Claimants' positions. Claimants lament that MEM did not carry out consultations after the issuance of the Supreme Court's *amparo provisional* and *definitivo*, yet Claimants have argued that MEM lacked standing to be sued in the amparo proceedings and that Congress was the authority to carry out the consultations.[549] This shows the lack of seriousness of Claimants' arguments.

2. The Order from the Judicial Branch is consistent with Guatemala's international human rights commitments

232. Guatemala's actions are consistent with its national laws and international human rights obligations. As expressed in the Counter Memorial,[550] Guatemala is a party to a series of international human rights agreements that include ILO Convention 169 and the UN's Declaration on the Rights of Indigenous Peoples, and Guatemala's actions (especially those of the Judiciary) relating to the Progreso VII Derivada case have directly applied those international commitments. Claimants deem this discussion irrelevant,[551] in yet another display of detachment with the complex human and social aspects of this case.

233. Guatemala is a member of the Interamerican Human Rights System and is therefore bound by the "conventionality control" doctrine. This doctrine is eloquently explained by Interamerican Human Rights Court Judge Mac-Gregor, as:

> "a doctrine [that] creates an international obligation on all state parties to the American Convention on Human Rights to interpret any national legal instruments (the constitution, law, decrees, regulations, jurisprudence etc.) in accordance with the ACHR and with the Inter-American corpus juris more generally (also called the "block of conventionality").2 Wherever a domestic instrument is manifestly incompatible with the Inter-American corpus juris, state authorities must refrain from application of this law, in order to avoid

[546] Claimants' Reply, ¶ 498.
[547] Vice Minister Oscar Pérez Second Witness Statement, ¶ 11.
[548] Richter II Report, ¶ 150.
[549] Reply, ¶ 237; Fuentes Report I, ¶¶ 143, 152; and Fuentes II ¶¶ 151-155.
[550] Guatemala's Counter Memorial ¶¶ 94-100.
[551] Guatemala's Counter Memorial ¶ 251.

any violation of internationally protected rights."[552]

234. Judge Mac-Gregor further observes that the "conventionality control" doctrine has three main goals: (1) prevent the implementation of national laws manifestly incompatible with the Inter-American Human Rights Convention, (2) serve as a mechanism for authorities to meet their obligations under the Inter-American Human Rights Convention, and (3) serve as a "bridge or medium through which to facilitate and increase *dialogue*, especially *judicial dialogue*, between national courts and the Inter-American Court on the subject of human rights, and for this to enable the effective realization of these rights. Consequently, it represents a key component in the creation and unification of a *ius constitutionale commune* which protects the dignity of all individuals and strengthens constitutional democracy in the region." [553]

235. As a result of that regional *judicial dialogue* and the interest of the international and regional community on a consistent application of international human rights instruments and jurisprudence, Guatemala's top judiciary officials have received a series of visits and trainings from the International Labor Organization,[554] the Office of the United Nations High Commissioner for Human Rights, the United Nations Special Rapporteur on the situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples, UNICEF, the United Nations Development Program and the Interamerican Court of Human Rights, as well as from reputed jurists from Chile, Colombia, Costa Rica, Ecuador and Mexico.[555]

236. These visits and trainings have been consistently held from 2010 until present day, and have dealt with the application of ILO Convention 169, the application and interpretation of constitutional rules under the light of international standards,[556] conventionality control in human rights,[557] conventionality control and incorporation of international human rights law to domestic law,[558] conventionality control and efficiency of international decisions and the *pro homine* principle, jurisprudential trends on indigenous peoples rights,[559] inter-jurisdictional dialogue between local courts and the Inter-American Court of Human Rights,[560] and collective indigenous peoples rights to land under international human rights law.[561]

237. During these visits and trainings, international and regional organizations emphasized Guatemala's

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[552] Mac-Gregor, E. (2015). Conventionality Control the New Doctrine of the Inter-American Court of Human Rights. AJIL Unbound, 109, p. 93 (**RL-0430**)
[553] *Id.* at pp. 98-99.
[554] Letter No. 9222 from the International Labor Organization (**R-0344**)
[555] See List of Technical Assistance Activities between the Constitutional Court and the United Nations High Commissioner for Human Rights (**R-0328**).
[556] *Id.* at p. 1.
[557] *Id.* at p. 3.
[558] *Id.* at p. 4.
[559] *Id.* at p. 5.
[560] *Id.*
[561] *Id.* at pp. 5-6.

obligation to ensure compliance with indigenous peoples' right to prior and informed consultation, as recognized in ILO Convention169 and the UN's Declaration on the Rights of Indigenous Peoples.

238. These training activities have also guided the conduct and approach taken by the Executive Branch regarding the consultation of indigenous peoples.[562] As a result, Guatemala's conduct was and will be in strict compliance with its international human rights obligations and consistent with the expectations of international and regional organizations regarding this matter.

III. ARTICLE 10.16.1 OF CAFTA-DR DOES NOT ALLOW CLAIMANTS TO RECOVER CLAIMS FOR REFLECTIVE LOSES

239. This is the first opportunity for Guatemala to elaborate on its defense since the Tribunal's receipt of the Non-Disputing Party Submissions from the CAFTA-DR State Parties. Moreover, this is the procedural opportunity to do so under the Tribunal's instructions.

240. In its Decision on Preliminary Objections, a majority of the Tribunal resolved, *inter alia*, that Claimants can pursue, through Article 10.16.1(a) of the CAFTA-DR, a claim for either its direct losses or its reflective losses. Based on a textual reading of the CAFTA-DR, the majority held that it is "unable to find anything in the Treaty text itself, including the context of various provisions related to Article 10.16.1, which would impose a limitation of "direct" losses, or an exclusion for derivative or reflective loss, onto Article 10.16.1(a)'s open language about a claimant pursuing its own losses on its own behalf."[563]

241. We respectfully request that the Tribunal reconsider its decision.

A. The Tribunal has the power to reconsider its Decision on Preliminary Objections

242. As opposed to an award,[564] the ICSID Convention does not deal with the question of reconsideration of a decision. Also, as opposed to an award,[565] the ICSID Convention does not state that a decision has the effect of finality and *res judicata*. Precisely for the reason that there is nothing in the treaty text prohibiting the tribunal from reconsidering its decisions, the tribunal in *Standard Chartered Bank* held that "it is not possible to draw any conclusions *a priori* about the question of reopening."[566]

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[562] *See Challenges* in the intercultural dialogue in consultation processes with Indigenous Peoples (**R-0304**); Course Program on Formation and Transformation of Intercultural Conflicts and Dialogue **(R-0305**); *see also,* Investigation: Addressing Controversies in the Context of High Polarization and Risk of Retaliation (**R-0306**).
[563] Decision on Preliminary Objections, ¶ 144.
[564] ICSID Convention, arts. 51 and 52.
[565] ICSID Convention, art. 53.
[566] *Standard Chartered Bank (Hong Kong) Ltd. v. Tanzania Electric Supply Company Ltd.*, ICSID Case No. ARB/10/20, Award, September 12, 2016, ¶ 315 (**RL-0431**). *See also Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, February 7, 2017, ¶ 84 (**CL-0303**) ("[T]he ICSID framework is silent about the possibility of reopening a pre-award decision").

243. What is clear from Article 44 of the ICSID Convention, however, is that this Tribunal is vested with the inherent power to decide any question not otherwise provided in the ICSID Convention or in the Arbitration Rules. According to the learned Prof. Georges Abi-Saab, that inherent power includes the power to reconsider a decision.[567] Bucher seconds Prof. Abi-Saab's view[568] and adds that the presence of post-award remedies does not negate the tribunal's power to reconsider its decisions.[569]

244. Having located the source of this Tribunal's power to reconsider its decisions, Prof. Abi-Saab opines that a decision may be reconsidered "if the tribunal becomes aware that it had committed an *error of law or of fact* that led it astray in its conclusions, or in case of new evidence or changed circumstances having the same effect."[570] Given that the ICSID Convention does not bar this Tribunal from reconsidering its decision, but rather grants it inherent powers to deal with questions not otherwise covered by the Convention or the Rules, nothing should prevent the Tribunal from reconsidering its decision on the basis of an error of law or fact.

245. Guatemala submits, with all due respect, that the Tribunal committed an error of law or was otherwise misled by Claimants when it ruled in favor of allowing reflective losses to be pursued under Article 10.16.1(a) of the CAFTA-DR. In turn, an erroneous interpretation of Article 10.16.1(a) of the CAFTA-DR implicates this Tribunal's jurisdiction,[571] making reconsideration of the Decision on Preliminary Objections even more pressing under the circumstances. The question of jurisdiction is so fundamental to the resolution of any dispute such that the ICSID Arbitration Rules confers the Tribunal the power "on its own initiative [to] consider, *at any stage of the proceeding*, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence."[572]

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[567] Dissenting Opinion of Prof. Georges Abi-Saab in *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV, and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Decision on Respondent's Request for Reconsideration, March 10, 2014, ¶ 84 (**RL-0432**).

[568] Dissenting Opinion of Andreas Bucher in *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV, and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, February 9, 2016, ¶ 34 (**RL-0434**).

[569] *Id.*

[570] Dissenting Opinion of Prof. Georges Abi-Saab in *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV, and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/30, Decision on Respondent's Request for Reconsideration, March 10, 2014, ¶ 84 (**RL-0432**).

[571] Decision on Preliminary Objections, ¶ 120: "Although Respondent frames this question as a matter of admissibility, the Tribunal sees it more fundamentally as an issue of jurisdiction. Either CAFTA-DR provides consent under Article 10.16.1(a) for a shareholder claim based on indirect or "reflective" harm, measured by the diminished value of the shareholder's shares in a local enterprise, or it does not."

[572] ICSID Arbitration Rules, Rule 41(2).

B. The Tribunal was misled to believe that Claimants would pursue a claim for damages in the form of decrease in Exmingua's value

246. Guatemala has consistently taken the position that "[n]owhere [in their Notice of Arbitration or Notice of Intent] do Claimants allege or seek to recover for any purported loss in the value of 1) their interest in Exmingua, 2) their shares, or 3) any other type of reflective losses."[573] It was for this reason that Guatemala opposed Claimants' resort to Article 10.16.1(a) of the CAFTA-DR on the premise that this provision, unlike Article 10.16.1(b), does not allow a claimant to recover reflective losses, *i.e.*, loss or damage "that the enterprise has incurred."

247. In response, Claimants argued that they "are not making claims for loss of or damage to Exmingua's assets. To the extent that Exmingua's value has decreased as a result of action taken against its assets, however, that, in turn, harms Claimants, by decreasing the value of their investments in Exmingua."[574]

248. From this premise, a majority of the Tribunal allowed the Claimants to pursue its Article 10.16.1(a) claim against Respondent and held that "it is important to be attuned to the distinction between damages incurred directly by a local enterprise and those said to have been incurred indirectly by an upstream investor, including the very real possibility that not all of the former may be equated to the latter."[575] According to the Tribunal, "Claimants [must] be able to demonstrate not only that Respondent breached a CAFTA-DR obligation, but also that *they in particular* incurred cognizable "loss or damage by reason of, or arising out of" that breach, is a matter for proof."[576]

249. Claimants' submissions, however, make it indubitable—as Guatemala has feared—that Claimants are not making a claim for a diminution of value of their shares, but for the loss or damage that Exmingua itself had allegedly suffered. Contrary to what Claimants told the Tribunal they would do, they now argue that "they "***need not*** show a diminution in the ***value of its shares in [Exmingua]***."[577] An examination of the nature of Claimants' alleged damages indicate that, indeed, what they are asking for are damages that, if true, only Exmingua itself had suffered, *i.e.*, Lost Cash Flow from the Operating Mine and Interest thereon, Value of Impounded Concentrate and Interest thereon, Lost Value of the Operating Mine, Lost Value from El Tambor's Known Exploration Potential, and Lost Value from El Tambor's Exploration Opportunity.[578]

250. Additionally, Claimants refuse to compute corporate income and withholding taxes[579] in their calculation

[573] Guatemala's Reply on Preliminary Objections, ¶ 22.
[574] Claimants' Rejoinder on Preliminary Objections, ¶ 68.
[575] Decision on Preliminary Objections, ¶ 159.
[576] *Id.*
[577] Claimants' Reply, ¶ 456.
[578] Claimants' Memorial, ¶ 399.
[579] Rosen/Milburn Report, ¶ 158.

of damages, arguing that "applying taxes on a [historical] lost profits calculation would result in double taxation."[580] In his dissenting opinion, Arbitrator Prof. Zachary Douglas QC already cautioned that the CAFTA-DR embraces "a clear concern with the protection of the rights of any creditors of the company (secured and unsecured commercial creditors, involuntary creditors such as tort victims of the company's activities, the tax authorities, and so on)."[581]

251. Had Claimants at the outset been candid to this Tribunal that their claim was for merely the loss or damages incurred by Exmingua, there would not have been a need for the Tribunal to resolve the question of whether Article 10.16.1(a) of the CAFTA-DR allows them to recover reflective losses. Claimants' misrepresentation led the Tribunal to err in interpreting the provision and, with all due respect, incurred in an error of law in the process.

C. The Tribunal erred as a matter of law in allowing Claimants to pursue a claim for reflective losses under Article 10.16.1(a) of the CAFTA-DR.

252. Article 10.22.1 of the CAFTA-DR instructs this Tribunal to "decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Past tribunals have held that, in interpreting an investment treaty, it must "apply ***international law as a whole*** to the claim, and not the provisions of the [treaty] in isolation."[582] Consistently, Philippe Sands opines that a tribunal must apply the "customary rule"[583] and that the "burden [is] on the party opposing the interpretation compatible with the customary rule to explain why it should not be applied."[584] In this regard, Annex 10-B of the CAFTA-DR confirms the State Parties' "shared understanding" that customary international law "results from a general and consistent practice of States that they follow from a sense of legal obligation." The question, then, is whether, as a matter of customary law, a presumption exists that a shareholder, like Claimants in this case, are barred from seeking reflective losses. The answer is yes.

253. The OECD has opined that "[t]he distinction between shareholders' direct rights and reflective loss is […] well-recognised in general international law."[585] According to the OECD, "for policy reasons, advanced

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[580] Versant Report II, ¶ 135.
[581] Partial Dissenting Opinion on the Decision on Preliminary Objections, ¶ 6.
[582] *MTD v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment of 21 March 2007, ¶ 61 (**RL-0133)** (emphasis added).
[583] Philippe Sands, *Treaty, Custom and the Cross-fertilization of International Law*, 1 Yale Hum. Rts. & Dev. L.J. 85-106, p. 104 (1998) (**RL-0424**).
[584] *Id.*
[585] Gaukrodger, D. (2013), *"Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency"*, OECD Working Papers on International Investment, 2013/03, OECD Publishing, pp. 7-8 (**RL-0056**). *See, e.g.*, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment on Preliminary Objections, (2007) ("Diallo 2007"), § 67 **(RL-0060)** (distinguishing between admissible claims based on direct rights as shareholder and inadmissible claims based on reflective loss); *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v*

national legal systems, both common law (United States, Canada, United Kingdom, Australia, Hong Kong), and civil law (Germany, France), generally apply a "no reflective loss" principle: shareholders generally cannot recover damages for reflective loss."[586] Not only that, but this rule "has been recently reaffirmed in strong terms" by the International Court of Justice and the European Court of Human Rights.[587] This matter is further discussed elsewhere in this Rejoinder, but there is strong evidence that, under customary international law, shareholders are barred from recovering reflective losses. The Non-Disputing Party Submission of the United States filed before this Tribunal on February 19, 2021, confirms that this is the customary rule contained in the CAFTA-DR—an issue that Guatemala brings to the Tribunal's attention at this first opportunity.[588]

254. According to the United States, "no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares." This is so because, as reaffirmed by the International Court of Justice in *Diallo*, "international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders."[589] The United States explains that "Article 10.16.1(a) adheres to the principle of customary international law that shareholders may assert claims only for *direct* injuries to their rights," and that "where the injury is to an enterprise or an asset held by that enterprise, the harm to the investor is generally derivative of that to the enterprise and *Barcelona Traction* precludes a claim for direct injuries to a shareholder's rights."[590]

255. The United States' submission before this Tribunal carries weight and should inform its interpretation of the CAFTA-DR. The United States is not only a State Party to the CAFTA-DR. The United States' 2004 Model BIT influenced the negotiations leading to the conclusion of the CAFTA-DR[591] and Article 24 of the Model BIT[592] is an exact replica of Article 10.16.1 of the CAFTA-DR. It also bears mention that the

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Democratic Republic of the Congo), Judgement, ("Diallo 2010") (reaffirming the distinction) (**RL-0015**); *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, I.C.J. Reports 1970 ("Barcelona Traction 1970"), § 47 **(CL-0368)** ("a distinction must be drawn between a direct infringement of the shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company"); Oppenheim 's International Law, 9th ed. (1990), p. 520 ("Shareholders may, furthermore, have their rights directly infringed (as where shares held only by a particular category of owners are expropriated), as opposed to suffering loss indirectly through damage inflicted upon the company"). For the European Court of Human Rights, see, e.g., Olczak v. Poland, § 58 (Decision dated 7 November 2002) (**RL-0435**).

[586] *Id.* at pp. 7-8 (**RL-0056**).

[587] *Id.*

[588] Non-Disputing Party Submission of the United States, ¶ 50.

[589] *Id.* at ¶ 53.

[590] *Id.* at ¶ 57.

[591] *See also* J. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford: OUP, 2013), p. 351 (**RL-0400**)

[592] United States Model BIT (**RL-0011**)

United States is the home country and the State of nationality of the Claimants. If this Tribunal were to allow Claimants to pursue their claims under Article 10.16.1(a) of the CAFTA-DR, Claimants would be circumventing the legal and policy reasons for which the United States forbids its own nationals from claiming reflective losses.

256. For all these reasons, the Tribunal is most respectfully urged to reconsider its Decision on Preliminary Objections insofar as it ruled that a shareholder, through the vehicle of Article 10.16.1(a) of the CAFTA-DR, can recover loss or damage only incurred directly by a corporation in which those it holds shares.

IV. OBJECTIONS TO JURISDICTION AND ADMISSIBILITY [593]

A. The Tribunal does not have jurisdiction to hear Claimants' investment claims against Guatemala

257. Article 10.16.1 of CAFTA-DR provides two separate paths for pursuing a claim against a State party. Through subparagraph (a) of Article 10.16.1, the claimant can bring a claim against the State if it "has incurred loss or damage by reason of, or arising out of, that breach." However, if the damage or loss was incurred by the claimants' enterprise, the claimant must bring a claim under sub(b) of Article 10.16.1 on behalf of its enterprise.[594]

258. As rightly put by the Tribunal, if Claimants pursued a claim "under a path that had not been offered to them," the Tribunal must reject the claim for lack of jurisdiction.[595] Such is the case here. Below, Guatemala will demonstrate that the Tribunal lacks jurisdiction to hear Claimants' investment claims because: 1) Claimants are seeking recovery of damages incurred by Exmingua—a recourse unavailable under Article 10.16.1(a); and 2) Claimants cannot bring a claim under Article 10.16.1(b) since they have not fulfilled the requisite elements.

259. In the alternative, Guatemala submits that Claimants are abusing the process available under Article 10.16.1. In its Decision on Preliminary Objections, the Tribunal has made it clear that while Claimants can bring a claim under Article 10.16.1(a) for losses "they themselves directly or indirectly" suffered, it noted that Claimants cannot equate Exmingua's losses with their own losses.[596] Abusing the process under Article 10.16.1, Claimants did just what the Tribunal instructed them not to do, to the point of asserting falsely to

[593] Nothing expressed in this Rejoinder Memorial is intended to waive any right or objection, and the fact that an argument of Claimants has been omitted in Guatemala's response should not be taken to imply acceptance of Claimants' position.
[594] See CAFTA-DR, Annex 10-B (**CL-0001**).
[595] Decision on Preliminary Objections, ¶ 120.
[596] *See* Decision on Preliminary Objections at ¶ 157.

be the owners of the El Tambor project.[597]

1. Article 10.16.1(a) does not allow Claimants to seek direct loss for damages sustained exclusively by Exmingua

260. In the Preliminary Objection Phase of the Proceeding, the Tribunal elaborated on the distinction between the remedies available under subparagraph(a) and (b) of Article 10.16.1. Article 10.16.1(a) allows a claimant to bring a claim for "its sole benefit" on the basis that it itself incurred damages.[598] On the other hand, Article 10.16.1(b) permits a claimant to "stand[] in the entity's shoes for purposes of making the claim."[599]

261. A claimant that selects the second route does not "have to demonstrate whether, how, and to what extent it ultimately might have incurred harm as a result of the enterprise's injury (such as through the non-payment of expected dividends or the diminished market value of shares). The sole questions for purposes of Article 10.16.1(b) standing, where the claimant proceeds "on behalf of" the enterprise, are whether the claimant owns or controls the enterprise and whether the enterprise itself has incurred injury by reason of the alleged State breach."[600]

262. As aptly put by the United States, "[e]ach claim by an investor must fall within either CAFTA-DR Article 10.16.1, either subparagraph (a) or (b), and is limited to the type of loss or damage available under the subparagraph invoked."[601] An investor that brings a claim under Article 10.16.1(a) cannot equate the company's damage with its own. This is consistent with the fundamental principle, that a company has a distinct legal personality from its shareholder. International law respects this corporate veil because "to do otherwise would be completely to travesty the notion of a company as a corporate entity."[602]

263. The Tribunal adhered to this principle. Acknowledging their separate personalities, the Tribunal noted that "damages incurred directly by a local enterprise" are distinct from "those said to have been incurred directly by an upstream investor."[603] To seek recovery under Article 10.16.1(a), the Tribunal noted, "it

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[597] *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award (August 13, 2009), ¶ 175 (**RL-0146**) "a claim that is based on the purchase of an investment solely for the purpose of commencing litigation is an abuse of process, then surely a claim based on the false assertion of ownership of an investment is equally an abuse of process.")
[598] Decision on Preliminary Objections, ¶ 128.
[599] *Id.* at ¶ 132.
[600] *Id.* at ¶ 133.
[601] Non-Disputing Party Submission of the United States, ¶ 52
[602] Barcelona Traction, Separate Opinion of Judge Sir Gerald Fitzmaurice, p. 67 (**RL-0433**) ("Since the limited liability company with share capital is exclusively a creation of private law, international law is obviously bound in principle to deal with companies as they are – that is to say by recognizing and giving effect to their basic structure as it exists according to the applicable private law conceptions.")
[603] Decision on Preliminary Objections, ¶ 159.

would not be sufficient for a claimant to demonstrate only that a local enterprise in which it has an interest has incurred harm."[604] Simply put, Claimants cannot equate Exmingua's losses to their own losses; they must demonstrate that they suffered injury as a result of the breach. [605]

264. But once the Tribunal dismissed the Preliminary Objection, Claimants did just that. As will be illustrated below, Claimants disregarded Article 10.16.1 by filing a claim under Article 10.16.1(a) but pursuing the type of loss or damages available only under Article 10.16.1(b).

2. Claimants are seeking recovery for damages sustained by Exmingua contrary to Article 10.16.1(a)

265. As previously indicated in this Rejoinder, Claimants constantly modified their argument at the prejudice of Guatemala's right to defend the claim filed against it. Despite consuming much time in the Preliminary Objections phase describing their claim as a reflective loss claim, and, in any event, a loss incurred by themselves as a result to the breach,[606] it is now clear that Claimants are pursuing a claim for losses suffered by Exmingua.

266. Paying no regard to the corporate veil, and the stern warnings contained in the Decision on Preliminary Objections, Claimants seek recovery of damages which can only be alleged to have been incurred by Exmingua. Among others, they claim damages for loss of value from the:[607] 1) El Tambor's Known Exploration Potential;[608] 2) El Tambor' Exploration Opportunity; and 3) impounded gold concentrate.[609] From the calculation of their damages, it is further evident that Claimants are attempting to recover the

[604] *Id.* at ¶ 129.
[605] *Id.* at ¶ 118.
[606] *See* Claimants' Rejoinder on Preliminary Objections, ¶ 73 (Guatemala "clearly had 'notice' that Claimants' claims were for 'reflective' loss.") (emphasis added); Claimants' Counter Memorial on Preliminary Objections, September 27, 2019, ¶ 57; *Id*.,¶ 61 (Claimants' loss consists of the diminution of the value of Claimants' investment (Exmingua) and, therefore, the diminution of the value of Claimants' shares in Exmingua, incurred as a result of the measures that Guatemala has adopted and maintained."); *Id*., ¶ 33 ("Like the claimants in *Clayton*, Claimants here have lost their opportunity to develop the Tambor project. In such circumstances, there can be no doubt that Claimants may make a claim on their own behalf to recover damages for Respondent's breach").
[607] *See* Versant I Report, ¶18 ("As Claimants have been deprived of 100% of the benefits of the Tambor Project, the damages are equal to the current value of the entire project."); Second Versant Report, ¶ 16 (**"**Claimants lost the ability to advance the Tambor Project from 2016 to present day because of the Measures")); Memorial, para 379 ("Claimants suffered damages in the amount of approximately US$ 89 million, because they were unable to mine additional known gold targets that extend deeper or laterally from the Operating Mine or are otherwise located throughout Tambor").
[608] *See* Claimants' Memorial, ¶ 393 ("Claimants incurred US$ 244 to US$ 291 in damages on account of the lost opportunity of exploring for additional gold resources at Tambor and developing those resources into mines (Tambor's "Exploration Opportunity").
[609] *See* Claimants' Reply, ¶¶ 676-679; Versant II Report, ¶ 244 ("In the First Versant Report, we explained that our understanding is that, in May 2016, the government seized a shipment of gold concentrate from Exmingua. We further understand that the amount of gold contained in the concentrate seized was 15,388 grams (494.74 ounces) based on an email from Dan Kappes dated 31 March 2017. We applied the current gold price to value this gold concentrate. Lastly, we applied a payability percentage of 83% to account for shipping and other costs").

damages as if they were standing in the shoes of Exmingua. For instance, the cash flows alleged to be included in the company value do not reflect the withholdings and taxes that Guatemala and the United States would have collected before Claimants received any dividends from Exmingua.[610] In addition, while they claim the full value of the gold concentrate, as shareholders, Claimants would have only received benefits from the gold (should there be any) through dividends, which perchance were actually declared after taking into account costs, taxes, and withholdings[611] and yet they claim the total direct value.

267. To overcome the prohibition against equating the company's loss with that of the shareholder, Claimants cite to *Clayton v. Canada.*[612] But the case is unavailing for several reasons. In *Clayton*, the tribunal held that "[t]he opportunity to invest in a quarry and a marine terminal […] was an opportunity of the Investors and not an opportunity of Bilcon of Nova Scotia."[613] The tribunal's finding has no merit. First, the tribunal gave no legal justification for piercing the corporate veil that many international tribunals have rejected to do.[614] Second, the facts are distinguishable from the present case. In that case, the tribunal found that the claimant "was not structured [as a separate entity]" from Clayton.[615] The claimant's subsidiary, Bilcon, was "no more than a conduit to facilitate the Clayton's operations."[616]

268. Here, the story is different. Claimants made what little investment they made in Exmingua more than a decade after Exmingua was incorporated.[617] At the start of Claimants' investment, Exmingua already had its "exploration licenses for the Progreso VII area and the Santa Margarita area."[618] It had also "applied for exploitation licenses" for these projects.[619]

269. Guatemala law also prohibits what Claimants are asking this Tribunal to do: pierce the corporate veil with no valid reason. As shareholders, Claimants' rights under Guatemala law are limited to the right: (1) to participate in the profits and to the distribution of the company's capital upon liquidation; (2) of first refusal in relation to new shares issued by the company; and (3) to vote in shareholders' meetings. Exmingua's Articles of Incorporation grants no greater rights than those conferred by law.[620] There is no legal authority which would expand Claimants' right to the opportunity to develop the El Tambor project

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[610] Rosen/Milburn Report, ¶ 158.
[611] *See infra, section* VII, Damages.
[612] Claimants' Preliminary Objections Rejoinder ¶ 33.
[613] *William Ralph Clayton,* et al*. v. Government of Canada, ("Clayton v Canada")* UNCITRAL, Award on Damages (January 10, 2019), ¶ 396 (**CL-0243**).
[614] *Id.* at ¶¶ 392-396 (**CL-0243**).
[615] *Id.* at ¶ 395 (**CL-0243**) (emphasis added).
[616] *Id.* at ¶ 394 (**CL-0243**).
[617] *See* Claimants' Memorial, ¶ 19 (noting that Exmingua was "incorporated on 25 July 1996.")
[618] Claimants' Memorial, ¶ 25
[619] *Id.*
[620] *See* Exmingua's Articles of Incorporation (*Protocolo Registro No. 397062*), Articles 7 and 8, p. 34 (**R-0324**).

and other associated rights. Claimants have also failed to provide any arrangement they have with Exmingua granting Claimants the opportunity to develop the El Tambor project.

270. Given that Claimants are seeking recovery for damages allegedly incurred by Exmingua under a path that had not been offered to them, and for which they fail to meet the requirements as already recognized by this Tribunal, the Tribunal should dismiss the claim for lack of jurisdiction.

3. Claimants have not satisfied the formalities necessary to bring a claim under Article 10.16.1.b

271. Claimants also cannot pursue a claim on behalf of Exmingua because they have not fulfilled the requirements under Article 10.18.2(b) and Article 10.26.2(b) of the CAFTA-DR. According to Article 10.18.2(b), an investor who wishes to bring a claim on behalf of its company must file along with its "notice of arbitration" their written waivers "of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach."[621] Here, Claimants have not presented such waivers.

272. In addition, where a claim is brought on behalf of a company, Article 10.26.2(b) of the CAFTA-DR obliges a tribunal to "award damages and any applicable interest" to the company.[622] Claimants, however, are requesting this Tribunal to award damages to them, not Exmingua.[623] Because Claimants lack the necessary prerequisites to bring a claim under Article 10.16.1(b), they must be denied of any opportunity to present a claim under this avenue.

B. Claimants' illegal activities deprives the Tribunal of jurisdiction and renders their claims inadmissible

273. As stated in Guatemala's Counter-Memorial, an arbitral tribunal should not assist an investor that failed to make and operate its investment in accordance with the host state's domestic laws and certain fundamental principles widely taken to constitute international public policy, including good faith and a prohibition on fraud, misrepresentation, and deceit.[624]

274. In their Reply, Claimants contend that CAFTA-DR does not contain a legality requirement[625] and that,

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[621] CAFTA-DR, Article 10.18.2(b).
[622] CAFTA-DR, Article 10.26.2(b).
[623] Claimants' Memorial, ¶ 399.
[624] Guatemala's Counter-Memorial, ¶¶ 164-179; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* pp.149, 155-158 (1958) ("[A]n unlawful act cannot serve as the basis of an action in law.") **(CL-0218)**; Dolzer and Schreuer interpret legality as being based "not just[on] the laws on admission and establishment but also [on] other rules of the domestic legal order." Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law, p.* 93 (2nd ed., Oxford 2012) **(RL-0309)**; Bernardo Cremades, *Investment Protection and Compliance with Local Legislation,* 24(2) ICSID Rev. 557, 561 (2009) **(RL-0310)** (Bernardo Cremades defined legality as flowing from the general principles of good faith, legitimate expectations, and clean hands).
[625] Claimants' Reply, ¶ 327.

in any case, any legality requirement pertains only to the establishment of the investment.[626] Claimants further argue that Guatemala has not proven its allegations of illegality, misrepresentation, and fraud.[627] For the reasons set forth below, Claimants' arguments are unavailing and must be rejected.

275. As explained in the Counter-Memorial and as detailed further below, the tribunal has no jurisdiction over the claims, because: (1) CAFTA-DR contains explicit references or *renvois* to the host State's law; (2) Claimants' home country, the United States, confirmed the relevance of the host state's law in its non-disputing party submission; (3) the legality requirement is also implicit in the concept of investment; (4) the Foreign Investment Law of Guatemala ("FIL") requires investments to be made and carried out in accordance with legislation and its scope is not temporal; and (5) Claimants operated their alleged investment through misrepresentation and fraud by flagrantly violating Guatemalan law, namely by erecting the mine's infrastructure without a valid construction permit, violating environmental laws, and failing to abide by the orders of the Guatemalan courts. As a result of these violations, the clean hands doctrine also renders the claims inadmissible before this Tribunal.

1. Claimants' investment is subject to a legality requirement under the Treaty, Guatemala's Foreign Investment Law and international public policy.

276. The legality of an investment is a condition precedent for its protection under investment law.[628] The tribunal in *Metal-Tech v. Uzbekistan,*[629] pointed out that "the subject-matter scope of the legality requirement covers: *(i)* non-trivial violations of the host State's legal order (*Tokios Tokelés*[630]*, LESI*[631] *and Desert Line*[632]), *(ii)* violations of the host State's foreign investment regime (*Saba Fakes*[633]), and *(iii)* fraud or misrepresentation (*Inceysa* [634], *Plama* [635], *Hamester* [636]). Claimants' unlawful activities fall within the scope of the legality requirement because they are not trivial, they breach Guatemala's foreign investment

[626] *Id.* at ¶¶ 331-334.
[627] *Id.* at ¶¶ 337-351.
[628] Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, ¶ 6.110 (Oxford 2007) **(RL-0311)**; Jeswald Salacuse, *The Law of Investment Treaties Chapter IV,* p.167 (Oxford 2010) **(RL-0313)**.
[629] *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (October 4, 2013), ¶ 165 **(RL-0142)**; *see also Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (September 27, 2012), ¶ 266 **(RL-0125)**.
[630] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (April 29, 2004), ¶ 86 **(CL-0017)**
[631] *LESI Spa et Astaldi S.p.A. v. Algeria*, Decision on Jurisdiction (July 12, 2006), ¶ 83(iii) **(RL-0314)**.
[632] *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award (February 6, 2008), ¶ 104 **(CL-0216)**.
[633] *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (July 14, 2010), ¶ 119 **(RL-0315)**.
[634] *Inceysa Vallisoletana v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (August 2, 2006), ¶¶ 236-238 **(RL-0147)**.
[635] *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Award (August 27, 2008), ¶¶ 133-135 **(RL-0140)**.
[636] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana,* ICSID Case No. ARB/07/24, Award (June 18, 2010), ¶¶129, 135 **(RL-0139)**.

regime, and involve misrepresentation and fraud.[637]

277. The requirement for the investment to be made and carried out in compliance with the host State's laws originates from any one of these three sources: *(i)* the relevant investment treaty; *(ii)* general principles of international law; and *(iii)* host state's legislation on investment. As discussed in further detail below, Claimants' conduct falls squarely within the subject-matter scope of the legality requirement set by the *Metal-Tech* tribunal, and the legality requirement is triggered by each/all three relevant sources.

278. *First,* Claimants unpersuasively reject the explicit legality clauses in the CAFTA-DR. [638] While Claimants appear to want to exempt their investment from having to comply with the law, all relevant sources of law require that the Claimants' investment be made and carried out in compliance with Guatemala's laws as laid out below.

279. The requirement that investments comply with Guatemalan law in order to qualify for treaty protection is specifically provided for under CAFTA-DR. Article 10.28 of CAFTA-DR limits the scope of treaty coverage to "investments" that are "*conferred pursuant to domestic law.*"[639] Claimants misinterpret the phrase "conferred pursuant to domestic law" as the "nature of rights granted to the investor."[640] It is widely accepted, however, that "[t]hese treaty provisions refer to 'the validity of the investment and not its definition."[641] In addition, the relevance of the host State's domestic laws is emphasized in footnote 10 of Article 10.28.[642]

280. Under Article 31 of the VCLT, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning […] and in the light of its object and purpose."[643] The ordinary meaning of the text tends

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[637] Guatemala's Counter-Memorial, ¶¶ 200-219.
[638] Claimants' Reply, ¶¶ 327-329.
[639] CAFTA-DR, Article 28 **(CL-0001)**.
[640] Claimants' Reply, ¶ 328
[641] *Salini Costruttori SpA and Italstrade SpA v. Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23. 2001), ¶ 46 **(RL-0036)**; Carolyn B. Lamm, E. Hellbeck; M. Khan, *Pleading and Proof of Fraud and Comparable Forms of Abuse in Treaty Arbitration,* Legitimacy: Myths, Realities, Challenges, p. 569 (Van den Berg ed., 2015) **(RL-0316).**
[642] Guatemala's Counter-Memorial, ¶ 192. Within the definition of an investment, footnote 10 of Article 10.28, it was clarified that "[W]hether a particular type of license, authorization, permit, or similar instrument has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party" **(CL-0001)**.
[643] Vienna Convention on the Law of Treaties, Vienna, May 23, 1969, 1155 U.N.T.S. 331, Art. 31(1) **(RL-0027)**. C.McLachlan, L.Shore and M.Weiniger, *International Investment Arbitration: Substantive Principles,* ¶ 6.97 (OUP 2007) **(RL-0311)** ('[t]he plain meaning of this phrase is that investments which would be illegal upon the territory of the host State are disqualified from the protection of the BIT'); Aust, Anthony, *Modern Treaty Law And Practice,* 235 (2d ed., 2007) **(RL-0317)** ("It is important to give a term its *ordinary meaning* since it is reasonable to assume, at least until the contrary is established, that the ordinary meaning is most likely to reflect what the parties intended."); Paul Reuter, *Introduction to the law of treaties,* 74 (2d ed., 1989) **(RL-0336)** ("The purpose of interpretation is to ascertain the intention of the parties from a text …. The primacy of the text, especially in international law, is the cardinal rule, of any treaty interpretation.")**.**

to be a starting point for tribunals[644] because the specific terms used by the parties to a treaty are understood to provide the most reliable indication of their common intention.[645] In the present case, the ordinary meaning of Article 10.28 of CAFTA-DR explicitly refers to the condition that the investor comply with the laws of the host state.

281. Claimants' interpretation of *RDC v Guatemala,*[646] the only tribunal that has to-date addressed article 10.28(g) of CAFTA-DR, appears to support Guatemala's position. Claimants affirm that the tribunal in *RDC* concluded that "conferred pursuant to domestic law" in article 10.28(g) of CAFTA-DR is not a characteristic of the investment to qualify as such, but a "condition of its validity under domestic law."[647] To reach this conclusion, the *RDC* tribunal cites to *Salini*, which found that the reference to the law of the host State in the BIT referred "to the validity of the investment and not to its definition."[648] It should be noted that the *RDC* tribunal concluded that "[i]t is to be expected that investments made in a country will meet the relevant legal requirements."[649]

282. Claimants' reference to *Achmea v Slovakia* for the proposition that a legality clause cannot be read into a treaty is also unavailing.[650]First, *Achmea* and *Bear Creek,* which Claimants also cite, are in the minority view on this issue. Second, while the *Achmea* tribunal would not read in a legality requirement for purposes of jurisdiction, it did maintain that illegality could still affect admissibility.[651]

283. *Second*, the United States agrees that the domestic law of the host State determines the existence of an investment pursuant to Article 10.28 and Article 10.14.1 of the CAFTA-DR. An investment is said to exist in the present case only if Claimants prove that: i) the underlying right is "protected under domestic law," pursuant to Article 10.28(g), and ii) the alleged investment is constituted in accordance with the domestic

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[644] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment,* pages 109-112 (2009) **(RL-0319).**

[645] Villiger, Mark, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission,* The Law of Treaties beyond the Vienna Convention. pages 107, 109 (E. Cannizzaro ed., 2011) **(RL-0320).**

[646] *RDC v. Guatemala*, Second Decision on Objections to Jurisdiction (May 18, 2010), ¶ 140 **(RL-0127**) (The tribunal held that it 'does not consider that it is correct to infer from this fact that rights conferred under other forms of investment may be contrary to[domestic] law'. Rather, it noted, '[i]t is to be expected that investments made in a country will meet the relevant legal requirements.').

[647] Claimants' Reply, ¶ 329. *RDC v Guatemala*, Second Decision on Objections to Jurisdiction (May 18, 2010), ¶ 140 **(RL-0127)**.

[648] *RDC v Guatemala*, Second Decision on Objections to Jurisdiction (May 18, 2010), ¶ 140, ft 99 **(RL-0127).**

[649] *RDC v Guatemala*, Second Decision on Objections to Jurisdiction (May 18, 2010), ¶ 140 **(RL-0127)**.

[650] Claimants' Reply, ¶ 327 (In *Achmea,* the tribunal could not find reference to the host state's law under the Netherlands-Slovakia BIT).

[651] *Achmea B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award (December 7, 2012), ¶ 177 **(CL-0268)**. ("an investment that satisfies the jurisdictional requirements *ratione materiae* of a BIT may yet be denied protection under that BIT because, for example, the investor acted in bad faith by resorting to fraud or corruption in order to make the investment").

law (*i.e*., Guatemalan law in this case) as required under Article 10.28. Furthermore, the United States agrees that a state, pursuant to Article 10.14, is allowed to explicitly require that "covered investments be legally constituted under the laws or regulations of the" state without breaching its national treatment obligation.

284. *Third*, the legality requirement is implicit in the concept of investment, as Guatemala explained in its Counter-Memorial. [652] In their Reply, Claimants totally ignore this argument.[653] It can only be assumed that Claimants implicitly agree with Guatemala on this matter. This is unsurprising considering that in *Plama v. Bulgaria,*[654] the law firm counselling Claimants advocated and successfully argued that the legality requirement is implicit in the absence of an express legality requirement under the applicable treaty. Indeed, in *Plama*, the lack of an "in accordance with the law" provision did not preclude the tribunal from analyzing the legality of the investment in assessing the admissibility of the claimant's claims. Rather, the tribunal concluded that "the substantive protections of the ECT cannot apply to investments that are made contrary to law."[655]

285. Other cases where the requirement for compliance with domestic law was inferred in the absence of treaty language to this effect, be it in *obiter dicta*, include *Saur,*[656] *Phoenix,*[657] *Jan Oostergetel*[658] *and AMPAL.*[659] In addition to these cases, counsel from the same firm representing Claimants has argued that "even an interpretation of the investment treaty under Articles 31(1) and 31(3)(c) of the VCLT should lead tribunals

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[652] Guatemala's Counter-Memorial, ¶¶ 195-199.

[653] Guatemala's Counter-memorial referred to *Fraport v. Philippines, South American Silver v. Bolivia, Mamidoil Jetoil v Abania, and Plama v. Bulgaria* tribunals which held that the legality requirement is a general principle of law independent of any relevant treaty language. None of these cases were addressed in Claimants' Reply.

[654] *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, *Counsel for Bulgaria - White & Case LLP.*

[655] *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, ¶ 139 **(RL-0140)**.

[656] Jarrod Hepburn, *Newly-Released* SAUR v. Argentina *Decision Touches on Illegality, Test for Expropriation, and Financial "Strangulation" of a Concessionaire*, IA Reporter (June 14, 2012) **(RL-0321)** (The tribunal in *SAUR v. Argentina* held that the legality requirement was inherent to all investment treaties, regardless of whether any formulation on legality was used.).

[657] *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (April 15, 2009), ¶ 101 **(RL-0135)** ("States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws") According to that tribunal, "this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT."

[658] *Minnotte and Lewis v. Poland*, ICSID Case No. ARB/10/1, Award (May 16, 2014), ¶ 131**(RL-0136)** (In *Minnotte,* the tribunal found that "[…] it is now generally accepted that investments made on the basis of fraudulent conduct cannot benefit from BIT protection; and this is a principle that is independent of the effect of any express requirement in a BIT that the investment be made in accordance with the host State's law").

[659] *AMPAL-American Israel Corp., et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction (February 1, 2016), ¶ 301 **(RL-0322)**. According to *Ampal* tribunal '[i]t is a well-established principle of international law that a tribunal constituted on the basis of an investment treaty has no jurisdiction over a claimant's investment which was made illegally in violation of the laws and regulations of the Contracting State.

to conclude there is an explicit legality requirement."[660]

286. In general, an investment that is made and operated in breach of the laws of the host State will not qualify as an investment a treaty. Tribunals have affirmed that the requirement of compliance with domestic law can and should be implied in the absence of a treaty provision to that effect, for a number of different justifications.[661] An alternative approach would be to concede that the tribunal has jurisdiction over the investment but refuse the investor the benefits of the substantive protections under the investment treaty.[662]

287. *Finally*, in addition to the Treaty, this Tribunal should also turn to the laws of the host State to determine the existence of a legality requirement. Under Guatemala's FIL, the legality requirement is explicit in the definition of investment, which is defined as "*any activity undertaken with a view to the production, brokerage, or transformation of assets, as well as for the delivery and intermediation of services involving any type of assets or rights, provided such activities have been carried out in accordance with the pertinent laws and regulations.*"

288. In the Reply, Claimants understate the role of the FIL, arguing that the FIL "cannot be a bar to jurisdiction of the tribunal, because Claimants rely solely on CAFTA-DR as a basis for jurisdiction."[663] Claimants ignore the fact that Guatemala's consent is limited to disputes related to investments carried out in in accordance with domestic laws and regulations.[664]

289. Claimants' objection on the inapplicability of Guatemala's fundamental law on regulation of foreign investment is contrary to logic. All states have a primary interest in securing respect for their law, and as the tribunal in *Anderson v. Costa Rica* held, this requirement serves as a "crucial" objective for "the public welfare and economic well-being of any country."[665] For these reasons and based on the case law given below, the Tribunal cannot discount the role – and, indeed, the fundamental importance – of the FIL of Guatemala in the assessment of Claimants' claims under CAFTA-DR.[666]

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[660] Carolyn B. Lamm, E. Hellbeck, M. Khan, *Pleading and Proof of Fraud and Comparable Forms of Abuse in Treaty Arbitration,* page 561, Legitimacy: Myths, Realities, Challenges (Van den Berg ed., 2015) **(RL-0316)**.
[661] *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award (April 23, 2012), ¶¶ 178, 184 **(RL-0195)**; *RDC v Guatemala*, Second Decision on Objections to Jurisdiction (May 18, 2010), ¶ 140 **(RL-0127)**. Campbell McLachlan, Laurence Shore, et al., *International Investment Arbitration: Substantive Principles*, Oxford International Arbitration Series 217-263 (Second Ed., Oxford University Press 2017) **(RL-0311)**.
[662] *Yukos Universal Ltd v Russia,* UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, ¶¶1349–1353 **(CL-0180)**.
[663] Claimants' Reply, fn 979.
[664] Guatemala's Counter-Memorial, ¶¶ 183-187.
[665] *Ross Anderson et al. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award (May 19, 2010), ¶ 53 **(RL-0153)** ("The assurance of legality with respect to investment has important, indeed crucial, consequences for the public welfare and economic well-being of any country").
[666] Ch.Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration,* McGrill Journal of Dispute Resolution

290. It is a truism that foreign nationals are subject to the domestic law of the host State in whose territory they are present.[667] According to the Montevideo Convention on the Rights and Duties of States, "[t]he jurisdiction of states within the limits of national territory applies to all the inhabitants."[668] This is a function of the principle of territorial sovereignty of States and the corollary exclusive jurisdiction they have within their own territory,[669] in particular the right to regulate and choose their own political, social and economic system.[670] As stated in the Lotus case, "restrictions upon the independence of States cannot …be presumed" and, in addition, States have broad discretionary powers over their territorial jurisdiction and the application of the laws with the titles based on their sovereignty.[671]

291. Furthermore, the signing of international agreements granting rights to citizens of third countries cannot and should not be viewed as a violation of the State's right to regulate the activities of foreign citizens in its territory, or to require them to comply with its domestic legislation. Such a cancellation would be a substantial limitation on the sovereignty of the host State and thus would require a clear provision in this regard.

292. Recent cases insist that compliance with the laws of host States is a fundamental obligation of any foreign investor. In *Kardassopoulos v. Georgia,* the tribunal considered that it is "well established that there are provisions of international agreements that can only be given meaning by reference to municipal law."[672] The tribunal in *Total v. Argentina* noted that the laws of the host State "has a broader role than that of just determining factual matters," and "the content and the scope of [the claimant's] economic rights . . . must be determined by the Tribunal in light of [the respondent's] legal principles and provisions."[673] The tribunal in *AAPL v. Sri Lanka* also held that "the BIT is not a self-contained closed legal system limited to provide

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(2014) **(RL-0323)** (According to Schreuer, some questions with a bearing on jurisdiction, such as the investment's legality, the investor's nationality and the existence of property rights, are governed by domestic law. He emphasized that an exclusion of domestic law, especially of host state law, by way of a narrow provision on applicable law is unworkable).

667 James Crawford, *Brownlie's Principles of International Law,* p. 611 (8th ed., Oxford 2012) **(RL-0324).**

668 Convention on the Rights and Duties of States, December 26, 1993, 165 L.N.T.S. 19 Article 9 **(RL-0325)**. *See* to the same effect, Article 2(2) of the Charter of Economic Rights and Duties of States, GA Res. 29/3281 (1974) **(RL-0326)**.

669 *Island of Palmas case* (*Netherlands v. USA*), PCA, Award (April 4, 1928), 2 UNRIAA, ¶¶ 829, 838 **(RL-0327)**.

670 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, GA Res. 2625(XXV) (1970) **(RL-0328)**. *See also* Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. USA*), Merits, Judgment (June 27, 1986), ICJ Reports 1986, 205, 258, 263 **(RL-0329)**.

671 *S.S. Lotus* (*France v. Turkey*), PCIJ Series A, No. 10, Judgment (September 7, 1927), pp. 18–19 **(RL-0330)**.

672 *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (July 6, 2007), ¶ 145 **(RL-0331)**.

673 *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (December 27, 2010) ¶ 39 **(RL-0312)**; *see also El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (October 31, 2011) ¶ 135 **(CL-0047)** ("[t]he fact that the BIT and international law govern the issue of Argentina's responsibility for violation of the treaty does not exclude that the domestic law of Argentina has a role to play too . . . Thus, in order to establish which rights have been recognized by Argentina to the Claimant as a foreign investor, resort will have to be had to Argentina's law").

for substantive material rules of direct applicability," but that it must "be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature."[674]

293. The conclusions above are relevant to the present case. Consistent with the Treaty, international law, and the FIL, there is an explicit condition that the right to invest and operate in a State's territory requires the investor's compliance with domestic laws, in this case the laws of Guatemala. Claimants' unlawful conduct detailed in the Counter-Memorial[675] and in the facts above,[676] includes violations of Guatemalan law as well as fraudulent misrepresentations in violation of international public policy.

2. Claimants' illegal conduct occurred both in inception and operation of the investment.

294. Claimants' main argument is that the legality requirement only applies to the establishment of the investment, not to any and all violations of the host State's law after the investment is made.[677] They contend that their investment was established on June 19, 2009, when they initially purchased shares in Exmingua,[678] and argue that Guatemala cannot refer to any illegalities after that date. Claimants' position is incorrect.

295. *First*, legality cannot be determined with reference only to the initial purchase of Exmingua's shares in 2009. Claimants' investment is not limited to the shares, as by their own submission on the damages claimed, their claims extend to Exmingua' assets, including mining rights, and thus the mining operation must be considered in its totality.[679] The point of acquisition is therefore not a singular event in 2009 with the purchase of the shares, but includes every point in between until Claimants' fully acquired the mining operations. This would include any required permits in order to operate the mine, including the required exploitation and construction licenses. Without the construction license, for example, the key component of the mine, which is the processing plant and related infrastructure, would impact the acquisition of the mining operations. Claimants' failure to secure a construction license for the mine site, including any misrepresentations in getting their exploitation and environmental permissions are illegalities made in

[674] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), ¶ 21 **(CL-0254).**
[675] Guatemala's Counter-Memorial, ¶¶ 208-219.
[676] *Supra,* Section II.
[677] Claimants' Reply, ¶ 324.
[678] *Id.* at ¶¶ 331-334.
[679] Hearing on preliminary objections, December 16, 2019, page 80, ¶¶ 17-22 ("We clearly laid out the fact that we had a protected investment. The investment is Exmingua. Investments are defined as an enterprise. They are also defined as shares. They're also defined as interests in an enterprise. So all of those are our investments"); Notice of Dispute, p. 2; Notice of Arbitration, ¶ 46.

establishing the investment.

296. In this regard, Guatemala recalls *Mamidoil v. Albania*, [680] where the respondent moved to dismiss the claims because the claimant failed to obtain the required construction license. In response, the claimant tried to distinguish its investment by claiming that it was only comprised of shares in a local subsidiary, a lease contract and tank farm, and insisted that the respondent had not challenged the legality of either the shares or of the lease.[681]

297. Albania had argued that "the composite parts of the investment form a whole and must be considered together."[682] The tribunal agreed with Albania, finding that "the three elements considered above form a unity." [683] The tribunal noted "likewise, the nature and fate of the investment pertaining to the construction and operation of the tank farm extends automatically to all other components. The lease without storage facilities makes no economic sense … fully-owned subsidiary is equally bound to the construction and operation of the tank farm." [684] The tribunal noted that illegality of one component makes the whole investment illegal.[685]

298. There is consistent case law showing that tribunals, when examining the existence of an investment for purposes of jurisdiction, look beyond the specific transaction to assess the overall operation. [686] Tribunals have thus refused to dissect an investment into individual steps taken by an investor, even if those steps were identifiable as separate legal transactions. Tribunals look rather to the entire operation directed at the investment's overall economic goal.[687]

299. *Second*, illegality can occur at a time, including after certain steps in the process of establishing the investment have already been performed.[688] Thus, even if Claimants' acts are not seen as tainting the

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[680] *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Albania*, ("*Mamidoil* v. *Albania*") ICSID Case No. ARB/11/24 (March 30, 2015) **(RL-0141)**.
[681] *Id.* at ¶ 363 **(RL-0141)**.
[682] *Id.* at ¶ 364 **(RL-0141)**.
[683] *Id.* at ¶ 366 **(RL-0141)**.
[684] *Id.* at ¶ 367 **(RL-0141)**.
[685] *Id.* at ¶ 369**(RL-0141)** ("Tribunal finds that the components of the investment form an inseparable whole and that the determination of the legality of the construction and/or operation of the tank farm would affect its totality").
[686] *PSEG v. Turkey,* ICSID Case No. ARB/02/5, Decision on Jurisdiction (June 4, 2004), ¶¶ 106–124 **(RL-0332)**; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award (August 6, 2004), ¶ 54 **(RL-0333)**; *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on Annulment (November 1, 2006), ¶ 38 **(RL-0334)**.
[687] *Mamidoil v. Albania*, Award, ¶ 367 **(RL-0141)**.
[688] Carolyn B. Lamm, E. Hellbeck; M. Khan, *Pleading and Proof of Fraud and Comparable Forms of Abuse in Treaty Arbitration,* Legitimacy: Myths, Realities, Challenges, p. 560 (Van den Berg ed., 2015) **(RL-0316)** (As explained by C. Lamm, "an investor can hardly be heard to complain that it has some right to operate its investment in violation of host State law or premised on misrepresentation, and seek the assistance of an international tribunal").

acquisition of the investment, they are certainly issues that affected the operation of the investment. Claimants engaged in a series of illegalities that also impacted the operation of the investment, in this case, the mining operation as whole, when they ignored court orders[689] and breached their obligations to comply with environmental mitigation measures.[690] Claimants' operation of the investment in breach of international and Guatemalan laws deprives the tribunal from jurisdiction over the claims.

300. In line with the *Mamidoil* decision, a partner at the firm representing Claimants has emphasized that the illegality does not have to occur in the making of an investment, adding that the illegality in performance or implementation cannot be ignored. This makes sense because it would be an affront to the host State's sovereignty to ignore illegality in carrying out the investment, since States have a significant interest in having investments operate legally within their territories.[691]

301. In the present case, Guatemala's foreign investment law reflects the lack of temporal requirements that Claimants are attempting to impose. As explained above, under Guatemalan law, any investment activity is protected under the FIL if "such activities have been *carried out* in accordance with the pertinent laws and regulations of Guatemala."[692] This legality requirement applies both to investments and any activities associated with operation and implementation of such investments, meaning that no temporal limitation applies.

3. Guatemala has substantiated its allegations of illegality

302. Claimants' unlawful activities in connection with the mine fall within the scope of the legality requirement because they are not trivial, they breach Guatemala's foreign investment regime, and they involve fraud and misrepresentation. For the reasons described below, the Tribunal should decline jurisdiction.

a. Claimants failed to obtain a valid construction permit

303. Exmingua carried out the mine's infrastructure works without a valid construction license as required by Guatemalan Law. Claimants point to the certification of minutes from the Municipal Secretariat of the Municipality of San Pedro Ayampuc No.45-2011[693] (the "Certification") as a construction permit, but that is misleading, and certainly insufficient to support the proposition that they had a valid municipal

[689] Guatemala's Counter-Memorial, ¶ 216
[690] Guatemala's Counter-Memorial, ¶¶ 766-769
[691] C.B. Lamm, E. Hellbeck; M. Khan, *Pleading and Proof of Fraud and Comparable Forms of Abuse in Treaty Arbitration,* Legitimacy: Myths, Realities, Challenges. page 560 (Van den Berg ed., 2015) **(RL-0316).**
[692] Foreign Investment Law of Guatemala, Article 1, Decree No.9-98, 1998 **(RL-0134)**. Article 1 of the Foreign Investments Law of Guatemala expressly provides that activities associated with investment must be "carried out in accordance with the pertinent laws and regulations."
[693] Minutes of San Pedro Ayampuc Municipal meeting dated November 15, 2011 **(C-0092)**.

construction license. The Certificate only purports to certify the existence of a document that does not exist. There is no construction permit as was explained above.[694] Moreover, there are numerous red flags that suggest that the Certification was false.

304. In their Reply, Claimants argue that Guatemala's allegation on the lack of construction license is baseless, and that it "merely exposes the discriminatory, arbitrary, and unlawful conduct of Guatemala's municipal and judicial organs."[695] Furthermore, Claimants refer to MARN's Technical report that Exmingua "ha[d] [a]… Construction license granted by municipalities of San Pedro Ayampuc and San Jose de Golfo"[696] and claim that at no point during the construction phase did the mayor or any official from the municipality question the existence of the construction license.[697]. These arguments are unavailing.

305. *First*, Claimants *post-hoc* attack on the judicial proceedings and the court's determination on the lack of a valid construction license as arbitrary, discriminatory, or unlawful is contradicted by the record of those proceedings. Even now, Claimants do not base any of their claims on the conduct of either the municipal authorities or the court in those proceedings with regards to the construction license issue. Moreover, the fact that MARN acknowledged the existence of a permit does not attest to the validity of the documents.

306. *Second*, this situation mirrors the facts and arguments made in *Mamidoil*. In *Mamidoil,* the claimant never obtained a valid construction permit, but rather relied on written assurance in the form of a letter that they could proceed with their project. [698] Furthermore*,* Mamidoil argued that the "[r]espondent never challenged the legality of the construction, never imposed any sanctions" and "these facts are an implicit acknowledgement of the investment's legality".[699] The claimant presented different news, inspection and audit reports, where the construction permit is mentioned as having been issued.[700] With respect to those allegations the tribunal noted that:

> "[t]he different allegations are not related to and do not have any bearing on the construction permits. It does not share Claimant's appreciation of the facts. As to the general attitude of Respondent, it is true that it never imposed sanctions and did not order the destruction of the tank farm as the law provided. Yet, the decision not to impose sanctions must not be confounded with an implicit issuance of a permit."[701]

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[694] *Supra*, Section II.
[695] Claimants' Reply, ¶ 342-346.
[696] MARN Technical Report dated February 23-27, 2015, pp. 7, 63 **(R-0105)**.
[697] Claimants' Reply, ¶ 343.
[698] *Mamidoil v. Albania*, Award, ¶ 103(c) **(RL-0141)**.
[699] *Id.* at ¶ 415 **(RL-0141)**.
[700] *Id.* at ¶ 415 **(RL-0141)**.
[701] *Id*. at ¶ 416 **(RL-0141).**

307. As reflected in *Mamidoil,* the State's lack of enforcement of a requirement did not vitiate the legal requirements under the law. The tribunal observed that the "investment may be …tainted by illegality when the investor violates procedural norms and regulations for setting up its investment." The facts in this case are even more compelling.

308. Guatemala, unlike Albania, never gave affirmative assurances that Claimants could proceed with their Project without a construction license. To the contrary, Guatemala's court decidedly found that no construction permit existed. Yet, Claimants continued to construct[702] and never tried to remedy the lack of construction permit by applying for it. Instead, Claimants continue to rely on the Certification, which a Guatemala court had already determined does not constitute a valid construction license. In light of this, Claimants continue to maintain that they have a permit, but never were able to present a valid copy of it.

309. Bin Cheng citing to the cases of *Corfu Strait*,*Kling*, and *Melczer Mining Co.,* noted that "[t]he absence of evidence in rebuttal is an essential consideration in the admission of prima facie evidence. Where the opposing party can easily produce countervailing evidence, its non-production may be taken into account in weighing the evidence . . . ."[703] In such contexts, "[t]he situation, as established by prima facie evidence, coupled with the adverse presumption arising from the non-production of available counter-evidence, is thus sufficient to create a moral conviction of the truth of an allegation."[704] Other tribunals have also applied burden-shifting principles in such context.[705]

310. Even if the Tribunal finds that the Certification constitutes a valid construction license, which would contravene the findings of the Third Civil Court of First Instance, the Certification has all the indicia of being false. As outlined above in Section II(A)(3), there are a number of issues with the Certification. Among other things, the Certification refers to minutes of the municipality that do not exist in the official books. The municipality has confirmed that "*within the files of the Municipal Secretariat of the Municipality of San Pedro Ayampuc, department of Guatemala there is no record of granting of a construction license to Exmingua.*"[706] Moreover, the document was not signed by the actual municipal secretary and the former mayor has denied that he approved the construction permit.

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[702] Witness Statement of Gonzalez, ¶ 21.
[703] Bin Cheng, General principles of law as applied by international courts and tribunals, pages 323-324 (1953) **(CL-0218)**.
[704] *Id.* page 325 **(CL-0218)**.
[705] *Methanex Corp v. USA,* UNCITRAL, Final Award, ¶ 55, **(RL-0227)** ("Once the US demonstrate prima facie evidence that Methanex had acted unlawfully "if not criminally, the burden of proof … shifted to Methanex"); *Fraport AG Frankfurt Airport v. Republic of Philippine*, ICSID Case No. ARB 11/12, Award, ¶ 99 **(RL-0150)** (if a respondent "adduces evidence sufficient to present prima facie case," then the "claimant must produce rebuttal evidence").
[706] Report of the Municipality of San Pedro Ayampuc **(R-0116)**.

311. Claimants' reliance on the receipt is also unpersuasive.[707] The payment was made over a month later, despite the fact that the Certification claims that the payment was made in November 2011.[708] In any event, payment for a construction permit in and of itself does not prove the existence of a valid construction license.

312. Accordingly, Claimants' operation of the mine without a valid construction license and misrepresentation that they had a construction permit, when no such permit exists, leaves no other conclusion other than the operation was operated illegally. Moreover, even when a Guatemalan court ordered Exmingua to suspend construction works, construction continued in complete defiance of the law. The Tribunal should find that Claimants' unlawful activities in establishing and operating the mine deprives the Tribunal of jurisdiction. And even if the Tribunal finds that there is jurisdiction, claims are inadmissible.

b. Claimants carried out their investment in violation of Guatemala's environmental laws

313. As previously mentioned, an investor, who provides misleading information in order to obtain a favorable decision from a governmental authority, has engaged in fraudulent misrepresentation. In general terms, elements of fraud include *(i)* misrepresentation of a material fact, *(ii)* the reckless disregard of the truth, and *(iii)* the host State's implicit or explicit reliance upon that fact.[709] As noted by ICSID tribunals, with respect to allegations of fraud, motive and intent are not required, [710] and a claimant must meet the legality requirement "regardless of his or her knowledge of the law or his or her intention to follow the law".[711] Moreover, fraudulent misrepresentation is a unilateral act, that is, the acts or omissions of one party are sufficient to establish fraud for purposes of determining whether the tribunal has jurisdiction over the case or whether claimant's claims are admissible.[712]

314. In the ICSID context, arbitral tribunals have considerable discretion over evidentiary matters and tribunals have applied the ordinary standard of preponderance of evidence with allegations of fraud and

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[707] Receipt dated December 21, 2011 **(C-0093)**.
[708] *Compare* Certification **(C-0092)** *with* Receipt dated December 21, 2011 **(C-0093)**.
[709] A. Llamzon and A. Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct*, in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18. p. 527 (**RL-0355**); *See also* Carolyn B. Lamm, E. Hellbeck; M. Khan, *Pleading and Proof of Fraud and Comparable Forms of Abuse in Treaty Arbitration,* Legitimacy: Myths, Realities, Challenges, p. 560 (Van den Berg ed., 2015) **(RL-0316)** (defining fraud as "a knowing misrepresentation of the truth of a material fact to induce another to act in a manner that is detrimental to their interests").
[710] *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No.ARB/12/14 and 12/40, Award, December 6, 2016, ¶¶ 243-244 (**RL-0151**); *See also* Carolyn B. Lamm, E. Hellbeck; M. Khan, *Pleading and Proof of Fraud and Comparable Forms of Abuse in Treaty Arbitration,* Legitimacy: Myths, Realities, Challenges 560 (Van den Berg ed., 2015), p. 558 (**RL-0316)**.
[711] *Anderson v. Republic of Costa Rica* ICSID Case No. ARB(AF)/07/3, Award, (May 19, 2010) ¶ 52. (**RL-0153**).
[712] *Jan de Nul N.V. et al. v. Arab Republic of Egypt* ICSID Case No. ARB/04/13, Award (November 6, 2008) ¶¶ 75, 76, 112. (**RL-0143).**

misrepresentation.[713] In particular, in determining fraud and misrepresentation, tribunals use the "balance of probabilities" standard, which requires a showing that an allegation is more likely than not to be true.[714] The tribunals in *Inceysa*[715] and *Plama*[716], which dismissed the cases due to misrepresentation, have relied on an overall assessment and weighting of contemporaneous objective evidence, rather than on a particular standard of proof. Here, the Tribunal should follow in the steps of these tribunals and apply a preponderance of the evidence standard.

315. In the EIA, Claimants made a series of representations to MARN and the surrounding communities about the impacts of the Project, including that they would develop the project to the highest international and national standards.[717] This proved false. Considering the experience that Claimants and their environmental consultants claim to have,[718] Claimants should have known that the EIA was not conducted in accordance to best practices.[719] In particular, there were omissions and deficiencies in the baseline data that meant that the predictive effects of the Project could not be accurately identified or mitigated.[720] Therefore, any conclusions presented in regard to many of the physical and biological aspects of the projects were without sound data.[721] This also meant that in the absence of real data, any management plans were nothing more than a guess.[722] In essence, Claimants misrepresented or recklessly omitted material data and facts that would affect the conclusions and management plans presented in the EIA.

316. As a consequence, Claimants' act of providing incomplete data and thus misleading conclusions to MARN in order to obtain environmental approval for the project is nothing short of a fraudulent misrepresentation. MARN approved the project and issued environmental permissions *relying on*

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[713] *The Rompetrol Group N.V.* v. *Romania*, ICSID Case No. ARB/06/3, Award (May 6, 2013) ¶ 183 **(CL-0211)**; *Desert Line* v. *Yemen,* ICSID Case No. ARB/05/17, Award (February 6, 2008) ¶ 129 **(CL-0216)**; *Libananco Holdings Co. Limited* v. *Republic of Turkey,* ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶ 125 (**RL-0353).**

[714] A. Llamzon and A.Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct*, in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18. p. 490-491 (**RL-0355**); see also *Tokios Tokeles v. Ukraine,* ICSID Case No. ARB/02/18, Award (July 26, 2007) ¶ 124 **(CL-0274)** (referring to "the usual standard, which requires the party making an assertion to persuade the decision-maker that it is more likely than not to be true"); *Rompetrol v. Romania,* Award ¶ 183 **(CL-0211)** (referring to "the normal rule of the 'balance of probabilities'") ¶ 178 ("the standard of proof is *relative*" meaning that "whether a proposition has in fact been proved by the party which bears the burden of proving it depends not just on its own evidence *but on the overall assessment of the accumulated evidence put forward by one or both parties…*".**).**

[715] *Inceysa v. El Salvador*, Award, ¶ 105 **(RL-0147)** The tribunal concluded that fraudulent misrepresentations had occurred in respect of the investor's financial information after a comparison of the investor's financial statements submitted pursuant to the bid against those filed for the same fiscal years with the Spanish Commercial Registry.

[716] *Plama v. Bulgaria,* ICSID Case No. ARB/03/24, Award, August 27, 2008, ¶ 128 (RL-0140).

[717] EIA, p. 59 (**C-0082**).

[718] Kappes Statement II, ¶¶ 5-12; Claimants' Reply ¶¶ 63, 67-68 (discussing the credentials of GSM).

[719] SLR II Report, ¶¶ 143-153.

[720] *Id.* at ¶¶ 143, 156 (d).

[721] *Id.* at ¶ 156 (d-e).

[722] *Id.* at ¶ 156 (a-h).

Claimants' conclusions regarding impacts and mitigation measures. The EIA thus hid the true impacts of the Project because the conclusions reached were not based on sound data.[723] Considering the lack of proper baselines studies, there is no possibility for Claimants to have any basis to believe that they knew the extent of the impacts, especially with regard to water availability, water quantity and impact on the community's water sources. Claimants thus acted in reckless disregard of the truth in presenting the EIA for approval.

317. Moreover, international specialists Dr. Moran and Dr. Robinson, both of whom separately reviewed the EIA, concluded that the EIA contained misleading information, faulty or absent data, and lacked major ground and surface water studies, and misrepresented negative environmental effects of the projects.[724] While Claimants' focus on attacking the credibility of Moran and Robinson because they were engaged by NGOs,[725] they never previously disputed their findings although they had ample time to do so. Guatemala's experts also agree.

318. In addition, once the permit was obtained, Claimants then proceeded to breach Guatemala's law by failing to abide the obligation set forth in the EIA.[726] Claimants do not deny these breaches.[727] Instead, they attempt to downplay them as being part of an ongoing process with MEM or MARN.[728] There is no basis for this. MARN commenced a proceeding that is currently ongoing regarding these breaches.[729] And many of those violations continue to exist to this day,[730] further evidencing Claimants' disregard for the environment, the surrounding the communities, and the rule of law.

319. Claimants should not be permitted to seek relief through claims arising out of their own unlawful conduct. Accordingly, the tribunal lacks jurisdiction over the claims. And even if the Tribunal finds that there is jurisdiction (which it should not), the claims are inadmissible.

4. <u>The claims also are inadmissible because Claimants' have unclean hands with respect to the entirety of the investment</u>

320. Apart from the fact that the Tribunal lacks jurisdiction over this dispute due to Claimants' flagrant violations of Guatemalan law in making their investments, Claimants' claims must also be dismissed as their illegal conduct deprives them of standing. The claims are inadmissible under the "clean hands"

[723] *Id.* at ¶¶ 144, 156.
[724] Robinson Report, p. 1-2 (**R-0049**); Moran Report, p. 1-2 (**R-0051**).
[725] Claimants' Reply, ¶¶ 77-79, 341.
[726] MARN Inspection Report dated 23 to 27 of February 2015 **(R-0105)**; MARN Inspectio Report dated November 27, 2015 **(C-0629)**; MARN Inspection report dated September 1, 2021 (**R-0285**).
[727] Claimants' Reply ¶ 339.
[728] Claimants' Reply ¶¶ 347-350
[729] MARN Sanction Proceeding initiated February 24, 2016 (**R-0295**).
[730] MARN Inspection report dated September 1, 2021 (**R-0285**).

doctrine. [731]

321. The clean hands doctrine precludes an investor that has engaged in illegal behavior from petitioning a tribunal for relief on a matter connected to his own illegal conduct.[732] This principle requires that an investor act in accordance with the clean hands doctrine both during the establishment of the investment as well as subsequent operation of that investment.[733] This principle is supported by outstanding authors and international tribunals [734] who suggest that the current emerging arbitral trend is reflecting an increased recognition of the "clean hands" doctrine in investment law. [735]

322. In addition, it is a well-established that the invocation of the clean hands principle is not a matter of right or choice for the parties but is left to the discretion of the tribunal,[736] and considered more as a guidance for

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[731] J. Crawford, *Brownlie's Principles of Public International Law,* p. 675 (OUP, 9th ed. 2019) **(RL-0324)** (the clean hands doctrine is a principle "according to which a claimant's involvement in activity illegal under ***either municipal or international law*** may bar the claim")**.**

[732] *Chapman v United Kingdom* (27238/95) Judgment (2001), ¶ 5 **(RL-0337).** J.Bonello in his Separate Opinion noted that "the classic constitutional doctrine of 'clean hands' precludes those who are in prior contravention of the law from claiming the law's protection"

[733] Dumberry, Patrick, *State of Confusion: The Doctrine of Clean Hands in Investment Arbitration after the Yukos award*, Journal of Investment and Trade 239-240 **(RL-0338)**; Kaldunski, Marcin, *Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration*, Polish Review of International and European law 99 **(RL-0339)**; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227.

[734] J. Crawford, *Brownlie's Principles of Public International Law,* p. 675 (OUP, 9th ed. 2019) (explaining the clean hands doctrine as a principle "according to which a claimant's involvement in activity illegal under either municipal or international law may bar the claim") **(RL-0324)**; Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, pages 149, 155-158 **(CL-0218)** ("[N]o one may gain advantage from his own wrong" and "[A]n unlawful act cannot serve as the basis of an action in law."); *Société d'Investigation de Recherche et d'Exploitation Minière v. Burkina Faso*, ICSID Case No. ARB/97/1, Award (January 19, 2000), ¶ 6.33 **(RL-0340)** (denying the claimant's claim on the basis that it would be "shocking to see the Claimant, whose conduct is tainted with fraud, obtaining compensation"); *Inceysa v. El Salvador*, ICSID Case No. ARB/03/26, Award, ¶ 244 **(RL-0147)** ("No legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them."); *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, ¶¶ 135, 141-146 **(RL-0140)** (claims were rejected because of misrepresentation by the claimant, in particular it "recognizing the existence of rights arising from illegal acts would violate the 'respect for the law' which is a principle of international public policy").

[735] Caroline Le Moullec, *The Clean Hands Doctrine: A Tool for Accountability of Investor Conduct and Inadmissibility of Investment Claims,* page 26 **(RL-0341)**; R. Moloo, "A Comment on the Clean Hands Doctrine in International Law" 16 (2011) 1 T.D.M., page 1475 **(RL-0342)**; R.H. Kreindler, *Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine*, *Between East and West: Essays in Honour of Ulf Franke,* page 317 (K. Hobér ed., Juris, 2010) **(RL-0343)** (Kreindler argues that the reliance on the *maxim ex turpi* by some tribunals "can and should be considered another application of the clean hands doctrine"); *Hulley Enterprises Ltd (Cyprus) v Russia,* PCA Case No.2005-03/AA226, Expert Opinion of Prof. Rudolf Dolzer (October 20, 2015), ¶¶ 292-309 **(RL-0344)** (the doctrine "has in part been taken over with other doctrines based on the same rationale and … remains valid today and applicable to areas and settings not clearly covered by the doctrines applied in recent investment awards"); A. Llamzon, "*Yukos Universal Limited (Isle of Man) v Russia*: The State of the 'Unclean Hands' Doctrine in International Investment Law: Yukos as Both Omega and Alpha" , ICSID Review Volume 30. (2015), p. 317 **(RL-0345)**; M. de Alba, *Drawing the Line: Addressing Allegations of Unc Suriname v Guyan Clean Hands in Investment Arbitration,* 1 Revista de Direito Internacional (2015), at 324 **(RL-0335).**

[736] Ori J.Herstein, *A Normative Theory of the Clean Hands Defense*, Cornell Law Faculty Publications (2011) at 5 **(RL-0347)** (Some courts have in fact at times refused to apply the doctrine "where public interest or the gravity of the violation of the plaintiffs' rights outweighed the severity or egregiousness of the plaintiffs' prior iniquitous or wrongful conduct")**.**

a tribunal rather than a hard rule,[737] because a claimant's wrongdoing potentially extends beyond non-compliance with the law.[738]

323. As defined by J. Lawrence, the doctrine's aim is to protect the integrity of the legal system itself, not of the defendant:

> "Allowing an unclean plaintiff to recover would not only abet him in his inequitable conduct, but would also raise doubts as to the justice provided by the judicial system … Courts use the doctrine to ensure a fair result. Where the plaintiff's conduct is such that it would be unjust to allow him a remedy, courts can use the doctrine as a bar to remedy. Therefore, withholding assistance from the unclean plaintiff allows courts to prevent a wrongdoer from enjoying the fruits of his transgression."[739]

324. The ILC Committee members also expressed that "the clean hands rule was a basic principle of equity and justice" and a "principle of positive international law",[740] with ILC's Special Rapporteur observing that "the clean hands doctrine was an important principle of international law that had to be taken into account whenever there was evidence that an applicant State had not acted in good faith and that it had come to court with unclean hands".[741]

325. Outside of the legality requirement contained in CAFTA-DR and the FIL, there are four more grounds for the Tribunal to apply the doctrine in present dispute:

- the clean hands doctrine is applicable through the inherent powers of the tribunal to regulate the proceedings;[742]

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[737] G. Virgo, *The Principles of Equity & Trusts* (OUP, 2016), 36 ("[t]he maxims [of equity] are a useful method of paraphrasing a complex body of law: they are guidelines rather than rules. They are useful because … rules of Equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the particular circumstances of each case.") **(RL-0348)**

[738] Ori J.Herstein, *A Normative Theory of the Clean Hands Defense*, Cornell Law Faculty Publications (2011) at 3 **(RL-0347)** ("[a]ny willful conduct that is iniquitous, unfair, dishonest, fraudulent, unconscionable, or performed in bad faith may constitute 'unclean hands' under the [clean hands doctrine]. Conduct in violation of the [clean hands doctrine] need not therefore be illegal"); W. J. Lawrence, "Application of the Clean Hands Doctrine in Damage Actions" (1982) 57 Notre Dame L. Rev. p. 674. **(RL-0349).**

[739] W. J. Lawrence, *Application of the Clean Hands Doctrine in Damage Actions* (1982), 57 Notre Dame L. Rev., p.p. 673, 675 **(RL-0349).**

[740] ILC, Report of the International Law Commission on the work of its fifty-first session (1999), ¶ 413 **(RL-0350).**

[741] ILC, "Report of the International Law Commission on the work of its fifty-seventh Session" (May 2– June 3 and July 11–August 5 2005) UN Doc A/60/10, ¶ 236 **(RL-0351).**

[742] A. Newcombe, *Investor Misconduct: Jurisdiction, Admissibility or Merits?* in C. Brown and K. Miles (eds.), Evolution in Investment Treaty Law and Arbitration 194 (CUP, 2011) **(RL-0352)** ("investment treaty tribunals, as creatures of public international law, should be viewed as having inherent or incidental jurisdiction to find that claims are inadmissible for abuses of process or other serious forms of misconduct."); *Libananco Holdings Co Ltd v. Turkey,* ICSID Case No. ARB/06/8, Decision on Preliminary issues, (June 23, 2008), ¶ 78 **(RL-0353)** ("like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process")**.**

- it is an implicit requirement in all investment treaties;[743]
- the clean hands doctrine as a general principle of international law;[744] and
- the clean hands doctrine as a matter of international or transnational public policy.[745]

326. It is notable that in *Hesham Talaat M. Al-Warraq v. Indonesia,* the tribunal applied the doctrine to violations that occurred after the establishment of the investment. In *Warraq,* the tribunal first found that the respondent had not provided fair and equitable treatment to the claimants.[746] Then the tribunal held that the claimant had breached Article 9 of the OIC Agreement by failing to uphold Indonesian laws and regulations and by acting in a manner which was prejudicial to the public interest.[747] The tribunal concluded that "[t[he Claimant having breached the local laws and put the public interest at risk, he has deprived himself of the protection afforded by the OIC Agreement."[748] The tribunal also noted that the claimant's conduct "falls within the scope of application of the "clean hands" doctrine, and therefore cannot benefit from the protection afforded by the OIC Agreement"[749] and "renders the Claimant's claim inadmissible".[750]

327. In the present case, Claimants' activities directly affected the public interests of the surrounding communities. Therefore, Claimants' claims should fail regardless of their merits because the clean hands

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[743] *Mamidoil v. Albania* ICSID Case No.ARB/11/24, Award, ¶ 291 **(RL-0141)** ("[i]n exchange for their acceptance to enter into investment treaties and giving their consent to the resolution of investment disputes by arbitral tribunals, States expect that such protection would extend only to investments that have been made lawfully"); R. H. Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine" in K.Hobér (ed), *Between East and West: Essays in Honour of Ulf Franke* (Juris, 2010), p. 317 **(RL-0343)** (both the ICSID and ECT should be read, given their object and purpose to foster foreign investments and the development of the host state, to include a "clean hands" requirement of general application, beyond compliance with the law at the time of the making of the investment)**.**

[744] Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, ICSID Review Vol 29 No.1(2014) at 156 **(RL-0137)**; Rahim Moloo and Alex Khachaturian, *The Compliance with the Law Requirement in International Law*, Fordham International Law Journal (2010), at 1485 **(RL-0354)**; Aloysius Llamzon and Anthony Sinclair, *'Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct'* in Albert Jan van den Berg (ed), *Legitimacy: Myths, Realities, Challenges, p.* 511 (18 ICCA Congress, Kluwer 2015), **(RL-0355)**; M. de Alba, *Drawing the Line: Addressing Allegations of Unclean Hands in Investment Arbitration*, Revista de Direito Internacional (2015), pages 324–325**(RL-0335).** According to de Alba, the clean hands doctrine has been recognized as a general principle of international law, so that the doctrine can be applied absent a reference to such requirement in the text of the BIT; R. H. Kreindler, "Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine" in K.Hobér (ed), *Between East and West: Essays in Honour of Ulf Franke* (Juris, 2010), p. 317 **(RL-0343).** (existence of the doctrine "in the domestic legal orders of many States" makes it a general principle of law and thus a source of international law within the meaning of art.38(1)(c) of the Statute of the International Court of Justice).

[745] C. B. Lamm, "Fraud and Corruption in International Arbitration" in M. Ángel Fernández-Ballesteros and D. Arias (eds), Liber Amicorum Bernardo Cremades, pages 709 (La Ley, 2010) **(RL-0356)** (international public policy is applicable "by way of public international law, which governs [investment disputes]".)

[746] *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL Award (December 15, 2014), ¶ 621 **(CL-0273)**.

[747] *Id*. at, ¶¶ 631 et seq, 645 **(CL-0273)**.

[748] *Id*. at ¶ 645 **(CL-0273)**.

[749] *Id*. at ¶ 647 **(CL-0273)**.

[750] *Id*. at ¶ 646 **(CL-0273)**.

doctrine derives from the concept of conscience and fairness, and is particularly relevant in disputes involving the issues of public interest:

> "Courts can use the doctrine where a suit involves a public right or issue. The Supreme Court of the United States has stated that, in cases involving the public interest, the 'doctrine assumes wider and more significant proportions. Thus, in suits involving the public interest, a court may not only prevent a wrongdoer from benefitting from his transgressions but avoid injury to the public."[751]

328. In sum, the clean hands doctrine should prevent Claimants from benefiting from their own unlawful behavior. [752] Claimants hands are unclean, because by operating the project without valid municipal construction permit[753] and providing defective environmental impact studies,[754] they engaged in misrepresentation, fraud, and violation of Guatemala's laws and regulations related to their own claims. As a result, Claimants' claims must be found inadmissible.

C. Claimants Have Not Established That Their Full Protection and Security Claim Is Not Barred Pursuant to Article 10.18.1

1. Claimants misinterpret Article 10.18.1 of the CAFTA-DR

a. Neither a continuous course of conduct nor an ongoing effect of acts taken prior to the critical date can renew the limitation period

329. Contrary to Claimants' interpretation, Article 10.18.1 instructs an investor wishing to bring a claim against a State to do so within three years from when it "first acquired or should have first acquired knowledge of the breach" and "loss or damages."[755] Tribunals and State Parties have read Article 10.18.1 to mean that there could only be one "specific date" when the investor acquired knowledge.[756]

330. Disregarding the clear text of Article 10.18.1, Claimants argue that "a continuous breach" can reset the limitation period.[757] To support their claim, Claimants rely on *UPS v. Canada* and *Feldman v. Mexico*, but these cases, which have received much criticism, are not instructive.

331. *UPS* is unavailing as the tribunal's decision is contrary to the ordinary meaning and object of the period

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[751] W. J. Lawrence, "Application of the Clean Hands Doctrine in Damage Actions" (1982) 57 Notre Dame L. Rev. at page 675 **(RL-0349)**.
[752] P.Dumberry State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the Yukos Award, 17 Journal of World Investments and Trade (2016), p. 253 **(RL-0338)** ("inadmissibility of a claim based on the ground that an investor has failed to respect the implicit legality requirement is indeed an expression of the clean hand doctrine)**.**
[753] Supra, Section II. A (3)(b).
[754] SLR II Report, ¶ 156.
[755] CAFTA-DR, Article 10.18.1, **(CL-0001)**.
[756] Costa Rica's submission, ¶ 10; US Non-Disputing Party Submission, ¶ 4; *See* also *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction, (July 20, 2006) ¶ 81 **(RL-0039)**
[757] *See* Claimants' Reply, ¶¶ 357, 370.

of limitation of Article 10.18.1 of the CAFTA-DR. Without much analysis, the tribunal in *UPS* concluded that "it was true generally in law" that a continuing course of conduct could reset the limitation period under NAFTA which is similar to Article 10.18.1.[758] It further noted that the *Feldman* tribunal's conclusion on the matter supports its finding.[759] The tribunal's reasoning is flawed.

332. As rightly noted by the United States, "a general rule would not override the specific requirements" under Article 10.18.1, "which operates as a *lex specialis* and governs the operation of the limitations period for claims brought under CAFTA-DR Chapter Ten."[760] Like Claimants, the tribunal in *UPS* also misconstrued *Feldman*. In that case, the tribunal did not find that a continuous course of conduct could renew the period of limitation. Rather, it held that NAFTA has no retroactive effect and could not apply to acts and omissions that occurred before NAFTA came into effect.[761]

333. Contrary to the present case, the issue there was whether the lack of jurisdiction over actions that occurred prior to NAFTA's entrance into force could strip the tribunal of its jurisdiction to hear the part of a continuing course of conduct that occurs after NAFTA's entrance into force.[762] Because the issue here is distinct from that in *Feldman,* the case has no relevance.

334. The tribunal's reading in *UPS* has been criticized and rejected by several tribunals[763] and scholars.[764] In

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[758] *UPS v. Canada*, Award on the Merits (May 24, 2007) ¶ 28 (**CL-0037**).
[759] *Id.*
[760] *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission of the United States of America (March 11, 2016), ¶ 6 **(RL-0042).**
[761] *See Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (December 6,2000) ¶ 62 (**CL-0094**).
[762] *See Marvin Feldman v. United Mexican States*, Interim Decision on Preliminary Jurisdictional Issues, ¶ 62 (**CL-0094**).
[763] *See e.g. Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Jurisdiction and Admissibility, (July 13, 2018), ¶ 161 **(CL-0365)** ("**[A]part from *UPS***, Mobil's **continuing breach argument has attracted comparatively little support** in the jurisprudence of NAFTA arbitration tribunals. While Mobil rightly points out that none of the award son this subject concerned facts directly comparable to those in the present case, **it is now over ten years since the award in *UPS* and the absence of any subsequent endorsement of that tribunal's views on continuing breach means that, at the very least, they should be treated with caution**.") (emphasis added); *Apotex Inc v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (June14, 2013), ¶¶ 325-327 **(RL-0215)** ("**Apotex cannot avoid this conclusion by asserting that the** FDA **measure is part of a 'continuing breach'** by the United States, or 'part of the same single, continuous action,' in so far as this is intended as a mechanism to use later court proceedings to toll the limitation period for the earlier FDA measure. As the Respondent has forcefully argued, **nothing in the text or jurisprudence of NAFTA Chapter Eleven suggests that a party can evade NAFTA's limitation period in this way**.") (emphasis added); *Grand River*, Decision on Objections to Jurisdiction, (July 20, 2006), ¶ 81 (**RL-0039)**.
[764] *See, e.g., Peter A. Allard v. Government of Barbados*, PCA Case No. 2012-06, Award on Jurisdiction, 13 June 2014, ¶ 102 **(RL-0104)** ("Plainly, **the UPS v. Canada decision** on which the Claimant relies **misapplies the relevant law and ignores the purpose of the limitation period**.") (*emphasis added*); S. Blanchard, *State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration*, 10(3) Washington University Global Studies Law Review 419, pp. 471-72 **(RL-0106)** ("At first glance, UPS's argument that a continuing act should extend the limitation period with each new application has intuitive appeal. […] This logic ignores the purpose of

Berkowitz, the tribunal rejected the finding in *UPS*, denouncing the decision for defeating the purpose of the limitation period.[765] The tribunal held that a continuous course of conduct "cannot without more renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims."[766]

335. To follow the path taken in *UPS*, the tribunal noted, "would also encourage attempts at the endless parsing up of a claim into ever finer subcomponents of breach over time in an attempt to come within the limitation period. This does not comport with the policy choice of the parties to the treaty" which is to "to limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring."[767]

336. It is also generally accepted that an ongoing effect of a measure taken prior to the critical date cannot preset the limitation period. As aptly put by the ILC in its Articles on Responsibility of States, "an act of a State not having a continuing character occurs at the moment when the act is performed, even its effects continue."[768] Citing to the ILC, the tribunal in *Mondev* also affirmed this distinction and recognized that effects emanating from a prior state action cannot renew the limitation period.[769] Claimants argue that this is "incorrect" but provides no further explanation.[770] Rather, they refer to another text from *Mondev* where the tribunal held that "events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation."[771]

337. It is unclear how this defeats the tribunal's holding on ongoing effects. The text is also insignificant for Claimants' case. While the tribunal did indeed accept the relevance of acts prior to the critical date, it did also note in the subsequent text that this does not relieve the claimant of its duty to "point to a conduct of

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the limitation period, as Canada pointed out. **A reading that resets the limitation period with each new application of a regulation eviscerates the limitation.** Also, as explained above, sophisticated international investors should be able to estimate their losses from a new regulation or policy within the three-year window. If a new state action truly causes unforeseen losses, it will likely fall within the definition of a measure and thus begin a new limitation period.") (emphasis added); R. Digon, *Jurisdiction Ratione Temporis under NAFTA Article 1116(2)*, 2008 Yale Law School Legal Scholarship Repository 1, pp. 37-42 **(RL-0107)**.

[765] *Aaron C. Berkowitz, Brett E. Berkowitz, and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ("*Berkowitz v. Costa Rica*") ICSID Case No. UNCT/13/2, Interim Award, (May 30, 2017), ¶ 208 (**RL-0038**).

[766] *Id.*

[767] *Id.*

[768] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 55th Session (2001), Article 14(1) **(RL-0306)**.

[769] *Mondev International Ltd. v. United States of America*, ("*Mondev v United Sstates*") ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002), ¶ 58 **(RL-0018)**.

[770] Claimants' Reply, ¶ 360.

[771] *Ibid*, citing to *Mondev v United States*, Award, ¶ 70 (**RL-0018**)

the State after that date which it itself is a breach."[772]

b. An investor cannot evade the limitation period by relying on the most recent transgression in a series of similar and related actions is at issue

338. As noted in *Grand River* and affirmed in *Corona Materials*, where "a series of similar and related actions by a respondent state" is at issue, an investor cannot surpass the limitation period by relying on the "most recent transgression in that series."[773] This principle, which has gained wide acceptance the among tribunals[774] and State Parties,[775] is uncontested in the present case.

339. Claimants rather challenge Guatemala's reliance on *Corona Materials*, noting that the breach in *Corona Materials* stemmed from one action: "the Environment Ministry's refusal to grant a license, an act which occurred prior to the critical date."[776] The objection is unfounded. In *Corona Materials*, the fair and equitable treatment claim arose from the Ministry's failure to respond to the claimant's request for motion for reconsideration of the Ministry's refusal to issue a license.[777] The claimant argued that the failure to respond to the motion "should be treated as an autonomous breach of international law, constitutive in itself of a denial of justice."[778] But the tribunal rejected the claim, declining to consider the lack of response as "a stand-alone 'measure,' or a separate breach of the Treaty."[779] The facts here leads to the same conclusion—the events in early 2016 do not constitute a separate breach of the Treaty.

340. Claimants do not challenge nor engage with the tribunal's separate conclusion that "even assuming that the DR administration's silence in reply to the Motion for Reconsideration would amount" to a separate breach, claimant could not evade the limitation period by basing its claim on the 'most recent transgression […]" of a "series of similar and related actions by a respondent state."[780]

341. The conclusion in *Corona Materials* is consistent with that reached by the tribunal in *Grand River v. USA*. The case involved a series of escrow statues enacted by states to implement the Master Settlement

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[772] *Mondev v United States*, Award, ¶ 70 (**RL-0018**)
[773] Guatemala's Counter-Memorial, ¶ 234, citing to *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2006), ¶¶ 214-215 (**RL-0002);**
[774] *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2006), ¶¶ 214-215 (**RL-0002)** *Grand River,* Decision on Jurisdiction, ¶ 81 **(RL-0039)**.
[775] *See* US Non-Disputing Party Submission, ¶ 5; *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission of the United States of America (March 11, 2016) ¶ 5 **(RL-0042)**; *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Submission of the United States of America (September 11, 2007), ¶10 (**RL-0161)**; *Berkwoitz v Costa Rica*, U.S. Submission, ¶ 7 **(RL-0043)**; *Merrill v Canada*, U.S. Submission, ¶ 16 **(RL-0158)**
[776] Claimants' Reply, ¶ 257.
[777] *Corona Materials LLC v. Dominican Republic*, Award, ¶¶ 201-209 (**RL-0002)**
[778] *Id.* at ¶ 209 (**RL-0002)**.
[779] *Id.* at, ¶ 210 (**RL-0002)**.
[780] *Id.* at ¶¶ 214-215 (**RL-0002)** *citing Grand River v USA*, Decision on Objection to Jurisdiction, ¶ 81 **(RL-0039)**.

Agreement (MSA).[781] A good number of these statutes were enacted prior to the critical date. The claimant argued that the "limitation periods…applied separately to each contested measure taken by each state implementing the MSA."[782] In short, "there is not one limitations period, but many."[783] Like *Corona*, the tribunal dismissed the argument stating that such "analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries."[784]

c. The United States and Costa Rica agree with Guatemala's reading of Article 10.18.1

342. The United States and Cost Rica have a similar interpretation of Article 10.18.1. Costa Rica insists that the period of limitation must be strictly applied as it expresses the State parties' intention to limit their consent only to claims brought within three years from when the claimant first acquired knowledge of the breach and the damage.[785] It further notes that the claimant bears the burden of establishing that its claim is within the period of limitation.[786]

343. The United States is of the same view. It submits that "[t]he limitations period is a 'clear and rigid' requirement that is not subject to any 'suspension,' 'prolongation,' or 'other qualification.'" The United States also asserts that the burden of establishing the conditions under Article 10.18.1 rests on the claimant.[787]

344. Consistent with its previous submission, the United States further notes that the term "first acquired" under Article 10.18.1 refers to a "particular 'date'" where the claimant acquired knowledge of the alleged breach, loss, or damages. It submits that "[s]uch knowledge cannot first be acquired at multiple points in time or on a recurring basis."[788] Hence, in cases where a "series of similar and related actions by a respondent state' is at issue, an investor cannot evade the limitations period by basing its claim on 'the most recent transgression in that series." [789]

345. The United States contends that allowing a claimant to base its claim on the most recent transgression would make Article 10.18.1 futile. Both Costa Rica and the United States agree that purpose of Article

[781] *Grand River v. USA*, Decision on Objection to Jurisdiction, ¶ 6-21 **(RL-0039)**.
[782] *Id*. at 81.
[783] *Id*.
[784] *Id.*
[785] Costa Rica, Non-Disputing Party submission, ¶ 6
[786] *Id*.
[787] United States submission, ¶ 3
[788] *Ibid*
[789] *Id*. at ¶ 5

10.18.1 is to promote "diligent prosecution of claims," "insure[] that claims will be resolved when evidence is reasonably available and fresh," and "therefore…protect the potential debtor from late actions."[790] Permitting a claimant to bring its claim based on the most recent transgression in a series of similar or related measures would, as noted below by the United States, 'would render the limitation provisions ineffective."[791]

2. Claimants' full protection and security claim is time barred

a. The ever-shifting full protection and security claim has inhibited Guatemala from comprehensively defending the claim brought against it

346. The right to be heard is a fundamental rule of procedure which includes a party's right to state its defense and present its argument.[792]By continuously re-framing their full protection and security claim as demonstrated below, Claimants have hindered Guatemala from exercising its due process right to fully defend the claim brought against it.

Progreso VII

347. Claimants' full protection and security claim in connection to Progreso VII is a moving target. Following Claimants' Notice of Arbitration, Guatemala filed a Preliminary Objection, arguing, *inter alia*, that Claimants' full protection and security claim with respect to the impediment to Progreso VII and Santa Margarita are time barred. Particularly, Guatemala submitted that the claim is based on events that occurred three years before Claimants commenced the arbitration, hence, the claim must be dismissed pursuant to CAFTA-DR Article 10.18.1.[793]

348. Following Guatemala's objection, Claimants adjusted their argument. Despite the description of their claim in the Notice of Arbitration, Claimants assured the Tribunal that "they are *not* pursuing any claim for pre-2016 events with respect to the Progresso VII Project."[794] Notably, Claimants "insist[ed] that with respect to [Progreso VII], "they do not allege any separate damages as a result of subsequent protests and blockades at the Progreso VII site, since Exmingua's license was suspended in any event."[795]

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[790] Costa Rica submission, ¶ 11. See also United States submission, ¶ 4

[791] United States' submission, ¶ 5

[792] *See, Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment (5 February 2002), ¶ 57 **(RL-0132)**, *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, Decision on Annulment (1 March 2011), ¶ 168 **(RL-0357)**; *CDC Group plc v. Republic of Seychelles,* ICSID Case No. ARB/02/14*,* Decision on Annulment (29 June 2005), ¶ 49 **(RL-0358)**, *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Decision on Annulment (17 September 2020), ¶¶ 131, 144 **(RL-0359)**.

[793] Guatemala's Preliminary Objections, ¶ 129.

[794] *Id*. at, ¶ 223. *See also* Claimants' Rejoinder on Preliminary Objections, ¶ 141 (as explained in their Counter-Memorial, the loss or damage for which Claimants are claiming is the loss of an opportunity to obtain an exploitation license for the Santa Margarita Project.").

[795] Decision on Preliminary Objections, ¶ 213.

349. Taking "Claimants at their word," the Tribunal rejected Guatemala's Preliminary Objection.[796] But once Claimants received a favorable decision, they backtracked on their position and resurrected their full protection and security claim with respect to Progreso VII. Contrary to their submission to the Tribunal, Claimants argued in their Memorial that "Guatemala's failure to act…prevented Exmingua from entering the Project site, using its laboratory facilities."[797]

350. Guatemala pointed out the inconsistency between Claimants' submission in the Preliminary Objection phase and the Memorial.[798] But instead of clarifying their position in the Reply, Claimants left their claim as it is—incomprehensible and contradictory. At the outset, Claimants recognized that "in its Decision on Preliminary Objections the Tribunal accepted that Claimants were not seeking damages for a breach of FPS arising out of the delay to the exploitation activities at the Progreso VII site."[799] In doing so, Claimants admit that their position before the Tribunal was that they are not making a full protection claim in connection to Progreso VII.

351. However, Claimants neither accept nor reject whether this continues to be their position. Instead, Claimants make the same claim they presented in the Notice of Arbitration and Memorial. Claimants argue that "Guatemala failed to take reasonable measures to ensure that Exmingua had access to the Project site."[800] Referring to the Memorial, they insist that "Guatemala's failure to act prevented Exmingua from entering the Project site" and using "its laboratory facilities."[801]

Santa Margarita

352. Claimants' full protection and security claim with respect to Santa Margarita is similarly incoherent and contrary to Claimants' initial submission in their Notice of Arbitration. In the Notice of Arbitration, Claimants noted that Exmingua had to prepare EIA in order to "obtain the exploitation license for the Santa Margarita Project."[802] However, Exmingua was unable to "complete the public consultations required for its EIA due to the continuous and systematic protests and blockades at the site since 2012."[803]

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[796] *Id*. at, ¶ 223.
[797] Claimants' Memorial, ¶¶ 118, 258. *See also Id.*, ¶ 259, citing to Kappes Statement I, ¶ 145 ("Guatemala has refused to clear the gate protestors and allow Exmingua free access to the site situated on the land owned by Exmingua and where Exmingua maintains a fully functional laboratory and machine shop. Given that Exmingua still maintains professional personnel who could run these facilities, including a lab manager, we could use these facilities to provide services to other companies in mining or other industries, but Exmingua is prevented from doing so.")
[798] *See* Guatemala's Counter-Memorial, ¶¶ 221-223.
[799] Claimants' Reply, ¶ 354, citing to Decision on Preliminary Objections, ¶ 228.
[800] Claimants' Reply, ¶ 508. *See also Id*., ¶ 369. *See also* fn. 1123
[801] Claimants' Reply, ¶ 508.
[802] Notice of Arbitration, ¶ 48.
[803] Notice of Arbitration, ¶ 48 (emphasis added).

353. The Tribunal found Claimants' argument "problematic" and highlighted the following questions as important "for determining the timeliness of any full protection and security claim related to the Santa Margarita Project."[804] First, was "access to the Santa Margarita site…restored during the interim period starting in May 2014 when Exmingua obtained access to the adjacent Progreso VII site"? Second, were there "any efforts…made during this interim period to make progress on the EIA consultations for Santa Margarita"? Third, were there "any requests for assistance…made to Guatemala authorities during this period"?[805]

354. Mindful of the challenge of responding to these questions, Claimants ignored these questions and recrafted their arguments. Instead of framing the blockade as "continuous," they describe it as blockade that commenced in early 2016.[806] However, Claimants provided no evidence of such blockade.

355. Where a party continuously modifies its claim to the prejudice of the adverse party, its claim must be dismissed.[807] This is the case here. By amending their claim with every submission, Claimants have violated Guatemala's due process right to fully defend the claim brought against it, hence the Tribunal must dismiss Claimants' claim. For the reasons stated further below, the claim must also be dismissed because it is time-barred.

b. There is no evidence that Exmingua was unable to access the Progreso VII site or was hindered from completing the EIA for Santa Margarita because of blockade in early 2016

356. Claimants cannot merely allege facts to establish jurisdiction. As rightly noted by the Tribunal, "jurisdictional objections do not require a tribunal to assume as true all facts alleged in the notice of arbitration."[808] Hence, to pass over the hurdle under Article 10.18.1, Claimants must establish the following conditions:[809] First, prove that Guatemala failed to provide police protection to remove the alleged blockade. Second, demonstrate that the post-2016 events are not merely "continuation of (or effects emanating from) prior State actions or omissions," but are new State actions or omissions."[810]

357. Because Claimants have not established the first prong, the Tribunal does not need to proceed to the second question. As explained in the Counter-Memorial, there is no evidence which proves that Exmingua

[804] Decision on Preliminary Objections, ¶ 224.
[805] *Id*.
[806] *See* Claimants' Reply, ¶¶ 363-367, 508, 515, Claimants' Memorial 258, 263-264.
[807] *See Lotus Holding Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/17/30, Award (April 6, 2020), ¶ 193 (**RL-0360)**
[808] Decision on the Respondent's Preliminary Objection, ¶ 220.
[809] *Berkowitz v. Costa Rica,* Interim Award on Jurisdiction, (October 26, 2016) ¶ 239 **(RL-0156)**.
[810] Decision on Preliminary Objections, ¶ 226-227.

was impended from accessing the Progreso VII site or from carrying out the social studies necessary to obtain the EIA for Santa Margarita.

Progreso VII

358. The facts on the record defeats Claimants' submission that Exmingua was unable to access the Progreso VII site due to a blockade in early 2016. MEM's inspection of the site in May 2016 confirmed that Exmingua, not only had access to the site, but it also continued to operate the mine.[811] Mr. Kappes also affirms that Exmingua had access to the site.[812]

359. While he claims that the main gate was blocked by protestors, he acknowledges that employees were able to access the site through another trail from San Jose del Golfo.[813] He further admits that the same route was used to deliver "fuel and equipment" to the site.[814] These admissions are disastrous for their claim.

360. [redacted][815]

361. This was affirmed by the Constitutional Court which noted that "all measures necessary to safeguard public order in the Progreso VII Derivada mining project facilities and in areas adjacent thereto" were taken by the relevant authorities.[816]

362. In conclusion, there is no proof that Exmingua was unable to access Progreso VII in early 2016 or that Guatemala failed to provide the necessary police protection.

Santa Margarita

363. Claimants' submission with respect to Santa Margarita is even more astounding. Before proceeding to the merits, the Tribunal should take note of two preliminary points. First, Santa Margarita and Progreso VII are two distinct project sites that could be accessed through different routes.[817] Accordingly, protests at the gate of Progreso VII would not hinder Exmingua from accessing the Santa Margarita project site. Second, the social study required for EIA is not conducted at the project site. To conduct the study, Exmingua must,

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[811] See EM's Mining Rights Control Section Dictamen CM-SCDM-167-2017, dated May 3, 2016, p.1 (**R-0326**)
[812] *See* Kappes Statement II, ¶ 75, Kappes Statement I, ¶ 138.
[813] *See* Kappes Statement II, ¶ 75, Kappes Statement I, ¶ 138.
[814] *See* Kappes Statement II, ¶ 75, Kappes Statement I, ¶ 138.
[815] *See* [redacted] **(R-0299);** Photos [redacted] **(R-0298)**.
[816] *See* Constitutional Court of Guatemala, Case No. 1904-2016, Ruling denying Exmingua's request for an *amparo* against the President, the Ministry of Interior, and the Director General of the National Civil Police (March 2, 2017), p.6 (**C-0147**)
[817] *See* Area Map where two different access points to Santa Margarita and the adjacent communities can be identified. In Situ Report of the area of Progreso VII Derivada and Santa Margarita dated September 21, 2021, p. 6-8. (**R-0277**).

as Mr. Kappes admits, conduct "public meetings in the local villages in the vicinity of Santa Margarita."[818]

364. There is no evidence that there was any blockade in 2016 which hindered Exmingua from accessing the communities. The only evidence presented to this Tribunal is a notarial act submitted to MEM along with Exmingua's request for the suspension of the EIA.[819] But this notarial act, as Guatemala noted before, merely mentions "scattered banners and canvases with slogans against mining," nothing more.[820] In any event, there is no evidence that Exmingua requested the National Police's assistance and that the National Police refused to resolve this purported impediment. Claimants allege that Exmingua had asked MARN to "provide 'guidelines' and 'recommendations' to complete the public consultations to the EIA."[821] However, they do not allege nor prove that they sought security assistance to conduct the study. In any case, MARN is not the proper authority to provide security assistance.

365. Given that Claimants have failed to prove that Exmingua was impeded from completing the EIA in 2016 or that the National Police refused to provide protection, the claim with respect to Santa Margarita must similarly be dismissed for lack of jurisdiction.

c. Claimants have not established that the protests, blockade, and alleged inaction by Guatemala in early 2016 is different from that claimed to have taken place pre-2015

366. Even assuming *arguendo* that the blockade in 2016 and Guatemala's inaction prevented Exmingua from accessing Progreso VII and completing its EIA for Santa Margarita, the full protection and security claim must still be dismissed because is time barred.

367. Claimants represent the pre-2015 and post-2015 blockade as "fundamental distinct" events based on the purpose of the protests.[822] According to Claimants, the 2012 protests "were aimed at preventing *construction and operation* of the mine following issuance of Exmingua's exploitation license (and thus sought to *prevent Exmingua from operating*)," whereas "the 2016 protests arose from the Guatemalan Supreme Court *granting an amparo* against the MEM, on 11 November 2015, and ordering suspension of the exploitation license (and thus sought to *compel the MEM to take action*)."[823] The evidence says otherwise. As illustrated below, the purpose of the protests, in both periods, was to show opposition to the Progreso VII project and force Claimants to comply with the law.

368. The claim with respect to Santa Margarita is also timebarred because it is based on effects that emanated

[818] Kappes Statement I, ¶ 92.
[819] Letter from Exmingua to the MEM, attaching Notary Public's Certification (March 21, 2017), pp. 2-3. **(C-0013).**
[820] *Id*. at p. **(C-0013)**.
[821] Claimants' Reply, ¶ 520.
[822] *Id*. at, ¶ 363.
[823] *Id.*

from events pre-2015.[824] In any event, the claim must be rejected because Claimants cannot evade the period of limitation by relying on the most recent transgression (post-2015 events) in a "series of similar and related" inactions by Guatemala.[825]

Progreso VII

369. No amount of hairsplitting can conceal what is plainly visible from Claimants' submission—the alleged protest and blockade pre- and post-2015 centered on the communities' distrust of the mining project. Aside from one notification by CALAS, (which does not prove that the protest actually happened) none of the evidence submitted by Claimants demonstrate that the sole purpose of the alleged protests in early 2016 was to ensure that MEM's compliance-with the Supreme Court's order.[826] To the contrary, they prove that the goal of the pre and post-2015 protests was primarily to express "opposition" to the mining project at Progreso VII as a result of Claimants' disregard for the communities' concerns and the law of Guatemala.[827]

370. Claimants' reliance on news articles reporting of protests at MEM is unavailing. Citing to these articles, Claimants argue that the protestors demanded MEM to comply with the Supreme Court's order. But according to these articles, these protests took place "in front of the MEM facilities," not Progreso VII.[828]

Santa Margarita

371. Despite Claimants ever-shifting argument, it is clear that Exmingua was unable to complete its EIA due to blockade that allegedly occurred pre-2015. The written statements by Mr. Kappes, Prof. Fuentes, and Exmingua as well as Claimants' Reply affirm this. In Mr. Kappes' own words Exmingua was unable to complete the EIA for Santa Margarita "first due to the initial 2012-2014 blockade and then because Exmingua was focused on getting its operation up and running after the nearly two-years delay, before

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[824] *See* Counter-Memorial, ¶¶ 238-244

[825] *See* Counter-Memorial, ¶ 238

[826] Compare Madre Selva's Notification of Protests (May 31,2016) (C-0888) *with* Madre Selva's Notification of Protests (January 18, 2016) (**C-0875**); Madre Selva's Notification of Protests (February 8, 2016) **C-0876**; **Feb. 2016 (C-0878);** Madre Selva's Notification of Protests (March 8, 2016 (**C-0879**);Madre Selva's Notification of Protests (March18, 2016) (**C-0881**); Madre Selva's Notification of Protests (March 30, 2016) (**C-0882**); Madre Selva's Notification of Protests (April 8, 2016) (**C-0883**); Madre Selva's Notification of Protests (April 19, 2016) (**C-0884**); Madre Selva's Notification of Protests (April 28,2016) (**C-0885**); Madre Selva's Notification of Protests(May 6, 2016) (**C-0886**); Madre Selva's Notification of Protests(May 20, 2016) (**C-0887**); Madre Selva's Notification of Protests (June 9, 2016) (**C-0889**); Madre Selva's Notification of Protests (June 17, 2016) (**C-0890**); Madre Selva's Notification of Protests (July 29, 2016)(**C-0891**); Madre Selva's Notification of Protests dated 16 Aug. 2016 (C-0892); Madre Selva's Notification of Protests (August 29, 2016 (**C-0928**); Madre Selva's Notification of Protests (September 28, 2016) (**C-0893**); Madre Selva's Notification of Protests (October 13, 2016) (**C-0894**); Madre Selva's Notification of Protests (November 3, 2016) (**C-0895**); Madre Selva's Notification of Protests (February 28, 2018) (**C-0931**); Madre Selva's Notification of Protests (March 22, 2018) (**C-0896**).

[827] *Id.*

[828] *See* Claimants' Reply, ¶¶364, 366 *citing* to Geovani Contreras, "Locals from La Puya continue with the protests," *La Prensa Libre* dated March 13, 2016 (**C-0009); Nelton Rivera, "The new camp at the peaceful resistance La Puya," *Prensa Comunitaria Km*. 169 dated May 19, 2019 (C-0011).**

turning back to further exploration, having its Santa Margarita EIA approved."[829] Mr. Kappes' submission is inconsistent with Exmingua's statement to MARN. In its April 2017 letter, Exmingua informed MARN that it was unable to conduct the study because of blockade the started in 2012 and continued to the present date.[830]

372. Claimants also attributed the failure to complete the EIA to events in 2012. In its Reply, Claimants alleged that Exmingua was unable to conduct the consultation because Exmingua's consultants feared for their security.[831] Yet the fear does not originate from actions that took place in 2016 or after the critical date. According to Claimants, the consultants were fearful because on April 10 and May 3, 2012, protestors "threatened" two Exmingua workers.[832] In conclusion, the entire claim in connection to Santa Margarita rests on incidents alleged to have occurred pre-2015, hence the claim is time-barred and must therefore be dismissed.

D. The Tribunal Lacks Jurisdiction over the National Treatment and MFN Treatment Claims

373. The Treaty reservations identified in Guatemala's Counter-Memorial,[833] and set out in Annex II of the Treaty, are *jurisdictional* in nature, despite what Claimants say to the contrary.[834] If a measure taken by Guatemala falls within the scope of Annex II, then, according to Article 10.13, the national treatment and MFN treatment standards "do not apply," and thus, the Tribunal has no power to determine whether Guatemala violated those standards.

374. The United States made this same point towards a separate but similar treaty. Like CAFTA-DR, the national treatment and MFN treatment standards under the Colombia-U.S. TPA "do not apply" to any measures identified in an annex to the treaty.[835] The United States interprets this to mean that a tribunal

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[829] Guatemala's Counter Memorial, ¶ 241, citing to Kappes Statement I, ¶141. *See also* Kappes, ¶ 92 (Once the blockade was removed, Exmingua was finally able to continue the development of the mine. Exmingua also expected GSM to be able to conduct the social studies for the Santa Margarita EIA, which became impractical due to the blockades because the majority of the social studies needed for the EIA would have involved public meetings in the local villages in the vicinity of Santa Margarita and, given the threatening messages coming from the protesters, it would have been impossible to hold such public meetings")

[830] *See* Letter from Exmingua to the MARN dated April 7, 2017 (**C-0015**) ("from 2 March 2012, the project's main access road was blocked by various groups of protesters. The referred blockade lasted 2 years and, during such period, [Exmingua] was unable to access and develop the mining exploitation project. On 25 May 2014, project activities were resumed, but blockades irregularly continued to take place, and they continue to the present date.")

[831] *See* Claimants' Reply, ¶ 288.

[832] *See* Claimants' Reply, ¶ 288, citing to Report of the National Civil Police of Guatemala (PNC), Official Letter No. 164-2016/REF/JJGD/dl dated May 10, 2016, p. 2 (**R-0117**)

[833] Guatemala's Counter-Memorial, § V.D.

[834] *See* Claimants' Reply, ¶ 374.

[835] U.S. Colombia TPA, § 12.9(1). **(RL-0428)**.

"has no jurisdiction to consider" claims that fall within that annex.[836] Guatemala cited this submission in its Counter-Memorial,[837] and Claimants said nothing about it.

375. In any event, should these objections be considered on the merits, Claimants would fair no better since Guatemala cannot not breach standards that "do not apply."

1. National Treatment

376. Claimants agree that under Article 10.13, the national treatment standard (Article 10.3) "do[es] not apply to any measure that [Guatemala] adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II." They also acknowledge the reservation made by Guatemala pursuant to Article 10.13,[838] exempting "all matters related to disadvantaged minorities."[839] The Description of the reservation reads: "Guatemala reserves the right to adopt or maintain *any measure* that grants rights or preferences to socially or economically disadvantaged minorities and indigenous peoples."[840]

377. Claimants oppose this objection, arguing that (i) the claims made against Guatemala do not fall within the scope of the reservation; and (ii) the claims related to Minera San Rafael and CGN are *not* national treatment claims for purposes of the reservation. Each argument fails.

a. Each treatment falls within the reservation.

378. Claimants argue that their claims fall outside the scope of the reservation because the specific *differences in* treatment alleged did not confer protections onto the indigenous communities.[841] Claimants misread the text of Article 10.13 and the reservation. For one, both the reservation and Article 10.13 specifically refer to "measures,"[842] not differences in treatment. The term "measures" is defined as "any law, regulation, procedure, requirement, or practice,"[843] which means the "procedures, requirements or practices" must confer protections onto the indigenous communities to fall within the reservation—not the differences in those procedures or practices. The actions taken by Guatemala, i.e., the Court's *amparo* decisions and MEM's consultations, undoubtedly qualify as measures; and they indisputably conferred rights on to the

[836] *See Astrida Benita Carrizosa v. Colombia*, ICSID Case No. ARB/18/05, Submission of the United States of America (May 1, 2020), ¶. 17 **(RL-0162)** (explaining how the Tribunal "has no jurisdiction to consider" claims that fall under reservation s made by the treaty parties).
[837] Guatemala's Counter-Memorial, ¶ 257, fn. 411.
[838] Claimants' Reply, ¶ 374.
[839] CAFTA-DR, Annex II-GU-3 **(CL-0001)**.
[840] CAFTA-DR, Annex II-GU-3 **(CL-0001)**.
[841] Claimants' Reply, ¶ 376.
[842] CAFTA-DR, Annex II-GU-3; CAFTA-DR, art. 10.13(1) ("Articles 10.3, 10.4, 10.9, and 10.10 do not apply to: (a) any existing non-conforming measure that is maintained by a Party…") **(CL-0001)**.
[843] CAFTA-DR, art. 2.1 **(CL-0001)**.

indigenous communities.[844] They are thus "non-conforming measures" under Article 10.13 and Annex II.

379. More broadly, this reservation encompasses everything within the specific "sector" identified by Guatemala. According to the opening page of Annex II, paragraph 3, the national treatment, and MFN treatment "do not apply to the *sectors, subsectors, and activities*" identified in each reservation.[845] Using the word "and" confirms that there are multiple ways for an act to fall within the scope a reservation. The measure can fall within the specific "sector" identified, and it can qualify as one of the activities specified in the reservation (above).

380. Under Annex II, Guatemala exempted all "matters related to disadvantaged minorities and indigenous peoples" *as a sector*. Thus, if the measures carried out by Guatemala are "related to…indigenous peoples," then they properly fall within that sector and outside the Tribunal's jurisdiction. Here, there is no dispute that the Court's decisions and MEM's activities are related to indigenous peoples. Thus, for this reason as well as the reason above, they fall within the reservation.

b. All of the different treatments are national treatment claims, not MFN claims.

381. As explained in the Counter-Memorial, all of claims made by Claimants are national treatment claims—and thus exempted by the reservation—because each entity compared with Exmingua—Oxec, Minera San Rafael and CGN—is a domestic investor (*i.e.,* the State's "own investor") as defined by the Treaty.[846] Claimants oppose this view, clarifying—for the first time[847]—that the allegations towards Minera San Rafael and CGN qualify as MFN treatment. They also *add* some new MFN claims towards Oxec, in addition to the pre-existing national treatment claims.[848] Both maneuvers fail.

382. Regarding Minera San Rafael and CGN, there is no question that these entities fit the definition of domestic investors such that the claims connected to them can be considered national treatment rather than MFN treatment.[849] Both Minera San Rafael and CGN are "enterprises of [Guatemala]," holding a license

[844] Claimants' Reply, ¶ 375. Claimants have alleged four measures: (i) suspending Exmingua's operations pending consultations *with indigenous communities*; (ii) imposing a condition that Exmingua "cannot resume operations unless a determination is made that operations will not threaten the existence of *the indigenous population*;" (iii) deciding the *amparo* proceedings filed by representatives of *the indigenous populations* at different times; and (iv) completing consultations with *indigenous communities*. Claimants "do not challenge" these measures *per se*.

[845] CAFTA-DR, Annex II **(CL-0001)**.

[846] Guatemala's Counter-Memorial, ¶ 259.

[847] As explained in Guatemala's Counter-Memorial, Claimants did not identify in their Memorial which claims were national treatment and which were MFN treatment. All of them were (are) grouped together in one overarching section, making it very difficult to determine how each entity is being compared. Counter-Memorial, ¶, 617; *see also* Claimants' Memorial, ¶ 323.

[848] Claimants' Reply, ¶ 548.

[849] Claimants' Counter-Memorial, ¶¶ 259-260 ("Each entity is an 'enterprise of [Guatemala],' with an 'investment' in the State, as defined by the Treaty, *i.e.* a license.") Moreover, Oxec, Minera San Rafael and CGN fall outside the definition of "foreign investor" under Guatemalan law because they are all organized under Guatemalan law).

to conduct some activity.[850] They are domestic investors as defined by the Treaty, and Claimants do not argue otherwise.

383. To escape this result, Claimants point to their foreign owners (PSA and Soloway), turning the otherwise national treatment claims into MFN claims. But that is just an attempt to avoid the reservation. Notably, those foreign owners were not involved in the *amparos* or MEM consultations at all. They were not even referenced.

384. It is important to stress in this regard that there is no evidence of discrimination based on foreign ownership in this case.[851] Everything is domestic. All the comparisons made by Claimants are between domestic entities. The alleged treatments have nothing to do with the foreign owners, including Claimants.[852] Claimants have not provided any indication that the foreign owners were relevant in any way. These are national treatment claims and should be dealt with as such.

385. Claimants posit that if Guatemala's position were correct, "an investor whose investment was a juridical entity could never bring an MFN claim," since, by definition, all investments have a Guatemalan nationality.[853] There is nothing wrong with that scenario, however. The Treaty Parties are free to require foreign investors to register as residents, and to register their investments as domestic legal entities.[854] If every investor or investment is organized under state law, as is the case here, then they are all domestic entities, and any discrimination between them is protected under national treatment. In other words, there is no need for MFN protection since everything is domestic.

386. Regarding *Oxec*, Claimants previously lodged a national treatment claim that is barred by the reservation. That much is clear. As to the new MFN claims, Claimants cannot add these claims for the first time in their Reply. The Memorial affirmatively describes Oxec as a local entity "owned and controlled by Guatemalan nationals,"[855] meaning the comparisons with Oxec were limited to national treatment. Claimants never suggested, much less raised, an MFN claim related to Oxec. The fact that they have added a new discrimination claim without any additional allegations or evidence of discrimination shows that Claimants are simply trying to avoid the reservation. All of the national treatment claims should be dismissed.

[850] Guatemala's Counter-Memorial, ¶ 259.
[851] Guatemala's Counter-Memorial, ¶ 660.
[852] Guatemala's Counter-Memorial, ¶ 262 ("The four treatments alleged by Claimants never mention the foreign owners of Minera San Rafael and CGN—Pan American Silver (Canada) and the Soloway Group (Switzerland), respectively. Nor do Claimants discuss any similarities between those two entities and themselves, as they must do to satisfy the MFN standard.").
[853] Claimants' Reply, ¶ 379.
[854] CAFTA-DR, § 10.14.1; United States Submission, ¶ 8.
[855] Claimants' Memorial, ¶ 323.

2. Most-favored Nation Treatment

387. Guatemala has also reserved the right, vis-à-vis the United States, to adopt "*any* measure that accords differential treatment to countries under *any* bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement."[856] As explained in the Counter-Memorial, CGN is owned by Soloway Investment Group of Switzerland; and Switzerland and Guatemala have a bilateral investment treaty that pre-dates the CAFTA.[857] Any MFN claims between Claimants and Soloway fall under this reservation.

388. Claimants oppose this objection because the actions taken towards CGN were not carried out "under" the BIT between Switzerland and Guatemala.[858] In their view, the State would have to act by some express reference to a bilateral investment treaty for the reservation to apply. Respectfully, Claimants misread this reservation.

389. The word "under" is used in the general sense, similar to how the national treatment claims fall "under" the reservation for indigenous peoples. Neither the Treaty nor the reservation require states to expressly connect their acts to a specific treaty before the reservation is applicable. The plain language of the reservation encompasses "*any* measure that accords differential treatment to countries under *any* bilateral or multilateral international agreement." That broad language includes Guatemala's actions towards CGN.

390. What is more, States do not act by express reference to treaties. Nor do they accept foreign investment by express reference either. The interpretation proposed by Claimants would render the reservation ineffective since States rarely, if ever, make such references. Claimants' interpretation simply does not comport with the ordinary meaning of the text.

V. MERITS ISSUES

A. The Law Applicable to the Dispute

391. Claimants assail an array of governmental acts and omissions on the part of Guatemala that purportedly gave rise to several CAFTA-DR claims.[859] Yet, the common thread that weaves all these claims together is the Constitutional Court's decision in the *CALAS amparo* case suspending Exmingua's Progreso VII

[856] CAFTA-DR, Annex II-GU-1 (emphasis added).
[857] Guatemala's Counter-Memorial, ¶ 263.
[858] Claimants' Reply, ¶¶ 37, 383 (The United States appears to take this same position in its Non-Disputing Party Submission).
[859] Claimants criticize the various decisions of the Supreme Court and the Constitutional Court, the MEM's suspension orders, the Guatemalan authorities' investigation of Exmingua's illegal exploitation and subsequent seizure of gold concentrate, the alleged inaction of the police authorities, and MEM's alleged inaction on their EIA application for the Santa Margarita mine.

exploitation license.[860] Verily, Claimants would not have initiated this arbitration were it not for the Constitutional Court's suspension of the Progreso VII mining operations in the *CALAS amparo*.[861]

392. At the heart of this dispute, then, is whether the Constitutional Court was justified,[862] *first*, in requiring the Guatemalan government to comply with the ILO Convention 169 requirements to consult with indigenous peoples and tribal communities, and *second*, in suspending the Progreso VII mining operations pending compliance with these ILO Convention 169 consultation requirements. In relation to the second issue, it bears mention, as the succeeding discussion will show, that the Court suspended the Progreso VII mining operations due in large part to social tensions fomented by the El Tambor mining project. These social tensions could have been prevented if only Claimants had satisfied their corporate responsibilities recognized in the UN Framework for Business and Human Rights (the "UN Framework") and well-established in investment jurisprudence. Specifically, Claimants failed to conduct due diligence and to secure a license to operate Exmingua's mining project which inevitably led to and exacerbated legitimate social opposition to the project.

393. Necessarily, then, this dispute cannot be resolved solely through the prism of the CAFTA-DR. The ILO Convention 169 and the UN Framework contain relevant rules of international law that are applicable to this dispute.

394. The International Law Commission has observed that "whatever their subject matter, treaties are a creation of the international legal system, and their operation is predicated upon that fact."[863] Consistent with this pronouncement, Campbell McLachlan has urged that "investment treaties are not self-contained regimes. International law is a legal system, and investment treaties are creatures of it and governed by

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[860] Claimants contend that these acts constitute breaches of Articles 10.3 (National Treatment), 10.4 (Most Favored Nation Treatment, 10.5 (Minimum Standard of Treatment), and 10.7 (Expropriation and Compensation) of the CAFTA-DR.

[861] *See*, *e.g.*, Claimants' Notice of Arbitration dated 9 Nov. 2018 ("Notice of Arbitration") ¶¶ 2-3: "Claimants hereby elect to proceed with this arbitration […] Specifically, […], Claimants' mining project that already was operating was halted by the courts of Guatemala due to the State's own supposed failure to conduct consultations with local communities; ¶ 68 on alleged Articles 10.3 and 10.4 breaches: "[…] Exmingua has received less favorable treatment by the courts and by MEM than has been accorded to the two other projects; ¶ 72 on alleged Article 10.5 breach: "Guatemala breached its obligation to accord Claimants' investment fair and equitable treatment by, among other things, suspending Exmingua's operations at Progreso VII […]; retroactively imposing a new requirement on Exmingua for the exploitation of resources after it already had been granted a valid exploitation license; […];" ¶ 77: "Guatemala has expropriated Claimants' investment in Exmingua, because the State's suspension of the exploitation license for the Progreso VII Project and its illegal *moratorium* have deprived Exmingua of the use and enjoyment of its mining rights to the Progreso VII and Santa Margarita Projects." (emphasis added).

[862] This, of course, is without prejudice to Guatemala's other objections and defenses, among others, its jurisdiction and admissibility objections, objection to the attribution of the courts' acts to the State absent denial of justice or bad faith, and defenses on the merits.

[863] International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Yearbook of the International Law Commission, 2006, vol. II, Part Two, p. 180 (**RL-0318)**

it."[864] This principle, which McLachlan describes as "*systemic integration* within the international legal system,"[865] is reflected in both the ICSID Convention and the CAFTA-DR.

395. Article 42(1) of the ICSID Convention provides that "[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties, and absent which, "such rules of international law as may be applicable." In turn, Article 10.22.1 of the CAFTA-DR, the primary law agreed upon by States Parties, provides that "the tribunal shall decide the issues in dispute in accordance with this Agreement *and* applicable rules of international law". The Vienna Convention, which governs the interpretation of ***all*** treaties like the CAFTA-DR, "include[s], in Article 31(3)(c), a requirement to refer to 'relevant rules of international law applicable in the relations between the parties'."[866]

396. These "rules of international law" under both the ICSID Convention and the CAFTA-DR refer to the whole gamut of sources of international law under Article 38 of the Statute of the International Court of Justice.[867] Investment jurisprudence adopts this view. In *Urbaser v. Argentina*, the tribunal held that it "must apply ***international law***. This entails applying not only the BIT, ***but also international law in general***. A BIT is not a set of self-contained rules."[868] The annulment committee in *MTD v. Chile* similarly pointed out that "… the Tribunal had to apply ***international law as a whole*** to the claim, and not the provisions of the BIT in isolation."[869] international law *as a whole* must therefore be applied in resolving an investment dispute.

397. McLachlan and Ian Brownlie have cautioned that a failure to observe the principle of systemic integration

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[864] Campbell McLachlan, *Investment Treaties and General International Law*, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, April 2008, Vol. 57, No. 2, 361, 369 (**RL-0420**).

[865] Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, Vol. 54, April 2005, 279, 280 (**RL-0421)**

[866] Campbell McLachlan, *Investment Treaties and General International Law*, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, April 2008, Vol. 57, No. 2, 361, 371 (**RL-0420**).

[867] Emmanuel Gaillard and Yas Banifatemi, *The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, ICSID Review—Foreign Investment Law Journal, Volume 18, Issue 2, Fall 2003, 375 at 397 (**RL-0422**): "Under Article 42(1), second sentence, the wording "and such rules of international law as may be applicable" should therefore be understood as an option for the tribunal to determine the applicable substantive rules of international law in accordance with the sources set forth in Article 38 of the Statute of the International Court of Justice. **In other words, international law should be understood as a *body of substantive rules* which may be applicable to a particular issue presented to an ICSID tribubal.**" (emphasis added, italics in original). *Eli Lilly and Co. v. Government of Canada*, Case No. UNCT/14/2, Final Award of 16 March 207, ¶ 106 (**RL-0040**): The phrase "rules of international law" "addresses not simply, for example, rules of interpretation of treaties, such as those reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT"), **but also any other applicable rules of international law that may be relevant to the *case before it***." (emphasis added).

[868] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award (December 2016), ¶ 555 (**RL-0129)** (emphasis added).

[869] *MTD v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment of 21 March 2007, ¶ 61 (**RL-0133)** (emphasis added).

"could lead to serious conflicts of laws within the international legal system."[870] To avoid this tension present in cross-fertilization, Philippe Sands even goes further to suggest that tribunals must proceed from the "presumption that […] the rules of any primarily self-contained system of rules is to be interpreted consistently with general international law."[871] What this means in practice, according to Sands, is that "the customary rule is to apply unless it can be shown that such an application would undermine the object and purpose of the self-contained system of rules"[872] and that the "burden [is] on the party opposing the interpretation compatible with the customary rule to explain why it should not be applied."[873]

398. Pierre Marie-Dupuy has also espoused the view, as Guatemala has argued, that a host state's domestic law is no less relevant in the tribunal's calculus especially when the domestic law "establishes a constitutional link between public international law and the municipal legal order."[874] According to him, "[w]hen, in particular, the national Constitution of the host state contains an option in favour of monism granting primacy to public international law, **the latter partakes in the law applicable to the dispute**."[875] The late Emmanuel Gaillard and Yas Banifatemi likewise take the position that, in interpreting rules of international law under Article 42(1) of the ICSID Convention, "international law may apply either directly, possibly **in conjunction with the law of the host State**, or indirectly as **incorporated into the selected domestic law**."[876]

399. It is undisputed that the ILO Convention 169 "has been part of the Guatemalan legal system" since it came into force in the country on June 5, 1997.[877] Further, "the obligation of consultation [provided for in ILO Convention 169], in addition to constituting a conventional rule, is **also a general principle of International Law**."[878] Yet, according to Claimants, Guatemala's "discussion of how ILO Convention

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[870] Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, Vol. 54, April 2005, 279 (**RL-0421**) at p. 284 *citing* Ian Brownlie, *The Rights of Peoples in Modern International Law*, in Crawford (ed), *The Rights of Peoples* (Clarendon Press Oxford 1988) 1 at 15 **(RL-0423)**.

[871] Philippe Sands, *Treaty, Custom and the Cross-fertilization of International Law*, 1 Yale Hum. Rts. & Dev. L.J. 85-106, p. 104 (1998) (**RL-0424)**

[872] *Id.*

[873] *Id*.

[874] Pierre Marie-Dupuy, *Unification Rather than Fragmentation of International Law?*, in Human Rights in International Investment Law and Arbitration (2009), p. 59 (**RL-0425).**

[875] *Id*

[876] Emmanuel Gaillard and Yas Banifatemi, *The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Proces*, ICSID Review—Foreign Investment Law Journal, Volume 18, Issue 2, Fall 2003, 375 at 376 (**RL-0422)** (emphasis added).

[877] Richter Report, ¶ 25: ("According to the text of ILO Convention 169 itself, it came into force in Guatemala one year after its ratification, which occurred on June fifth, nineteen ninety-seven (06/05/1997). Since that date, the Convention has been part of the Guatemalan legal system and, as a result, it is a current and applicable rule").

[878] Judgment of the Interamerican Court of Human Rights issued on June 27, 2012 (*Sarayaku v. Ecuador*), ¶164, p. 49 (**R-0085**).

169 is part of Guatemalan law … is irrelevant"[879] in addressing their allegations that Guatemala's courts violated Exmingua's purported acquired rights.[880] Rather, according to Claimants' expert, in suspending the exploitation license for Progreso VII pending conduct of consultation under the ILO Convention 169, "[i]n essence, the Court took on the role of the legislature."[881] This argument is meritless.

400. Arbitrator Douglas has opined that "[t]he extent to which domestic courts can give effect to those international norms through the medium of domestic litigation **depends upon the constitutional law of the particular State**."[882] Claimants forget that, by virtue of Article 46 of Guatemala's Political Constitution, **ILO Convention 169 takes precedence over domestic law**.[883] This precedence of ILO Convention 169 over domestic law had also been affirmed by Guatemala's national courts and within the Inter-American Human Rights system.[884] Further, Claimants' broad-brush attack against the scope of judicial power crumbles in the face of the clear grant of general jurisdiction under Article 272(i) of the Political Constitution of Guatemala for the Constitutional Court "[t]o act, to render opinions, to dictate, or to take cognizance of those matters under its competence established in the Constitution of the Republic."

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[879] Claimants' Reply Memorial, ¶ 250.
[880] Claimants' Reply Memorial, ¶¶ 250-251.
[881] Fuentes Report II, ¶ 67.
[882] Douglas, Z., *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, International and Comparative Law Quarterly, Vol. 63, 2014, p. 874. **(RL-0191)**
[883] Political Constitution of the Republic of Guatemala, Art. 46: ("The general principle that within matters of human rights, the treaties and agreements approved and ratified by Guatemala, have preeminence over the internal law, is established.) **(C-0414-R)**.
[884] Counter-Memorial, ¶¶ 85-100, 588. *See* Judgment of the Constitutional Court issued on May 18, 1995, case No. 199-1995, p. 6 (**R-0078**) ("It can be said that article 46 of the Constitution recognizes the general principle that in the matter of rights the treaties and conventions accepted and ratified by Guatemala prevail over domestic law. In this regard, this Court has considered that the Constitution should be interpreted as a harmonious whole, in which each part is interpreted in accordance with the rest, that no provision should be considered in isolation and that the conclusion that harmonizes and not the one that puts in conflict the different precepts of the constitutional text should be preferred."); Judgment of the Constitutional Court issued on October 31, 2000, case No. 30-2000, p. 7 (*Mining Law* Case) (**R- 0079**) ("...by virtue of article 46, it submits to the general principle that treaties and conventions accepted and ratified by Guatemala have pre-eminence over domestic law"); Judgment of the Constitutional Court issued on May 8, 2007, Case No. 1179-2005, p. 13 (*Sipacapa* Case) (**C-0440**); Judgment of the Constitutional Court issued on September 7, 2007, Case No. 1408-2005, p. 8 (*Río Hondo I* Case) (**R-0088**); Judgment of the Constitutional Court issued on April 9, 2008, Case No. 2376-2007, p. 8 (*Río Hondo II* Case) (**R- 0089**); IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, ¶ 140 **(RL- 0235).** ("Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives."); IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, ¶ 142 **(RL-0236)**; and I/A Court H.R., *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, ¶ 194(e) **(RL-0237)** ("[E]nvironmental and social impact assessments [must be conducted] by independent and technically competent entities, prior to awarding a concession for any development or investment project within traditional Saramaka territory, and implement adequate safeguards and mechanisms in order to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Saramaka people.")

In turn, Article 9 of Guatemala's Judicial Branch Law not only empowers, but makes it a duty, for the courts to "always observe the principle of regulatory hierarchy and the supremacy of the Political Constitution of the Republic over any law or treaty, *with the exception of treaties or conventions on human rights, which take precedence over domestic law*." What these provisions mean is that the judiciary has an obligation, ***independent of the other branches of government***, to implement ILO Convention 169. Thus, when the Constitutional Court required the Government to comply with ILO Convention 169, notwithstanding the absence of any legislative or administrative regulation, it cannot be gainsaid that the Court was ***directly*** affirming the State's obligations under the treaty. Besides, as the Court had explained in the *CALAS amparo* case involving Exmingua, "the shortcomings of the domestic legal system cannot translate into the denial of the right to consultation enjoyed by indigenous peoples."[885]

401. Guatemala has also been under the watchful eye of the international community. There had been several visits in Guatemala from the ILO and the United Nations Special Rapporteur on the Rights of Indigenous Peoples.[886] These visits were all meant not only to assess Guatemala's compliance with its ILO Convention 169 obligations, but more importantly, to ensure that governmental authorities safeguard indigenous peoples' rights in accordance with the standards set forth in the Convention.

402. The Tribunal is urged to put itself in the shoes of the Constitutional Court. If this Tribunal were to find Guatemala liable for an internationally wrongful act under the CAFTA-DR, it would be faulting Guatemala for simply exercising its independent constitutional mandate. Worse, no less than the international community has urged Guatemala to comply with its international obligations under ILO Convention 169. To hold Guatemala liable under the CAFTA-DR would be to penalize the State for complying with its international human rights obligations and, in turn, reward an investor that has shown no respect for human rights and flouts Guatemala's laws. The principle of systemic integration in international law bars precisely this kind of interpretation.

403. On the issue of whether the Constitutional Court was justified in suspending Exmingua's Progreso VII mining operations pending the completion of ILO Convention 169 consultations, the Court's decision is grounded on both law and fact.

404. As a matter of law, former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, notes that it is common for business enterprises to have secured concessions to exploit natural resources ***prior to***

[885] Constitutional Court of Guatemala, Case No. 3207-2016 and 3344-2016, June 22, 2020, p. 32 (**C-0145**) (*CALAS amparo*) *citing* Judgment of the Constitutional Court issued on December 21, 2009, Case No. 3878-2007 (**R-0080**) (*Cementos Progreso*).
[886] *See Report of the Special Rapporteur on the rights of indigenous peoples*, James Anaya (June 2011) (**RL-0366).**

the conduct of ILO Convention 169 consultations.[887] In such cases, as in the case at bar, Anaya has presaged that business enterprises "may try to use international law," like the CAFTA-DR, "as a basis of state responsibility."[888] Anaya, however, is emphatic that government measures requiring consultations after a license has been granted can give rise to liability only "**in very rare cases** – for instance, if the duty to consult is implemented in complete disregard 'to the principle[s] of due process embodied in the principal legal systems of the world'."[889] As will be further elaborated elsewhere in this Rejoinder, the Constitutional Court observed both procedural and substantive due process in suspending Claimants' mining operations pending compliance with ILO Convention 169.

405. Indeed, the suspension of a project pending consultations is not only founded in law, but in common sense. Were the rule otherwise, the consultation process would be rendered meaningless. The purpose of consultation is for the affected communities to "***take part*** in assessing measures with the ***potential to impact*** their cultural relationship with their land and natural resources."[890] Allowing a project to proceed during the consultation process forces the affected communities to accept the project as *fait accompli*. Consultations, in such a case, would serve no real purpose and be nothing more than nominal compliance with ILO Convention 169. Consultations are an opportunity for affected communities to voice their concerns about the project, not mere rubberstamps.[891]

406. In fact, Claimants cannot pretend to be so puzzled that the Constitutional Court required the conduct of ILO Convention 169 consultations for the Progreso VII mining project and suspended the exploitation license pending completion of these consultations. In April 2008, two months before Claimants' letter of intent to acquire Exmingua[892] and almost one whole year before Claimants acquired Minerales KC,[893] the Constitutional Court rendered *Rio Hondo II* affirming the State's obligations to consult indigenous peoples under ILO Convention 169.[894] Then, in December 2009, a month before Exmingua carried out EIA

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[887] Anaya, S. James and Puig, Sergio, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples* (January 3, 2018), 67 University of Toronto Law Journal 435 (2017), Arizona Legal Studies Discussion Paper No. 16-42, U of Colorado Law Legal Studies Research Paper No. 17-1, p. 463. (**RL-0426**)
[888] *Id*.
[889] *Id.* (emphasis added).
[890] Counter-Memorial, ¶ 559 *citing* Maria Victoria Cabrera Ormaza, *The Requirement of Consultation with Indigenous Peoples in the ILO: Between Normative Flexibility and Institutional Rigidity*, Leiden: Brill Nihjoff, p. 63 **(RL-0297)** (emphasis added).
[891] ILO, *Handbook for Tripartite Constituents: Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169),* 2013, p. 11 (**RL-0128**): "Consultation and participation are important objectives in themselves, but are also the means through which indigenous peoples can fully participate in the decisions that affect them."
[892] Claimants' Memorial, ¶ 24.
[893] Claimants' Memorial, ¶ 26.
[894] Judgment of the Constitutional Court issued on April 9, 2008, Case No. 2376-2007, p. 17 (**R- 0089**) (*Río Hondo II* Case)

consultations between January and February 2010,[895] the Court decided *Cementos Progreso* stating that consultations must be "carried out ***before*** the granting of the mining license."[896] What is more, the Constitutional Court cautioned that ILO Convention 169 consultation requirements subsist even when a project "**has been implemented, as long as it has not been fully consummated**."[897] Claimants' insistence that the Guatemala "changed all the rules of the game,"[898] therefore, is at once meritless and disingenuous.

407. Further, the suspension of Exmingua's mining operations is not the first in the Constitutional Court's jurisprudence. As Claimants readily admit, the Court in *Minera San Rafael* and *CGN* suspended the exploitation license pending consultations.[899] While Claimants point to *Minera San Rafael* and *CGN* as a basis to argue that the Guatemalan courts discriminated against Exmingua[900]—which is not the case, as further detailed below—the Court's jurisprudence demonstrates a consistent stance on the immutability of ILO Convention 169 even as against a previously granted mining license, as was the case with Exmingua.

408. To obviate any doubt, the reasonableness of the suspension of the Progreso VII license is buttressed by the prevailing practice of other States. Other Latin American courts and agencies have also ordered the suspension of projects pending compliance with ILO Convention 169 consultation requirements. In Costa Rica, the State's Institute of Electricity suspended the Diquís Hydroelectric Project "because it was necessary to carry out a process of dialogue with the organizations indigenous people of Térraba."[901] In Colombia, sub fluvial drilling works of the Canal del Dique were suspended until a consultation process had been completed with the affected indigenous communities.[902] In Chile, four projects were similarly

[895] Request for Arbitration, ¶ 5; SLR Report, ¶¶ 30, 123.
[896] Judgment of the Constitutional Court issued on December 21, 2009, Case No. 3878-2007, p. 20 (**R-0080**) (*Cementos Progreso*)
[897] *Id*.
[898] Claimants' Reply, ¶ 251; Claimants' Memorial. ¶¶ 297-300; Fuentes I ¶¶ 165-170.
[899] Claimants' Memorial, ¶ 113 *citing* Constitutional Court Ruling, Case No. 4785-2017 dated 3 Sept. 2018 (**C-0459**) and Claimants' Reply, fn. 827 *citing* Constitutional Court of Guatemala, Case No. 697-2019, Decision dated 18 June 2020, at 268, 274 [at 3-4 ENG] (**C-0496**) (ordering the MEM to conduct consultations under ILO Convention 169 within 18 months and the continued suspension of CGN's exploitation license pending such suspension).
[900] Claimants' Reply, ¶ 258-268.
[901] ILO Regional Office for Latin America and the Caribbean, Regional Report, ILO Convention 169 on Indigenous and Tribal Peoples in different countries and the prior consultation of Indigenous Peoples in Investment Projects (2016) ¶ 151 (**CL-0223**): ("Although the studies of the project PH Diquís began to be developed approximately
10 years ago, the year 2005, the ICE-CR should have suspended them by a period of two years since it was required to realize a process of dialogue with the indigenous organizations of Térraba. Just recently, in the year 2007 it restarted the studies.").
[902] State Council, Chamber of Administrative Disputes, Indigenous Communities Gabote of Village Zenú v.
PROMIGAS S.A., March 23, 2017, p. 38(**RL-0429**) ("2.4. During the period in which the above orders are fulfilled, The order suspending sub fluvial drilling work of the dique canala, is maintained.")

suspended pending the State's completion of ILO Convention 169 consultations.[903]

409. As a matter of fact, too, there were compelling interests at stake in the *CALAS amparo* case that impelled the Constitutional Court to order suspension of Exmingua's mining operations. The Court found that serious conflicts in the area "[had] endangered the lives and security of the inhabitants of the applicable municipalities."[904] The Court, "in its discretion, maintained the suspension until the consultations were complete."[905] As the investor-state dispute settlement mechanism does not confer appellate jurisdiction to this Tribunal over the legal and factual findings of domestic courts, it would be improper for this Tribunal, with all due respect, to disturb or second-guess this factual finding by the Court which served as basis for the suspension.[906]

410. Related to the facts that shaped the Court's decision to suspend the Progreso VII mining project, Guatemala must here reiterate that business enterprises have the responsibility to respect human rights.[907] Flowing from this responsibility, any prudent investor ought to know and take into consideration the Constitutional Court's jurisprudence on ILO Convention 169, as well as the social tensions surrounding mining in Guatemala more broadly and the El Tambor mining project specifically.

411. It is indubitable that businesses "have a direct interest in acting in accordance with the principles of the Convention, for issues of legal security, legitimacy, partnerships and sustainability."[908] Thus, in interpreting Convention 169, the ILO is emphatic that the treaty has "clear legal implications for private sector actors operating in ratifying countries." [909] For this reason, the ILO has endorsed the application of the UN

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[903] ILO Regional Office for Latin America and the Caribbean, Regional Report, ¶ 180 (**CL-0223**): ("The diversity of the projects that have had to be put under the dispositions of the Convention, have allowed the State of Chile to accumulate a first experience around its application. To date, they are the 34 projects of investment that have been put under consultation processes, as much to the interior of the SEIA as outside this one, and it is anticipated to initiate 9 additional processes of consultation in the next months. In turn, there are projects that have been prosecuted in relation to the indigenous consultation, of which 5 have been discarded, 4 have been suspended and subsequently have had to face consultation processes, and the rest have been approved after judicial processes, or they are still pending before the Courts of Justice").

[904] Guatemala's Counter-Memorial, ¶ 635. *See* Decision of the Constitutional Court in Case No. 1592-2014, issued on June 11, 2020, p. 38 **(C-0145-ENG)** ("An assessment of the situation inclines this Court towards ordering that the project developed under the aforementioned mining license remain suspended as ordered by the Amparo Court of first instance upon granting provisional protection in its decision of 11 November 2015.")

[905] *Id*.

[906] *Loewen Group and Another v. United States of America*, Opinion of Christopher Greenwood Q.C, 26 March 2001, ¶ 64 (**RL-0194**) ("**The international tribunal is not a court of appeal from the national court (as Loewen accepts), nor is its task to review the findings of the national court**. In the absence of clear evidence of bad faith on the part of the relevant court…the claimant must demonstrate that either it was the victim of discrimination on account of its nationality or that the administration of justice was scandalously irregular. Defects in procedure or a judgment which is open to criticism on the basis of either rulings of law or findings of fact are not enough.").

[907] *See* Guatemala's Counter-Memorial, ¶ 596.

[908] ILO, *Handbook for Tripartite Constituents: Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169),* 2013, p. 25 (**RL-0128**).

[909] *Id*.

Framework in relation to the ILO Convention 169 to assess the responsibilities of investors in countries that have ratified the Convention.[910]

412. As Guatemala has previously stated,[911] the UN Framework, unanimously adopted by the Human Rights Council, recognizes as an international norm that "corporate responsibility to respect [rights] exists independently of States' duties."[912] The UN Framework provides that "[t]o discharge the [business enterprise's] responsibility to respect [rights] requires due diligence."[913] Principle 17[914] of the UN Guiding Principles on Business and Human Rights dictates that "[t]he process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed." As such, due diligence is "a process whereby companies not only ensure compliance with national laws ***but also*** manage the risk of human rights harm with a view to avoiding it."[915] Human rights due diligence, in this context, includes, at minimum, legal and social diligence.

413. Notably, Claimants did not respond at all to Guatemala's repeated reliance on and reference to the UN Framework and UN Guiding Principles. Claimants must, thus, be deemed to have admitted the applicability of the rules and norms contained in these documents in assessing their conduct as investors and, ultimately, in assessing their claims against Guatemala. In any event, the tribunal in *Urbaser v. Argentina* has already recognized that "**international law accepts corporate social responsibility** as a standard of crucial importance for companies operating in the field of international commerce."[916]

414. Indeed, in the context of general investment jurisprudence, it is by now well-established that a putative investor "**has the burden of performing its own due diligence** in vetting the investment within the context of the operative legal regime."[917] According to the *Biwater v. Tanzania* tribunal, "***countervailing factors***

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[910] *Id*.
[911] Guatemala's Counter-Memorial, ¶ 592.
[912] John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights* (hereafter, "UN Framework"), A/HRC/8/5 (April 7, 2008), p. 55 **(R-0149)**.
[913] Guatemala's Counter-Memorial, ¶ 594 *citing* UN Human Rights Council Resolution No. 17/4, A/HRC/RES/17/4 (adopted 16 June 2011), ¶ 56 (**RL-0303)**
[914] Principle 17 states that "[i]In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence." (**RL-0243**).
[915] Guatemala's Counter-Memorial, ¶ 594 *citing* UN Human Rights Council Resolution No. 17/4, A/HRC/RES/17/4 (adopted 16 June 2011), ¶ 25 (**RL-0303)**
[916] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award (December 2016), ¶ 1195 (**RL-0129)**. In footnote 434, the *Urbaser* tribunal went on to state that the "basic document" which contains these principles is the UN Framework, as further implemented by the UN Guiding Principles on Business and Human Rights.
[917] *Invesmart, B.V. v. Czech Republic,* UNCITRAL, Award, 26 June 2009, ¶ 254 (**RL-0363**).

such as the responsibility of foreign investors, both in terms of prior due diligence as well as subsequent conduct" must be taken into account to determine whether a State has committed a treaty violation.[918] The absence of investors' due diligence is not merely a factor in mitigating damages, but is considered in evaluating whether the State should be held liable to begin with.[919] It is well to remind Claimants that "BITs are not an insurance against business risk. […] Claimants should bear the consequences of their own actions as experienced businessmen."[920]

415. Guatemala had already pointed out that Claimants failed to provide any proof that they conducted any legal or social due diligence prior to or at any point of their investment.[921] Guatemala gave Mr. Kappes the opportunity to substantiate his self-serving statements during the document production phase.[922] Despite the Tribunal's order for Claimants to produce documents to support their due diligence assertions,[923] Claimants produced nothing, all the more proving that no due diligence in fact transpired.

416. Instead, Claimants attempt to hide behind the fact that the legislative and executive branches had not drafted measures to implement ILO Convention 169, or that the executive branch had made conflicting pronouncements before the IACHR.[924] However, as already pointed out, the Court's own jurisprudence militate against Claimants' suppositions. As the *SolEs v. Spain* tribunal held, "a prudent investor should be expected to have a general awareness of recent decisions of the highest court of the host State that interpret provisions of the regulatory regime on which the investor would rely."[925] Had Claimants actually conducted due diligence as they claim they did, the Courts' decisions would have quelled any doubts as to the force

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[918] *Biwater Gauff (Tanzania) Limited. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 601 (**CL-0085**).
[919] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶ 285 (**CL-0246**).
[920] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 178 (**CL-0208).**
[921] Guatemala's Counter-Memorial, ¶ 599: "Claimants do not attach any document that contains the results of that [legal] due diligence, if it is any different from the CAM Report that was rendered four years before Claimants decided to invest in Exmingua. Mr. Kappes also did not bother to identify who these Guatemalan lawyers are and what they said."
[922] Respondent's Requests for the Production of Documents, February 22, 2021, Document Request No. 15 ("A copy of any due diligence report prepared by or for KCA, Kappes or their related entities prior to their acquisition of an interest in Exmingua. This includes any evaluation of the legal climate, technical assessments, or valuation analyses.") and Document Request No. 16 ("A copy of any documents, including communications regarding any due diligence process, if any, in any transaction involving acquisition of an interest of Exmingua by Claimants or any related entities.")
[923] Annex B to Procedural Order No. 6, Tribunal's Ruling on Respondent's Document Requests, March 15, 2021, on Tribunal's Ruling on Document Request Nos. 15 and 16 ("Request granted, subject to redaction of any passages protected by attorney-client privilege pursuant to Article 9(2)(b) of the IBA Rules.")
[924] Claimants' Reply, ¶ 111, Fuentes II ¶¶ 54-56, 70, 74-77; Fuentes I ¶¶ 51-52 *citing* Inter-American Commission of Human Rights, Petition 1566-07, *Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán v. Guatemala*, Admissibility Report No. 20/14 dated 3 Apr. 2014 ¶ 19 **(CL-0225)** and Inter-American Commission on Human Rights, Petition 1118-11, *Maya Q'eqchi' Agua Caliente Community v. Guatemala*, Admissibility Report No. 30-17 dated 18 March 2017 ¶ 29.
[925] *SolEs Badajoz GmbH v. Kingdom of Spain,* ICSID Case No. ARB/15/38, Award, 31 July 2019, ¶ 429 **(RL-0241)**

and effect of ILO Convention 169.

417. In any case, if at all that there was any doubt as Claimants argue, due diligence requires a prudent investor to "[s]eek ways to honor the principles of internationally recognized human rights when faced with conflicting requirements."[926] Not only that, but an investor must "be able to demonstrate their efforts in this regard."[927] No such efforts were exerted here. Instead, Claimants invested in Exmingua and proceeded with their exploitation license application for Progreso VII while taking advantage of their misplaced perception that ILO Convention 169 was not and would not be required of their license application.

418. Additionally, due diligence requires the investor, as noted in *Duke v. Ecuador*, to be aware of "**all circumstances**, including not only the facts surrounding the investment, but also the political, socio-economic, cultural, and historical conditions prevailing in the host State."[928] Then, "in response to or anticipation of changes in the operating environment (e.g. rising social tensions),"[929] businesses must also undertake human rights impact assessments "at regular intervals."[930] These human rights impact assessments must include not just indigenous peoples, but affected communities more broadly. While ILO Convention 169 recognizes that indigenous peoples must be given special attention as vulnerable groups with special interests,[931] "[c]onsultation and participation are not rights exclusively ascribed to indigenous peoples."[932] Rather, according to the ILO, consultation and participation are "fundamental principles of democratic governance and of inclusive development."[933]

419. Following these well-recognized principles, Guatemala has argued that, in relation to Claimants failure to conduct due diligence, they had also failed to gain a social license to operate.[934] Ana Maria Esteves, social license expert, espouses the same view as the ILO that social license to operate and human rights are

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[926] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partuergoa v Argentine Republic*, ICSID Case No. ARB/07/26, Award (December 2016), fn. 434 (**RL-0129)** *citing* UN Guiding Principles, Principle 23.

[927] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy Framework, 2011, Commentary on Principle 23 **(RL-0274)**.

[928] *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, ICSID Case No. ARB/04/19 Award, (August 18, 2008), ¶ 340 **(CL-0202)**. *See also* ILO Convention 169 and the Private Sector Questions and Answers for IFC Clients, March 2007, p.1 ("Private sector companies need to be aware of the various legal, reputational, and business risks they may run when implementing projects with potential impacts on indigenous and tribal peoples and, at the same time, of the opportunities of forming partnerships with these peoples and delivering development benefits to them") **(RL-0302)**; *LG&EE Energy Corp v. Argentina*, Decision on Liability, (October 3, 2006), ¶ 130 **(CL-0161)** ("the investor's fair expectations cannot consider parameters such as business risk or industry's regular patterns").

[929] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy Framework, 2011, Commentary on Principle 18 **(RL-0274)**.

[930] *Id*.

[931] ILO, *Handbook for Tripartite Constituents: Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169),* 2013, p. 11 (**RL-0128**)

[932] *Id*.

[933] *Id*.

[934] *See, e.g.*, Guatemala's Counter-Memorial, ¶¶ 153, 863.

interconnected.[935] To her, this view started gaining traction in 2008, at a time when the obtention of social license to operate was already well-rooted in the mining industry.[936] Consistent with the ILO's view, Esteves opines that social license to operate "is influenced by perceptions of project efforts to build trusting relations with community stakeholders, management of negative impacts, delivery of benefits to stakeholders, and procedural fairness."[937] Leading up to 2008, mining companies were observing codes of conduct and standards to encourage environmentally and socially responsible practices,[938] and were also integrating business tools to develop sound relationships with indigenous peoples and respect for their rights to gain mining access to indigenous land.[939]

420. Claimants' case stands in stark contrast to the then prevailing practice in the industry. For instance, despite the fact that 67% of the population identify as indigenous in the area in which they mine was operating,[940] it is shocking that at no point in the inception or operation of the mining project did Claimants engage with indigenous peoples. There is no mention of ILO Convention 169 in the CAM Report that preceded their investment[941] or in the EIA submitted to MARN in relation to their Progreso VII mining license application.[942] Indigenous peoples were not involved in the consultation process carried out by Exmingua under the EIA.[943]

421. Also, at the time of and soon after Claimants' purchase of Exmingua in 2008, the country's socio-political climate was inhospitable for the mining industry.[944] The Marlin Mine, which Mr. Kappes claims to have closely followed,[945] was riddled with so much social tension that Goldcorp, the company operating the project, was delisted as a socially and environmentally responsible Canadian firm.[946] Not to mention, Radius, Claimants' predecessor-in-interest, was aware of these conflicts in the region.[947] Against the backdrop of all these tensions, it is also no secret that Guatemala had been striving to implement ILO

[935] CIG Report ¶ 31.
[936] *Id.*
[937] *Id.* at ¶ 30.
[938] *Id.* at ¶ 42.
[939] *Id.* at ¶ 48.
[940] Vice Minister Pérez II Statement, ¶ 38.
[941] Guatemala's Counter-Memorial, ¶ 598.
[942] CIG Report, ¶ 67.
[943] CIG Report, ¶¶ 74-76.
[944] *Mining Referendum Called by Guatemalan Indigenous Communities,* OXFAM, Press Release, July 8, 2005 (**R-0222**).
[945] Kappes II Statement ¶ 17,
[946] Zarsky and Stanley, *Can Extractive Industries Promote Sustainable Development? A Net Benefits Framework and a Case Study of the Marlin Mine in Guatemala*, pp. 143-144 (**R-0278**)
[947] Press Release, *Radius Gold Sells Interest in Guatemala Gold Property,* August 31, 2012 (**R-0001)** (*emphasis added*).

Convention 169 amid rising social tensions.[948] Several news articles had been published about it prior to and at the time of Claimants' investment in Exmingua, and during Exmingua's conduct of an EIA approval process.[949]

422. Had Claimants conducted the due diligence and the social and human rights impact assessment required of them as a prudent mining investor, they would have been informed of and would have been able to mitigate these risks. On this point, Esteves confirms that "[t]he Claimants' engagement was not designed to enable all potentially affected groups to understand how they may be affected by the project and to participate in the decisions on the project that affect them. An adequate social context review would have identified the appropriate and preferred engagement methods for each stakeholder group."[950]

423. Rather, Claimants ignored these realities in Guatemala in their obvious haste to salvage Radius' "problematic assets."[951] They consequently committed a string of erroneous business decisions. Between 2008 to 2012, they purchased 100% shareholdings in Exmingua more than the 51% they originally said they would purchase[952] despite the percolation of social conflict and opposition to mining in the region. In Exmingua's EIA approval process conducted between 2010 to 2012, rubberstamp "hot dog parties and mine induction" events[953] were held instead of meaningful consultations. At no point too did Claimants at the least inquire with the Guatemalan government whether ILO Convention 169 consultations were needed

[948] There were other governmental acts that would have led a prudent investor to reassess its investment or otherwise mitigate the concomitant risks. In August 2009, that is, prior to the conduct of Exmingua's consultations in 2010, the Transparency Commission of the Congress of the Republic held public hearings on the Marlin mine, as well as on the construction project of the cement plant in San Juan Sacatepequez. The Transparency Commission concluded that deficiencies existed in the legal framework for the conduct of environmental and social impact studies, and that there was a need to strengthen the institutional framework for the protection of indigenous peoples' rights. Before Claimants' full purchase of Exmingua in 2012, the Congress Committee on Indigenous Peoples had already issued a favorable opinion on the Consultation Act Initiative, which would have laid down the legislative mechanism for the implementation of ILO Convention 169. The Guatemalan government had also formulated its "Third Draft of the Regulation on the Consultation Process under ILO Convention 169 on Indigenous and Tribal Peoples" formulating policies for the conduct of consultations of indigenous peoples. *See Report of the Special Rapporteur on the rights of indigenous peoples,* James Anaya, ¶¶ 8-9 (June 2011) (**RL-0366)**

[949] *See, for example,* Compilation of newspaper articles from 2004 to 2012 (**R-0218**).

[950] CGI Report, ¶ 72.

[951] Press Release, *Radius Gold Sells Interest in Guatemala Gold Property,* August 31, 2012 (**R-0001)**.

[952] Counter-Memorial, ¶ 517; Radius Press Release, Radius Gold Sells Interest in Guatemala Gold Property (**C-0223**); *See also* Claimants' Memorial, ¶¶ 26-27.

[953] Email from S. Morales to D. Kappes dated November 23, 2012 (**R-0284**); *see also,* Preliminary Report on the hot dog parties and mine induction (October 9, 2012) (**C-0712-ENG**) (including a series of photos with captions such as "people gathered to listen to the Project's information" and "people from la Choleña who are in training worked hard in the activity, many people showed up with their respective t-shirt"). The budget allocation for these hot dog parties included a funds for t-shirts and expenditures of Q10.50 per person in attendance. *See,* Email from S. Morales to D. Kappes dated October 12, 2012, attaching budget for hot dog parties (**R-0245**).

for the approval of the project, notwithstanding the Constitutional Court's jurisprudence[954] and the consolidation of government efforts to require such consultations.[955] Between 2012 to 2014, Claimants employed force and violence which aggravated legitimate social opposition to their project.[956]

424. At every step of the way, Claimants made deliberately callous business choices that undercut their own ability to secure a social license from the indigenous peoples and the broader community affected by the El Tambor mining project. From the inception of their investment and to this day, they have been tone-deaf and reductionist towards the social conflicts engendered by the mining project. They dismiss the social conflicts as nothing more than a "small group" of protesters with "a violent and ideological attitude oriented towards conflict,"[957] confirming that Claimants are oblivious to their corporate responsibilities under international law.

425. It should not come as a surprise to Claimants that, in 2015, the Supreme Court suspended Exmingua's Progreso VII mining license[958] or that the Constitutional Court affirmed this suspension pending the Government's conduct of ILO 169 consultations. The Constitutional Court exercised its unimpeachable discretion precisely to protect the "lives and security of the inhabitants of the applicable municipalities,"[959] a decision that would not have been necessary if only Claimants had conducted due diligence and obtained social license in the first place.

426. For all these reasons, Guatemala should not be held liable for breach under the CAFTA-DR. The amalgamation of Claimants' own acts and omissions, not Guatemala's, was the proximate cause of the failure of the El Tambor mining project.

B. Claimants' Purported Expectations Fail Without Evidence of Prior Due Diligence and Absent Specific Assurances or Commitments from the Government

427. In its Counter-Memorial, Guatemala established that, as a matter of law, expectations of any kind—be they legitimate expectations under the fair and equitable standard, or reasonable investment-backed expectations under the non-expropriation standard—cannot arise unless, "as a threshold circumstance,"

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[954] *See* Judgment of the Constitutional Court issued on April 9, 2008, Case No. 2376-2007, p. 17 (**R- 0089**) (*Río Hondo II* Case) and Judgment of the Constitutional Court issued on December 21, 2009, Case No. 3878-2007, p. 20 (**R-0080**) (*Cementos Progreso*)

[955] *See Report of the Special Rapporteur on the rights of indigenous peoples,* James Anaya, ¶¶ 8-9 (June 2011) (**RL-0366**)

[956] CGI Report, ¶¶ 86-89.

[957] Reply, ¶¶ 174-175 *citing* Mendoza, ¶¶ 45-49.

[958] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Judgment of provisional amparo of November 11, 2015 **(C-0004).**

[959] Counter-Memorial, ¶ 635. *See* Decision of the Constitutional Court in Case No. 1592-2014, issued on June 11, 2020, p. 38 **(C-0145-ENG)** ("An assessment of the situation inclines this Court towards ordering that the project developed under the aforementioned mining license remain suspended as ordered by the Amparo Court of first instance upon granting provisional protection in its decision of 11 November 2015.")

Claimants are to show "at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment."[960] Claimants themselves concede that an investor's legitimate expectations "arise from conditions that the State offered to induce the investor's investment."[961] Further, Guatemala has argued that without any due diligence conducted prior to the making of an investment, much less a specific assurance or representation from the government, an investor's expectation claims fails at the outset.[962]

428. In their Reply, Claimants backpedal on their legitimate expectations claim,[963] and now anchor their FET and expropriation claims on the basis of purported frustrations of "legitimate confidence" and "legal certainty".[964] As regards their expropriation claim, Claimants contend that Guatemala cannot rely on investment treaty jurisprudence interpreting the FET concept of legitimate expectations to interpret the reasonable, investment-backed expectations factor.[965] They argue that, to prove the existence of distinct, reasonable, investment-backed expectations, they "do not need to show any 'inducements to invest'."[966] Rather, according to Claimants, all they need to establish is "reliance on a regulatory and business

[960] Guatemala's Counter-Memorial, ¶¶ 601-602, citing *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, (June 8, 2009), ¶ 766 (**RL-0041)**

[961] Guatemala's Counter-Memorial, ¶ 601, citing Claimants' Memorial, ¶ 209.

[962] Guatemala's Counter-Memorial, fn. 620 citing *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award (October 8, 2009), ¶ 217-218 **(RL-0220)**: "Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would neither be legitimate nor reasonable." *See also id*., ¶ 218 ("the tribunal also noted that "the FET obligation cannot serve the same purpose as stabilization clauses specifically granted to foreign investors."); *Parkerings-Companiet AS v. Lithuania*, ICSID Case No. ARB/05/08, Award (September 11, 2007), ¶ 332 ("It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.") **(RL-0221)**. Guatemala's Counter-Memorial, ¶ 612, citing *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), ¶ 336 **(RL-0221)**: "By deciding to invest notwithstanding this possible instability, the Claimant took the business risk to be faced with changes of laws possibly or even likely to be detrimental to its investment. The Claimant could (and with hindsight should) have sought to protect its legitimate expectations by introducing into the investment agreement **a stabilization clause or some other provision protecting it against unexpected and unwelcome changes**."

[963] Claimants' Reply, ¶ 483 ("In its Counter-Memorial, Guatemala attempts to reframe Claimants' case by, among other things, trying to make this into a "legitimate expectations" case, when it is not […])."

[964] *Id.* at ¶ 252 ([I]t was inconsistent with the principles of legal certainty and the rule of law for the Courts years later to require yet another consultation process while suspending the license, which had been validly granted in accordance with the pre-existing laws and regulations and, thereby, in the words of Prof. Fuentes, "chang[ing] all the rules of the game"). Reply, ¶ 279 ("This is because no investor would conduct exploration work and the market will assign no value to an exploration license unless that investor has legitimate confidence that it will obtain an exploitation license if it proves an economically viable deposit"). Reply, ¶ 532 ("[T]he Guatemalan court decisions ordering and upholding the suspension of Exmingua's operations over more than five years and without any end in sight have had the direct effect of depriving Exmingua of its vested rights under its lawfully obtained exploitation license, in contravention of the Guatemalan constitutional principles of legitimate confidence, legal certainty, equality before the law, and due process of law, as well as the right to property and the freedom of trade and industry").

[965] Claimants' Reply, ¶ 443.

[966] *Id.*

environment which does not fundamentally change during the course of the investment."[967] Claimants' arguments are meritless.

429. It is disingenuous for Claimants to now contend that their FET claim is not one based on legitimate expectations when their Memorial is riddled with factual allegations and legal principles that advance such a claim.[968] In any case, Claimants' bid to distinguish between "legitimate expectations" and "reasonable investment-backed expectations" is refuted by their own source, Anne K. Hoffmann, who considers these concepts as one and the same. According to Hoffman, "[o]ne might also refer to [distinct, reasonable, investment-backed expectations] as the reliance of the investor upon certain given circumstances which he, at least in part, bases his decision upon to make an investment in the host State **or, in short, 'legitimate expectations'**."[969] The UNCTAD espouses the same view that "[i]n IIA arbitrations, the notion of legitimate expectations has gained particular prominence in the context of the fair and equitable treatment standard […]. However, this concept has a role to play when considering expropriation claims too."[970] A review of investment jurisprudence, as the UNCTAD has pointed out, is indeed replete with cases that make no distinction between "legal certainty", "legitimate confidence", "legitimate expectations", and "distinct, reasonable, investment-backed expectations."

430. For instance, according to the *Electrabel v. Hungary* tribunal, claims of "[f]airness and consistency must be assessed against the background of information that the investor knew and should reasonably have known at the time of the investment and of the conduct of the host State."[971] This is consistent with what Guatemala has earlier argued that "legitimate expectations are measured with reference to the knowledge that a hypothetical prudent investor is deemed to have had as of the date of the investment."[972] The extent, if at all, of the investor's knowledge is demonstrated through evidence of some form of due diligence investigating the regulatory framework, as well as the social and political conditions, availing at the time of the making of the investment.[973] Then, acting on the knowledge gathered through due diligence, an investor must secure a specific commitment or assurance from the State for the legal framework would remain as it was at the time the investment was made.

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[967] *Id.*
[968] Claimants' Memorial, ¶¶ 209, 242, 243.
[969] Anne K. Hoffmann, *Indirect Expropriation*, in Standards of Investment Protection 162 (August Reinisch ed., 2008) (**CL-0378**).
[970] UNCTAD, *Expropriation: A Sequel*, UNCTAD Series on International Investment Agreements II, p. 73 **(RL-0266)**
[971] *Electrabel v. Hungary,* ICSID CASE NO. ARB/07/19, Part VII, ¶ 7.78 **(RL-0253)**
[972] Guatemala's Counter-Memorial, ¶ 562, citing *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award (July 31, 2019), ¶ 331 **(RL-0241).**
[973] *Id.*

431. With regard to due diligence, the *Stadtwerke München GmbH v. Spain* tribunal held that for an expectation of an immutable regulatory framework to be reasonable, it must "arise from a rigorous due diligence process carried out by the investor."[974] To assess the legitimacy or reasonableness of a purported expectation, the *Belenergia S.A. v. Italy* tribunal looked at the amount of information that the investor knew and should reasonably have known at the time of the investment.[975] The *Belenergia* tribunal ratiocinated that "an investor cannot legitimately expect that the legal and regulatory framework will not change when any prudent investor could have anticipated this change before making its investment."[976]

432. In *OperaFund v. Spain*, the tribunal found due diligence adequate when the investor showed that it had carried out a "reasonable analysis" of the "regulatory framework prior to its investment."[977] On the converse, the *Antaris v. Czech Republic* tribunal held that the absence of "real due diligence" on the part of the investors would vitiate any claim of an expectation of legal certainty.[978] A putative investor "has the burden of performing its own due diligence in vetting the investment within the context of the operative legal regime," according to *Invesmart, B.V. v. Czech Republic*.[979]

433. The same principles have been applied in the expropriation context. In *Feldman v. Mexico*, the investor's expropriation claim was denied because the investor failed to conduct a diligent inquiry into his supposed tax entitlements despite "the complex and exacting nature of tax laws and regulations, and the ambiguity of statements by and correspondence with [the Ministry of Finance and Public Credit] officials."[980] The *Feldman* tribunal held that, under those circumstances, "a reasonable person" would have sought a "formal administrative ruling" from the proper officials or, at the least, obtained expert tax legal advice, to remove the ambiguities in his claimed benefits.[981]

434. With regard to specific assurances or commitments, it has been held that, as a matter of law, "[l]egitimate expectations require reasonable reliance of investors on host state acts; *the more specific they are directed towards the investors the more likely they can be considered to be reasonable and thus protected*."[982] "In assessing the level of specificity," tribunals must turn to "the legal force of the state's representations

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[974] *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award (December 2, 2019) ¶ 264 **(RL-0273)**.
[975] *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award (August 6, 2019), ¶ 583 (**RL-0361**).
[976] *Id.* at ¶ 584 (**RL-0361**).
[977] *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award (September 6, 2019), ¶ 486 (**RL-0362**).
[978] *Id.* (citing *Antaris Solar GmbH v. Czech Republic*, PCA Case No. 2014-01, Award (May 2, 2018), ¶¶ 432-438 **(RL-0152)**).
[979] *Invesmart, B.V. v. Czech Republic,* UNCITRAL, Award (June 26, 2009), ¶ 254 (**RL-0363).**
[980] *Marvin Roy Feldman Karpa v. United Mexican States*, Award (December 16, 2002), ¶ 132 **(CL-0093)**.
[981] *Id.* at ¶¶ 132, 134 **(CL-0093)**.
[982] *OperaFund Eco-Invest SICAV PLC v. Spain,* ICSID Case No. ARB/15/36, Award, ¶ 481 (**RLA-0362**).

through their legal form, content, and wording,"[983] "to the point of having solicited or induced that investor to make a given investment."[984] On the basis of these standards, the *OperaFund* tribunal found a specific commitment in a legislation which provided that "revisions […] shall not affect facilities for which the functioning certificate had been granted."[985]

435. Guatemala has touched on Claimants' failure to conduct due diligence in this Rejoinder in the context of proving that the proximate cause for the failure of the El Tambor mining project was not Guatemala's purported acts or omissions, but those of Claimants themselves.[986] In this Section, Guatemala will respond more specifically to Claimants' contention that Guatemala has not "identif[ied] what it is that Claimants purportedly could have "discovered" had they conducted due diligence[987] and their argument that "[n]o State would reasonably provide such specific commitments, nor were Claimants required to seek such commitments as part of any "due diligence"."[988]

436. For this purpose, Guatemala finds instruction from the *Mamidoil v. Albania* tribunal which took into account the timeline of the investment and held that it had "to determine precisely whether there was a moment when legitimate expectations may have been created and would be owed protection."[989] Here, Claimants putatively made their investment in Exmingua when KCA signed a letter of intent with Radius on June 2, 2008.[990] They then acquired Minerales KC in January 2009,[991] and fully acquired Exmingua in August 2012.[992] At every step, Claimants omitted to perform any due diligence, much less obtain any assurance or commitment from the government, that would have mitigated, if not fully obviated, the adverse consequences of the mining licenses' non-compliance with ILO 169.

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[983] *Total S.A. v. Argentine*, ICSID Case No. ARB/04/01, Decision on Liability (December 27, 2010), ¶ 117 (**RL-0312**).
[984] *Id.* at ¶ 124 (**RL-0312**) ("On the one hand, the form and specific content of the undertaking of stability invoked are crucial. No less relevant is the clarity with which the authorities have expressed their intention to bind themselves for the future. Similarly, the more specific the declaration to the addressee(s), the more credible the claim that such an addressee (the foreign investor concerned) was entitled to rely on it for the future in a context of reciprocal trust and good faith. Hence, this accounts for the emphasis in many awards on the government having given 'assurances', made 'promises', undertaken 'commitments', offered specific conditions, to a foreign investor, to the point of having solicited or induced that investor to make a given investment.")
[985] *OperaFund Eco-Invest SICAV PLC v. Spain,* ICSID Case No. ARB/15/36, Award, ¶ 485 (**RL-0362**)
[986] *See, supra*., Section V.A.
[987] Claimants' Reply, ¶ 8.
[988] Claimants' Reply, ¶ 445.
[989] *Mamidoil v. Albania*, Request for Arbitration, July 8, 2011, ¶ 701 (**RL-0364**).
[990] Claimants' Memorial, ¶ 24.
[991] Claimants' Memorial, ¶ 26.
[992] Radius Press Release, Radius Gold Sells Interest in Guatemala Gold Property **(C-0223)**; See also Claimants' Memorial, ¶¶ 26-27.

1. Claimants failed to conduct any legal or social due diligence prior to their decision to invest in Exmingua in June 2008 and prior to their initial investment in January 2009

437. To support their claim of a legal and social due diligence prior to their decision to invest in June 2008, all that Claimants have to offer as proof are: (1) Mr. Kappes' bare assertion that "[a]s part of the investment process, KCA carried out due diligence, advised by Guatemalan lawyers, in order to understand and comply with the necessary requirements to be able to acquire the rights and carry out mining activities in Guatemala;"[993] and (2) the CAM Report and technical mining reports.[994] None of these documents establish the existence, much less the extent, of due diligence that Claimants conducted prior to or at the time of their decision to invest in Exmingua.

438. As Guatemala previously pointed out, Mr. Kappes has not presented any evidence to prove his claim that he consulted with Guatemalan lawyers prior to his decision to invest in Exmingua.[995] These claims of due diligence remain unsubstantiated despite the Tribunal's order during the document production phase for Mr. Kappes to substantiate his self-serving statements.[996] Of all the documents in the record, it is only the CAM Report and other technical mining reports that predate Claimants' decision to invest in Exmingua in June 2008. However, Claimants themselves set up their own due diligence case for failure when they candidly conceded that the CAM Report was commissioned ***only*** as a technical study to evaluate El Tambor's mineral resources and "it was **not expected to comment on any other matters**."[997] As things stand, then, there is nothing on record to satisfy Claimants' *onus probandi* that they conducted due diligence prior to their decision to invest.

439. In regards to what Claimants could have "discovered" had they conducted due diligence,[998] Guatemala has reiterated that ILO Convention 169 has been directly applicable in the country by virtue of Article 46

[993] Kappes Statement I, ¶ 40.
[994] Kappes Statement II, ¶¶ 14-21 (**C-0683**, online mining data for the Marlin mine; **C-0039**, CAM Technical Report; **C-0046** – Maynard, Tambor JV – Summary of Exploration Potential dated 18 Nov. 2003, and C-0040, Gregory F. Smith **(C-0040).**
[995] Guatemala's Counter-Memorial, ¶ 599: "Claimants do not attach any document that contains the results of that due diligence, if it is any different from the CAM Report that was rendered four years before Claimants decided to invest in Exmingua. Mr. Kappes also did not bother to identify who these Guatemalan lawyers are and what they said."
[996] *See* Respondent's Requests for the Production of Documents, February 22, 2021, Document Request No. 15 ("A copy of any due diligence report prepared by or for KCA, Kappes or their related entities prior to their acquisition of an interest in Exmingua. This includes any evaluation of the legal climate, technical assessments, or valuation analyses."), Document Request No. 16 ("A copy of any documents, including communications regarding any due diligence process, if any, in any transaction involving acquisition of an interest of Exmingua by Claimants or any related entities."), and Annex B to Procedural Order No. 6, Tribunal's Ruling on Respondent's Document Requests, March 15, 2021, on Tribunal's Ruling on Document Request Nos. 15 and 16 ("Request granted, subject to redaction of any passages protected by attorney-client privilege pursuant to Article 9(2)(b) of the IBA Rules.")
[997] Claimants' Reply, ¶ 446 (emphasis added).
[998] *Id.* at. ¶ 8.

of the Political Constitution of the Republic of Guatemala[999] since the treaty came into force on June 5, 1997.[1000] Claimants could have also discovered that Guatemala's judiciary is constitutionally independent of the legislative and executive branches,[1001] has always had the independent authority and duty under the Judiciary Branch Law of 1989[1002] and the Amparo Law of 1986[1003] to implement human rights treaties even as against domestic law, and possesses the power under the Amparo Law to suspend governmental acts whenever the circumstances make it advisable.[1004] The relevant provisions of these laws rebut Claimants' arguments that a mining license can only be rescinded through a *lesividad* declaration.[1005] Not only that, in the exercise of these duties and powers vested in the judiciary, Guatemalan courts were already recognizing not only the pre-eminence of ILO Convention 169 over domestic law, but also, and more importantly, that the State has the obligation to take appropriate steps to consult indigenous peoples under the said Convention.[1006] During the same period, the IACHR had been rendering decisions along the same path,[1007] which Guatemalan courts were bound to follow consistent with the notion of conventionality

[999] Guatemala's Counter-Memorial, ¶¶ 151, 387. *See* Political Constitution of Guatemala, Art. 46 **(C-0414-R)**.

[1000] *See also* Richter Report, ¶ 25: ("According to the text of ILO Convention 169 itself, it came into force in Guatemala one year after its ratification, which occurred on June fifth, nineteen ninety-seven (06/05/1997). Since that date, the Convention has been part of the Guatemalan legal system and, as a result, it is a current and applicable rule").

[1001] Political Constitution of the Republic of Guatemala, art. 203 (**C-0414-R**): "The magistrates and judges are independent in the exercise of their functions and are subjected solely to the Constitution of the Republic and to the laws."

[1002] Judicial Branch Law, art. 9 (**C-0415**): "[T]he courts shall always observe the principle of regulatory hierarchy and the supremacy of the Political Constitution of the Republic over any law or treaty, with the exception of treaties or conventions on human rights, which take precedence over domestic law."

[1003] Amparo Law, art. 3 **(C-0416-R)** "...in matters of human rights, the treaties and conventions accepted and ratified by Guatemala prevail over domestic law"

[1004] *See* Amparo Law, Article 27 **(C-0416-R)**.

[1005] Claimants' Memorial, ¶ 181; Claimants' Reply, ¶¶ 476-477; Fuentes Report I, ¶¶ 23-35.

[1006] Guatemala's Counter-Memorial, ¶¶ 85-100, 588. *See* Judgment of the Constitutional Court issued on May 18, 1995, Case No. 199-1995, p. 6 (**R-0078**) ("It can be said that article 46 of the Constitution recognizes the general principle that in the matter of rights the treaties and conventions accepted and ratified by Guatemala prevail over domestic law. In this regard, this Court has considered that the Constitution should be interpreted as a harmonious whole, in which each part is interpreted in accordance with the rest, that no provision should be considered in isolation and that the conclusion that harmonizes and not the one that puts in conflict the different precepts of the constitutional text should be preferred."); Judgment of the Constitutional Court issued on October 31, 2000, Case No. 30-2000, p. 7 (*Mining Law* Case) (**R- 0079**) ("...by virtue of article 46, it submits to the general principle that treaties and conventions accepted and ratified by Guatemala have pre-eminence over domestic law"); Judgment of the Constitutional Court issued on May 8, 2007, Case No. 1179-2005, p. 13 (*Sipacapa* Case) (**C-0440**); Judgment of the Constitutional Court issued on September 7, 2007, Case No. 1408-2005, p. 8 (*Río Hondo I* Case) (**R-0088**); Judgment of the Constitutional Court issued on April 9, 2008, Case No. 2376-2007, p. 8 (*Río Hondo II* Case) (**R- 0089**).

[1007] IACHR, Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, ¶ 140 **(RL- 0235).** ("Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives."); IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, ¶ 142 **(RL-0236)**; and I/A Court H.R., *Case of the Saramaka People v. Suriname*, Preliminary Objections,

control.[1008]

440. A prudent investor had the duty to be aware of the legal framework[1009] and these decisions.[1010] Because Claimants did not conduct any legal due diligence prior to their investment in June 2008 or, at the latest, prior to their initial investment in January 2009, they now wrongly argue that the Guatemalan courts arrogated upon themselves the power to suspend the Progreso VII exploitation license.

441. With regard to the conduct of social due diligence, Mr. Kappes directs this Tribunal to two e-mails attached to his Second Witness Statement. One e-mail pertains to a supposed visit to the El Sastre Mine in June 2009 while the other e-mail relates to a meeting arranged with the managers of the Marlin Mine in March 2011.[1011] At the outset, it bears mention that these documents are irrelevant and immaterial to establish the existence of due diligence as these e-mails relate to facts that allegedly occurred ***after*** Claimants' decision to invest in June 2008 and their initial investment in January 2009. In any case, Guatemala has already explained above[1012] that neither e-mail explains the specific purpose for requesting or visiting the other mines.

442. Indeed, had Claimants really conducted social due diligence, they would have discovered that social tensions were hounding the mining industry in Guatemala,[1013] alongside calls to implement ILO Convention 169.[1014] These events were so well-documented in the news[1015] such that no prudent investor would have gone into Guatemala without even inquiring into the implications of ILO Convention 169 on the obtention of a mining license.

Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, ¶ 194(e) **(RL-0237)** ("[E]nvironmental and social impact assessments [must be conducted] by independent and technically competent entities, prior to awarding a concession for any development or investment project within traditional Saramaka territory, and implement adequate safeguards and mechanisms in order to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Saramaka people.")

[1008] Mac-Gregor, E. (2015). Conventionality Control the New Doctrine of the Inter-American Court of Human Rights. AJIL Unbound, 109, pp. 98-99 (**RL-0430**)

[1009] *Invesmart, B.V. v. Czech Republic,* UNCITRAL, Award (June 26, 2009), ¶ 254 (**RL-0363**): A putative investor "has the burden of performing its own due diligence in vetting the investment within the context of the operative legal regime."

[1010] *SolEs Badajoz GmbH v. Kingdom of Spain,* Award, ¶ 429 **(RL-0241):** "a prudent investor should be expected to have a general awareness of recent decisions of the highest court of the host State that interpret provisions of the regulatory regime on which the investor would rely."

[1011] Kappes Statement II, ¶¶ 14-21 (citing to **C-0682**, an email from KCA to Exmingua requesting meetings dated March 18, 2011; **C-0684**, an email from David Croas to Daniel Kappes dated 18 June 2009).

[1012] *See, infra.*, Section II.A.1.

[1013] CGI Report, ¶¶ 66, 86-89. *See also*, *Mining Referendum Called by Guatemalan Indigenous Communities,* OXFAM, Press Release, July 8, 2005 (**R-0222**).

[1014] *See, e.g.,* Episcopal Church Conference, Press Release issued on January 27, 2005 (**R-0219**); *see also,* MAC/20: Mines and Communities, *The People of Sipacapa Reject Mining Activities in their Territory,* June 21, 2005 (**R-0220**).

[1015] *See* Compilation of articles on ILO 169 and issues with extractive issues reported in Prensa Libre in the years 2004 to 2007 (**R-0218).**

443. At this point, too, the Tribunal would see that Claimants have offered not a single shred of evidence of any governmental conduct, much less any assurance or commitment, towards Claimants that would have induced them to invest in Exmingua. Quite the opposite, Claimants readily admit on record that they "concluded that the El Tambor Project had great potential and could be profitably developed by KCA,"[1016] which was the basis for them to decide to invest in Exmingua.

444. In the same vein, Guatemala addresses Claimants' purported reliance on the executive officials' position in the *Sipacapa* and *Maya Q'eqchi'* cases before the IACHR as basis for their expectations. According to Claimants, it was the government's "official position […] that consultations conducted as part of the EIA process satisfy the consultation requirement under ILO Convention 169."[1017] These statements are of no assistance to Claimants. The government's positions in the *Sipacapa* and *Maya Q'eqchi'* cases before the IACHR, as Guatemala already emphasized in its Counter-Memorial, were not publicized, much less directed towards Claimants.[1018] Tribunals have consistently held that expectations must be generated by state conduct *directed to the investor*,[1019] and that, accordingly, it is not appropriate to base a claimed expectation upon facts "to which the investor was not privy at the time."[1020] Further, these pronouncements, made in **2014** and **2017**, respectively, post-date Claimants' investments made as far back as **2008**. Claimants, therefore, could not have, by any stretch of imagination, relied on the government's litigation posture in these cases.

2. Exmingua proceeded with its Progreso VII and Santa Margarita mining license applications despite the absence of ILO Convention 169 consultations and the increasing social opposition to the project

445. Claimants anchor their "legal certainty" and "legitimate confidence" claims on the fact that the Progreso VII exploitation license and Santa Margarita exploration license were issued in favor of Exmingua. They argue that "it was inconsistent with the principles of legal certainty and the rule of law for the Courts years later to require yet another consultation process while suspending the license."[1021] Yet, this argument would

[1016] Claimants' Memorial, ¶ 24.
[1017] Claimants' Reply, ¶ 111, Fuentes II ¶¶ 54-56, 70, 74-77; Fuentes I ¶¶ 51-52 citing Inter-American Commission of Human Rights, Petition 1566-07, *Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán v. Guatemala*, Admissibility Report No. 20/14 (Apr. 3, 2014) ¶ 19 **(CL-0225)** and Inter-American Commission on Human Rights, Petition 1118-11, *Maya Q'eqchi' Agua Caliente Community v. Guatemala*, Admissibility Report No. 30-17 dated March 18, 2017 ¶ 29.
[1018] Guatemala's Counter-Memorial, ¶ 564.
[1019] *Invesmart, B.V. v. Czech Republic,* UNCITRAL, Award (June 26, 2009), ¶ 252 (**RL-0363**). ("Thirdly, there is a temporal dimension to evaluating a claimed expectation. To the extent that the expectation is based upon the investor's reliance upon the acts and/or statements of the responsible government officials, *it must be based on how the officials actually dealt with the investor at the time*.") (*emphasis added*).
[1020] *Invesmart, B.V. v. Czech Republic,* UNCITRAL, Award (June 26, 2009), ¶ 253 (**RL-0363**).
[1021] Claimants' Reply, ¶ 252.

bear gumption only if the Government had actually made any assurance or commitment that that Exmingua's mining licenses were somehow exempt from complying with ILO Convention 169 consultations. None was made here, and the legal framework and social situation prior to Claimants' investment contradict the development of any such expectations. There were also several developments prior to and during Exmingua's conduct of an EIA that similarly prevent Claimants' purported expectations from arising.

446. In December 2009, that is, a month before Exmingua conducted its initial EIA for Progreso VII between January and February 2010,[1022] the Constitutional Court rendered *Cementos Progreso*. There, the Constitutional Court confirmed that consultations must be "carried out ***before*** the granting of the mining license."[1023] Claimants do argue that, in "*Cementos Progreso*, […] the Court ordered consultations under ILO Convention 169 to proceed but did not order suspension of the project's operations."[1024] Yet, the Court also stated there that ILO Convention 169 consultation requirements have to be observed even when a project "has been implemented, as long as it has not been fully consummated."[1025] The Court's word of caution should have placed Claimants on inquiry as to the implications of that pronouncement for future mining licenses; an investor simply "cannot benefit from gaps in its subjective knowledge of the regulatory environment."[1026]

447. There were other also governmental acts that defeat Claimants' purported expectations that ILO Convention 169 consultations were not required in advance of the issuance of mining licenses for the El Tambor Project. In August 2009, the Transparency Commission of the Congress of the Republic held **public hearings** on the Marlin mine, as well as on the construction project of the cement plant in San Juan Sacatepequez.[1027] The Transparency Commission concluded that deficiencies existed in the legal framework for the conduct of environmental and social impact studies, and that there was a need to strengthen the institutional framework for the protection of indigenous peoples' rights.[1028] The Congress Committee on Indigenous Peoples had also issued a favorable opinion on the Consultation Act Initiative,

[1022] Request for Arbitration, ¶ 5; SLR Report, ¶¶ 30, 123.
[1023] Judgment of the Constitutional Court issued on December 21, 2009, Case No. 3878-2007, p. 20 (**R-0080**) (*Cementos Progreso*).
[1024] Claimants' Reply, ¶ 262.
[1025] Judgment of the Constitutional Court issued on December 21, 2009, Case No. 3878-2007, p. 20 (**R-0080**) (*Cementos Progreso*)
[1026] Guatemala's Counter-Memorial, ¶ 562, citing *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award (31 July 2019), ¶ 331 **(RL-0241).**
[1027] *Report of the Special Rapporteur on the rights of indigenous peoples,* James Anaya, ¶¶ 8-9 (June 2011) (**RL-0366)**
[1028] *Id.*

which would have laid down the legislative mechanism for the implementation of ILO Convention 169.[1029] That none of these proposals came to fruition is of no moment. *Eco Oro v. Colombia* stands for the proposition that these government proposals should have risen to an awareness on the part of Claimants of the potential requirement of ILO 169 consultations and the repercussions of non-compliance.[1030]

448. It also bears mention that around 3 weeks after Claimants entered into a letter of intent with Radius, social unrest over the lack of ILO Convention 169 consultations prompted the President to declare a state of alert in a municipality just over 70km away from the El Tambor Project.[1031] Moreover, if Mr. Kappes did indeed conduct a site visit of the El Sastre Mine in June 2009 and of the Marlin Mine in March 2011,[1032] he would have discovered the intense social oppositions to these projects.[1033] Even Radius' own president admitted that Exmingua was a problematic asset located in a region subject to much social conflict.[1034]

449. Against the backdrop of all these events, a prudent investor would have, at the very least, inquired why MEM and MARN, as the State authorities, were not conducting ILO 169 consultations in advance of the issuance of mining licenses for the El Tambor Project. Such minimum inquiry was expected of a prudent investor, as *OperaFund* and *Feldman* instruct. Further, if at all that there was any doubt in Guatemala's ILO Convention 169 consultation requirements, due diligence required a prudent investor not to "take advantage of laws which they must know may be in a state of flux."[1035] There is additionally a heightened need for an investor to secure a specific assurance or commitment from the government to obviate those doubts.[1036] Finally, an investor must "[s]eek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements."[1037]

[1029] *Id*.
[1030] *Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability, and Directions on Quantum (September 9, 2021), ¶. 685 (**RL-0365**).
[1031] *See* The Observatory for the Protection of Human Rights Defenders, *Guatemala – "Smaller than David: The Struggle of Human Rights Defenders"* (February 2015), p. 22, fn. 93 **(R-0152-ENG)**; *see also,* https://mapa.conflictosmineros.net/ocmal_db-v2/consulta/view/14 (which shows that based on a 2007 survey only 4 of the 8950 inhabitants were in favor of that project in San Juan Sacatepéquez (**R-0224**).
[1032] Kappes Statement II, ¶¶ 14-21 (citing to C-0682, an email from KCA to Exmingua requesting meetings dated March 18, 2011; C-0684, an email from David Croas to Daniel Kappes dated 18 June 2009).
[1033] As Claimants admit, Kappes Statement II, ¶ 19, El Sastre suffered from social conflict in 2011, a year *before* Claimants completed their investment in Exmingua.
[1034] Radius Press Release, Radius Gold Sells Interest in Guatemala Gold Property **(C-0223)**: Radius' own President, Ralph Rushton, admitted that the company sold their interest in the Tambor mining project as "part of [their] corporate strategy to divest **problematic assets**, allowing the Company to concentrate capital and expertise on **areas less conflicted** regarding development in the region."
[1035] *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, May 2, 2018, ¶ 435 (**RL-0152**)
[1036] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (June 8, 2009), ¶ 767 (**RL-0041).**
[1037] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partuergoa v. Argentine*, ICSID Case No. ARB/07/26, Award (December 2016), fn. 434 **(RL-0129)** *citing* UN Guiding Principles, Principle 23.

450. Here, Claimants did the exact opposite of all these duties expected of a prudent investor and proceeded to purchase the whole of Exmingua in August 2012 without any assurances or commitments to protect their misplaced assumption that Exmimgua's mining licenses are exempt from ILO Convention 169 consultations. Claimants, thus, cannot now be heard to complain that the courts have suspended their mining licenses due to lack of prior ILO 169 consultations. If this Tribunal were to sustain Claimants' FET and expropriation claims, it would be treating the CAFTA-DR as an insurance policy against poor business judgment.[1038] The evidence on record demonstrates that Claimants displayed opportunistic and exploitative behavior from the inception of their investment—behavior that this Tribunal is urged not to reward and incentivize.[1039]

C. Claimants Have Failed to Establish a Breach of the Fair and Equitable Treatment Obligation under Article 10.5

451. As explained in the Counter-Memorial, the claim that Guatemala breached its obligation under Article 10.5 to provide fair and equitable treatment has no merit. First, Claimants have failed to prove that the customary international law minimum standard of treatment has evolved to include the obligations that Guatemala is alleged to have breached, namely, the obligation "to act in good faith, refrain from acting arbitrarily, provide a stable and secure legal business environment, and respect an investor's legitimate expectations."[1040]

452. *Second*, even if Claimants have proved that these standards are part of the minimum standard of treatment, which they have not, Guatemala maintains that the claim must still be denied because they have misconstrued and ultimately failed to establish a breach of these standards. By in large, Claimants' case rests on the frequently rejected premise that a misapplication of law (which they have failed to demonstrate) could result in a breach of the fair and equitable treatment.[1041] While Claimants have abandoned their legitimate expectations claim, they insist that their expectation of a stable and secure legal environment should be respected.[1042] Multiple tribunals and scholars have rejected such claim, holding that, in the absence of legitimate expectations, an investor's expectation of consistency or of a stable and predictable

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[1038] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (December 27, 2010), ¶ 124 (**RL-0312**) ("Tribunals have evaluated the investor's conduct in this respect, highlighting that BITs "are not insurance policies against bad business judgments" and that the investor has its own duty to investigate the host State's applicable law.")
[1039] *Antaris Solar GmbH v. Czech Republic*, PCA Case No. 2014-01, Award (May 2, 2018), ¶ 435 (**RL-0152**) ("The Tribunal considers that Dr Göde's actions were essentially opportunistic, and that the investment protection regime was never intended to promote and safeguard those who, in the words of the Respondent, "pile in" to take advantage of laws which they must know may be in a state of flux caused essentially by investors of that type. In the words of the Respondent, the Claimants had "a speculative hope – as opposed to an internationally-protected expectation.")
[1040] Claimants' Reply, ¶¶ 462, 482
[1041] Claimants' Memorial, ¶¶ 237, 232, 230, 276, 296-305; Claimants' Reply, ¶¶, 486, 490, 497, 501, 532-539, 540-544.
[1042] *See* Claimants' Reply, ¶¶ 474-475, 483

legal environment has no relevance.[1043] The Tribunal should do the same.

453. *Third*, should the Tribunal decide to proceed to the merits of the claim, Guatemala maintains that Claimants have failed to demonstrate that the challenged measures violate the standard they advance here. There is no proof that the measures taken by MEM, MARN, and other agencies of the Government were arbitrary or contrary to Guatemala law.[1044] Nor have they established that Guatemalan courts committed denial of justice against Exmingua.[1045] Finally, Claimants' allegation of bad faith and the inuendo that the challenged measures are part of a grand scheme to stop mining in Guatemala is unfounded. Aside from painting every unfavorable decision as a conspiracy, Claimants have not presented any evidence to support such serious allegation.

1. Claimants Misinterpret the Obligation to Provide Fair And Equitable Treatment Under Article 10.5 of the CAFTA-DR

a. Claimants ignore the elements of customary international law as adopted through Annex 10-B of the CAFTA-DR.

454. The following aspects of the fair and equitable treatment under Article 10.5 of the CAFTA-DR are uncontested between the Parties. First, State parties to the CAFTA-DR have deliberately limited the fair and equitable treatment under Article 10.5 to the customary international minimum standard of treatment.[1046] Second, customary international law, as affirmed under Annex 10-B of the CAFTA-DR, can only arise "from a general and consistent practice of States that they follow from a sense of legal obligation."[1047] Third, "the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinion juris*" and to demonstrate a breach of such obligation.[1048]If Claimants fail to prove that customary international has indeed evolved to include the standards that they advocate here, the Tribunal must simply reject the claim of such evolution.[1049] Laying the burden solely on the claimant, several tribunals and States have taken such position.[1050]

[1043] *See* Reply, ¶¶ 462, 475, 483
[1044] *See infra.,* Section V.C.4.a
[1045] *See infra.,* Section V.C.4.b
[1046] *See* Guatemala's Counter-Memorial, ¶ 307; Reply, ¶ 460.
[1047] *See* Guatemala's Counter-Memorial, ¶ 307.
[1048] *See* Non-Disputing Party Submission of the United States, ¶16; Guatemala's Counter Memorial, ¶307.
[1049] *See* ILC, Draft conclusion on identification of customary international law, with commentaries, A/73/10 (2018), p. 125 ("Where the existence of a general practice accepted as law cannot be established, the conclusion will be that the alleged rule of customary international law does not exist.") (**RL-0367**).
[1050] See *ADF Group Inc. v. United States of America*, NAFTA, ICSID Case No. ARB(AF)/00/1, Award (January 9, 2003) ¶ 185 (**CL-0081)**; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (June 8, 2009), ¶ 601 **(RL-0041)**; *Methanex Corp. v. United States of America,* NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part

455. Based on the above shared understanding of Article 10.5, it is reasonable to conclude that for Claimants' fair and equitable treatment claim to succeed, the following two questions must be answered in the affirmative: have Claimants established that the minimum standard of treatment has evolved to include the standards they allege to have been breached by Guatemala? Has Guatemala breached these standards?

456. Claimants have made no such showing. They argue that the content of the minimum standard of treatment has evolved to include the obligation to "act in good faith, refrain from acting arbitrarily, provide a stable and secure legal business environment, and respect an investor's legitimate expectations."[1051] But neither their Memorial nor Reply attempt, let alone prove, that these standards are endorsed by general and consistent State practice followed from a sense of legal obligation. Claimants' theory of "evolution" rather rests on two propositions. First, customary international law is not static—it can evolve over time.[1052] Second, their "explication of the FET standard has been endorsed by…several State Parties, including Guatemala."[1053] It has also "been endorsed by numerous CAFTA-DR, NAFTA and other tribunals..."[1054] The claim must simply be dismissed.

457. Claimants cannot meet the requirement under Annex 10-B by simply insisting that customary international law is subject to change; they must prove that such evolution occurred. Nor can pointing fingers at a few arbitral awards that support their description of the minimum standard of treatment, save Claimants from the real task of establishing customary international law based on the approach under Annex 10-B.[1055]

i. *Other than insisting that customary international law is not static, Claimants have not established a change of custom*

458. Instead of proving a change of customary international law through the approach laid out under Annex 10-B of the CAFTA-DR, Claimants generally emphasize that customary international law is subject to evolution. Claimants argue that "since the *Neer* decision…the content of the standard and the types of State conduct that violate it" has changed.[1056] To prove their claim, Claimants cite to several cases which recognize that customary international law "continues to evolve in accordance with the realities of the

IV, Chapter C (August 3, 2005) (**RL-0227**) ¶ 26; *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award (September 18, 2009), ¶ 273 **(CL-0197)**; Non-Disputing Party Submission of the United States, ¶16.

[1051] Claimants' Reply, ¶¶ 462, 467.

[1052] *Id.* at ¶ 467.

[1053] *Id.* at ¶ 471.

[1054] *Id.*

[1055] See Claimants' Memorial, ¶¶ 202-209; Claimants' Reply ¶¶ 462, 471

[1056] Claimants' Reply, ¶ 467.

international community."[1057]

459. Next, Claimants criticize Guatemala for selectively quoting from *Glamis* and *Thunderbird* and insist that due considerations should also be given to other sections of the decisions.[1058] Particularly, Claimants cite to a sentence in *Glamis* where the tribunal recognized that 'it is entirely possible that as an international community, we may be shocked by State actions now that did not offend us previously.'[1059] Claimants also cite to another sentence in *Thunderbird* in which the tribunal noted that 'the minimum standard should not be rigidly interpreted and it should reflect evolving international community.'[1060]

460. Claimants miss the point. There is no question that customary international law can evolve, Guatemala admitted as much in its Counter-Memorial.[1061] The issue here is whether Claimants, as a party alleging a change in customary international law, have carried their burden, and proved that the customary international law has in fact evolved to include the obligations they identify as being part of the minimum standard of treatment. Given the lack of evidence here, the answer should be in the negative. No amount of hairsplitting of *Glamis* and *Thunderbird* can conceal the tribunals' conclusions that "the fundamentals of the *Neer* standard…apply today."[1062]

461. In both cases, the claimants, citing to several cases, argued that the minimum standard of treatment has evolved since its definition in *Neer*.[1063] Relying on "*Waste Management*, among other awards," the claimant in *Glamis v. USA* argued that the fair and equitable treatment has evolved to include: "(1) an obligation to protect legitimate expectations through establishment of a transparent and predictable business and legal framework; and (2) an obligation to provide protection from arbitrary measures."[1064] The tribunal rejected the claim. While the tribunal recognized that the situation had changed since the 1920s when the decision in *Neer* was passed, it held that "the fundamentals of the *Neer* standard thus still apply today."[1065] To breach the minimum standard of treatment, the tribunal noted, "an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due

[1057] *See* Claimants' Reply, ¶¶ 467-468.
[1058] *Id.*
[1059] *Id.*
[1060] *Id.*
[1061] Guatemala's Counter Memorial, ¶ 309.
[1062] *Glamis Gold v. USA*, UNCITRAL, NAFTA, Award (June 8, 2009), ¶ 616 (**RL-0041**); *See also*, *Int'l Thunderbird Gaming Corp. v. The United Mexican States*, NAFTA, Arbitral Award (January 26, 2006), ¶ 194 (**CL-0198**).
[1063] *Glamis Gold v. USA*, Award, ¶¶ 561, 572 (**RL-0041**). *Int'l Thunderbird Gaming Corp. v. The United Mexican States*, NAFTA, Arbitral Award (January 26, 2006), ¶¶ 185 **(CL-0198)**.
[1064] *Glamis Gold v. USA, Award,* ¶¶ 561, 572 (**RL-0041**).
[1065] *Glamis Gold v. USA*, Award, ¶ 616 (**RL-0041**) (emphasis added).

process, evident discrimination, or a manifest lack of reasons."[1066]

462. A similar conclusion was reached in *Thunderbird*. Leaning on *Waste Management II*, the claimant insisted that the respondent's arbitrary conduct violated its obligation to provide fair and equitable treatment.[1067] But the tribunal declined the claim. Here too, the tribunal accepted that customary law has evolved since the decision in *Neer*, however, it concluded that "the threshold for finding a violation of the minimum standard of treatment *still remains high*"— only acts that amount "to a gross denial of justice or manifest arbitrariness falling below acceptable international standards" would constitute a breach of the minimum standard of treatment.[1068]

463. Claimants have presented no evidence which should prompt the Tribunal to decide against them. There is nothing on the record that corroborates Claimants' submission that their definition of the minimum standard of treatment "has been endorsed by…several State Parties, including Guatemala."[1069] While a plethora of evidence exists that proves the opposite. Six out of the seven CAFTA-DR State parties have expressly rejected the standards enumerated in *Waste Management II*, insisting instead that the minimum standard treatment can only be breached in the face of a "denial of justice," "manifest arbitrariness," or "evident discrimination."[1070] Nicaragua has, as explained below, tacitly consented to the State parties' framing of the minimum standard of treatment.[1071]

ii. International awards are not customary international law

464. International arbitral awards, particularly those that are not supported by State practice and *opinio juris*, do not prove customary international law. Citing to a few NAFTA and CAFTA-DR awards, Claimants declare that their "explication of the FET standard" has received "consistent" and "overwhelming support [ ]."[1072] This is neither accurate nor relevant.

465. From the evidence on the record, it is a far stretch to conclude that Claimants' framing of the fair and equitable treatment has received "consist" and "overwhelming support." Relying on *Waste Management II*, Claimants argue that the fair and equitable treatment includes the obligation to refrain from arbitrary measures, respect investor's legitimate expectations, and act in good faith.[1073] While Claimants allege that this has been widely endorsed by CAFTA-DR and NAFTA tribunals, they cite only three supportive

[1066] *Id.*
[1067] *Int'l Thunderbird Gaming v. The United Mexican States*, Arbitral Award, ¶ 185 **(CL-0198)**.
[1068] *Id.* at ¶ 194 (**CL-0198**) (emphasis added).
[1069] Claimants' Reply, ¶¶ 462, 471.
[1070] *See* Section V.C.3.a.
[1071] *See* Section V.C.3.d
[1072] *See* Claimants' Reply, ¶ 471.
[1073] *See* Claimants' Memorial, ¶¶ 204-205.

cases.[1074] Claimants next submit that the fair and equitable treatment includes the obligation to provide a stable and secure legal environment,[1075] and restrain from a retroactive application of a new law.[1076] These standards are not drawn from the decision in *Waste Management II*, as Claimants try to allude, but from one or two cases that have either interpreted the fair and equitable treatment as an autonomous standard or described these standards as general principles of law.[1077] In addition to lacking broad support, the standards invoked by Claimants have been rejected by various tribunals.[1078]

466. More importantly, it is immaterial that Claimants' framing of the fair and equitable treatment has been endorsed by tribunals. To simply conclude, as Claimants argue, that a certain rule is a customary international law because it was endorsed by various international arbitral tribunals, is to disregard the general principles of customary international law as explicitly endorsed under Annex 10-B and subsequently affirmed by the State Parties. Ultimately, Claimants' submission, if accepted, will go against the General Rules of Interpretation of the VCLT, which this Tribunal analyzed in painstaking detail and applied during the Preliminary Objections phase of these proceedings.[1079]

467. Article 10.5 must be interpreted in accordance with the principles of interpretation under Article 31 and Article 32 of the VCLT. Pursuant to Article 31 of the VCLT, the provision must be interpreted in line with the "ordinary meaning" of their terms and the Treaty's "object and purpose", in the "context" in which it

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[1074] *Id.* at ¶ 205; Claimants' Reply, ¶ 472, fn. 1416, citing to *RDC. v. Guatemala*, Award, ¶ 219 (**CL-0068**); *TECO v. Guatemala*, Award, ¶¶ 454-455 (**CL-0031**); *Clayton v Canada*, Award on Jurisdiction and Liability (March 17,2015) ¶ 591 (**CL-0088**). While Claimants cite to *Merrill v. Canada*, the tribunal in that case simply noted the following: "[e]ven if the Tribunal were to accept Canada's argument to the effect that good faith, the prohibition of arbitrariness, discrimination and other questions raised in this case are not stand-alone obligations under Article 1105(1) or international law, and might not be a part of customary law either, these concepts are to a large extent the expression of general principles of law and hence also a part of international law." As to the minimum standard of treatment, the tribunal vaguely noted that it "provides for the fair and equitable treatment of alien investors within the confines of *reasonableness.*" *See Merrill & Ring Forestry L. P. v. Canada*, ICSID Case No. UNCT/07/1, Award (March 31, 2010) ¶¶ 187, 213 **(CL-0201)**.

[1075] *See* Claimants' Memorial, ¶ 209; Claimants' Reply, ¶¶ 462, 475, citing to *See Merrill & Ring Forestry L. P. v. Canada*, ICSID Case No. UNCT/07/1, Award (March 31, 2010), ¶ 187 (**CL-0201**); *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003), ¶ 154 (**CL-0122**);

[1076] *See* Claimants' Reply, ¶¶ 534-535, *citing* to *Cairn Energy Plc and Cairn UK Holdings Ltd. v. The Republic of India*, UNCITRAL, PCA Case No. 2016-7, Award (December 21, 2020), ¶ 1749 **(CL-0335)**.

[1077] *See* Claimants' Reply, ¶ 462; *compare* with Claimants' Reply, ¶¶ 533-535, 475; *See* Claimants' Memorial, ¶218.

[1078] *Glamis Gold v. USA*, Award, ¶¶ 561, 562, 614-616, 761, 766 (**RL-0041**) (rejecting the claim that the fair and equitable treatment includes the obligation to refrain from arbitrary treatment and provide transparent and predictable business and legal framework); *Int'l Thunderbird Gaming Corp. v. The United Mexican States*, Arbitral Award, ¶¶ 185, 194 (**CL-0198**) (rejecting the claim that the fair and equitable treatment could be breached by a mere arbitrary conduct); *Cargill, Inc. v. United Mexican States*, Award, ¶¶ 294, 290 (**CL-0197**) (rejecting the argument that the fair and equitable treatment includes the obligation to provide a stable and predictable environment that does not affect reasonable expectation); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002), ¶ 137 **(RL-0018)** (dismissing the argument that an application of a new decisional law retrospectively would violate the fair and equitable treatment. It noted that "[i]t is normally for local courts to determine whether and in what circumstances to apply new decisional law retrospectively.")

[1079] *See* Decision on Preliminary Objections, ¶¶ 123-161.

occurs, and taking into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[1080]

468. By its terms, the fair and equitable treatment under Article 10.5 is limited to "customary international law minimum standard of treatment."[1081] This provision must be read in the context of Annex 10-B, which describes the State Parties "shared understanding" that "'customary international law' …in Article 10.5…results from a general and consistent practice of States that they follow from a sense of legal obligation."[1082] From the State parties' subsequent practice in the interpretation of Article 10.5, it is also clear that these elements of customary international law must be strictly adhered to.[1083]

469. The practice of the International Court of Justice ("ICJ") and the International Law Commission ("ILC")[1084] are also instructive. As noted by the State parties, Annex 10-B was drafted to mirror the "standard practice of States and international courts, including the International Court of Justice,"[1085] which in numerous occasions concluded that the "existence of a rule of customary international law requires that there be a 'settled practice' together with *opinio juris*."[1086] The ILC describes these two elements as "indispensable for any rule of customary international law properly so called."[1087] Claimants could not and have not explained why these elements must be ignored in the present case.

470. From the wordings of these elements, it is clear that "[i]t is the conduct of States which is of primary importance for the formation and identification of customary international law."[1088] State practice, as

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[1080] VCLT, Article 31(1)(3)(b), Article 32 **(RL-0027)**.
[1081] CAFTA-DR, Article 10.5 **(CL-0001)**.
[1082] CAFTA-DR, Annex 10-B **(CL-0001)**.
[1083] *See infra.,* Section V.C.3
[1084] International Law Commission ("The International Law Commission was established by the United Nations General Assembly, in 1947, to undertake the mandate of the Assembly, under article 13 (1) (*a*) of the Charter of the United Nations to "initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification".")
[1085] US submission ¶ 14. *See also* Costa Rica submission, ¶ 24.
[1086] US Non-Disputing Party Submission, ¶ 14, fn. 16 *citing* to Jurisdictional Immunities of the State (*Germany v. Italy*: *Greece intervening*), Judgment (February 3, 2012) I.C.J. Report 1999 ¶ 55 **(RL-0368)**; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, I.C.J. Report 1969 3,¶ 77 (February 20, 1969)(**RL-0206**); *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, I.C.J. Report 1985 ¶ 29-30 (June 3, 1985) (**RL-0369**).
[1087] International Law Commission, Second Report on Identification of Customary International Law (May 22, 2014), ¶ 23 (**RL-0370**) citing to K. Wolfke, *Custom in Present International Law*, pp.40-41 (**RL-0371**).
[1088] International Law Commission, Second Report on Identification of Customary International Law (May 22, 2014(, ¶ 33 (**RL-0370**). *See also id.,* p. 18 ("Role of practice: The requirement, as an element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the creation, or expression, of rules of customary international law.") (**RL-0370**); *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening),* Judgment, (February 3, 2012), ¶ 101. (it is "State practice from which customary international law is derived.") (**RL-0368**); *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, NAFTA, Award (June 8, 2009),¶ 607 (**RL-0041**) ("[a]scertaining custom is necessarily a factual inquiry," that requires "looking to the actions of States and the motives for and consistency of these actions.)

affirmed by the ICJ and the ILC, can be inferred from the actions taken by the State "in the exercise of [their] executive, legislative, judicial or other functions."[1089] To establish "general and consistent" State practice, Claimants are not required to prove that the practice is "unanimous (universal)," but they must establish that the practice is 'extensive' or in other words, "sufficiently widespread"[1090] and "uniform."[1091] Having proved a general and consistent State practice, Claimants must then establish the second element, *opinio juris.* In that respect, there must be proof that 'States…have accorded deference to a rule 'as a matter of legal obligation…" and not merely "by the need to comply with treaty…obligations."[1092]

471. Granted, establishing custom is a hefty task, but Claimants cannot lessen their burden by relying on international arbitral awards, and, hence, deserting the methodology set out under Annex 10-B. The Tribunal has made it clear in its Decision on Preliminary Objections that it would not tolerate such departures from the clear texts of the Treaty. Citing to *Nissan v. India*, the Tribunal held that "the task of a tribunal is not to make policy choices about the preferable design of an investment arbitration system, but rather to respect and enforce the choices already made by the Contracting Parties, to the extent these can be divined through the interpretative tools that the VCLT provides."[1093] Guatemala calls upon the Tribunal to take the same position here—enforce Annex 10-B by ensuring that Claimants' proposition of evolution of customary international law of the minimum standard treatment is supported by State practice.

[1089] International Law Commission, Second Report on Identification of Customary International Law, ¶ 7 (identifying the following as "the types of evidence suitable for establishing" customary international law: "(a) official statements before legislatures, courts and international organizations; and(b) decisions of national, regional and subregional courts".), ¶ 34 (for the purpose of determining State practice "the actions of all branches of Government (whether exercising executive, legislative, judicial or other functions) may be relevant.") (**RL-0370**); International Law Commission, Draft Conclusion on Identification of Customary International Law 2018, conclusion 5(2), (**RL-0367).** *See also, Jurisdictional Immunities of the State*, 2012 I.C.J, ¶ 56 **(RL-0368)** (the ICJ recognized State immunity as customary international law after receiving a survey of State practice in the form of national legislation, judicial, and official statements."); Patrick Dumberry, *The Role and Relevance of Awards in the Formation, Identification and Evolution of Customary Rules in International Investment Law*, Journal of International Arbitration, Kluwer Law International, p.270 (**RL-0346**).

[1090] International Law Commission, Second Report on Identification of Customary International Law, ¶ 52, (**RL-0370**).

[1091] International Law Commission, Second Report on Identification of Customary International Law, ¶ 55 (**RL-0370**), *citing* to *Colombian-Peruvian asylum case*, Judgment (November 20, 1950): I.C.J. Reports 1950, pp. 276 and 277 ("a constant and uniform usage") (**CL-0172**); *Case concerning Right of Passage over Indian Territory (Portugal v. India),* Judgment (April 12 1960): I.C.J. Reports 1960, p. 40 ("a constant and uniform practice") (**RL-0372**); *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment*,* I.C.J. Reports 1974, p. 90 (Separate Opinion of Judge De Castro) ("For a new rule of international law to be formed, the practice of States, including those whose interests are specially affected, must have been substantially or practically uniform") (**RL-0373**) *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment*,* I.C.J. Reports 1974, p. 50 (Joint Separate Opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda) ("Another essential requirement for the practice of States to acquire the status of customary law is that such State practice must be common, consistent and concordant. Thus contradiction in the practice of States or inconsistent conduct, particularly emanating from these very States which are said to be following or establishing the custom, would prevent the emergence of a rule of customary law") (**RL-0374**).

[1092] International Law Commission, Second Report on Identification of Customary International Law, ¶¶ 62 (**RL-0370**) See also *Id*. ¶ 67 **(RL-0370)**.

[1093] Decision on Preliminary Objections, ¶ 158. *See also id.,* ¶¶ 140, 154.

472. An international arbitral award cannot create customary international law; it can only serve to illustrate customary international law if it is "based on a comprehensive and detailed analysis of both State practice and *opinio juris*."[1094] Because neither of the cases cited by Claimants considered the elements of customary international law, they offer no guidance to this Tribunal.

473. In the much-criticized decision,[1095] *RDC v. Guatemala*, the tribunal abdicated its role of enforcing the treaty as written by the State parties, all in the name of "efficiency." [1096] In *RDC*, the claimant argued that the fair and equitable treatment, "as understood by the arbitral tribunals in *Waste Management II* and *Tecmed*," obliges a State to be "transparent, consistent, non-discriminatory and not based on unjustifiable or arbitrary distinctions."[1097] At the outset, the tribunal agreed that "arbitral awards do not constitute State practice."[1098] Nonetheless, it decided to rely on these awards, alleging, without any proof, that "there is ample evidence" that "parties in international proceedings use them" to establish customary international law.[1099] It added that this practice is "an efficient manner for a party in a judicial process to show what it believes to be the law."[1100] In doing so, the tribunal failed to give full meaning to the State parties' intention as noted in Annex 10-B and subsequently affirmed by the State Parties.[1101]

474. For a similar reason, *Waste Management II*, and *Bilcon v. Canada* are unhelpful to Claimants' case. In *Waste Management II*, the tribunal's analysis, and determination of the minimum standard of treatment was

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[1094]Patrick Dumberry, *The Role and Relevance of Awards in the Formation, Identification and Evolution of Customary Rules in International Investment Law*, Journal of International Arbitration, Kluwer Law International, p. 276 (**RL-0346**). *See also, id*., pp. 279-280 **(RL-0346)**. International Law Commission, Draft conclusion on identification of customary international law, with commentaries, A/73/10 (2018), p. 149 (**RL-0367**) ("Decisions of courts and tribunals on questions of international law, in particular those decisions in which the existence of rules of customary international law is considered and such rules are identified and applied, may offer valuable guidance for determining the existence or otherwise of rules of customary international law. The value of such decisions varies greatly, however, depending both on the quality of the reasoning (including primarily the extent to which it results from a thorough examination of evidence of an alleged general practice accepted as law) and on the reception of the decision, in particular by States and in subsequent case law."); *Glamis Gold, v. USA*, Award, ¶ 605 (**RL-0041**) ("Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law."); *Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/02, Award (September 18, 2009), ¶277 (**CL-0197**) (awards "do not create customary international law but rather, at most, reflect customary international law." The tribunal further noted that "the evidentiary weight to be afforded [to awards] is greater if the conclusions therein are supported by evidence and analysis of custom."). The State parties also agree. *See infra*, Section V.C.3..c.i.

[1095] *Omar E. Garica Bolivar, Case Comment Railroad Development Corporation v. Republic of Guatemala*, The First CAFTA Award on the Merits, ICSID Review, Vol. 28, No. 1 (2013), pp. 29-31 (**RL-0375**).

[1096]*RDC v. Guatemala*, Award, ¶ 217 (**CL-0068**).

[1097] *Id.* at ¶ 156 (**CL-0068**).

[1098] *Id.* at ¶ 217 (**CL-0068**).

[1099] *Id.*

[1100] *Id.*

[1101] *Ver, infra,* Section V.C.3.c.i.

exclusively based on a "survey" of previous international awards, not States' conduct.[1102] The tribunal's conclusion in *Bilcon* fares no better. In that case, the tribunal concluded that the fair and equitable treatment includes the obligation to refrain from arbitrary conduct simply because "*Waste management* test mentions arbitrariness."[1103]

475. In conclusion, the Tribunal should dismiss Claimants' fair and equitable treatment claim because they have not provided any evidence of State practice which proves that the fair and equitable treatment under Article 10.5 has evolved to include the obligations they are advancing. Neither of the arbitral awards cited support Claimants' proposition because their findings are not based on State practice.

iii. Claimants conflate the distinction between general principles of law and customary international law

476. On several occasions, Claimants refer to general principles of law to describe the evolution of fair and equitable treatment. Particularly, Claimants argue that fair and equitable treatment includes the obligation to act in good faith,[1104] provide stable and secure legal environment,[1105] ensure legal certainty,[1106] and adhere to the principle of estoppel[1107] because these are general principles of law. Because customary international law and general principles of law are distinct sources of international law, Claimants' attempt to apply the former through analogy must be rejected.

477. As can be inferred from Article 38 of the ICJ Statute, "the general principles of law recognized by civilized nations" and "international custom, as evidence of general practice accepted as law" are two different sources of international law.[1108] Recently, the ILC affirmed their distinction, noting that "the fact that a rule of customary international law requires there to be a "general practice accepted as law" (accompanied by *opinio* juris), while a general principle of law needs to be "recognized by civilized nations," should not be overlooked. This suggests that these two sources are distinct and should not be confused."[1109]

478. Recognizing their difference, tribunals have interpreted and applied both sources of international law separately.[1110] In *Merrill*, a case on which Claimants have heavily relied, the tribunal acknowledged their

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[1102] *Waste Management v. Mexica (II)*, ICSID Case No. ARB/AF/00/03, Award (April 30, 2004), ¶ 98 (**CL-0022**).
[1103] *Clayton v Canada*, Award on Jurisdiction and Liability (March 17, 2015), ¶ 591 (**CL-0088**) .
[1104] *See* Claimants' Memorial, ¶ 206, citing to *Merrill & Ring Forestry v. Canada*, Award, ¶ 187 (**CL-0201**).
[1105] *See* Claimants' Reply, ¶ 475, citing *Merrill & Ring Forestry v. Canada*, Award, ¶ 187 (**CL-0201**).; *Tecmed v Mexico*, Award, ¶ 154 **(CL-0122)**.
[1106] *See id.* at ¶ 533.
[1107] *Id.* at ¶ 481.
[1108] *See* ILC, First Report on General Principles of Law, A/CN.4/7/32 (April 5, 2019), ¶ 28 **(RL-0376)**.
[1109] *Id*.
[1110] *Merrill & Ring Forestry v. Canada*, Award (March 31, 2010), ¶ 184, 186-187 (**CL-0201**).

distinction. Having found that Article 1105 obliges states to afford fair and equitable treatment in accordance with international law, the tribunal analyzed the standard by considering different sources of international law, including general principles of law and customary international law.[1111] However, the tribunal considered these rules, as it should, as two separate sources of international law and analyzed their content separately.[1112]

479. No such analysis is necessary here. With respect to Article 10.5 of CAFTA-DR, State parties have made their choices clear. State parties have decided, unequivocally, to limit their obligation to provide fair and equitable treatment to the customary international law minimum standard of treatment.[1113] Accordingly, it is this source of international law that Claimants must analyze and establish its elements, not general principles of law.

b. Claimants' overly broad reading of the denial of justice principle is unfounded

i. Egregious violations of due process by the national judiciary, and not misapplication of laws, constitute denial of justice

480. Due to the wide deference given to national courts, the threshold for finding denial of justice is high.[1114] A denial of justice occurs only if the judiciary of a State "administers justice in a seriously inadequate manner" that it "shocks a sense of judicial propriety."[1115] It is not enough that a single court administered

[1111] *Id.* at ¶¶ 183-184 (**CL-0201**).
[1112] *Id.* at ¶ 184 (**CL-0201**).
[1113] CAFTA-DR, Article 10.5 **(CL-0001)**.
[1114] *See* Guatemala's Counter-Memorial, ¶ 286, *citing* to *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II)*, PCA Case No. 2009-23, Partial Award on Merits (March 30, 2010), ¶ 244 (**CL-0175**); *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (November 30, 2011), ¶¶ 10.4.5-10.4.6 (**RL-0198**). *See also H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award (May 6, 2014), ¶ 400 (**RL-0024**) ("The Tribunal also stresses that the evidentiary threshold to establish a claim of denial of justice is high."); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, (June 22, 2010), ¶ 27 **(RL-0196)** ("The Tribunal stresses that the threshold of the international delict of denial of justice is high and goes far beyond the mere misapplication of domestic law"); Jan Paulsson, Denial of Justice in International Law 87 (Cambridge University Press, 2005) (**CL-0171**) ("It is not easy for a complainant to overcome the presumption of adequacy and thus to establish international responsibility for denial of procedural justice"); *Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7 Award, (February 22, 2021), ¶216 **(RL-0377)** ("the Claimant must show that Respondent had not provided a minimally adequate justice system in order to satisfy the high threshold for a claim for denial of justice.") ; *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*(Separate opinion of Judge Tanaka), I.C.J. Report (February 5, 1970), p.160 **(RL-0307)** ("It is an extremely serious matter to make a charge of a denial of justice vis-a-vis a State. It involves not only the imputation of a lower international standard to the judiciary of the State concerned but a moral condemnation of that judiciary. As a result, the allegation of a denial of justice is considered to be a grave charge which States are not inclined to make if some other formulation is possible.")
[1115] Guatemala's Counter Memorial, ¶¶ 284-286, 401; Claimants' Memorial, ¶¶ 268-269. *See also*, *Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7 (February 22, 2021), ¶ 209 (**RL-0377**)*; Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Award (March 26, 2008),¶ 76 (**RL-0378**).

justice unfairly.[1116] There must be a showing of a "systematic failure of the State's justice system."[1117] Claimants' generally agree with this definition and, thereby, accept that the threshold for establishing denial of justice is high.[1118]

481. Parties disagree, however, on whether an erroneous judgment constitutes denial of justice. Guatemala's position, which is supported by overwhelming authority, is that it does not.[1119] Application of national law should be left to the exclusive jurisdiction of the national judiciary. To conclude otherwise, "would require a tribunal to delve into the decision-making process under national law," which "international tribunals cannot" do.[1120] But Claimants invite this Tribunal to assume this role, which many other tribunals have refused to take, by misconstruing Prof. Paulsson's interpretation of the principle of denial of justice.[1121]

482. Claimants insist that Prof. Paulsson recognizes substantive denial of justice.[1122] To support their conclusion, Claimants cite to a text from Prof. Paulsson's book in which he notes that a judicial decision that "no judge could reasonably have reached" could indicate "that it was not rendered by an independent judicial mind deciding according to its conscience."[1123] They also make reference to another text from his book in which he states that if "an international tribunal rejects a decision founded on a national judicial authority's interpretation of its own law," it does so because of its "determination that the process was defective."[1124] These texts do not support Claimants' proposition.

483. Contrary to Claimants' submission, the above quoted texts merely demonstrate Prof. Paulsson's recognition that a grave misapplication of law could have evidentiary value. Nothing more. No amount of

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[1116] *Jan Oostergetel and Theodora Laurentius v. Slovak Republic, UNCITRAL*, Final Award (April 23, 2012), ¶ 225 ("[D]enial of justice deals with the failure of a system not of a single court") **(RL-0195)**;
[1117] *Corona Materials v Dominican Republic,* Award ¶ 254 **(RL-0002)**. *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL Award (January 12, 2011), ¶ 223 (**RL-0155**) (*citing* to Prof. Paulsson which "identifies denial of justice in international law as involving the failure of a national judicial system, taken as a whole, to render due process to aliens. The concept therefore involves a duty to 'create and maintain a system of justice which ensures that unfairness to foreigners either does not happen, or is corrected'"); *Arif v. Moldova*, Award (April 8, 2013), ¶ 345 (**CL-0126)** ("In a claim for denial of justice, the conduct of the whole judicial system is relevant"); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award (June 22, 2010), ¶ 279 ("[T]he Tribunal concludes that Respondent can only be held liable for denial of justice if Claimants are able to prove that the court system fundamentally failed") **(Rl-0196)**; *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award (May 6, 2014), ¶ 404 (**Rl-0024**); *Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7 (February 22, 2021), ¶ 216 (**RL-0377**).
[1118] *See* Claimants' Memorial, ¶ 268
[1119] See Guatemala's Counter-Memorial, ¶¶ 300-302
[1120] *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award (September 20, 2021), ¶ 217 (**RL-0379)**
[1121] *See* Claimants' Reply, ¶ 524-527.
[1122] Claimants' Reply, ¶ 527
[1123] *Id.*
[1124] *Id.*

hairsplitting of Prof. Paulsson's writing can conceal his unequivocal stand that an erroneous decision, no matter how grave, does not result in denial of justice.[1125] Prof. Paulsson's position is consistent with the prevailing practice.[1126] While tribunals have acknowledged that an erroneous decision—a kind which 'no competent judge could reasonably have made'— could serve as 'elements of proof of a denial of justice,' they have emphasized that such decision does not, in and of itself, constitute denial of justice.[1127]In the words of the former ICJ Judge Sir Gerald Fitzmaurice,

> The only thing which can establish a denial of justice so far as a judgment is concerned is an affirmative answer, duly supported by evidence, to some such question as "Was the court guilty of bias, fraud, dishonesty, lack of impartiality, or gross incompetence?" If the answer to this question is in the negative, then, strictly speaking, it is immaterial how unjust the judgment may have been. The relevance of the degree of injustice really lies only in its evidential value.[1128]

484. Claimants pay no regard to the limited weight given to erroneous judgments. Instead, Claimants use

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[1125] Jan Paulsson, Denial of Justice in International Law (Cambridge University Press, 2005) p. 82(**CL-0171)** ("[I]n modern international law there is no place for substantive denial of justice. Numerous international awards demonstrate that the most perplexing and unconvincing national judgments are upheld on the grounds that international law does not overturn determinations of national judiciaries with respect to their own law. To insist that there is a substantive denial of justice reserved for 'grossly' unconvincing determinations is to create an unworkable distinction."); *id*, at 98 ("Denial of justice is always procedural. There may be extreme cases where the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it. Such cases would sanction the state's failure to provide a decent system of justice. They do not constitute an international appellate review of national law.").

[1126] *See Agility for Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Award ¶ 212 (**RL-0377**); *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on the Track II (August 30, 2018), ¶¶ 8.36-8.37 **(CL-0117)** ("A denial of justice implies the failure of a national system as a whole to satisfy minimum standard…The Tribunal has also borne in mind, as these legal materials confirm, that the doctrine of denial of justice essentially addresses procedural unfairness and not (by itself) an error of fact or applicable national law, although both may equally defeat the complainant's substantive rights."); *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (July 29, 2008), ¶ 653(**CL-0147**); *Loewen v. USA*, ICSID Case No. ARB (AF)/98/3, Award (June 26, 2003), ¶ 441 (**CL-0170)** (defining denial of justice as "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety."); *Mondev v. USA*, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002), ¶ 136 **(RL-0018)**; *Liman v. Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award (June 22, 2010), ¶ 279 ("[T]he Tribunal concludes that Respondent can only be held liable for denial of justice if Claimants are able to prove that the court system fundamentally failed. Such failure is mainly to be held established in cases of major procedural errors such as lack of due process.") (**RL-0196**); *Lion Mexico Consolidated v. Mexico*, ICSID Case No. ARB(AF)/15/2 Award (September 20, 2021), ¶¶ 218-219(**RL-0379**).

[1127] *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (July 30, 2009), ¶ 94 (**RL-0025**); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award (June 22, 2010), ¶ 279 (**RL-0196**) ([T]he Tribunal concludes that Respondent can only be held liable for denial of justice if Claimants are able to prove that the court system fundamentally failed. Such failure is mainly to be held established in cases of major procedural errors such as lack of due process. The substantive outcome of a case can be relevant as an indication of lack of due process and thus can be considered as an element to prove denial of justice."); *Agility for Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Award ¶ 213 (**RL-0377**).

[1128] G.G. Fitzmaurice, "The Meaning of the Term 'Denial of Justice'," 13 British Yearbook of International Law 93 (1932), pp 112 (**RL-0282)**

denial of justice as a pretext to appeal and seek remedy for what they presume to be a misapplication of Guatemala law. At its core, the denial of justice claim centers on the argument that Guatemalan courts violated the Amparo Law by admitting CALAS' *amparo* and suspending the Progreso VII exploitation license outside the avenues provided under the Mining Law.[1129] Regardless of how Claimants chose to frame the decisions as "arbitrary" or outright denial of justice, their claim fails because a misapplication of law does not fall under either of the categories.

485. As explained in the Counter-Memorial, Chapter 10 of the CAFTA-DR does not bestow tribunals with the power to review and provide remedy for an erroneous national court decision.[1130] Even "the most perplexing and unconvincing national judgments are upheld on the grounds that international law does not overturn determination of national judiciaries with respect to their own law."[1131] It is irrelevant, as Claimants allege, that they faced grave consequences as a result of the error;[1132] judicial errors, whatever the result of the decision, do not give rise to international responsibility on the part of the State.[1133] Neither a retroactive application of a new law nor a misapplication of a procedural law changes this principle.

ii. A retroactive application of new laws or retroactive re-interpretation of existing laws does not amount to a denial of justice

486. Claimants argue that Guatemalan courts committed denial of justice by suspending the exploitation license outside the grounds provided under the Mining Law.[1134] They argue that the "ruling was akin to retroactively applying a new law."[1135] The claim has no merit. Like any misapplication of law, an erroneous retroactive application of a new law does not give rise to a denial of justice.

487. A similar claim was made and dismissed in *Mondev v. USA*. In that case, the claimant brought a denial of justice claim, alleging that the supreme judicial court's decision to dismiss its subsidiary's contractual claims 'was arbitrary and profoundly unjust.'[1136] Like Claimants, Mondev argued that the decision was

[1129] *See* Claimants' Memorial, ¶ 298.
[1130] *See Mondev v. USA*, ICSID Case No. ARB(AF)/99/2, Award, ¶127 **(RL-0018)**; *Azinian v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award (November 1, 1999), ¶ 99 (**CL-0144);** Jan Paulsson, Denial of justice in international law (Cambridge Univ. Press 2005) p.82 (**CL-0171**); *See also* Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63 Int'l & Comp. L.Q., p. 877 (**RL-0191)** ("An authoritative determination of a claim of right or accusation of guilt by a domestic adjudicative body cannot be disturbed by an international court or tribunal simply on the basis that a more rational set of reasons was available to that domestic adjudicative body."); *Loewen v. USA*, ICSID Case No. ARB (AF)/98/3, Award (June 26, 2003), ¶ 242 (**CL-0170)**; *Bilcon v. Canada*, UNCITRAL, Award on Jurisdiction and Liability (March 17, 2015) ¶ 437 (**CL-0088**).
[1131] Jan Paulsson, Denial of justice in international law (Cambridge University Press, 2005), p.82 (**CL-0171**).
[1132] Claimants' Reply, ¶ 538.
[1133] F.V. Garcia Amador (Special Rapporteur), Third Report on International Responsibility, A/CN.4/111, p.71 **(RL-0380)**.
[1134] *See* Claimants' Memorial, ¶ 298; Claimants' Reply, ¶ 532.
[1135] *See* Claimants' Memorial, ¶ 298.
[1136] *Mondev v. USA*, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002), ¶ 131 (**RL-0018**).

arbitrary because, *inter alia*, the court applied a new rule retrospectively.[1137] The tribunal was "unimpressed by the 'new law' argument."[1138] It held that such measure does not give rise to denial of justice, noting that "it is normally a matter for local courts to determine whether and in what circumstances to apply new decisional law retrospectively."[1139]

488. Other tribunals have also declined the claim that a State's decision that is radically different from the existing law and practice could breach the fair and equitable treatment. *Glamis v. USA* is a case in point. In that case, the claimant argued that the United States federal government's decision to deny claimant's plan of operation was "unexpected, novel and arbitrary."[1140] The tribunal agreed that the decision "changes, in an arguably dramatic way, previous law or prior legal interpretation upon which an investor has based its reasonable, investment-backed expectations."[1141] But the tribunal concluded that the decision was not arbitrary because it "did not exhibit a manifest lack of reason"—the 19 pages decision was based on factual and legal analysis.[1142]

489. The legal authorities cited by Claimants to argue the contrary are unhelpful to their case. Citing to *Cairn v. India*, Claimants make two propositions. First, the principle of legal certainty "should guide this Tribunal in determining Guatemala's obligation not to deny justice under CAFTA-DR Article 10.5(1)" because they are general principles of law.[1143] Second, "the principles of non-retroactivity…is 'one of the essential elements of the principle of legal certainty and runs afoul of the guaranteed of predictability of the legal environment."[1144]

490. Claimants' reliance on general principles of law is misplaced. Only the customary international law of the minimum standard of treatment is relevant for the purpose of determining Guatemala's obligation not to deny justice. It is, therefore, immaterial that legal certainty or the principle of non-retroactivity are general principles of law.

491. While the tribunal in *Cairn* went as far as concluding that the principles of "[l]egal certainty/stability/predictability" are part of the fair and equitable treatment, its finding has no value to the

[1137] *See Mondev v. USA*, Award, ¶ 137 (**RL-0018**).
[1138] *Mondev v. USA*, Award,¶ 133 (**RL-0018**)
[1139] *Id.* at ¶ 137 (**RL-0018**).
[1140] *Glamis Gold v. USA*, UNCITRAL, NAFTA, Award, ¶¶ 633-639 (**RL-0041**).
[1141] *Id.* at ¶ 760-761(**RL-0041**).
[1142] *Id.* at ¶¶ 763-764(**RL-0041**).
[1143] Claimants' Reply, ¶ 533.
[1144] *Id.* at ¶534.

present case. [1145] The fair and equitable treatment in *Cairn* was "an autonomous standard" that "does not as a general proposition operate a *renvoi* to the MST [minimum standard of treatment]."[1146] Contrary to tribunals faced with an autonomous standard of fair and equitable treatment, NAFTA tribunals have rejected the notion that the minimum standard of treatment includes the obligation to provide stable and predictable legal environment.[1147] *Cairn* is unavailing for another reason. The tribunal in *Carin* did not find, as Claimants argue here, that retroactive application of new laws constitute a denial of justice. In fact, denial of justice was never alleged by the claimant in that case.

492. Claimants' reliance on *Bilcon v Canada* is similarly unavailing. While Claimants attempt to allude that the tribunal in *Bilcon* found a breach of the fair and equitable treatment because of the State's application of a new law, the case tells a different story.[1148] In *Bilcon*, the act in question was a recommendation issued by a Joint Review Panel ("JRP"), suggesting that the government of Canada reject the claimant's project because it was inconsistent with "community core values."[1149] The tribunal held that the decision was arbitrary because the notion of "community core values" was "created by the [JRP], without legal authority or fair notice to Bilcon."[1150]

493. The tribunal's decision predominately rested on the lack of proper notice. It noted that the standard, which played a large role in the JRP's finding, was "not mentioned in any of the statutes or regulations."[1151] As a result "Bilcon was denied reasonable notice of 'community core values.' "[1152] In addition to being unable to decipher the standard from existing legal authorities, Bilcon had no "opportunity to seek clarification and respond to" JRP's application of the standard.[1153] The claimant's witness testified that neither he nor Bilcon's experts were asked during the review process to "address the concept of 'core values.'"[1154] In fact, he 'never heard the term during the entire process, including at the hearings.'[1155] In light of these facts, the tribunal concluded that Bilcon "was denied a fair opportunity to know the case it had to meet. It had no reason to expect under the law or any notice provided by the JRP, that 'community core values' would be

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[1145] *Cairn Energy Plc and Cairn UK Holdings Ltd. v. The Republic of India*, UNCITRAL, PCA Case No. 2016-7, Award (December 21, 2020) ¶ 1740 (**CL-0335**)
[1146] *Cairn Energy v. India*, UNCITRAL, PCA Case No. 2016-7, Award, ¶ 1704 (**CL-0335**)
[1147] *See e.g.*, *Cargill, Inc. v. United Mexican States*, Award, ¶ 243, 249,290 (**CL-0197**).
[1148] Claimants' Reply, ¶ 537.
[1149] *Clayton v Canada*, Award on Jurisdiction and Liability ¶¶ 502-508, 591 **(CL-0088)**.
[1150] *Id.* at ¶ 591 **(CL-0088)**.
[1151] *Id.* at ¶ 503 **(CL-0088)**.
[1152] *Id.* at ¶ 534 (**CL-0088**).
[1153] *Id.*
[1154] *Id.* at ¶ 536 (**CL-0088**).
[1155] *Id.* at ¶ 537 (**CL-0088**).

an overriding factor."[1156]

494. Here, the facts are starkly different. Claimants do not, and cannot allege, that they had no fair notice of Indigenous Peoples' right to consultation, which is clearly laid out in several international instruments ratified by Guatemala and thereby incorporated into the Constitution.[1157] Contrary to the case in *Blicon*, the right to consultation was at the center of CALAS *amparo* so Exmingua was fully aware of this right and had the opportunity to address its application from the Supreme Court up to the Constitutional Court. Finally, the claim of arbitrariness in *Blicon* was not invoked in the context of judicial decisions. This distinction is crucial. As explained in the Counter Memorial, significant deference is given to national judiciaries— "[i]t is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State."[1158]

495. Finally, Claimants cite, in vain, to Prof. Paulsson to argue that "'new 'judge-made' or 'decisional' law may amount to a denial of justice." [1159] Given the full context, the Tribunal will appreciate that Prof. Paulsson's position is unhelpful to Claimants' case. Contrary to Claimants' insinuation, Prof. Paulsson's stance is that "judge-made" law "must be viewed with greatest skepticism" if the action was "targeted," *i.e.*, taken "to disadvantage a foreigner."[1160] In the absence of such ill-will, a retroactive application of a new law by the national judiciary does not constitute a denial of justice.

iii. A misapplication of procedural law does not constitute a denial of justice

496. For the same reason discussed above, multiple tribunals and scholars agree that a misapplication of a procedural law does not give rise to denial of justice. *Mondev v. USA* is again instructive. In that case, the tribunal disagreed with the claimant's argument that "an application of local procedural rules" could violate the obligation to provide a fair and equitable treatment.[1161] To adopt the claimant's suggestion, the tribunal noted, is to convert "NAFTA tribunals…into court of appeals."[1162] Other tribunals have reached the same conclusion, emphasizing that it is not the role of the tribunal to "correct procedural or substantive

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[1156] *Id.* at ¶ 590 (**CL-0088**).
[1157] *See*, *infra*, Section V.C.4.
[1158] Guatemala's Counter Memorial, ¶ 283, *citing* to *Mondev v. USA*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 126 **(RL-0018)**. *See also*, *B.E. Chattin (USA) v. Mexico*, United States Mexican Claims Commission, Award (July 23, 1927), p. 288 (1951) (**CL-0176**).("it is a matter of the greatest political and international delicacy for one country to dis-acknowledge the judicial decision of a court of another country."); *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Award, (June 3, 2021), ¶ 357 (RL-0397) (agreeing with Costa Rica and Canada that 'claims of arbitrariness or unfairness in the context of judicial decisions must be viewed through the lens of denial of justice.')
[1159] Claimants' Reply, ¶ 534.
[1160] Jan Paulsson, Denial of justice in international law, (Cambridge University Press, 2005), pp 199-200 (**CL-0171**) (emphasis added).
[1161] *Mondev v. USA*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 136 **(RL-0018)**
[1162] *Id.*

errors…committed by…local courts."[1163]

497. Regardless of how Claimants frame the Guatemala courts' decisions—be it retroactive application or a misapplication of the substantive or procedural law of Guatemala—there is a consensus that such error cannot constitute a denial of justice. The rationale is clear. If Claimants' submission is to be accepted, it would open a Pandora's box whereby investors, dissatisfied with a local court judgment, could appeal the judgment before CAFTA-DR tribunals—a right that the State parties did not intend to provide by virtue of the Treaty.

2. Claimants have failed to demonstrate that the fair and equitable treatment has evolved to include the obligations allegedly breached by Guatemala

a. Claimants have failed to prove that the minimum standard of treatment could be breached by arbitrary treatment nor have denied that international law defines the term 'arbitrary' stringently

498. Solely relying on *Waste Management II* and its endorsement in *Merrill* and *Bilcon*, Claimants insist that the minimum standard of treatment obliges States to refrain from arbitrary conduct.[1164] Because neither of the tribunals based their finding on State practice, the Tribunal should give no weight to these decisions.[1165] *Merrill* is unavailing for other reasons. Claimants criticize Guatemala for ignoring the decision in *Merrill* where the tribunal found "the prohibition of arbitrariness are no doubt an expression of…general principles,"[1166] but the case has no probative value. The issue in the present case is whether the obligations alleged to have been breached by Guatemala are part of the minimum standard of treatment, and not whether they are part of general principles of law.

499. Even assuming *arguendo* that the minimum standard of treatment has evolved to include the obligation to refrain from arbitrary measures, Claimants have not proved a violation of such obligation. The threshold

[1163] *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB 09/15, Excerpts of Award (May 6, 2014), ¶ 400 ("As to the Claimant's allegation of denial of justice and denial of effective means, the Tribunal points out that its role is not to correct procedural or substantive errors that might have been committed by the local courts in Egypt. As explained by Jan Paulsson in his book *Denial of Justice in International Law*, the international obligation on states is not to create a perfect system of justice but a system of justice where serious errors are avoided or corrected.") (**RL-0024**); *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Award, (August 14, 2020), ¶ 409 ("As to this dispute what matters is not whether the Supreme Court disregarded procedural requirements but whether, if they did, this supports the Claimants' case that there was a denial of justice under international law. Do they support the case that, taken as a whole, the decision reached by the Court was one that no honest and competent court could have reached?.") (**RL-0381**); *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award (September 12, 2010), ¶ 275 (holding that errors of domestic procedural or substantive law which may have been committed by national courts" do not give rise to a denial of justice.) **(CL-0053).**

[1164] Claimants' Reply, ¶ 472.

[1165] *See, infra,* Section C.1.a.ii

[1166] Claimants' Reply, ¶ 472, citing to *Merrill & Ring Forestry L. P. v. Gov't of Canada*, NAFTA, ICSID Case No. UNCT/07/1, Award (March 31,2010), ¶ 187 (**CL-0201**).

for establishing arbitrariness that results in international liability is high.[1167] While Claimants do not define the term "arbitrary," they do not dispute that arbitrariness–as defined in *ELSI* and endorsed by numerous tribunals– "is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[1168] Neither retroactive application of a new law nor "clear-cut mistakes in following procedures" fall under any of the above characteristics.[1169]

500. Due to the stringent definition of the term under international law, "the instances in which state conduct has been qualified as 'arbitrary' are drastically fewer" in number.[1170]

501. No matter how many times Claimants attempt to frame *GAMI v. Mexico* in a favorable light, the case is detrimental to their claim. While Claimants and Guatemala agree that the tribunal in *GAMI* dismissed the claimant's fair and equitable treatment claim, both Parties read the rationale for the dismissal differently. Claimants argue that the tribunal dismissed the claim because "GAMI was unable to show that… [the government's] misapplication [of its law] …was 'both directly attributable to get government and directly causative of GAMI's alleged injury."[1171] They next distinguish *GAMI* from the present case, noting that, here, "Guatemala bears sole responsibility for MEM's suspension of Exmingua's exploitation license, as it does for Guatemala's failure to enact implementing legislation for ILO Convention 169."[1172]

502. Guatemala disagrees. GAMI's claim was also denied because GAMI failed to prove that the government's failure to implement the Mexican Sugar Program was arbitrary.[1173] A complete reading of

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[1167] *See generally,* Guatemala's Counter-Memorial, ¶ 339-344.

[1168] Guatemala's Counter Memorial, ¶ 339, *citing* to *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, I.C.J. Reports, 1989, p. 15, Judgment (July 20, 1989), ¶ 128 **(RL-0199)**. *See also* Jacob Stone, *Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment*, Leiden Journal of International Law (2012), p.88 (**RL-0270**) (the definition framed in *ELSI* has been acknowledged by many as "the landmark case for the definition of arbitrariness at international law."); *Thunderbird International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award (January 26, 2006), ¶ 194 (**CL-0198**); *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, NAFTA, Award (June 8, 2009), ¶ 22 (**RL-0041**); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002), ¶ 127 (**RL-0018**). *See also, Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, Award (April 10, 2013), ¶ 873 (**CL-0365)**.

[1169] Guatemala's Counter Memorial, ¶ 340; *Clayton v Canada*, Award on Jurisdiction and Liability, ¶ 437 (**CL-0088**); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (July 8, 2016) ¶ 390 ("According to the international law standard set forth by the ICJ Chamber in the ELSI case, "arbitrariness" is defined as "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.". As noted by the Respondent, the ELSI judgment is most commonly referred to by investment tribunals' decisions as the standard definition of "arbitrariness" under international law.") (**CL-0375**)

[1170] Jacob Stone, *Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment*, Leiden Journal of International Law (2012), p.79 (**RL-0270**).

[1171] Claimants' Reply, ¶ 487.

[1172] *Id.*

[1173] *See GAMI Investments, Inc. v. Government of the United Mexican States*, NAFTA, UNCITRAL, Final Award (November 15, 2004), ¶¶ 103-104 (**CL-0036**).

the case supports Guatemala's conclusion. Although the tribunal agreed that "GAMI has demonstrated clear instances of failures to implement important elements of Mexican regulations,"[1174] it did not find the action to be arbitrary because GAMI was unable to prove "anything approaching 'outright and unjustified repudiation' of the relevant regulations."[1175] The same is true here. Aside from alleging that MEM's suspension of the exploitation is illegal, which as explained below is not, Claimants have not established that the measure was arbitrary.

503. *Waste Management II* also concluded with a dismissal of the claimant's arbitrariness claim.[1176] In that case, the dispute arose from a waste management concession contract between claimant's subsidiary and the city of Acapulco.[1177] After Acapulco refused to pay and failed to comply with other provisions of the contract, the claimant commenced an arbitration against Mexico alleging, *inter alia*, that the city's action was "wholly arbitrary" and "grossly unfair."[1178] The tribunal rejected the claim. While it accepted that the city breached "its contractual obligations,"[1179] the tribunal held that the city's action does not "amount to an outright and unjustified repudiation of the transaction," considering that the city was even unable to "pay its own payroll" due to the financial crisis at the time."[1180]

504. The lack of evidence that the city's action "was motivated by sectoral or local prejudice" also contributed to the tribunal's decision.[1181] According to the tribunal, the city, on the contrary, had taken several measures to protect the interests of the claimant.[1182] Among others, the tribunal considered that the city, in good faith, "defended proceedings brought against it by local residents challenging the Concession Agreement."[1183] It also took into account that the city's failure to comply with the contract was, partially, due to "interim or final orders obtained against the City."[1184] As will be further explained below, the same conclusion can be drawn from the present case. In good faith, MEM defended against the *amparo* action filed by CALAS to suspend the Progreso VII exploitation license.[1185] Once, however, the Supreme Court rejected its objection,

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[1174] *GAMI v. Mexica*, NAFTA, UNCITRAL, Final Award (November 15, 2004), ¶ 103 (**CL-0036**).
[1175] *GAMI v. Mexica*, ¶ 104 (**CL-0036**) (emphasis added).
[1176] *Waste Management v. Mexica (II)*, ICSID Case No. ARB/AF/00/03, Award (April 30, 2004) ¶ 115 (**CL-0022**).
[1177] *Id.* at ¶ 109 (**CL-0022**).
[1178] *Id.* at ¶ 115(**CL-0022**).
[1179] *Id.* at ¶ 109 (**CL-0022**).
[1180] *Id.* at ¶ 115 (**CL-0022**).
[1181] *Id.*
[1182] *Id.* at ¶ 110 (**CL-0022**).
[1183] *Id.*
[1184] *Id.* at ¶ 111 (**CL-0022**).
[1185] *See* Response by the Ministry of Energy and Mines to CALAS' application for *amparo nuevo* (September 5, 2014), pp 2-7 (**C-0465**); Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming *amparo provisional (*May 5, 2016), p. 2(**C-0143)**

MEM had no other choice but to comply with the decision.[1186]

505. Since the Claimants have not demonstrated that fair and equitable treatment has evolved in such a way that includes protection against arbitrary measures, the assertion that Guatemala violated its obligation to provide fair and equitable treatment by making those decisions should be rejected.

b. There is no evidence which proves that the minimum standard of treatment includes the obligation to act in good faith

506. Claimants continue to insist that the minimum standard of treatment includes a stand-alone obligation to act in good faith but fail to engage with Guatemala's counter arguments for why the claim must fail.[1187]

507. As explained in the Counter-Memorial, there is no evidence of "general and consistent" State practice accepting the obligation to act in good faith.[1188] The absence of evidence in either the Memorial or the Reply is understandable. Multiple States and tribunals have opposed such expansive reading of the minimum standard treatment.[1189] In line with its "consistent and longstanding position," the United States noted that "a claimant 'may not justifiably rely upon the principle of good faith' to support a claim, absent a specific treaty obligation, and the CAFTA-DR contains no such obligation."[1190]

508. The State parties' positions are affirmed by multiple scholars and tribunals.[1191] In *Glamis v. USA*, the claimant, citing to arbitral awards, argued that fair and equitable treatment, *inter alia*, includes the obligation "to act in good faith."[1192] The tribunal rejected the argument, noting that the claimants have failed to prove a change in custom.[1193] Likewise, the tribunal in *ADF v. USA*, concluded that the "duty of good faith adds only negligible assistance in the task of determining or giving content to a standard of fair and equitable

[1186] *See*, Section V.C.4.
[1187] See Guatemala's Counter-Memorial, ¶¶ 326-330
[1188] Guatemala's Counter-Memorial, ¶¶ 326
[1189] *See Ibid*, ¶¶ 326.
[1190] *See* Submission of the United States, 2021, ¶ 25; Counter-Memorial, ¶ 326, fn. 537
[1191] Ionna Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law*, p. 174 **(RL-0382 NG)**; Roland Kläger, *Fair and Equitable Treatment in International Investment Law*, p. 131**(RL-0383)**; Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*, p. 243-245 **(RL-0384 ENG)**; Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43(1) N.Y.U. J. Int'l L. & Pol. 43 (2010) **(RL-0385)**; OECD, *Fair and Equitable Treatment Standard in International Investment Law* 26 (Working Papers on International Investment, Paper No. 2004/3, 2004), p.40 **(RL-0386)**; Barnali Choudhury, *Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law*, at 316 **(RL-0387)**; T. Weiler, *Good Faith and Regulatory Transparency: The Story of Metalclad v. Mexico*, International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, p. 725 **(RL-0388)**; Concerning Border and Transborder Armed Actions (*Nicaragua v. Honduras*), Jurisdiction and Admissibility, Judgment, (December 20, 1988), ICJ Rep. 1988, ¶¶ 105, 106(**RL-0216)**;
[1192] *Glamis Gold v. USA*, Award, ¶¶ 545, 605 **(RL-0041)**.
[1193] *Glamis Gold v USA*, Award, ¶¶ 605-606, 612 **(RL-0041).**

treatment."[1194]

509. Indeed "[n]o award in favor of claimant rests solely on the good faith principle."[1195] As noted by the Organization for Economic Co-operation and Development ("OECD"), after reviewing various types of fair and equitable treatment provisions, "[g]ood faith seems to be considered more a basic principle underlying an obligation rather than a distinct obligation owed to investors pursuant to the "fair and equitable treatment" standard."[1196]

510. The above authorities clearly dispel the argument that the duty to act in good faith has been endorsed as an obligation under the fair and equitable treatment by "numerous CAFTA-DR, NAFTA, and other tribunals and States."[1197] Claimants attempt to establish international liability based on the principle of good faith must, therefore, be dismissed.

c. Claimants have not proved that the fair and equitable treatment includes the obligation to protect an investor's legitimate expectations, nor that Claimants had such expectations

511. Mindful of the hurdle of establishing a breach of legitimate expectations, Claimants have abandoned this claim.[1198] Nonetheless, they insist that such expectation is "a component of the fair and equitable treatment" but fail to provide any evidence of State practice or *opinio juris* confirming their proposition. [1199] The lack of evidence, alone, should prompt the Tribunal to reject Claimants' submission, but there is another reason why the argument fails. As noted in the Counter-Memorial and elaborated below, there is an agreement among the State parties of the CAFTA-DR that the notion of legitimate expectations is not part of the minimum standard of treatment.[1200] Pursuant to Article 31(3)(b), the Tribunal should consider the State parties' agreement on the matter and dismiss Claimants' submission.[1201]

512. In addition to lacking support from the State Parties, Claimants' submission is uncorroborated by the cases on the record. None of the CAFTA-DR or NAFTA cases cited by Claimants describe legitimate expectations as a stand-alone obligation under the fair and equitable treatment.[1202] Rather, they consider it

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[1194] *ADF Group Inc. v. USA*, ICSID Case No. ARB(AF)/16/3, Award (January 9, 2003), ¶ 191 **(CL-0081)**.
[1195] Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43(1) N.Y.U. J. Int'l L. & Pol. 43, p.97 (2010) **(RL-0385)**.
[1196] OECD, *Fair and Equitable Treatment Standard in International Investment Law 26* (Working Papers on International Investment, Paper No. 2004/3, 2004), p.40 **(RL-0386).**
[1197] Claimants' Reply, ¶ 462.
[1198] Claimants' Reply, ¶ 483
[1199] Claimants' Reply, ¶ 476.
[1200] *See infra,* Section V.C.3.c.ii.
[1201] *See infra, S*ection V.C.3.d.
[1202] *See* Guatemala's Counter-Memorial, ¶¶ 315-316, citing to *Waste Management II*, ¶ 98 (**CL-0022)**; *Bilcon*, Award on Jurisdiction and Liability (March 17, 2015), ¶ 455 (**CL-0242**).

as being a "relevant" or "a factor" in the determination of a breach of the fair and equitable treatment.[1203]

513. In any event, Claimants have not established the elements of legitimate expectations. It is widely recognized that legitimate expectations could only occur in the face of a "definitive, unambiguous, and repeated assurance" made to an investor in order to "induce [its] investment."[1204] An investor's expectation must also be objective. As affirmed by various tribunals, "[i]nvestment Treaties are not insurance policies against bad business judgments."[1205] A host state cannot be held internationally responsible for violating an expectation that is not supported by due diligence.[1206] Before making a foreign investment, an investor must have a "general awareness of recent decisions of the highest court of the host State that interpret provisions of the regulatory regime on which the investor would rely."[1207] If the investor plans to "operate in a highly sensitive industry…a due diligence assessment, including possible human rights impacts, is an essential part of appraising a host state's regulatory framework."[1208]

[1203] *See Waste Management II*, Award, ¶ 98 (**CL-0022)** (considering legitimate expectations not as a component of the fair and equitable treatment but as a factor "relevant" determining if the respondent's action was "arbitrary, grossly unfair, unjust or\ idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety."); *Bilcon*, Award on Jurisdiction and Liability (March 17, 2015), ¶ 455 (**CL-0242**) (Consistent with *Waste Management II*, the tribunal in *Bilcon v Canada*, described "reasonable expectation" as a "factor to be taken into account in assessing whether the host state breached the international minimum standard of fair treatment.")

[1204] *See* Guatemala's Counter-Memorial, ¶ 370, citing to *Grand River v. USA*, Award, ¶ 141 **(RL-0155)** ("The "conduct" of the United States pointed to by the Claimants as giving rise to reasonable expectations of immunity from MSA measures is U.S. federal Indian law and the Jay Treaty. Ordinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly or implicitly by a state party."); *Marvin Feldman v. Mexica*, ICSID Case No. ARB(AF)/99/1, Award (December 16, 2002), ¶ 148-149 **(CL-0093)** (the tribunal declined Feldman's claim of legitimate expectation because, unlike in the case of *Metalclad v. Mexico*, the representation was not "definitive, unambiguous and repeated."); *Glamis Gold v. USA*, Award, ¶ 620 **(RL-0041)**; *White Industries Australia Limited v. India*, UNCITRAL, Final Award (November 30, 2011), ¶ 10.3.7 ("Encouraging remarks from government officials do not of themselves give rise to legitimate expectations. There must be an 'unambiguous affirmation' or a 'definitive, unambiguous and repeated assurances.") **(RL-0198)**.

[1205] *Waste Management II*, ¶ 114, citing to *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (November 13, 2000), ¶ 64 (**RL-0389**); *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (July 17, 2003), ¶ 29 (**CL-0038**).

[1206] *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award (December 2, 2019) ¶ 264 **(RL-0273)** (for "an expectation to be reasonable, it must also arise from a rigorous due diligence process carried out by the investor.").

[1207] *SolEs Badajoz GmbH v. Kingdom of Spain,* ICSID Case No. ARB/15/38, Award (July 31 2019), ¶ 429 (**RL-0241)**. *See also, Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award (May 16, 2012), ¶ 258 (R**L-0258)**

[1208] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic,* ICSID Case No. ARB/07/26, Award (December 8, 2016) ¶¶ 623-624 (**RL-0129)**. *See also* ILO Convention 169 and the Private Sector Questions and Answers for IFC Clients, March 2007, p.1 **(RL-0302)** ("Private sector companies need to be aware of the various legal, reputational, and business risks they may run when implementing projects with potential impacts on indigenous and tribal peoples and, at the same time, of the opportunities of forming partnerships with these peoples and delivering development benefits to them"); *LG&EE Energy Corp v. Argentina*, Decision on Liability, (October 3, 2006), ¶ 130 **(CL-0161)** ("the investor's fair expectations cannot consider parameters such as business risk or industry's regular patterns"); *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, ICSID Case No. ARB/04/19 Award, (August 18, 2008), ¶ 340 **(CL-0202)**.

514. None of the above elements exist here. There is no evidence that Guatemala, with the hopes of attracting investment, assured Claimants that the exploitation license would not be revoked if issued without the required consultation under international instruments, including ILO Convention 169. Nor is there any evidence that Claimants, prior to investing, conducted due diligence to comprehend the legal, cultural, social, and historical dynamics of Guatemala.

515. In conclusion, Claimants have not demonstrated that the minimum standard of treatment has evolved to include an investor's legitimate expectations. In any event, none of the elements which could result in such expectations exist in the present case.

d. Claimants have failed to define the obligation to provide stable and secure legal business environment or prove that the fair and equitable treatment includes such obligation

516. While Claimants maintain that the obligation to provide a stable and secure legal business environment is part of the fair and equitable treatment, they make no effort to define this standard nor to demonstrate that it is a component of the minimum standard of treatment.[1209] At the outset, Claimants submit that this standard "does not require a State to freeze its laws in place" and allege that this standard "'has a close connection too to such [general principles]' of law, such as good faith and the prohibition of arbitrariness."[1210] But this does not say much as to what the obligation actually entails. The definition of the standard is lacking.

517. Claimants also fail to prove that the minimum standard of treatment has evolved to include the obligation to provide a stable and secure legal business environment. Like the rest of the standards, Claimants' allegation is unsupported by any evidence of State practice followed from a sense of legal obligation. Instead, Claimants rely on three cases, *Merrill & Ring*, *Tecmed*, *PSEG*, and the preamble of the CAFTA-DR.[1211] For the following reasons, the Tribunal should reject their claim.

518. *First*, for the purpose of determining the content of the fair and equitable treatment under Article 10.5, reference should only be made to the minimum standard of treatment, not general principles of law.[1212] Claimants' reliance on *Merrill & Ring* is, therefore, misplaced. The tribunal's finding in *Merrill & Ring* with respect to this principle is also vague. Claimants cite to *Merrill & Ring* where the tribunal noted that "[t]he availability of a secure legal environment has a close connection…to such [general] principles" of

[1209] *See* Claimants' Memorial, ¶ 209; Claimants' Reply, ¶ 462, 475.
[1210] Claimants' Reply ¶ 475.
[1211] *Id.*
[1212] *See supra,* Section V.C.1.a.iii

law, such as good faith, but the holding has no significance to the issue at hand.[1213] Aside from pointing to the "close connection" between other general principles of law and the notion of a secure legal environment, the tribunal did not hold that the latter is part of general principles of law. The applicable law for purposes of determining the contents of the fair and equitable treatment is international customary law, not general principles of law.

519. *Second*, neither the preamble of the Treaty nor the arbitral awards Claimants cite prove customary international law—only State practice accompanied with *opinio juris* can establish the existence, as well as the evolution, of customary international law.[1214] Circumventing this rule, other investors have attempted but failed to establish the minimum standard of treatment by relying on arbitral awards or the preamble of the relevant treaty.[1215] *Cargill v. Mexico* is a case in point.

520. In *Cargill*, the claimant argued that the minimum standard of treatment includes the obligation to provide "a stable and predictable environment that does not offend reasonable expectations."[1216] Like Claimants, Cargill argued that its claim is buttressed by the preamble of NAFTA which "calls for 'a predictable legal and commercial framework for business planning and investment"[1217] and the tribunal's holding in *Tecmed* that "the fair and equitable treatment requires the parties "to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[1218] Next, the claimant argued that the respondent violated this obligation by modifying "the rules upon which [c]laimant had based its legitimate expectations and investments decisions."[1219]

521. The tribunal dismissed the claim.[1220] It noted that the decision in *Tecmed*, which was based on a clause "viewed as possessing autonomous meaning," has no relevance for the purpose of determining the content of the minimum standard of treatment.[1221] For a similar reason, the tribunal gave no weight to the quoted text from the preamble of the treaty.[1222] Other investors have also failed to demonstrate the inclusion of this

[1213] *Merrill & Ring Forestry L. P. v. Gov't of Canada*, NAFTA, ICSID Case No. UNCT/07/1, Award (March 31,2010), ¶ 187 (**CL-0201**).
[1214] *See Supra,* Section V.C.1.a.ii.
[1215] *Cargill, Inc. v. United Mexican States*, NAFTA, ICSID Case No.ARB(AF)/05/2, Award (September 18, 2009), ¶ 290 (**CL-0197**); *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, NAFTA, Award (June 8, 2009), ¶ 571, 610 (**RL-0041**)
[1216] *Id*, ¶ 243 (**CL-0197**).
[1217] *Id*, ¶ 249 (**CL-0197**).
[1218] *Id*, ¶ 249 (**CL-0197**).
[1219] *Id*, ¶ 250 (**CL-0197**).
[1220] *Id*, ¶ 290 (**CL-0197**).
[1221] *Id*, ¶ 290 (**CL-0197**).
[1222] *Id*, ¶ 289 (**CL-0197**).

principle in the minimum standard of treatment.[1223] Relying on arbitral awards, the claimant in *Glamis* argued that "stability of the legal and business framework is an essential or dominant element of fair and equitable treatment…."[1224] The tribunal, however, rejected the claim, limiting the grounds for a breach of the fair and equitable treatment to acts that demonstrate "a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."[1225]

522. Finally, *PSEG* is unavailing for Claimants' case. In *PSEG*, the tribunal held that the fair and equitable treatment includes the obligation "to ensure stable and predictable business environment."[1226] But like *Tecmed*, the case involved an autonomous standard for fair and equitable treatment.[1227] There are other facts that distinguish *PSEG* from the present case. In *PSEG*, the tribunal's finding was based, *inter alia*, on "the United States Technical Memorandum on the BIT…[which] referred to fair and equitable treatment as a standard that can be invoked in arbitration to protect investments against possible vagaries of the host-Party's national laws and their administration."[1228] Here, on the contrary, no such statement exists in the *travaux preparatoire*.

523. As Claimants have failed to prove that the minimum standard of treatment includes the obligation to provide stable and secure legal business environment, the Tribunal should dismiss the claim. Even in the unlikely event that the Tribunal accepts that Claimants have carried out their burden of establishing the inclusion of this standard, it should still dismiss the claim because Claimants have failed to identify what the obligation entails.

e. In the absence of legitimate expectations, Claimants' expectation of legal certainty or stable and secure legal environment has no relevance

524. Claimants' inability to establish legitimate expectations, which ultimately forced them to relinquish such claim, is determinantal to their claim of legal certainty or stable and secure legal environment. As aptly put by Prof. Douglas, "investment treaty obligations do not protect expectations that are wholly unsubstantiated

[1223] *Glamis Gold v. USA*, Award, ¶ 570, 616 (**RL-0041**) (the claimant similarly argued that stability of the legal and business framework is an essential or dominant element of fair and equitable treatment…..," citing to several arbitral awards. The tribunal dismissed the claim, noting that "to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1).
[1224] *Id*, ¶ 570 (**RL-0041**).
[1225] *Id,* ¶¶ 571, 616 (**RL-0041**).
[1226] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (January 19, 2007), ¶ 239-240 (**CL-0371**).
[1227] *Id*, ¶ 222 (**CL-0371**).
[1228] *Id*, ¶ 253 (**CL-0371**) (internal citations omitted).

by reference to the municipal law of the host state or general principles of municipal legal system."[1229]

525. Several tribunals have affirmed this limitation.[1230] In *Glamis*, the claimant argued that the United States federal government's decisions, which denied the claimant's plan of operation, "were arbitrary and in contravention of prior law and practice."[1231] The tribunal agreed that the decision in question "changes, in an arguably dramatic way, previous law or prior legal interpretation upon which an investor has based its reasonable, investment-backed expectations."[1232]It also accepted that that the decision "surprised Claimant."[1233] But the tribunal held that this, in the absence of legitimate expectations, does not constitute a violation of the fair and equitable treatment.[1234]

526. The tribunal in *Grand River v. USA* made a similar remark. In that case, the claimant argued that it had reasonable expectations of immunity from MSA [Masters Settlement Agreement] measures" based on "U.S. federal Indian law and the Jay Treaty."[1235] The tribunal rejected the claim, noting that "[o]rdinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly or implicitly by a state party."[1236]

527. Given that Claimants have not established the elements of legitimate expectations, their attempt to rely on the principles of legal certainty or the notion of a stable and secure legal environment must be rejected.

3. <u>The State Parties of the CAFTA-DR Support Guatemala's Reading of the fair and equitable treatment of Article 10.5</u>

a. There is a consensus among the State parties that a violation of the fair and equitable treatment requires a showing of egregious misconduct as explicated by Guatemala

528. To date, six of the seven CAFTA-DR countries have expressed their interpretation of the fair and equitable treatment under Article 10.5 CAFTA-DR.[1237] In the present case, the United States, El Salvador, the Dominican Republic, and Costa Rica have filed non-disputing party submissions before this Tribunal, reiterating their longstanding position regarding the scope of the fair and equitable treatment under Article

[1229] Zachary Douglas, The International Law of Investment Claims, p.435 (**RL-0007**).
[1230] *See e.g.*, *Glamis Gold v. USA*, Award, ¶ 766 (**RL-0041**); *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, NAFTA, UNCITRAL Award (January 12, 2011), ¶ 141 (**RL-0155**).
[1231] *Glamis Gold v. USA*, Award, ¶ 631 (**RL-0041**).
[1232] *Id.*, ¶ 760 (**RL-0041**).
[1233] *Id.*, ¶ 759 (**RL-0041**).
[1234] *Id.*, ¶ 766 (**RL-0041**).
[1235] *Grand River Enterprises Six Nations, Ltd*, Award at ¶ 141 (**RL-0155**).
[1236] *Id.* ¶ 141 (**RL-0155**).
[1237] *See* Counter-Memorial, ¶ 279; US Non-Disputing Party Submission, ¶¶ 9-29; El Salvador Non-Disputing Party Submission, ¶¶ 3-22; the Dominican Republic Non-Disputing Party Submission, ¶¶ 2-16; Costa Rica Non-Disputing Party Submission, ¶¶ 19-33.

10.5 of the CAFTA-DR. Honduras has filed a similar submission on Article 10.5 in another case.[1238]

529. These State parties emphasize that the fair and equitable treatment "establishes a minimum 'floor below which treatment of foreign investors must not fall."[1239] Hence, "the threshold for finding a violation of this obligation is particularly high."[1240] The State parties agree with Guatemala's framing of the minimum standard of treatment. The United States insists that "customary international law has crystallized to establish a minimum standard of treatment in only a few areas," such as the "obligation not to deny justice."[1241] While El Salvador, Costa Rica, the Dominican Republic, and Honduras accept that, in addition to denial of justice, "evident discrimination," "manifest arbitrariness," or "manifest lack of reason" could also result in a violation of the minimum standard of treatment.[1242]

530. Claimants argue that the United States does not support the proposition that a mere arbitrary measure does not result in a violation of Article 10.5.[1243] This is simply false. In the absence of a clear statement to the contrary, the proper conclusion from the United States' Non-Disputing Party Submission is that the United States maintains its position that manifest arbitrariness and not just arbitrary treatment could result in a breach of the fair and equitable treatment.[1244] If anything else can be drawn from its submission, it is that the United States has now narrowed the minimum standard of treatment to the obligation to refrain from denying justice, provide full protection and security, and not to expropriate investments.[1245]

b. The State parties agree with Guatemala's interpretation of the denial of justice

531. Due to the unique nature of adjudication, judicial measures are given more deference than other branches

[1238] *TECO v. Guatemala*, Honduras Non-Disputing Party Submission, para 9-10 **(RL-0186)**.
[1239] US Non-Disputing Party Submission, ¶ 11, citing to *S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, First Partial Award (Nov. 13, 2000), ¶ 259 **(RL-0104)**; *Glamis Gold v. USA*, Award, ¶ 615 **(RL-0041)**. *See* also Costa Rica Non-Disputing Party Submission, ¶ 23, *citing* to *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-07, Final Award, ¶ 1724 (December 21, 2020) **(CL-0335)**; El Salvador Non-Disputing Party Submission, p. 5 ("only extreme levels of State conduct fall below the minimum standard of treatment.")
[1240] *See* Costa Rica Non-Disputing Party Submission, ¶ 27; *See also* El Salvador Non-Disputing Party Submission, p. 7; Dominican Republic Non-Disputing Party Submission, ¶ 10.
[1241] US Non-Disputing Party Submission, ¶ 12.
[1242] **El Salvador –** *see* Non-Disputing Party Submission of the Republic of El Salvador, ¶ 13; *RDC v. Guatemala*, Submission of the Republic of El Salvador as a Non-Disputing Party under CAFTA Article 10.20.2 (January 1, 2012), ¶ 6 **(RL-0190)**. *Berkowitz v. Republic of Costa Rica*, Submission of the Republic of El Salvador (April 17, 2015), ¶ 13 **(RL-0044)**. **Costa Rica**- *see* non-Disputing party submission of the Republic of Costa Rica, ¶ 28; *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Respondent's Memorial on Jurisdiction and Counter-Memorial on Merits (July 15, 2014) ¶ 199 **(RL-0157)**; *Aven v. Costa Rica*, Costa Rica's Counter-Memorial (April 8, 2016), ¶ 564 **(RL-0189). The Dominican Republic**- *see* Non- Disputing Party Submission of the Dominican Republic, ¶ *9.* **Honduras:** *TECO v. Guatemala*, Non-Disputing Party Submission of the Republic Honduras' submission (November 15, 2012), ¶¶ 9-10 **(RL-0186).**
[1243] Claimants' Reply, ¶ 469.
[1244] US Non-Disputing Party Submission, ¶¶ 12-13.
[1245] US Non-Disputing Party Submission, ¶ 20.

of the State. The United States agrees. Like Guatemala, the United States submits that "domestic courts are accorded a greater presumption of regularity under international law than" other branches of the government."[1246] The presumption, the United States notes, arises from the "principle of judicial independence, the particular nature of judicial action, and the unique status of the judiciary in both international and municipal legal systems."[1247]

532. The United States and the Dominican Republic reject the notion that a misapplication of law or even a "development of 'new' judge-made law that departs from previous jurisprudence" could in itself constitute a denial of justice.[1248] When it comes to the application of a national law, the United States submits, international tribunals "will defer" to the domestic courts' interpretation of the law.[1249] The State Parties further insist that denial of justice is limited to due process violations. According to the United States, this concept "in its historical and 'customary sense' denotes 'misconduct or inaction of the judicial branch of the government" and involves 'some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process."[1250]

533. The State parties, however, do not label every due process violation as denial of justice. Both the United States and the Dominican Republic agree that only egregious due process violations by the national judicial system, taken as a whole, could constitute a denial of justice.[1251]

c. The State parties reject Claimants' interpretation of the minimum standard treatment

534. None of the States Parties accept the proposition that the minimum standard treatment has evolved to include the obligations alleged by Claimants, *i.e.*, the obligation to act in good faith, refrain from acting arbitrarily, provide a stable and secure legal and business environment, and respect an investor's legitimate expectations.[1252]

535. Like Guatemala, the State parties insist that a party alleging such change in the minimum standard treatment carries the burden of proving general and consistent State practice and *opinio juris*.[1253] Going a step further, the State parties, aside from Nicaragua, explicitly reject the argument that the fair and equitable

[1246] *Id.*
[1247] *Id.*
[1248] US Non-Disputing Party Submission, ¶ 19; Dominican Republic Non-Disputing Party Submission, ¶¶ 9, 14.
[1249] US Non-Disputing Party Submission, ¶ 20.
[1250] *Id*, ¶ 18.
[1251] US Non-Disputing Party Submission, ¶ 19; Dominican Republic Non-Disputing Party Submission, ¶ 14.
[1252] Claimants' Reply, ¶ 462.
[1253] *See* US Non-Disputing Party Submission, ¶¶ 14-16; EL-Salvador Non-Disputing Party Submission, ¶ 8; Costa Rica Non-Disputing Party Submission, ¶ 24; Dominican Republic Non-Disputing Party Submission, ¶ 6.

treatment has evolved to include the obligation to protect legitimate expectations.[1254] In addition, the United States objects to the notion that the obligations to act in good faith and refrain from exercising economic discrimination are part of the fair and equitable treatment.[1255] Each of these positions are addressed in turn below.

i. The State Parties agree that a party alleging a change of the minimum standard treatment bears the burden of establishing such change using the methodology under Annex 10-B

536. Consistent with the prevailing practice and Annex 10-B, the State Parties agree that a party alleging a change of the minimum standard treatment carries the exclusive burden of proving such change.[1256] Like Guatemala, the United States further submits that if the claimant "does not provide the Tribunal with proof of such evolution, it is not the place of the Tribunal to assume this task."[1257] In such case, the Tribunal "should hold that Claimant fail[ed] to establish the particular standard asserted."[1258]

537. With regards to the methodology of establishing customary international law, the State Parties insist that a party alleging the existence of such rule must, as noted in Annex 10-B, provide "evidence of (1) general and consistent practice of States that (2) follow from a sense of legal obligation...."[1259] The Dominican Republic calls for a strict application of Annex 10-B, noting, that to do otherwise and adopt an approach outside Annex 10-B is to go "against the will of the State Contracting Parties and the Treaty itself."[1260]

538. Finally, El Salvador and the United States submit that international awards are not customary international law.[1261] According to these State Parties, international awards are only relevant in "determining State practice when they include an examination of such practice."[1262]

[1254] *See* El Salvador Non-Disputing Party Submission, ¶¶ 9-10; Dominican Republic Non-Disputing Party Submission, ¶ 11; US Non-Disputing Party Submission, ¶ 26; Costa Rica Non-Disputing Party Submission, ¶ 33; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of the Republic Honduras' submission (November 15, 2012), ¶10 **(RL-0186).**

[1255] *See* US Non-Disputing Party Submission, ¶¶ 24-25; US Non-Disputing Party Submission, ¶ 27.

[1256] *See TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of the Republic Honduras' submission (November 15, 2012), ¶7 **(RL-0186)**; US Non-Disputing Party Submission, ¶¶ 14, 16; EL-Salvador Non-Disputing Party Submission, ¶ 8; Costa Rica Submission, ¶ 24; the Dominican Republic Non-Disputing Party Submission, ¶ 6.

[1257] US Non-Disputing Party Submission, ¶ 16.

[1258] *ibid*, citing to *Cargill,* Award ¶ 273 **(CL-0197).**

[1259] El Salvador Non-Disputing Party submission, ¶ 6. *See also*, Costa Rica Non-Disputing Party submission, ¶ 24; US Non-Disputing Party Submission, ¶¶ 14, 16; *TECO v. Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of the Republic Honduras' submission (November 15, 2012), ¶7 **(RL-0186)**; Dominican Republic Non-Disputing Party Submission, ¶ 6; US Non-Disputing Party Submission, ¶14.

[1260] Dominican Republic Non-Disputing Party submission, ¶ 16.

[1261] El Salvador Non-Disputing Party submission, ¶ 7; US Non-Disputing Party Submission, ¶ 29.

[1262] US Non-Disputing Party Submission, ¶ 29.

ii. <u>The State Parties oppose the notion that the fair and equitable treatment includes the obligation to protect an investor's legitimate expectations.</u>

539. Claimants argue that "an investor's legitimate expectations…has been accepted as a component of FET by NAFTA and CAFTA-DR Parties…despite NDP submissions to the contrary."[1263] The opposite is true. Aside from Nicaragua, all the State Parties to CAFTA-DR have, prior to the present case, expressly objected against the inclusion of legitimate expectations in the minimum standard of treatment.[1264] Four of the State Parties have reiterated their objections in the present case.[1265]

540. El Salvador and the Dominican Republic insist that a minimum standard of treatment is an objective standard that does not alter based on the investor's expectations.[1266] According to El Salvador, the minimum standard of treatment "must be an objective concept to evaluate the treatment a State accords to an investor, not a concept that can vary depending on the investor's subjective" expectations.[1267] Finding otherwise, El Salvador notes, would affect a "State's regulatory capacity, something the State Parties never agreed to do in the Treaty."[1268] In the same token, the Dominican Republic emphasizes that the relevant factor for the purpose of minimum standard of treatment is the action of the State and not the expectation of the investor.[1269] If accepted, such obligation "would have an adverse effect on the sovereignty of States as it would impose non-consensual obligations to the State."[1270]

541. The United States and Costa Rica also oppose its inclusion in the minimum standard of treatment. While they recognize that an investor may have certain expectations about the regulatory regime of the host state, they submit that such "expectations impose no obligations on the State under the minimum standard of treatment."[1271]

[1263] Claimants' Reply, ¶ 476.
[1264] *See RDC v. Guatemala*, Submission of the Republic of El Salvador as a Non-Disputing Party under CAFTA Article 10.20.2 (January 1, 2012), ¶7 **(RL-0190)**; *TECO v. Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of the Republic of El-Salvador (October 5, 2012), ¶16 **(RL-0188)**; *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Guatemala's Counter Memorial on Merits (October 5, 2010), ¶¶ 424-429 **(RL-0269)**; *TECO v. Guatemala*, ICSID Case No. ARB/10/23, Non- Disputing Party Submission of the Republic of Honduras (November 15, 2012), ¶10 **(RL-0186)**; *TECO v. Guatemala*, ICSID Case No. ARB/10/23, Submission of the United States of America (November 23, 2012) ¶ 6 **(RL-0187)**.
[1265] *See* El Salvador Non-Disputing Party submission, ¶ 9. Costa Rica Non-Disputing Party submission, ¶ 33; US Non-Disputing Party Submission, ¶¶ 26; Dominican Republic Non-Disputing Party Submission c, ¶ 13.
[1266] El Salvador Non-Disputing Party Submission, ¶¶ 9-10.
[1267] El Salvador Non-Disputing Party Submission, ¶9.
[1268] *Id.*
[1269] *See* Dominican Republic Non-Disputing Party Submission, ¶ 11.
[1270] *Id*, ¶ 11.
[1271] US Non-Disputing Party Submission, ¶ 26; Costa Rica Non-Disputing Party Submission, ¶ 33.

iii. The United States affirms that the obligation to act in good faith is not an element of the minimum standard of treatment

542. Chapter 10 of CAFTA-DR does not require states to act in good faith. In the absence of such requirement, the United States insists that a Chapter 10 CAFTA-DR tribunal does not have jurisdiction to settle a claim alleging a violation of good faith.[1272] Like Guatemala, the United States submits that "customary international law does not impose free-standing, substantive obligation of 'good faith' that, if breached, can result in State liability."[1273] It is a position consistent with the stand it took in previous submissions.[1274]

iv. The United States agrees that the fair and equitable treatment does not restrict a state from extending preferential treatment to nationals and other aliens

543. Consistent with its longstanding position, the United States contends that the minimum standard of treatment does not prohibit a state from discriminating against foreign investments.[1275] Relying on several authorities, the United States notes that generally, "a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently."[1276]

544. Discrimination in the context of Article 10.5 is only prohibited in limited circumstances. The United States contends that "[t]o the extent that the customary international law minimum standard of treatment incorporated in Article 10.5 prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibition against discriminatory takings, access to judicial remedies or treatments by the courts, or the obligation of States to provide full protection and security."[1277]

d. Due consideration should be given to the State Parties' subsequent practice pursuant to the Vienna Convention on the Laws of Treaties

545. The State Parties express and tacit agreement on the interpretation of Article 10.5 of CAFTA-DR is instructive. Depending on the level of agreement among the State parties, the VCLT recognizes subsequent state practice as authentic or supplementary means of interpretation.[1278]

546. Where, like here, there is a "subsequent practice in the application of the treaty which establishes the

[1272] US Non-Disputing Party Submission, ¶24.
[1273] US Non-Disputing Party Submission, ¶25.
[1274] *See* Guatemala's Counter-Memorial, ¶ 326.
[1275] US Non-Disputing Party Submission, ¶ 27.
[1276] *Id.*
[1277] *Id.*
[1278] Draft conclusion on subsequent agreements and subsequent practice in relation to the interpretation of treaties, seventieth session A/73/10 (2018), p. 23 (**RL-0390**) ("Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31); *Id*., p.20 (**RL-0390**) ("subsequent practice in the application of the treaty, which does not establish the agreement of all parties to the treaty, but only of one or more parties, may be used as a supplementary means of interpretation.").

agreement of the parties regarding its interpretation," Article 31(3)(b) of the VCLT instructs the Tribunal to "take into account" such agreement.[1279] NAFTA tribunals have adhered to this rule. As aptly put by Claimants' counsel, "[w]ith a few notable exceptions, where the NAFTA parties' agreement was evidenced through [non-disputing party] submission, tribunals have ruled consistently with the parties' shared interpretation."[1280] In the unlikely event that the Tribunal finds no agreement among the parties with regards to the content of the minimum standard of treatment, the subsequent practice of the State parties is still relevant because it qualifies as a supplementary means of interpretation under Article 32 of the VCLT.[1281]

547. Here, there is a consensus among the State parties as to the scope of the minimum standard treatment. Aside from Nicaragua, six of the seven of the State parties of CAFTA-DR have publicly and consistently declared that the minimum standard treatment can only be breached in the face of denial of justice, manifest arbitrariness, and evident discrimination.[1282] Contrary to Claimants' submission, the State Parties have also ardently objected against the inclusion of legitimate expectations into the minimum standard treatment.[1283]

548. Claimants argue that the State Parties' conduct does not qualify as subsequent practice" because Guatemala did not provide "the position, if any, of Nicaragua and the Dominican Republic."[1284] The argument has no merit. Following the submission of the Counter-Memorial, the Dominican Republic has presented its views on the minimum standard treatment. As expected, the Dominican Republic agrees with the other State Parties' framing of the standard.[1285] Claimants' argument with respect to Nicaragua's silence fares no better. As repeatedly noted by the ILC, "an 'agreement' resulting from subsequent practice under article 31(3)(b) can result, in part, from silence or omission."[1286] This is particularly the case where a State

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[1279] VCLT, Article 31(3)(b) (**CL-0005)**. *See also*, Draft conclusion on subsequent agreements and subsequent practice in relation to the interpretation of treaties, seventieth session A/73/10 (2018), p. 20. **(RL-0390).**

[1280] Andrea Menaker, *Treatment of Non-Disputing State Party Views in Investor-State Arbitrations*, p. 68 **(RL-0395)**.

[1281] VCLT, Article 32; **(CL-0005)** Draft conclusion on subsequent agreements and subsequent practice in relation to the interpretation of treaties, seventieth session A/73/10 (2018), p.55 **(RL-0390)** (subsequent practice, "as a supplementary means of interpretation, can confirm the interpretation that the interpreter has reached in the application of article 31, or determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.").

[1282] *See* Guatemala's Counter Memorial, ¶ 280

[1283] *See* Section V.C.3.c.ii.

[1284] Claimants' Reply, ¶ 469.

[1285] *See* Dominican Republic Non-Disputing Party Submission, ¶ 9 (a violation of the Minimum Standard of Treatment consists of: a) A gross and grave denial of justice b) Manifest arbitrariness, or inconsistent arbitrariness which is called into question with respect to judicial and administrative policies, as well as procedures, in such way that constitutes a rejection of the object and purpose of the policy, among others c) Absence of due process that violates judicial righteousness d) A flagrant injustice e) Manifest discrimination, or manifest lack of grounds for a decision.").

[1286] International Law Commission, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, sixty-sixth session, A/CN.4/671, p.29 (**RL-0391**). *See also*, International Law Commission, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, sixty fifth session, p.34 (**RL-0392)**; Draft conclusion on subsequent agreements and subsequent practice in relation to the interpretation of treaties, seventieth session, A/73/10 (2018), p. 31,49-50, 113 (**RL-0390)**.

Party to a treaty choses silence "when the circumstances call for some reaction."[1287]

549. Unlike many investment agreements, Article 10.20 of CAFTA-DR gives State Parties the right to interject in any CAFTA-DR case and present their interpretation of the Treaty. The right given to State parties under Article 10.20 is different from *amicus curiae* submission which is also permitted under CAFTA-DR. While the purpose of *amicus curiae* is to provide the tribunal "particular expertise and a view different from that expressed by the disputing parties,"[1288] the goal of Article 10.20 is to help the tribunal understand the State Parties' intention behind the agreements and, hence, must be given "special significance."[1289]

550. Exercising their right under Article 10.20 of CAFTA-DR, six of the State Parties have expressed their opinion on Article 10.5 in several cases, as early as 2012.[1290] As these submissions are public, Nicaragua is aware of the State Parties' positions with regard to the fair and equitable treatment. Nonetheless, it did not interject and offer a contrary position in any of the cases. In the present case, Nicaragua was informed of the CAFTA-DR provisions that are in question in the present case, but it chose not to intervene and express its position.[1291] Considering that Nicaragua was given the opportunity to comment under Article 10.20 of CAFTA-DR to express a view contrary to the parties in any of the CAFTA-DR cases but chose not to do so, its silence should be considered as a tacit acceptance to the statements made by the remaining State parties.

551. Even assuming *arguend*o that there is no agreed subsequent practice with respect of the content of the fair and equitable treatment, recourse should still be made the State Parties' submission as a supplementary means of interpretation.[1292] As noted by the ILC, 'subsequent practice' for the purpose of Article 32 includes "any application of the treaty by one or more (but not all) of the parties"[1293] that falls short of "reflect[ing] an agreement of all parties regarding the interpretation of a treaty." [1294] Here, six of the State parties to the CAFTA-DR have expressly rejected Claimants' explication of the minimum standard of

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[1287] International Law Commission, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, sixty sixth session, Conclusion 9(2), p. 35 (**RL-0391)**; International Law Commission, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, sixty seventh session, Conclusion 9(2),p. 88(**RL-0393)**; International Law Commission, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, sixty eight session(2016), A/71/10, Conclusion 10(2), p.122 (**RL-0394)**; Draft conclusion on subsequent agreements and subsequent practice in relation to the interpretation of treaties, seventieth session, conclusion 10(2), p. 54 (**RL-0390).**

[1288] Andrea Menaker, *Treatment of Non-Disputing State Party Views in Investor-State Arbitrations*, pp. 59-60 **(RL-0395)**.

[1289] *Id.*

[1290] *See* Guatemala's Counter-Memorial, ¶ 280.

[1291] See Email from Guatemala, International Affairs Unit to the Ministry of Development, Industry and Commerce (December 18, 2020) **(R-0329)**.

[1292] VCLT, Article 32 (**CL-0005**); Draft conclusion on subsequent agreements and subsequent practice in relation to the interpretation of treaties, seventieth session A/73/10 (2018), p.27, 56 **(RL-0390)**.

[1293] *Id*., p. 36. **(RL-0390)**.

[1294] *Id*., p. 56. **(RL-0390)**.

treatment.[1295] Hence, should the Tribunal find the meaning of the standard ambiguous, it should rely on the State Parties' interpretation of the standard.

4. Claimants have not proved that Guatemala has breached its obligation to provide fair and equitable treatment

552. To determine a breach of the fair and equitable treatment, the Tribunal should assess each challenged measure individually against the standards it finds to be part of the minimum standard of treatment.[1296] In the absence of ill intent, acts that do not individually constitute a breach of the fair and equitable treatment, could not as a whole amount to a breach of such an obligation.[1297]

553. Taken individually and as a whole, the challenged actions do not constitute a breach of the fair and equitable treatment. Claimants frame their claim into the following two main categories:

a) Measures that do not constitute a denial of justice but still violate the obligation to provide fair and equitable treatment:

i. MEM's unlawful, arbitrary, and discriminatory suspension of Exmingua's Progreso VII license and *de facto* suspension of the exploration license of Santa Margarita;[1298]

ii. MEM's unlawful, arbitrary, bad faith, and discriminatory suspension of Exmingua's *exportation* license;[1299]

iii. MEM's arbitrary, discriminatory, and bad faith failure to conduct the court ordered consultation [necessary for the lifting of the suspension of Exmingua's Progreso VII exploitation license] suspending the exploitation license of Progreso VII;[1300]

iv. MEM's arbitrary and bad faith refusal to provide assistance or guidance to Exmingua for conducting the consultations for the Santa Margarita EIA and refusing to rescind the arbitrary and bad faith 30-day deadline for submission of the completed EIA;[1301]

v. the arbitrary and unlawful criminal charges and impoundment of Exmingua's gold concentrate; and"[1302]

vi. MEM's unlawful and "retaliatory" impoundment Exmingua's bank accounts.[1303]

[1295] *Glamis Gold v USA*, Award, ¶¶825-826 **(RL-0041)**.
[1296] While Claimants insist that the Tribunal should "asses the challenged State conduct as a whole," they have in fact followed the former approach advocated by Guatemala and accepted by other tribunals. See Claimants' Reply, ¶¶ 484-506
[1297] *Glamis Gold v USA*, Award ¶¶ 825-826. **(RL-0041)** (the tribunal noted that "for acts do not individually violate Article 1105 to nonetheless breach that article when taken together, there must be some additional quality that exists only when the acts are viewed as a whole, as opposed to individually." For the tribunal, the "additional quality" is intent to destruct the investment, it is only intent that "may elevate individually non-violative acts into a record as a whole that breaches international treaty obligations.")
[1298] Claimants' Memorial, ¶¶ 9, 221, 223-236, 242-249; Claimants' Reply, ¶¶ 484-489
[1299] Claimants' Reply, ¶¶ 489-492; Claimants' Memorial, ¶ 231.
[1300] *Id.* at. ¶ 493.
[1301] Claimants' Reply, ¶ 497; Claimants' Memorial, ¶ 245.
[1302] Claimants' Memorial, ¶¶ 237-241.
[1303] Claimants' Reply, ¶¶ 504-506.

b) Measures that constitute a denial of justice and, hence, a breach of the obligation to provide fair and equitable treatment:

i. Guatemala courts' unlawful suspension of the exploitation license of Progreso VII which was contrary to Guatemala's "prior authorizations and representations"[1304]

ii. Guatemala courts' unlawful admission of CALAS *amparo;* [1305]

iii. Guatemala courts' discriminatory treatment of Exmingua[1306]

iv. The Supreme Court's failure to notify Exmingua of the *amparo provisional* which constitutes a violation Exmingua's right to be heard; and[1307]

v. The four years taken by Constitutional Court to rule on Exmingua's appeal of the *amparo definitivo* contrary to the Amparo law. [1308]

554. For the reasons explained in the Counter-Memorial and elaborated below, these claims lack merit. Without delving much deeper into each of these claims, the Tribunal will realize what Claimants are in fact asking it to do: review, afresh, whether the actions taken by Guatemalan courts and other agencies of the Government are consistent Guatemala law, and if not, find Guatemala internationally liable. Clearly, this is outside the jurisdiction of CAFTA-DR tribunals which are not bestowed with appellate jurisdiction.[1309] In the sections below, Guatemala will address these two categories below in the order presented by Claimants.

a. None of the actions taken by MEM, MARN and the Public Prosecutor constitute a breach of the fair and equitable treatment

555. As explained in the Counter-Memorial, Claimants have not established that the challenged measures give rise to a breach of the fair and equitable treatment. In summary, the claim must be rejected for the following six reasons.

556. *First*, Claimants have failed to establish that MEM's decision to suspend the exploitation license of Progreso VII through Resolution No. 1202 was arbitrary, taken in bad faith, or inconsistent with Guatemalan law. The evidence on the record shows the opposite of what Claimants allege here. Resolution No. 1202 explains in clear terms the law and facts behind the decision.[1310] Contrary to Claimants' submission, Resolution No. 1202 is also consistent with the Constitution of Guatemala which obliges the executive organ to enforce court judgments. In any event, Claimants incurred no damage as a result of

[1304] *Id.* at ¶537.
[1305] *Id.* at ¶¶ 540-542.
[1306] *Id.* at ¶ 539.
[1307] *Id.* at ¶¶ 543-544; Claimants' Memorial ¶¶ 277-280.
[1308] Claimants' Reply, ¶¶ 545-547.
[1309] Guatemala's Counter Memorial, ¶ 285.
[1310] *See* Section V.C.4.a.

Resolution No. 1202.

557. *Second*, MEM's initial suspension of the Progreso VII exportation license was not arbitrary or taken in bad faith, and any legal error was immediately rectified.[1311] The exportation license was suspended based on the *amparo provisional* and Resolution No. 1202 which suspended the exploitation license. Following Exmingua's successful appeal, however, the suspension was immediately revoked. Given that the alleged error was quickly rectified, there can be no breach of the fair and equitable treatment. Finally, there is no proof that either Exmingua or Claimants suffered as a result of the suspension that lasted only five months.

558. *Third*, MEM's decision to wait to conduct the consultation until the June 2020 Constitutional Court decision is final and executable was reasonable and consistent with Guatemala law.[1312] There is also no evidence which supports Claimants' allegation that MEM's decision was "politically motivated" or discriminatory.

559. *Fourth*, MEM's order that Exmingua provide a complete and approved EIA and its refusal to grant Exmingua's request for indefinite suspension of the EIA requirement was well reasoned and consistent with Guatemala law.[1313] In order to obtain an exploitation license an applicant must submit a complete and approved EIA. While MEM instructed Exmingua to submit an approved EIA within 30 days, the deadline was extended on numerous occasions. In addition, Claimants have not established that MEM was legally required to grant Exmingua's request. Finally, the claim fails on causation. Claimants have not proved that Exmingua's failure to complete the EIA is attributed to MEM.

560. *Fifth*, neither the criminal charges against Exmingua nor the impoundment of the gold concentrate constitutes a breach of the fair and equitable treatment because there is no proof of gross mistreatment.[1314] Exmingua's employees who were charged were immediately brought to court and released the next day based on lack of merit order. In any event, Claimants lack standing to bring a claim on behalf of these employees. There is also no showing that Claimants incurred a loss as a result of the charges brought against Exmingua's employees.

561. Similarly, the claim that the impoundment of the gold concentrate was arbitrary or unlawful is unfounded. The concentrate was legally impounded and subsequently released to Exmingua pursuant to the Fourth Criminal Court's decision. Finally, there is no proof that Claimants suffered damages due to the

[1311] *See* Section V.C.4.a.ii
[1312] *See* Section V.C.4.a.iii.
[1313] *See infra,* Section V.C.4.a.iv.
[1314] *See infra,* Section V.C.4.a.v.

impoundment.

562. *Sixth*, MEM's impoundment of Exmingua's bank accounts was not "retaliatory" but reasonable and consistent with Guatemala law.[1315] MEM was forced to take such measure because Exmingua failed to pay the fine imposed by MEM due to Exmingua's failure to suspend operations as directed by the Supreme Court and MEM.

i. MEM's execution of the Supreme Court's decision to suspend the exploitation license was neither arbitrary, taken in bad faith, or inconsistent with Guatemalan law

563. Claimants' fair and equitable treatment claim with respect to MEM's decision to suspend the Progreso VII exploitation license through Resolution No. 1202 rests on three arguments. They claim that Resolution No. 1202 was: a) arbitrary,[1316] b) contrary to Guatemala law,[1317] and c) inconsistent with Guatemala's previous positions.[1318] For the following reasons, these claims must be denied.

Resolution No. 1202 was not arbitrary, but a reasoned resolution based on Guatemala law

564. Claimants have not established that MEM's decision was arbitrary. Arbitrary, as defined in *ELSI*, consists of "a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[1319] The decision in question must "exhibit a manifest lack of reason."[1320] Resolution No.1202 is nowhere close to this threshold.

565. Complying with the Supreme Court's order to suspend the exploitation license of Progresso VII, MEM suspended the exploitation license on March 10, 2016, through Resolution No. 1202.[1321] In clear terms, Resolution No. 1202 explains that the measure was based on the Supreme Court's decision and its obligation to comply with the decision.[1322] Given that there is no argument or proof that MEM lacked authority to issue the resolution nor any allegation that Resolution No. 1202 lacked reasons, the claim that MEM's decision was arbitrary must be dismissed.[1323]

A misapplication of law does not give rise to a breach of the fair and equitable treatment, nonetheless,

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[1315] *See infra,* Section V.C.4.a.vi.
[1316] *See* Claimants' Reply, ¶486.
[1317] *Id.*
[1318] *See* Claimants' Reply, ¶¶ 485-486.
[1319] Guatemala's Counter-Memorial, ¶ 339, citing to *ELSI*, ¶ 128 **(RL-0199)**; Jacob Stone, Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment, Leiden Journal of International Law (2012), p.88 **(RL-0270)** (the definition framed in ELSI has been acknowledged by many as "the landmark case for the definition of arbitrariness at international law.").
[1320] *Glamis Gold, Ltd. v. The United States of America*, Award, ¶ 803 (**RL-0041**).
[1321] MEM Resolution No. 1202 dated March 10, 2016 (**C-0139**).
[1322] *Id.*
[1323] Claimants' Memorial, ¶ 229.

Resolution No. 1202 is consistent with Guatemala law

566. Claimants' second claim is bizarre. They submit that under Guatemala law "a license, once validly granted, could only be revoked or suspended" through Article 51 of the Mining Law or by an Executive decree.[1324] By suspending the exploitation license for lack of consultation, Claimants contend, MEM violated Guatemala law.[1325]

567. In other words, Claimants are requesting this Tribunal to find Guatemala liable for MEM's compliance with the Supreme Court's order. The request is astounding. Starting from the basics, a misapplication of law, alone, does not result in a breach of the fair and equitable treatment.[1326] In any event, MEM's decision was consistent with Guatemala law. Even if the Supreme Court erred in suspending the exploitation license, which it did not, MEM is still obliged to comply and enforce the Supreme Court's decision in line with Article 203 of the Constitution.[1327] An official at MEM who failed to comply with the order would have faced criminal and civil liability.[1328]

568. Given that an erroneous decision, without more, does not give rise to a breach of the fair and equitable treatment and considering that Claimants have, in any event, failed to prove that Resolution No. 1202 is unlawful, their claim must be dismissed.

Claimants have failed to demonstrate that Guatemala violated Claimants' expectation of stable and predictable legal environment

569. Their claim of inconsistency suffers from several legal and factual defects. Claimants argue that Resolution No. 1202 is inconsistent with Guatemala's previous stance and, therefore, constitutes a breach of the fair and equitable treatment.[1329] Particularly, they claim that the suspension was contrary to:

a. MEM's previous practice of issuing license "where consultations had been led by MARN-registered consultants in accordance with the Mining Regulations." [1330]

b. Guatemala's statement before the Inter-American Commission on Human Rights ("IACHR")[1331]

570. The claim has no merit. As explained above, the fair and equitable treatment does not include the obligation to provide stable and secure legal environment.[1332] In addition, in the absence of legitimate

[1324] Claimants' Reply, ¶ 486.
[1325] *Id.*
[1326] *See supra,* Section V.C.1.b.iii.
[1327] *See* Constitution of Guatemala, Article 203 (**C-0414)**.
[1328] *See* Penal Code Art. 420 (**RL-0396**); Art. 78 of the Amparo Law **(C-0416-R)**.
[1329] Claimants' Reply, ¶ 485; Claimants' Memorial ¶ 81.
[1330] Claimants' Reply, ¶ 485.
[1331] Claimants' Memorial, ¶¶ 80-81, 97; Claimants' Reply, ¶485 (**C-0225)**.
[1332] *See supra,* Section V.C.2.d

expectations, Claimants' expectation of consistency has no relevance in the determination of a breach of the fair and equitable treatment.[1333]

571. There are other reasons for rejecting the claim. First, estoppel only applies to "statement of facts," and does not apply to statements on the meaning of a law.[1334] Second, regardless of whether MEM agrees or disagrees with the Supreme Court's decision, it must implement the decision in its entirety.[1335] It is, therefore, irrelevant that MEM had, prior to the Supreme Court's decision, granted licenses following consultations led by MARN-registered consultants. Nor is it of any significance that Guatemala had offered a different interpretation of the ILO Convention 169 before the IACHR. Once the Supreme Court suspended the Progreso VII exploitation license for lack of consultation, MEM had no choice but to comply and enforce the decision pursuant to its duty under the Constitution.[1336]

572. *PSEG*, the only case cited by Claimants, certainly does not support Claimants' reading of the stable and predictable legal environment standard. In *PSEG*, the tribunal found a breach of this standard particularly because the Ministry of Energy and Natural Resources ("MENR") disregarded the claimants' right under Turkish law and the court's decision to "uphold[]" the claimant's right under the contract.[1337] No such facts exist here. Resolution No. 1202 is consistent with the Supreme Court's decision to suspend the Progreso VII exploitation license and its obligation under the Constitution to execute a judgment.

ii. *MEM's suspension of the exportation license was not arbitrary or taken in bad faith and any legal error was immediately rectified*

573. Claimants next allege that Guatemala breached Article 10.5 of the CAFTA-DR because MEM suspended Exmingua's exportation license unlawfully, arbitrarily and in bad faith.[1338] But the claim fails under the most rudimentary scrutiny of the minimum standard of treatment.

574. First, neither a misapplication of a domestic law nor an "outright mistake" qualifies as arbitrary.[1339] But Claimants' case exclusively rests on such claim. Aside from faulting the decision for being wrong, Claimants do not allege, let alone demonstrate, that MEM acted arbitrarily, *i.e.*, it willfully disregarded due process of law or failed to explain its decision. Nor could they. In clear terms, MEM explained that its

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[1333] *See supra,* Section V.C.2.e
[1334] *See Pope & Talbot Inc. v. Canada*, UNCITRAL, Interim Award, (June 26, 2000), Interim Award, ¶ 111 (**CL-0129**).
[1335] *See* Constitution of Guatemala, Article 203 (**C-0414-R).**
[1336] Constitution of Guatemala, Article 203 (**C-0414-R).**
[1337] *PSEG v. Turkey*, ICSID Case No. ARB/02/5, Award dated 19 January 2007, ¶¶ 247-249 (**CL-0371**).
[1338] Claimants' Reply, ¶489.
[1339] *William Ralph Clayton* et al*. v. Gov't of Canada*, NAFTA, PCA Case No. 2009-04, Award on Jurisdiction and Liability (March 17, 2015), ¶ 437 (**CL-0088**). *See also S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, (November 13, 2000), ¶ 261 (**CL-0104)**; *Cargill, Inc. v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/05/2, Award (September 18, 2009), ¶ 292 (**CL-0197**).

decision was based on the Supreme Court's order to suspend the Progresso VII exploitation license and MEM's subsequent suspension of the exploitation license. [1340] Whether the decision is correct or not is insignificant. The fact that the decision could be incorrect, does not mean that it was arbitrary.

575. Second, and in any event, the error was rectified without undue delay, hence, there cannot be a reasonable claim for a breach of the fair and equitable treatment. Various tribunals have affirmed this.[1341] In *ECE and Panta*, the tribunal held that "there can be no violation of fair and equitable treatment in a flawed decision at first instance which is subsequently reversed on appeal, and the effects of which were therefore only temporary."[1342] Such is the case here.

576. On May 6, 2016, Exmingua, exercising its right under Guatemala law, appealed the suspension of the exportation license to MEM on the ground that the Supreme Court's ruling is only limited to the Progreso VII exploitation license, not the exportation license.[1343] In compliance with the administrative law of Guatemala, MEM gave Exmingua, the Legal Advisory Unit, and the Office of the Attorney General of the Nation the opportunity to present their case from May 12, 2016 to October 10, 2016.[1344] On October 24, 2016, a few days after the Attorney General of the Nation made its last submission, MEM issued Resolution No. 5194, revoking the suspension of the exportation license and thereby ruling in favor of Exmingua.[1345]

577. Third, the argument that the initial suspension was in bad faith is unfounded. The only proof Claimants dare bring to the Tribunal is timing. Claimants argue that MEM's decision to revoke the suspension of the exportation license on October 24, "one day after its license expired," "underscores its bad faith."[1346] The facts on the record demonstrates otherwise. As noted in the resolution, MEM, in line with Section 12 of the Administrative Law, had to give the relevant parties the opportunity to present their case.[1347] Had MEM ruled on the appeal without giving the parties the opportunity to make their case, it would have violated the parties' fundamental due process rights and, thereby, breached its obligation under Guatemala law. The

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[1340] Resolution No. 146 of the Ministry of Energy and Mines (May 3 ,2016) **(C-0140)**

[1341] *See Glamis Gold v. USA*, Award (June 8, 2009), ¶ 768-771 (**RL-0041**).(In this case, the claimant argued that the solicitor's failure to issue a regulation prior to its decision to terminate its mining project "exhibits 'a complete lack of due process." The tribunal agreed that the failure to issue a regulation could result in a breach of customary international law, because without such regulation, interested parties, like the claimant, would not have the opportunity to comment. But the tribunal held the issue to be moot, having found that such "procedural error…was corrected quickly and effectively through domestic channels.")

[1342] *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award (September 19, 2013), ¶ 4.805 **(RL-0203)**.

[1343] *See* MEM, Resolution No. 5194 (October 24, 2016), p.2-3 (**C-0142**).

[1344] *Id.* at p.3, (e) (**C-0142**).

[1345] *Id.* at p.3-4 (**C-0142**).

[1346] Claimants' Reply, ¶ 491.

[1347] *See* MEM, Resolution No. 5194 (October 24, 2016), p.3-4(**C-0142**).

only conclusion that can be drawn from the procedural posture is that MEM decided Exmingua's appeal expeditiously while adhering to the parties' due process rights.

578. Finally, Claimants have not shown that they incurred loss due to the initial suspension. There is no evidence of exports that were pending shipment but for the suspension of the license. Nor is there any showing of attempts made by Exmingua to renew the license. Claimants have also failed to establish that they suffered as a result any harm that Exmingua allegedly incurred due to the initial suspension of the exportation license.

iii. The MEM's decision to wait for the final execution order before conducting the consultation was reasonable and taken in good faith to comply with Guatemalan law

579. Claimants' case changes with every submission. In their Reply, Claimants for the first time argue that Guatemala breached its obligation to provide fair and equitable treatment by failing to conduct the court ordered consultation.[1348] While they claim that Guatemala was "silent on this aspect of its FET breach," the simple truth is that Claimants never framed it as such in their Memorial.[1349]

580. The crux of Claimants' novel claim lies in the time taken by MEM to conduct the consultation necessary to reinstate the suspension of the Progreso VII exploitation license.[1350] Claimants make two contradictory propositions as to when MEM was obliged to conduct the consultation. Counting from the date that the Constitutional Court rejected Exmingua's request to revoke its affirmation of the *amparo provisional*, Claimants argue that "the MEM had been obligated for more than four years to conduct the consultations."[1351] Next, Claimants criticize MEM for failing to conduct the consultation for "more than five years," seemingly starting the clock from the date of the *amparo provisional*.[1352] Claimants then conclude that the delay was part of a scheme "to serve political ends with respect to the community opposition."[1353]

581. Just like the rest of their claim, the argument is legally and factually meritless. *First*, it ignores the rule that a mere delay or a misapplication of the law, without more, cannot result in a violation of the fair and

[1348] Claimants' Reply, ¶493.
[1349] Claimants' Reply, ¶ 493. While Claimants cite to Memorial, para 105-108, these paragraphs do not contain Claimants' FET claim. Section III. B. 3 which does provide their FET claim does not include this argument that Claimants are making here.
[1350] Claimants' Reply, ¶ 493.
[1351] *Id*., ¶ 300. *See Id.*, ¶299; Exmingua's request before the Constitutional Court **(C-0544)**.
[1352] Claimants' Reply, ¶ 493.
[1353] *Id*. ¶ 496.

equitable treatment. [1354] *Second*, it contradicts Guatemalan law. The MEM could not carry out the consultations in any of the circumstances indicated by Claimants. The MEM was not certain that it was the competent organ for carrying out the consultation, and even if it was, it did not have certainty as to what specific action should be taken to comply with the requirement under ILO Convention 169.[1355] But even then, MEM could not conduct the consultation because the decision was not final and executable.

582. On September 1, 2020, MARN filed before the Constitutional Court a request for clarification of the Court's judgment of June 11, 2020, and the Constitutional Court issued a decision in August 2021.[1356] Upon receiving a final execution order (*ejecutoria*) issued from the Supreme Court, the decision will be final and subject to execution.[1357] To conduct the consultation in the absence of an execution order, would be not only illegal, but also imprudent.

583. While Claimants allege that MEM's inaction was in bad faith, they provide no evidence which supports their claim.[1358] *Waste Management II*, the case heavily relied on by Claimants, denied similar empty allegations, noting that while the fair and equitable treatment obliges States not to "deliberately set out to destroy or frustrate the investment by improper means" such allegation of bad faith "needs to be proved."[1359] Here, the record shows that MEM acted in good faith. Although it was unable to conduct the consultation, it carried out series of activities in preparation for the consultation.[1360]

584. In conclusion, MEM's decision to wait for the final decision could not result in a breach of the fair and equitable treatment. For the purpose of establishing a breach of this standard, it is irrelevant whether MEM erred in waiting to conduct the consultation. The relevant question is whether, as Claimants allege here, MEM acted arbitrarily and in bad faith. For the reasons stated above, the answer should be in the negative.

iv. MEM's request for a complete and approved EIA and its refusal to grant Exmingua's suspension of the EIA requirement was well reasoned and consistent with Guatemala law

585. Realizing the weakness of their case, Claimants continue to modify their claim. In their Memorial,

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[1354] *Clayton v Canada*, Award on Jurisdiction and Liability (March 17, 2015) ¶ 437 (**CL-0088**) ("State authorities are faced with competing demands on their administrative resources and there can be delays or limited time, attention and expertise brought to bear in dealing with issues. The imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard.") (emphasis added)

[1355] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision (June 11, 2020) p.10 (**C-0145**)

[1356] *See* Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, MARN's Request for Clarification (September 1, 2020) (**C-0668**).

[1357] *See* Vice Minister Oscar Pérez Second Witness Statement, ¶ 11.

[1358] *See* Claimants' Reply, ¶ 496.

[1359] *Waste Management Inc. v. Mexica (II)*, NAFTA, ICSID Case No. ARB/AF/00/03, Award, ¶ 139 (**CL-0022**).

[1360] *See* Vice Minister Oscar Pérez Second Witness Statement, ¶ 15.

Claimants argued that Guatemala breached its obligation of fair and equitable treatment when MEM: i) "[a]rbitrarily demand[ed] in December 2016 that Exmingua file the EIA for Santa Margarita, duly approved by MARN, within 30 days,"[1361] and ii) "[u]njustifiably den[ied], in April 2017, Exmingua's request to suspend the EIA requirement to conduct local consultations…and direct[ed] Exmingua to file the EIA for Santa Margarita within 30 days of Exmingua's notification of the resolution."[1362]

586. Claimants now add another, yet meritless, ground in their Reply. They claim that MEM acted arbitrarily and in bad faith by failing to assist or give guidance on how Exmingua can "conduct consultation in the face of the protests and blockades."[1363] Claimants then conclude that these measures precluded Exmingua from "finaliz[ing] its Santa Margarita exploitation license application" in line with the scheme of the State's *de facto* moratorium.[1364]

587. Aside from blindly coloring every unfavorable decision as "arbitrary," a demonstration of "bad faith," or a conspiracy, Claimants make no attempt to prove their claim. To the contrary, Guatemala has established in its Counter Memorial that MEM's decision was well-reasoned and consistent with its authority under Guatemala law.

588. Following an application for an exploitation license, MEM has 30 days to decide on the application. As noted by Prof. Fuentes, an investor who wishes to obtain an exploitation mining license must file an approved EIA that also includes the relevant social studies.[1365] Exmingua was given ample time to complete the social studies but chose not to. On January 19, 2009, Exmingua applied for an exploitation license for the Santa Margarita site.[1366] After waiting for more than seven years for Exmingua to submit a complete EIA, MEM instructed Exmingua on December 21, 2016, to submit a complete EIA approved by MARN within 30 days.[1367] Exmingua paid no regard to the deadline put by MEM. Three months after the deadline, Exmingua wrote to MEM, requesting it to "indefinitely" suspend the requirement because "access to the project area has been blocked and the communities opposing the project have made threats."[1368]

589. While MEM declined Exmingua's request for an indefinite suspension of the EIA, it continuously

[1361] Claimants' Memorial, ¶ 245
[1362] *Id.*
[1363] Claimants' Reply, ¶ 498.
[1364] *See* Claimants' Reply, ¶¶ 291, 630.
[1365] *See* Fuentes Report I, ¶ 75.
[1366] *See* Claimants' Memorial, ¶ 242. See also Application for the Santa Margarita exploitation license (January 19, 2009), p. 1 (**C-0070**).
[1367] *See* Official Notification No. 497 from the MEM to Exmingua, attaching Resolution No. 4056, (December 21, 2016) (**C-0012**).
[1368] *See* Letter from Exmingua to the MEM, attaching Notary Public's Certification (March 21, 2012) (**C-0013**).

extended the timeframe in the hopes that Exmingua would submit a completed EIA. Although the original deadline was on January 21, 2017, MEM extended the deadline until November 21, 2017.[1369] On November 7, 2017, Exmingua again requested for an indefinite suspension of the EIA, alleging that it was unable to conduct the study due to "blockades, as well as intimidation by communities," but yet again failing to attach supporting evidence.[1370] Despite Exmingua's failure to comply with MEM's request, it was, nonetheless, granted another extension to comply with its obligation until January 3, 2020.[1371] But Exmingua ignored the extension and took no action to finalize the EIA. Considering the long timeframe given to Exmingua to comply with its obligation to provide a completed EIA, it is disingenuous to argue before this Tribunal that the 30-day deadline set in 2016 is arbitrary or imposed in bad faith.

590. Next, Claimants criticize MEM for rejecting the request, but fail to provide any legal authority which obliges or permits MEM to indefinitely suspend the social studies requirement under Guatemala law. Claimants cite to Article 50 of the Judiciary Law to justify their request, but as Guatemala already explained, this law has no bearing. A cursory reading of the preamble should have cautioned Exmingua and Claimants from relying on this law. The Judiciary Law only extends to judiciary proceedings. It was drafted to "harmon[ize] the fundamental provisions of organization and functioning of the Judiciary with the current constitutional order, giving greater efficiency and functionality to the administration of justice."[1372] Even if it was applicable, its request was time barred.[1373]

591. The claim with respect to the lack of assistance fares no better. At the outset, Claimants confuse the facts. There is no evidence which supports the claim that Exmingua requested, but MEM declined to provide assistance or guidance.[1374] To the extent that Claimants are rather referring to Exmingua's request for "guidance" and/ or "recommendation" from MARN, Guatemala submits that Exmingua's request was unclear and, in any event, Claimants provide no legal authority which obliges MARN to assist Exmingua in completing the required studies.

592. Exmingua's supposed request for assistance was vague. From the letter, it is impossible to decipher Exmingua's request for relief. On April 7, 2017, Exmingua asked MARN to "issue [its] recommendations and/or guidelines to continue and complete the Environmental Impact Assessment in regard to the baseline

[1369] *See* Official Notification No. 5099 from the MEM to Exmingua, attaching Resolution No. 1191 (April 5, 2017) (**C-0014**).
[1370] Letter from Exmingua to the MEM (November 7, 2017) (**C-0550**).
[1371] MEM Resolution No. 4473 (November 20, 2019) (**C-0153**).
[1372] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision (June 11, 2020), p.1 (**C-0145**).
[1373] *See* Counter Memorial, ¶ 360.
[1374] *See* Reply, para 498, ¶ 12.

update process and the presentation of the project to the community."[1375] If police assistance was what Exmingua was seeking, the letter does not convey such message. In addition, neither Exmingua nor Claimants demonstrate that MARN is obliged to grant Exmingua's request.

593. Finally, the insinuation that the entities' failure to accommodate Exmingua's request was part of the "*de facto* moratorium on the issuance of new mining licenses and operation" is unwarranted.[1376] The President's declaration of a two-year moratorium in 2013 was not implemented, *de jure* or *de facto*. MEM continued to issue licenses through 2015.[1377] While Claimants allege that the licenses granted "markedly decreased," they admit that licenses were still being issued.[1378]

594. In any event, the claim fails on causation. Claimants have not established that Exmingua's inability to complete the EIA is attributable to Guatemala. There is no proof that Exmingua was impeded from conducting the required consultation nor is there any evidence that, had MARN provided "guidance," whatever that may be, Exmingua would have completed the EIA. To the contrary, the facts on the record indicate that the EIA was not completed because of Exmingua's strategic decisions. Since 2009, Exmingua had the opportunity to complete the EIA but it chose not to, because it prioritized the Progreso VII operation.[1379] Guatemala cannot be held liable for Exmingua's business decision to focus on Progreso VII.

v. *Claimants have failed to prove that Exmingua was grossly mistreated by the criminal charges imposed or the impoundment nor have they established that the actions were arbitrary or unlawful*

595. Claimants allege but fail to establish that "Guatemala breached its FET obligation by arbitrarily and unlawfully pursuing baseless criminal charges and impounding Exmingua's gold concentrate, in a pattern of abusive misconduct."[1380]

596. There is no dispute that international law permits States to "organize the enforcement of laws on its own territory in such manner as it may reasonably chose."[1381] Foreign investors do not receive special privileges. Like the rest of the nation, foreign investors are "bound to respect local law."[1382] As a result, "[t]hey may suffer inconvenience, such as detention for questioning, when the state acts to prevent or punish crime.

[1375] Letter from Exmingua to the MARN (April 7, 2017), p.1 (**C-0015).**
[1376] Claimants' Reply, ¶ 211.
[1377] *See,* Exhibits MEM's Statistical Yearbook, 2014, p. 9 (**C-0531**), MEM's Statistical Yearbook, 2015, p. 10 (**C-532**) (showing that in 2012-12 exploitation licenses were issued; 2013: 5 exploitation licenses were issues; 2014: 4 exploitation licenses were issues and 2015: 2 exploitation licenses were issued).
[1378] Claimants' Memorial, ¶ 51.
[1379] Claimants' Memorial, ¶ 242. Application for the Santa Margarita exploitation license (January 19, 2009), p. 1 (**C-0070**).; Kappes Statement I, ¶ 141; Fuentes Report I, ¶75.
[1380] Claimants' Reply, ¶ 501.
[1381] *See* Guatemala's Counter-Memorial, ¶ 351; Claimants' Reply ¶¶ 501-503.
[1382] Jan Paulson, Denial of justice in international law, at 174 (Cambridge University Press, 2005) (**CL-0171-R**).

Their property may be subjected to conservatory measures ordered by a judge in connection with legal disputes."[1383] This, as noted by Prof. Paulsson, "must be tolerated without complaint unless mandatory principles of international law have been neglected or specific requirements of treaties have not been met."[1384]

597. It is generally recognized that only "[g]ross mistreatment in connection with apprehension or detention violates international standards."[1385] No such allegation or evidence is presented here. Claimants' case rather rests on two legal actions in 2016:

a. on May 9, 2016, "the police stopped and searched a vehicle with four Exmingua workers transporting 19 bags of gold concentrate from the site to the port" and detained the workers overnight; and [1386]

b. impoundment of Exmingua's gold concentrate[1387]

598. None of these actions constitute a breach of the fair and equitable treatment. To start with, Claimants do not have standing to bring a claim on behalf of Exmingua's employees. In their own words, it is the employees who allegedly suffered harm due to the criminal proceeding. In any event, there is no evidence that Guatemala mistreated the employees in the process of these actions. In fact, the record shows the opposite–justice was delivered in an expediated manner. On May 9, 2016, the agents of the PNC detained four Exmingua employees for, *inter alia*, transporting gold concentrate "without an appropriate transportation and storage license."[1388] The employees were brought in the following day to appear before the Fourth Judicial Criminal Court and released on the same day based on a lack of merit order (*auto de falta de mérito*).[1389]

599. Claimants make repeated reference to the lack of merit order, hoping that this demonstrates a breach of the fair and equitable treatment, but the attempt is futile. The employees were released not acquitted. In any event, even "[a]cquittal… does not in and of itself open the gate to recovery for wrongful imprisonment if the proceedings were based on probable cause and were conducted in accordance with established procedures (which themselves satisfy minimum international standards, and in particular are not corrupted

[1383] *Id.*
[1384] *Id.*
[1385] *Id.*
[1386] Claimants' Memorial, ¶ 126; Claimants' Reply, ¶ 311.
[1387] *See* Claimants' Reply, ¶ 501.
[1388] Guatemalan Civil Police (PNC) Investigation Report (May 9, 2016) p.3 (**C-0148**).
[1389] *See* Claimants' Memorial, ¶¶ 126-127, citing to Letter to the Court of Appeal attaching a certified copy of the Supreme Court decision of Amparo 1464-2016 (June 8, 2018) **(C-0545)**.

by malice or arbitrariness)."[1390] Here, there is no proof that the employees' right to due process was violated.

600. While the Public Prosecutor appealed the Criminal Court's decision, it is utterly misguided to describe such action as an attempt to "drag out criminal proceeding" or as "unlawful pursuit of criminal proceedings."[1391] No State should be admonished or fear international liability for merely enforcing its national law.

601. The claim with regard to the impoundment of the gold concentrate similarly has no merit. There is no allegation that Exmingua's due process rights were violated or that Exmingua was grossly mistreated in the process of the impoundment. Instead, Claimants simply assert that the impoundment in May 2016 by the Fourth Criminal Court of First Instance was unlawful.[1392] Two points are worth repeating here. First, a misapplication of law does not in itself constitute a breach of the international minimum standard.[1393] Second, in the absence of a denial of justice, a judgment, even an erroneous judgment, cannot give rise to international liability.[1394]

602. Nonetheless, the impoundment is lawful. The gold concentrate was seized pursuant to the Fourth Criminal Court's order and consistent with Article 206 of the Code of Criminal Procedure which allows the seizure of items "whose nature or size makes it impossible to keep them under custody."[1395] Following Exmingua's petition, the Fourth Criminal Court lifted the seizure and released the gold concentrates under custody to Exmingua because there are no further investigations "pending in the property and on the machinery."[1396]

603. Finally, Claimants have not established that they suffered harm as a result to the impoundment. From May 3, 2016, until October 24, 2016, the exportation license was suspended.[1397] Although the suspension was revoked on October 24, 2016, Exmingua could not utilize the license because it expired on October 23, 2016, and Exmingua failed to renew the license.[1398] Hence, even in the absence of the impoundment, Exmingua could not have exported the concentrate. Exmingua would have also been unable to sell the

[1390] Jan Paulsson, Denial of justice in international law, at 174 (Cambridge University Press, 2005) (**CL-0171-R**).
[1391] *See* Claimants' Memorial, ¶¶ 237, 241.
[1392] Fuentes Report II, ¶ 163.
[1393] Guatemala's Counter-Memorial, ¶¶ 339-343; *See* also Section V.C.2.a.
[1394] *See* Section V.C.4.b. Guatemala's Counter Memorial, ¶¶ 283 289.
[1395] *See* Fourth Criminal Court of First Instance, Case No. 1069-2016-00228, Transcript of hearing (March 25, 2021), p. 6 (**C-0677**).
[1396] *See id.*, p.7 (**C-0677**).
[1397] *See* Resolution No. 146 of the Ministry of Energy and Mines (May 3, 2016) (**C-0140**); MEM Resolution No. 5194 (October 24, 2016) (**C-0142**).
[1398] *See* Claimants' Memorial, ¶231.

concentrate locally as a result of Resolution 1202.[1399]

vi. MEM's decision to freeze Exmingua's bank accounts was legal and justifiable

604. Finally, Claimants introduce a new argument. They allege that "Guatemala also breached its obligation of fair and equitable treatment by impounding Exmingua's bank accounts.[1400] Besides being meritless, the claim is rich in irony. Claimants also allege that the decision was "vindictive and in bad faith".[1401] In other words, Claimants are asking this Tribunal to find Guatemala liable for Exmingua's violation of Guatemala law.

605. Despite the Supreme Court's suspension of the operations in November 2015 Exmingua continued mining.[1402]Claimants attempt to justify this delinquency on the fact that "Exmingua was not a party to the proceeding" before the issuance of the *amparo provisional*.[1403] But this is simply irrelevant. Exmingua joined the proceeding on December 1, 2015, so it was cognizant of the decision since that date.[1404] The argument that MEM acted inconsistently by implementing some court rulings and disregarding others is also flawed.[1405] Claimants criticize MEM for not conducting consultations right after the *amparo provisional*, but the *amparo provisional* did not make such ruling. It only noted that the Progreso VII exploitation license must be suspended because of the lack of consultation.[1406]

606. Exmingua was given another opportunity to comply with the decision. On March 10, 2016, MEM issued Resolution No. 1202, again holding that Exmingua's "exclusive right to mine and exploit gold and silver, as well as the power granted under such right to sell locally, transfer or exploit such products" are suspended in line with the *amparo provisional*.[1407] After discovering that Exmingua, nonetheless, continued operation, MEM issued several notices instructing Exmingua to stop operation and warning Exmingua of legal actions should it fail to comply.[1408] At this point, both the judiciary and the executive, pursuant to the authority given to them under Guatemala law, have clearly ordered Exmingua to stop mining. But feeling invincible, Exmingua continued operations. After confirming that Exmingua continued operations despite the orders, MEM fined Exmingua in November 2016 giving it five days to pay from the date of the notification of the

[1399] See Resolution No. 1202 of the Ministry of Energy and Mines (March 10, 2016) p.3 **(C-0139)**.
[1400] *See* Claimants' Reply, ¶ 504.
[1401] Claimants' Reply, ¶ 506.
[1402] *See* MEM's Resolution 1677, dated April 14, 2016 **(C-0442)**.
[1403] *See* Claimants' Reply, ¶ 505.
[1404] *See* Brief from Exmingua appearing in file 1592-2014 (December 1, 2015) **(C-0469)**.
[1405] Claimants' Reply, ¶ 505.
[1406] *See* Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo provisional* (November 11, 2015) (**C-0004**).
[1407] MEM Resolution No. 1202 (March 10, 2016) pp. 2-3 (**C-0139**).
[1408] See MEM's Resolution 1677, April 14, 2016 **(C-0442)**; Administrative Providence CM-SCDM-218-2016, April 11, 2016 (**R-0327**).

fine.[1409] Ignoring MEM's order yet again, Exmingua failed to comply with the fine. [redacted].[1410]

607. Claimants do not deny that Exmingua was aware but chose not to comply with any of the orders. Rather, they argue that Exmingua's lack of compliance should be excused because a few months before issuing Resolution No. 1202, MEM noted in a filing before the Supreme Court that it was "'impossible' to comply with the ruling."[1411] This is not accurate. MEM clearly noted to the Supreme Court that it "will suspend the effects of the mining license, for as long as the *amparo provisional* remains in force."[1412]

608. Finally, Claimants provide no evidence that supports the allegation that the impoundment "is disproportionate, retaliatory, and done in bad faith."[1413] Nor could they. The facts demonstrate that it is Exmingua that should be blamed for the impoundment, not Guatemala.

b. Claimants Have Not Established a Denial of Justice

609. Claimants argue that the Guatemalan courts committed a denial of justice in violation of Guatemala's obligation to provide fair and equitable treatment under Article 10.5.[1414] Particularly, Claimants identify the following as measures that constitute a denial of justice:

i. Guatemala courts' decisions to suspend the exploitation license of Progreso VII[1415]

ii. Guatemala courts' decisions to admit CALAS amparo[1416]

iii. Supreme Court's failure to notify Exmingua of the *amparo provisional* and the "Constitutional Court's four-year delay in issuing its decision."[1417]

iv. Guatemala courts' suspension was discriminatory because the courts did not suspend other operations despite the lack of consultation.[1418]

610. For the reasons stated in the Counter-Memorial and elaborated further below, the claims must be

[1409] MEM, Resolution No. 384 (November 16, 2016) (**C-0904**).
[1410] *See* [redacted] (**R-0300**).
[1411] Claimants' Memorial, ¶ 97, citing to Natiana Gándara, "CIG urges the MEM to not bend over pressure," La Prensa Libre, March 11, 2016 **(C-0007-SPA/ENG)**; Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ministry of Energy and Mines' submission in relation to compliance with *amparo provisional*, March 10, 2016, p. 2 **(C-0008-SPA/ENG)**.
[1412] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ministry of Energy and Mines' submission in relation to compliance with *amparo provisional* (March 10, 2016), p. 4 (**C-0008**).
[1413] Claimants' Reply, ¶ 506.
[1414] *See* Claimants' Memorial, ¶ ¶ 274-312; Claimants' Reply, ¶¶ 529-547.
[1415] *See* Claimants' Reply, ¶¶ 531-539.
[1416] *See* Claimants' Memorial, ¶¶ 281-290; Claimants' Reply, ¶¶ 540-542
[1417] *See* Claimants' Reply, ¶¶ 543-547.
[1418] *See* Claimants' Reply, ¶ 539.

dismissed.

i. Guatemalan courts' suspension of the Progreso VII exploitation license does not constitute a denial of justice

611. At its core Claimants' denial of justice claims rest on Guatemala courts' alleged misapplication of the national law. Claimants argue that Guatemala courts' decision to suspend the Progreso VII exploitation license and impose conditions for its reactivation:

i. were arbitrary because they were "contrary to Guatemala's legal framework and prior authorizations, and representations, and was further to the retroactive application of a novel consultation requirement;"[1419]

ii. violated Guatemalan constitutional principles of legitimate confidence, legal certainty, equality before the law, and due process law, as well as the right to property and the freedom of trade and industry;[1420]

iii. breached the principle of non-retroactivity and violated Claimants' protected interest of legal certainty/stability/ predictability under Guatemala law.[1421]

612. Finally, Claimants bring an additional claim with respect to Santa Margarita. Although there is no court ruling with respect to either the exploration or the exploitation license of Santa Margarita, Claimants contend, nonetheless, that the courts "arbitrarily and unlawfully *de facto* suspended the Santa Margarita exploration license."[1422]

613. Reviewed against the minimum standard of treatment, Claimants' denial of justice claim fails. While Claimants relentlessly color the decisions as arbitrary, neither the Memorial nor the Reply make such showing. Rather, Claimants' written submissions are crammed with complaints that the Guatemalan courts misapplied Guatemalan law.[1423] It is evident what they are asking this Tribunal to do: review the Guatemalan courts' well-reasoned decision *de novo*, as if this was an appeal. Because this is not the proper forum to seek such a relief, the Tribunal should—consistent with the prevailing practice—decline Claimants invitation to review the validity of the Courts' decisions and dismiss the claim.[1424] In *Arif,* the tribunal did just that, holding that, in the absence of a malicious application of Moldovan law, "[t]here is

[1419] Claimants' Reply, ¶537. (emphasis added)
[1420] Claimants' Reply, ¶ 532. (emphasis added)
[1421] See Claimants' Reply, ¶¶ 532 (emphasis added)
[1422] Claimants' Memorial, ¶ 113.
[1423] *See Claimants' Reply,* ¶¶ 532, 537, 540-543; Claimants' Memorial, ¶¶ 224, 228, 230-231, 237, 277-290.
[1424] See *Azinian v. Mexico, Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (November 1, 1999), ¶ 82 **(RL-0144)** ("[t]he possibility of holding a State internationally liable for judicial decisions does not, however, entitle a Claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. […] What must be shown is that the court decision itself constitutes a violation of the treaty. […] Claimants must [also] show either a denial of justice, or a pretence of form to achieve an internationally unlawful end."); *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 283 **(RL-0204)**.

no compelling reason that would justify a new legal analysis by this Tribunal regarding the invalidity of these agreements which has already been repeatedly, consistently and irrevocably decided by the whole of the Moldovan judicial system."[1425]

614. But should the Tribunal find it necessary to assess the substance of the claim, Guatemala maintains that the argument that Guatemalan courts retroactively applied a new law or misapplied the existing law is unfounded. The courts' decisions were well-reasoned and supported under Guatemala law. The indigenous' right to consultation was not a new law crafted by the Guatemalan courts with the filing of CALAS' *amparo*. To the contrary, the Indigenous Peoples' right to consultation was incorporated into the Constitution with the ratification of ILO Convention 169 and other international instruments, decades before Claimants invested in Guatemala. It was subsequently recognized and solidified by the Constitutional Court prior to CALAS' *amparo*.

615. None of the principles of estoppel, legal certainty/ legitimate confidence, or proportionality support Claimants' denial of justice claim. To start with, Claimants have not established that a breach of these principles would implicate a violation of the minimum standard of treatment or constitute a denial of justice. In any event, there is no evidence that the courts breached these principles.

616. Their claim with respect to Santa Margarita is similarly unfounded. Exmingua's decision to cease its exploration in the Santa Margarita is not attributable to any action taken by Guatemala. Neither of the courts' decisions with respect to Progreso VII extended to the exploration license of Santa Margarita. Exmingua knew this but made a strategic decision to stop exploration. Guatemala cannot be held liable for the decision that Exmingua made willingly and with no government interference.

The Guatemalan courts' decisions to suspend the exploitation license were not retroactive nor arbitrary but well-reasoned and justified under Guatemala law

617. Struggling to establish a denial of justice, Claimants argue that the Guatemalan courts' decision to suspend the exploitation license until consultations were carried out with indigenous communities was in violation of Guatemala law and, hence, arbitrary.[1426] Claimants insist that the exploitation license can only be suspended:

> (i) under Article 51 of the Mining Law, based on the specific motives listed there and subject to an administrative proceeding where the holder of the license has de opportunity to be heard and seek new remedies "(ii) by a declaration of *Lesividad* by an Executive Decree issued by the President of

[1425] *Arif v. Moldova*, Award, ¶ 416 **(CL-0126)**.
[1426] Claimants' Reply, ¶ 537

Guatemala."[1427]

618. Claimants argue that by instead suspending the Progreso VII exploitation license for failure to conduct consultation under ILO Convention 169, the Guatemalan courts retroactively applied a new law[1428] or retroactively reinterpreted the existing laws.[1429]

619. It is confounding how Claimants relentlessly insist that the courts retroactively applied a new law but make no such showing to that effect. In fact, Prof. Fuentes, refrains from aligning with Claimants' position.[1430] And rightfully so. It is hard to fathom how the Courts' application of the ILO Convention 169—an instrument that entered into force in 1997 and endorsed by Guatemalan courts on numerous occasions—can qualify as a new law. Nor is it clear how the courts' decisions qualify as a "retroactive re-interpretation of existing laws."[1431]

620. Despite Claimants' mischaracterization of the courts' decisions, it is evident that the decisions were well reasoned and based on pre-existing legal authorities. On June 8, 2016, the Supreme Court issued an *amparo definitivo*, suspending Progreso VII exploitation license until such time that the MEM conducts the consultation required under ILO Convention 169.[1432] On June 11, 2020, the Constitutional Court affirmed the *amparo definitivo*, endorsing the Supreme Court's interpretation of Guatemala law.[1433]

621. Both courts explained in detail the rationale behind their decisions. In clear terms and organized structure, they described the background of the CALAS *amparo*,[1434] properly summarized the parties' argument,[1435] determined the applicable law,[1436] and applied the proper law to the facts of the case.[1437] Dedicating many pages, each court outlined the rationale for their decision, which as noted below, was based on existing

[1427] Claimants' Reply, ¶ 298.
[1428] *See* Claimants 'Memorial, ¶¶ 297-298; Claimants' Reply, ¶532.
[1429] *See* Claimants' Reply, ¶ 532.
[1430] Prof. Fuentes only notes that 'the principle of legal security is crystallized through the observance of other principles, such as due process, legality, non-retroactivity, and lex certa, supported by the notions of res judicata, limitations and time-bars, among others.' *See* Fuentes Report II, ¶ 136, Fuentes Report I, ¶ 110.
[1431] *See* Claimants' Reply, ¶ 532.
[1432] *See* Supreme Court of Guatemala, Case No. 1592-2014, Decision (June 28, 2016) p.18 (**C-0144**).
[1433] *See* Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision, pp.18-22 (June 11, 2020) (**C-0145**).
[1434] *See* Supreme Court of Guatemala, Case No. 1592-2014, Decision (June 28, 2016), pp 1-2 (**C-0144**); Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision (June 11, 2020), pp. 1-8 (**C-0145**).
[1435] *See* Supreme Court of Guatemala, Case No. 1592-2014, Decision (June 28, 2016), pp 2-4 (**C-0144**); Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision (June 11, 2020), pp. 8-14 (**C-0145**).
[1436] *See* Supreme Court of Guatemala, Case No. 1592-2014, Decision (June 28, 2016), pp 5-10 (**C-0144**); Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision (June 11, 2020), pp. 14-22, 29-42(**C-0145**).
[1437] *See* Supreme Court of Guatemala, Case No. 1592-2014, Decision (June 28, 2016), pp 16-19 (**C-0144**); Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision (June 11, 2020), pp. 22-29, 42-45(**C-0145**).

Guatemala law:

> *First*, pursuant to Article 46 of the Constitution, ratified international conventions are hierarchically above any domestic law.[1438]
>
> *Second,* ILO Convention and other international instruments ratified by Guatemala recognize the indigenous' right to consultation with regard to measures which may affect their interests.[1439]
>
> *Third*, in addition to the above instruments, the Courts relied on set precedent, as required under Article 43 of the Amparo Law, and practice of international courts.[1440] Among others, the Constitutional Court relied on its decision in December 2009 and September 2018 in which it affirmed that the State must consult the indigenous people prior to taking measures that could affect their interest.[1441] The Constitutional Courts also relied on the practice of international courts and neighboring states which have similarly held that "consultation with indigenous peoples in connection with mining exploration and exploitation initiatives is a mandatory requirement."[1442]

622. After affirming the right of Indigenous Peoples to consultation, the courts suspended the Progreso VII exploitation license in light of the power given under Article 27 of the Amparo Law to suspend measures which could affect human rights. [1443] Given that the decisions were based on international instruments ratified decades before Claimants invested in Guatemala and the precedent existing at the time of the case, Claimants' submission that the courts retroactively applied a new law fails.

[1438] *See* Supreme Court of Guatemala, Case No. 1592-2014, Decision (June 28, 2016), p. 8 (**C-0144**). See also Political Constitution of Guatemala, Art. 46 **(C-0414-R)**.

[1439] *See* Supreme Court of Guatemala, Case No. 1592-2014, Decision (June 28, 2016), pp 8-11 (**C-0144**); Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision (June 11, 2020), p.20 (**C-0145**).

[1440] Amparo Law, Article 43 (**C-0146**)

[1441] Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision (June 11, 2020), p.2 (**C-0145)**, *citing* to Judgment of the Constitutional Court issued on December 21, 2009, case No. 3878-2007. The Supreme Court also relied on precedent. *See* Supreme Court of Guatemala, Case No. 1592-2014, Decision (June 28, 2016), p.12 (**C-0144**) citing to Case No. No. 3878-2007; No. 2432-2011 and No. 2481-2011.

[1442] *See* Supreme Court of Guatemala, Case No. 1592-2014, Decision (June 28, 2016), pp 10-11 (**C-0144)**, *citing* to *Yakye Axa Indigenous Community v. Paraguay*, Judgment (June 17 2005), ¶¶ 131, 135-137; Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment (June 27 2012), ¶¶ 232, Considerations of the Court. *See also* Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision (June 11, 2020) (**C-0145)**, citing to Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment (June 27, 2012), ¶¶ 232, Case of *Saramaka People v. Suriname*, Interpretation of the Judgment on Preliminary Obejctions. Merits, Reparations, and Costs dated August 12, 2008. Series C No 195, ¶ 37; Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision (June 11, 2020), p 31-32 citing to Inter-National Commission on Human Rights, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, Op. Cit., p. 55; Decision SU-383/83 dated May 13, 2003, case file No. T-517583 on the action for protection of fundamental rights commenced by the Organization of Indigenous Peoples of the Colombian Amazon **(C-0145)**

[1443] *See* Amparo Law, Article 28; *See* Supreme Court of Guatemala, Case No. 1592-2014, Decision (June 28, 2016), (**C-0144**).

623. Claimants' arbitrary claim is similarly unfounded. They argue that decisions are contrary to prior legal interpretation made by the State before the IACHR that "its granting of licenses pursuant to its Mining law and Regulations satisfies" the requirement of the ILO Convention.[1444] To qualify as arbitrary, the decision in question must exhibit a "willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[1445] Claimants have not shown that the decisions fall under any of these categories. The courts are not estopped from adopting an interpretation different from that conveyed in previous instances. After all, estoppel only applies to "a statement of fact," not a statement of law.[1446]

Neither of the conjoined principles of estoppel and legal certainty (or legitimate confidence) aids Claimants' denial of justice claim

624. Claimants next deploy several inapplicable principles to establish a denial of justice. They argue that the State breached the principles of estoppel and legal certainty when the courts suspended the license after the MEM approved Exmingua's Progreso VII exploitation license.[1447] According to Claimants, a violation of these principles could result in denial of justice because they are: i) general principles of law,[1448] and ii) are part of Guatemalan law.[1449] The argument is flawed for the following reasons.

625. As Guatemala established, the only applicable law to interpret the content of the fair and equitable treatment under Article 10.5 of the CAFTA-DR is, as specifically noted in the same provision, customary international law. As Claimants do not allege, let alone prove, that the principles of estoppel or legal certainty are part of the fair and equitable treatment of the customary international law minimum standard of treatment, the Tribunal should end its analysis here and deny Claimants' attempt to rely on these principles.

626. Claimants' second argument similarly has no merit. Even assuming *arguendo* that they are part of Guatemalan law and Guatemalan courts breached these principles, which they have not, such showing does not move the needle in Claimants' favor, considering the consensus that an erroneous judgment, alone, does not constitute a denial of justice.[1450] In any event, Claimants have not established a breach of these principles.

627. Aside from requesting that the Tribunal apply the principle of estoppel, Claimants make no attempt to

[1444] *See* Claimants' Reply, ¶485-486.
[1445] *See* Guatemala's Counter Memorial, ¶ 339.
[1446] *See Pope v Canada*, Interim Award, ¶ 111 **(CL-0129)**.
[1447] *See* Claimants' Memorial, ¶¶ 224, 234-235.
[1448] *See* Claimants' Reply, ¶ 533 ("as a general principle of law, the principle of legal certainty also should guide this Tribunal in determining Guatemala's obligation not to deny justice under CAFTA-DR Article 10.5(1); *Id*. ¶ 481.
[1449] *See* Fuentes Report II, ¶¶ 32, 36, 38. *See also* Funtes I Report, ¶ 37.
[1450] See Guatemala's Counter-Memorial, ¶¶ 300-302.

establish the required elements.[1451] Instead, they merely argue that Guatemalan courts were estopped from suspending the license because MEM "approved Exmingua's Progreso VII exploitation license.[1452]The relief that Claimants are seeking is remarkable. Put simply, Claimants are requesting this Tribunal to find Guatemala internationally liable because its courts—the organ ordained to interpret and apply the law of the nation—caried out their mandate.

628. A similar argument was rejected in *Arif v. Moldova*. In that case, the claimant argued that Moldova is estopped from invoking that the lease agreement was invalid based on the Moldovan court's ruling "because it was Moldova itself that granted [the claimant] this right."[1453] The tribunal dismissed the claim, refusing to hold Moldova internationally liable "for the correct application by the Moldovan courts of Moldovan law in lawsuits filed by a private competitor."[1454]

629. Claimants' legitimate confidence/legal certainty claim fares no better. Claimants argue that an exploitation license could only be suspended through Article 51 of the Mining Law or a declaration of *Lesividad* by an Executive Decree issued by the President of Guatemala.[1455] By suspending the Progreso VII exploitation license outside of theses grounds, Claimants submit, Guatemalan courts breached the principles of legitimate confidence/legal certainty.[1456] The argument cannot withstand scrutiny.

630. Neither the Memorial nor the Reply demonstrates that these principles are part of the minimum standard of treatment. While Claimants offer a definition of these principles under Guatemala law, they do not state what these principles entail under international law. In any event, even by their own definition of legitimate confidence/certainty, there is no breach. According to Prof. Fuentes, the principle of legitimate confidence, which is "inherent in the principle of legal certainty," would be breached if the State revokes an administrative decision "through arbitrary or unjustified decisions."[1457] No such measure exists here.

631. As Guatemala explained, the courts' decisions were based on ILO Convention 169 and their power under the *Amparo* Law to protect constitutional and human rights under imminent threat.[1458] Had Claimants conducted even the most minimal due diligence, they would have clearly appreciated the right of

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[1451] *Pope v Canada*, ¶ 111 (To benefit from the principle of estoppel, Claimants must demonstrate three elements: "(1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntarily, unconditional, and authorized; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the state or to the advantage of the party making the statement") **(CL-0129)**.
[1452] Claimants' Memorial, ¶¶ 224, 234-235.
[1453] *Arif v. Moldova*, Award, ¶ 419 **(CL-0126)**. See also *Id*. ¶ 275 **(CL-0126)**.
[1454] *Arif v. Moldova*, Award, ¶ 419 **(CL-0126)**.
[1455] Claimants' Memorial, ¶ 298.
[1456] Claimants' Reply, ¶ 532; *See also* Claimants' Memorial, ¶¶ 298-300.
[1457] Fuentes Report II, ¶ 43.
[1458] See Amparo Law, Article 49(a) **(RL-0410)**.

Indigenous Peoples' to be consulted and the risk of surpassing this requirement laid down in several instruments and endorsed by national and international courts.

The proportionality principle is inapplicable, and, in any event, Claimants have not established a violation of this principle

632. Claimants continue to craft other principles mindful of their feeble claim. They argue that the suspension violated the principle of proportionality under international and Guatemalan law.[1459] As Guatemala elaborates further below, this is simply false.

633. Before proceeding to the heart of the claim, two preliminary points are useful here. First, Claimants have not demonstrated that a violation of the principle of proportionality gives rise to a denial of justice. Nor is there any evidence that this principle is part of the minimum standard of treatment. Its application under international law, according to the tribunal in *Cairn*, is limited to the principle of non-retroactivity.[1460] In that case, the tribunal held that a State must balance the public and individual interests prior to imposing retroactive regulations.[1461] Here, no such analysis is required—there was no retroactive application of a new law.

634. Claimants' reliance on Guatemalan law is also unhelpful. A misapplication of law, including an erroneous application of the principle of proportionality, does not constitute a denial of justice. In any event, the Constitutional Court's decision to continue the suspension of the Progreso VII operation did not violate the principle of proportionality. Before making its decision, the Constitutional Court weighed the: i)interests of "the affected or potentially affected parties; ii) State's duty to adequately fulfill its international obligations and "respect and safeguard the fundamental rights of its citizens;" iii) "economic, cultural, historical and ecological reality of the State of Guatemala;" and iv) "promotion of investment projects" and the desire to "prevent unreasonable objections to financially sound projects that may be developed by the nation."[1462]

635. Exercising its discretion, under Article 30 of the *Amparo* Law, the Constitutional Court then held that the Progreso VII operation must remain suspended because of the "several serious conflicts [that] have emerged" near the Progreso VII Derivada exploitation project that "have endangered the lives and security of the inhabitants of the applicable municipalities."[1463] In light of this rationale, which is clearly noted in the decision, it is disingenuous to argue, as Claimants do, that the Constitutional Court did not "conduct a

[1459] *See* Claimant's Reply, ¶ 536; Fuentes Report I, ¶ 173, 179.
[1460] *See* Claimant's Reply, ¶ 535.
[1461] *See* Claimant's Reply, ¶ 535, citing to *Cairn Energy v. India*, Award, ¶ 1794 (**CL-0335**).
[1462] *See* Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision (June 11, 2020), p.22 (**C-0145**).
[1463] *See* Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision (June 11, 2020), p**. 38 (C-0145**).

proportionality analysis to determine whether it was necessary or adequate to suspend Exmingua's operations in order to conduct the consultations."[1464]

636. Finally, Claimants have not established that they suffered a loss as a result of the temporary suspension of the Progreso VII exploitation license. Claimants' damages claim rests on the incorrect premise that Exmingua's "value is nil," because, *inter alia*, the Progreso VII exploitation license was indefinitely suspended. [1465] While Claimants cite to the courts' decisions to support their claim, the decisions clearly note that the exploitation license is suspended only until such time that MEM conducts the consultation with the indigenous communities residing in the area.[1466] In addition, MEM had taken preliminary steps to implement the Supreme Court's decision.[1467]

ii. Claimants have not established a de facto *suspension of the Santa Margarita exploration license*

637. Claimants next request the Tribunal to hold Guatemala liable for Exmingua's business decision to stop exploration of Santa Margarita. They argue that the *de jure* suspension of Progreso VII exploitation license and the September 2018 Constitutional Court decision that "both pre-existing exploration and exploitation licenses are subject to ILO Convention 169 consultations" had the *de facto* effect of suspending the exploration license of Santa Margarita.[1468] The claim has no merit.

638. Claimants misuse the term '*de facto*.' The CALAS *amparo* was specifically limited to the Progreso VII exploitation license. Hence, if Exmingua had any desire to exploit Santa Margarita, it could have done so despite the courts' suspension of the Progresso VII exploitation license. In case of doubt, Exmingua could have requested a clarification from the court. But it did not. Instead, Exmingua chose to stop exploration because it presumed that there could be "another claim by CALAS seeking *amparo* suspending the Santa Margarita exploration license."[1469] Guatemala cannot be held liable due to Exmingua' strategic decision to stop exploration.

639. Claimants' reliance on the Constitutional Court's ruling of September 2018 in *Minera San Rafael* is misplaced. Neither Claimants nor Exmingua was a party in the *Minera San Rafael* case. Hence, even if the Constitutional Court in that case erred or violated the parties' due process rights, which it did not, Claimants have no standing to bring a breach of the CAFTA-DR based on that decision. In any event, the

[1464] Claimants' Reply, ¶ 536.
[1465] Claimants' Memorial, ¶ 630.
[1466] *See* Guatemala's Counter-Memorial, ¶ 545.
[1467] *See* MEM Report submitted to the Constitutional Court on 11 June 2020 (**C-0872**).
[1468] Claimants' Memorial, ¶ 243; *See also* Claimants' Reply, ¶ 279.
[1469] Claimants' Memorial, ¶ 170.

Constitutional Court in *Minera San Rafael* did not rule that all exploration licenses existing at the time of the decision must be suspended.[1470]

iii. The courts' decisions to admit CALAS' amparo do not amount to a denial of justice

A misapplication of a procedural law does not constitute a denial of justice and, in any event, the courts' decisions were consistent with the Amparo Law

640. With respect to the courts' decision to accept CALAS' *amparo,* Claimants argue that the courts disregarded: i) "Article 20 of the Amparo Law" which requires *amparo* petitions to be made within 30 days after being aware of the complained act,[1471] ii) Article 19 of the Amparo Law which obliges petitioners to first exhaust administrative remedies requirement before filing an *amparo*,[1472]iii) Article 25 of the Amparo Law which only permits "the Public Prosecutor's Office and the Human Rights State Attorney to file *amparo* action on behalf of a group,"[1473] and iv) MEM's "lack[] of standing to be sued in the *amparo* action brought by CALAS."[1474] Aside from alleging that the courts violated the Amparo Law, Claimants have not established that Exmingua's due process rights were seriously violated because of these decisions.

641. Because a misapplication of law, be it procedural or substantive law, does not in itself constitute a denial of justice, the Tribunal should refrain from impugning the courts' decisions and dismiss the claim.[1475] Should the Tribunal, however, decide to analyze the merits of the claim, Guatemala maintains that the courts' decisions were consistent with Guatemalan law for the reasons stated in the Counter-Memorial and discussed further below.

The limitation period under Article 20 of the *Amparo Law*

642. Claimants submit that the Supreme Court and the Constitutional Court disregarded Article 20 of the Amparo Law by accepting CALAS' *amparo* petition filed more than 30 days after MEM issued a public notice of Exmingua's application for an exploitation license on June 22, 2011.[1476] The argument is without merit.

643. Article 20 of the Amparo Law instructs a party wishing to challenge a measure that it deems prejudicial to do so within 30 days from when it became aware of that measure.[1477] But there are two main exceptions

[1470] *See* Decision dated September 3, 2018, issued in Case No. 4785-2017 by the Constitutional Court *(Minera San Rafael* case) **(C-0459).**
[1471] *See* Claimants' Memorial, ¶ 281; Claimants' Reply, ¶ 540.
[1472] *See* Claimants' Memorial, ¶ 287; Claimants' Reply, ¶ 542.
[1473] *See* Claimants' Memorial, ¶ 288; Claimants' Reply, ¶ 541.
[1474] *See* Claimants' Memorial, ¶ 290; Claimants' Reply, ¶ 540.
[1475] *See supra,* Section V.C.1.b.iii
[1476] *See* Claimants' Reply, ¶ 214; Claimants' Memorial, ¶ 281.
[1477] Amparo Law, Article 20 **(C-0416-R).**

to this rule. First, when the *amparo* is directed against the challenged authority's failure to act.[1478] Second, when there is a real possibility that the challenged action could "violate the right of the petitioner."[1479]

644. Under the first scenario, the period of limitation does not apply because there is no cutoff period from when the clock should start counting. By its very nature, an omissive conduct causes a continuous harm until cured.

645. Based on this rationale, the Supreme Court and the Constitutional Court have repeatedly declined to extend the period of limitation to petitions filed against the lack of consultation of indigenous communities.[1480] For instance, On January 12, 2016, the Constitutional Court declined to dismiss an *amparo* filed against MEM for issuing an exploration license to Nichormet Guatemala before consulting the indigenous communities nearby.[1481] Like Exmingua, the Office of the Attorney General of the Nation argued that the *amparo* must be dismissed because it was filed more than four years after the resolution which granted the license.[1482]

646. The court rejected the argument. It held that Article 20 is inapplicable because the *amparo* is against "omissive conduct on the part of recriminated authority." Like CALAS' *amparo*, the petitioners' "ground for grievance" is that "these actions have taken place—and continue to take place—without consulting the communities located there."[1483]

647. While Claimants allege that Oxec was treated favorably by the Guatemalan judiciary,[1484] the Constitutional Court's ruling with respect to the application of Article 20 in the *amparo* filed against Oxec paints a different picture. In May 2017, the Constitutional Court held that the period of limitation does not apply to the *amparo*, challenging MEM's failure to consult the communities in the department of Alta

[1478] Richter I Report, ¶ 84.
[1479] Amparo Law, Article 20 **(C-0416-R).**
[1480] Richter I Report, ¶ 84, citing to Constitutional Court. File 1798-2015, judgment of January 26, 2017, p.23 (**MR-045**) ("The time limit provided for in article 20 of the Law on Amparo… is not applicable for this account, as the inactivity of the authority questioned is maintained in respect of the right of consultation that is alleged to be violated."); Constitutional Court. File 3120-2016, judgment of June 29, 2017, p.3 (**MR-039)** ("the time limit provided for in article 20 of the Law on Amparo, Personal Exhibition and Constitutionality is not applicable, because the inactivity of the authority at issue is maintained with respect to the right of consultation that is denied violated. The infringement of the right of consultation is considered to be permanent in nature, since it remains in force for as long as the obliged authority ceases to fulfil the legal mandate to consult the communities concerned."); Constitutional Court. File 411-2014, judgment of January 12, 2016 (**MR-035**), p. 13, 22; Constitutional Court. Accumulated Files 90-2017, 91-2017 and 92-2017, judgment of May 26, 2017, p 2-3 (**MR-033**); Constitutional Court. File 697-2019, judgment of June 18, 2020, p. 2 (**MR-036**); Constitutional Court. File 4785-2017, judgment of September 3, 2018 (**MR-040**), p.5.
[1481] Richter I Report, ¶ 84, citing to Constitutional Court. File 411-2014, judgment (January 12, 2016), p.22 (**MR-035**).
[1482] Richter I Report, ¶ 84, citing to Constitutional Court. File 411-2014, judgment (January 12, 2016), p.13 (**MR-035**).
[1483] Richter I Report, ¶ 84, citing to Constitutional Court. File 411-2014, judgment (January 12, 2016), p.22 (**MR-035**).
[1484] Claimants' Memorial, ¶ 307.

Verapaz prior to granting the concession to Oxec.[1485] Consistent with its previous stance, the court declined to apply the period of limitation, describing the lack of consultation "as being of a continuing nature, as long as the required authority circumvents the legal mandate to consult the affected community."[1486]

648. CALAS' *amparo* was reviewed and accepted under the same rationale. In line with the existing precedent, the Supreme Court admitted CALAS' *amparo*, holding that Article 20 is inapplicable because "the complaint concerns an omission by the challenged authority" which "continues as regards to the consultation rights alleged to have been violated."[1487] Subsequently, the Constitutional Court affirmed the decision, reiterating that Article 20 does not apply because "the violation of the right to consultation…is deemed to be permanent" or "of a continuous nature." [1488] The second exception would also apply to CALAS' *amparo* as there was a real likelihood that the rights of indigenous communities would be affected by the lack of consultation.

Exhaustion of local remedies

649. Next, Claimants argue that the courts' admission of CALAS' *amparo* violated "Article 19 of the Amparo Law, "which required CALAS first to exhaust 'all ordinary court administrative remedies available to adequately dispose of the matter.'[1489] Prof. Fuentes claims that CALAS could have, but chose not to, pursue the following remedies: i) participated in the objection procedure under Article 47 of the Mining Law before the MEM granted the license,"[1490] ii) sought "reconsideration of the MEM's decision to grant the license under Article 9 of the Contentious Administrative Law,"[1491] or iii) "commence a contentious-administrative proceeding under Article 19 of that Law."[1492] As such, Prof. Fuentes argues, the courts should have rejected the claim.

650. The argument has no merit. It is uncontested here that CALAS' *amparo* was directed against MEM's failure to consult the indigenous communities.[1493] Neither of the avenues mentioned above apply to a party who wishes to seek remedy against the challenged authority's failure to consult indigenous

[1485] Richter I Report, Constitutional Court. Accumulated Files 90-2017, 91-2017 and 92-2017, judgment (May 26, 2017), p 2-3 (**MR-033**).
[1486] Richter I Report, Constitutional Court. Accumulated Files 90-2017, 91-2017 and 92-2017, judgment (May 26, 2017), p.3 (**MR-033**).
[1487] Supreme Court of Guatemala, Case No. 1592-2014 (June 28, 2016), p. 23 **(C-0144)**.
[1488]Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision, p.17 (June 11, 2020) (**C-0145)**, p. 17. *See also id*., p 16 (**C-0145)**.
[1489] Claimants' Reply, ¶ 222.
[1490] *Id.* at ¶ 225, citing to Fuentes Report I, ¶¶ 129-130, 133; Fuentes Report II ¶ 126, 128-135.
[1491] *Id.* citing to Fuentes Report I, ¶ 133; Fuentes Report II, ¶¶ 130-131.
[1492] Claimants' Reply, ¶ 225, citing to Fuentes Report I ¶ 133; Fuentes Report II ¶¶ 132.
[1493] Claimants Reply, ¶240.

communities.[1494] It is telling that neither Claimants nor Prof. Fuentes argue otherwise. Since March 2015, the Constitutional Court has repeatedly affirmed that there is no administrative or judicial remedy that must be exhausted before a party aggrieved by lack of consultation can file an *amparo*.[1495] The decision to admit CALAS' *amparo* was consistent with this longstanding precedent.

CALAS' Standing

651. Claimants argue that by allowing CALAS to file its *amparo*, the courts breached Article 25 of the *Amparo* Law, "which only allows the Public Prosecutor's Office and the Human Rights Ombudsman to file an *amparo* action on behalf of a group."[1496] They further claim that the courts' decisions are contrary to "established jurisprudence" and "in direct contradiction to the law."[1497] This is simply inaccurate.

652. Contrary to Claimants' submission, the courts' decisions were consistent with existing precedent on standing. According to Article 43 of the *Amparo* Law, three judgments of the Constitutional Court on the interpretation of a certain law establishes a precedent that "must be respected by the courts."[1498] Both the Constitutional Court and the Supreme Court adhered to this rule.[1499] As the Constitutional Court explained in its decision, in four separate judgments the Constitutional Court has established that civil associations, like CALAS, can seek constitutional remedies on behalf of communities whose right to consultation have been affected.[1500]

653. By ruling consistent with the set precedent, the Constitutional Court complied with Article 43 of the Amparo Law which requires compliance with legal precedents.

MEM's standing to be sued

654. Finally, Claimants accuse the courts of ignoring MEM's lack of standing to be sued. They insist that, "in the absence of legislation implementing the right to consultations under ILO Convention 169, the MEM had no legal authority to conduct such consultations, and the responsibility for any such failure by the MEM to conduct consultations thus lay with the Congress."[1501]

[1494] Richter II Report, ¶¶ 118-126.
[1495] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming amparo definitive (**C-0145)**, p. 18.
[1496] Claimants' Reply, ¶ 232.
[1497] *Id.* at ¶ 236.
[1498] Amparo Law, Article 43 **(C-0416-R).**
[1499] *See* Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision, pp 14-15 (June 11, 2020) (**C-0145**), *citing* to Case file No. 1600-2015, consolidated files Nos. 795-2016 and 1380-2015, and No. 4785-2017, No. 4069-2015; Supreme Court of Guatemala, Case No. 1592-2014 (June 28, 2016), pp. 14-15 **(C-0144)**.
[1500] *See* Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision, pp 14-15 (June 11, 2020), pp. 14-15 (**C-0145)**, *citing to* Case file No. 1600-2015, consolidated files Nos. 795-2016 and 1380-2015, and No. 4785-2017, No. 4069-2015.
[1501] Claimants' Reply, ¶ 237.

655. It is hard to miss the irony of this claim. As Guatemala noted in its Counter Memorial, Claimants lack standing to bring a claim on behalf of MEM.[1502] While Claimants dedicate several paragraphs in their Reply to discuss the alleged lack of standing, they do not engage with Guatemala's counterargument.[1503]

656. In any event, as noted by the Supreme Court and affirmed by the Constitutional Court, MEM is the proper organ to conduct the consultation.[1504] Claimants confuse the role of the executive and Congress under Guatemalan law. They note that in several decisions the Constitutional Court has held that "it was the 'institutional responsibility' of the Congress to enact legislation to implement the right to consultations under ILO Convention 169."[1505] The argument is misplaced. Claimants admit, as they should, that the 'challenged act' was the granting of the exploitation license "without previously holding a consultation with the potentially affected indigenous communities."[1506] Conducting consultation (which is different from enacting implementing legislation) is not the function of the Congress and Claimants have not proved otherwise.

iv. *Claimants have not established that the Guatemalan judiciary, as a whole, failed to ensure fair administration of justice*

657. As explained in the Counter-Memorial and elaborated here, only egregious deficiency in the administration of justice by the State's judicial system, and not of a single court, can give rise to a denial of justice.[1507] While Claimants pay homage to this condition, they have not established that the national judiciary of Guatemala administered justice in a seriously inadequate manner. Claimants identify the following as denial of justice:

i. The courts' decisions to suspend the Progreso VII operation while allowing other projects to continue operation;

ii. The Supreme Court's failure to notify Exmingua of CALAS' *amparo* action prior to issuing the *amparo* provisional violated Exmingua's right to be heard;[1508] and

iii. "The Constitutional Court's four-year delay in issuing its decision" resulted in the "continued suspension of Exmingua's operations."[1509]

658. For the reasons noted in the Counter-Memorial and here below, the claim must be dismissed.

[1502] Counter Memorial, ¶ 427.
[1503] Claimants' Reply, ¶¶ 237-242.
[1504] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Ruling granting *amparo definitive* **(C-0144)**, p.16
[1505] Claimants' Reply, ¶ 241.
[1506] *See* Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision (June 11, 2020) p. 1 (**C-0145**).
[1507] *See Jan Oostergetel and Theodora Laurentius v. Slovak Republic, UNCITRAL*, Final Award (April 23, 2012), ¶225 ("[D]enial of justice deals with the failure of a system not of a single court") **(RL-0195).**
[1508] *See* Claimants' Reply, ¶ 543-544.
[1509] Claimants' Reply, ¶ 545, 547.

Claimants have not established that the courts discriminated against Exmingua

659. Claimants continue to dress what they deem to be a nationality-based preferential treatment as a breach of the fair and equitable treatment violation. They insist that the suspension of the Progresso VII exploitation license was discriminatory because the courts did not take such measure against other mining projects, *i.e*., Oxec and Minera San Rafael.[1510] The claim has no merit.

660. As explained in the Counter-Memorial, there is no evidence of nationality-based discrimination.[1511] In any event, the fair and equitable treatment does not prohibit a State from treating foreigners and nationals differently or from treating foreigners from different States differently.[1512] While this may qualify as a breach of the MFN or national treatment obligation, Article 10.5 (3) explicitly notes that a breach of these treatments do not establish a breach of the fair and equitable treatment.[1513]

661. The fair and equitable treatment rather prohibits "evident discrimination."[1514] This includes "specific targeting of a foreign investor on other manifestly wrongful grounds…, or the types of conduct that amount to a 'deliberate conspiracy […] to destroy or frustrate the investment.'"[1515]

662. Here, there is no allegation that the court singled out Exmingua and suspended the Progreso VII exploitation license to frustrate its project. Nor is there any claim that the court failed to prevent local prejudice in the court room. Instead, Claimants base their claim on the different conclusions reached in the *amparos* against Exmingua, Oxec and Minera San Rafael—while Exmingua's exploitation license was suspended until consultation, Oxec and Minera San Rafael were allowed to continue operation in parallel to the consultation.[1516] The argument is flawed.

663. Just because the outcomes are different does not mean there was discrimination. The claim also fails in light of the reasoning provided by the Constitutional Court in continuing the suspension of the Progreso VII exploitation license. Contrary to Claimants' submission, the Constitutional Court's decision to continue

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[1510] *See* Claimants' Reply, ¶ 539.
[1511] Guatemala's Counter-Memorial, ¶¶ 614 *et. seq*.
[1512] *See* U.S. Non-Disputing Party submission, ¶27*; Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award (Jan. 12, 2011), ¶¶ 208-209 **(RL-0155)**; Guatemala's Counter-Memorial, ¶ 303.
[1513] CAFTA-DR, Article 10.5 (3) ("A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.")
[1514] *Glamis v USA*, Award, ¶¶ 627 **(RL-0041)**. *See also, Cargill v. México,* Award, ¶ 2 **(CL-0197)**; *Eli Lily v. Canadá*, Final Award, ¶ 222 **(RL-0040)**; Patrick Dumbery, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105*, U.S. Submission, p.261 **(RL-0211)**; El Salvador Submission, ¶ 13.
[1515] Guatemala's Counter-Memorial, ¶ 304, citing to UNCTAD Series on Issues in International Investment Agreement II, Fair and Equitable Treatment, 2012, p.82 **(RL-0268)**. See also Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105, p.126 **(RL-0211);** *Loewen Group, Inc., and Raymond L. Loewen v. United States of America,* ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), ¶¶ 135-136 **(CL-0170)**.
[1516] *See* Claimants' Memorial, ¶¶ 236,112.

the suspension of the Progreso VII exploitation license was not based on ill-intent against Exmingua but based on history of unrest in the area.[1517]

The Supreme Court did not violate Exmingua's right to be heard

664. Claimants' submission with respect to the lack of notice is twofold: i) the Supreme Court's failure to notify Exmingua of CALAS' *amparo* action violates Article 35 of the *Amparo* Law,[1518] and ii) had "Exmingua been timely notified, it would have seen that CALAS's *amparo* request expressly requested the Supreme Court to order the provisional (and final) suspension of Exmingua's exploitation license, and would have had the opportunity to respond to that request before the Court issued its *amparo provisional* on 11 November 2015."[1519] Neither of these claims has merit.

665. *First*, Claimants' reliance on Article 35 of the Amparo Law is misplaced. Article 35 describes the procedure for the first hearing after the issuance of the *amparo* provisional.[1520] It notes that the court, after hearing from the interested parties, "shall confirm or revoke the provisional suspension decreed in the initial order of the proceeding."[1521] No such requirement exists for the court to order an *amparo provisional*. Due to the urgent nature of such requests, Article 25 of the Amparo Law allows the court to order *amparo provisional* in its "first resolution."[1522] Even assuming *arguendo* that the decision breached the Amparo Law, such misapplication of law does not constitute a denial of justice.[1523]

666. *Second*, Claimants have not established that Exmingua was prejudiced by joining the proceeding 16 days after the issuance of the *amparo provisional*. Nor could it. Even if Exmingua joined the court proceeding prior to the *amparo provisional*, it would have made the same argument that MEM made in response to CALAS' action and what Claimants make here in the form of denial of justice.[1524]

667. *Third*, Exmingua has not exhausted the local remedies. As noted in the Counter-Memorial, Exmingua never alleged and sought remedy before the national courts for what Claimants describe here as a violation

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[1517] *See* Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision (June 11, 2020) p. 38 (**C-0145**).
[1518] *See* Claimants' Reply, ¶ 543; Claimants' Memorial, ¶ 277, citing to Fuentes Report I, ¶¶ 94, 184.
[1519] *See* Claimants' Reply, ¶ 543, citing to Fuentes Report I, ¶ 94.
[1520] *See* Amparo Law, Article 35 (**C-0416-R**).
[1521] *Id.* (emphasis added).
[1522] *See* Amparo Law, Article 27 (**C-0416-R**).
[1523] *See* Section V.C.2.a.
[1524] *See* Guatemala's Counter Memorial, ¶ 408, citing to Supreme Court of Justice, File No. 1592-2014, Exmingua Appeal against the decision granting provisional protection (February 23, 2016), pp. 6,11,14 **(C-0005)**; Supreme Court of Justice, File No. 1592-2014, Judgment granting definitive amparo dated June 28, 2016, p.4 **(C-0144)**; Supreme Court of Justice of Guatemala, Case No. 1592-2014, Appeal by Exmingua against the Ruling granting *amparo definitivo* (June 30, 2016) **(C-0475)**; Claimants' Reply, ¶ 544.

of Exmingua's right to be heard.[1525] Claimants do not dispute this. Instead, they note that the Constitutional Court rejected "Exmingua's appeal, [and] simply found that 'the conditions warranting the grant of the interim protection are met,' without addressing any of the blatant violations of Exmingua's due process rights that formed the basis of Exmingua's appeal."[1526] The argument makes no sense. Without Exmingua making a claim of a due process violation, the Constitutional Court could not have addressed such alleged violation.

668. In conclusion, Claimants have not established a violation of the *Amparo* Law or that Exmingua's right to be heard was violated. In any event, since Exmingua had not sought to rectify the alleged violation before that national courts, the lack of notice could not constitute a denial of justice. Finally, Exmingua was not prejudiced by joining the proceeding a few days after the *amparo* provisional.[1527] The facts on the record prove that Exmingua would have made the same argument that MEM made before the Supreme Court and the Constitutional Court.

The time taken by the Constitutional Court to issue the final judgment is justifiable

669. Realizing the heavy burden of making a case of denial of justice solely based on a delay in issuing a judgment, Claimants allege that the delay was "politically motivated and based on nationality bias."[1528] But aside from repeatedly making such conclusory assertions, Claimants have not presented any evidence which support their claim. As they have failed to elaborate or present evidence regarding this allegation, Guatemala's discussion will be limited to the time taken by the Constitutional Court to issue a judgment on Exmingua's appeal of the *amparo definitivo*.

670. It is uncontested between the Parties that a claim based on a delay of judgment must be assessed in consideration of, *inter alia*,: i) the nature of the proceeding and the need celerity (whether the case is a civil or criminal matter) ii) the circumstances that contributed to the delay and the development status of the country; iii) the effect of the delay.[1529] Reviewed under the above factors, the fact shows that the time taken by the Constitutional Court was justified.

The need for celerity

671. Claimants do not dispute that unlike criminal proceedings where fundamental rights, such as right to life

[1525] Guatemala's Counter-Memorial, ¶ 409.
[1526] Claimants' Reply, ¶ 544.
[1527] While Claimants allege that Exmingua was not "served with the notice of the amparo action" until February 22, 2016, they admit that Exmingua joined the proceeding on December 1, 2015, 16 days from the *amparo provisional*. *See* Claimants' Memorial, ¶ 88.
[1528] Claimants' Memorial, ¶ 293.
[1529] *Id.* at ¶ 269; Guatemala's Counter-Memorial, ¶ 292.

and freedom of movement, are at stake, the need for a swift judgment is not very compelling in cases that are "purely commercial matters."[1530] Here, the case before the Constitutional Court was not a criminal, but an administrative case revolving around the validity of an exploitation license granted contrary to various international instruments ratified by Guatemala. [1531]Hence, the need for celerity is less compelling.

The circumstances that contributed to the delay and the development status of the host State

672. Tribunals also accept that delay in judgment could be justified by events that could reasonably constrain the court from issuing a judgment in a timely manner. This includes, but is not limited to, the case load at the relevant period and the capacity of the judiciary to resolve the dispute expeditiously, which is often affected by the development status of the country.[1532]Claimants do not disagree with these considerations nor do they dispute that the Constitutional Court was dealing with an immense number of cases from 2016-2020.[1533]

673. The Constitutional Court's workload has "grown exponentially."[1534] From 2016, the year in which Exmingua filed its appeal, until the Constitutional Court ruled on the *amparo*, the Constitutional Court received more than 20,000 petitions.[1535] Most of the cases were of "national importance." This includes cases relating to La Línea case, originating from the acts of corruption that led to the imprisonment of the President of the Nation and the Vice President, as well as other officials of the Pérez Molina administration, for corruption.[1536]

674. Other factors also contributed to the delay. As noted in the Counter-Memorial, there were reshuffling of judges in 2016. Although the case was initial assigned to Judge Dina Ocha Escriba, she recused herself shortly after. [1537] Upon recusal, the case was transferred to Judge Bonerge Mejía, who was dealing with a great number of cases and administrative duties as Presiding Magistrate of the Court.[1538]

675. Claimants have not established that they suffered damages as a result to the delay. Two points are worth

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[1530] *See* Guatemala's Counter-Memorial, ¶ 293, citing to *White Industries*, ¶ 10.4.14 **(RL-0198)**; Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63 INT'l & COMP. L.Q., p. 880; *id.*, p.870. (**RL-0191)** ("Delay in proceedings to establish the criminal responsibility of a defendant who has been remanded in custody since the indictment is not the same as delay in proceedings to establish a defendant's civil responsibility to pay damages for a breach of contract.")

[1531] *See* Constitutional Court of Guatemala, Consolidated Cases Nos. 3207-2016 and 3344-2016, Decision, pp 14-15 (June 11, 2020) (**C-0145**).

[1532] *See* Guatemala's Counter-Memorial, ¶¶ 293-294.

[1533] *Id.* at ¶ 413.

[1534] *See* Report of the Constitutional Court, p.8 (**R-0074)**.

[1535] *Id.*

[1536] *Id.* at pp. 9-10 (**R-0074)**.

[1537] Guatemala's Counter-Memorial, ¶¶ 70-73.

[1538] *Id.*

repeating here. *First*, Exmingua does not have a construction permit.[1539] Hence, even if the Constitutional Court ruled earlier than June 2020, Exmingua would have been unable to utilize the processing plant without which the project would be economically unviable.[1540] *Second*, aside from alleging to have suffered "moral harm," as a result to the delay, Claimants make no other claim for damages.[1541] Claimants also fail to identify the moral harm and the damages they are seeking to recover as a result to this alleged harm.[1542]

Overall, the Guatemalan judiciary administered justice fairly and expeditiously

676. As explained in the Counter-Memorial and elaborated here, only egregious deficiency in the administration of justice by a national judicial system, and not of single court, can give rise to a denial of justice.[1543]

677. Hence, even where a national court of a State took a long period in issuing a judgment, tribunals still found no denial of justice given that the national judicial system, overall, treated the investor fairly and resolved its case expeditiously.[1544] Such was the case in *White Industries v. India*. In *White Industries*, the tribunal dismissed the claim that the national court of India committed a denial of justice because it took several years to issue a judgment.[1545] Although the tribunal agreed the delay was "certainly unsatisfactory in terms of efficient administration of justice," it held that the delay, in the absence of bad faith, did not reflect "a particularly serious shortcoming."[1546]

678. In numerous occasions, the courts of Guatemala resolved Exmingua's petition expeditiously and respected its due process rights to present its claim as well as to defend claims brought against it. For instance, the Constitutional Court issued a judgment on Exmingua's appeal of the CALAS *amparo provisional* in less than two months and decided on Exmingua's request for clarification of the *amparo provisional* in three days.[1547]

679. Its petition with respect to the *amparo* filed by the Kakchiquel indigenous community was also resolved within a reasonable period. On November 24, 2016, Exmingua appealed the *amparo provisional* granted

[1539] *See* Judgment of the Third Civil Court of First Instance of Guatemala, issued on July 13, 2015, File 01050-2014-00871, p. 32 (**R-0064**). See Section IV.B.
[1540] Second SLR Report, ¶ 64.
[1541] Claimants' Reply, ¶ 547.
[1542] *Id*.
[1543] *See Jan Oostergetel and Theodora Laurentius v. Slovak Republic, UNCITRAL*, Final Award (April 23, 2012), ¶ 225 ("[D]enial of justice deals with the failure of a system not of a single court") **(RL-0195)**.
[1544] *See White Industries*, Award, ¶ 10.4.17, 10.4.23 (**RL-0198)**.
[1545] *Id.* at ¶10.4.1 (**RL-0198)**.
[1546] *Id.* at ¶10.4.23 (**RL-0198)**.
[1547] *See* Constitutional Court of Guatemala, Case No. 1592-2014, Request by Exmingua for clarification (May 6, 2016) (**C-0538)**; Constitutional Court of Guatemala, Case No. 1592-2014, Ruling on request for clarification (May 9, 2016) (**C-0554)**.

to the Kakchiquel communities to the Constitutional Court.[1548] The Constitutional Court issued a decision on the appeal within six months of Exmingua's appeal.[1549] On September 12, 2017, Exmingua requested the Supreme Court revoke the *amparo provisional* granted to the Kakchiquel communities.[1550] After initially suspending the request on October 31, 2017, the Supreme Court granted the requested and suspended the *amparo provisional* on December 12, 2017.[1551]

D. Claimants Have Not Proved that Guatemala Breached its Obligation to Provide Full Protection and Security

1. Claimants misinterpret the full protection and security obligation under Article 10.5 of CAFTA-DR

a. The full protection and security obligation is limited to police protection

680. Claimants agree that the standard of full protection and security does not provide an absolute guarantee against physical occupation or disturbance of its investment.[1552] It rather requires a State to take reasonable measures to protect an investment from physical damage.[1553] There is also no dispute that the obligation to provide full protection and security must be assessed in light of "the state's level of development and stability."[1554]

681. Claimants, however, disagree on the scope of the full protection and security obligation. They insist that this obligation goes beyond the State parties' duty to "provide police protection" and encompasses the duty to "ensure [an investor's] enjoyment of its economic rights, which include, *inter alia*, its right to freely move around, use and develop its assets."[1555] Like the Memorial, the Reply provides no authority to support such an expansive outlook of a full protection and security obligation limited to customary international law.[1556]

682. To the contrary, multiple scholars, tribunals, and States, including the United States, affirm that the full protection and security obligation does not serve as an armor against all economic harms.[1557] It does not

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[1548] *See* Exmingua Appeal against the *Amparo Provisional* (November 24, 2016) (**C-0478**).
[1549] *See* Decision of the Constitutional Court affirming the *Amparo Provisional* dated May 30, 2017 (**C-0482**).
[1550] *See* Exmingua's request to revoke *Amparo Provisional (*September 12, 2017) (**C-0483**).
[1551] *See* Supreme Court Resolution (October 31, 2017) (**C-0484**); Supreme Court Resolution (December 6, 2017) (**C-0485**).
[1552] *See* Claimants' Reply, ¶ 507.
[1553] *See* Guatemala's Counter-Memorial, ¶¶ 435-436, Claimants' Reply, ¶ 507.
[1554] *See id.* at ¶¶ 437-438.
[1555] Claimants' Reply, ¶ 510.
[1556] *Id.*
[1557] *See e.g.,* the United States Non-Disputing Party Submission, ¶ 23; *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, United States of America Third Non-Disputing Party Submission, ¶ 23 **(RL-0223)**. *See also*, Guatemala's Counter Memorial, ¶ 433, fn. 731, 733, 735.

shield an investor from unfavorable decisions by the State's executive or judiciary organ.[1558] Nor can the full protection and security clause be utilized to surpass the hardline rule that judicial decisions cannot give rise to an international responsibility in the absence of a denial of justice.[1559]

683. Endorsing this view, the tribunal in *Crystallex v. Venezuela* rejected the claimant's attempt to extend the standard to the decision-making organs of Venezuela.[1560] In that case, Crystallex argued that Venezuela breached its obligation to provide full protection and security because the Ministry of Environment dismissed its motion for reconsideration of its permit request and "senior Venezuelan officials made a number of discriminatory statements threatening to nationalize Crystallex's investment and/or transfer it to other interested parties."[1561]

684. The tribunal dismissed the claim, noting that the obligation to provide full protection and security "only extends to the duty of the host state to grant physical protection and security."[1562] In doing so, the tribunal aligned with the majority of investment tribunals which have similarly held that "the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."[1563]

685. Claimants have not proved the contrary. None of the cases cited by Claimants extended the full protection and security obligation under customary international law beyond physical protection.[1564] In fact, aside

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[1558] *See e.g.,* the United States Non-Disputing Party Submission, ¶23; *Omega Engineering LLC and Oscar Rivera v. Republic of Panama*, ICSID Case No. ARB/16/42, United States of America Third Non-Disputing Party Submission, ¶ 23 **(RL-0223)**. *See also,* Guatemala's Counter Memorial, ¶ 433; fn. 733, 735.

[1559] *See e.g.,* the United States Non-Disputing Party Submission, ¶23; Guatemala's Counter-Memorial ¶ 453, citing to *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award **(RL-0143)**. *See also, Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Award (June 3, 2021), ¶ 357 (under customary international law "absent a denial of justice, judicial decisions interpreting domestic law cannot breach international law.") (**RL-0397**). Other states like Costa Rica and Canada also agree with this principle.

[1560] *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (April 4, 2016), ¶¶ 624-627, 632-635 (**CL-0153)**.

[1561] *Crystallex Int'l Corp.*, Award, ¶ 627 (**CL-0153)**.

[1562] *Crystallex Int'l Corp.*, Award, ¶ 632 (**CL-0153)**.

[1563] *Crystallex Int'l Corp.*, Award, ¶ 633 (**CL-0153)**, citing to *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award (March 17, 2006), ¶ 484 (**CL-0154**).

[1564] *See Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA No. 2012-2, Award (Redacted) (March 15, 2016) ¶ 6.83 (**CL-0138**) (holding that the respondent breached its obligation to provide full protection and security by taking no measure to remove the anti-mines in Juin area which had prevented the claimant from conducting the necessary consultations); *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Losses (February 21,2017), ¶¶ 288-290 (**CL-0135)** (finding that the respondent breached its obligation because its security forces failed "to take any concrete steps to protect Claimants' investment" from being damaged by the saboteurs.); *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, Award (November 7, 2018) ¶ 403 (**CL-0190**) ("In the most basic formulation, the purpose of the FPS standard is to protect the physical integrity of an investment against interference by use of force."); *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (May 4, 2016), ¶¶ 352-356 (**CL-0015**) (holding that the respondent breached the "most constant and

from the tribunal in *Azurix v. Argentina*, numerous tribunals have concluded that even the full protection and security clause that appear as an autonomous standard does not go beyond physical protection.[1565] Accordingly, Claimants' full protection and security claim with respect to actions taken by MEM, MARN, and the Constitutional Court must be dismissed.

b. Physical obstructions, in and of themselves, do not constitute a breach of the full protection and security obligation

686. To establish a breach of the full protection and security obligation, Claimants must demonstrate more than an impediment to the Project sites. As the tribunal noted in *Copper Mesa*, such "difficulties" do "not constitute by themselves violations of the Treaty," especially where "they were caused by third persons (whose conduct is not attributable to the Respondent)."[1566] The investor, to succeed in its claim, must prove that the State, despite calls for assistance, refused to provide the necessary physical protection.

687. This was critical to many of the cases cited by Claimants. In *Ampal v. Egypt*, the tribunal's finding of the breach of the full protection and security obligation lied on Egypt security personnel's failure to "take any steps to stop saboteurs from damaging the lifeline of Claimants' investment," despite the investor's request for protection.[1567] Similarly, in *Cengiz v. Libiya,* the Libyan government's failure to respond to the claimant's numerous call for security assistance and prevent the attack against claimant's investment resulted in the breach of its obligation to provide full protection and security.[1568] Other tribunals also gave due consideration to the claimant's request for assistance and the State's failure to respond to such requests for the purpose of determining a violation of the full protection and security obligation.[1569]

688. Here, Claimants have not demonstrated that Exmingua was physically impeded in early 2016 from accessing the Progreso VII site or conducting the social studies necessary for completing the EIA for Santa Margarita. There is also no evidence that PNC refused to provide assistance to Exmingua.

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protection security" clause when the police refused to provide protection to the claimant); *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (July 28, 2015), ¶ 596 (**CL-0260**) ("The Tribunal also considers that this standard relates to physical security and threats of violence and is materially the same under both BITs.").

[1565] *See Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006), ¶ 408 (**CL-0149**). Compare with *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Losses (February 21, 2017), ¶¶ 286-290 (**CL-0135)**; *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, Award (November 7, 2018), ¶ 403 **CL-0190**); *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (May 4, 2016), ¶ 351 (**CL-0015**).

[1566] *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA No. 2012-2, Award, (March 15, 2016), ¶ 6.76 (**CL-0138**).

[1567] *Ampal-American Israel Corp.*, Decision on Liability and Heads of Losses, ¶ 288 (**CL-0135**).

[1568] *See Cengiz Insaat Sanayi ve Ticaret A.S.*, Award, ¶ 437-444 (**CL-0190**).

[1569] *See Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009) ¶¶ 446-447 (**CL-0167**); *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (May 4, 2016) ¶¶ 351-3555 (**CL-0015**).

c. The United States concurs with Guatemala's reading of the full protection and security obligation under Article 10.5 CAFTA-DR

689. Like Guatemala, the United States agrees that that the full protection and security obligation under the minimum standard of treatment is limited to police protection. It further concurs that Article 10.5 does not "require States to prevent injury inflicted by third parties," nor oblige "States to guarantee" that investments "are not harmed under any circumstances."[1570] Instead, the full protection and security obligation require States to provide "reasonable police protection against acts of criminal nature that physically invaded the person or property of an alien."[1571]

2. Claimants have not established a violation of the full protection and security obligation

a. There is no evidence that Exmingua was impeded from accessing the Progreso VII site or hindered from accessing the communities residing near Santa Margarita

690. Claimants maintain that due to the blockade at Progreso VII site in early 2016 and the PNC's failure to remove the obstruction, Exmingua was: i) unable to access its laboratory facilities at the Progreso VII site, and ii) "conduct the social studies required for the EIA in furtherance of Exmingua's application of an exploitation license for Santa Margarita."[1572] But as noted in the Counter-Memorial and elaborated further below, nothing in the record indicates obstruction to Progreso VII in early 2016. Nor is there any proof that Exmingua was physically hindered from conducting the social studies for Santa Margarita due to such blockade.

Progreso VII

691. Given the lack of evidence, it is surprising that Claimants have maintained their full protection and security claim. Claimants allege that Exmingua was unable to access the Progreso VII site in early 2016 due to the blockade at the site. But Mr. Kappes says the opposite. While Mr. Kappes alleges that the gate was blocked by protestors, he notes that Exmingua' employees were able to access the site through another path from San Jose del Golfo.[1573] He further admits that the same route was used to deliver "fuel and equipment" to the site.[1574]

692. Given that Claimants have failed to prove that Exmingua was impeded from accessing the Progreso VII site, their full protection and security claim in connection with Progreso VII must be dismissed.

Santa Margarita

[1570] US Non-Disputing Party Submission, ¶23.
[1571] US Non-Disputing Party Submission, ¶23.
[1572] *See* Claimants' Reply, ¶ 508; Claimants' Memorial, ¶118.
[1573] *See* Kappes Statement II, ¶ 75; Kappes Statement I, ¶138.
[1574] *See* Kappes Statement II, ¶ 75; Kappes Statement I, ¶138.

693. Claimants' full protection and security claim with respect to Santa Margarita is similarly unfounded. By in large, the claim rests on the misconceived notion that obstruction to Progreso VII could hinder Exmingua from conducting the social studies required to complete the Santa Margarita EIA.[1575]

694. Claimants fault Guatemala for failing to "remove the blockade" at Progreso VII and provide a list of documents which allegedly proves that access to Progreso VII was obstructed.[1576] They next claim that this blockade prevented Exmingua from conducting "the social studies required" to complete the EIA for Santa Margarita.[1577] Claimants' argument is flawed. The social studies are not conducted at the Progresso VII site but in the surrounding communities of Santa Margarita.[1578] In addition, Santa Margarita could be accessed through routes that do not pass by Progreso VII.[1579]Therefore, had Exmingua intended to complete the social studies for Santa Margarita, it could have done so regardless of any blockade at the Progreso VII site.

695. With respect to the Santa Margarita area, the only evidence presented to this Tribunal to prove the existence of a blockade is a notarial act which documented "EVENTS WITNESSED ON THE ROAD TO THE "SANTA MARGARITA" MINING EXPLORATION RIGHTS SITE."[1580] Citing to this document, Claimants argue that Exmingua was unable to finalize the EIA because "access to the project area has been blocked and the communities opposing the project have made threats." [1581] But the Notary Public, Mr. Josué Martinez, made no statement to that effect. After his 2 hours and 51 minutes trip, Mr. Martinez merely reported of observing "scattered banners and canvases with slogans against mining." [1582]

696. Finding no facts in 2016 to support their claim, Claimants next rely on altercations between Exmingua employees and protestors prior to the critical date. Claimants argue that "Exmingua's consultants were fearful, and thus unable to carry out the consultations" because protestors had threatened Exmingua employees in April and May 2012.[1583] The claim fails for several reasons. *First*, the claim is time barred because the incident occurred prior to the critical date.[1584] *Second*, Claimants have not demonstrated

[1575] Claimants' Memorial, ¶¶ 258-259; Claimants' Reply, ¶ 515; Guatemala's Counter-Memorial, ¶ 449.
[1576] *See* Claimants' Reply, ¶ 366, fn.1112, ¶ 515. *See also*, Gándara, "CIG urges the MEM to not bend over pressure," *La Prensa Libre*, Mar. 11, 2016 (**C-0007**); Geovani Contreras,"Locals from La Puya continue with the protests," *La Prensa Libre*, Mar. 13, 2016 (**C-0009**);Nelton Rivera, "The new camp at the peaceful resistance La Puya," *Prensa Comunitaria Km.* 169, May 19, 2019 (**C-0011**).
[1577] *See* Claimants' Reply, ¶ 508.
[1578] *See* Section II.C.
[1579] *See* Guatemala's Counter-Memorial, ¶ 449; *See* Section II.C.
[1580] Letter from Exmingua to the MEM, attaching Notary Public's Certification dated Mar. 21, 2012 (**C-0013**).
[1581] *See* Claimants' Reply, ¶ 288, citing to Letter from Exmingua to the MEM, attaching Notary Public's Certification dated Mar. 21, 2012 (**C-0013**) (emphasis added).
[1582] Letter from Exmingua to the MEM, attaching Notary Public's Certification (March 21, 2017) **(C-0013)**.
[1583] *See* Claimants' Reply, ¶ 288 citing to Report of the National Civil Police of Guatemala (PNC), Official Letter No. 164-2016/REF/JJGD/dl (May 10, 2016) (**R-0117**).
[1584] See Section IV.C.

causation. There is no evidence that the incidents in 2012 contributed to Exmingua's failure to conduct the consultation. Indeed, Exmingua gave no such reasoning in its letter to MEM.[1585]

b. There is no evidence that Guatemala refused to provide the necessary police protection

Progreso VII

697. Although Claimants allege that the PNC "refused to take reasonable measures to remove the blockade at the Project site," the facts on the record prove the opposite. [1586] From early 2012 up until 2016, Guatemala has provided continuous protection to Exmingua.[1587] Having reviewed several pieces of evidence to that effect, the Constitutional Court rejected the argument that Claimants make here.[1588]

698. In April 2016, Exmingua filed an *amparo* against several agencies of the government, including the PNC, alleging that these entities breached their obligation to protect its constitutional rights.[1589] After reviewing "detailed reports" presented by the challenged authorities, the Constitutional Court held "that all measures necessary to safeguard public order in the Progreso VII Derivada mining project facilities and in areas adjacent thereto" were taken by the relevant authorities.[1590] Because Claimants have not alleged or demonstrated that the Constitutional Court committed a denial of justice, its finding is final and binding here.

699. [redacted] [1591] Pursuant to this order, the PNC deployed a good number of security personnel beginning from January 2016 in the following instances:

- **January 5, 2016**: 15 members of the PNC were deployed.[1592] The Justice of Peace, Mr. Antonio Reyes, held a discussion between the representative of La Puya Resistance and the representative of Exmingua.[1593]The representative of the resistance group informed him that they have no intention to obstruct the site or detain

[1585] *See* Letter from Exmingua to the MEM, attaching Notary Public's Certification dated March 21, 2012 (**C-0013**).
[1586] Claimants' Reply, ¶ 508. *See also*, Claimants' Memorial, ¶ 261.
[1587] *See* Section II.H. See also Guatemala's Counter-Memorial, ¶¶ 447-448.
[1588] *See* Constitutional Court of Guatemala, Case No. 1904-2016, Ruling denying Exmingua's request for an *amparo* against the President, the Ministry of Interior, and the Director General of the National Civil Police (March 2, 2017), p. 6 (**C-0147**).
[1589] *Id*., p. 1 (**C-0147**).
[1590] *Id*., p. 6 (**C-0147**).
[1591] *See* [redacted] **(R-0299)**.
[1592] *See* Report No. 164-2016 issued by the Nacional Civil Police (May 10, 2016), p. 15 (**R-0117**).
[1593] *Id.* at p. 16 (**R-0117**).

Exmingua's employees.[1594]

- **January 6, 2016**: 15 members of the PNC were present.[1595] In addition, the Ombudsman for Human Rights, who was also present at the site, settled a minor altercation between people resisting the Project and Exmingua employees who were trying to enter the Progreso VII site.[1596]
- **January 7, 2016**: about 27 security personnel from PNC were present to maintain order in the area.[1597] The Ombudsman for Human Rights was also present to discuss with the people resisting against the mine.[1598]
- **May 23-26,2016**, members of the PNC secured the entrance to Progreso VII so that Exmingua's employees and construction machineries could freely enter the site.[1599]

700. Considering the documented police protection provided by the PNC, Claimants' reliance on *Copper Mesa v. Ecuador* is misplaced. In *Copper Mesa*, the tribunal held that Ecuador breached its obligation to provide full protection and security because it failed to take any action against the anti-miners that blocked the claimant's mining concession.[1600] Instead of taking such measures, the tribunal noted, the respondent made "the situation even worse, by making it legally impossible, under threat of criminal penalties, for the Claimant to complete" its Environmental Impact Study.[1601]

701. Here, on the contrary, Guatemala provided constant police protection to Exmingua. Unlike Ecuador in the above case, Guatemala promoted rather than restricted Exmingua from completing the EIA by continuously extending the deadline for completing the EIA. In light of these facts, the claim that Guatemala failed in its obligation to provide full protection and security should be dismissed.

Santa Margarita

702. Claimants allege that "the State… has refused Exmingua's pleas for assistance in dispersing the protesters and dismantling the blockade so as to allow Exmingua and its consultant to conduct the social studies necessary for completing its Santa Margarita EIA."[1602] However, Claimants provide no evidence to demonstrate that Exmingua sought assistance from the PNC and the latter refused assistance.

703. Instead, Claimants fault MEM and MARN for allegedly failing to assist Exmingua in conducting the

[1594] *Id.*
[1595] *Id.*
[1596] *Id.*
[1597] *See id*. at pp. 16-17 (**R-0117**).
[1598] *See id*. at p. 18 (**R-0117**).
[1599] *See* Report of the National Civil Police of May 10, 2016, p. 7-12 (**R-0303**); *See also,* Abott, *'Nasty' Protesters Won't Make Guatemalan Gold Mine Disappear, Says CEO,* Vice News (August 4, 2015) (**R-0061)** (noting that "early on Monday, anti-riot units from the Guatemalan National Police were deployed to protect construction materials").
[1600] *Copper Mesa Mining Corp. v. Ecuador*, PCA Case No. 2012-2, Award (March 15, 2016) ¶ 6.83 (**CL-0138**).
[1601] *Copper Mesa Mining Corp. v. Ecuador*, PCA Case No. 2012-2, Award (March 15, 2016), ¶ 6.84 (**CL-0138**).
[1602] *See* Claimants' Reply, ¶ 12.

social studies.[1603] They allege that Exmingua requested MEM to indefinitely suspend the social studies requirement, but the latter failed to respond to this request.[1604] This is false. A few days after Exmingua's request, the MEM issued a letter to Exmingua, noting that "there is no legal basis in the Mining Law" which allows it to indefinitely suspend the requirement.[1605]

704. Claimants' criticism with respect to MARN is similarly unwarranted. On April 7, 2017, Exmingua requested MARN to "[i]ssue recommendations and/or guidelines to continue and complete the Environmental Impact Assessment in regard to the base line update process and the presentation of the project to the community."[1606] By failing to respond to Exmingua's request, Claimants argue, Guatemala hindered Exmingua from completing the EIA and obtaining the exploitation license for Santa Margarita.[1607]

705. The claim lacks any merit. Exmingua did not request MARN to provide physical protection, and even if it did, Claimants provide no legal authority which obliges MARN to provide police protection. Such request should have been made to the PNC. Given that Claimants have not established that Exmingua was unable to carry out the studies because of the blockade in the area or that they sought police protection but were denied assistance, the claim must be dismissed.

c. Neither of the measures taken by MEM, MARN or the Constitutional Court of Guatemala could result in a violation of the obligation to provide full protection and security

706. Although Claimants insist in their Reply that their claim "squarely concerns Guatemala's failure to provide police protection,"[1608] they continue to argue that the action or inactions by MEM, MARN, and the Constitutional Court constitute a breach of full protection and security.[1609] Because this standard is limited to police protection, the claim with respect to the decision-making process of the other organs of the government must be dismissed.

707. Other factors caution against finding international liability based on the national court's interpretation of the national law. As noted in the Counter-Memorial, an act by the judiciary cannot trigger state responsibility unless denial of justice is proven.[1610] Here, Claimants do not allege, let alone prove, that the

[1603] *See id.* at ¶ 520.
[1604] *See id.*
[1605] *See* Official letter No. 5099 of the MEM, attaching Resolution No. 1191 (September 22, 2017) **(C-0014)**
[1606] Letter from Exmingua to the MARN (April 7, 2017) (**C-0015)**.
[1607] Claimants' Reply, ¶ 521.
[1608] Claimants' Reply, ¶ 510.
[1609] *See* Claimants' Reply, ¶¶ 368, 521; Claimants' Memorial, ¶263.
[1610] *See Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award (July 3, 2008), ¶ 106 **(RL-0192)**; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (November 6, 2008), ¶ 191 **(RL-0143)** ("the relevant standard to trigger state responsibility for the [judicial proceedings] are the standards of denial of justice…holding otherwise would allow to circumvent the standards of denial of justice.").

Constitutional Court committed a denial of justice in declining Exmingua's *amparo*. In the absence of such showing, the Tribunal, in line with the majority practice, should refrain from second guessing the Constitutional Court's decision.

708. Even assuming *arguendo* that the full protection and security standard goes beyond police protection, Claimants have failed to demonstrate how the supposed action or inaction of MEM, MARN, and the Constitutional Court amounts to a breach of this standard.

d. Claimants have not established that they suffered damages as a result to the alleged breach

709. Claimants do not dispute that to succeed in their full protection and security claim, they must prove that: (i) they suffered damage as a result to the state's failure to exercise due diligence and that (ii) the damage could have been prevented had the host state exercised due diligence.[1611] However, the Reply makes no such showing, hence, the Tribunal should dismiss the full protection and security claim in its entirety.

Progreso VII

710. Since the operation of Progreso VII was already suspended by the Supreme Court on November 11, 2015, Claimants admit, as they should, that they could not have suffered any harm due to the alleged blockade at the site in early 2016.[1612] In light of this admission, the Tribunal should dismiss Claimants' full protection and security claim with respect to Progreso VII.

Santa Margarita

711. Claimants argue that "Exmingua had legitimate confidence that it would obtain an exploitation license for Santa Margarita" absent Guatemala's breach of full protection and security.[1613] Aside from making such conclusory assertions, Claimants provide no evidence to support their claim. There is no proof that Exmingua, as Claimants allege, was unable to complete the EIA because it was impeded from accessing the communities in Santa Margarita.

712. The lack of causation is expected. Exmingua's failure to complete the EIA was rather based on a few strategic decisions—completely unassociated with the actions or inactions of MEM or MARN. First, Exmingua wanted to prioritize the operation at Progreso VII.[1614] Second, Exmingua's consultant "refused"

[1611] *See Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award (October 12, 2005), ¶ 166 **(RL-0229)**.
[1612] *See* Guatemala's Counter-Memorial, ¶ 455, citing to Tr. Hearing, 216:14-217:14; *See also,* Decision on Preliminary Objections, ¶ 213.
[1613] *See* Claimants' Reply, ¶ 629; fn. 1845.
[1614] *See* Kappes I (Exmingua' consultant, GSM completed the environment studies for the Santa Margarita EIA back in 2011, but the social studies were outstanding, first due to the initial 2012-2014 blockade and then because Exmingua was focused on getting its operation up and running after the nearly two-years delay, before turning back to further exploration,

to conduct consultation based on altercations that occurred in 2012 between protestors and a few Exmingua employees.[1615] Third, Exmingua presumed that there is "no hope of obtaining an exploitation license" because "Exmingua's Santa Margarita exploration license has been *de facto* suspended, just like Exmingua's Progreso VII exploitation license."[1616] It was based on these considerations that Exmingua decided against completing the EIA.

713. Finally, Claimants have not established that had MARN granted Exmingua's request and issued a recommendation or a guideline, whatever that may be, Exmingua would have been able to surpass the alleged blockade and conduct the required social studies. Given the several loopholes in Claimants' allegation of loss, the Tribunal should dismiss their full protection and security claim.

E. Guatemala Did Not Breach Article 10.7 of the CAFTA-DR

714. In its Counter-Memorial, Guatemala summarized the requirements of CAFTA-DR to establish a breach of Article 10.7[1617] and measured Claimants' allegations against these standards. Guatemala pointed out that, at the outset, Claimants failed to identify the investment purportedly subject to expropriation.[1618] Also, in their Reply, Claimants now allege that their case had always been for their lost opportunity to develop the El Tambor project, and that their case had always been for "direct" loss. [1619] This, of course, as the discussion will show, is untrue. In any case, whether it be a claim for "indirect loss" or "direct loss," Guatemala established that Claimants failed to prove all the necessary conditions to successfully claim damages for indirect expropriation.[1620] Guatemala also demonstrated that, under customary international law and the CAFTA-DR, non-discriminatory regulatory actions do not give rise to any liability for

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having its Santa Margarita EIA approved."); Fuentes Report I, ¶ 75 (Exmingua was under an obligation to prepare an EIA to obtain an exploitation mining license for the Santa Margarita area, which it started to prepare in parallel with the EIA for Progreso VII Derivada. However, to date, the EIA could not be completed because, as stated by Claimants, the development of the Progreso VII Derivada area was prioritized and, afterwards, it was physically impossible to approach the neighboring communities due to the obstruction exercised by certain groups, which prevented the completion of the required social studies for the EIA.")

[1615] *See* Claimants' Reply, ¶ 515.

[1616] *See* Claimants' Memorial, ¶ 170.

[1617] Guatemala's Counter-Memorial, ¶ 472: ("To summarize, the Tribunal's decision calculus in assessing Claimant's indirect expropriation involves, *first*, identifying the property rights or interests in the investment and whether the government's actions or series of actions interfere with these rights or interests; *second,* determining whether the alleged actions or series of actions are attributable to Guatemala; *third*, assessing whether the interference rises to the level of expropriation by reference to the treaty's standards, specifically, weighing the economic impact and the character of the assailed government actions or series of actions, and the existence of reasonable investment-backed expectations; and *finally*, in relation to the character of the government action, ascertaining whether the challenged government actions or series of actions constitute nondiscriminatory regulatory actions designed and applied to protect legitimate public welfare objectives. The subsequent discussion will go through this analysis to establish that Guatemala did not breach Article 10.7 of the CAFTA-DR.")

[1618] Guatemala's Counter-Memoria, ¶ 465-466, 483.

[1619] Claimants' Reply, ¶ 456: (The "claim is not one for reflective loss; it is a direct claim.").

[1620] Guatemala's Counter-Memorial, ¶¶ 154-184.

expropriation.[1621]

715. Similarly, Claimants now characterize their expropriation claim as a "creeping expropriation" claim arguing, for the first time, that this Tribunal should not look at the assailed government measures in isolation but in the aggregate.[1622] Claimants also now insist in their Reply that the severity of the economic impact is the decisive criterion to establish indirect expropriation.[1623]

716. Claimants' case is a moving target. Guatemala opposes Claimants' amendments to their cause of action midway into the proceedings not least because these unwarranted changes impede Guatemala's right to present its own case. That Claimants keep on changing the main theories of their case only highlights the weakness of their expropriation case against Guatemala. As the Tribunal will see, no matter how Claimants attempt to reframe and recharacterize their Article 10.7 CAFTA-DR claim, they miserably err—both as a matter of law and fact—in their allegations.

1. Claimants have altered their expropriation claim against Guatemala, impeding Guatemala's right to due process and rendering their claim dismissible

717. It is well-settled that the respondent's right to due process is violated when the claimant fashions its claim as a 'moving target'.[1624] Here, Guatemala's right to present its case is severely impeded by Claimants' constant equivocation as to the identity of their investment and the character of losses of their CAFTA-DR Article 10.16.1(a) claim. For their part, Claimants lament Guatemala's efforts to distinguish between these two kinds of losses, criticizing it as a "reprise of its arguments regarding reflective loss."[1625] Claimants fail to appreciate the need to distinguish between these two concepts. Guatemala distinguished between direct losses and reflective losses in its Counter-Memorial[1626] and continues to do so now because both the *identity of the investment* and the *character of loss* claimed have every bearing on the success of an investment claim. Claimants themselves have admitted that they must properly characterize the nature of their claim at this stage of the proceedings. They admit that "the existence of loss is an issue for the *merits*."[1627]

718. Indeed, the Tribunal has held in its Decision on Preliminary Objections that Claimants have the burden to prove the existence of a causal link to prove their losses under a CAFTA-DR Article 10.16.1(a) claim,[1628]

[1621] *Id.* at ¶¶ 184-191.
[1622] Claimants' Reply, ¶ 420-422.
[1623] *Id.* at ¶ 426.
[1624] *See, e.g.*, *Mr. Franck Charles Arif v. Republic of Moldova,* ICSID Case No. ARB/11/23, Award (April 8, 2013), ¶. 534 (**CL-0126)**.
[1625] Claimants' Reply, ¶ 388.
[1626] Guatemala's Counter-Memorial, ¶¶ 473-492.
[1627] Claimants' Counter-Memorial on Preliminary Objections, ¶ 63 (emphasis added); *See also,* US Non-Disputing Party Submission, ¶ 54: "what is determinant is whether the infringed right belongs to the shareholder or the corporation."
[1628] Decision on Respondent's Preliminary Objections, ¶ 128.

be it one for direct losses or reflective losses. The required proofs of causation for each claim are different.[1629] According to the Tribunal, **direct losses** involve "deprivation of share *ownership* or interference with shareholder *rights*."[1630] **Reflective losses**, on the other hand, involve "the diminution of the value of the shares […] the loss of dividends […] and all other payments which the shareholder may have obtained from the company if it had not been deprived of its funds."[1631] In short, a reflective loss claim entails a claim for "damages for loss of share *value*."[1632] What is more, the Tribunal imposed a double-barreled requirement for Claimants to establish causation for reflective losses. According to the Tribunal, a claim for reflective losses under CAFTA-DR Article 10.16.1(a) requires Claimants to demonstrate: (1) "that a **local enterprise** in which it has an interest **has incurred harm**;" and "that the **claimant itself must have incurred harm**."[1633] In even simpler terms, the Tribunal stated that a claimant must show that it "incurred harm through a chain of events starting with State conduct towards a company in which it holds shares."[1634]

719. To be sure, the Tribunal's distinction is consistent with general international law jurisprudence. In the *Barcelona Traction* case, the International Court of Justice described a shareholder's direct loss claim as one that consists in an infringement of the **shareholder's direct rights**, "including the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation."[1635] The Court affirmed the distinction in its 2010 Judgment in the *Case Concerning Ahmadou Sadio Diallo*.[1636]

720. The same conclusions have been applied in investment law practice. In *Enkev Beheer B.V. v. Republic of Poland,* the tribunal analyzed Polish law to determine the existence and scope of the property rights of a shareholder. The *Enkev* tribunal held that "[i]t **does not accept** that the Claimant's "investment" extends beyond such rights, whether under Article I of the Treaty or under Polish law."[1637] In *Eureko v. Polonia*,

[1629] *Id.* at ¶ 159: As the Tribunal emphasized, "it is acutely alert to the causation and quantum implications of claims for indirect loss, including the additional hurdles of proof that a claimant pursuing such a claim ultimately may face."
[1630] Decision on Respondent's Preliminary Objections, ¶ 128 (emphasis in original).
[1631] Decision on Respondent's Preliminary Objections, fn. 121 *citing* Z. Douglas*, The international law of investment claims* (2009), p. 402 **(RL-0398)**.
[1632] Decision on Respondent's Preliminary Objections, ¶ 128 (emphasis in original).
[1633] *Id.* ¶ 129.
[1634] *Id.* at ¶ 130.
[1635] *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain) Second Phase*, Judgment, I.C.J. Reports 1970, (1970), ¶ 47 (**RL-0006**).
[1636] *Case Concerning Ahmadou Sadio Diallo* (Republic of Guinea v Democratic Republic of the Congo), Judgment, ("Diallo 2010"), ¶ 157 (**RL-0015**): According to the Court, "together with its other assets, including debts receivable from third parties, the capital is part of the company's property, whereas the *parts sociales* [*i.e.*, shareholdings] are owned by the *associés* [shareholders]. The *parts sociales* represent the capital but are distinct from it and confer on their holders rights in the operation of the company and also a right to receive any dividends or any monies payable in the event of the company being liquidated."
[1637] *Enkev Beheer B.V. c. Polonia*, PCA Case No. 2013-01, First Partial Award (April 29, 2014), ¶ 310 (**RL-0249**).

cited by the Claimants to advance their expansive notion of property rights,[1638] the tribunal found that claimant had "rights under an initial public offering" as the amendment to the shares purchase agreement between the Republic of Poland and Eureko, indeed, granted such right to the shareholder.[1639] *Eureko*, in other words, does not maintain – as submitted by Claimants – that "the lost of opportunity" is included *per se* within the notion of property rights.

721. State practice[1640] likewise affirms these principles developed in general international law and investment law jurisprudence. According to the Organisation for Economic Co-operation and Development, "[s]hareholders in companies can be harmed in two broadly different ways. First, they can suffer direct injury to their rights as a shareholder, such as the right to attend and vote at general meetings. Shares may also be expropriated. Second, shareholders (and others) can suffer so-called "reflective loss" through an injury to the company: the market value of the company's shares and/or bonds may fall."[1641]

722. In summary, for a shareholders' **direct loss** claim to prosper, the claimant must show proof of injury to the **shareholders' rights as such, not the rights of the company** which they own. The same rule applies even if the shareholders wholly own the company. Further, the claimant must prove that the purported right exists and accrues to it as a shareholder under the law. On the other hand, **reflective loss** claims require proof of: (1) injury to the **company's rights**; and (2) diminution of value to the shares of the shareholder. Thus, at this stage, Guatemala differentiates between direct losses and reflective losses not as a "reprise" of its arguments to remove the present claim from the Tribunal's jurisdiction. Rather, to demonstrate that proving causation for direct losses and reflective losses entails different evidentiary burdens to establish causation, and that Claimants' inability to make up their mind on the subject and character of their claim prejudices Guatemala's right to present its case.

723. As to the ***investment at issue***, Guatemala had already pointed out in its Counter-Memorial[1642] that, in Claimants' earlier submissions, they had identified their shares in Exmingua as the investment at issue.[1643] Now, in their Reply, Claimants argue that the opportunity to develop the El Tambor project "is appurtenant

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[1638] Claimants Reply, ¶ 401 ("In *Eureko v. Poland*, for example, the tribunal held that the lost opportunity in acquiring additional shares is an investment based on an agreement, was equivalent to an expropriation).
[1639] *Eureko B.V. v. Polonia*, UNCITRAL, Partial Award (August 19, 2005), ¶¶152-153 (**CL-0125**).
[1640] Gaukrodger, D. (2013), *"Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency"*, OECD Working Papers on International Investment, 2013/03, OECD Publishing, p. 3 (**RL-0056)**: The OECD reached this conclusion through "a series of questions for discussion [that had] been discussed by governments participating in an OECD-hosted investment roundtable."
[1641] Gaukrodger, D. (2013), *"Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency"*, OECD Working Papers on International Investment, 2013/03, OECD Publishing, p. 7 (**RL-0056)**.
[1642] Guatemala's Counter-Memorial, ¶¶ 466, 473.
[1643] Claimants' Notice of Arbitration (November 9, 2018), ¶ 20 ("The Investors' investment in Exmingua, moreover, qualifies as an "investment" under the CAFTA-DR, as it is in the form of shares.")

to their shareholding in Exmingua, which holds validly-granted licenses under Guatemalan law for the exploitation and exploration of Progreso VII and Santa Margarita, respectively."[1644] On the basis of *Bilcon v. Canada*, Claimants assert that the opportunity to develop the El Tambor project belongs to Claimants *themselves* and *not* to Exmingua.[1645]

724. As to the ***character of the loss*** claimed, in their Rejoinder on Preliminary Objections, Claimants categorically admitted that "**Claimants' claims were for "reflective" loss**."[1646] They also acknowledged that, for a reflective loss claim to succeed, they must be able to prove "diminution of the value of Claimants' investment (Exmingua) and, therefore, the diminution of the value of Claimants' shares in Exmingua."[1647] Based on Claimants' submissions, the Tribunal noted in its Decision on Preliminary Objections that "Claimants state that they seek damages for the ***diminution in the value of their shares in Exmingua***."[1648] Yet, from Claimants' earlier characterization of their claim as one for reflective losses, they now contend in their Reply that their "**claim is not one for reflective loss; it is a direct claim**."[1649] They assert that, because they wholly own Exmingua, "*only* the shareholder (and **not the investment itself**) suffers a loss when a wholly-owned investment is expropriated."[1650] According to Claimant, as their claim is a direct claim, they "***need not*** show a diminution in the ***value of its shares in [Exmingua]***."[1651]

725. Applying these standards, Claimants' present expropriation claim is no longer the same as—and indeed contradictory to—its original claim alleged in its Notice of Arbitration registered with the ICSID. The elements of causation for each kind of claim are evidently different such that a claim can only *either* be one for direct losses *or* for reflective losses, but *not both*. These claims are mutually exclusive. Here, as shown above, Claimants' CAFTA-DR Article 10.16.1(a) claim has mutated into different, contradictory claims in every written submission they filed before this Tribunal.[1652]

[1644] Claimants' Reply, ¶ 399.
[1645] Claimants' Reply, fn. 1853; *See also* Guatemala's Counter-Memorial on Preliminary Objections, ¶ 60.
[1646] Rejoinder on Preliminary Objections, ¶ 73 (emphasis added).
[1647] Rejoinder on Preliminary Objections, ¶ 61. *See also* Counter-Memorial on Preliminary Objections, ¶ 57.
[1648] Decision on Respondent's Preliminary Objections, ¶ 98.
[1649] Claimants' Reply, ¶ 456 (emphasis added).
[1650] *Id.*
[1651] *Id.*
[1652] Claimants' first characterization of their case is a claim for reflective losses for the loss of value of their shares in Exmingua. (*See* Claimants' Notice of Arbitration November 9, 2018, ¶ 20 ("The Investors' investment in Exmingua, moreover, qualifies as an "investment" under the CAFTA-DR, as it is in the form of shares."); Decision on Respondent's Preliminary Objections, ¶ 98: ("Claimants state that they seek damages for the diminution in the value of their shares in Exmingua."); Rejoinder on Preliminary Objections, ¶ 7: ("Claimants' claims were for "reflective" loss.") Claimants made no mention at all any alleged lost opportunity to develop the Tambor project. The second variant is a claim for reflective losses for *their* (not Exmingua's) lost opportunity to develop the Tambor mining project. (*See* Memorial, ¶¶ 144, 364. *See also* Memorial, Summary of Claimants' Damages, ¶ 399: ("Summing the damages from Claimants' lost profits from the

726. Claimants cannot, as a matter of due process, change their claim midway into the proceedings. This alteration in the claim is in itself a ground for the Tribunal to dismiss the claim. In *Lotus Holding v. Turkmenistan*, the tribunal recently held that, if a claimant "has purported to modify its claim in a manner that is not permitted by the principle set out in ICSID Arbitration Rule 40 [on the making of ancillary claims], and has transformed the original claim into a new claim materially different from that set out in the Request for Arbitration, **the Tribunal *cannot* make its decision** under ICSID Arbitration Rule 41(5) **by focusing on the new claim**."[1653] Rule 41(5) governs the procedure for resolving preliminary objections. If, as the tribunal held in *Lotus*, a claim cannot be altered at the early preliminary objection stage, then with more reason that this Tribunal cannot render an award on a claim that has been modified at the liability and damages stage. At the outset, therefore, and without even having to delve into the merits, the Tribunal should already dismiss the present expropriation claim as it is no longer the same claim alleged in the Notice of Arbitration registered before ICSID.

727. Be that as it may, and without prejudice to Guatemala's right to seek dismissal of the claim for violation of its right to present its case, Guatemala will demonstrate in the following Sections that Claimants failed to prove the existence of expropriation no matter how they make it into a moving target. Guatemala will first address Claimants' misguided arguments on treaty interpretation.

2. The Tribunal can rely on U.S. takings law and practice for purposes of interpreting the CAFTA-DR

728. Claimants lament Guatemala's reliance on U.S. takings law in interpreting Article 10.7 of the CAFTA-DR.[1654] *First*, it is not true, as Claimants seem to imply, that Guatemala is relying *solely* on U.S. law to interpret the CAFTA-DR. Guatemala pointed out that "[t]he text of CAFTA-DR, of course, is the starting point."[1655] As Guatemala stressed—and Claimants do not argue otherwise—"unlike many other international investment agreements, the CAFTA-DR took pains to enumerate the factors upon which a finding of indirect expropriation should rest."[1656] Guatemala also pointed out that, "*in contrast*" to other treaties involved in the awards cited by Claimants, Annex 10-C.4(a) of the CAFTA-DR "*enjoins this*

Operating Mine, as well as the value of the Known Exploration Potential and the Exploration Opportunity, Claimants' damages as of March 31, 2020 are between US$ 403 million to US$ 450 million.") The third and most recent permutation is a claim for direct losses for *their* (not Exmingua's) lost opportunity to develop the Tambor mining project appurtenant to their shares. (*See* Reply, ¶ 399: ("Claimants' lost opportunity to further develop the Tambor Project is a property right that is appurtenant to their shareholding in Exmingua."); Claimants' Reply, ¶ 456: (The "claim is not one for reflective loss; it is a direct claim.")

[1653] *Lotus Holding Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/17/30, Award (April 6, 2020), ¶ 193 (**RL-0360**) (emphasis added).

[1654] Claimants' Reply, ¶ 390-395.

[1655] Guatemala's Counter-Memorial, ¶ 462.

[1656] *Id.* at ¶ 470.

Tribunal to consider" other factors.[1657] Guatemala referred to U.S. case law insofar as it influenced the conclusion of the CAFTA-DR if only to bolster its textual interpretation. Thus, "[i]n addition to the text of the treaty," the Tribunal should also apply the aids to interpretation set out in Articles 31 and 32 of the Vienna Convention and also take into account any relevant rules of international law applicable in the relations between the parties.[1658]

729. Here, there is no confusion between Article 31 and Article 32 of the VCLT in Guatemala's treaty interpretation. Guatemala's position is that, whether from the viewpoint of Article 31 or Article 32 of the VCLT, the Tribunal can rely on U.S. case law and practice to inform itself of the State Parties' shared understanding of the content of Article 10.7 and Annex 10-C of the CAFTA-DR. Article 31 requires the Tribunal to look at the context, object, and purpose of the treaty. Outside of the text of CAFTA-DR, its context, object, and purpose can be inferred from certain objective factors, such as, "the type of event, document, or instrument and its legal nature; temporal relation of the circumstance to the conclusion of the treaty; actual knowledge or mere access to a published act or instrument; subject matter of the document, instrument, or event in relation to the treaty provision to be interpreted; and whether or how it was used or influenced the negotiations of the treaty."[1659]

730. Here, Claimants do not dispute the objective factors, as Guatemala alleged in its Counter-Memorial. The first objective factor is that Annex 10-C of the CAFTA-DR is an exact copy of Annex B of the 2004 US Model BIT.[1660] Also, Guatemala has argued, and the Claimants do not assert otherwise, that the U.S. Congress would not have passed the CAFTA-DR if it found the Agreement in violation of its own instruction in the Bipartisan Trade Promotion Authority Act of 2002 for the government "[seek] to establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice."[1661] These are objective factors that the State Parties knew or had access to when they were negotiating the CAFTA-DR and, as the USTR confirms, actually shaped the conclusion of the

[1657] *Id.* at ¶533. *See also* ¶532 ("However, Annex 10-C.4 of the CAFTA-DR, unlike many other international investment agreements, enumerates, albeit not exclusively, certain factors that this Tribunal should apply in assessing the presence of indirect expropriation. Too, it must be recalled, as explained above, that Annex 10-C was negotiated by the U.S. Government to be consistent with its legal principles and practices, specifically those embodied in the U.S. Supreme Court's decisions in *Penn State* and *Tahoe* and is a textual replica of the U.S. Model BIT Treaty.")
[1658] Guatemala's Counter-Memorial, ¶ 462.
[1659] Guatemala's Counter-Memorial, ¶ 463, *citing* EC-Chicken Cuts, WT/DS269/AB/R WT/DS286/AB/R (12 September 2005), ¶¶ 290–291 **(RL-0399)**.
[1660] Guatemala's Counter-Memorial, ¶ 470, *citing* Annex B Expropriation of the 2004 U.S. Model BIT (**RL-0011**).
[1661] Guatemala's Counter-Memorial, ¶ 464, *citing* Trade negotiating objectives, 19 U.S.C § 3802 **(RL-0232)**.

Treaty.[1662]

731. Meanwhile, Article 32 of the VCLT allows the Tribunal to examine "the circumstances of the conclusion of a treaty." As Prof. Ian Sinclair has posited, a treaty interpreter must "bear constantly in mind the historical background against which the treaty has been negotiated."[1663] Again, Claimants do not assert that the historical background of a treaty cannot be used a supplementary means of interpretation. Claimants' only quarrel with Guatemala is their flimsy excuse that none of the prerequisites under Article 32 of the VCLT for the Tribunal to resort to these supplementary means of interpretation have been shown to exist,[1664] in effect admitting that this Tribunal can refer to U.S. case law and practice at the time of the conclusion of the CAFTA-DR on the basis of Article 31 of the VCLT. In any case, the divergence of views between the parties[1665] is the best evidence of ambiguity contemplated in Article 32 of the VCLT that would allow the Tribunal to resort to U.S. case law and practice as supplementary means of interpreting the CAFTA-DR.

732. *Second*, Claimants insist that the Tribunal cannot rely on unilateral interpretations of one State Party to inform the Tribunal's interpretation of CAFTA-DR. Guatemala is not making the submission that this Tribunal should interpret CAFTA-DR because that is how the United States, as a State Party to CAFTA-DR, has interpreted the Treaty. That is a gross oversimplification of Guatemala's position. Rather, Guatemala's argument is that U.S. case law, legal principles, and practice are relevant to the interpretation of the CAFTA-DR because the State Parties knew or ought to have known these matters and had actually influenced the conclusion of the Treaty. The Non-Disputing Party Submission of the United States presented before this Tribunal all the more confirms, as Guatemala has argued, that: (1) the first step in any expropriation analysis must begin with an examination of whether there is an investment capable of being expropriated;[1666] (2) only direct loss or damage suffered by shareholders is cognizable under customary

[1662] USTR Final Environmental Review, p. 30 **(R-0140)** ("The expropriation provisions [in the CAFTA-DR] have been clarified in an annex to ensure that they are consistent with U.S. legal principles and practice."). *See also* J. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford: OUP, 2013), p. 351.
[1663] Guatemala's Counter-Memorial, ¶ 463 *citing* Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., (Manchester University Press, 1984), p. 141 **(RL-0401)**.
[1664] Claimants' Reply, ¶¶ 391-392.
[1665] Claimants argue, among others, that the CAFTA-DR does not impose on them a ""heavier burden […] to establish indirect expropriation" under the Treaty relative to making a showing under other treaties where the factors listed in Annex 10-C(4) are not specifically articulated." (Claimants' Reply, ¶ 395) Guatemala argues, on the other hand, that "unlike many other international investment agreements, the CAFTA-DR took pains to enumerate the factors upon which a finding of indirect expropriation should rest. […] Suffice it to state for the moment that these cases, consistent with the weight of authority in investment arbitration, impose a heavier burden on the Claimants to establish indirect expropriation under the CAFTA-DR relative to other treaties where these factors are not articulated." (Guatemala's Counter-Memorial, ¶ 470).
[1666] U.S. Non-Disputing Party Submission, February 19, 2021, ¶ 41.

international law,[1667] and that loss of opportunity is not an instance of direct loss;[1668] (3) decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants do not give rise to a claim for expropriation under Article 10.7;[1669] and (4) an adverse economic impact "standing alone, does not establish that an indirect expropriation has occurred,"[1670] rejecting Claimants' insistence on the application of the sole effects doctrine to assess a CAFTA-DR expropriation claim. El Salvador, on the other hand, affirms that "the claimant has the burden to rebut the strong presumption created in CAFTA-DR that a State's nondiscriminatory regulatory measures designed to protect the environment do not constitute an indirect expropriation."[1671] It bears repeating, as was argued elsewhere in this Rejoinder, that non-disputing state party submissions assist the tribunal in understanding the intention behind the agreements and, hence, are given "special significance."[1672]

733. *Third*, while Claimants are adamant that there is "no reason to interpret the Treaty by reference to U.S. law,"[1673] they fail to offer any clear alternative. What Claimants do, instead, is rely purely on academic scholarship and investment tribunal awards. Academic scholarship and prior awards, however, are not tools of treaty interpretation whether under Article 31 or 32 of the VCLT. They are not more useful than U.S. case law and legal principles to the extent that they formed part of the negotiation history of the CAFTA-DR. Quite the opposite, "[c]oncatenations of abstract propositions abound in academic writing, but seldom provide a *ratio decidendi*,"[1674] as Jan Paulsson opines. With regard to arbitral awards, the governments of El Salvador, the United States, and the Dominican Republic all caution against arbitral decisions as the basis for treaty interpretation, and for good reason. It is well-established that there is no *stare decisis* in international arbitration, and so this Tribunal has no obligation to follow precedents.[1675]

734. To be sure, Guatemala does not assert here that academic scholarship and arbitral awards cannot guide this Tribunal's interpretation of the CAFTA-DR, as even Guatemala refers to them too. What Guatemala

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[1667] U.S. Non-Disputing Party Submission, February 19, 2021, ¶ 53.
[1668] U.S. Non-Disputing Party Submission, February 19, 2021, ¶ 55: ("Examples of claims that would allow a shareholding investor to seek direct loss or damage include where the investor alleges that it was denied its right to a declared dividend, to vote its shares, or to share in the residual assets of the enterprise upon dissolution. Another example of a direct loss or damage suffered by shareholders is where the disputing State wrongfully expropriates the shareholders' ownership interests – whether directly through an expropriation of the shares or indirectly by expropriating the enterprise as a whole.")
[1669] U.S. Non-Disputing Party Submission, February 19, 2021, ¶ 48.
[1670] *Id.* at ¶ 43.
[1671] El Salvador Non-Disputing Party Submission, February 19, 2021, ¶ 25.
[1672] Claimants' Counsel agrees. *See* Andrea Menaker, Treatment of Non-Disputing State Party Views in Investor-State Arbitrations, pp. 1-2 (**RL-0395**).
[1673] Claimants' Reply, ¶ 395.
[1674] *Westmoreland Coal Company v. Government of Canada*, ICSID Case No. UNCT/20/3, Expert Report of Jan Paulsson (February 26, 2021), ¶ 65 (**RL-0402**), *emphasis added*.
[1675] *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment (July 14, 2015), ¶ 170 (**RL-0403**).

does not and cannot accept is Claimants' blanket refusal to accord any weight at all to U.S. takings law even when it sheds light on the object and purpose of CAFTA-DR, and forms part of the context and the circumstances of the conclusion of Article 10.7 and Annex 10-C of the CAFTA-DR. Further, previous arbitral awards can only assist but cannot bind this Tribunal,[1676] especially when "the parties, the underlying treaties, the legal arguments and the evidence" are different from the treaty and the facts under examination.[1677] This is the same reason why Guatemala painstakingly went through each award the Claimants cited in their Memorial and distinguished them from their claim before this Tribunal. By the same token, this Tribunal is urged to look at the *ratio decidendi* and not merely at the tribunal's holding in prior awards should it rely on them for its decisions.[1678]

3. Absent denial of justice, collusion, bad faith, or similar grave circumstances, the actions of the courts of Guatemala cannot be attributed to the State of Guatemala or otherwise do not constitute a breach of the CAFTA-DR.

735. In its Counter-Memorial, Guatemala argued that a State cannot be held liable for the acts of its judiciary absent a finding of denial of justice. Guatemala referred to the learned Judge Tanaka of the International Court of Justice who opined that "a State by reason of the independence of the judiciary, in principle, is immune from responsibility concerning the activities of judicial organs."[1679] Claimants, however, attempt to downplay the weight of Judge Tanaka's views because "[his] observations were made in his separate opinion" in *Barcelona Traction*. Guatemala also cited *Loewen v. United States* where the NAFTA tribunal was categorical that "a claim alleging an appropriation in violation of Article 1110 can succeed ***only*** if Loewen establishes a denial of justice under Article 1105."[1680]

736. Additionally, Guatemala cited the award in *Azinian v. Mexico* which held that, for the actions of the court to be attributable to the State, "***[m]ore is required***; the Claimants must show either a denial of justice, or a

[1676] *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on Jurisdiction (May 17, 2007), ¶ 56 (**RL-0404**).
[1677] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment (April 5, 2016), ¶ 237 (**CL-0100**).
[1678] Prof. Jan Paulsson has cautioned: "[…] Arbitrators with no grounding in the law of jurisdictions which follow the rule of *stare decisis* tend to be undisciplined when they refer to what they conceive of as "precedents"; they have not read the locus classicus, Precedent in English Law (Cross & Harris), and **have little feeling for the distinction between the holding of a case and an adjudicator's incidental observations**. […] [W]hile future arbitrators may and do consider everything put before them, it is clear that the greater weight they intend to signify when they refer to "precedents" **should be limited to matters of *ratio*** […]" *See Westmoreland Coal Company v. Government of Canada*, ICSID Case No. UNCT/20/3, Expert Report of Jan Paulsson (February 26, 2021), ¶¶ 65, 67 (**RL-0402**) (emphasis added).
[1679] Barcelona Traction, Judge Tanaka Separate Opinion, p. 153 **(RL-0307)**.
[1680] *Loewen Group, Inc. y Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), ¶ 141 (**CL-0170**), *emphasis and underscoring supplied*. *See also MNSS BV and Recupero Credito Acciaio NV v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (May 4, 2016), ¶ 370 (**CL-0015**) where the tribunal held that a "court decision cannot be considered a direct expropriation *unless* a denial of justice is found."

pretense of form to achieve an internationally unlawful end."[1681] Consistent with *Azinian*, Guatemala made reference to other cases which, *despite* holding that denial of justice is not required, still buttressed the view that "more is required" to attribute court acts to the State.[1682]

737. In response, Claimants maintain that denial of justice is not required to attribute the acts of the courts to the State. Claimants refer to the award in *Karkey v. Pakistan* as authority for their view.[1683]

738. *First*, Judge Tanaka's views are being offered not because of the facts and issues peculiar to *Barcelona Traction* but due to the weight of his views as a highly qualified publicist in international law. Claimants are forgetting that the Judges of the Court are required to "possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law."[1684] Claimants themselves ask the Tribunal to follow the views forwarded by an academic[1685] and two arbitration practitioners.[1686] Why this Tribunal should accord weight to their views to prove customary international law but not to the separate opinion of a former Judge of the International Court of Justice, Claimants do not explain.

739. Past tribunals have, in fact, relied on separate opinions, including those of Judge Tanaka, as proof of customary international law.[1687] The United States, which is a Contracting Party to the CAFTA-DR and, as discussed above, whose takings law had influenced the conclusion of the Treaty, look to Judge Tanaka as well.[1688] The Tribunal is urged to give weight to Judge Tanaka's opinions corresponding to his stature as a highly qualified publicist of international law.[1689]

[1681] *Azinian v. Mexico,* ICSID Case No. ARB(AF)/97/2, Award (November 1, 1999), ¶ 98 **(CL-0144)**.
[1682] Guatemala's Counter-Memorial, ¶¶ 498-503 *citing Swisslion v. Macedonia*, ICSID Case No. ARB/09/16, Award (July 6, 2012), ¶ 314 (**CL-0119**): ("Since there was no illegality on the part of the courts, the first element of the Claimant's expropriation claim is not established); *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (April 8, 2013) ¶ 415 (**CL-0126**). ("The Tribunal is not persuaded that there has been collusion between the courts.").
[1683] Claimants' Reply, ¶ 410 *citing Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award (Aug. 22, 2017) (**CL-0217**).
[1684] Statute of the International Court of Justice, Article 2 **(RL-0405)**.
[1685] *See* Claimants' Reply, fn. 1209.
[1686] *Id*.
[1687] *Ambiente Ufficio S.p.A. v. Argentine Republic* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Liability (February 8, 2013), ¶ 599 (**CL-0181**) *citing* the Separate Opinions of Judge Tanaka and of Judge Gros in *Barcelona Traction, Light and Power Company, Limited (Second Phase), Judgment*, ICJ Reports 1970, to conclude that "[an] exception to the local remedies rule, the so-called futility rule, is now universally recognized in the law of diplomatic protection." **(RL-0307)**; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, November 30, 2018, ¶ 431 (**RL-0406**) *citing* the Dissenting Opinion of Judge Tanaka in *South West Africa (Ethiopia v. South Africa), Second Phase,* I.C.J. Reports 1966, July 18, 1966*,* for the principle of non-discrimination which requires a State to treat equally what is equal but it does not require a State to treat equally that which is different **(RL-0407)**.
[1688] U.S. Non-Disputing Party Submission, February 19, 2021, ¶ 20.
[1689] Statute of the International Court of Justice, Article 38(1)(d): "[T]he teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." **(RL-0405)**.

740. *Second*, *Karkey v. Pakistan* does not support Claimants' position at all. In *Karkey*, the tribunal noted that "**Pakistan *accepts*** that the ***acts of the Supreme Court***, MoWP and the NAB **are attributable to the State**."[1690] Hence, the tribunal's discussion about denial of justice centered ***not*** on attribution, but on whether "[d]eficiencies relating to the substance of the Judgment […] may amount to a **breach** of international law," even if "such deficiencies [do not] amount to a denial of justice."[1691] Attribution and breach are two separate, but cumulative elements of an internationally wrongful act.[1692]

741. Assuming that the Tribunal agrees with Claimants' position, however, it is still not enough that the judiciary's actions are "manifestly wrong" to establish breach on the basis of court actions. Claimants concede as much, on the basis of *Azinian*, that they have the duty to prove, if not denial of justice, then at least "a pretence of form to achieve an internationally unlawful end."[1693] By Claimants' own admission, something "more is required" than that the Supreme Court's and the Constitutional Court's decisions were "manifestly wrong"[1694] to hold the State liable for the acts of its judiciary. In the recent decision in *Infinito Gold v. Costa Rica,* the tribunal held that "Costa Rica can be held internationally liable as a result of the decisions of tribunals even if it does not amount to denial of justice."[1695] However, on the issue of breach of the treaty's expropriation standard, the tribunal held that a court decision cannot be characterized as an expropriatory measure because bad faith was not established. According to the tribunal, "[h]ad [the court's] decision been rendered in ***bad faith***, ***in order to deprive Industrias Infinito of a validly held concession***, **it would have been open to the Tribunal to assess whether it was expropriatory**. However, this is not the case here: […] the 2011 Administrative Chamber Decision cannot be characterized as a denial of justice, nor was it fundamentally arbitrary or unfair."[1696]

742. In all, *Infinito Gold* and the cases earlier cited by Guatemala prove that absent denial of justice, collusion, bad faith, or similar grave circumstances, the courts' acts, even if they are found to be "manifestly wrong," cannot be attributed to the State of Guatemala and cannot amount to a breach of international law - "something more" is required.

743. As a matter of fact, Guatemala has also showed that "the courts of Guatemala interpreted and applied the

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[1690] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award (August 22, 2017), ¶ 564 (**CL-0217**).
[1691] *Karkey Karadeniz Elektrik Uretim A.S.*, Award, ¶ 550 (**CL-0217**).
[1692] Articles of State Responsibility for Internationally Wrongful Acts, Article 2 **(RL-0408)**.
[1693] Claimants' Reply, ¶ 408.
[1694] Claimants' Memorial, ¶ 74 ("As Prof. Fuentes explains, the Supreme Court's decision to grant the amparo provisional was manifestly wrong, both procedurally and substantively."); *Id.* ¶ 137 ("The Constitutional Court's ruling dated 11 June 2020 was manifestly wrong on all these counts.)
[1695] *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, ¶ 718 (**RL-0397**).
[1696] *Id.*

laws of Guatemala legitimately, in good faith, and with a rational basis."[1697] For their part, Claimants contend "that Guatemala has not even attempted to defend its courts' decisions on the merits."[1698] What Claimants would have this Tribunal do, in other words, is to venture into the correctness of the Guatemalan courts' decisions; a power that this Tribunal, with all due respect, does not enjoy. Guatemala has impressed upon this Tribunal, as a matter of customary international law, that arbitral tribunals do not possess appellate jurisdiction over the courts of Guatemala.[1699] The Claimants' burden is to establish the courts' decisions "surprising, shocking, or exhibits a manifest lack of reasoning."[1700] Here, far from being unreasoned or rendered in bad faith, the decisions of the Guatemalan courts are all grounded in law[1701] (in fact, no less than on the Guatemalan Constitution),[1702] supported by precedent,[1703] demanded by the courts' obligations to comply with the State's international obligations,[1704] and attended by circumstances peculiar to those decisions.[1705]

744. *Third*, Claimants' new characterization of their indirect expropriation claim as one of "creeping expropriation" all the more seals their admission that something "more is required" to hold the State liable for the acts of its judiciary. It is not enough that the decisions are just "manifestly wrong," if at all. An allegation of creeping expropriation entails that Claimants prove a chain of events between and among the acts of the Guatemalan judiciary and the other branches of government. This chain of events may be established by showing a "clear linkage,"[1706] a "common thread weaving together each act or omission into a single conduct attributable to the Respondent," a "converging action towards the same result, *i.e.*

[1697] Guatemala's Counter-Memorial, ¶¶ 513-523.
[1698] Claimants' Reply, ¶ 531.
[1699] Guatemala's Counter-Memorial, ¶ 514.
[1700] *Id. citing Glamis Gold Ltd*., Award, ¶¶ 616-617, 762, 779. (**RL-0041)**.
[1701] Guatemala's Counter-Memorial, ¶ 516: ("The Republic of Guatemala ratified ILO Convention 169 on June 5 1996. They also admit that ILO Convention 169 vests indigenous peoples with "the right to be consulted: (i) "whenever consideration is being given to legislative or administrative measures which may affect them directly," and (ii) prior to the exploration or exploitation of mineral or sub-surface resources.")
[1702] Guatemala's Counter-Memorial, ¶ 588: ("Claimants knew, or at least they ought to have known, that the ILO Convention 169 has been part of the legal framework of Guatemala since its ratification in 1996. Article 46 of the Political Constitution of the Republic of Guatemala makes all treaties to which Guatemala is a party, especially those dealing with human rights, directly applicable in the State without need of further executive or legislative action; treaties even have preeminence over domestic law.")
[1703] Guatemala's Counter-Memorial, ¶¶ 519- 520.
[1704] Guatemala's Counter-Memorial, ¶¶ 520-521.
[1705] Guatemala's Counter-Memorial, ¶ 635: ("In the Exmingua case, the Court took note of the serious conflicts emerging in the area that "have endangered the lives and security of the inhabitants of the applicable municipalities," and, in its discretion, maintained the suspension until the consultations were complete.")
[1706] *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (August 22, 2016), ¶ 230 (**CL-0204**).

depriving the investor of its investment."[1707] For instance, in *Rumeli v. Kazakhstan*, expropriation would not have been found were it not for the evidence that the court process was borne out of improper collusion between the State and the third party beneficiary.

745. At this juncture, Guatemala maintains that Claimants' belated characterization of their claim as one for creeping expropriation is not permitted under the ICSID Arbitration Rules. Claimants did cite to cases about creeping expropriation in their Memorial.[1708] However, it is only in their Reply that Claimants alleged that the acts of Guatemala's judiciary must be assessed not in isolation from the "acts and omissions of the executive (including the President of Guatemala, MEM, MARN, and the National Police),"[1709] but all these acts or omissions "in the aggregate."[1710] This development in Claimants' arguments is consistent with Claimants' attempts to create a moving target out of their expropriation claim, and should not be entertained by the Tribunal. In any case, as the ensuing discussion will show, there is no sufficient evidence of creeping expropriation, no matter the investment at issue or the character of the claim, in this dispute.

4. No matter how Claimants frame their expropriation claim, they failed to prove that the alleged acts constitute indirect expropriation under the CAFTA-DR.

746. At this point, there are already ample reasons for the Tribunal to dismiss Claimants' expropriation claim. *First*, Claimants' current claim is no longer the same claim that Claimants instituted in their Notice of Arbitration registered before the ICSID. Claimants initiated a dispute against Guatemala for *reflective losses* for the alleged *diminution of the value of their shares in Exmingua*, not a claim for *direct losses* for their *purported opportunity to develop the El Tambor mining project appurtenant to their shares*. Customary international law, investment case law, and State practice all confirm that these two claims are mutually exclusive. Further, Claimants, *for the first time* in their Reply, are asking the Tribunal to assess the assailed executive and judicial acts as a composite act, in aggregation and not in isolation. The Tribunal should not shut its eyes to Claimants' blatant disregard for procedural rules and Guatemala's right to due process.

747. *Second*, under customary international law, the acts of the Supreme Court and the Constitutional Court cannot be attributed to the State of Guatemala, even if they are "manifestly wrong"; something "more is required," as even Claimants themselves admit. Unless there is proof of denial of justice, or at the least, collusion, bad faith, pretence of form to achieve an internationally unlawful end, or other similar grave

[1707] *Técnicas Medioambientales Tecmed, SA v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003), ¶ 62 **(CL-0122)**.
[1708] Claimants' Memorial, fn. 362 and 380.
[1709] Claimants' Reply, ¶ 406.
[1710] *Id.* at ¶ 405.

circumstances, customary international law prevents liability (whether attribution or breach) from attaching to the State of Guatemala for its courts' judgments, assuming these judgments are even "manifestly wrong."

748. These are all independent reasons for the Tribunal to dismiss the Claimants' expropriation claim without need of going any further into its merits. In any event, irrespective of how Claimants frame their claim as one for direct losses or reflective losses, Claimants were unable to establish any of the factors under Annex 10-C of the CAFTA-DR for their expropriation claim to prosper. As Guatemala has argued in its Counter-Memorial, and further elaborated below, the acts complained of by Claimants, whether in isolation or in aggregate, do not constitute indirect expropriation.

a. Claimants' creeping expropriation claim fails without proof that there is a clear linkage and a converging action among the alleged acts of interference to deprive Claimants of their investment.

749. Claimants criticize Guatemala for purportedly isolating each and every act of alleged interference to deny expropriation. Specifically, as to the acts of the judiciary, Claimants contend that there is "no need for the Tribunal to review the propriety of the judicial conduct in isolation from the entire chain of events."[1711] Advocating a fresh standard not earlier argued in their Memorial, Claimants now want this Tribunal to assess the alleged acts of interference "in the aggregate."[1712] They try to make the case now that "Guatemala's conduct towards Claimants' investments in Exmingua are reminiscent of the "illegitimate 'campaign'" […] [that] leads to an inexorable conclusion of indirect expropriation."[1713]

750. *First*, Guatemala has already advocated above, and consistent with customary international law in assessing allegations of composite acts like creeping expropriation, there must be "a series of acts leading in the same direction [that] could result in a breach at the end of the process of aggregation."[1714] In this case, other than Claimants' broad assertion of an "illegitimate campaign" against Exmingua and their still unsubstantiated claim that the Guatemalan courts were "driven by … political interference,"[1715] Claimants have failed to allege, much less prove, that the alleged acts of interference complained of are driven by a converging action to deprive them of their investment. Quite the opposite, Claimants' own allegations negate any finding of such a clear linkage or converging action.

751. By Claimants' own admission, the MEM had earlier defended the issuance of an exploitation license in

[1711] Claimants' Reply, ¶ 406.
[1712] *Id.* at ¶ 405.
[1713] *Id.* at ¶ 422.
[1714] *Société Générale in Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction (September 19, 2008), ¶ 91 (**RL-0409**).
[1715] Claimants' Memorial, ¶ 133.

their favor[1716] and that the "MEM repeatedly expressed its disagreement with the Supreme Court's ruling" suspending that license.[1717] That the MEM, an executive agency separate from the judiciary, initially took up the cudgels for Claimants belies any sort of a clear linkage and converging action between the acts of the executive agencies and the judiciary to deprive Claimants of their purported opportunity to exploit the Progreso VII mine. The MEM's subsequent suspension of the exploitation license through Resolution No. 1202, meanwhile, was nothing more than compliance with the Supreme Court's order to do so.[1718] If the MEM had not complied with such order, it would have acted in complete defiance of a standing lawful order from the court, exposing the relevant authorities to administrative and criminal liability.[1719]

752. As to the Santa Margarita mine, Claimants readily concede that they suspended exploration activities not because of a government order for them to do so, but as an exercise of their own business judgment. According to them, "no investor would conduct exploration work and the market will assign no value to an exploration license unless that investor has legitimate confidence that it will obtain an exploitation license if it proves an economically viable deposit."[1720] This statement is pregnant with an admission that the suspension of the exploration activities for Santa Margarita was borne out of their own business decision, and not as a direct result of any governmental action, negating the element of attribution under Article 2 of the Articles of State Responsibility.

753. That Claimants cannot make any connection between their own suspension of the exploration license and the other alleged governmental acts of interference[1721] is buttressed by the fact that the exploration license has not been invalidated. In fact, Article 25 of the Guatemalan Mining Law automatically extends the period of validity of the exploration license until the license of exploitation is granted. This means that the Santa Margarita exploration license continues to and would continue to subsist even if the requirement to conduct

[1716] Claimants' Reply, ¶ 269.
[1717] *Id.* at ¶ 273.
[1718] Amparo Law, art. 49(a) (**C-0406**) ("Effects of amparo. The declaration of origin of the amparo will have the following effects: Leave in suspense, regarding the claimant, the law, the regulation, resolution or contested act and, where appropriate, the reestablishment of the affected legal situation or the cessation of the measure"); Amparo Law, art. 54 (**C-0406**) ("Breach of resolution. If the obliged party has not exactly complied with the resolution, the prosecution will be ordered ex officio, certifying what is conducive, without prejudice to dictating all those measures that lead to the immediate execution of the amparo resolution"); *See also*, Political Constitution of the Republic of Guatemala, art. 203: "Justice is imparted in accordance with the Constitution and the laws of the Republic. The power to judge and to promote the execution of what is judged corresponds to the tribunals of justice. **The other organs of [the] State must give to the tribunals the assistance they require for the fulfillment of their resolutions**." (**C-0414-R**). *See also* Richter II Report, ¶ 47.
[1719] *See* Amparo Law, art. 78 (**C-0406**) and Penal Code, art. 420 (**RL-0396**). *See also, infra.*, Section II.G.
[1720] Claimants' Reply, ¶ 279.
[1721] Counter-Memorial, ¶ 527: "[T]he issue of State attribution does not even come into play here considering the absence of state conduct as required under Article 2 of the Articles on Responsibility of States for Internationally Wrongful Conduct and Annex 10-C.2 of the CAFTA-DR. Without any government-ordered suspension of Exmingua's exploration works, there exists no rhyme or reason for Exmingua to suspend its own operations."

ILO Convention 169 consultations was made applicable to the EIA process as a condition for the approval of an exploitation license for the Santa Margarita mine. Besides, Claimants could have very well started their EIA approval process for Santa Margarita as far back as 2011, the same time that GSM had finalized the environmental section for Progreso VII,[1722] and no alleged physical impediment prevented them from doing so,[1723] yet they did not. Thus, Claimants' exercise of business judgment, irrespective of its soundness, was the sole and proximate cause of the suspension of the Santa Margarita mine exploration activities, and neither the *Minera San Rafael* decision nor the suspension of the Progreso VII exploitation license had any linkage, much less of a clear nature, with that suspension.

754. On the other hand, the exportation certificate was suspended,[1724] the gold concentrates were impounded,[1725] and the bank accounts were frozen[1726] due to Exmingua's violations of the law—specifically their continued mine operations—in direct contravention of the Supreme Court's decision, as well as the MEM's Resolution implementing that decision, suspending the exploitation license. What Claimants would have this Tribunal do is exculpate them from the consequences of their criminal activities and administrative violations. As to the gold concentrate, too, it bears mention that these were released under legal custody by the Fourth Criminal Court, consistent with Article 206 of the Code of Criminal Procedure, and Claimants do not challenge that decision as erroneous, much less as one that has amounted to a denial of justice.[1727]

755. *Second,* Guatemala cannot help but treat Claimants' allegations of interference as single and independent acts because, as Claimants have themselves argued, the standard for creeping expropriation requires "[o]bviously, [that] **each step** must have an adverse effect."[1728] Thus, if Guatemala shows that at least one of the alleged acts of interference has no adverse effect at all, then Claimants would not succeed in establishing an unbroken chain of events to support their nebulous claim of a creeping expropriation.

756. The same principle applies with more force with regard to the acts of the judiciary, specifically the Constitutional Court's decision to suspend the Progreso VII exploitation license pending compliance with ILO 169 consultations. Guatemala has established that, at the outset, such act cannot be attributed to the State of Guatemala absent a showing of denial of justice or that, in any event, there is no breach of Article

[1722] Kappes Statement I, ¶ 49.
[1723] *See, infra*., Section II.C.
[1724] *See, infra*., Section II.F.
[1725] *See, infra*., Section II.F.
[1726] *See, infra*., Section II.A.3.
[1727] *See, infra*., Section V.C.
[1728] Claimants' Reply, ¶ 420 *citing Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award (February 6, 2007), ¶ 263 (**CL-0159**).

10.7 of the CAFTA-DR because "the courts of Guatemala interpreted and applied the laws of Guatemala legitimately, in good faith, and with a rational basis."[1729] In that sense, "[t]he last step" that Claimants complain of does not meet the standard of being "the straw that breaks the camel's back,"[1730] a standard that Claimants themselves have advocated. Claimants, put simply, miserably err in their contention that there "is no need for the Tribunal to review the propriety of the judicial conduct in isolation from the entire chain of events."[1731]

757. As shown, Claimants' insinuations of an "illegitimate campaign" against Exmingua are more imagined than real. Without any clear linkage between and among the alleged acts of interference that purport to converge towards the deprivation of Exmingua, Claimants unfounded accusation of a creeping expropriation falls flat on its face.

b. Regardless of how Claimants characterize their property rights or interests, Claimants failed to prove that the alleged acts of interference, whether in isolation or in the aggregate, are expropriatory

758. Annex 10-C.2 of the CAFTA-DR provides that "[a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment." The Treaty thus requires *a priori* that Claimants show two cumulative requirements: (1) the existence of a property right or property interest in the investment at issue; and (2) that such property right or interest belongs to them. The existence of a property right is clearly the start of any expropriation inquiry.[1732]

759. It has been discussed above that Claimants, in their Reply, assert that they are seeking a direct loss claim against Guatemala[1733] and have identified their shares in Exmingua,[1734] specifically *their* (not Exmingua's) supposed opportunity to develop the El Tambor project,[1735] as the investment at issue. Especially now that Claimants are forwarding a direct loss claim instead of a reflective loss claim,[1736] this Tribunal—as it has said it would do in its Decision on Preliminary Objections—should ascertain whether there has been a

[1729] Guatemala's Counter-Memorial, ¶¶ 513-523.
[1730] Claimants' Reply, ¶ 420 *citing Siemens A.G.*, Award (Feb. 6, 2007) ¶ 263 (**CL-0159**).
[1731] Claimants' Reply, ¶ 406.
[1732] Thus, as Guatemala has repeatedly emphasized, "it is important to correctly identify the investment at issue." *See* Guatemala's Counter-Memorial, ¶ 465 *citing* UNCTAD, *Expropriation: A Sequel*, UNCTAD Series on International Investment Agreements II, p. 104 **(RL-0266)**.
[1733] Claimants' Reply, ¶ 456(emphasis added) (The "[c]laim is not one for reflective loss; it is a direct claim.")
[1734] Claimants' Reply, ¶ 636 ("[E]ven if Claimants' claim was not for the expropriation of their shares in Exmingua – which it is […].")
[1735] Claimants' Reply, fn. 1853; *See also* Guatemala's Counter-Memorial on Preliminary Objections, ¶ 60.
[1736] Claimants' Reply, ¶ 456: (The "claim is not one for reflective loss; it is a direct claim.")

"deprivation of share *ownership* or interference with shareholder *rights*."[1737] Assuming that Claimants' expropriation claim is indeed one for direct loss, the Tribunal should assess the merits of Claimants' expropriation claim with their shares in Exmingua as the investment in issue.

i. Assuming that Claimants' expropriation claim is a direct loss claim, the opportunity to develop the El Tambor mining project is neither a shareholder right, nor is mere loss of opportunity enough to constitute expropriation

760. In fact, in their Reply Claimants argue that "Claimants' lost opportunity to further develop the Tambor Project is a property right that is appurtenant to their shareholding in Exmingua, which holds validly-granted licenses under Guatemalan law for the exploitation and exploration of Progreso VII and Santa Margarita, respectively."[1738] Claimants, thus, do not dispute that they must show a property right or interest in the investment at issue. What Claimants challenge, however, is what they perceive as Guatemala's "restrictive notion of property."[1739] They cite the NAFTA awards in *Methanex* and *Pope & Talbot*, as well as Arbitrator Prof. Douglas, suggesting this Tribunal should follow an expansive concept of property rights.[1740] Claimants also refer to *Bilcon v. Canada*, *Olympic Entertainment Group v. Ukraine*, *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, and *CME Czech Republic B.V. v. Czech Republic*, for the proposition that because Claimants own Exmingua which, in turn, holds the licenses to the El Tambor project, the opportunity to develop the El Tambor project belongs to them.[1741]

761. *First*, Claimants' suggestion for the adoption of an expansive interpretation of property rights is baseless. The CAFTA-DR makes no direction for the Tribunal to interpret the "property right or interest" requirement in an expansive manner. Rather, Annex 10-C of the CAFTA-DR states that Article 10.71. is "intended to reflect customary international law concerning the obligation of States with respect to expropriation."

762. Under customary international law, the property rights of a shareholder, like Claimants herein, do not extend beyond the rights conferred by domestic law to the shareholders of a corporation. According to the International Court of Justice, "[m]unicipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them."[1742] Applying this rule, the Court in

[1737] Decision on Respondent's Preliminary Objections, ¶ 127.
[1738] Claimants' Reply, ¶ 399.
[1739] Claimants' Reply, ¶ 399.
[1740] Claimants' Reply, ¶ 399 and fn. 1188.
[1741] Claimants' Reply, ¶ 458, fn. 1853 *citing Clayton v Canada*, Award on Damages (Jan. 10, 2019) (**CL-0243**); *Olympic Entertainment Group AS v. Ukraine*, PCA Case No. 2019-18, Award (Apr. 15, 2021) (**CL-0327**); *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award (Dec. 23, 2019 (**CL-0343**); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (Sept. 13, 2001) (**CL-0052**).
[1742] *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain) Second Phase*, Judgment, I.C.J. Reports 1970, (1970), ¶ 41 (**CL-0368**).

the *Diallo* case, for instance, examined Congolese domestic laws to assess the existence and extent of rights that Mr. Diallo, a Guinean investor, possessed as a shareholder in two Congolese companies that had been the subject of Guinea's government measures.[1743] Looking at Congolese law, the Court concluded that Mr. Diallo, as a shareholder, possessed the right to participate and vote in general meetings,[1744] but not the right to appoint a *gérant* (director) as this latter right belonged to the company.[1745]

763. Investment arbitration practice reveals the same approach. In *Enkev Beheer B.V. v. Republic of Poland*, the tribunal analyzed Polish law to ascertain the existence and extent of a shareholder's property rights or interests. The *Enkev* tribunal held that "[i]t does not accept that the Claimant's "investment" extends [to movable and immovable property (including intellectual property) of the subsidiary company, contracts, assets and monies (including profits)], whether under Article I of the Treaty or under Polish law."[1746]

764. The Tribunal, thus, should look at Guatemalan law insofar as it defines the rights of a shareholder in a company. Articles 91 to 131 of the Guatemalan Commercial Law[1747] regulate the rights and duties of a shareholder (*accionistas*). Specifically, Article 105, entitled Rights of the Shareholders (*Derechos de los Accionistas*), provides Exmingua's shareholders with the right (1) to participate in the profits and to the distribution of the company's capital upon liquidation; (2) of first refusal in relation to new shares issued by the company; and (3) to vote in shareholders' meetings. Exmingua's Articles of Incorporation grants no greater rights than those conferred by law.[1748] Clearly, there is nothing in Guatemalan law or in Exmingua's charter that confers Claimants, as corporate shareholders of Exmingua, the opportunity to develop the El Tambor project. Such opportunity, if at all one exists, can neither be derived from, nor is it appurtenant to their shares in Exmingua.

765. It bears noting too that Guatemala has shown that Exmingua retains control of its management decisions and its day-to-day operations.[1749] In case law, expropriation claims have failed when the claimant's basic rights in the exercise of his ownership of the shares, and his actual control over the shares remained

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[1743] *Case Concerning Ahmadou Sadio Diallo* (Republic of Guinea v Democratic Republic of the Congo), Judgment, ("Diallo 2010"), ¶¶ 103-108 (**RL-0015**); *See* ¶ 104: ("In order to determine Mr. Diallo's legal rights as associé in Africom-Zaire and Africontainers-Zaire, and whether those rights have been infringed, the Court will have to examine in the first instance the existence and structure of those companies under DRC law.") and ¶ 114: ("[T]he Court will have to assess whether, under DRC law, the claimed rights are indeed direct rights of the associé, or whether they are rather rights or obligations of the companies."

[1744] *Case Concerning Ahmadou Sadio Diallo*, Judgment, ("Diallo 2010"), ¶ 119 (**RL-0015**).

[1745] *Case Concerning Ahmadou Sadio Diallo*, Judgment, ("Diallo 2010"), ¶ 133 (**RL-0015**).

[1746] *Enkev Beheer B.V. v. Republic of Poland*, First Partial Award, April 29, 2014, ¶ 310 **(RL-0249)**.

[1747] Commercial Law of Guatemala (Decreto No. 2-70) (**C-0407**)

[1748] *See* Exmingua's Bylaws (*Protocolo Registro No. 397062*), Articles 7 and 8, p. 34 (**R-0324**).

[1749] Guatemala's Counter-Memorial, ¶ 476.

intact.[1750] Proof of deprivation of share ownership or interference with these shareholder rights is an indispensable element under customary international law for any direct loss claim,[1751] which Claimants have failed to allege, much less establish with evidence.

766. *Second*, the alleged property right or interest, if at all one exists, must belong to the Claimants. This matter has already been discussed above[1752] in relation to the definition of a direct loss claim, which Claimants assert to be claiming, as distinguished from a reflective loss claim. To recapitulate, for a shareholders' direct loss claim to prosper, the claimant must show proof of injury to the shareholders' rights as such, not the rights of the company which they own. For their part, Claimants cite to cases which, to their mind, bolster their view that the opportunity to develop the El Tambor project is a property right that belongs to them and is capable of expropriation.

767. While *Bilcon v. Canada* held that "[t]he opportunity to invest in a quarry and a marine terminal […] was an opportunity of the Investors and not an opportunity of Bilcon of Nova Scotia,"[1753] the tribunal was careful to qualify that such finding was made based "[**o]n the circumstances of [that] case**."[1754] The *Bilcon* tribunal noted not only that the Clayton Group, *i.e.*, the claimants, owned Bilcon but that "[t]hey prospected quarry sites," "all of the dealings between the Canadian and Nova Scotia authorities considering the location of, and establishing the necessary approvals for, the investment were conducted by or on behalf of the Clayton Group," and that "**[a]s far as the Tribunal is concerned, the Clayton Group was not structured [as a separate entity]**" from Bilcon.[1755] In other words, the tribunal in *Bilcon* pierced the veil of corporate fiction in that case due to facts owing therein. It did not lay down a general principle that all opportunities owing to the company, if at all, accrue to the upstream investor. Besides, unlike the claimants in *Bilcon*, Claimants' predecessors-in-interest had already conducted initial exploration of the El Tambor area in 2000 and 2001, and between November 2001 and late 2003, had already carried out extensive exploration activities in the Santa Margarita and the Progreso VII areas.[1756] By the time Claimants began their

[1750] *Al-Warraq v. Indonesia*, Ad Hoc Tribunal, Final Award, IIC 718 (2014), (December 15, 2014), ¶ 524 **(CL-0273)**.
[1751] *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain) Second Phase*, Judgment, I.C.J. Reports 1970, (1970), ¶ 47 (**RL-0006**); *Case Concerning Ahmadou Sadio Diallo* (Republic of Guinea v Democratic Republic of the Congo), Judgment, ("Diallo 2010"), ¶ 157 (**RL-0015**); *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award (April 29, 2014), ¶ 310 **(RL-0249)**; *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award (Aug. 19 2005), ¶¶ 152-153 (**CL-0125**); *Mamidoil* v. *Albania*, Award, ¶ 570-579 (**RL-0141**); Gaukrodger, D. (2013), "Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency", OECD Working Papers on International Investment, 2013/03, OECD Publishing, p. 7 (**RL-0056)**
[1752] *See above*, Section III and IV.A
[1753] *Clayton v Canada,* Award on Damages (January 10, 2019), ¶ 396 (**CL-0243**).
[1754] *Id*. at ¶ 391 (**CL-0243**).
[1755] *Id*. at ¶¶ 392-395 (**CL-0243**) (emphasis added).
[1756] Claimants' Memorial, ¶ 20.

investment in June 2008, exploration licenses for the Progreso VII area and the Santa Margarita area were already issued to Exmingua.[1757] Also, by the time Claimants fully acquired Exmingua in 2012, an exploitation license for Progreso VII was already issued to Exmingua back in May 2011.[1758] Exmingua is, for all intents and purposes, a separate entity from Claimants,[1759] and no reason has been advanced, because none exists, to pierce the veil of corporate fiction in this case. *Bilcon*, therefore, adds nothing to Claimants' case.

768. Claimants rely as well on *CME v. Czech Republic*., where the tribunal considered that the State was responsible for the expropriation if it was proved that "the commercial value of the investment" had been destroyed and considered irrelevant that the formal property rights of a television lice that were the bases of the investment had never been disturbed by the measures of the Czech government.[1760] This Tribunal would note that that award stands in direct opposition to another case that involved "precisely the same facts."[1761] In *Ronald S. Lauder v. The Czech Republic*, the tribunal rejected the expropriation claim because the claimant "ha[d] indeed not brought sufficient evidence that any measure or action taken by the Czech Republic would have had the effect of transferring his property or of depriving him of his ***rights to use his property*** or even of interfering with his ***property rights***."[1762] The standard in *Lauder*, in turn, has been adopted by a great majority of cases; indeed, it is the mainstream view.

769. The tribunal in *Waste Management v. Mexico* was categorical that "the loss of benefits or expectations is **not** a sufficient criterion for an expropriation, even if it is a necessary one."[1763] The *El Paso v. Argentina* award concurred with that principle in *Waste Management*, and held that "a mere loss in value of the investment, even if important, is **not** an indirect expropriation."[1764] The *El Paso* tribunal dissected the cases in *Middle East Cement v. Egypt*, *Goetz and Others v. Republic of Burundi*, *Metalclad v. Mexico*, *Tecmed v. Mexico*, and *Consortium R.F.C.C. v. Morocco* and concluded that "**mainstream case-law** finds that for an expropriation to exist, the investor should be substantially deprived **not only of the benefits**, but also of

[1757] *Id.* at ¶ 25.
[1758] *Id.* at ¶ 37.
[1759] Commercial Law, art. 14: "The commercial company incorporated in accordance with the provisions of this Code and registered in the Commercial Registry, will have its own legal personality different from that of the partners individually considered." (**C-0407**).
[1760] Claimants' Reply, ¶ 431 *cting CME v. Czech Republic*, Partial Award (September 13, 2001), ¶ 591 (**CL-0052**).
[1761] Jan Paulsson and Zachary Douglas, *Indirect Expropriation in Investment Treaty Arbitrations*, Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, Studies In Transnational Economic Law, Volume 19, p. 150 (Norbert Horn And Stefan Michael Kroll (Eds.), Kluwer Law International 2004) (**RL-0278**).
[1762] *Lauder v. The Czech Republic*, UNCITRAL, Award (Sept. 3, 2001) ¶ 202 (**CL-0186**)(emphasis added).
[1763] *Waste Management, Inc. v. Mexico II*, ICSID Case No. ARB(AF)/00/3, Award (April 30, 2004), ¶ 159 (**CL-0022**).
[1764] *El Paso Energy Int'l Co. v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011) ¶ 249 (**CL-0047**)

the use of his investment. **A mere loss of value**, which is not the result of an interference with the control or use of the investment, **is not an indirect expropriation**."[1765] Consistent with the principle that mere loss of value or benefits is not enough to prove expropriation, the *El Paso* award expressed that "***at least one of the essential components of the property rights*** must have disappeared for an expropriation to have occurred."[1766] Notably, the *El Paso* tribunal also referred to *Pope & Talbot*, which herein Claimants cite,[1767] to emphasize that "a significant degree of deprivation of ***fundamental rights of ownership***" is required to establish expropriation.[1768]

770. Aside from *Bilcon* and *CME*, Claimants refer to *Olympic Entertainment Group v. Ukraine* and *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*.[1769] *Olympic* and *Bahgat*, however, applied the minority view in *CME*. According to the *Olympic* tribunal, "what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment."[1770] On the other hand, *Bahgat* applied the standard that "[f]or an indirect expropriation to exist, it is generally accepted that the act or acts of the public authority concerned must have the effect of substantially depriving the investor of the economic value of its investment."[1771] This Tribunal is urged not to follow the standard in these cases not only because a greater majority of awards rejects it, but also because, as repeatedly stressed by Guatemala, the CAFTA-DR rejects the sole effects doctrine espoused in the cases that Claimants rely on. An adverse economic impact "standing alone, does not establish that an indirect expropriation has occurred."[1772]

771. To be sure, the more recent *Mamidoil v. Albania* award lauded the *El Paso* tribunal's "careful analysis"

[1765] *El Paso Energy Int'l Co.*, Award, ¶ 250-256 (**CL-0047**) (emphasis added) (*citing Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (April 12, 2002) (**CL-0137**), *Antoine Goetz & Consorts et S.A. Affinage des Metaux v. República de Burundi*, ICSID Case No. ARB/01/2, Award (June 21, 2012) (**CL-0136**); *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000) **(CL-0120)**; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States,* ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003) **(CL-0122)**; and *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Award (December 22, 2003) (**RL-0410**).

[1766] *El Paso Energy Int'l Co.*, Award (October 31, 2011), ¶ 245 (**CL-0047**) (emphasis added).

[1767] Claimants' Reply, ¶ 399 and fn. 1188.

[1768] *El Paso Energy Int'l Co.*, Award (October 31, 2011), ¶ 246 (**CL-0047**) (emphasis added) (*citing Pope & Talbot Inc. v. Canada*, NAFTA, UNCITRAL, Interim Award (June 26, 2000), ¶ 99 (**CL-0129**)).

[1769] Claimants' Reply, ¶ 458, fns. 1372, 1853 *citing Clayton v Canada*, Award on Damages (**CL-0243**); *Olympic Entertainment Group AS v. Ukraine*, PCA Case No. 2019-18, Award (Apr. 15, 2021) (**CL-0327**); *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award (Dec. 23, 2019) (**CL-0343**); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (Sept. 13, 2001) (**CL-0052**).

[1770] *Olympic Entertainment Group AS v. Ukraine*, PCA Case No. 2019-18, Award (Apr. 15, 2021), ¶ 104 (**CL-0327**) *citing Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (December 14, 2012), ¶¶ 396-398 (**CL-0156**).

[1771] *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award (Dec. 23, 2019), ¶ 221 (**CL-0343**).

[1772] CAFTA-DR, Annex 10-C(4)(a)(i); U.S. Non-Disputing Party Submission, February 19, 2021, ¶ 43.

of caselaw and held that, in investment jurisprudence, "emphasis was laid not only on the fact that the investment lost value and the investor was deprived of benefits, but also that these effects resulted from a loss of one or several attributes of ownership."[1773] The *Mamidoil* tribunal also did its own analysis of caselaw, specifically of *Santa Elena v. Costa Rica* and *AES v. Hungary*, and concluded that "that the owner [must have] truly lost **all the attributes of ownership**" to succeed in its expropriation claim.[1774] Notably, there are several points of contact between *Mamidoil* and the present case that make it apposite in resolving Claimants' expropriation claim. Mamidoil Jetoil, the investor in *Mamidoil*, wholly owned a corporation in the host state and sought compensation representing its "[d]irect losses" and "[l]oss of profits",[1775] as Claimants in the present case similarly plead.[1776] Also, just like herein Claimants who decry the supposed expropriation of their purported opportunity to develop the El Tambor project,[1777] the investor in *Mamidoil* complained about its lost opportunity to operate a tank farm.[1778] Too, similar to Claimants' assertion that "it would be legally and economically imprudent to continue exploration under the license without any hope of obtaining an exploitation license,"[1779] the investor in *Mamidoil* argued that "without the possibility to discharge tankers in the port, the operation of the tank farm was completely uneconomical."[1780] Finally, as in Claimants' argument that the opportunity to develop the El Tambor project is derived from the mining licenses granted to Exmingua,[1781] Mamidoil Jetoil anchored its expropriation claim on the trading licenses granted to its wholly owned subsidiary.

772. In disposing of Mamidoil Jetoil's expropriation claim, the *Mamidoil* tribunal remarked in no less than categorical terms that "[i]t is ***not*** **the Tribunal's task to evaluate business opportunities** but to determine whether the **dramatic losses of benefit are *caused by* the loss of one or all elements which constitute the essence of property**."[1782] It was of no moment to the tribunal that Mamidoil Jetoil wholly owned Mamidoil S.A. and that Mamidoil S.A. had a trading license. The *Mamidoil* tribunal likewise explained the

[1773] *Mamidoil* v. *Albania*, Award, ¶ 568 (**RL-0141**).
[1774] *Id*. at, ¶ 566-567 (**RL-0141)**
[1775] *Id*. at, ¶ 69 (**RL-0364**), (emphasis in original).
[1776] *See* Claimants' Memorial, Summary of Claimants' Damages, ¶ 399: ("Summing the damages from Claimants' lost profits from the Operating Mine, as well as the value of the Known Exploration Potential and the Exploration Opportunity, Claimants' damages as of 31 March 2020 are between US$ 403 million to US$ 450 million.")
[1777] Claimants' Reply, ¶ 399: ("Claimants' lost opportunity to further develop the Tambor Project is a property right that is appurtenant to their shareholding in Exmingua.")
[1778] *Mamidoil* v. *Albania*, Award, ¶ 559 (**RL-0141**).
[1779] Claimants' Reply, ¶ 499.
[1780] *Mamidoil* v. *Albania*, Award, ¶ 559 (**RL-0141**).
[1781] Claimants' Reply, ¶ 458, fn. 1853 *citing Clayton v Canada*, Award on Damages (**CL-0243**); *Olympic Entertainment Group AS v. Ukraine*, PCA Case No. 2019-18, Award (Apr. 15, 2021) (**CL-0327**); *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award (Dec. 23, 2019) (**CL-0343**); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (Sept. 13, 2001) (**CL-0052**).
[1782] *Mamidoil* v. *Albania*, Award, ¶ 579 (**RL-0141**) (emphasis in original).

rationale behind the need to prove loss of all attributes of ownership.[1783]

773. In sum, business opportunities are not property rights in and of themselves. Further, deprivation of economic value, standing alone, does not constitute indirect expropriation. Rather, Claimants bear the onus of showing that they have lost all attributes of ownership to their shares in Exmingua; failing which, their expropriation claim crumbles. All told, even if the Tribunal were inclined to rule on Claimants' direct loss claim instead of its original reflective loss claim, Claimants still failed to satisfy the primary material element of expropriation under Annex 10-C.2 of the CAFTA-DR that there be "a tangible or intangible property right or property interest in an investment." That is, even if this Tribunal were to allow Claimants to reframe their claim from a reflective loss claim to a direct loss claim, Claimants were unable to prove: (1) that the opportunity to develop a mining project is a property right under international law and Guatemalan law, and (2) that such right, if at all one exists, belongs to them under Guatemalan law as shareholders claiming direct losses against Guatemala. Exmingua, as company registered in Guatemala, is a separate entity from Claimants, who are the company's shareholders, and no convincing reasons have been presented to pierce the corporate veil in this case. Thus, Exmingua's rights, if at all, belong to Exmingua alone and not the Claimants as shareholders.

ii. Assuming that Claimants' expropriation claim is a reflective loss claim as they originally presented, Claimants have not suffered any diminution of value of their shares in Exmingua

774. Even if Claimants were to revert to a reflective loss claim as they had originally forwarded before this Tribunal, their claim still falls. A reflective loss claim imposes, as this Tribunal has ordered, a double-barreled requirement for Claimants to establish (1) that Exmingua has incurred harm; and (2) that Claimants themselves must have incurred harm.[1784]

775. As to the first element, Claimants must prove that Exmingua's company rights have been interfered

[1783] *Mamidoil* v. *Albania*, Award, ¶561 (**RL-0141**) ("In order to be capable of being considered expropriatory – even indirectly – the consequences for the property must be substantiated in accordance with the specificities of the claim for expropriation. The simple allegation that (the lack of) policy measures "*made it impossible to earn any profits which could be distributed to Claimant*" **does not suffice to elevate the description of conduct into the sphere of a loss of the investment**. […])"; *Id* at. ¶ 570. The definition of expropriation has developed over time and gone beyond the formalistic concentration on title. It encompasses the substance of property and protects the property even if title is not taken. However, a further extension into the sphere of damages, loss of value and profitability, without regard to the substance and attributes of property, would deprive the claim of its distinct nature and amalgamate it with other claims. Thus, **a mere loss of value or a loss of benefits that is connected to and caused by the dissolution of at least one attribute of property, does not constitute indirect expropriation. The contrary approach would not only contradict the literal meaning of the term "expropriation", but would also be inconsistent with the clear intention of State parties when they entered into the BIT and the ECT and provided for separate standards of protection**."

[1784] Decision on Preliminary Objections, ¶ 129.

with.[1785] Yet, in their Reply, Claimants do not identify *anything* belonging to Exmingua as the subject of expropriation. Quite the contrary, Claimants assert that the opportunity to develop the El Tambor project belongs to Claimants *themselves* and *not* to Exmingua.[1786] As to the second element, Claimants have argued that they "***need not*** show a diminution in the ***value of its shares in [Exmingua]***."[1787] This, of course, is wrong and contravenes the Tribunal's double-barreled requirement.

776. For purposes of the second element, Claimants do argue alternatively that "Exmingua had not paid dividends; instead, it reinvested the revenue it generated into the mining operations."[1788] However, there is not a single shred of evidence on record to show that Exmingua would have been able to and would have declared dividends during the period of suspension of the Progreso VII exploitation license *but for* the alleged acts of interference. Instead, Claimants "calculated their losses as a decrease in the market value of their shares in Exmingua" which they claim, "in any event, would be equivalent to the dividends that would be distributed to Claimants in the but-for scenario and if Exmingua was liquidated."[1789] This false equivalence is fundamentally flawed.

777. Dividends, if at all Exmingua would have made profit during the period of suspension, would have been declared in favor of the shareholders ***only*** if Exmingua had actually made actual net profits.[1790] Meanwhile, at liquidation, profits are to be paid last in the order of payment.[1791] Here, "[t]he Tambor Project had not established a history of profitable operations over the 8 years that the Claimants had been involved (and was unable to pay the royalties it owed to Radius from its gold production) and Versant has not established that it would have been profitable from May 2016 to the present, or into the future, absent the Alleged Breaches."[1792] Still, even if Exmingua had actually made profit, Mr. Kappes himself admits that Claimants have decided to re-invest *all* of Exmingua's profits into the Operating Mine for a new major exploration

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[1785] *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain) Second Phase*, Judgment, I.C.J. Reports 1970 (1970), ¶ 47 (**CL-0368**); *Case Concerning Ahmadou Sadio Diallo* (Republic of Guinea v Democratic Republic of the Congo), Judgment, ¶ 157 (**RL-0015**); *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award (April 29, 2014), ¶ 310 **(RL-0249)**; *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award (Aug. 19, 2005), ¶¶ 152-153 (**CL-0125**); *Mamidoil* v. *Albania*, Award, ¶ 570-579 (**RL-0141**); Gaukrodger, D. (2013), "Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency", OECD Working Papers on International Investment, 2013/03, OECD Publishing, p. 7 (**RL-0056).**

[1786] Claimants' Reply, fn. 1853; *See also* Guatemala's Counter-Memorial on Preliminary Objections, ¶ 60.

[1787] Claimants' Reply, ¶ 456.

[1788] *Id.* at ¶ 637.

[1789] *Id.* at ¶ 637.

[1790] Commercial Law, art. 35 **(C-0417)** ("*The distribution of profits that have not actually been obtained according to the balance sheet for the year is prohibited*").

[1791] Commercial Law, art. 248 **(C-0417)** ("In the payments, the liquidators will observe in any case the following order: 1º. Settlement expenses. 2nd. Debts of the company. 3rd. Members' contributions. 4th. Utilities").

[1792] Rosen/Milburn, ¶ 51(b). *See also* ¶ 87 describing the Tambor Project as a "small, risky and unprofitable mining project that only had 253,000 ounces of Resources."

program anyway.[1793] In fact, any profit from the Operating Mine would have still been insufficient to realize their reinvestment plan—Claimants would even need to invest at least an additional USD 18.6 million more.[1794] Viewed from any perspective, Claimants would not have received dividends *regardless* of the alleged breaches.

778. All told, Claimants' reflective loss claim, if at all it still survives, fails for two independent reasons. First, Claimants have not identified—and refuse to identify—any harm to Exmingua's company rights. Second, Claimants, as a matter of law, disagree that they need to show a loss in *their* share value in Exmingua. As a matter of fact, Claimants have not established that Exmingua would have been able to and would have declared dividends during the period of suspension of the Progreso VII exploitation license *but for* the alleged acts of expropriation. On the contrary, Exmingua was not profitable and, even if it were, the profits would not have been declared as dividends but reinvested into the Operating Mine and, even then, Claimants would need to expend more from their own pockets.

779. At this point, the Tribunal has yet another sufficient reason to dismiss Claimants' expropriation claim. Claimants' allegations do not square with either a direct loss or indirect loss claim.[1795] However, even if the Tribunal were to disregard the proper framing of direct loss claims and reflective loss altogether, and agree with Claimants' nebulous argument that the opportunity to develop the El Tambor project is a property right appurtenant to their shares in Exmingua, it would still arrive at the same conclusion. Claimants failed to establish that the alleged acts of interference, if at all there was any interference with Claimants' opportunity to develop the El Tambor mining project, are expropriatory.

iii. The alleged acts of governmental interference do not satisfy the threshold of substantial deprivation to be considered in breach of Article 10.17 of CAFTA-DR

780. Annex 10-C.4(a)(i) of the CAFTA-DR cannot be any more categorical: "the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, **standing alone**, does **not** establish that an indirect expropriation has

[1793] Kappes Statement I, ¶ 126; Versant II, ¶ 89.

[1794] Rosen/Milburn, ¶ 182: Since Versant assumes that the Claimants would have needed to start a major exploration program from May 2016 to March 2020 (or 2021) that SRK estimates would have cost USD 44.9 million, then the exploration program would have required not only all of the Versant's projected after-tax cashflows from the Operating Mine over this period but the Claimants would have needed to invest at least an additional USD 18.6 million in order to complete Versant's and SRK's assumed new major exploration program to discover an additional 5 million to 7 million potential ounces of gold and create from USD 337 to USD 417 million in value over the past loss period (May 2016 to March 2021).

[1795] Counter-Memorial, ¶ 469: "If this Tribunal were to assess the economic impact and character of the assailed government action and the existence of any alleged reasonable investment-backed expectations without first being satisfied of the constitutive elements under Annex 10-C.2 of the treaty, Annex 10.C-2 would be reduced to a mere superfluity to Annex 10-C.4(a) of the CAFTA-DR."

occurred." This explicit text in the CAFTA-DR undermines Claimants' insistence on a substantial deprivation test that relies on the sole effects doctrine. This text denies the severity of the economic impact as the decisive criterion to hold Guatemala liable for indirect expropriation under the Treaty.

781. Rather, as reflected in customary international law and U.S. takings law insofar as it has influenced the conclusion of the CAFTA-DR, Claimants must show, *first*, substantial deprivation in that they have "truly lost **all the attributes of ownership**."[1796] *Second*, it is also required that the taking must be permanent, irrevocable, and not ephemeral or temporary.[1797] *Third*, the Tribunal is required to look at the extent to which the government action interferes with distinct, reasonable investment-backed expectations.[1798] In this inquiry, the investor must show that it conducted due diligence prior to the making of the investment and that its expectations are based on some specific assurance or representation from the State.[1799] *Finally*, the Tribunal must examine the character of the government action, that is, the purpose behind the alleged acts of interference,[1800] whether someone other than Claimants benefitted from the alleged taking,[1801] and whether they were designed and applied to protect the legitimate public welfare objectives.[1802] In this case, Claimants failed to prove the concurrence of these factors which must perforce result in the denial of their expropriation claim.

Claimants retain the opportunity to develop the El Tambor mining project, if at all such opportunity belongs to them, and any alleged interference is merely temporary

782. Guatemala maintains that Claimants' rights pertain only to their rights as shareholders, and the opportunity to develop the El Tambor mining project is not a right as the term is understood in customary

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[1796] *Mamidoil* v. *Albania*, Award, ¶ 566-567 (**RL-0141**). *See also Waste Management, Inc. v. Mexico II*, ICSID Case No. ARB(AF)/00/3, Award (April 30, 2004), ¶ 159 (**CL-0022**); *El Paso Energy Int'l Co. v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011), ¶ 250-256 (**CL-0047**) (emphasis added) (*citing Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award dated 12 Apr. 2002 (**CL-0137**), *Antoine Goetz & Consorts et S.A. Affinage des Metaux c. República de Burundi*, ICSID Case No. ARB/01/2, Award (June 21, 2012) (**CL-0136**), *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000) **(CL-0120)**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States,* ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003) **(CL-0122)**, and *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Award (December 22, 2003) **(RL-0410)**; *See also,* U.S. Non-Disputing Party Submission, February 19, 2021, ¶ 43.

[1797] *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award (July 17,2006), ¶ 176(D) **(RL-0231)**; *Técnicas Medioambientales Tecmed, SA v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003), ¶ 166 **(CL-0122)**; *Plama*, Award, ¶ 193 (**RL- 0140)**.

[1798] CAFTA-DR, Annex 10-C (4).

[1799] *Marvin Roy Feldman*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶¶ 132 and 134 **(CL-0093)**.

[1800] *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award (13 November 2000), ¶ 285 (**CL-0104**): "[T]he tribunal "must look at the real interests involved and the purpose and effect of the government measure."

[1801] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, (13 November 2000) ¶ 287 (**CL-0104):** The tribunal denied expropriation, among others, because "CANADA realized no benefit from the measure."

[1802] Annex 10-C.4(b): "Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

international law, much less a right that belongs to Claimants. In any event, even assuming that the opportunity to develop the El Tambor mining project is in and of itself a property right appurtenant to Claimants' shares in Exmingua, such opportunity still exists and has not been deprived, much less irrevocably, by Guatemala. Claimants' bone of contention is that "there is ***no*** indication that Exmingua will regain the use of its licenses or be able to enjoy the benefits of its concentrate by exporting it."[1803] This is an utter lie.

783. *First*, as to the Progreso VII exploitation license, it bears pointing out once more that the Constitutional Court's decision to suspend the same is merely subject to a condition. As Guatemala has already argued, "[t]he Court's decision explicitly contemplates the "resumption of the works" for the Progreso VII area upon satisfaction of the conditions set forth in the order, proving further that the order is only a temporary stoppage of the mining license."[1804] From the time the decision becomes final—which is when the MEM receives the writ of execution from the Supreme Court[1805]—the MEM only has 12 months to effectuate the Constitutional Court's decision.[1806] An honest and objective reading of the Court's decision belies any of Claimants' attempt to obfuscate the temporary and revocable nature of the suspension of the Progreso VII exploitation license. Add to that, the MEM's Vice Ministry of Sustainable Development had already taken preliminary steps to implement the Supreme Court's decision,[1807] further removing any cloud as to the temporary and revocable nature of the court order.

784. Claimants and their expert maintain as well that it would "delay the resumption of mining activities indefinitely"[1808] that the Constitutional Court conditioned the resumption of Progreso VII mining works post-consultation if the project "is found not to threaten the existence of the indigenous peoples living within its area of influence."[1809] Guatemala has already argued that Claimants have failed to explain how the Court's requirement is impossible to satisfy so as to amount to an "indefinite" delay.[1810] Claimants still make no effort in their Reply to show how that condition is impossible to meet for, indeed, their argument defies common sense. The very *raison d'être* for consultations under ILO Convention 169 is precisely to

[1803] Claimants' Reply, ¶ 435.
[1804] Guatemala's Counter-Memorial, ¶ 545.
[1805] Vice Minister Oscar Pérez Second Witness Statement, ¶ 11.
[1806] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming amparo definitive (Decision dated 11 June 2020, issued in Consolidated Cases No. 3207-2016 and 3344-2016 by the Constitutional Court) **(C-0145)**, pp. 42-45.
[1807] MEM Report submitted to the Constitutional Court on 11 June 2020 (**C-0872**).
[1808] Claimants' Reply, ¶ 266; Fuentes Report II, ¶ 162; *See also* Fuentes Report I, ¶ 177; Guatemala's Counter-Memorial, ¶¶ 141, 311.
[1809] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming amparo definitivo (Decision dated 11 June 2020, issued in Consolidated Cases No. 3207-2016 and 3344-2016 by the Constitutional Court) **(C-0145)**, p. 43.
[1810] Guatemala's Counter-Memorial, ¶¶ 547-548.

safeguard the indigenous peoples' existence.[1811] It cannot be denied that the mining industry has "the potential of causing ecological damage, endanger the economic interests, survival, and cultural integrity of the indigenous communities and their members, in addition to affecting the exercise of their property rights over lands and natural resources."[1812] As a matter of fact, too, the Constitutional Court "noted that several serious conflicts have emerged throughout the region in which the Progreso VII Derivada exploitation project is being carried out."[1813] Given all these, the Court's condition merely seeks to fulfill the objective for which the Convention exists and is proportional to the circumstances attendant in Progreso VII. If this Tribunal were to subscribe to Claimants' argument, then all consultations would be impossible to satisfy. Yet, as the experience in the case of Minera San Rafael illustrates, the Government of Guatemala has complied with the courts' orders to conduct the consultations as soon as the order has been executed (*ejecutoria*). [1814] Besides, and contrary to the Claimants' exaggeration that "there is no end in sight" for the consultations, the progress of the consultations for Minera San Rafael illustrate the contrary.[1815]

785. Besides, under Article 28 of the Mining Law, an exploitation license lasts for an original 25-year period extendible "without further process" for another period of up to 25 years. Any delay, which is justified in any case by the Supreme Court's order in 2016, to date amount to only one-tenth of the entire period of validity of an exploitation license. The economic impact of the delay, if at all, fails to approach the exacting standards of substantial deprivation "as to deprive the investor of the economic value, use, or enjoyment of the investment."[1816] What is more, Claimants have not responded at all to Guatemala's argument that, even applying the stricter test in *LG&E v. Argentina*, there is here no evidence that "the investment's successful development depends on the realization of certain activities at specific moments that may not endure variations."[1817]

786. Instead of highlighting the MEM's faithful compliance with court orders, Claimants argue that

[1811] Guatemala's Counter-Memorial, ¶¶ 572-583. *See,* ILO Convention 169, Preamble: The Convention recognizes "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they lives." Maria Victoria Cabrera Ormaza, *The Requirement of Consultation with Indigenous Peoples in the ILO: Between Normative Flexibility and Institutional Rigidity,* Leiden: Brill Nihjoff, p. 33 (**RL-0297**): The consultation right under ILO Convention 169 "contributes to the protection of the cultural integrity of indigenous peoples by ensuring that these communities take part in assessing measures with the potential to impact their cultural relationship with their land and natural resources."
[1812] *See* Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming *amparo definitivo*, Decision dated 11 June 2020, issued in Consolidated Cases No. 3207-2016 and 3344-2016, p. 41 (**C-0145 ENG**).
[1813] Constitutional Court of Guatemala, Case No. 1592-2014, Ruling confirming *amparo definitivo*, Decision dated 11 June 2020, issued in Consolidated Cases No. 3207-2016 and 3344-2016, p. 38 (**C-0145 ENG**).
[1814] Vice-Minister Pérez II, ¶¶ 16.
[1815] Vice-Minister Pérez II, ¶¶ 17-18.
[1816] *Telenor v. Hungary*, ICSID Case No. ARB/ 04/15, Award of 13 September 2006, ¶ 65 **(CL-0130).**
[1817] *LG&E Energy Corp. v. Argentine Republic*, Decision on Liability (3 October 2006), ¶ 193 **(RL-0240).**

"Respondent's subsequent actions concerning the impounded concentrate and frozen bank accounts only add to a showing of the unlawfulness of its conduct."[1818] What Claimants forget to mention, however, is that the Guatemalan government impounded the concentrate, froze Exmingua's bank accounts, and suspended Exmingua's exportation license due to Exmingua's violations of the law (specifically its continued exploitation of the Progreso VII project despite the Supreme Court's *amparo definitivo* and the MEM's Resolution implementing the court suspension) and its inability to pay the administrative fine.[1819] If Exmingua had only complied with the law like it was supposed to do, its gold concentrate and bank accounts would not have been impounded and frozen, and its exportation license would not have been suspended in the first place.

787. In any case, as to the gold concentrate, Claimants have already dropped their claim which renders that issue moot. [redacted].[1820] As to the exportation certificate, the same was suspended following MEM's good faith interpretation in enforcing the Supreme Court's *amparo*[1821] and, in any case, was quickly restored to Exmingua upon its request, which evidences that, in reality, Guatemala's actions are temporary in nature.

788. *Second,* as to the Santa Margarita mine, again, it was Claimants' own business decision to stop the exploration works and to desist from pursuing their exploitation license application. That decision is not attributable at all to the State of Guatemala. It is in this context that Guatemala has made issue of the fact that Claimants have not sought to compel the MEM to conduct these consultations for the EIA approval process relating to the Santa Margarita exploitation license application.[1822] If Claimants in good faith believed that the *Minera San Rafael* decision and the *CALAS* decision were applicable as well to the EIA approval process for the Santa Margarita exploitation license, Claimants incur no harm because Exmingua is required under Article 20 of the Guatemalan Mining Law to submit an EIA and have it approved as a precondition to an exploitation license anyway. As of date, Exmingua has not seriously pursued the EIA approval process and the requirement to observe ILO Convention 169 consultations, if at all, would have only impacted a future EIA application. Instead, Claimants made the business decision to suspend explorations and no longer pursue their exploitation license application for the Santa Margarita mine.

[1818] Claimants' Reply, ¶ 434.
[1819] *See*, *infra.*, Sections II.F and G.
[1820] [redacted]
[1821] *See* Section II.G.
[1822] Guatemala's Counter-Memorial, ¶ 529.

Again, Claimants had no impediment to starting their EIA approval process for Santa Margarita as far back as 2011[1823] and they could have physically accessed the mine,[1824] but they chose not to do so. All these facts support the conclusion that Claimants were never serious about exploring the Santa Margarita mine and in converting the exploration license to an exploitation license. In short, the exploration works and future exploitation of the Santa Margarita mine would have never materialized *regardless* of the alleged breaches.

789. Yet, even if the *Minera San Rafael* decision and the *CALAS* decision were really the proximate cause for the suspension as Claimants make it appear, no loss accrues to Claimants. Exmingua's exploration license has not been invalidated and, pursuant to Article 25 of the Guatemalan Mining Law, until such time that an exploitation license is granted in favor of Exmingua even if ILO Convention 169 consultations were conducted for the Santa Margarita EIA approval. What becomes obvious is that Claimants just refuse to abide by ILO Convention 169—even though this is a legal requirement that has been part of Guatemalan law as early as 1997 and recognized by the Constitutional Court in *Rio Hondo II* (April 2008) and *Cementos Progreso* (December 2009),[1825] predating Claimants' first investment in Exmingua in January 2009 and their EIA approval process for Santa Margarita that could have begun in early 2011. They also refuse[1826] to recognize and respect the courts' independent authority and duty under the Judiciary Branch Law of 1989[1827] and the Amparo Law of 1986[1828] to implement human rights treaties even as against domestic law, and to suspend governmental acts whenever the circumstances make it advisable.[1829]

790. Based on the foregoing premises, Claimants' insinuation that there is "no end in sight" to the Court's suspension of the Progreso VII exploitation license and Claimant's self-imposed suspension of the Santa Margarita exploration license is nothing more than an exaggeration. Claimants' narrative is but an unconvincing attempt to draw sympathy for their own misdeeds and poor business choices. Albeit the opportunity to mine the El Tambor project has been suspended, the indubitable fact is that such opportunity still exists. All indications point to Exmingua's eventual ability to use the Progreso VII exploitation license

[1823] Kappes Statement I, ¶ 49.
[1824] *See, infra*., Section II.C.
[1825] *See, infra*., Section V.B.
[1826] According to Claimants, mining licenses can only be nullified through a *lesividad* declaration by the President. Memorial, ¶ 181; Claimants' Reply, ¶¶ 476-477; Fuentes Report I, ¶¶ 23-35.
[1827] Judicial Branch Law, art. 9 (**C-0415**): "[T]he courts shall always observe the principle of regulatory hierarchy and the supremacy of the Political Constitution of the Republic over any law or treaty, with the exception of treaties or conventions on human rights, which take precedence over domestic law."
[1828] Amparo Law, art. 3 **(C-0416-R)** "...in matters of human rights, the treaties and conventions accepted and ratified by Guatemala prevail over domestic law".
[1829] *See* Amparo Law, art. 27 **(C-0416-R)**.

and they have a subsisting opportunity to secure an exploitation license for the Santa Margarita mine. In the words of the *SD Myers* tribunal, the suspension results in nothing more than a delayed opportunity, but that, in itself, does not rise to the level of expropriation in violation of Article 10.7 of the CAFTA-DR.[1830]

Claimants do not possess any distinct, reasonable investment-backed expectations

791. It has already been argued above[1831] that, for any expectation to arise, an investor mush show the concurrence of two elements: (1) that it had conducted due diligence prior to the making of the investment; and (2) that the investor received specific assurances, commitments, or representations upon which those expectations rely. Guatemala has also pointed out that, aside from Claimants' dependence on CAM's technical report, Claimants admit that they did **not** conduct any legal, social, or environmental due diligence at any time prior to their signing of a letter of intent with Radius in 2008, their purchase of Minerales KC in 2009, and their eventual purchase of 100% of Exmingua's shares in 2012. Had Claimants conducted due diligence, they would have known, as they ought to have known, that the government was required to conduct ILO 169 consultations as a precondition to the approval of activities that affect indigenous peoples and that it was a requirement that subsists even when a project "**has been implemented, as long as it has not been fully consummated**."[1832] Failing in that stand-alone requirement to conduct due diligence, Claimants' claim of any reasonable investment-backed expectation fails at the outset.

792. Claimants contend as well that they enjoy "the right to legal certainty" "of regulations and predictability in their application, as well as the enjoyment of the benefits"[1833] and that they possess a "legitimate confidence that it was going to convert its existing exploration license into an exploitation license for Santa Margarita."[1834] It is well-established that no claim to legal certainty or legitimate confidence can arise from just the fact of issuance of an administrative act; hence, case law requires another act, in the form of an assurance, commitment, or representation, upon which the expectation can be based.[1835] Here, as already argued above,[1836] there is nothing on record of any sort that the State of Guatemala committed to recognize the continuing validity of a license issued without the required ILO 169 consultation requirements. If anything, Claimants sought to benefit from their alleged gaps in their knowledge on the implementation of

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[1830] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, (13 November 2000) ¶ 287 (**CL-0104).**
[1831] *See, infra*., Section V.B.
[1832] Judgment of the Constitutional Court issued on December 21, 2009, Case No. 3878-2007, p. 20 (**R-0080**) (*Cementos Progreso*).
[1833] Fuentes Report II, ¶ 38.
[1834] Claimants' Reply, ¶¶ 400, 444.
[1835] *See Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶¶ 132 and 134 **(CL-0093)** where tribunal held that "a reasonable person" would have sought a "formal administrative ruling" from the proper officials or, at the least, obtained expert tax legal advice, to remove the ambiguities in his claimed benefits.
[1836] *See, infra*., Section V.B.

ILO 169 in Guatemala and cannot now be heard to complain that the Progreso VII exploitation license was suspended for precisely the absence of ILO 169 consultations.

793. As a matter of fact, too, Richter is categorical that no legitimate confidence and legal certainty are concepts alien in Guatemalan law.[1837] While Claimants refer to Article 2 of the Constitution as the sole source for their purported right to legal certainty and legal confidence,[1838] the same Constitution espouses that administrative acts are, as what happened in this case, subject to review by the judiciary.[1839] Were it otherwise, the Constitution should have carved out administrative acts from the review jurisdiction of the judiciary. Instead, Congress saw it fit to arm the judiciary with the power to suspend administrative acts under the Amparo Law.[1840] It is unfortunate that Claimants cherry-pick provisions of Guatemalan law to support their purported legitimate confidence and legal certainty claims.

794. Guatemalan Mining Law is also clear that exploitation licenses are not granted as a matter of certainty to an exploration license holder. The EIA process itself is subject to "evaluation and approval" under Article 20 of the Guatemalan Mining Law. The application is also subject to opposition under Articles 46 to 48 of the Law. The law also clearly delimits the scope of rights that the exploration license confers to the holder, but not the right—not even an inchoate one—to convert the same into an exploitation license. Too, while Article 30 of the Law employs the term "right" to augment the license so as to include new minerals discovered in the course of exploitation, the Law makes no mention of the word "right", in the juridical sense, to an exploitation license.

795. With this in mind, Claimants should have presented evidence, that is, some specific assurance, commitment, or representation, to back their confidence that their exploration license would be converted into an exploitation license. Again, the Tribunal could pore over the entire record and find no such specific commitment that the State would grant an exploitation license for Exmingua.

796. Besides, as explained above, there has been no obstacle to Exmingua's processing of its Santa Margarita exploitation license application. It was Claimants' own business decision to desist from pursuing—in fact,

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[1837] Richter II Report, ¶¶ 51, 76.
[1838] Fuentes Report II, ¶ 38.
[1839] Political Constitution of the Republic of Guatemala, art. 204: "In all their decisions or sentences, the tribunals of justice will obligatorily observe the principle that the Constitution of the Republic prevails over ***any*** law or treaty." (**C-0414-R**); *See also* art. 268: "The Court of Constitutionality is a permanent tribunal of privative jurisdiction, of which the essential function is the ***defense of the constitutional order***; [it] acts as a collegiate tribunal ***with independence from the other organs of the State*** and exercises [the] specific functions assigned to it by the Constitution and the law of the matter. (**C-0414-R**).
[1840] Amparo Law, art. 49(a) ("Amparo effects: The declaration of admittance of the amparo will have the following effects: Suspend, with respect to the plaintiff, the law, the regulation, resolution or challenged act, and, if applicable, the reinstalation of the previous juridical status or the cease of the measure") (**C-0416-R**). See also Richter II Report, ¶ 47.

they never seriously pursued—Exmingua's application. Indeed, Claimants' desistance all the more proves that Claimants knew that an exploitation license is not granted as a matter of right and, thus, they could not have developed a legitimate confidence that one would be issued in their favor. If anything, all they had was a mere expectancy that they could convert their exploration license into an exploitation license. The CAFTA-DR, however, does not extend its protections to mere expectancies or inchoate rights but to reasonable investment-backed expectations that, by law, arise from a quasi-contractual relationship between the State and the investor.[1841]

The alleged acts of interference were the result of non-discriminatory regulatory actions designed and applied to protect the legitimate public welfare objectives

797. In its Counter-Memorial, Guatemala showed that, "[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed to the general welfare."[1842] More recently, the tribunal in *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* "the position under general international law" that "measures [that] are taken for the public benefit as established by law, on a non- discriminatory basis" do not entitle the investor to damages.[1843] State practice, as reflected in the 1967 OECD Draft Convention on the Protection of Foreign Property, also supports the view "that measures taken in the pursuit of a State's "political, social or economic ends" do not constitute compensable expropriation.[1844]

798. Drawing from the text Annex 10-C.4(b) of the CAFTA-DR, Guatemala argued that it requires proof of two cumulative elements that: (1) the regulation is designed and applied to protect legitimate public welfare objectives, and (2) the regulation be nondiscriminatory.[1845] Guatemala then showed that the suspension of the Progreso VII exploitation license was meant to implement ILO 169, an international instrument whose underlying public welfare objective is "the protection of the cultural integrity of indigenous peoples by ensuring that these communities take part in assessing measures with the potential to impact their cultural relationship with their land and natural resources."[1846] Guatemala also established that, in the *CALAS* case, the Court took note of the serious conflicts emerging in the area that "have endangered the lives and security

[1841] Guatemala's Counter-Memorial, ¶¶ 602 *citing Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June, 2009, ¶ 766 (**RL-0041)**
[1842] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL (March 17, 2006), ¶ 255 (**CL-0154**).
[1843] *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award (July 8, 2016), ¶¶ 301, 182 (**RL-0124)**.
[1844] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL (March 17, 2006), ¶ 259 (**CL-0154**).
[1845] Guatemala's Counter-Memorial, ¶ 575.
[1846] Maria Victoria Cabrera Ormaza, p. 38, *citing* A. Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples*, p. 63 **(RL-0297)**.

of the inhabitants of the applicable municipalities," and, in its discretion, maintained the suspension until the consultations were complete."[1847]

799. In their Reply, Claimants argue that the police powers doctrine does not constitute as an exception to liability for expropriation.[1848] They argue, on the basis once more of academic writings, that Annex 10-C.4(b) of the Treaty is not "meant to create *a blanket exception for regulatory measures*."[1849] They then attempt to dilute the categorical statement in *Saluka*, arguing that the police power doctrine's "contours [are] ill-defined,"[1850] and that *Philip Morris* relied on the police powers doctrine only as an "additional reason in support of the same conclusion."[1851] They finally do not challenge that ILO Convention 169 consultations are based on and seek to promote legitimate public welfare objectives. Their only quibble is that "*none* of the challenged measures were measures of general application, all were discriminatory, and they were taken without due process."[1852] These arguments are meritless.

800. *First,* Guatemala has never advocated that Annex 10-C.4(b) of the CAFTA-DR constitutes an exception to liability. Under international law, exceptions are justifications that, under certain conditions, exculpate the State from international responsibility when it would otherwise be held liable without such exception.[1853] The effect of an exception is "to preclude the wrongfulness of a conduct *that would otherwise not be in conformity* with the international obligations of the state concerned."[1854] Here, Guatemala's argument is that the alleged acts of interference do not even give rise to any wrongfulness or breach of the Treaty if the Tribunal finds that the measures are nondiscriminatory regulations designed and applied to protect legitimate public welfare objectives. Claimants failed to appreciate this subtle but important distinction.

801. In terms of burden of proof, "the onus of establishing responsibility lies in principle on the claimant … Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance [precluding wrongfulness], however, the position changes and the onus lies on that State to justify or excuse its conduct."[1855] Because Guatemala does not

[1847] Guatemala's Counter-Memorial, ¶ 635. *See* Decision of the Constitutional Court in Case No. 1592-2014, issued on June 11, 2020, p. 38 **(C-0145-ENG)** ("An assessment of the situation inclines this Court towards ordering that the project developed under the aforementioned mining license remain suspended as ordered by the Amparo Court of first instance upon granting provisional protection in its decision of 11 November 2015.")
[1848] Claimants' Reply, ¶¶ 451, 453.
[1849] Claimants' Reply, ¶ 451.
[1850] Claimants' Reply, ¶ 452.
[1851] Claimants' Reply, ¶ 453.
[1852] Claimants' Reply, ¶ 454.
[1853] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 563 (8th ed. 2012) (**RL-0324**).
[1854] Articles on State Responsibility, Chapter V, Commentary 1 (**RL-0291**).
[1855] Articles on State Responsibility, Chapter V, Commentary 8 (**RL-0291**).

argue that Annex 10-C.4(b) of the CAFTA-DR is an exception that precludes wrongfulness but rather, as the United States observes and Claimants agree, serves as "additional guidance in determining whether an indirect expropriation has occurred,"[1856] the onus remains at all times with Claimants to establish the wrongful character of the government actions complained of.

802. In other words, Claimants impliedly admit that this Tribunal should examine the character of the government action as the CAFTA-DR commands and, in that calculus, include its examination of whether (1) the regulation is designed and applied to protect legitimate public welfare objectives, and (2) the regulation be nondiscriminatory, as Guatemala has argued all along. Annex 10-C.4(b) of the CAFTA-DR is, consistent with Annex 10-C.4(a)(i), a rejection of the sole effects doctrine that Claimants want this Tribunal to apply in assessing the merits of their indirect expropriation claim. In the recent Decision in *Eco Oro Minerals Corp. v. Colombia*, the tribunal opined that "[a]n assessment of whether there has been interference "*with distinct, reasonable investment-backed measures*" and "*the character of the measure or series of measures*" […] can only take place with reference to whether those measures "*are designed and applied to protect legitimate welfare objectives*." This is most obvious in connection to the 'character' criterion but is also true of the 'expectations' criterion, as investors must be taken to understand that States retain the power to regulate in the public interest."[1857]

803. *Second,* Claimants' criticisms of *Saluka* and *Philip Morris* do not dilute the fundamental principles laid down in these cases. The fact remains that, in both cases, the tribunals were categorical that acts employed in a non-discriminatory manner to meet legitimate public welfare objectives do not give rise to liability. To obviate any doubt, the NAFTA tribunal in *Chemtura v. Canada* similarly remarked that "[a] measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation."[1858] In that case, the expropriation claim was denied because "[i]rrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers."[1859]

804. *Third*, in this case, the alleged acts of interference are not discriminatory, nor were they taken without due process, as Claimants complain. The Constitutional Court ordered suspension of the Progreso VII exploitation license pending ILO 169 consultations because of the serious conflicts emerging in the area that "have endangered the lives and security of the inhabitants of the applicable municipalities"; the Court,

[1856] U.S. Non-Disputing Party Submission, February 19, 2021, ¶ 46.
[1857] *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability, and Directions on Quantum, September 9, 2021, ¶ 629 (**RL-0365**).
[1858] *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (Aug. 2, 2010), ¶ 266 (**CL-0087**).
[1859] *Id.*

"in its discretion, maintained the suspension until the consultations were complete."[1860] Surely, this Tribunal would agree that it possesses neither the authority nor the jurisdiction to second-guess the Court's factual finding. Once more, Guatemala implores the Tribunal to stay its hand and not assume the powers of an appellate body.[1861] Further, as argued elsewhere in the Counter-Memorial[1862] and in this Rejoinder,[1863] Exmingua's case is distinguishable from the *Oxec*, *CGN*, and *Minera San Rafael* cases. Too, the Constitutional Court acted, at every stage, in respect of Exmingua's due process rights.[1864]

805. With regard to the suspension of the exportation certificate, the impoundment of the gold concentrate, and the freezing of the bank accounts, again, these would not have transpired but for Exmingua's criminal and administrative violations,[1865] and so there is not any room to argue discrimination for these alleged acts of interference. Criminal and administrative liabilities are personal, and Claimants have not otherwise shown that criminal and administrative violations were committed by other mining companies. Exmingua's due process rights were likewise observed in all of these processes.[1866]

806. Meanwhile, no government action can be complained of for purposes of the suspension of exploration activities and the exploitation license application for the Santa Margarita mine. As Guatemala has repeatedly argued, Claimants suspended Exmingua's mining operations and desisted from their exploitation license application for the Santa Margarita mine on their own volition and that they were never really keen on realizing the Santa Margarita mine project anyway. In any event, *Minera San Rafael* required consultations as well pursuant to ILO Convention 169. Thus, if at all, any requirement to conduct ILO 169 consultations for EIA approvals is imbued with a public welfare objective that Claimants do not deny exists.

807. In summary, Claimants failed to establish any and all of the required factors under Annex 10-C of the CAFTA-DR to prove that the challenged governmental measures constitute indirect expropriation. Regardless of what property rights or interests Claimants identify as basis for their expropriation claim and

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[1860] Guatemala's Counter-Memorial, ¶ 635. *See* Decision of the Constitutional Court in Case No. 1592-2014, issued on June 11, 2020, p. 38 **(C-0145)** ("An assessment of the situation inclines this Court towards ordering that the project developed under the aforementioned mining license remain suspended as ordered by the Amparo Court of first instance upon granting provisional protection in its decision of 11 November 2015.")

[1861] *Loewen Group and Another v. United States of America*, Opinion of Christopher Greenwood Q.C (March 26, 2001), ¶ 64 (**RL-0194**) ("**The international tribunal is not a court of appeal from the national court (as Loewen accepts), nor is its task to review the findings of the national court**. In the absence of clear evidence of bad faith on the part of the relevant court…the claimant must demonstrate that either it was the victim of discrimination on account of its nationality or that the administration of justice was scandalously irregular. Defects in procedure or a judgment which is open to criticism on the basis of either rulings of law or findings of fact are not enough.").

[1862] Counter-Memorial, pp. 202-218.

[1863] *See infra.*, Section V.F.

[1864] *See infra.*, Section V.C.3

[1865] *See infra.*, Section II.F and G.

[1866] *See infra.*, Section V.C.3.

irrespective of the nature of their claim as one for direct losses or reflective losses, Claimants failed to prove that the alleged acts of interference, whether in isolation or in the aggregate, are expropriatory in nature. Hence, this Tribunal should find that Guatemala did not breach Article 10.7 of the CAFTA-DR and deny Claimants' unfounded expropriation claim irrespective of its framing.[1867]

F. None of the Treatments Alleged Satisfy the National Treatment Standard or the MFN Treatment Standard.

808. Should any of the national treatment or (supposed) MFN treatment claims survive the jurisdictional objections, the claims fail on the merits for the following reasons: (1) judicial measures cannot form the basis for either standard; (2) there is still no evidence of nationality-based discrimination for any of the four treatments; (3) all of Guatemala's measures were carried out in furtherance of rational and non-discriminatory policies; (4) none of the comparators are in like circumstances; and (5) Guatemala did not treat Exmingua or Claimants any less favorably.

1. Judicial measures cannot form the basis for national treatment or MFN treatment claims.

809. The United States agrees with Guatemala that the courts of a state are not subject to claims of national treatment and MFN treatment.[1868] According to the United States, "judicial measures may give rise to a claim for denial of justice under Article 10.5.1. However, absent a denial of justice involving discriminatory treatment by the courts or access to judicial remedies, judicial measures do not violate Articles 10.3 or 10.4 of the CAFTA-DR."[1869]

810. The rationale behind this position is sound. If national or MFN treatment is extended to the courts, then the task of identifying comparable litigants in "like circumstances" would be difficult given that the facts, counsel, case strategy and witnesses will undoubtedly vary.[1870] Litigants are not entitled to equal treatment. Courts assess the circumstances of each case individually.

811. Claimants do not contest these points. They simply argue that the acts of the judiciary are attributable to the State and may give rise to State responsibility.[1871] That may be true in the denial of justice context,

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[1867] Jan Paulsson and Zachary Douglas, *Indirect Expropriation in Investment Treaty Arbitrations*, in Norbert Horn and Stefan Michael Kroll (eds), Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, Studies in Transnational Economic Law, Volume 19 (Kluwer Law International; Kluwer Law International 2004) pp. 145-158, 148 **(RL-0278) (**"The question of compensation under Article 10.7.1 of the CAFTA-DR does not even come into play considering that no expropriation took place in this case. As Guatemala has argued, not every taking, if at all there was taking, amounts to an expropriation. Arbitrator Douglas similarly opines that: "Investment treaty awards sometimes appear to confuse two distinct analytical steps for a finding of expropriation by conflating the questions as to whether there has been a taking attributable to the Host State and whether the Host State is under an obligation to compensate that taking.")

[1868] Guatemala's Counter-Memorial, ¶¶ 618-620.

[1869] U.S. Non-Disputing Party Submission, ¶ 34.

[1870] U.S. Non-Disputing Party Submission, ¶ 35; Guatemala's Counter-Memorial, ¶ 619.

[1871] Claimants' Reply, ¶ 558.

where the measures at issue target a single litigant.[1872] But when comparisons are made between two completely separate cases (as here), any differences between them are not *wrongful per se* given that courts decide each case individually by assessing the different facts and circumstances presented at that time. Put simply, a difference in treatment is not wrongful when carried out by the courts, absent a denial of justice.[1873] All of the claims involving the Constitutional Court should be accordingly dismissed.

2. Claimants have not provided any evidence of nationality-based discrimination

812. The United States submits that Articles 10.3 and 10.4 "prohibit nationality-based discrimination" between domestic and foreign investors/investments.[1874] For support, the United States cites two NAFTA Awards (from *Loewen v. United States* and *Mercer v. Canada*) that reach the same conclusion.[1875] The United States took this same position in other cases as well,[1876] as did Mexico,[1877] and countless tribunals.[1878]

813. The *Loewen* award cited by the United States is particularly instructive. The tribunal in *Loewen* held that NAFTA Article 1102 (National Treatment) proscribes "only demonstrable and significant indications of bias and prejudice on the basis of nationality."[1879] Claimants do not refute this holding, or the position taken by the United States. Nor do they offer any indications of bias.

814. Claimants argue that they need not prove "discriminatory *intent*" to establish their claims.[1880] That may be true, but they still must prove discrimination. As explained in the Counter-Memorial, Articles 10.3 and

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[1872] See Section V.C.4; JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 199-200 (**CL-0171**); *Cargill v. México*, Award, ¶ 2 **(CL-0197).**

[1873] Guatemala's Counter-Memorial, ¶ 620.

[1874] U.S. Non-Disputing Party Submission, ¶ 30.

[1875] U.S. Non-Disputing Party Submission, ¶ 30 n. 62; *Loewen v. United States*, Award ¶ 139 **(CL-170)** (finding that "Article 1102 [National Treatment] is direct[ed] *only* to nationality-based discrimination") (emphasis added); *Mercer v. Canada*, Award, ¶ 7.7 **(RL-0247)** ("accept[ing]" the positions of the United States and Mexico that the National Treatment and Most-Favored Nations obligations are intended to prevent discrimination on the basis of nationality).

[1876] *Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Submission of the United States (July 6, 2008), ¶ 12 **(RL-0245)** ("This obligation thus prohibits nationality-based discrimination between domestic and foreign investors (or investments of foreign and domestic investors) that are 'in like circumstances.'"); *Mercer v. Canada*, Submission of the United States, ¶ 10 **(CL-0173)** ("[NAFTA Articles 1102 and 1103] are intended to prevent discrimination on the basis of nationality. They are not intended to prohibit all differential treatment among investors or investments. Rather, they are designed to ensure that nationality is not the basis for differential treatment, in accordance with the provisions of the NAFTA.")

[1877] *Mercer v. Canada*, Submission of Mexico Pursuant to Article 1128 of NAFTA (May 8, 2015), ¶ 11 **(RL-0246)** ("the national treatment obligation is intended to prevent discrimination against investors of the other Parties (and their investments) on the basis of nationality[.]").

[1878] *Feldman v. Mexico*, Award, ¶ 181 **(CL-0093)** ("It is clear that the concept of national treatment as embodied in NAFTA and similar agreements are designed to prevent discrimination on the basis of nationality, or 'by reason of nationality.'"); *Cargill v. Mexico*, Award, ¶ 220 **(CL-0197)** ("Moreover, the Tribunal also concludes that the discrimination was based on nationality both in intent and effect."); *GAMI v. Mexico*, Final Award, ¶ 115 **(CL-0036)** ("It is not conceivable that a Mexican corporation becomes entitled to the antidiscrimination protections of international law by virtue of the sole fact that a foreigner buys a share of it.").

[1879] *Loewen v. United States*, Award, ¶ 139 **(CL-170)**.

[1880] Claimants' Reply, ¶ 553 (emphasis added).

10.4 must be read in light of their object and purpose; and the purpose of these standards is to prevent nationality-based discrimination.[1881] If the evidence does not so much as suggest nationality-based discrimination (by intent or effect), then the claims must fail.

815. The cases cited by Claimants support this position. While the tribunal in *Marvin Feldman* cautioned against the need for proof of "explicit" discrimination, it said nothing about intent.[1882] In fact, that tribunal ultimately found a "nexus between the discrimination and the Claimant's status as a foreign investor" without any regard to intent.[1883] The *Electrabel* tribunal found that "discriminatory effects" would be sufficient to show national treatment.[1884] Likewise, the *LG&E* Tribunal held that "a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has *discriminatory effect*."[1885] To be clear, Guatemala's position is that intent is relevant, even if not decisive.[1886] But absent intent, Claimants must still show some type of nexus between the discrimination and their status as a foreign investor.

816. Claimants have not shown that nexus. There is absolutely nothing to suggest that the Courts or the MEM were motivated by Claimants' foreign status. Nor is there anything to suggest that the effects of the treatments were discriminatory. The hodge-podge of claims and comparators lumped together by Claimants confirms this view. In two of the treatments—the second and third—the domestic comparator (Oxec) received the same treatment as the Canadian and Swiss foreign comparators (PSA and Solway).[1887] In other words, domestic and foreign investors were treated equally. Even if Exmingua was treated differently (which it was not), it was not based on nationality.

817. The new MFN claims for Oxec further show a *lack of* nationality-based discrimination. The new MFN claims just add a foreign owner for Oxec without offering any additional evidence of discrimination based on that foreign owner. In other words, there are no factual differences between these claims. If the facts are constant across the two different claims with different comparators of different nationalities, then it cannot be said that nationality played a role in Guatemala's actions.

[1881] Guatemala's Counter-Memorial, ¶ 622.
[1882] *Feldman v. Mexico*, Award ¶ 183 **(CL-0093)**.
[1883] *Feldman v. Mexico*, Award ¶ 182 **(CL-0093)**.
[1884] *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.152 **(RL-0253)**.
[1885] *LG&E Energy Corp. v. Argentina*, Award, ¶ 146 **(CL-02237)** (emphasis added).
[1886] *S.D. Myers v. Canada*, Partial Award, ¶ 254 **(CL-0104)**; *See also* Counter-Memorial, ¶ 660 ("While intent may not be determinative, it is still relevant[.]").
[1887] This argument is without prejudice to Respondent's position that all four investments are domestic investments for purposes of Annex II and Article 10.13 of the Treaty. *See supra* Section IV.D.

3. All of the treatments alleged were based on rational and non-discriminatory policies

818. Separate and apart from the lack of nationality-based discrimination, all four treatments are based on rational and non-discriminatory policies.[1888] They all were directly connected with Guatemala's attempt to protect and enforce the rights of indigenous people and to uphold Guatemala's commitments under international law.[1889] These policies do not distinguish between foreign and domestic companies, either on its face or *de facto*. Nor does they undermine the investment liberalizing objectives of the Treaty. Claimants do not dispute these points.

819. Claimants only response is that none of Guatemala's "actions" included any balancing between Exmingua's interest and the State's interest in conducting consultations, or a proportionality analysis on whether suspension was necessary and adequate.[1890] According to Claimants, the State abused its discretion through this "arbitrary and discriminatory *conduct*" to the determent of Exmingua.[1891]

820. Claimants appear to confuse actions with policies. While Guatemala's actions were neither arbitrary nor discriminatory, as explained above,[1892] it is the policies underlying those actions that are the focus of this analysis.[1893] The *policy* must be non-discriminatory; not the action.[1894]

821. In *GAMI*, the tribunal found that the State closed some sugar mills (action) to ensure that the sugar industry was solvent (policy). Here, the Court suspended operations (action) to protect the rights of indigenous populations (policy) and to uphold Guatemala's international obligations (policy). It imposed conditions on Exmingua's exploitation license (action) for the same policy ends. And the MEM held consultations (action) to protect the indigenous communities (policy) and to comply with the Court's instructions (policy). These policies do not distinguish between foreign and domestic companies, either on

[1888] Counter-Memorial, ¶ 663; The United States agrees, submitting that "whether treatment is accorded in like circumstances under Articles 10.3 and 10.4 depends on the totality of circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare concerns." U.S. Non-Disputing Party Submission, ¶ 33.

[1889] With regards to the first treatment about the suspension, the Court ordered the suspension to give priority to the rights of indigenous peoples. As to the second treatment, the alleged conditions placed on Exmingua's consultations were intended, in Claimants' own words, to ensure that "operations would not threaten the existence of the indigenous population in the vicinity of the mining project." For the last two treatments, the time taken by the Court and the MEM was spent ensuring that the rights of indigenous peoples were fully protected, either through a well-developed court decision, which sets out instructions for the MEM to follow, or by the MEM following those instructions. Counter-Claimants' Memorial, ¶ 664.

[1890] Claimants' Reply, ¶ 578 (emphasis added).

[1891] *Id*.

[1892] *See Supra*.

[1893] *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, ¶ 78 **(CL-0116)**; *GAMI v. Mexico*, Award, ¶ 114 **(CL-036)** ("That measure was plausibly connected with a legitimate goal of policy (ensuring that the sugar industry was in the hands of solvent enterprises) and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity.").

[1894] The GAMI tribunal made this clear when it said that the "measure" must be connected to a "legitimate goal of policy." *GAMI v. Mexico*, Award, ¶ 114 **(CL-036)**.

their face or *de facto*. Nor does they undermine the investment liberalizing objectives of the Treaty.

4. None of the comparators are in like circumstances with Exmingua

822. The question of "like circumstances" rests on whether the entities were "direct competitors."[1895] Tribunals consider a non-exclusive list of factors, such as whether the comparators (i) are in the same economic or business sector (ii) have investments in or are businesses that compete with the investor or its investments in terms of goods and services; or (iii) are subject to comparable legal regimes or regulatory requirements. [1896] Claimants also agree that business sectors and regulatory regimes are relevant.[1897]

823. Oxec and Exmingua are not in "like circumstances" because they operate in different economic sectors subject to different regulations.[1898] In other words, they are not direct competitors. Claimants believe these differences are "irrelevant" because they have nothing to do with the four treatments alleged.[1899] Claimants are mistaken.

824. To the extent Exmingua and Oxec were treated differently, the Court did so because of the different policy goals underlying each project. Exmingua is a mining project, which offers proceeds to the state from the sale of minerals.[1900] Oxec, on the other hand, is a hydroelectric dam intended to bring renewable energy to one of the remotest areas of Guatemala.[1901] The Court accounted for this distinction when it balanced the need to "properly safeguard the lawful interests of the affected or potentially affected parties," meaning the indigenous peoples, with the need to "prevent unreasonable objections to financially sound projects that may be developed by the Nation.[1902]

825. The size differences between Exmingua, MSR and CGN are also relevant. The tribunal in *Renée Rose v. Peru* held that claimant's small bank holding two percent of the countries' deposits was not in "like

[1895] *RDC v. Guatemala*, ICSID Case No. ARB/07/23, Respondent's Rejoinder on the Merits (October 21, 2011), ¶ 291 **(CL-0069)** ("NAFTA tribunals 'have focused mainly on the competitive relationship between investors in the marketplace.') (Quoting *Archer Daniels Midland Company et al. v. Mexico*, ICSID Case No. ARB (AF)/04/5, Award (November 21, 2007), ¶ 199 **(CL-0195)**.

[1896] Guatemala's Counter-Memorial, ¶¶ 624; *Apotex v. United States*, Award, ¶ 8.15 **(RL-0215)**. The United States agrees that the analysis involves "more than just the business or economic sector, but also the regulatory framework and policy objectives." U.S. Non-Disputing Party Submission, ¶ 33.

[1897] Claimants' Reply, ¶ 564.

[1898] Guatemala's Counter-Memorial, ¶ 625.

[1899] Claimants' Reply, ¶ 564.

[1900] Guatemala's Counter-Memorial, ¶¶ 625-626.

[1901] *Id*.

[1902] Decision of the Constitutional Court in Case No. 1592-2014, issued on June 11, 2020, p. 22 **(C-0145)**. "On the one hand," the Court said, "it is necessary to identify and consequently, respect and properly safeguard the lawful interests of the affected or potentially affected parties; and, on the other hand, to prevent unreasonable objections to financially sound projects that may be developed by the Nation."

circumstances" with a much larger bank holding 51 percent of the countries' deposits.[1903] Nor was claimant's bank in "like circumstances" with a different bank that had "far reaching network of individual depositors," while claimant's bank did not[1904] Here, Progresso VII processed 150 tons per day of raw material, while the Escobal Mine (MSR) processed 4,500 tons per day and Fenix Nickel Mine (CGN) processed 4,010 tons per day.[1905] In addition, Progesso VII employed 94 people from the local communities, while Escobal employed 7,600.[1906] The market share of each mine, and the impact on the local community, was dramatically different.

5. Exmingua was not treated unfavorably

826. Guatemala explained its position in the Counter-Memorial. Regarding the suspension, the Court applied the same standard to both Exmingua and Oxec, only to reach different conclusions.[1907] The Court also set out the same conditions for Oxec, Minera San Rafael, CGN and Exmingua for their licenses to be reinstated.[1908] The timing of each decision was neither unreasonable or intentional.[1909] And the MEM is following the same procedures for Exmingua's consultations as it did for Oxec.[1910]

827. With regards to the suspensions, Claimants take issue with the level of discretion judges exercise to decide the suspension issue.[1911] But the legality of that discretion cannot be challenged here. The important thing is that the Court applied the same discretionary standard in each case:[1912] a "balance and harmonization between…the rational use of its natural resources; [and] the promotion of investment projects aimed at sustainable development, in a climate of legal security and social peace," among other factors.[1913] Claimants believe that this balancing is not present in the decisions,[1914] but they are wrong. The text from the Exmingua decision is quoted above and in the Counter-Memorial.[1915] Claimants take no issue with that

[1903] *Renee Rose v. Peru*, Award, ¶ 398 **(RL-0251)**.
[1904] *Renee Rose v. Peru*, Award, ¶ 398 **(RL-0251)**.
[1905] Guatemala's Counter-Memorial, ¶ 643.
[1906] *Id*. at ¶ 643.
[1907] *Id*. at, ¶ 631.
[1908] *Id*. at, ¶ 646.
[1909] *Id*. at, ¶ 413.
[1910] *Id*. at, ¶ 637.
[1911] Claimants' Reply, ¶ 572; *See also,* Amparo Law, Art. 27 **(C-0416-R)**. ("The provisional suspension of the act complained of is appropriate both ex officio and at the request of a party. In any case, the court, in the first decision it issues, even if it has not been requested, will decide on the provisional suspension of the act, resolution or procedure complained of, when, at the Amparo Court's discretion, the circumstances of the case call for it.") **Note that Article 27 appears in Claimants' original exhibit, but it was curiously removed in the resubmitted version (attached to the Reply).**
[1912] *See Bilcon v. Canada*, Award, ¶ 697 **(CL-0242)** ("What is of critical importance here is that the Whites Point project did not receive the expected and legally mandated application, for the purposes of federal Canada environmental assessment, of the essential evaluative standard under the CEAA.")
[1913] Guatemala's Counter-Memorial, ¶ 634.
[1914] Claimants' Reply, ¶¶ 539, 572.
[1915] Guatemala's Counter-Memorial, ¶ 634.

text. In the Oxec decision, the Court balanced the states desire to exploit natural resources as a "public utility and need," with rights granted to indigenous communities.[1916] It's the same test in both decisions.

828. Regarding the "additional" condition, Guatemala showed in its Counter-Memorial how each decision was similar, but Claimants refused to acknowledge their similarities.[1917] The decisions speak for themselves, however.[1918] As Guatemala explained, ensuring the survival of the indigenous communities (the supposed new condition) has always been a necessary outcome of the consultations.[1919] Nothing new was added for Exmingua.

829. On the timing of each decision, Claimants do not contest that the Court has the discretion to decide the order of cases.[1920] Nor do they dispute that their own actions prolonged the proceedings.[1921] They even confirm that these *amparos* affecting the rights of indigenous peoples were very controversial.[1922] Under the circumstances, any delay was neither unreasonable nor intentional.[1923]

830. In addition, there is not a hint of nationality-based discrimination with regards to the timing. Oxec's case was decided first, followed by Minera San Rafael's case. Exmingua's case was decided third, and lastly CGN's case. There is no correlation between the nationality of these companies (or their investors) and the timing of each decision. There is no discrimination.

831. As for MEM, Claimants take issue with MARN's decision to submit a request for clarification to the Court,[1924] but MARN had every right to submit this request. According to the Vice Minister, the MEM has waited for a *final* execution order in <u>all cases</u>, including Exmingua, Oxec and San Rafael.[1925] Thus, the MEM treated Exmingua and Oxec the same.

VI. MINING ISSUES

A. Claimants' lack of social responsibility imperiled the viability of the Project and affected its value

832. An EIA is a crucial document for building a positive relationship with the people who live near a project. While an exploitation license may have technical terms that are difficult to understand, the EIA has input

[1916] Oxec Decision, p. 60 **(C-0441-R)**.
[1917] Claimants' Reply, ¶ 580.
[1918] Guatemala's Counter-Memorial, ¶¶ 646-649.
[1919] Guatemala's Counter-Memorial, ¶ 650.
[1920] Guatemala's Counter-Memorial, ¶ 652.
[1921] Guatemala's Counter-Memorial, ¶ 655.
[1922] Claimants' Reply, ¶ 305 (referring to the "ideologization and politicization of proceedings" as well as the "contradictory rulings").
[1923] Guatemala's Counter-Memorial, ¶ 413.
[1924] Claimants' Reply, ¶ 294.
[1925] Oscar Perez Statement, ¶ 15.

from community members, often with names and direct quotes. The EIA will outline plans for people in the area, and those plans will directly impact the lives of families for years in the future. Locals will look to the EIA to see if the concessionaire listened to them, and they will understand the EIA's text as the concessionaire's promises. It is much more than a perfunctory permit application. It is a conversation and a commitment. As the Tribunal will see below, Claimants did not take seriously either the process or their promises.

1. Claimants failed to deliver on their promise to carry out the project following the highest social management standards

833. Claimants made multiple representations in the EIA that the Project would be carried out to the highest social management standards,[1926] but from the start Claimants failed to deliver on this promise. As Guatemala's expert lays out, the existing social performance standards reflected in the ICMM, IFC PS, and Equator Principles,[1927] which Claimants do not deny applied to the mining industry in 2008, aimed to (i) avoid harm; (ii) ensure the respect of human rights and other rights of the affected community members; (iii) provide for equitable benefits across the affected communities; and (iv) provide for procedural fairness.[1928] None of these processes and outcomes is evident in Claimants' social performance leading to no other conclusion than the Project failed to adhere to international best practices.

834. Incredibly, and despite the representations made in the EIA, Claimants now state that those standards "are inapplicable to the present dispute as they are voluntary standards."[1929] This is a shocking admission. Not only does this statement justify the community's lack of trust in Claimants, but it also undermines Claimants' damages model, which implicitly relies on external funding that requires compliance with international standards.[1930] And instead of compliance, Claimants offer something much less: the allegation[1931] that their social consultation process was "in line with IFC guidance." Claimants offer little to prove what it means to be "in line with" while not compliant, especially when they omit mention of their social outreach programs. As shown below, Claimants utterly failed to comply with international best practices in both the EIA process and the social management actions taken thereafter, exacerbating local tensions and undermining any valuation.

[1926] *See,* EIA, pp. 45, 437 (**C-0082-ENG**).
[1927] Claimants' Reply ¶¶ 108(recognizing IFC Principles and Equator Principles), ¶ 166 (recognizes ICMM); Mendoza Repot, ¶¶ 37 *et seq.* (claiming that consultation process followed international best practices as reflected in IFC).
[1928] CIG Report, ¶ 53.
[1929] Claimants' Reply ¶ 108.
[1930] Rosen / Milburn Report, ¶ 51.
[1931] *See* SLR II Report ¶ 168 (There is no indication that Ms. Mendoza has any experience of credentials with the application of IFC principles with regards to mining projects. Her experience appears to be centered on public relations and corporate image).

a. Claimants made little effort to avoid and minimize harm to the surrounding communities

i. Claimants failed to conduct an adequate social impact assessment

835. Claimants' failure on the social aspects of the Project began with the EIA process. The EIA is supposed to identify the communities affected and their concerns as well as predict and mitigate any harmful effects.[1932] Claimants largely disregarded the process, not only by international standards,[1933] but also against the guidelines set forth in MARN's Terms of Reference ("TOR").[1934] As the Tribunal will see, Claimants used the EIA process as a simple checklist to obtain their exploitation permit, not a meaningful conversation. There was no real intent to understand and build trust with the surrounding communities, as shown in the examples that follow.[1935]

836. *First,* Claimants admittedly failed to properly study the social environment in which they would operate. This is not merely an allegation by Guatemala. Claimants' own consultants acknowledge this failure.[1936] The social baseline studies in the EIA are totally devoid of, among other things, any mention of potential sources of local conflict, conflict experienced by other mining projects,[1937] the implications of ILO Convention 169, or any analysis of the impacts on indigenous peoples, other than to note that the area was 67% indigenous.[1938] This omission also contravenes MARN's Terms of Reference which emphasized the "importance of the company to identify the sources of potential conflict."[1939] The social baselines are largely a regurgitation of demographic data.[1940]

837. *Second,* the EIA defined the area of influence ("AOI") too narrowly. Despite there being around 53 communities nearby, Claimants only claimed to consult with 5 of those communities (3 villages and 2 urban centers).[1941] Without justification, the EIA excluded other villages that are in the same geographical vicinity

[1932] CIG Report, ¶ 62.
[1933] SLR Report, ¶ Annex II; CIG Report ¶ 84.
[1934] MARN's Terms of Reference Guiding the Public Participation Process (**C-0740**).
[1935] *See, e.g.,* CEDER 2013 Report p. 20 (**C-0716**) (Claimants' own consultant points out in 2013 "the lack of foresight to develop in parallel with the exploration studies a deep study of the political and social context of the region").
[1936] CEDER 2013 Report, p. 20 (**C-0716**). *See* SMCA Strategic Plan, p. 2-4 (**C-0701**) **(**describing the origins of the conflicts with mining projects in Guatemala, an issue not even mentioned in the EIA).
[1937] In August 2011, after the consultation process had been completed, SMCA's Strategic Plan shows the stark omission from the EIA of any conflict issues as SMCA included basic information on the "origin of the opposition to mining" and "ancestral traits against mining." *See* SMCA's Strategic Plan (August 2011), p. 2 *et seq.* (**C-0701**); *see also,* SMCA Report and power point slides (9 December 2011), p. 5 (**C-0702**) (mentioning a series of issues with the mining project El Sastre with the neighboring communities).
[1938] SLR II Report, ¶¶ 159-160; CIG Report ¶¶ 64 (also noting that there is no mention of "land tenure arrangements, history of impact from past projects, people's dependency on natural resources for their livelihoods, social cohesion or level of trust and participation in institutions, and changes in the regulatory framework that affect socio-political context of the project").
[1939] Terms of Reference for the Process of Public Participation, p. 2 (**C-0740-ENG**).
[1940] EIA, pp. 251 *et seq.*(**C-0082-ENG**).
[1941] CIG Report, ¶ 70; SLR II Report, ¶ 160a and p. 41; *See* EIA, Figure 3, p. 58 (**C-0082**).

in the AOI.[1942] As noted by Guatemala's expert, Claimants failed to take into account other impacts beyond socio-economic impacts, including impacts on water sources, roadways and other resource issues, and such excluded communities that would have been impacted.[1943] Claimants subsequent efforts to expand the "coverage to other neighboring villages" further supports the EIA's mistake in defining the AOI.[1944]

838. *Third,* Claimants failed to engage with the relevant stakeholders. Claimants acknowledge that they had an obligation to consult the affected communities,[1945] but argue that consultation through COCODE representatives was an effective means to engage the wider community, [1946] and that the consultation completed was done in accordance with the "requirements" set forth in MARN's Terms of Reference.[1947] This is simply untrue.

839. For Exmingua to follow international best practices, it should have engaged directly with affected community members, not only their formal representatives.[1948] This only makes sense. As a newcomer to the area, Exmingua had to acquire a deep knowledge of the community, not a superficial discussion with someone who claims to be a leader. Exmingua had no apparent intention to do this basic level of work. Had it done the appropriate baselines studies during the EIA process Claimants would have been able to identify

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[1942] SLR II Report, ¶ 33; *See also,* SMCA Strategic Plan (August 2011) p. 14 (acknowledging that the communities "are considered independent of others" and therefore "representatives will be present in each village and each community" in a plan to inform the communities *after* the permits are issued).

[1943] CIG Report, ¶ 68 (the EIA mentions the usage of roads through El Carrizal, shared drainage systems of surface waters that run through El Carrizal and La Barranca, and the usage of those waters for their livestock) EIA, pp. 54, 180 (**C-0082**).

[1944] Mendoza Report ¶ 65. Claimants' Reply ¶ 180 (citing to educational program initiatives in the villages of San Antonio el Angel and el Carrizal in addition to the areas within the direct area of influence); Exmingua's Summary of Social Development Activites 2015, p. 2 (**R-0524**) (showing 22 communities receiving tin roofs; 30 communities receiving training course; meetings with 30 communities of COCODES; *see also* CEDER 2013 Report, p. 8 where Exmingua's Geologist point out that "nothing in the social area has been worked on in the [sic] Carrizal"). Even most of Claimants' community witnesses that discuss the impacts of the project come from outside the AOI. *See* Telma Garcia Statement ¶¶ 1, 3(resides in village of Prados de San Pedro La Lagunilla approx.. 7 miles from the mine); Carraza Statement, ¶ 1 (Resident of Lo De Reyes which is 7km from the mine).

[1945] Claimants' Reply, ¶ 89 *et seq.* ("Guatemalan law also requires that an EIA present social studies assessing the impact of the project on local communities. As Claimants further explained, from January to February 2010, Exmingua—in collaboration with GSM—carried out consultations with communities located in the vicinity of the Project. During these consultations, Exmingua provided details of the planned mine to the participants and responded to their queries"). Mendoza Yaquian Report, ¶ 24 ("Government Resolution 431-2007 provides that a project proponent must involve and consult with the population in the project's area of influence during the assessment process, and must include information concerning this public participation in the EIA.").

[1946] Mendoza Report ¶ 40. To the extent that Claimants allege they met with the COMUDE of the Municipalities, this is also false. According to Article 11 of the law on Law of Urban and Rural Development Councils, a COMUDE is made up of the mayor, trustees, and councilors as that is determined by the municipality, representatives from the various COCODES, representatives of public local entities and any representatives from local organizations that are invited. In the meetings presumably held with the COMUDES, there was no presence of any COCODE representatives at any of the municipal meetings. *See* EIA Amendments, Annex 7, pp. 1188-1193;1195-1196 (**C-0089-R-ENG**).

[1947] Claimants' Reply ¶ 92 *et. seq.* While stating that they are requirements, Claimants subsequently refer to them as "Consultation Guidelines."

[1948] CIG Report, ¶ 46 (citing to IFC Stakeholder Engagement Handbook).

the relevant stakeholders, which would have included not only community leadership, but other interested groups including indigenous groups, land users, local NGOs, etc.[1949] By failing to carry out this process following international practice the consultations process excluded relevant stakeholders.[1950] In doing so, the EIA ignored key international principles of "recognition and preservation of diversity," as well as the principle of subsidiarity, meaning that Exmingua did not make its decisions or obtain input "as close to the individual citizen as possible."[1951]

840. In any event, Claimants during the EIA consultation process never met with all the COCODES within the AOI, let alone with the wider community, as previously explained.[1952] Even those COCODE leaders present at the time were not seen as legitimate because they had been appointed by the mayor.[1953] Exmingua's social development consultant highlighted the fallacy of this approach, due to the lack of representational legitimacy of the COCODES at the time.[1954] There is also no indication any indigenous representatives were present at any of these "consultation" meetings, despite the area's population being 2/3 indigenous.[1955]

841. Claimants' allegation that they had "comprehensive discussions" with the community during the course of one or two meetings is incredulous.[1956] In any case, having a focus group session right after giving a technical presentation of the Project did not comply with international standards for conducting reliable social research to determine the perceptions of the project.[1957] Claimants' attempts to now paint a picture of a different consultation process are unavailing. The consultations were not "designed and implemented precisely to make known the project activities, their potential impacts, and the environmental management plans to be implemented." This is false. The information translated during these presentations was misleading or contradictory at times.[1958] At the meeting, Exmingua described environmental impacts

[1949] Mendoza Report ¶ 70.
[1950] CIG Report, ¶ 69-70; Claimants only point to a purported "Strategic Plan" to Change the Public Opinion on the Project which was developed *after* the consultation process had completed, and only one month before the exploitation permit was granted; *see* Claimants Reply ¶ 151. In any event, this plan does not meet international standards. CGI Report ¶ 88.
[1951] CGI Report, ¶ 85.
[1952] Claimants' Reply ¶ 106.
[1953] Sandoval Statement ¶ 5; SMCA, p. 5 (**C-0702**) (undermining Mendoza's assertion that they were democratically elected. *See* Mendoza Report ¶ 41
[1954] SMCA Report and power point slides (December 9, 2011), p. 5 (**C-0702**) (noting that COCODES are "designated by the mayor's office" and "often do not represent the interest[sic] of the population"); Sandoval Statement, ¶ 5.
[1955] EIA Amendments, Annex 7, pp. 1989-1226 **(C-0089-R-ENG)**; GSM Second Phase Report (C-0742).
[1956] Claimants' Reply ¶ 105.
[1957] CIG Report ¶ 78.
[1958] CIG Report, ¶¶ 80-82; *see also, supra* ¶¶ Section II.A (facts section). *See also,* GSM Second Phase Report, p. 6 (**C-0742**) (claiming that "mitigation measures will be taken…people will use appropriate safety equipment").

without having done the studies, downplaying serious consequences[1959] and referred to "the sworn statement before MARN to comply with the measures requested,"[1960] which MARN later found that Exmingua did not do.[1961] Exmingua's own geologists that had been present during the consultations later stated that there was "high contamination,"[1962] further justifying the lack of trust between Claimants and the people.

842. Unable to make a compelling case under international standards, Claimants allege that the consultation was adequate because it complied with MARN's Terms of Reference.[1963] But this was not the case.[1964] *First*, not all of the informational meetings were led by a person who "specialized in participatory methods," as many of the meetings were only attended by either Exmingua's general manager or their geologists.[1965] *Second*, in the citizen participation process,[1966] Exmingua did not comply with all three stages.[1967] There is no indication in the participation process that Exmingua responded to and addressed the community's concerns. To the contrary, Exmingua offered no response to a number of concerns, such as "the role of the COCODE in the project, the extent of noise pollution, and how the social projects would be identified."[1968] These were fundamental questions, and Exmingua remained silent.

843. Exmingua also ignored aspects raised by the COCODE members, such as communicating to the wider population to avoid the "problems with Montana [..] due to lack of information and *direct* relationship with the population."[1969] Without this conversation, there is no indication that Exmingua complied with the third stage, which required the monitoring and follow-up of any agreements reached during the consultation process.[1970] Other than additional meetings with the same groups in 2011, there is no indication of what was discussed in these meetings, whether the issues raised in 2010 were followed up on, or whether any

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[1959] *See, e.g.,* EIA p. 294 (**C-0082**) (said they are aware of the concerns generated by the mining activity, for which the design of the project considers safety measures environmental and industrial tending to eliminate negative impacts).
[1960] GSM Second Phase Report, p. 12 (**C-0742**).
[1961] MARN Inspection February 23-27, 2015 (**R-0105**).
[1962] *See, e.g,* GSM Second Phase Report, p. 14 **(C-0742)** (claiming that there would be "nothing negative" from the water waste, no "gas emissions" during the presentation with the Village of Los Achiotes. *See* EIA Amendments, Annex 7, p.1202 (**C-0089-R-ENG**) (attended by Alex Vaides and Hector Vaidez (Exmingua's geologists). *See also,* CEDER 2013 Report, p. 12 (**C-0716-ENG**).
[1963] Claimants' Reply, ¶ 92; *See* Mendoza Report, ¶ 31.
[1964] SLR II Report, ¶ 41.
[1965] EIA Amendments, Annex 7 (**C-0089-R-ENG**).
[1966] Terms of Reference for the Process of Public Participation p. 4 (**C-0740-ENG).**
[1967] *Id*.
[1968] CIG Report, ¶ 77.
[1969] GSM Second Phase Report, p. 9 (**C-0742**) (Despite warnings from the participants to avoid the issue that faced the Montana mining project due to a failure of having a *direct* relationship with the communities, Claimants never ensured the participation of the wider community in the process.)
[1970] SRL II Report ¶ 41; CGI Report ¶ 84.

agreements with the participants were reached.[1971] By failing to listen, respond, and show that Exmingua could be trusted to keep its word, Claimants failed to consult, choosing instead to selectively talk.

844. With misleading information being provided and no real conversation with the affected communities, there is no basis to conclude that the GSM Strategic Plan was carried out in a manner that "makes it possible to know the [real] attitudes, concerns, and perceptions of the communities" regarding the Project.[1972] Claimants have admitted this is true. Years later, Claimants' consultant, SMCA, drew up its Strategic Plan, which aimed to "Making Presence" and "first contacts with the population."[1973] There would have been no need for "first contacts" if Claimants had actually listened and acted in good faith from the beginning.

ii. Claimants exacerbated the existing conflict

845. In their Reply, Claimants attempt to turn the focus away from their controversial actions to the alleged benefits and support they provided the surrounding communities.[1974] The Reply misses the point. Claimants do not have an obligation to buy off a few people through minimal contributions. International practice requires minimizing harm,[1975] and Claimants have shown no intention to comply with this basic standard.

846. As part of its "first contacts," Claimants opted for military force and division. It remains undisputed that despite Guatemala's long internal armed conflict, Claimants inexplicably hired ex-military members to lead their social outreach efforts.[1976] The role of SMAC was largely seen as a source of tension and a mistake, not only from the community, but from the perspective of Exmingua's owner, employees, and contractors.[1977]

847. In keeping with Claimants' true approach to the community, SMCA distributed flyers that falsely accused the opposition of being "liars,"[1978] and then showed that the company was intent on using force to break through the opposition,[1979] with several attempts being made with the assistance of the national civil police and other special forces.[1980] A few of those attempts resulted in injuries to community members, including

[1971] EIA Amendments, Annex 7, pp. 1216-1220 (**C-0089-R-ENG**) (reflecting only attendance sheets for the 2011 meetings); *see also,* GSM Second Phase Report, p. 1 (**C-0742**) (which only provides summaries of 2010 meetings). Claimants' Reply ¶ 101. (Contrary to Claimants' assertion there are no records of "questions, suggestions, doubts, and opinions of the participants recorded for the meetings that allegedly took place in 2011).
[1972] Claimants' Reply ¶ 100; GSM Strategic Plan, p. 1 (**C-0832**).
[1973] SMCA's Strategic Plan (August 2011), p. 13 (**C-0701**).
[1974] Claimants' Reply ¶ p 58.
[1975] CIG Report, ¶ 53.
[1976] Claimants' Reply ¶¶ 181.
[1977] CEDER 2013 Report, pp.8, 13,14 (**C-0716-ENG**) (Exmingua's geologists noting that SMCA deceived people; Exmingua noting that it was a mistake to hire military personnel; the interview of SMCA "was not good, allowing the conflict to grow").
[1978] Flyers distributed by Exmingua in the community, p. 5 (**R-0216**).
[1979] *Supra,* Section II.A.
[1980] *Supra,* Section II.A.

women.[1981]

848. In addition, Claimants proved that they were not trustworthy, failing to comply with almost 50% of the obligations established in the EIA. This is a stunning number, consistent with, at best, an amateurish approach to mining. Claimants knew the communities were concerned about water availability, pollution, and other health hazards,[1982] yet they did little to ensure compliance with their own EIA. [redacted] There was no attempt to test and treat wastewater or sludge generated from the mining process, an issue raised in prior inspections.[1984] This was despite prior representations to the communities that the project would protect the environment and not contaminate.[1985]

b. Claimants failed to consider Indigenous Peoples' rights

849. Claimants' EIA and written submissions in these proceedings continually skirt the issue of indigenous peoples in the area. While Claimants allege, through a community member, that out of the 42 COCODE representatives in the area, 15 were indigenous,[1986] they never identify whether any of those indigenous members were part of the consultation process.[1987] The consultation process is devoid of any mention of indigenous representation or that any consultation was carried out in a language other than Spanish.[1988] Indeed, the public notification given during the EIA process was only made in Spanish.[1989] The only effort that appears to have been made to communicate in the Kakchiquel language was in October 2013 in a *proposed* series of "educational" radio spots to promote support for the mining project three years *after* the consultation process had taken place.[1990] Claimants made no attempt to truly engage with the indigenous population.

850. Other than mentioning the existence of an indigenous population of almost 67% in the municipality in which the Project was located, there is no identification of the implication of any social programming or

[1981] Oliva Statement ¶ 20; Sandoval Statement, ¶ 11.
[1982] CIG Report, ¶ 93.
[1983] [redacted] (**R-0246**).
[1984] MARN Inspection February 23-27, 2015, p. 50 (**C-0105-SPA**).
[1985] Flyers distributed by Exmingua in the community, pp. 1, 2, 10 (**R-0216**).
[1986] Telma Garcia Statement, ¶ 9.
[1987] Claimants' Reply, ¶ 110.
[1988] *See* EIA Amendments, Annex y, pp. 1179-1226 (**C-0089-R-ENG**). Since they did not include indigenous representatives in the consultation process, the fact that COCODES may have a translator is an irrelevant point for purposes of the adequacy of Claimants' consultation process. *See* Claimants' Reply 110.
[1989] *See* EIA Amendments, Annex 15, pp. 1226 (**C-0089-R-ENG**).
[1990] CEDER weekly report No. 01/2013 for the period of 1 to 11 Oct. 2013, p. 1 (**C-0853**).

assessment.[1991] The EIA ignores the existence of the ILO Convention 169, and there is no discussion of bridging any regulatory gaps or even consideration of the indigenous communities' knowledge or interests.[1992] As Guatemala's expert states, the EIA excluded "any assessment of impacts on Indigenous peoples' rights," "any understanding of traditional land use and rights," and "any assessment of potential risks for social or legal conflict."[1993] Unsurprisingly, Claimants did not identify a single indigenous community during the "consultation" process.

851. Nevertheless, Claimants' expert tries to claim that the purported consultation carried out through the COCODES complies with ILO Convention 169 under Guatemala law through the application of Article 26 of the Law of Urban and Rural Development Councils.[1994] There is no basis for this position. *First,* Claimants misstate the law.[1995] Article 26 clearly states that the ILO Convention 169 consultations cannot be through any member of the COCODES. The law requires consultations through the representatives of the indigenous communities in the COCODES, who are duly accredited under Article 10.[1996] It is a conversation with affected people, not a presentation to individuals who might be representatives of the affected people. In the case of Exmingua, there is no evidence that any indigenous representatives from COCODES participated in the EIA consultation process.

852. *Second,* it is obvious that Claimants and their expert performed only a superficial analysis of the law. Article 23 of the Law of Urban and Rural Development Councils establishes that the representative body of the indigenous communities is the Indigenous Peoples' Advisory Council,[1997] which must *always* be consulted where there is at least one indigenous community affected.[1998] Moreover, the only development councils that include direct representation of indigenous communities are the Departmental Development

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[1991] *See* EIA, p. 270 **(C-0082)**.
[1992] CGI Report, ¶ 67; SLR II Report, Section 2.4, ¶ 33e.
[1993] CIG Report, ¶ 95.
[1994] Mendoza Report ¶ 39; Claimants' Reply ¶ 109.
[1995] Article 26 does not say it is the *only proper mechanism* through which to carry out the consultation process.
[1996] Law of Urban and Rural Development Councils, Article 10 **(C-0515)** ("For the accreditation of the representatives of the indigenous peoples before the System of Urban and Rural Development Councils, it will be sufficient for those appointed to present the documents or other means accustomed by said peoples, to the coordination of the respective Council, based on the articles 5, 7 and 9 of the Law").
[1997] Law of Urban and Rural Development Councils, Article 23 ("Indigenous Advisory Councils are constituted at community levels to provide advice to the coordinating body of the Community Development Council and the Municipal Development Council, where there is at least one indigenous community. The Indigenous Advisory Councils will be integrated with the authorities recognized by the indigenous communities according to their own principles, values, norms, and procedures. The municipal government will give the support it deems necessary to the Indigenous Advisory Councils according to the requests presented by the communities").
[1998] Regulation of Urban and Rural Development Councils, Article 44(c) (**R-0310**) ("In addition to those indicated in the Law, the Municipal Development Council shall the following powers: … e) When there is at least one indigenous community in the municipality, you should always consult the opinion of the appropriate indigenous advisory council."

Council,[1999] the Regional Development Councils,[2000] and the National Development Council.[2001] None of these participated in the purported consultations process carried out by Exmingua.

853. *Finally*, the decisions Claimants cite support Guatemala's position. The Constitutional Court's decision No. 1072-2011, reaffirms the role of the Indigenous Peoples' Advisory Councils[2002] and that the systems of Development Councils should not "be understood as the only valid consultation mechanism for the issue in question, but as a primary basis to identify and approach the different communities and indigenous peoples that should actively participate…."[2003] There is no basis therefore for Claimants to have believed that their consultation process was compliant with ILO Convention 169 at the time.[2004]

c. Claimants' social investment was minimal and self-serving

854. Claimants allege to have provided "generous support to the community" in the form of information meetings, medical support, educational activities, and other isolated infrastructure works and social support.[2005] Despite Claimants' attempts to show these as significant benefits conferred on the community, most of the social investment went to overhead and to engage in PR efforts through an "Information Program" to sway public opinion in favor of the mining project[2006] and any benefits purportedly conferred appear to have been in exchange for showing support for the project.[2007] It is almost insulting to consider "information meetings" and "educational activities" as support for the community. Neither of these things help improve the lives of anyone—they do not buy food, protect the water, or raise wages. This is especially true considering Claimants' ignorance. Claimants did not conduct tests, and they had no idea what impacts the project would cause. If this was Claimants' idea of "generous support," then it is no wonder community members were willing to risk their lives to stop Claimants from continuing.

855. While Claimants allege to have spent USD 380,000 in community support programs in 2012,[2008] the budgets show that a significant amount was spent on overhead and informational meetings, with a small

[1999] Law of Urban and Rural Development Councils, Article 9(e) (**C-0515**).
[2000] *Id*. at Article 7 (f) (**C-0515**).
[2001] *Id*. at Article 5 (g) (**C-0515**).
[2002] Constitutional Court, Decision in the case 1072-2011, p. 11 (**C-0659**).
[2003] *Id.*
[2004] Claimants' Reply, ¶ 111.
[2005] *Id*, ¶¶ 153-164.
[2006]SMCA's Plan for Development of Social Programs dated 2012 p. 1 **(C-0707)** (noting that the activities carried out by SMCA in 2012 have "succeeded in penetrating the thoughts of the inhabitants of the communities of direct interest of the Progress VII Derivative [sic] Mining Project, having achieved its proposed objectives).
[2007] Sandoval Statement ¶ 20; Oliva Statement ¶ 15.
[2008] Claimants' Reply ¶ 159 (citing Exhibit C-0521).

fraction being spent on actual direct benefits for the community.[2009] Indeed, the community felt that Exmingua had made false promises and many of the benefits were seen as patronizing.[2010] The community knew who Claimants are, and their conclusions were well-founded.

856. Even the benefits allegedly provided were either refused by the community or were sporadic in nature.[2011] In 2012, a support for a dental clinic had to be "withdrawn," because of opposition from villagers.[2012] As for 2013, there is no indication of any social programs or benefits carried out.[2013] It was not until end of July 2014, that Exmingua appeared to re-start any social outreach projects.[2014] In 2014 and 2015, the benefits largely consisted of handing out metal sheets for roofs to families in communities located mostly outside the area of influence,[2015] providing some medicines and medical support,[2016] giving out Christmas baskets and raffle prizes,[2017] which appear as one-off situations rather than a systematic approach to provide the benefits equitably to all impacted communities.[2018] There is no evidence of equitable distribution of the benefits, rather benefits seemed to flow to those who were willing to provide their support for the Project.[2019] In 2016, Exmingua appears to have stopped all social programs.[2020]

857. While the Project claims to have given "hundreds" of jobs to the local communities,[2021] most of those jobs were for low-paid manual labor rather than skilled positions.[2022] Community workers had little reason to expect more. Social outreach focused mostly on non-mining related training, calling into question the extent of the local training provided.[2023] Exmingua might have hired some local workers, but thereafter Exmingua seemed to care little for their physical wellbeing, as reflected by the significant number of health

[2009] August and September Proposed Budget from SMCA **(R-0307)** (showing no support for Health Programs and almost USD 13,000 out of 20,000 monthly budget going to overhead); Budget for Social Activities in October **(R-0308)** (showing all of the budget went to salaries, refreshments and other informational activities). Daily Budget for Hot Dog Parties in November 2012 **(R-0309)** (showing approximately $2,400 daily for a total of just over USD 14,000 spent).
[2010] CEDER 2013 Report, p. 20-21 (**C-0716**).
[2011] *See, e.g.,* SMCA Social Development Programs, p. 3 (**C-0707**) (where it is mentioned that medical services at the clinic had to be temporarily suspended in July). The educational program also appears to have been discontinued in the years 2014 and 2015. *See* exhibits **C-0524** y **C-0527**.
[2012] SMCA's Plan for Development of Social Programs dated 2012, p. 2 (**C-0707**).
[2013] Claimants' Reply ¶¶ 155-159 (all discussing activities in 2012).
[2014] Exmingua Consolidated Report – Social Responsibility (July -December 2014) (**C-0527**).
[2015] 2015 benefits went largely to villages outside the AOI in San Pedro Ayampuc. *See* Exmingua's Summary of Field Work 2015 (**C-0524)**.
[2016] The total medical assistance in 2015 amounted to just over USD 5,000. *See* **C-0524** at p. 3.
[2017] Exmingua Summary of Field Work 2015, pp. 7-10 (**C-0524**).
[2018] Exmingua Production Report (2013), p. 53 (**R-0103-SPA**).
[2019] Oliva Statement ¶ 15; Sandoval Statement ¶ 20.
[2020] There is no document showing any social outreach activities for 2016.
[2021] Claimants' Reply ¶ 130.
[2022] Garcia Statement ¶ 19; Camey Statement ¶ 14.
[2023] SMCA Social Development Programs, p. 6 (**C-0707**); Sandoval Statement, ¶ 20.

and safety violations noted in the February 2015 inspection.[2024] Moreover, Exmingua did not even register as an employer with the Ministry of Work as required by law,[2025] another example of Exmingua's continual disregard for Guatemala's law. The local community could be forgiven for thinking they were seen as nothing more than low-paid fodder for Claimants' business.

d. Claimants did not act in a procedurally fair manner

858. As Guatemala expert explains, "[p]eople value how they are treated in a decision-making process that affects their land, livelihood and wellbeing" and that "communities are more likely to support the continuing operation of a project when they perceive there is fairness and respect in the development and implementation of a project." This was not the case here.

859. From the start, as previously explained, Claimants did not conduct the consultations in a manner that aimed at inclusion.[2026] The failure to include the wider community in the consultation process resulted in a large majority of the population not knowing that the mining project was about to commence operations in their backyard until *after* the permits had been issued.[2027] They had no way to feel except excluded.[2028]

860. Without information from the company, the community went in search of answers, and since Claimants excluded them, they showed their discontent through open opposition to the project.[2029] Concerned, the community engaged experts to review the EIA, but Exmingua made the situation worse. Instead of providing a formal response, Exmingua did nothing, worsening the situation.

861. As Guatemala highlighted in its Counter-Memorial, there was also a lack of transparency and no grievance mechanism to manage the community's concerns.[2030] In its Reply, the Claimants were markedly silent on these points. Having a grievance mechanism would have provided an outlet to the community's concerns, which may have averted an escalation to the form of a protest as noted by Guatemala's expert.[2031]

862. While Claimants point to having hired CEDER to assist in conflict management, the documents do not show that CEDER did much more than interview and hold meetings with various parties as described in their report of the situation.[2032] After five months, CEDER appeared to give up, shifting its focus to help

[2024] MARN Inspection Report, Feb. 23-27, 2015, pp. 23-26 (**R-0105**).
[2025] Letter from Ministry of Labor (**R-0235)**.
[2026] CGI Report, ¶ 75, SLR II Report, ¶ 33.
[2027] SMCA Report August 2011 (**C-0701**).
[2028] Sandoval Statement ¶ 4; Oliva Statement ¶ 8-9.
[2029] CGI Report, ¶ 109; Sandoval Statement ¶ 4; Oliva Statement, ¶ 10; Camey Statement ¶ 7.
[2030] Guatemala's Counter-Memorial, ¶ 226-235.
[2031] CGI Report, ¶ 110.
[2032] *See, e.g.* CEDER 2013 Report (**C-0716**).

Exmingua with campaign efforts to obtain public support for the project.[2033] It appears that Exmingua was still trying to sway public opinion through propaganda two years *after* having received its permits.[2034]

863. Claimants' lack of adequate consultation, coupled with actions of using force against the opposition, environmental breaches, and disregard for the rule of law (including Court orders), showed a general disregard for the community's concerns. This goes against any notion of procedural fairness as reflected in international practice.[2035] In light of this, it is impossible to see how Exmingua can claim that through the consultation process and its subsequent social outreach it established a "relationship of trust with the authorities, local leaders and surrounding communities."

2. Claimants failed to obtain and maintain social license

864. All responsible mining companies readily understand social license, but Claimants take a different path. Instead, Claimants complain that Guatemala has failed to define what is meant by social license, what if any legal obligations derive from the term, and how Exmingua failed in this regard.[2036] Despite these objections, Claimants then accept the term and claim to have maintained and acquired social license for the Project, but dismiss social license as a legal obligation, claiming that it is an element of a mining company's Corporate Social Responsibility strategy.[2037] This convoluted response does nothing to prove Claimants' social license, and on each issue raised, Claimants fail.

865. Claimants appear to claim to have obtained and maintained social license because they "actively sought and secured the continuing support for [Exmingua's] operations from the surrounding communities"[2038] In support of this assertion, Claimants retained Ms. Margarita Mendoza Yaquian ("Mendoza") as an expert[2039] and have submitted three community witness statements, two of which are from former employees of Exmingua.[2040] Neither the expert report nor the witness statements support the existence of social license for Claimants' Progreso VII mining operation. Claimants' own contemporaneous documentation also contravenes their position.

a. The consultations process was insufficient to show the existence of social license

866. From the start, Claimants failed to show an ability to obtain social license. They claim to have consulted

[2033] CGI Report, ¶ 111.
[2034] *See,e.g.,* Exmingua Consolidated Report Jul-Dec 2014, p. 3 (**C-0527**) (The aim starting August 2014 was to "establish strategic alliances with institutions and community leaders in an effort to reach the community and eliminate barriers created by a lack of knowledge regarding responsible mining").
[2035] CGI Report, ¶¶ 116-117.
[2036] Claimants' Reply ¶ 166.
[2037] *Id.* at ¶ 167.
[2038] *Id.* at ¶ 168.
[2039] Based on Ms. Mendoza's experience, she appears to have never measured social license for a mining project.
[2040] *See* Witness Statements from Ms. Garcia, Mr. Carraza and Mr. Gálvez.

the local communities and that no one voiced objections.[2041] They also claim that the consultation process revealed that the communities had expressed that "project [was] welcome" and "agreed to give [their] support."[2042] These conclusions have no sound basis.

867. As Guatemala has already set forth above and in its Counter-Memorial, the consultation process lacked transparency and inclusion, let alone complied with best practices or even MARN's Terms of Reference. Any conclusions about community acceptance after Claimants' consultation process are at best misleading. Not only was the geographical extent of the consultation extremely limited, but even in the communities in which they carried out the consultation process not all stakeholders were included.[2043] The lack of transparency and information during the consultation process became apparent to even Claimants' own consultants who were engaged thereafter to implement an aggressive pro-mining campaign.[2044]

868. Not only was the wider surrounding community not informed of the project through this consultation process,[2045] but even those in attendance at the various presentations and meetings were given conflicting or misleading information about the project.[2046] This is unsurprising since their EIA was unable to accurately predict or mitigate any impacts because it was missing key underlying data. As a result, the conclusions at these meetings that the Project was received with approval prior to the issuance of the license are misleading, especially when those individuals were not true representatives of their communities and the information provided focused on downplaying any negative effects rather than addressing those impacts.[2047] There is no basis to conclude that social license was obtained as a result of the consultation process Claimants carried out.[2048]

b. Claimants' allegations of community support are dubious

869. *After* the EIA consultation process was completed, Claimants assert that they put together a comprehensive stakeholder engagement plan.[2049] They cite to a document prepared by SMCA, the military contractors, entitled a "strategic plan to achieve the balance in public opinion in the area of direct influence."

[2041] Notice of Arbitration, ¶ 5. Mendoza Report ¶ 42.
[2042] Claimants' Reply ¶ 105.
[2043] In the municipalities of San Jose del Golfo and San Pedro Ayampuc, Exmingua only met with municipal and institutional leaders. In the three adjoining villages, there was little effort made to include stakeholder beyond those self-proclaimed community leaders. None of Claimants' witnesses who lived in the surrounding communities participated in any of the consultation process or heard of the project through the consultations carried out. *See generally,* the three community witness statements submitted by Claimants.
[2044] SMCA Strategic Plan (August 2011) (**C-0701**); SMCA Report and PowerPoint Slides (**C-0702**).
[2045] SMCA Report and Power Point Pressentation, p. 8-9(**C-0702**).
[2046] *Supra,* ¶¶44-45.
[2047] *See, e.g,* Sandoval Statement, ¶ 5.
[2048]SLR II Report, ¶ 160.
[2049] Claimants' Reply, ¶ 150.

This document has the objective to "balance the opinion of the people in the area…to facilitate the taking of control of activities of the company Exmingua." There is no indication in this document that Exmingua was intent on engaging stakeholders in order to address their concerns, but rather as the document describes, it was an intent to create an "information network" to sway public opinion of the project by paying "information agents."[2050] Stated simply, Exmingua wanted to pay people for compliments.

870. Starting from the faulty premise that SLO is just about gaining the "acceptance of the majority of the community,"[2051] Claimants point to anecdotal evidence from their witnesses and contractors to state that they had gained the acceptance of the community.[2052] Claimants' own documents dispute this and there is no scientifically sound basis for assertion.

871. During the execution of this Information Plan, SMCA claims to have conducted a number of surveys to gauge the support of the project. None of the surveys appears to have followed international best practices in terms of methodology, including having a statistically representative sample of the communities affected.[2053] In a 2011 survey, SMCA reported that 35% of those surveyed were in favor, and the survey represented the view of family units, rather than individuals.[2054] Three years later in 2014, the project's credibility was reported at a mere 6%, although in the same report, without any basis, it later mentions that the approval level is now around 67%.[2055] Perhaps, SMCA resorted to paid "information agents" as survey respondents.

872. SMCA also emphasized the number of signatures collected through its various reports at these "information meetings," but there was never any discussion on the methodology used for obtaining them.[2056] Regardless that SMCA claims to have obtained significant amounts of signatures, there is no document cited on the record that shows thousands of signatures. Claimants and their expert only rely on one letter purportedly sent to the President with the signature of 17 community members from 5 communities.[2057] As Guatemala's expert points out, the manner in which these signatures appear to have been collected only casts doubts as to whether they represent the community's legitimate views.[2058]

873. Claimants cite to the number of attendees at informational meetings and their own paid employee's

[2050] SMCA Strategic Plan, August 2011, pp. 21- 23(**C-0701-ENG**).
[2051] CGI Report, ¶ 34.
[2052] Claimants' Reply ¶ 168.
[2053] CGI Report, ¶¶ 55-56.
[2054] *Id.* at ¶ 55.
[2055] *Id.* at ¶ 58.
[2056] *Id.* at ¶¶ 56, 59.
[2057] Mendoza Report, ¶ 56,
[2058] CIG Report, ¶ 57.

unsupported testimony that the "majority of the community members" supported the project."[2059] They also cite to the number of individuals that participated in mine tours or the number of meals handed out at meetings to reflect the efforts that Exmingua made to engage with the communities "to gain acceptance for its Project by the majority of the community."[2060] Despite these efforts, there is no credible evidence that this acceptance existed. The fact that benefits were received is also no basis to gauge acceptance, as a local contractor was noted as one of the strongest opponents to the project.[2061]

874. Claimants focus on disparaging La Puya as an alleged outside minority, with a violent and ideologically motivated opposition.[2062] But this oversimplification of the opposition is deceiving, and a typical trope used to discredit protesters. *First*, Claimants' documents recognize that La Puya is comprised of local people, despite trying to downplay it as outsiders and NGOs.[2063] Claimants have shown no evidence of "outsiders" forming La Puya. This is to be expected since Claimants routinely refused to consult with members of the community. Members of La Puya put their lives on the line for their beliefs, and it is non-sensical to assume that "outsiders" would volunteer for such a risk. *Second*, Claimants' own engagement with Congressman Mejía taken at face value belies their argument that that any efforts to resolve the conflict would have been futile because of the political ideology of the group[2064]

875. While Claimants attempt to minimize the focus of the opposition as being only from La Puya, there is evidence that the negative sentiment was shared across the wider community. Claimants' own continual efforts to sway public opinion over the course of four years cannot support their assertion that the majority of the community was in favor.[2065] Similarly, Ms. Mendoza's assertion that there had been no conflict between the mine and surrounding community prior to 2012 is simply not true.[2066] Claimants' own consultant identified sources of opposition to the project in mid-2011, well before La Puya existed.[2067] Moreover, Claimants lose sight of other sources of opposition in the surrounding communities.[2068] Separate

[2059] Claimants' Reply ¶ 169; Galvez Statement ¶ 12.
[2060] Claimants' Reply ¶ 170.
[2061] CEDER 2013 Report, p. 8 (**C-0716**) (In San Jose one of the strongest opposition leaders is Ovidio Palencia, however he serves the project (trucks).
[2062] Guatemala's expert disagrees. CGI Report, ¶ 91.
[2063] *See, e.g.,* CEDER 2013 Report, p. 10 (**C-0716**) (identifying the leaders as being from all the surrounding villages, including the three villages in the AOI).
[2064] Claimants' Reply ¶ 172-173; *see also,* SMCA Report and Power Point, p. 5 (**C-0702**)(December 9, 2011)(noting that 164 activists or leaders were identified, and that after three months' work only12 leaders remain).
[2065] Exmingua Consolidated Report on Social Responsibility p. 3 (**C-0527**).
[2066] Mendoza Report, ¶¶ 42-43.
[2067] SMCA Strategic Plan, pp. 19 (**C-0701**) (observing community opposition in La Choleña) SMCA Report and PowerPoint Slides, p. 13 (**C-0702**) (once SMCA officers were installed in San Jose del Golfo in 2011 they "received threats that the installations would be burned and the walls were defaced with paint);
[2068] Letter from D. Kappes to B. Williamson (U.S. Embassy) dated May 14, 2012 **(C-0102)** (noting negative sentiments from people in the urban centre of San Pedro Ayampuc).

to the CALAS *amparo* filed in 2014, the Kakchiquel community independently filed an amparo in 2016 against Exmingua for the lack of consultations compliant with ILO Convention 169, further undermining the argument that the Project enjoyed acceptance from a majority of the community.[2069]

876. On the basis of the above facts, Guatemala's experts concur that the Project lacked social license.[2070]

B. Claimants largely disregarded the environmental impacts of the Project

1. Claimants' EIA failed to adhere to recognized international standards

877. Claimants attempt to prop up the quality of the EIA by reference to the number of pages and the ultimate approval by MARN.[2071] While they claim they had no obligation to adhere to international standards, they made numerous misrepresentations to MARN and to the surrounding communities throughout the EIA that the project was being developed using the highest international standards.[2072] At a minimum, this is dishonest and should not be rewarded. But there are other problems. Claimants' damages model implicitly relies on finding third-party funding for the Project which would have required compliance with these international standards.[2073] Claimants also urge this Tribunal to make the uncomfortable conclusion that a polluting project that fails basic international standards is somehow worth millions of dollars. There is no need for the Tribunal to walk down this path.

878. Instead of touting their compliance, Claimants respond to criticisms by arguing that the EIA complied with the "spirit" of the IFC Performance Standards and Equator Principles, based not on a qualified expert's opinion but rather their counsel's own assessment of the EIA.[2074] At face value, this is an underwhelming response, and more importantly, actual experts, the ones retained by Guatemala who have experience applying the relevant standards, have categorically dispatched with Claimants' flimsy response. The bottom line is that the EIA omitted key components such as predictive effects and mitigation measures which make it impossible to appreciate the true environmental impacts and whether any conclusions or management plans reached in the EIA would have adequately mitigated those impacts.

879. Claimants point to the title of the chapters in the EIA to claim that all required topics were addressed.[2075] But this misses the point. The existence of a chapter title fails to address the sufficiency of the content of the EIA. Out of 113 key components required of an EIA, only four complied with international

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[2069] Indigenous community *amparo* file 1246-2016 (**C-0476**).
[2070] CGI Report ¶ 117 (no sound basis for finding that the Project has social license).
[2071] Claimants' Reply, ¶ 68.
[2072] *See* EIA, pp. 22, 45, 59, 437(**C-0082**).
[2073] Rosen/Milburn Report, p. 51.
[2074] Claimants' Reply, ¶¶ 77 *et seq.*
[2075] Claimants' Reply, ¶ 73.

standards.[2076] With regard to the environmental components, SLR highlighted 11 key areas as deficient.[2077]

880. Claimants then spend almost three pages disparaging the experts hired by the communities before getting to the substance of their criticisms.[2078] This is convenient since neither one of these individuals is available for cross-examination, and any insinuation of bias by these experts is belied by Guatemala's own independent experts' assessment.[2079] In any event, Claimants have never previously addressed the substance of those reports, a trend that continues almost a decade later. Unsurprisingly, Claimants continue to ignore the substance of those criticisms, preferring to turn the focus on the titles of the sections of the EIA and the number of pages dedicated to the topic.[2080]

881. Claimants insist that GSM had conducted extensive studies of the physical and biological environments, including a detailed analysis of the impacts, but the content of those studies (or lack therefore) shows the opposite. In Chapter 5 and Chapter 6, which Claimants cite, the studies on the physical and biological environments are either partially or completely deficient, as shown below,[2081] and none of the individual components in those chapters follows international standards.[2082]

882. On the physical environment, baseline data included only one sampling, ignoring seasonal variabilities;[2083] the air quality studies are substantially incomplete;[2084] and there are no prediction effects or mitigation measures included. In other words, the EIA had no idea what the air quality effects would be or how the fix them.

883. Despite Claimants highlighting that the hydrology section was 44 pages, Guatemala's criticisms of the hydrology studies in Section 5.5. continue to be valid. GSM's lack of a reliable baseline hydrology study means that any data collected is unreliable to determine the effect of the mine's water use on the nearby water sources.[2085] Even though eight monitoring locations were allegedly set up, there is no discussion as to why or how those monitoring locations were selected.[2086] The Tribunal will readily grasp that picking the wrong locations means that the data will never be good. Similarly, the studies in biological environment

[2076] SLR II Report, Annex II (Table showing the EIA's lack of compliance with International Standards).
[2077] SLR II Report, ¶32 (a) Regulatory Framework; (b) Investment; (c) Physical Environment; (d) Biological Environment; (e) Assessment of Alternatives; (f) Impact Assessment; (g) Environmental Management Plans; (h) Accidents and Malfunctions; (i) Ongoing Communications Plan; (j) Effects of the Environment on the Project; and (k) Cumulative Effects.
[2078] Claimants' Reply, ¶¶ 74-79.
[2079] SLR I Report, ¶ 29 and SLR II Report, ¶ 35.
[2080] Claimants' Reply, ¶¶ 80 *et. seq*.
[2081] SLR II Report, ¶ 156d-e; *See* Annex II.
[2082] SLR II Report, Annex II.
[2083] *See* EIA, p. 577(**C-0082**) acknowledging two separate seasons in Guatemala (rainy and dry).
[2084] SLR II Report, ¶ 156d, Annex II.
[2085] SLR II Report, Annex II.
[2086] SLR II Report, Annex II.

suffer from the same kind of defects, including lack of adequate sampling and no prediction effects or mitigation or monitoring plans. Without the predictive effects, any mitigation or monitoring plans would not be based on real data, and therefore any monitoring would be futile as there would be nothing to compare the results against.[2087]

884. Despite Claimants' overly complicated explanation on the methodology used,[2088] the EIA fails to demonstrate that Exmingua properly considered the cumulative impacts. If the predictive effects and mitigation were not omitted as previously stated, it is difficult to follow that the cumulative impacts were nothing more than a guess.[2089] Moreover, as SLR points out, the cumulative effects were not addressed because the risk must also take into consideration indirect impacts such as "inadvertent knock-on effects or cumulative effects that materialize through interaction with other developments," including impacts within the project's wider area of influence and impacts triggered over time.[2090] This omission is especially concerning considering that Claimants are claiming damages for their allegedly planned expansions.

885. Claimants argue that Guatemala ignores the analysis of alternatives discussed in Chapter 8, but the fact that the EIA considered certain issues does not mean that it analyzed the actual impact on the people and the environment. That section of the EIA is deficient as there is "only a high level explanation of the chosen mining methods" and there are "no mine plans and designs considered" making it impossible to assess the effects or impacts.[2091] There is no discussion of minewater treatment, process effluent treatment, tailings management facility (TMF), water supply, water discharge, watercourse realignments, site infrastructure positioning, aggregate supply, solid waste management/domestic sewage treatment, power supply and routing and mine closure.[2092]

886. Guatemala's criticism that the EIA is devoid of management plans to mitigate the risks of the Project still stands. Claimants allege they had a "comprehensive management plan" in Chapter 10, focusing again on its length of 65 pages rather than on its substance.[2093] Pointing to the existence of plans says nothing of their adequateness to mitigate the Project's risks. If the EIA relies on mitigation and monitoring plans that are not based on real data, it is impossible to conclude that the management plans included could have adequately addressed and mitigate any risks.[2094]

[2087] SLR II Report, Section 8.1. ¶ 156(d)(iv).
[2088] Claimants' Reply, ¶¶ 84 *et seq.*
[2089] SLR II Report, ¶156(1).
[2090] IFC PS 1 requires consideration of the impacts of any planned development.
[2091] SLR II Report, Section 8.1, ¶ 156(f).
[2092] *Id.*
[2093] Claimants' Reply, ¶ 87.
[2094] SLR II Report, ¶156(h).

887. These deficiencies, among others identified undermine any assertion by Claimants that their EIA was in line with international standards. Likewise, as a result of these deficiencies, the communities were justified in their concerns. This was not a mine that was miles away from the communities, it was in their backyard. If the EIA did not truly know the impacts, then it could not serve as a way to give reassurances that those impacts would be mitigated. If there was a risk to water availability or contamination, Exmingua could not provide information to the communities on how that risk would be mitigated or the impacts over time because it failed to do the necessary work to truly understand the environmental impacts of the Project. The lack of adequate mitigation measures also became apparent once operations started and Exmingua was found to have breached a substantial amount of its environmental obligations.[2095]

2. Claimants breached their environmental obligations

888. As Guatemala has already set forth in the facts of the case, Claimants breached an inordinate number of environmental obligations during the operations of Progresso VII despite representations in the EIA that they would carry out the project in accordance with Guatemala's laws. Then Claimants continued to violate the law. Once the Project was suspended Claimants refused to comply with mandatory mitigation measures. Incredibly, Claimants want this Tribunal to ignore this disrespect of the law.

889. In response to the February 2015 inspection results, Claimants do not deny that these violations existed but insist that these were "common findings for an initial inspection following the start of mining operations and comprised part of a collaborate process between Exmingua, MARN and MEM."[2096] Claimants further allege that they "responded promptly" and "diligently addressed outstanding issues" and that "nearly all" the issues noted by MARN and MEM in their earlier inspections had been addressed.[2097] In other words, they did not address all issues.

890. In support, Claimants first point to a checklist they prepared to address all the issues raised in the February inspection. This checklist indicates that Claimants were in violation of 13 out of 34 commitments from the EIA, were not complying with 51 out of 104 aspects of their environmental management plan, and were non-compliant in 13 out of 21 mitigation measures.[2098] In total, Claimants acknowledge to be in breach of 48% of their obligations.[2099] Tellingly, Claimants only submitted the draft checklist that apparently had been prepared for "senior management," without any indication of the status of each of those identified

[2095] MARN Technical Report of February 23 to 27, 2015 (**R-0105**).
[2096] Claimants' Reply, ¶¶ 135, 350.
[2097] *Id.* at ¶¶ 138, 146.
[2098] Exmingua's List of Findings of the MARN and MEM Inspections dated October 12, 2015 (**C-0699-ENG**).
[2099] *Id.*

issues because the document appears to have never been completed.[2100]

891. Claimants then point to the November 2015 inspections to claim that they had largely complied with their obligations because MARN only pointed to six action items and MEM only four pending items.[2101] According to Claimants, MEM had observed, among other things, that "the management of sediments…was evidenced," that solid waste was properly disposed of, a dining room had been implemented, and safety signage had been implemented.[2102]

892. Later inspections in 2016 and the administrative proceedings initiated against Exmingua on February 24, 2016, belie Claimants' assertion that it took its environmental obligations seriously.[2103] Because Exmingua failed in its remediation attempts, MARN initiated a proceeding on the basis of the breaches found in both the February and November 2015 inspections. Other problems continued to remain. Inspections in 2016 and 2017 noted breaches of items that were allegedly fixed by Exmingua in November 2015.[2104] In other words, Exmingua neither maintained compliance with those environmental obligations, nor did it finish addressing those issues identified in November 2015.

893. It is also both strange and troubling that Claimants would try to hand-waive their lack of compliance. As SLR points out these are not common findings for recently started mining operations, rather these are issues that should have been addressed before not during operations.[2105] And as is typical, Claimants do not offer any industry support for things that are supposedly "common." Claimants do not have the knowledge or experience to testify as to what is "common," and Claimants chose not to submit a qualified expert on this point.

894. In the years that followed, the breaches continued. MEM and MARN observed, among other environmental issues, that solid waste continued to pile up, posing a health and safety issue,[2106] sediments pits were in a state of collapse,[2107] inadequate storage of chemicals, [2108] missing safety signage,[2109] uncovered stockpiles,[2110] and the inexistence of appropriate drainage systems,[2111] all of which

[2100] *Id*.
[2101] Claimants' Reply, ¶¶ 143-144.
[2102] *Id.* at ¶ 144.
[2103] Claimants' Reply, ¶ 137.
[2104] MEM Report June 6, 2016 (**R-0280**).
[2105] SLR II Report, 175.
[2106] MEM Inspection Report (October 30, 2017), p. 28 (**R-0281**).
[2107] MEM Inspection Report (June 30, 2016), p. 4 (**R-0280**).
[2108] MEM Inspection Report, (October 30, 2017), p. 10 (**R-0281**); MARN Inspection (September 1, 2021) **(R-0285)**.
[2109] MEM Inspection Report (October 30, 2017), p. 26 (**R-0281**).
[2110] *Id.* p. 10 (**R-0281**).
[2111] MEM Inspection Report (June 30, 2016), p. 4 (**R-0280**) (Indicating a lack of drainage maintenance); *see also* MARN Inspection (September 1, 2021) (**R-0285**).

compromised the safety and health of workers and the surrounding communities.[2112]

895. To this day, MARN notes that Exmingua is in open violation of the mitigation measures required while the Project is suspended.[2113] Nothing has changed despite the numerous findings by MARN, further demonstrating Claimants' open defiance of Guatemalan law and mining best practices. Additional violations of law are likely to be found. The administrative proceedings arising from the 2015 breaches are still in progress. In other words, there is no document to support that Exmingua is in compliance with its environmental obligations.

896. Exmingua's failure to comply with its environmental obligations and mitigation measures not only breached the law, but it also broke any promises that they made to the communities, further exacerbating the conflict. These promises were not only in the EIA, where Claimants falsely promised to use the highest standards of environmental management, but were also plastered across flyers distributed to the surrounding communities. Through these flyers, Exmingua touted that the Project would "Protect the Environment"[2114] and that it would "Not Contaminate the Environment."[2115] This was blatantly not true.

C. Technical Issues with Progreso VII and Santa Margarita (LOM Plan, Recovery Rate, etc)

897. Claimants incredibly seek millions of dollars in damages without offering any case where a tribunal valued a mining project using a Life of Mine ("LOM") Plan like the one created by Claimants. There are certainly cases where valuations were based on exploration reports, feasibility studies, and pre-operational plans.[2116] But to Guatemala's knowledge (and based on Claimants' sources), no tribunal has ever awarded damages based on a plan created after-the-fact. This should give the Tribunal pause before accepting such a concocted and largely unsubstantiated valuation.

898. The LOM Plan, the arguments in the Reply, and the documents submitted reveal the truth about Claimants and their capacity to develop this project. They were in over their heads. They had never operated a mine or a taken a project from greenfield to profitability, and it shows. Claimants failed to engage in basic planning, never improved the processing of the plant, and had nothing more than concepts in mind for the future. This is the mark of poor business planning, and as the Tribunal will see, it is not the basis for a serious valuation.

[2112] MEM Inspection Report (October 30, 2017), pp. 24-25 **(R-0281)** (lack of maintenance of the ducts can cause "breakdown and as a result pollution of the water table).
[2113] *See* MARN Inspection September 1, 2021 (**R-0285**).
[2114] Flyers distributed to the surrounding communities, p.1 (**R-0216**).
[2115] Flyers distributed to the surrounding communities, p.10 (**R-0216**).
[2116] *See Tethyan Copper Co. Ltd. v. Pakistan*, ICSID Case No. ARB/12/1, Award (July 12, 2019) **(CL-0316)**; *Quiborax S.A. et al. v. Bolivia,* ICSID Case No. ARB/06/2, Award (September 16, 2015) **(CL-0226)**.

1. The LOM Plan does not satisfy Claimant's Burden of Proof.

899. In the Counter-Memorial, Guatemala established that the LOM Plan lacks support from pre-operational plans or studies.[2117] In response, Claimants take the position that pre-operational plans or studies are not required because Kappes did not have to conduct them.[2118] That excuse is woefully insufficient. Claimants must always prove their claim for damages with evidence. The standard of proof is "sufficient certainty," as Claimants acknowledge,[2119] and it must come from contemporaneous evidence, not speculation prepared for this case. The fact that Mr. Kappes essentially disregarded all forms of best practices and took a wildcatter's approach, followed by litigation made projections, does not diminish Claimants' burden of proof.[2120]

900. But more importantly, the LOM Plan does not provide sufficient certainty as to Claimants' loss because it is not a verifiable plan that an investor could reasonably rely on to determine the project's value. The plan is nothing more than a hypothetical drawn up from an unknown resource and Mr. Kappes' predictions of the future.[2121] Such self-serving predictions are not reliable enough for purposes of arbitration, especially when the Plan contradicts what little mining data Claimants have submitted.

901. That data is not reliable either. There is only one excel spreadsheet reporting how much ore was processed each day. The spreadsheet was created for purposes of this arbitration.[2122] And, notably, it is contradicted by other evidence submitted by Claimants.[2123] In their Reply, Claimants have submitted a composite exhibit called "Exmingua's Operation Reports (C-0720)" to support this single spreadsheet. But the 365 documents within that composite exhibit, most of which are hand-written, do not even match with the excel spreadsheet. There is no correlation between them. There is no relation between them. Even if there was, SRK relied on excel spreadsheet (C-0125) for its LOM Plan, not the underlying operation reports (C-0720). The spreadsheet does not support the inputs assumed by SRK.

[2117] Guatemala's Counter-Memorial, ¶ 772.
[2118] Claimants' Reply, ¶ 665.
[2119] Claimants' Memorial, ¶ 340 ("[O]nce the fact of future profitability is established and is not essentially of speculative nature, the amount of such profits need not be proven with the same degree of certainty. In other words, the Claimant must prove that it has been deprived of profits that would have actually been earned. This requires proving that there is sufficient certainty that it had engaged or would have engaged in a profitmaking activity but for the Respondent's wrongful act, and that such activity would have indeed been profitable.") (citing *Crystallex*, Award, ¶ 875) **(CL-0153)**).
[2120] SLR II Report, ¶ 47 ("The industry has taken control over these risks and has created well-defined, generally accepted methodologies, processes, and technical assumptions to ensure that informed investments are made. Market players rely on these standards when they buy and sell projects.")
[2121] Guatemala's Counter-Memorial, ¶¶ 774-775.
[2122] Claimants own evidence reveals that Mr. Kappes requested the spreadsheet to use in a "presentation about Tambor *for CAFTA*." Email from D. Kappes to R. Adams (May 31, 2016) **(C-0721)** (emphasis added).
[2123] *See* SLR I Report, ¶ 184 (comparing Daily Plant Summary Data for October 2014 – May 2016 **(Exhibit C-0125)** and Email from J. Hernandez (Exmingua) to A. Vaides (Exmingua), dated May 13, 2016 **(Exhibit C-0157-ENG**).

902. SRK even admits, as it must, that the mining data is unreliable. It describes the timing of the mining data as a "ramp up period," when production rates and profitability "are not representative of what would be achieved at steady state when the operators have gained the experience needed to optimise performance."[2124] The point SRK attempts to make is that the numbers could be higher in the future. But in making that point, SRK confirms that the mining data is "not representative" of how the mine would operate.[2125] Thus the data is not a reliable indicator of how the future mine would operate.

2. Claimants have not established the individual components of the LOM Plan.

903. Moving to the individual components, Guatemala established that (i) half of the LOM plan is based on Laguna Norte deposit, which Exmingua was not authorized to mine;[2126] (ii) the assumed size of the resource is based on an out-of-date estimate, 85% of which is too unknown for purposes of valuation;[2127] (iii) the assumed rate at which the mine would process material (consistently for 10.5 years) was rarely achieved in practice, not to mention above the limit at which Exmingua agreed to operate;[2128] (iv) the assumed recovery rate is 40 percent higher than the rate achieved in reality;[2129] (v) the assumed operating and capital costs are cursory and unsupported.[2130]

904. In light of these findings, Guatemala's mining expert SLR offered a more appropriate LOM plan as an alternative to Claimants' unsupported plan.[2131] SLR did not endorse this plan because there is far too little information on the record to construct any supportable LOM plan for purposes valuation.[2132] SLR simply adjusted the SRK model without endorsing it. The restated LOM plan:

- Reduced the size of the resource by 50 percent—from 900,000 tons of raw material to 494,000 tons.[2133] (The Laguna Norte deposit remained part of the restated plan as a precaution.[2134] If Laguna Norte deposit is to be removed, which it should, then the size of the resource must be reduced by an additional 47 percent.)
- Reduced the mines duration from 10.5 years to eight years;
- Reduced the recovery rate from 82 percent to 40 percent to more accurately reflect the recoveries achieved during the mines operation;
- Reduced the processing rate from 87,500 tpa to 70,000 tpa for the same reason;

[2124] SRK II Report, ¶ 47.
[2125] *Id.*
[2126] Guatemala's Counter-Memorial, ¶ 778.
[2127] *Id.*, at ¶ 783.
[2128] *Id.*, at, ¶ 790.
[2129] *Id.*, at, ¶ 794.
[2130] *Id.*, at, ¶ 797.
[2131] *Id.*, at, ¶ 801.
[2132] *Id.*
[2133] *Id.*
[2134] SLR I Report, ¶¶ 180, 200.

- Reduced the amount of gold recovered from 186,000 oz to 65,000 oz, as a result of the reductions above;
- Reduced Exmingua's net revenue from 236.1 million to USD 70 million.
- Added a 40 percent contingency on costs to account for the rudimentary manner in which SRK calculated them.[2135]

Assuming Claimants are entitled to any value at all (which they are not), each of these adjustments was immensely reasonable. The Reply does little to affect the strength of Guatemala's arguments.

a. The Laguna Norte deposit should be removed from the LOM Plan entirely.

905. Claimants confirm in the Reply that they were not authorized to mine at Laguna Norte,[2136] nor anywhere else in the Santa Margarita area. SRK does not dispute this point either. Instead, Claimants argue, based solely on Mr. Kappes' witness statement, that the deposit was part of the "initial conceived mine."[2137] One's thoughts are insufficient to form a plan. Claimants have not presented any documents to show that Exmingua was preparing to mine this deposit. The planning documents they have produced show the opposite in fact.[2138] One would think that if Exmingua had serious plans to develop Laguna Norte, it would have committed those plans to writing. Here, there is nothing.

906. There is also no mining data for Laguna Norte because the deposit was never operational, which means there is nothing to support Claimants' assumptions on the outcomes of that deposit. For purposes of Claimants' valuation, the mining data is key.[2139] But if this data does not exist, as is the case for Laguna Norte, then SRK cannot determine with any certainty how that deposit would have developed. It is nothing more than a flight of fancy. Accordingly, 47 percent of the Operating Mine's (assumed) value must be removed.[2140]

b. Eighty-five percent of the resource was too unknown for purposes of valuation

907. Here, Claimants and SRK claim that their choice of one Gold Fields' estimate over the other three[2141] best reflects "what was *actually* being mined during operations."[2142] Once again however, Laguna Norte—half the total resource—was never operational, making it impossible for Claimants and SRK to know what

[2135] Guatemala's Counter-Memorial, ¶ 801.
[2136] Claimants' Reply, ¶ 670.
[2137] Claimants' Reply, ¶ 670 (citing Kappes I).
[2138] Presentation, *Tambor Project Guatemala* (October 7, 2010) (failing all mention of Laguna Norte) **(R-0320)**; Presentation, *Tambor Project Guatemala* (May 24, 2015, 2010) (same) **(R-0321)**.
[2139] SRK II Report, ¶ 23.
[2140] Guatemala's Counter-Memorial, ¶ 781.
[2141] Counter-Memorial, ¶ 783. (As explained in the Counter-Memorial, the Gold Fields Report relied on by SRK gave four potential resource estimates. SRK simply picked one.).
[2142] Claimants' Reply, ¶ 669; SRK II Report, ¶ 34.

was "actually being mined" at that deposit.

908. On the issue of resource classifications (inferred resources versus mineral reserves),[2143] Claimants submit that the mining data renders those classifications irrelevant.[2144] According to Claimants, confidence classifications are "most relevant to potential external investors," whereas, here, the operating history of the mine obviated the need for any such classification.[2145] This defense does not apply to the Laguna Norte deposit since, once again, there is no mining data from Laguna Norte. Importantly, Laguna Norte was located miles apart from the other two deposits. The data is not transferrable.[2146]

909. What is more, "potential external investors" are precisely the kinds of market players that this Tribunal must consider. If the mining community would not touch this mine without proper classification, this Tribunal should not seriously consider Claimants' argument. This case is not a simulation. There must be a market value based on what the market requires. Here, the fact that there were no external investors is far more relevant than Claimants' suppositions and hopes.

910. The mining data would, in any event, not affect how a mine site is classified. Regardless of whether or not a mine is operating, if there are no mineral reserves, as is the case here, then the property is still considered an exploration property that carries a certain risk for investors. The fact that Exmingua took the risk to develop the mine on limited information does not imply that they have de-risked the project.

911. Rather, this is one of the riskiest types of mining. When miners purchase a property, they are looking at millions of dollars in sunk costs and a commitment to a region that will only become profitable if production is stable and sustainable over the time spent paying back lenders and paying any future remediation. A buyer of El Tambor would not know if Claimants had mined the highest-grade material first, if there were structural deficiencies in the later years of mining that might make the project uneconomic, or if the geology changed in such a way that processing costs would skyrocket. Miners rely on studies to value their properties because the field is full of complex variables, and Claimants' decision to forgo even basic studies increases the risk of finding serious problems only after the investment is made.

912. Claimants further argue that the classifications are not relevant because they are not required.[2147] But

[2143] As a reminder, the CAM Report categorized 85 percent of the resource as an "inferred resource," meaning it is too unknown for purposes of valuation. Counter-Memorial, ¶ 787.
[2144] Claimants' Reply, ¶ 669.
[2145] Claimants' Reply, ¶ 669.
[2146] Turning to the mine's operating history, this will not affect how a mine site is classified. Regardless of whether or not a mine is operating, if there are no mineral reserves, as is the case here, then the property is still considered an exploration property that carries a certain risk for investors. The fact that Exmingua took the risk to develop the mine on limited information does not imply that they have de-risked the project. SLR II Report, ¶ 46 n. 45.
[2147] Claimants' Reply, ¶ 669; SRK II Report, ¶ 35.

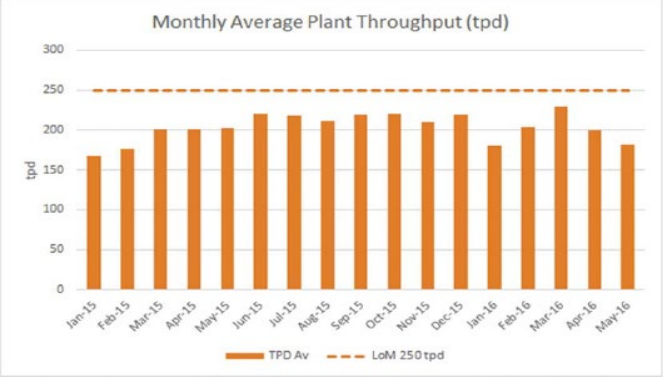
even if not required for mining, the resource classifications are still highly relevant for purposes of this arbitration. Resource classifications help provide a range of certainty that mining professionals rely on when placing their name next to a mining project. Resource classifications establish how much geological knowledge exists about the deposits, and where there is no resource classification, professionals in the market can only assume that the numbers are unreliable, just like in Claimants' made-up LOM Plan.

913. In light of these resource classifications, SLR reduced the size of the resource by 50 percent.[2148] This adjustment is reasonable. In *Quiborax v. Bolivia*, the claimant's expert valued a mining property based on varying confidence classifications. A number of deposits within that property were considered inferred resources, and the tribunal reduced the size of the resource by 90 percent accordingly for purposes of valuation.[2149] SLR makes a more conservative reduction of 50 percent, even though 85 percent of the entire resource is too unknown for purposes of valuation.

c. Exmingua never achieved a processing capacity of 250 tpd.

914. SRK admits that their assumed processing capacity of 250 tpd was rarely achieved.[2150] According to one chart presented by SRK, an average of 250 tpd was never achieved.[2151] Thus it is entirely inappropriate for Claimants to submit an LOM plan with this rate.

Figure 3-1 : Monthly average plant throughput (tpd)[67]



915. Here again, *Quiborax* is instructive. In *Quiborax*, the claimants argued that production would have *increased* as the mine progressed, just as Claimants argue here.[2152] The tribunal rejected that argument

[2148] SLR I Report, ¶ 178; SLR II Report, ¶ 59. This adjustment is without prejudice to SLR's belief that an income approach is not appropriate here. SLR II Report, ¶ 135 n. 143.
[2149] *Quiborax v. Bolivia*, Award, ¶ 416 **(CL-0226)**.
[2150] SRK II Report, ¶ 47 ("While this had not been achieved consistently up to the point that operations ceased in May 2016…").
[2151] SRK II Report, fig. 3-1.
[2152] *Quiborax v. Bolivia*, Award, ¶ 418 **(CL-0226)** ("Navigant revises these contractual estimates 'marginally upwards' to take into consideration the growth in the agricultural market for borates between 2001 and 2004 (which it forecasts at 5%

however, finding that the mine never reached its target production after two years of operation and, thus, "it would be speculative to conclude that the Claimant's production could sustain a 5% growth."[2153]

916. SRK defends by placing the mining data in a so-called "ramp up" period, during which the data is less reliable.[2154] The point SRK attempts to make, as explained above, is that the processing rate could be higher in future years. But once again, this argument only shows that the mining data as a whole is unreliable since this "ramp up" period is "not representative" of future operations. What is more, any ramp-up period would have ended by March 2016.[2155]

917. Claimants and SRK lastly claim that Exmingua was authorized to process at 250 tpd despite what the EIA says. According to Claimants, the EIA was never intended to set a "limit" for processing capacity. This is false. The EIA itself sets a "maximum" processing rate at 200 tpd, well below 250 tpd.[2156] Even then, the EIA sets a "nominal" or normal rate of 150 tpd.[2157] Exmingua presented this 150 tpd figure to Guatemala in obtaining the right to mine. That rate formed the basis for all Exmingua's projections (of Gupinol South and Poza del Coyote).[2158] Claimants should be held to that figure.

918. Claimants' own mining data confirms the 150 tpd figure. SLR had originally calculated an average rate of 208 tpd (based on Exmingua's excel spreadsheet (C-0125)),[2159] but it has since recalculated the rate to 159 tpd, accounting for maintenance, down time, and utilization.[2160] There is nothing to suggest that these periods of maintenance and down time would not have continued. As explained below, Exmingua tried to improve the plant's operations, but failed.[2161] And without the proper studies, Exmingua could not plan its future production and predict the amounts and types of rock it would process.

919. Initially, SLR estimated a conservative rate of 200 tpd (70,000 tpa),[2162] which is the highest rate

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between 2009-2014 and 1% from 2015 onwards), and because it believes that "Quiborax […] could have leveraged its mining and logistics expertise to ensure a more reliable and scalable supply of ulexite from the Bolivian Concessions.").

[2153] *Quiborax v. Bolivia*, Award, ¶ 422 **(CL-0226)**; *see also* SLR II Report, ¶ 75 ("The erratic results and failure to stabilize the operation are, in our opinion, further indication of shortcomings in management, as commented upon in the Argo Report [C-0602]").

[2154] SRK II Report, ¶ 47.

[2155] SLR II Report, ¶ 85 "It would have been expected that the ramp-up period had been completed and that the plant metallurgical balances would have been fully developed and understood by the date of the Argo site visit.").

[2156] EIA, p. 92 **(C-0082)**; *see also* SLR II Report, ¶ 76 n. 65 ("The nominal feed rate is the expected throughput rate during normal operations. The design rate is the maximum theoretical rate at which process engineers have designed the plant to operate.").

[2157] EIA, p. 92 **(C-0082-ENG)**.

[2158] See Email from Daniel Kappes dated May 8, 2008 (with all projections based on a 150 tpd rate) **(R-0325)**.

[2159] SLR I Report, ¶ 60(b).

[2160] SLR II Report, ¶ 77.

[2161] *See* Argus Consulting, El Tambor Trip Report **(C-602)**.

[2162] SLR I Report, ¶ 60(b).

Exmingua set in its Plant Design[2163] and the EIA.[2164] SLR then presented both rates for purposes of valuation.[2165] But in light of the admissions by Claimants regarding maintenance, downtime and utilization, this alternative is not appropriate at all. The most appropriate figure is 150 tpd, which accords with Exmingua's data and its promises made in the EIA.

d. Claimants cannot substantiate a recoverability rate of 82 percent

920. Regarding the recoverability rate, Claimants and SRK defend their assumed rate of 82 percent with nothing more than what Mr. Kappes thought would happen. SRK believes that Claimants made improvements to the plant to achieve higher recoverability rates.[2166] However, the report SRK and Claimants rely on to establish these improvements unequivocally states the opposite: "Even though a significant amount of capacity has been added with the cleaner and scavenger column circuits, *Au recoveries have not apparently been noticeably increased*, if any increase has been obtained."[2167] In other words, the supposed improvements did not increase the recoverability rate,[2168] and is no reason to believe recoverability would have increased in the future.[2169]

921. Claimants reject SLR's adjusted recoverability rate of 40, which was based on data that Exmingua compiled in 2016.[2170] SRK describes the 2016 data as "incomplete," "inconsistent[]," and not comprehensive,[2171] even though Exmingua found the data perfectly suitable for its own purposes.[2172]

922. As a contingency, SLR's restated model projected recoveries at two higher rates: 50 percent and 60 percent.[2173] Claimants reject the 50 percent rate because it does not align with *Exmingua's* own data. But as SLR explained, the 50 percent rate is just the average between the 40 percent rate calculated from one piece of Exmingua's evidence and the 60 percent rate calculated from another piece of Exminuga's own evidence.[2174] Indeed, the 50 percent rate reflects the same amount of gold found in the concentrate bags for

[2163] Design Criteria dated Aug. 31, 2010, Section 1.7 **(C-0126)**.
[2164] EIA, p. 92 (**C-0082-ENG**).
[2165] SLR II Report, ¶ 77.
[2166] SRK II Report, ¶¶ 58-60.
[2167] Argus Consulting, El Tambor Trip Report, p. 9 **(C-602)**.
[2168] SLR II Report, ¶ 91.
[2169] *See Quiborax*, ¶¶ 418, 422; SLR II Report, ¶ 85 ("What is surprising from the Argo Report is that the site visit by Mr. Hancock was conducted in March 2016 (approximately 18 months after plant start up). It would have been expected that the ramp-up period had been completed and that the plant metallurgical balances would have been fully developed and understood by the date of the Argo site visit.").
[2170] SLR I Report, ¶ 75; Email from J. Hernandez (Exmingua) to A. Vaides (Exmingua) dated May 13, 2016 **(C-0157)**.
[2171] SRK II Report, ¶ 55.
[2172] SLR II Report, ¶ 70 ("SRK is largely silent on why the metallurgical recoveries in 2015 from gold production in bags (40.8%) is significantly lower than the average plant metallurgical recoveries (60.0%) reported over the same period.").
[2173] SLR I Report, ¶ 185.
[2174] SLR I Report, ¶¶ 74-75.

shipment.[2175]

923. In summary, Claimants have failed to support their rate of 82% because the necessary improvements touted by Mr. Kappes failed.[2176] The Tribunal should therefore accept the 40 percent rate advocated by SLR because it is derived from Claimants' own evidence created closest in time to the mining activity. Claimant cannot and does not refute this evidence. In the alternative, the Tribunal should accept the 50 percent rate because it is a compilation of both data sets submitted by Claimants.

e. There is no evidence to substantiate Mr. Kappes' assumed costs

924. On the issue of capital costs, Claimants and SRK once again rely on the fact that no "formal and detailed" cost estimates were required to begin operations.[2177] As already explained, that is no reason to lower the burden of proof for purposes of this arbitration Nor does the Tribunal have to reward Claimants for making the foolhardy decision to start mining without estimating costs. SRK acknowledges in its Second Report that the costs estimates are not based on any detailed assessment done at the time.[2178] Given the lack of supporting documents, it was perfectly reasonable for SLR to add a 40% contingency for costs in their restated LOM.

925. As for operating costs, SLR cannot opine of the reasonableness of Claimant's estimate since there are no mine designs, equipment specifications, or equipment lists to review.[2179] The stripping ratio—the ratio of waste rock to ore—is the perfect example. There is no detailed design to determine the stripping ratio, which is critical to determining how much equipment and labor would be necessary, pit wall slopes and associated operating costs—"essentially everything to do with the safe and economic operation of an open pit mine."[2180]

926. In the restated LOM, SLR applied a 7.5:1 stripping ratio, up from the 5:1 ratio assumed by SRK.[2181] SRK now objects to the higher stripping ratio, stating that the "mining sequence was not set out to gradually deepen [the pits] over time (thus incurring a constantly increasing stripping ration as assumed by [SLR]) but rather to achieve an overall average stripping ratio of about 5:1" across the open pits.[2182] If that was the plan, then it would have been communicated within Exmingua in the form of a mine design or mine

[2175] SLR II Report, ¶ 90.
[2176] SLR II Report, ¶ 78 ("In any case, the 82% recovery used by SRK is clearly unsupportable.").
[2177] Claimants' Reply, ¶ 675; SRK II Report, ¶ 64.
[2178] SRK II Report, ¶ 95-98 (analyzing the recommended contingencies in AusIMM Cost Estimation Handbook).
[2179] SLR II Report, ¶ 55.
[2180] SLR II Report, ¶ 63.
[2181] SLR I Report, ¶ 60.
[2182] SRK II Report, ¶ 40.

plan.[2183] But here there is no plan; only what Mr. Kappes says would have happened.[2184] More is needed.

D. Exploration Targets and Lost Exploration Opportunities

1. Exploration Targets

927. Claimants fail to address one of the Guatemala's primary critiques to the Exploration Targets (and the Lost Opportunity Targets below): there is no evidence whatsoever that Claimants had any intention of developing these deposits.[2185] Claimants certainly provide no such evidence. Neither of their submissions discuss Exmingua's plans to develop the deposits. They are only mentioned in the damages section as part of a hypothetical analysis. Like with Laguna Norte in the previous section, if Claimants had a serious plan to target these deposits in the future, that plan would have been committed to writing. Here, there is nothing. Guatemala asked Claimants to produce copies of any plans to develop the Exploration Targets and the Lost Opportunity Targets,[2186] but Claimants could not provide a single plan.

928. This is important given the standard for damages. By Claimants' own submission, they must prove to "sufficient certainty that [Exmingua] had engaged or would have engaged in a profitmaking activity but for the Respondent's wrongful act."[2187] That standard is clearly not satisfied for the Exploration Targets given the complete lack of evidence. Claimants even admit in their Reply that there was no "certainty of success" for these targets.[2188] According to Claimants, "these targets *could have been defined* with greater certainty"—not *would have* been defined.[2189] Thus, it is not sufficiently certain that Exmingua would have developed these deposits, and even less certain that they would have developed the Lost Opportunity Targets, discussed below.

929. Regarding the Targets themselves, Claimants accept that they are "conceptual in nature" and do not constitute Mineral Resources or Mineral Reserves, which are the only two categories fit for an income-based evaluation.[2190] They claim that the Exploration Targets were not valued based on an income

[2183] SLR II Report, ¶ 66 (noting that it is impossible for SRK to assess the reasonableness of a 5:1 stripping ratio without a mine plan).
[2184] See SRK II Report, ¶ 40.
[2185] Guatemala's Counter-Memorial, ¶ 806.
[2186] Guatemala's Redfern Schedule, Request No. 22.
[2187] Claimants' Memorial, ¶ 340 ("[O]nce the fact of future profitability is established and is not essentially of speculative nature, the amount of such profits need not be proven with the same degree of certainty. In other words, the Claimant must prove that it has been deprived of profits that would have actually been earned. This requires proving that there is sufficient certainty that it had engaged or would have engaged in a profitmaking activity but for the Respondent's wrongful act, and that such activity would have indeed been profitable.") (citing Crystallex (**CL-0153**), ¶ 875).
[2188] Claimants' Reply, ¶ 681.
[2189] Claimants' Reply, ¶ 692.
[2190] Guatemala's Counter-Memorial, ¶ 808; Claimants' Reply, ¶ 682-83; SRK II, ¶ 77 (where SRK admits to applying a DCF calculation to its analysis of the Exploration Targets); SRK I Report, ¶ 55 ("The DCF models produced using the above

approach,[2191] but the not true. One of the main inputs into Versant's ultimate valuation is the Target Value, which is derived from a DCF (income-based) analysis.[2192] As SLR has insisted, and the valuation guidelines clearly state: "It is not considered acceptable to use, in the Income Approach, 'potential resources', 'hypothetical resources', or any other such categories that do not conform to the definitions of Mineral Resources and Mineral Reserves."[2193]

930. Claimants even agree that the leading valuation standards discourage the use of an income-based approach for exploration projects.[2194] They cast these points aside, however, arguing that these categories are "not designed to value lost opportunity."[2195] Be that as it may,[2196] the classification categories are designed to provide accurate and reliable information of risk that third-party investors can use in their investment decisions. Claimants offer no reason why that standard should be abandoned for purposes of this arbitration. The need for reliable information is present in both contexts.

931. Claimants submit that the Exploration Targets contain "conceptual tonnages and grades… which can then be used in conjunction with their geological aspects to arrive at a valuation."[2197] But that "conceptual" approach was rejected by in *South American Silver v. Bolivia*, where the mining project was "barely at the conceptual study or Preliminary Economic Assessment ("PEA")" stage, like the one here.[2198] Even though that project showed some potential, "there was no certainty that such potential would be realized," given the early stage of the project at the relevant time.[2199]

932. *Bear Creek v. Peru* is also persuasive. In *Bear Creek*, the tribunal rejected an income-based (DCF)

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data yielded NPVs at a 10% discount rate142 in the order of USD 55 million for each Hard Rock Target (a total of USD 165 million for the three Hard Rock Targets), and USD 425 million for the Saprolite Target.").

[2191] SRK II Report, ¶ 77.

[2192] SLR II Report, ¶ 108.

[2193] SLR II Report, ¶ 105; CIMVal 2003, G4.9 at p. 25 **(C-0197-ENG)**.

[2194] Claimants' Reply, ¶ 682; SRK II Report, ¶ 75.

[2195] Claimants' Reply, ¶ 682.

[2196] Respondent does not dispute that the resource classifications are not designed to value lost opportunity in the dispute resolution context.

[2197] Claimants' Reply, ¶ 683.

[2198] *South American Silver Limited (Bermuda) v. Bolivia*, PCA Case No. 2013-15, Award (Nov. 22, 2018), ¶¶ 809, 811 **(RL-0053)**.

[2199] *South American Silver v. Bolivia*, Award, ¶¶ 815, 857 **(RL-0053)** ("In summary, the valuation method put forward by FTI is subject to uncertainties that do not permit even a reasonable level of conviction regarding which could be the Project's value. This was a valuation subject to a high degree of contingencies, to the development of hypotheses, and to subjective appreciation criteria in light of the absence of objective grounds. In the view of the Tribunal, this results from the clear difficulty of valuing with any degree of precision and objectivity a project that, as indicated at paragraphs 808 to 823 above, is at an incipient stage, without mining activity, with a significant amount of exploration still to be done, without a prefeasibility study and subject to serious uncertainties covering not only the technical aspects, including the uncertainty of using the untested Metallurgical Process, but also the real scope of the resources and their marketability given the lack of a degree of certainty with respect to the costs to attain commercially viable exploitation. It is, in the end, a project at an almost embryonic stage that precludes a valuation with the required certainty as to its actual value.").

valuation—the basis for SRK's valuation—because the mining project was at too early a stage. The investor was not yet authorized to mine in that area, just like Exmingua was not authorized to mine the Santa Margarita concession area.[2200] There was no evidence that the project would have been profitable, just like here. And there was nothing to show that the investor could have made profits in similar circumstances.[2201] Exmingua has not provided any evidence of past profits related to mining.

933. Regarding Exmingua's capacity to develop these deposits, Claimants simply argue that Exmingua could have increased its processing capacity if it wished.[2202] Their own evidence says differently. As explained above, Claimants never reached their target capacity of 250 tpd on a consistent basis, and 250 tpd is still too low a rate to handle the additional raw material from the Exploration Targets. Claimants' own documents set a maximum rate of 200 tpd.[2203] The plant would have had to exceed this maximum rate to develop the additional deposits, but there is no evidence that it could. The data certainly does not support such a conclusion.

934. Finally, regarding Radius and Gold Fields, Claimants believe that their decision to retain the right to future payments indicates that the projects had value.[2204] It does not. If Radius and Gold Fields believed there were hundreds of millions of dollars in value, they would have mined the projects or sold them for that amount, not turned them over at a steep discount. And future payment is nothing more than the hope that something might come of the investment. Radius and Gold Fields could have used SRK's novel valuation methods to value the unknown deposits. But instead, they wrote off their losses, showing that they never planned to recover sunk costs, much less realize an upside in the future. Those decisions should certainly be given weight.

2. Lost Opportunity Targets

935. The Lost Opportunity Targets suffer from the same defects as the Exploration targets, namely the lack of a plan and/or capacity to develop these deposits. It is not, as Claimants submit, that Guatemala has assigned no value to these deposits.[2205] The value can only come from Claimants proving with sufficient certainty that Exmingua knew what it was doing, had a detailed plan moving forward with properly vetted resource

[2200] *Bear Creek v. Peru*, Award, ¶ 600 **(CL-0139)**.
[2201] *Bear Creek v. Peru*, Award, ¶ 601 **(CL-0139)** ("In the present case, Claimant concedes that to overcome a lack of history of profitability, it would need to produce convincing evidence of its ability to produce profits in the particular circumstances it faced. Such evidence could include experience (of its own or of experts) or corporate records that establish on the balance of probabilities it would have produced profits from the concession in the face of the risks involved.")
[2202] Claimants' Reply, ¶ 685.
[2203] EIA, p. 92 **(C-0082-ENG)**.
[2204] Claimants' Reply, ¶ 686.
[2205] Claimants' Reply, ¶ 689.

classification, and would have engaged with these deposits.

936. Claimants' use of the Geologic Probabilistic Approach is also problematic, for both these targets and the Exploration Targets. This approach was not designed to value exploration properties.[2206] It is rather an income-based approach not suitable to value inferred resources.[2207] And it is not even acknowledged by the various international valuation guidelines.[2208] If the approach is not suitable to value properties like El Tambor, and if it is not recognized by industry standards, then it should be not used for purposes of this arbitration.

937. SRK defends the approach by pointing to its own in-house use of the approach and a paper on probabilistic valuation methods in general. But neither document supports, much less applies, the Geological Probabilistic Approach used here by SRK. As Guatemala's expert SLR already explained, SRK's approach is an improper variation on a different approach used by other geologists.[2209] It is not recognized, much less mentioned, in any international valuation guidelines, and there is no example of this method ever being employed.

938. Claimants final point is that "it would be unacceptable to a willing buyer to accept, with certainty" that there would be no value across the seven exploration targets that have been tested and are in proximity to an operating mine. That argument flips the burden of proof on its head. Guatemala does not have to prove the negative: that no willing buyer would ascribe no value to these Targets. Claimants rather must prove that a willing buyer would assign value to the targets. Claimants fall far short of their burden.

939. To put this, lastly, in perspective, SRK has estimated that the El Tambor Project has a potential gold endowment between 4.8 million and 8.3 million ounces of gold, placing it in the 96th percentile of fold properties worldwide.[2210] Since 2003, only 0.2 million ounces have been discovered at the El Tambor Project, and yet SRK believes that this number will increase by a staggering 4,150 percent.[2211] The reality is that so few exploration properties ever become profitable that is not realistic to conjuring up a value to an imaginary deposit.[2212] Once again, Claimants had no plan to develop the Lost Opportunity Targets (or

[2206] SLR I Report, ¶ 229; *id.* ¶ 231 ("These geologically related "scaling factors" appear to be more related to the occurrence of mineralization at the exploration stage, without regard to size and grade, or the probability of discovery or potential economic viability."); Counter-Memorial, ¶ 813 ("the approach here is akin to the one used by governments and international agencies to 'assess the so-called undiscovered mineral endowment of a country.'").
[2207] SLR II Report, ¶¶ 105, 107.
[2208] SLR II Report, ¶ 107.
[2209] SLR I Report, ¶ 232 ("Neither SRK nor Versant has applied the Geological Probabilities (or Geological Risk) method correctly as outlined n Lord, et al. and Morley.").
[2210] SLR II Report, ¶ 121.
[2211] SLR II Report, ¶ 122.
[2212] SLR II Report, ¶ 125.

the Exploration Targets). Their valuations are just self-serving calculations based on internal guesses and theories that have never been peer-reviewed.

VII. DAMAGES[2213]

A. Claimants Continue to Apply an Incorrect Compensation Standard

940. Already in its Counter Memorial, Guatemala demonstrated that CAFTA-DR Article 10.7 sets forth the compensation standard for all direct or indirect expropriation cases within the scope of CAFTA-DR.[2214] Claimants' Reply has no impact on that demonstration. Claimants simply insist on a strategically inaccurate interpretation of the CAFTA-DR which completely ignores its text and interpretative annexes.[2215] In the words of this Tribunal, a tribunal construing the terms of CAFTA-DR should also take into account (*inter alia*) "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,"[2216] as well as "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[2217] Guatemala's position is supported in the treaty itself, the intention of the Parties to the CAFTA-DR, and the practice of different tribunals as explained in the following paragraphs.

941. *First,* the text itself supports Guatemala's position. Article 10.7 of CAFTA-DR does not establish any difference between lawful and unlawful expropriations. In their Reply, Claimants argue that Respondent attempts to conflate the treaty obligation to provide compensation for a taking with the obligation to pay damages for unlawful expropriation and that this reasoning "stems from a misunderstanding of the Treaty, and, more fundamentally, internal law."[2218] However, the opposite is true. Claimants simply attempt to obliterate the principle that investment treaties constitute *lex specialis* with regard to the matters covered by it, and, by way of consequence, the rules set forth in those treaties override the application of any conflicting rules of customary international law.[2219] There might be other provisions that explicitly or

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[2213] Without prejudice of the analysis in this section, Guatemala submits, as established in its Counter-Memorial and this submission, that no violation to the Treaty has occurred and, therefore, Claimants are not entitled to any form of reparation. Additionally, Guatemala has already explained in detail in section V.E.1 *supra*, how Claimants have altered their expropriation claim against Guatemala from a reflective loss claim to a direct loss claim and vice versa. Thus, and in abundance of caution, Guatemala is treating Claimants' damages claims without simply discarding them for lack of causal connection to the actual arguments ultimately presented by Claimants, who have not proven that any of the measures challenged affected their rights directly.

[2214] Guatemala's Counter Memorial, § VIII.A.

[2215] Claimants' Reply, ¶¶ 610-614.

[2216] Decision on Preliminary Objections, ¶123.

[2217] *Id.*

[2218] Claimants' Reply, ¶ 611.

[2219] Jose E. Alvarez, *A Bit on Custom*, 42 N.Y.U. J. INT'L L. & POL., 17, 31 (2009) (**RL-0411**) ("There are aspects of BITs that are *lex specialis* -that is, intended to exclude the applicability of any general rules to the contrary. […]"); International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 55th Session (2001), Article

implicitly rely on general international law,[2220] but the CAFTA-DR's standard of compensation in case of any form of expropriation is not one of them.

942. Prof. Gantz agrees with Guatemala's position. Under Article 10.7 of CAFTA-DR, "there are detailed guidelines for determining the amount of compensation and the calculation of interest for takings coming within the scope of Article 10.7."[2221] Prof. Gantz, in an article regarding the settlement of disputes under CAFTA-DR, reaches the conclusion that while some tribunals finding that an unlawful expropriation took place in a specific case might mistakenly take the position that the measure of compensation specified in the relevant expropriation provision is inapplicable, however, "[u]nder CAFTA-DR, a very explicit compensation standard is provided in Article 10, specifying fair market value at the time of the taking, and it seems unlikely that a Tribunal would apply a different standard."[2222] This only confirms that the Tribunal must apply the specific provision contained in the treaty – *lex specialis* – to the detriment of any conflicting customary international law rule –*lex generalis*–.

943. *Second*, the Parties to the CAFTA-DR have expressly confirmed that the same standard of compensation applies for direct, indirect, lawful, and unlawful expropriations. This is precisely what the Parties did when they negotiated and approved Annex 10-C. The Parties to the treaty clarified that those cases of indirect expropriation –which would necessarily constitute "unlawful" expropriations, if such term was accepted, – are addressed in Article 10.7, and therefore, the standard of compensation contained in Article 10.7 should apply to any indirect (ie, unlawful) expropriation. Negating the position that Article 10.7 covers all expropriations, including any so-called "unlawful" expropriations would contradict Claimant's stance and preclude them from bringing a claim for indirect expropriation under that specific provision.

944. Even assuming *arguendo* that CAFTA-DR's text was not sufficiently clear, the United States' Non-Disputed Submission, which is evidence of the intention of the parties to the treaty, supports and confirms Guatemala's position. According to the United States (the State of Claimants' nationality), "if an expropriation does not conform to each of the specific conditions set forth in Article 10.7.1, paragraphs (a) through (d), it constitutes a breach of Article 10.7. Any such breach requires compensation in accordance with Article 10.7.2."[2223] In other words, the compensation standard set forth in Article 10.7.2. shall apply

55 (**RL-0291**) ("Article 55. Lex Specialis. These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.")

[2220] *Id*.

[2221] David A. Gantz, *Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement*, 30 B.C. INT'L & COMP. L. REV. 331, at 382 (2007) (**RL-0050**).

[2222] *Id*., at n. 248 (**RL-0050**).

[2223] United States' Non-Disputed Party Submission, ¶ 40.

to any expropriations, irrespective of whether they are considered "lawful" or "unlawful" expropriations.

945. *Third*, the practice of international tribunals supports Guatemala's interpretation. As advanced in Guatemala's Counter-Memorial, different Tribunals have held that the standard of compensation set forth in a treaty can apply across the entire universe of expropriations, irrespective of whether they are considered lawful or unlawful.[2224] In *Rumeli v. Kazakhstan*, the tribunal found that the standard of compensation as stipulated in the BIT should be applied for lawful and unlawful expropriations.[2225] Likewise, the Tribunal in *British Caribbean Bank v. Belize* held that "at no point does the Treaty, being a *lex specialis*, distinguish between lawful and unlawful expropriation […] Once the violation of the Treaty provisions regarding expropriation is established, the State has breached the Treaty."[2226] The tribunal acknowledged that the language had been specifically negotiated by the Parties and that "[t]he use of the word 'shall' is unambiguous in that there is no room for another method of evaluation of the compensation sought" for cases which some may nominate as "unlawful" expropriations.[2227] In addition, the tribunals in *Marion Unglaube v. Costa Rica*[2228] and *Funnekotter v. Zibabwe* noted that the international legal opinion and case law are not perfectly clear with respect to the possibility of applying a different standard of compensation to so-called "unlawful" expropriations, showing *de iure*, that the Tribunal cannot fail to apply the applicable treaty.

946. The cases cited evidence that, contrary to what has been argued by Claimants,[2229] there is no consensus in applying a standard of full reparation for cases of unlawful expropriation brought under an investment treaty, and that, to the contrary, the text of the applicable treaty should prevail when the interpretation of its text mandates a Tribunal to apply the same standard of compensation to all cases of expropriation.

[2224] Guatemala's Counter Memorial, ¶¶ 826-828.

[2225] *See Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Award (July 29, 2008), ¶ 793 **(CL-0147)** ("[…] In either case, the Tribunal considers that the correct approach is to award such compensation as will give back to Claimants the value to them of their shares at the time when the expropriation took place. This requires the Tribunal to take account only of the value which the shares would probably have had in the hands of Claimants if the shares had not been expropriated, and therefore to leave out of account any increase (or decrease) in the value of the shares which Claimants would probably not have enjoyed (or suffered) if the shares had remained in their hands.")

[2226] *See British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18, Award (December 19, 2014), ¶ 260 (**RL-0308**). *See also* United States's Non-Disputed Party Submission, n. 69.

[2227] *See British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18, Award (December 19, 2014), ¶ 261 (**RL-0308**).

[2228] *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award (May 16, 2012), ¶ 306 **(RL-258)** (Arguing that the international legal opinion and case law are not perfectly clear with respect to the application of the customary international law standard to cases of unlawful expropriation); *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (April 22, 2009), ¶ 110 **(CL-0158)**.

[2229] Claimants' Reply, ¶607.

947. Claimants rely on Siemens v. Argentina,[2230] Vivendi v. Argentina,[2231] Biwater v. Tanzania,[2232] Saipem v. Bangladesh,[2233] Karkey Karadeniz v. Pakistan,[2234] and UP & CD Holding v. Hungary[2235] to prove an apparent "predominant approach" of arbitral tribunals to apply a full reparation standard for unlawful expropriations. However, apart from the fact that the sample offered includes decisions which were later reversed or left without effect before becoming final,[2236] Claimants have not proved the resemblance of these decisions to this case or made any comparison of the provisions applied in those cases to the provision in CAFTA-DR prescribing the applicable standard of compensation.

948. In fact, in *UP & CD Holding v. Hungary,* the Tribunal held that "unless a treaty contains a clear reference to damages due for unlawful expropriation, the compensation rule referred to in the BIT will only apply to lawful expropriation, with damages for unlawful expropriation being governed by customary international law".[2237] This only confirms Guatemala's position that the specific *lex specialis* contained in CAFTA-DR renders any contrary general provision in international customary law inapposite. On closer examination, the Tribunal will find that none of the cases cited by Claimants deal with treaties carrying a provision (and an annex that interprets such provision) comparable to the one contained in CAFTA-DR, or even less, a submission by a non-disputing party to the relevant treaty confirming their interpretation.

949. In sum, Guatemala has demonstrated that the text, object, purpose, and both the intention of the parties to the CAFTA-DR, and the subsequent practice of different tribunals, all favor its position and confirm that the standard of compensation to be applied in all cases of expropriation –including any lawful and unlawful expropriations– under CAFTA-DR, is the fair market value at the time of the alleged breaches. Claimants have failed to prove that the text and the intention of the parties favors their position and even less, that there is an international consensus to apply a full reparation standard to unlawful expropriations. Therefore, the Tribunal should easily find that the standard of compensation set forth in article 10.7.3 of the CAFTA-DR (i.e., fair market value at the date of expropriation) applies to this case.

B. Claimants' Chosen Valuation Date Expressly Contradicts the CAFTA-DR

950. As demonstrated in Guatemala's Counter Memorial, the correct valuation date according to the CAFTA-

[2230] *See* Art. 4, Argentina-Germany BIT **(RL-0222).**
[2231] *See* Art. 5.2., Argentina-France BIT **(CL-0105).**
[2232] *See* Art. 5.1., Tanzania-UK BIT **(RL-0412).**
[2233] *See* Art. 2, Bangladesh-Italy BIT **(RL-0413).**
[2234] *See* Art. 6, Pakistan-Turkey BIT **(RL-0414).**
[2235] *See* Art. 5, France-Hungary BIT **(RL-0415)**
[2236] *See., e.g.*, the cases of *Siemens v Argentina* and *Karkey v Pakistan*, both discontinued by the disputing parties during the pendency of annulment proceedings.
[2237] *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award (October 9, 2018), ¶501 **(RL-0085).**

DR is the date of the alleged conduct or act that caused the damages. Claimants insist on applying an incorrect compensation standard, i.e., full reparation, for the principal purpose of attempting an untenable argument that only an *ex-post* valuation date would "wipe out the consequences of Respondent's breach".[2238] Claimants' position is wrong as it expressly contradicts CAFTA-DR's text, which is confirmed by the persuasive decisions of different tribunals, as explained below.

951. *First*, Guatemala maintains that the CAFTA-DR constitutes *lex specialis* and its text supports Guatemala's chosen valuation date. Article 10.7.3 of CAFTA-DR provides that "[…] the compensation paid shall be no less than the **fair market value on the date of expropriation** […]" (emphasis added). Consequently, the valuation date to be applied in this case is May 5, 2016 (the "Valuation Date"),[2239] being the date on which the Constitutional Court issued the resolution confirming the provisional *amparo* decision issued by the Supreme Court on November 11, 2015,[2240] and, by way of consequence, the date of the act that Claimants argue breaches the treaty.[2241]

952. In addition to the clear text of CAFTA-DR, the United States submission also concludes that the appropriate valuation date should be the date of the breach as it "appropriately exclude[s] injuries resulting from events subsequent to the date of breach that lack sufficient causal connection to the breach."[2242] As supported by the United States, the valuation date not only impacts in the calculation of the value of the asset, but also guarantees that only the events that have a connection to the breach be remedied.

953. *Second*, the "principle" that in cases of unlawful expropriations the claimant has the right to choose the valuation date is not accepted, but rather has been contested by experts in international law. Judge George Abi Saab and Prof. Brigitte Stern submitted extensive and thorough dissenting opinions in *ConocoPhillips v. Venezuela* and *Quiborax v. Bolivia* explaining this point.

954. In *ConocoPhillips*, Judge Abi Saab confirmed that accepting that in case of an illegal expropriation, the standard of the treaty for compensation of expropriation does not apply is a "much controverted proposition".[2243]

955. Likewise, in *Quiborax*, Prof. Brigitte Stern presented an analysis of the case law regarding the method

[2238] Claimants' Reply, ¶ 607.
[2239] Judgment of the Constitutional Court of May 5, 2016, Docket 1592-2014 (**C-0193**).
[2240] Corte Suprema de Justicia de Guatemala, Judgment of November 11, 2015, Docket 1592-2014 (**C-0004**).
[2241] Guatemala's Counter-Memorial, ¶¶ 833-834.
[2242] US Non-Disputing Party Submission, ¶ 62.
[2243] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Dissenting Opinion to Decision on Jurisdiction and Merits (Feb. 19, 2015), ¶ 256 (**RL-0416**).

used to calculate the compensation in cases of "unlawful" expropriation, including the valuation date. She affirmed that an analysis of thirty years of investment arbitration case law shows that "[…] in the overwhelming majority of cases having dealt with an unlawful expropriation, the date of the expropriation was adopted in order to calculate damages, based on what was foreseeable at that date"[2244] i.e., an *ex-ante* approach. The only cases that have adopted the date of the award and *ex post* data to calculate the compensation are *ADC v. Hungary*, *Siemens v. Argentina*, *ConocoPhilips v. Venezuela*, and *Yukos v. Russia*, which constitute, in her opinion, an ultra-minority position.[2245] In her own words:

> […] These are – to the best of my knowledge – the ONLY cases in almost thirty years of investment arbitration adopting the date of the award and ex post data, compared to the hundreds of cases relying on the date of expropriation and what was foreseeable on that date,[2246]

956. In an attempt to inflate their claim, Claimants rely on an *ex-post* valuation and argue that they "would have had the opportunity to further advance the Project by conducting further exploration and continuing to mine."[2247] In addition to their arguments being legally inappropriate, the evidence shows the opposite. The Rosen/Milburn Report further demonstrates the inaccuracy of Versant's insistence of the use of an *ex-post* analysis in this case as "Versant is not able to observe the conditions that would have existed absent the Treaty Breaches or the extent to which the El Tambor Project may have advanced, if at all, to a current date and the passage of time does not assist Versant to do so."[2248] In other words, Claimants rely on assumptions that were not foreseeable at the time. This is precisely what Brigitte Stern criticizes in the use of *ex-post* valuations.[2249] She argues that the investor should only be entitled to receive "what was foreseeable at the date of the expropriation, which is indeed in line with the respect of the investor's legitimate expectations".[2250]

957. Claimants not only rely on unforeseeable information not available at the time, but their valuation report also abuses the *ex-post* framework

> to attempt to transform a small, risky and unprofitable mining project that only had 253,000 ounces of Resources that the Claimants owned prior the Alleged

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[2244] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Partially Dissenting Opinion (September 7, 2015), ¶43 (**RL-0126**).
[2245] *Id*., ¶ 43-44. Claimants precisely rely on Quiborax and ConocoPhillips to support their position. *See* Claimants' Reply ¶ 621, 623.
[2246] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Partially Dissenting Opinion (September 7, 2015), ¶¶ 43-44 (**RL-0126**).
[2247] Claimants' Reply ¶ 621.
[2248] Rosen/Milburn Report, ¶ 86
[2249] *See Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Partially Dissenting Opinion (September 7, 2015), ¶¶ 58-59 (**RL-0126**).
[2250] *Id.*, ¶ 60.

> Breaches into a large project that would have generated risk-free pre-tax cash flows to a current date and would have discovered an additional 5.0 million to 7.0 million ounces of gold by March of 2021[2251]

958. Finally, Claimants argue that another reason for applying the date of the Award as the valuation date is that claimants had no intention of selling the El Tambor Project in 2016 and that expert Rosen "is familiar with these lines" as he opined in the *Clayton* matter.[2252] Contrary to what Claimants contend, in *Clayton v. Canada*, expert Howard Rosen did not agree that a fair market value cannot be applied if a claimant has no intention to sell. What he actually said was that the fair market value may differ from full reparation to a claimant if the present value of the future cash flows to that claimant are higher than what a notional buyer would pay – due to vertical integration or some other attribute specific to them.[2253] Here, Versant has not demonstrated any specific attribute of the Claimants or the El Tambor Project that cause fair market value to differ from full reparation (other than a current valuation date which is a legal issue and is expressly set forth in CAFTA-DR).[2254]

959. In sum, there is no recognized principle establishing that an investor has the right to choose a valuation date in cases of "unlawful" expropriation. Quite the opposite, said premise has been strongly criticized and therefore, Guatemala maintains that pursuant to the *lex specialis* (i.e., Article 10.7.3 of CAFTA-DR) the valuation date is the date of the breaches and that an *ex-ante* framework should control as presented by the Rosen Report[2255] and the Rosen/Milburn Report.[2256] At any rate, the damages sought by Claimants should in reality be significantly less either using the valuation date suggested by Claimants (i.e., the award date) or the valuation dates submitted by Guatemala (i.e., the date of the breaches) as described in the following subsections.

1. <u>The correct valuation date would result in significantly less damages.</u>

960. As submitted by Guatemala in its Counter Memorial, the date of expropriation chosen by Claimants intends to cover a series of bogus claims. Their choice of an improper date is not innocent, as Claimants attempt to justify the consequences of Claimants' illegal actions and their companies since November 11, 2015, when the Supreme Court suspended their license.[2257]

961. As presented in detail in section VII.E below and based on the Rosen/Milburn Report, a valuation using

[2251] Rosen/Milburn Report, ¶87.
[2252] Claimants Reply, ¶ 625.
[2253] Rosen/Milburn Report, ¶ 120-121.
[2254] Rosen/Milburn Report, ¶ 123.
[2255] Rosen Report, ¶236.
[2256] Rosen/Milburn Report, ¶ 99-102.
[2257] Supreme Court of Justice of Guatemala, Case No. 1592-2014, Judgment of provisional amparo of November 11, 2015 (**C-0004**).

the Valuation Date (i.e., May 5, 2016), would yield a maximum value of from USD 3.1 million to USD 7.5 million.[2258] If, instead, we were to use November 11, 2015, the date on which the Supreme Court issued its decision granting the provisional *amparo* –and, as a result, arguably the correct valuation date if Claimants' case were taken at face value–, the valuation would be impacted and reduced. The Rosen Report shows that, even though the date is only 6 months prior to the Valuation Date, the market price of gold increased by 17% and the market for smaller gold companies increased by 63% in that 6-month period.[2259] Thus, the valuation would decrease by 43%, valuing the Project between US$1.9 million and US$4.5 million.[2260]

2. The valuation date used by Claimants should also result in significantly less damages

962. As submitted in the Counter-Memorial, the use of information available as of March 2021, would require Claimants to take into account a series of risks that would result in significant reductions on the damages valuation presented by Versant.[2261] Guatemala's position remains unchanged.

963. Apart from the numerous unresolved critics to Versant model developed in section VII.D below, Claimants' damages valuation continues to neglect several relevant risks that had and continue to have the El Tambor Project. Specifically, Versant's model fails to include COVID-19 effects and the social license risk.

964. Regarding the COVID-19 effects, Versant II Report prepared an illustrative analysis assessing the impact of a 2-month shutdown for COVID-19 citing a gold mine in Nicaragua that suspended operations for two months due to COVID and even acknowledged that if cash flows were to be adjusted, this would reduce damages by 2%.[2262] However, in Versant's primary cash flow projections, no adjustment is made to reflect this impact. Without a direct adjustment to the cash flow projections to reflect this risk, the only option remaining is to apply a project-specific risk.[2263]

965. Regarding the social license risk, Versant has not meaningfully addressed this issue in its second report either. As Versant's projected cash flows from 31 March 2020 to 31 March 2021 have now transitioned from the future loss period (where they were risk-adjusted) to the past loss period (where no risk-adjustment is applied), under Versant's methodology, 100% of the risk to these cash flows is eliminated simply by the passage of time. This is not reasonable and further illustrates this flaw in Versant's approach.[2264]

[2258] Rosen/Milburn Report, ¶397; Figure 11.1.
[2259] Rosen Report, ¶144.
[2260] Rosen Report, ¶145-147; Rosen/Milburn Report, ¶39.
[2261] Guatemala's Counter-Memorial, ¶ 841.
[2262] Versant II Report, n. 396.
[2263] Rosen/Milburn, ¶ 257.
[2264] Rosen/Milburn, ¶ 154.

966. Accordingly, if we were to apply the valuation date claimed by Claimants, which is incorrect and contrary to CAFTA-DR, the valuation would be reduced by factors not considered by Claimants' valuators, such as Covid-19 and the social license risk.

C. Claimants Fail to Prove that their Alleged Damages are Connected to Guatemala's Conduct

967. It is well established that several principles may justify the denial of compensation, or at least limit the amount of damages that a claimant may seek and that otherwise would be awarded. This includes the need to prove causation between the alleged violations and the damages claimed, contributory fault, failure to mitigate damages, and uncertainty of the damages sought, among others.[2265] In its Counter-Memorial, Guatemala demonstrated that the indirect nature of the damages claim submitted by Claimants has important effects on their ability to claim and prove the existence of compensation purportedly owed by Guatemala for their alleged damages.[2266] In an attempt to confuse the Tribunal, Claimants now argue that they are bringing a direct claim for the "expropriation of their shares in Exmingua"[2267] but at the same time, that they are seeking "damages for the loss in value of the entirety of their investment".[2268]

968. In any of the scenarios submitted, Claimants face fatal and self-imposed limitations that prevent them from proving their damages as (1) they have failed to prove the necessary causation established both by CAFTA-DR and the Decision on Preliminary Objections, (2) they have contributed to their own loss, and (3) the damages sought are clearly uncertain and based on unforeseeable and unacceptable assumptions. Thus, the Tribunal should easily find that even if liability is found against Guatemala, Claimants are not entitled to compensation as explained in the following subsections.

1. There is no sufficient causal link between the alleged violations and the damages claimed.

969. Under Article 10.16.1(a) of CAFTA-DR, as a precondition for obtaining any form of compensation in this proceeding, Claimants must prove not only that Guatemala has breached an obligation set forth in Section A of Chapter 10 of CAFTA-DR, but also that "the Claimant[s] ha[ve] suffered loss or damage by reason of, or arising out of, that breach".

970. In the preliminary objections phase, the Tribunal confirmed this by holding that "claimant bears the burden of proving causation, *i.e.*, that its own injury was suffered 'by reason of or arising out of' the

[2265] Borzu Sabahi, Noah Rubins, Don Wallace, *XXI. Compensation, Damages, and Restitution'*, in BORZU SABAHI, NOAH RUBINS, ET AL., INVESTOR-STATE ARBITRATION 703, 715 (Oxford University Press, 2nd Ed., 2019) (**CL-0299**).
[2266] Guatemala's Counter-Memorial, ¶¶ 842-853.
[2267] Claimants' Reply, ¶ 621.
[2268] Claimants' Reply, ¶ 635. For a full analysis on the moving target nature of Claimants' expropriation argument see V.E.1 *supra*.

challenged State conduct. The more tenuous the connection between the challenged conduct and the alleged injury to a claimant, the heavier this burden may be".[2269]

971. The U.S Submission also expands on the causation issue and confirms that Claimants are not entitled to the damages they seek. The US maintains that the "test is not met if the same result would have occurred had the breaching State acted in compliance with its obligations",[2270] and refers to *S.D. Myers v. Canada*, where the tribunal interpreted the NAFTA's equivalent provision, and held that damages may only be awarded to the extent that there is a "sufficient causal link" between the breach of a specific NAFTA provision and the loss sustained by the investor.[2271]

972. Thus, the causation legal framework, as confirmed by the Tribunal, sets forth that Claimants need to prove that their own injury was suffered *by reason* or *arising out of* the challenged conduct. In their Reply, Claimants purport to loosen this standard by arguing that they just need to show that the wrongful conduct "played *some* part in bringing the harm".[2272] Claimants' argument *vis a vis* CAFTA-DR's provision simply does not subsist.

973. As extensively described in section II.A above, Claimants are the only party responsible for their own losses.[2273] Therefore, Guatemala has every reason to question causation in this case. Claimants list a series of measures that are allegedly the cause of their losses[2274] but have failed to comprehensively, or even sufficiently, explain and prove that their damages *arise out of* or *by reason of* the following conducts:

- The courts' suspension of Exmingua's Progreso VII license is not the cause of Claimant's alleged loses. Claimants cannot use as a basis of their loss a legitimate and rational order issued by the courts of Guatemala. The Constitutional Court based its order on Guatemala's legal framework, which was known by Claimants since day one, i.e., that there was an obligation to consult with the communities affected by the project. Besides, this obligation was acknowledged by Mr. Kappes,[2275] and yet, far from building trust and confidence in the communities, Claimants did completely the opposite.[2276] Thus, a legitimate order *provisionally* suspending Exmingua's exploitation license does not give rise to, or is the reason of, Claimants' alleged losses.

[2269] Decision on Preliminary Objections, ¶118.
[2270] United States's Non-Disputed Party Submission, ¶ 60.
[2271] *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶12 (September 18, 2001) (**RL-0073**) (a tribunal's task is limited to assessing whether there has been a breach and whether the investor or investment suffered loss or damages proximately caused by such a breach) cited by United States's Non-Disputed Party Submission, ¶ 61.
[2272] Claimants' Reply ¶ 635. For a complete análisis of the nature of Claimants' "moving target", *see* section V.E.1, *supra*
[2273] In the alternative, as discussed in VII.C.2 below, Guatemala maintains that Claimants are principally or, in the further alternative, contributively liable for their losses, which in either scenario significantly reduces any potential liability and damages due by Guatemala.
[2274] Claimants' Reply ¶ 630.
[2275] Kappes Statement I, ¶ 50.
[2276] *See* § VI.A for a full explanation about Exmingua's lack of social license.

- Despite Claimants' criticisms of the cases cited by Guatemala, *Biwater v. Tanzania* is in fact instructive here. The concept applied in *Biwater v. Tanzania*,[2277] and confirmed in *Lemire v. Ukraine* (which Claimants rely on) is that if a claimant puts itself in a position where its investment decreases in value before –or even at the time of– the alleged breach, the causation is interrupted, and a claimant cannot fault the state for its loss. This is precisely the case of Exmingua. A company with a project which lacked social license,[2278] with unreliable mineral data,[2279] and with no evidence of funding for the project,[2280] that cannot blame Guatemala for the failure of a venture that was destined to collapse. Just because Exmingua was running a reduced operation at the time of the Court's suspension, it does not mean Exmingua was a successful mining project as Claimants portrait it.[2281]

- The MEM's indefinite suspension of Exmingua's Progreso VII license is not the cause of Claimants' alleged losses. After proving that the Courts' decisions are legitimate and based on Guatemala's international obligations, MEM's provisional suspension of Exmingua's Progreso VII license naturally cannot be the cause of Claimants' alleged losses.

- The alleged failure to conduct the court-ordered consultations by MEM is not the cause of Claimant's alleged losses. As explained in detail in section II.D, the consultations can only start when the decision of the Constitutional Court has been duly notified and executed to MEM. This is the usual course that amparo proceedings take place, as it happened in CGN and San Rafael cases. Therefore, it is unfounded for Claimants to argue that it is Guatemala's responsibility, when the consultations will take place as soon as the proceeding is over, according to the law as confirmed by Viceminister Pérez's declaration.[2282]

- The alleged State's *de facto* moratorium on issuing exploitation licenses and Respondent's alleged failure to provide security to enable Exmingua to carry out the social studies for its Santa Margarita license application are not the cause for Exmingua's alleged losses. Claimants did not prove that the so-called *de facto* moratorium was a cause of their loss. As explained in section II.C. above, Claimants never applied for the exploitation license because they had not completed the social studies despite claiming to having completed the environmental section of the EIA in 2010.[2283]

- If we break down the causation chain, it would in fact appear as follows: 1) Exmingua applied for an exploitation license on January 19, 2009;[2284] 2) According to Mr. Kappes, both EIA studies for Progreso VII and Santa Margarita were being carried out *in parallel*, and GSM had finalized the environmental sections of both EIAs "at about the same time, in early 2011";[2285] 3) despite the fact that it is crucial for their case, Claimants provide no reason why the social studies for Santa Margarita could not be carried out at that time; 4) Respondent has proven that Claimants could

[2277] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008), ¶ 792 (**CL-0085**) as cited in Claimants' Reply, ¶ 631 (**CL-0085**) ("the tribunal held that, as of the date of expropriation, the claimant's "investment was of no economic value," and so found that "the actual, proximate or direct causes of the loss and damage" was not Tanzania's treaty breaches.)
[2278] CIG Report, ¶117.
[2279] SLR II Report, ¶20.
[2280] Rosen/Milburn Report, ¶53 h.
[2281] *Id.*
[2282] Vice Minister Pérez Statement, ¶15.
[2283] Kappes Statement I, ¶ 141.
[2284] Application for Exploitation License for Santa Margarita Derivada, dated January 19, 2009 (**C-0070**).
[2285] Kappes Statement I, ¶ 49.

have accessed the surroundings of Santa Margarita,[2286] so even when the blockades were happening, Claimants could have accessed the site and conducted their social studies. Thus, Claimants' losses are not *by reason of* or *arise out of,* the State's alleged moratorium.

- The alleged refusal by MEM to provide assistance or guidance to Exmingua for conducting the consultations for the Santa Margarita EIA is also a red herring. Claimants argue that MEM's 30-day deadline to file Santa Margarita's EIA was both unlawful and unreasonable.[2287] As explained in the paragraph above, Claimants are the only party responsible for the failure to present Santa Margarita's EIA.

974. Despite their inability to articulate those arguments intelligibly, Claimants argue that their damages claim is consistent with the Decision on Preliminary Objections. In particular, Claimants have argued the following: (1) In the preliminary phase, Claimants acknowledged that the proof of their losses would require additional showings of causation as well as potentially more complex quantification, including accounting for any claims by Exmingua's creditors;[2288] (2) In their Reply, Claimants however attempt to argue that "[b]ecause Exmingua has no debt, there are no "complex calculations" required in this case, and Claimants' losses likewise consist of Exmingua's value but-for the measures;"[2289] 3) that "in case of an expropriation, it is the shareholders who suffer losses equivalent to the value of their expropriated investment, the expropriated investment, as such, does not suffer any distinct harm;"[2290] and 4) that the hurdles observed by the Tribunal in the Decision on Preliminary Objections are "simply not present" in this case as Claimants own a 100% equity interest in the El Tambor Project.[2291]

975. As evidenced in their Reply, Claimants' damages argument has been a moving target since the beginning.[2292] Yet, none of these arguments in the Reply provide a response to the objections articulated in Guatemala's Counter Memorial, and the damages claimed simply do not correspond to any losses that Claimants have proven they have experienced as shareholders in Exmingua.

976. The Rosen Report had already explained that, since Exmingua claims to have held no third-party debt, and the Claimants collectively owned a 100% ownership interest in Exmingua, the proper measure of the damages is the enterprise value ("EV") of Exmingua. The report made also clear that withholding taxes and

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[2286] *See* Area map where two differente access points to Santa Margarita and the adjacent communities are identified. In Situ Report of the Inspection of Progreso VII Derivada and Santa Margarita Derivada Projects dated September 21, 2021, pp. 6-8 (**R-0277**).
[2287] Claimants' Reply ¶ 289.
[2288] Decision on Preliminary Objections, ¶118 (citing Claimants' memorial at the Preliminary Objection phase, ¶ 118).
[2289] Claimants' Reply ¶ 639.
[2290] *Id.* at ¶ 633.
[2291] *Id.* at ¶ 638. Since they filed their claim, Claimants knew that they fully owned Exmingua but chose not to raise it before the Tribunal and instead, indicated that they were conscious that more complex calculations were needed it order to prove their damages. Now, without any change of the facts, they argue the opposite.
[2292] See ¶¶ V.E.1 *supra*, where it is evidenced that Claimants have changed their position with respect to the proper identification of their investment and nature of the claim sought since the very beginning.

the timing of the Claimants' realizing a return of and on their investment in the EV of Exmingua must also be reflected to accurately determine the damages.[2293] None of these issues were proven or clarified in Claimants' Reply.

977. The Rosen/Milburn Report confirms that, to prove their damages, Claimants must reflect the after-tax amount that Claimants would have received from dividend payments from Exmingua, which they then could have spent or invested as desired.[2294] The amounts received will differ from the after-tax cash flow generated by Exmingua due to withholding taxes levied by the Government of Guatemala on dividends paid, and any taxes payable in the US by the Claimants on dividends from a Guatemalan entity, if any. Additionally, the timing of the payment of the dividends is also important due to the time value of money and foreign exchange rates.[2295] Again, these issues remain a major flaw in Versant's analysis, and therefore, Claimants have failed to adequately comply with the evidential requirements set forth in the Decision on Preliminary Objections.[2296]

2. Claimants have contributed to their own loss

978. Even if the Tribunal finds that there is a direct and clear nexus between the alleged breaches and Claimants' losses, the compensation should be substantially reduced as Claimants have indisputably contributed to their own harm.

979. Claimants argue that, in order the Tribunal to find contributory negligence, Guatemala must discharge a bifold standard by establishing (1) that Claimants committed a willful or negligent act, and (2) that such fault interrupted the chain of causation. As explained below, Guatemala has far exceeded any threshold required to meet this standard.

980. *First*, Claimants have failed to secure a social license for both Progreso Derivada VII and Santa Margarita. This constitutes a clear willful or negligent act solely attributable to Claimants. As confirmed by the CIG Report, Claimants lacked social license.[2297]

981. The commentary to Article 39 of the Articles on State Responsibility -relied on by Claimants-set out the applicable standard of negligence where it is clear that the victim of the breach has failed to exercise due diligence in relation to its property or rights.[2298] Claimants fail to mention that under Article 39, the standard

[2293] Rosen Report, ¶ 120.
[2294] Rosen/Milburn Report, ¶177.
[2295] Rosen/Milburn Report, ¶178.
[2296] *See* Decision on Preliminary Objections, ¶ 159.
[2297] CIG Report, ¶117.
[2298] *See* Articles on State Responsibility, Art. 38, Commentary 5 (**RL-0291**). *See also* Guatemala's Counter Memorial, ¶ 860.

of negligence "is not qualified, for example, by requiring that the negligence has been 'gross', [and] the entitlement of any negligence to reparation will depend on the extent to which it has contributed to the harm as well as on the other circumstances of the case."[2299] Instead, Claimants argue that "[i]n terms of the degree of fault 'a mere contribution to causation is … no sufficient' the contribution must be material and significant."[2300] However, the record shows that Claimants' failure to exercise due diligence is in fact *material* and *significant* and thus, constitutes a willful or negligent action which sufficiently contributed to the damage for purposes Article 39 of the ILC Articles.

982. The principle of contributory negligence has also been widely recognized in the international community and further developed by different tribunals. Under the principle of contributory fault, the aggrieved party's role in the creation of its own injury, whether deliberate or negligent, will be taken into consideration when calculating compensation.[2301] Contrary to what Claimants argue,[2302] there is a persuasive body of case law that has dealt with situations such as this, where the investor has engaged in reckless conduct or exercised poor business judgement.

983. In *MTD v. Chile*, the tribunal found that the claimants had contributed to their losses by "failing to protect themselves from business risks inherent in their investment in Chile."[2303] Claimants attempt to distinguish *MTD* by arguing that they are "highly professionally qualified with expertise in the mining sector"[2304] as opposed to the investors in MTD. Had Claimants engaged with the communities with the purported professionalism and expertise they claim to possess, they would have obtained social license and consent from the community to guarantee a successful project, which never happened.

984. Claimants' allegation that they "conducted appropriate and proper due diligence before investing in Exmingua" does not hold water.[2305] The record shows that Claimants lacked sufficient experience to supervise the environmental and social aspects of the project;[2306] that the social studies for the Progreso VII were carried by persons who did not have the necessary experience to identify and mitigate the social risks;[2307] that despite the historical context, Claimants decided to hire ex-military members for social

[2299] Articles on State Responsibility, Art. 38, Commentary 5 (**RL-0291**).
[2300] Claimants' Reply ¶ 645.
[2301] Borzu Sabahi, Noah Rubins, Don Wallace, 'XXI. Compensation, Damages, and Restitution', in Borzu Sabahi, noah Rubins, et al., Investor-State Arbitration 703, 724 (Oxford University Press, 2nd Edition, 2019) (**CL-0299**).
[2302] Claimants' Reply ¶ 645.
[2303] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Award (25 May 2004) ¶¶ 242-243 (**CL-0208**).
[2304] Claimants' Reply ¶ 647.
[2305] Claimants' Reply ¶ 646.
[2306] *See* § II.A.2.a.
[2307] *See* § II.A.2.b.

outreach which only created mistrust and tension among the communities;[2308] that Claimants were not transparent with the communities from the very beginning;[2309] that Claimants provided minimal benefits to the communities and preferred to aggressively mount a pro-mining campaign instead of a long-term sustainable social development;[2310] that Claimants' tactics created division in the community rather than to find consensus for a path forward;[2311] and that Claimants showed disregard for the law that only exacerbated the conflict.[2312]

985. In *Bear Creek*, Prof. Philippe Sands drafted a well-regarded and powerful dissenting opinion where he maintained that the claimant had failed to obtain a social license that required consent from the community to support the project, which resulted in contributory responsibility by reason of claimants' acts and omissions.[2313] He concluded that the acts and omissions were significant and material and warranted a reduction of the damages awarded at least by 50%.[2314] He based his views on witness testimonies of the communities to prove the lack of social license[2315] and specifically maintained that "[t]he Claimant's contribution to the events that led to Supreme Decree 032 being adopted has implications for the amount of damages to be awarded,"[2316] and that "by the time Supreme Decree 032 was adopted the prospects for the Santa Ana Project were already dismal."[2317] This is precisely the case of the El Tambor Project. A project that even in absence of the legitimate provisional suspension ordered by the courts of Guatemala, would have failed for all the uncertainties surrounding, especially, the lack of social license.

986. *Occidental v. Ecuador*,[2318] *Copper Mesa v. Ecuador*,[2319] *Yukos v. Russia*,[2320] *Iuirii Bogdanov et al. v. Moldova*[2321] are also instructive and support the position that the conduct of the investor can lead a tribunal

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[2308] *See* § II.A.2.c.
[2309] *See* § II.A.2.d.
[2310] *See* § II.A.2.e.
[2311] *See* § II.A.2.f.
[2312] *See* § II.A.2.a.
[2313] *See Bear Creek Mining Corporation v. Republic of Peru* (ICSID Case No. ARB/14/21), Partial Dissenting Opinion of Prof. Philippe Sands QC (30 November 2017) ¶3 (**RL-0214**).
[2314] *Id.* ¶ 40.
[2315] *Id.*
[2316] *Id.* ¶ 39.
[2317] *Id.*
[2318] *Occidental Petroleum Corp. & Occidental Exploration and Production Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (October 5, 2012) **(RL-0256)** (The tribunal held that claimant's failure to obtain certain approvals had provoked the government's response, and so reduced the damages by 25%. Prof. Stern disagreed and argued that it should have been reduced by 50%).
[2319] *Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case No. 2012-2, Award, (March 15, 2016) **(CL-0138)** (The Tribunal held that Claimant had contributed to its own injury at 30% with respect to the concessions at stake).
[2320] *Yukos Universal Ltd (Isle of Man) v. Russia*, UNCITRAL, PCA Case No. AA 227, Final Award, July 18, 2014, **(CL-0180)** (The tribunal considered that claimants' tax evasions strategies had contributed to claimants' failure).
[2321] *Bogdanov et al. v. Moldova*, SCC, Arbitral Award, (March 20, 2010) ¶ 5.2 **(RL-0417)** (The tribunal found that Respondent was not liable for payment of damages of the entire loss and held Claimants partially responsible).

to find that the investor contributed to their loss in full, or at least, in a proportion of the damages sought.

987. *Second*, as evidenced in section VII.C.2. *supra*, Claimants' acts were the only cause of the Project's demise.

988. In sum, Claimants' failure to secure social license for the El Tambor Project constitutes an act that has been proven to have interrupted the causation in establishing the link to Claimants' damages. Accordingly, should the Tribunal find a more appropriate reduction under the circumstances of the case, Guatemala reiterates its request that the Claimants' damages be reduced by no less than 50%, considering that the investor's responsibilities are no less than those of the government.

3. The damages sought are clearly uncertain and based on unforeseeable assumptions

989. Claimants face a third limitation to prove and establish their damages case as their model is based on clearly uncertain and unforeseeable assumptions. Different academics agree that "[o]ne of the best settled rules of the law of international responsibility . . . is that no reparation for speculative or uncertain damage can be awarded".[2322]

990. Also, different tribunals have applied this principle and rejected compensation claims for being too remote or speculative.[2323] As explained in the Counter-Memorial[2324] and further in section VII.E below, the Rosen/Milburn report confirms that Claimants' experts, Versant and SRK, continue to advance damages conclusions that are speculative and unreliable.[2325]

991. For all the reasons stated above, the Tribunal should deny Claimants' request for compensation as they have failed to establish a direct causal link between their alleged damages and Guatemala's conduct; and in any event, the chain of causation has been interrupted as a result of Claimants' conduct, resulting in contributory negligence; and have failed to contest that their damages sought are clearly speculative and based on unforeseeable assumptions

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[2322] Borzu Sabahi, Noah Rubins, Don Wallace, '*XXI. Compensation, Damages, and Restitution'*, in BORZU SABAHI, NOAH RUBINS , ET AL., INVESTOR-STATE ARBITRATION 703, 725 (Oxford University Press, 2nd Edition, 2019) (**CL-0299**); *See also CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Separate Opinion of Ian Brownlie (March 14, 2003), ¶ 66 (**RL-0418**) ("the principle denying recovery for speculative benefits has long been recognized in the practice of international tribunals").

[2323] *Amoco Int'l Fin. Corp. v. Iran*, Partial Award No. 310-56-3, 15 Iran-US CTR 189, ¶ 238 (**RL-0419**) ("One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (July 25, 2007), ¶ 89 (**CL-0237**) (Prospective gains which are highly conjectural, "too remote or speculative" are disallowed by arbitral tribunals).

[2324] Guatemala's Counter-Memorial, §§ VIII.D and VIII.C.

[2325] Rosen/Milburn Report, ¶54.

D. Claimants Insist on Applying an Incorrect Method

992. Claimants argue that, but-for the measures, Exmingua would have allegedly continued operating the mine, expanded mining to other deposits, continued exploration to determine how and when to mine the various deposits, and would have had the opportunity to define and develop further mineral resources.[2326] Claimants rely on Versant's Report I and II to value El Tambor's Operating Mine, Known Exploration Potential, and its Lost Exploration Opportunity, which as of March 31, 2021, they calculate at USD 419-449 million.[2327] Guatemala submits that, as confirmed in the Rosen/Milburn Report, Versant's damages model does not offer a reliable assessment of quantification of Claimants' damages in this case as explained in this section.

993. In his first report, Mr. Rosen concluded that Versant's damages analysis is not realistic or credible due to the following reasons: (1) Versant's overall conclusion of the fair market value of the El Tambor Project including its three counts (i.e., Operating Mine, the "Known Exploration Potential" and the "Lost Exploration Opportunity") is not supported by the objective evidence; (2) Versant adopts a number of speculative, non-industry compliant estimates and assumptions from SRK and improperly assumes they are reliable; (3) Versant and SRK attempted to create a hypothetical new mine that is very different from the El Tambor Project; (4) 82% to 84% of Versant's damages calculation relates to value that did not exist at the time of the alleged breaches; and (5) Versant does not considered a number of significant risks that existed at their valuation date including the impact of COVID-19 and the historical social license issues.[2328]

994. The Rosen/Milburn Report confirmed the conclusions in the paragraph above, thus, Guatemala continues to have serious concerns about Versant's valuation framework[2329] and Versant's II Report did little to prove otherwise.

995. *First*, Versant continues to use an '*ex-post*' framework to calculate Claimants' damages. The Rosen/Milburn report disagrees that the way that Versant has applied this framework provides a reliable measure of damages.[2330] Versant is not only not able to observe the conditions that would have existed absent the alleged violations to a current date, but has abused this framework to attempt "to transform the small, risky and unprofitable mining project […] into a large project that would have generated risk-free pre-tax cash flows to a current date and would have discovered an additional 5.0 million to 7.0 million

[2326] Claimants' Memorial, ¶ 367; Claimants' Reply, ¶ 650,
[2327] Claimants' Reply, ¶ 694.
[2328] Rosen Report, ¶ 77.
[2329] Rosen/Milburn Report, ¶ 40, 41.
[2330] *Id.* at ¶ 42-50.

ounces of gold by March of 2021."[2331]

996. As explained in section VII.B. *supra*, the use of a valuation date different that the one of the breaches, and the resulting *ex-post* framework, is contrary to what is expressly set forth in Article 10.3.7 of CAFTA-DR. The Rosen/Milburn Report only confirms what Brigitte Stern criticizes in the use of *ex-post* valuations. An investor should only be entitled to receive "what was foreseeable at the date of the expropriation, which is indeed in line with the respect of the investor's legitimate expectations". [2332] In the words of experts Rosen and Milburn "[…] 'most of the Tambor Project' value as calculated by Versant did not exist on the date of the Alleged Breaches and rather was created by Versant and SRK in the period from May 2016 to the present through their use of valuation methodologies that are not recognized in the industry."[2333]

997. *Second*, Versant's damages framework is flawed as it has failed to properly model the cash flows that it assumes would have been available to the Claimants from the El Tambor Project absent the Alleged Breaches according to its own hypothetical 'but-for' case.[2334]

998. *Third*, a DCF model is not appropriate for the Operating Mine since there is insufficient technical and financial information available to reliably forecast its cashflows.[2335] Claimants argue, purportedly relying on CIMVAL and SAMVAL guidelines, that the income Approach is "widely used" in cases where the property is a production property with an operational mine.[2336] Yet, this method continues to be inappropriate and actually contrary to CIMVAL, given the lack of reserves and sufficient information to prepare a reliable cash flow forecast.[2337]

999. According to the Rosen/Milburn Report, Versant and SRK have not made any adjustments for the low level of confidence of Claimants' outdated inferred and indicated resource estimate and essentially claim they were reserves, without having performed the necessary drilling, testing or technical studies to apply modifying factors including economic, legal, social, and environmental issues.[2338] Versant replies by affirming that "[r]egarding potential resource risks […] the Operating Mine was a self-funded project for which there was no need to define Proven Reserves prior to commencing production".[2339] However, the

[2331] Rosen Report II, ¶ 87.
[2332] *See Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Partially Dissenting Opinion (September 7, 2015)*,* ¶60 (**RL-0126**).
[2333] Rosen/Milburn Report, ¶ 98.
[2334] *Id.* at ¶ 44.
[2335] *Id.* at ¶ 51.a.
[2336] *Id.* at ¶ 51.c.
[2337] *Id.*
[2338] Rosen/Milburn Report, ¶ 237.
[2339] Versant II Report, ¶ 219.

fact that the project was self-funded has no bearing on the fact that the project had no reserves, and thus, Versant's cash flow projections are based entirely on inferred resources from a 13-year-old technical report.[2340]

1000. Versant continues to use only one approach to value the operating project and does not present any support by any secondary benchmarks of value, contrary to international valuation standards.[2341]

1001. Finally, Versant's model did not include the heightened specific risk that the El Tambor Project faced in the past and that would continue to face in the future, specifically the lack of social license.[2342] Claimants argue that such a risk/premium is overly subjective and thus inappropriate,[2343] and that this was supported by Mr. Rosen in the *Pac Rim* case. The Rosen/Milburn Report disagrees with Claimants' position. In this case, it is necessary to include project specific risk either directly in the cash flows or by adding a premium in Versant's WACC estimate. In the absence of adjustments to cash flow projections, the application of a project specific premium is the only alternative. Contrary to what Claimants argue, what is inappropriate is ignoring evident risks such as the lack of social license or the Covid-19 effects.[2344] In the *Pac Rim* case, the risks associated with the El Tambor Project were different, thus, the comparison is futile.[2345]

1002. *Fourth,* Versant's implicitly assumes in its DCF calculation that the El Tambor Project would be financed with debt (at 17.37% of the total project value), which is not consistent with its statement that the Claimants were self-financing the El Tambor Project and its stated damages theory of full reparation to the Claimants specifically (as compared to FMV). Its assumption that the debt rate be approximately equal to the equity rate applicable to the El Tambor Project is not realistic since equity is riskier than debt by definition.[2346] In any event, the El Tambor Project had not performed a bankable Feasibility Study and likely would not have been able to obtain third-part financing, even if it wanted to, prior to doing so.[2347]

1003. *Fifth,* as of the Valuation Date, Versant calculates that the Claimants had invested a total of USD 18.9 million over the 8-year period it was involved in the El Tambor Project for which it received no return. To assume it would have invested at least another USD 18.6 million to USD 55.2 million for exploration from May of 2016 to March 2021 without any apparent source for this new investment is a major flaw in

[2340] Rosen/Milburn Report, ¶ 243.
[2341] *Id.* at ¶ 239.
[2342] Rosen/Milburn Report, ¶ 247.
[2343] Claimants' Reply, ¶ 659.
[2344] Rosen/Milburn Report, ¶257-267.
[2345] *Id.* at ¶¶151-152.
[2346] Rosen/Milburn Report, ¶ 51.g.
[2347] *Id.* at ¶ 122.

Versant's damages.[2348] The exercise turns even more speculative when the financial information that Mr. Kappes disclosed during the document production does not support Versant's assumed additional equity investment of from USD 18.6 million to USD 55.2 million from 2016 to 2021.[2349]

1004. *Sixth,* the El Tambor Project had not established a history of profitable operations over the 8 years that the Claimants had been involved (and was unable to pay the royalties it owed to Radius from its gold production), and Versant has not established that it would have been profitable from May 2016 to the present, or into the future, absent the alleged breaches.[2350]

1005. *Seventh*, Versant's but-for case is not well considered, is poorly supported and not credible. The conclusions reached by Versant and SRK cannot be reconciled with the available objective evidence as to the fair market value of the El Tambor Project and its exploration potential from 2003 to 2012.[2351] Specifically, the Rosen/Milburn concludes that, for Versant and SRK to opine that it would have successfully defined an additional 5.0 million to 6.9 million ounces of resources from May 2016 to March 2021 is unreasonable and speculative, when only 257,000 ounces of indicated and inferred resources had been defined over the entire history of the El Tambor Project. [2352] In fact, SLR confirmed that "there are currently no mineral resource estimates on the El Tambor Project that are recognized by industry standards."[2353] As explained in detail in section VI.C., Claimants' LoM Plan is not reliable, thus, any reliance by Versant on such plan makes Versant's damages model flawed.

1006. *Eight*, Versant's impounded concentrate calculation is unsupported. The Versant II Report purports to provide additional documentation to support this claim. However, Versant inappropriately continues to utilize a current gold price to value the allegedly impounded concentrate and continues to ignore applicable taxes and royalty payments which would apply on the sale of gold concentrate.[2354]

1007. Notably, Versant admits that the gold concentrate was returned to Claimants and that any value realized on the sale of this concentrate should be deducted from their damage's assessment.[2355] However, Versant elects not to deduct any amounts due to "uncertainty" regarding the net realizable amounts. Versant criticizes much the Rosen/Milburn report as holding Claimants to a "standard of certainty",[2356] but Versant

[2348] *Id.* at ¶ 50.
[2349] *Id.* at, ¶ 49.
[2350] *Id.* at ¶ 51.b
[2351] *Id.* at ¶ 51 f.
[2352] *Id.* at ¶ 53.c.
[2353] SLR I Report, ¶ 43.
[2354] Rosen/Milburn Report, ¶ 187.
[2355] Versant Report II, ¶ 253.
[2356] *Id.*

chooses to apply that standard when it favors Claimant's approach.[2357]

1008. Regarding Versant's use of a current gold price, in a but-for scenario where the gold concentrate was not impounded, it does not make logical sense that the Claimants would have held this gold concentrate until a current date and sold it at currently prevailing market prices when cash flow from the sale of concentrate would have been used to fund further development of the Project. Gold concentrate inventory would have been sold in the normal course of business at or around May of 2016 at then prevailing gold prices.[2358]

1009. With respect to Versant's failure to deduct applicable taxes in its valuation of impounded gold concentrate, there is no scenario where the Claimants would have received pre-tax cash flows and Versant continues to overstate the Claimants' losses by not applying any taxes to its calculation.[2359] Claimants insist on arguing that their damages must be calculated on pre/tax basis, or they would be subject to double taxation.[2360] However, as confirmed by the Rosen/Milburn Report, any taxes applicable to a potential arbitral award, should be considered separately.[2361]

1010. Lastly, Versant argues that they have not deducted any royalty payments in its calculation of impounded concentrate stating, "*we understand that Claimants will owe royalties…on the proceeds of the award related to this concentrate.*"[2362] This is inconsistent with Versant's approach in calculating damages using a DCF for the Operating Mine, where royalties are deducted. If the Claimants were expected to owe royalties on an award related to gold concentrate, it is not clear why they wouldn't also owe royalties on an award related to the Operating Mine.[2363] Thus, Claimants' damages on the impounded concentrated is unsupported and shall not be awarded, or at least, readjusted.

1011. *Ninth*, Versant continues to overstate Claimants' losses by not applying any taxes to its calculations of past losses. The Rosen/Milburn Report confirmed that past losses must be presented on an after-tax basis as that is how Claimants would have received them.[2364] Versant argues that deducting taxes would result in double taxation and the award would be taxable at a rate of 27%, the rate of income tax in the US.[2365] Versant has not provided any support of any tax opinion or explained whether it would be taxed as a capital,

[2357] Rosen/Milburn Report, ¶ 270.
[2358] *Id.* at ¶ 272.
[2359] *Id.* at ¶ 273.
[2360] Claimants' Reply ¶ 678.
[2361] Rosen/Milburn Report, ¶159.
[2362] Versant II Report, ¶ 251.
[2363] Rosen/Milburn Report, ¶ 274.
[2364] *Id.* at ¶ 158.
[2365] Versant II Report, ¶ 182-183.

income, or a combination of both.[2366] This only confirms Mr. Rosen and Mr. Milburn's position that any taxes on the award should be considered separately as that sum should be taxed based on the US tax regime, and the cash flows generated by Exmingua in the past loss period, would have been taxed at rates base on the applicable regime in Guatemala. Thus, Claimants' argument is again unsupported.

1012. *Tenth,* Versant continues to inappropriately consider the impact of withholding taxes in its calculation of Claimants' damages. Versant maintains that "Claimants would not have paid withholding taxes on free cash flow from the El Tambor Project during the historical period since these funds would be further investments in the Tambor Project".[2367]

1013. Versant's approach to this issue is inconsistent. On one hand, cash flows in the past loss period are assumed to provide a risk-free, pre-tax benefit to the Claimants that then accrue pre-award interest (including on amounts they would have had to pay in taxes to Guatemala). On the other hand, Versant claims these same cash flows would have been utilized to fund project development, which is necessary to support Versant's valuation of the Claimants' "Known Exploration Potential" and "Lost Exploration Opportunity."[2368]

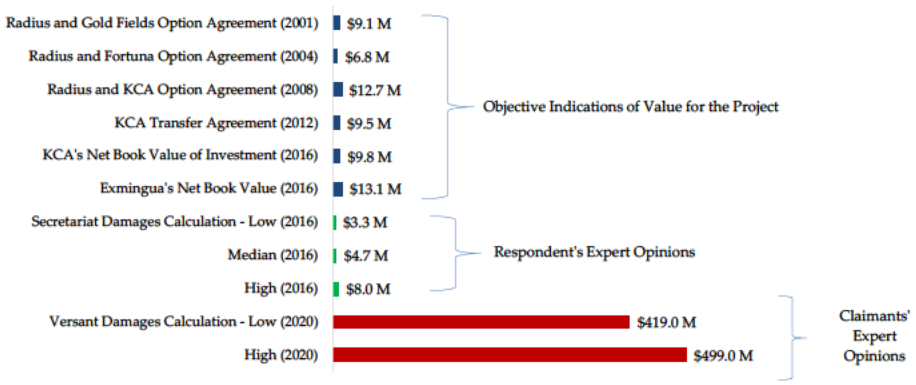
1014. Finally, the Rosen Report -as confirmed by the Rosen/Milburn- provided illustrative DCF calculations based on the RPA Restated Versant Model, which demonstrated that the Operating Mine was uneconomic as it provided a negative value.[2369] Versant contends that "[…] is unreasonable on its face that Claimants, who are experienced mining professionals, would have advanced a mining project, would have imported and constructed a processing facility […] if it had no economic value".[2370] It is simply inappropriate to assume that every project that "experienced mining professionals' are involved in must have economic value by virtue of their involvement or that experienced mining professionals do not get involved in projects that fail.[2371]

1015. For all the reasons stated above, Guatemala concludes that Claimants' valuation of the El Tambor's Operating Mine, Known Exploration Potential, its Lost Exploration Opportunity, and the impounded concentrate suffers from a series of flaws to which Versant's Reports have deficiently replied or in some instances, ignored. Consequently, the Tribunal should find that the appropriate valuation, based on reliable and foreseeable information as of the Valuation Date, is the one presented in the Rosen/Milburn Report, as

[2366] Rosen/Milburn Report, ¶ 161.
[2367] Versant II Report, ¶ 73.
[2368] Rosen/Milburn Report, ¶ 45.
[2369] *Id.* at ¶ 230.
[2370] Versant II Report, ¶ 26.
[2371] Rosen/Milburn Report, ¶ 232.

described in the following section.

1016. The figure presented below shows the overwhelming difference between the objective indications of the value of the project observed in the Rosen/Milburn Report and Claimants' calculations:[2372]



E. Correct Valuation

1017. Guatemala submits that the fair market value of Claimants' investment as of the Valuation Date ranges from USD 3.1 million to USD 7.5 million.[2373] The Rosen/Milburn Report confirms that a comparable transactions methodology provides objective evidence of the fair market value of the El Tambor Project.[2374] Market/based valuation techniques are recognized as valid methodologies for mineral projects at all stages of development under the CIMVAL Code and other internationally recognized mineral valuation codes such as VALMIN, SAMVAL, and the IMVAL.[2375]

1018. Mr. Rosen and Mr. Milburn's analysis consisted of the following:

- Applying 7 screening criteria to the S&P Global transaction mining database to obtain 4 suitably comparable transactions. The screening criteria included transactions for gold projects in Latin America with less than 1 million ounces of Resources (but no Reserves).[2376]
- A subsequent calculation of the enterprise value per ounce of gold equivalent resources (EV/AuEq Resources) in a range of USD 12.4 per ounce to USD 29.5 per ounce for each of these transactions and applied them to the 253,000 contained ounces for the El Tambor Project to obtain a valuation range for the El Tambor Project as of the Valuation Date from USD 3.1 million to USD 7.5 million.[2377]

1019. In the Counter-Memorial, Guatemala explained the comparable transactions model using a free-market approach and how the Rosen Report concluded that Claimants' investment as of the Valuation Date ranges

[2372] *Id.* at Figure 2-2.
[2373] Rosen/Milburn Report, ¶56.
[2374] Rosen Report, ¶ 152; Rosen/Milburn Report, ¶ 134.
[2375] Rosen Report, ¶ 153.
[2376] Rosen/Milburn Report, ¶ 204; Rosen Report, ¶¶ 157-164.
[2377] Rosen/Milburn Report, ¶ 205.

from USD 3.1 million to USD 7.5 million.[2378] In their Reply, Claimants argue that the Rosen Report's model is wrong and that suffers from fundamental flows.[2379] As summarized below, Claimants' criticisms are unfounded.

1020. *First,* the Rosen Report provides detailed information about the screening methodology. Versant complains that the report does not include a list of excluded transactions.[2380] However, the Rosen/Milburn Report confirms that the criteria applied is clearly set out in the report and that Versant was free to conduct its own market comparable analysis to identify transactions it deemed comparable to the entire El Tambor Project, but failed to do so.[2381]

1021. *Second,* the compared transactions used by the Rosen Report are in fact comparable. Claimants argue that "the 'comparables' are not at all comparable as they are (1) at a pre-operational stage, and (ii) involve projects with significantly lower gold grade, as compared to Tambor".[2382] As evidenced in the Rosen/Milburn Report, this statement is inaccurate. While it is true that the El Tambor Project had commenced operation prior to the alleged breaches, the Project only had indicated and inferred resources from an outdated technical study from 2003 that was not compliant with current mineral resource estimation and reporting standards. Any comparison with mineral projects that had reached operating mine stage properly by increasing the certainty of the minerals would have been inappropriate.[2383]

1022. With respect to the alleged lower gold grades of the comparables, the Rosen/Milburn Report states that while the grade is one of many factors that impact a mineral project's economics, it is not the primary factor. The project's stage of development and level certainty of the resources is more important.[2384] Further, given that the El Tambor Project only had indicated and inferred resources from an outdated technical study from 2003, the actual grade of its resources is poorly defined.[2385]

1023. Third, Versant's critics on the four comparable transactions (i.e., el Compas Project, Cajueiro Project, Santa Gertrudis Project, and Vetas Project) used by the Rosen Report are unjustified as explained in detail by the Rosen/Milburn.[2386]

1024. Finally, the Rosen/Milburn Report confirms that the following sources of information objectively

[2378] Guatemala's Counter-Memorial, ¶ 894-911.
[2379] Claimants' Reply, ¶ 657.
[2380] Versant II Report, ¶ 257.
[2381] Rosen/Milburn Report, ¶106.a.
[2382] Claimants' Reply, ¶ 657.
[2383] Rosen/Milburn Report, ¶106.c.i.
[2384] *Id.* at ¶206.d.i.
[2385] *Id.* at ¶206.d.ii.
[2386] *Id.* at ¶208-229.

evidence the value of the El Tambor Project at various points in time from 2004 to 2016, and they provide a confirmation of the reasonableness of the valuation presented by Guatemala: 1) amounts invested on exploration and project development from 2004 to the present; 2) transactions between arms-length parties involving the El Tambor Project from 2004 to the present; and 3) Exmingua's recorded book value of its assets from th2 2015 and 2016 financial statements.[2387]

1025. Although Versant objects to the Rosen/Milburn Report's use of these objective values, it is unable to meaningfully address why its valuation is disconnected and is unreconcilable with the objective evidence presented.[2388]

1026. In sum, after having dismissed all the alleged defects of the Rosen and Rosen/Milburn Report submitted by Claimants, the Tribunal should find that, the free-market-approach valuation using comparable transactions submitted by Guatemala is reliable and suitable for the El Tambor Project, and therefore, in case Guatemala is found liable for the alleged breaches, the Tribunal should only award damages of between from USD 3.1 million to USD 7.5 million.[2389]

F. The Award of Interest, if Applicable, should be Calculated at a Simple Rate no Higher than the Risk-Free Interest Rate

1. The Tribunal should award a risk-free rate

1027. As explained in the Counter-Memorial, Article 10.7.3 of the CAFTA-DR provides that "the compensation paid shall not be less than the fair market value on the date of expropriation, plus interest at a **commercially reasonable** rate for that currency," (emphasis added). CAFTA-DR sets the parameters to establish the interest rate in cases of expropriation (lawful or unlawful) and Guatemala submits that this should be a risk-free simple rate, applied both to the pre-award and post-award amount.[2390] Claimants disagree and argue instead, that interest should accrue at a rate of US Prime +2 to ensure full reparation for Claimants.[2391] Claimants' argument is unsupported for the reasons explained below.

1028. *First*, Claimants argue that Guatemala's expert misapplies the U.S. Government five-year Treasury Bond yield rates on a simple interest basis.[2392] Versant is incorrect. As explained in this section, a calculation on a basis of simple interest is appropriate in this case, which is what the Rosen/Milburn Report accurately

[2387] Rosen/Milburn Report, ¶ 315.
[2388] *Id.* at ¶357.
[2389] This number is presented without prejudice of further deductions that the Tribunal may find in concept of contributory negligence of the Claimants.
[2390] Guatemala's Counter-Memorial, ¶ 912-921.
[2391] Claimants' Reply, ¶ 695.
[2392] *Id.* at ¶ 698.

does.[2393]

1029. *Second*, Claimants argue that the risk-free rate sought by Guatemala is not a commercially reasonable rate because it is not available to participants in the commercial sector, as held in the *Bear Cree*k case.[2394] However, Guatemala has submitted different authorities that support its position,[2395] including *ADM v. Mexico*, where the Tribunal constituted under NAFTA, analyzed the same formula for the payment of interest and held that "[a] simple interest rate for US. Treasury bills"[2396] was appropriate.

1030. *Third*, according to Claimants, a risk-free rate would not properly compensate them for the opportunity cost and time value of their lost investment.[2397] As submitted in the Counter-Memorial, all the risks to which Claimants are exposed have already been taken into account in the damages compensation, where the opportunity cost would have been already contemplated.[2398] The reparation to be awarded must be merely compensatory.[2399] Anything different would result in punitive damages against the State, which are prohibited under article 10.26.3 of the CAFTA-DR.

2. The Tribunal should award simple interest

1031. Guatemala maintains that simple interest is appropriate in this case.[2400] Claimants insist on arguing that the award of compound interest is well-established[2401] and that has been recognized as a form of *jurisprudence constante* and has now become the norm. Claimants' assertions are unsupported for the reasons explained below.

1032. *First,* as described in the Counter-Memorial, article 38 of the ILC Articles expressly sets forth that "[t]he general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest".[2402] As a consequence, the ILC Articles support the premise that simple interest is the rule and compound interest is the exception.

[2393] Rosen/Milburn Report, ¶ 63.
[2394] Claimants' Reply, ¶ 698.
[2395] Guatemala's Counter-Memorial, ¶ 919.
[2396] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. c. Mexico*, ICSID Case No. ARB (AF)/04/5, Award (November 21, 2007), ¶ 300 (**CL-0195**).
[2397] Claimants' Reply, ¶ 699.
[2398] Guatemala's Counter-Memorial, ¶ 918.
[2399] *Waguih Elie George Siag & Clorinda Vecchi v. Egipto, ICSID Case No. ARB/05/15*, Award (June 1, 2009), ¶ 545 (**CL-0167**) (The tribunal also noted that "the majority opinión in the Iran-United States Claims Tribunal seems to have been that punitive damages are not available").
[2400] Guatemala's Counter-Memorial, ¶ 922-929.
[2401] Claimants' Reply, ¶ 588.
[2402] Articles on State Responsibility, Art. 38, Commentary 8 (**RL-0291**) (emphasis added).

1033. Prof. Marboe expands on this and explains that while there are courts that have awarded compound interest, their reluctance to award them for various reasons demonstrates that compound interest as a component of compensation for damages is not unanimously recognized in international practice claimants to be normally entitled to compensatory interest.[2403] Thus, Claimants' affirmation that the award of compound interest is well-established remains unsupported as it is clear that the views on this issue are not settled.

1034. *Second*, Claimants base their argument on an alleged *jurisprudence constante* of "over two decades" in awarding compound interest in international law.[2404] Claimants cannot prove a trend when there are relevant and persuasive cases that have ruled against it. More recent cases have awarded simple interest.[2405] In *Merrill v. Canada*, a NAFTA case interpreting the same formula set for the calculation of interests under CAFTA-DR, the Tribunal held that "The Tribunal agrees with the Respondent that Article 1110(4) and 1110(5) provide guidance for calculating the applicable interest rate in the present case. Compensation should include interest at a commercially reasonable rate. The Tribunal believes that only simple interest, rather than compound, should be awarded"[2406] Claimants attempt to distinguish *Autopista Concesionada v. Venezuela*, *Astaldi S.p.A. v. Republic de Honduras*,[2407] and *Elsamex v. Republic of Honduras*[2408] by arguing that those cases arose in the context of contractual, as opposed to treaty breaches, but fail to specifically explain how that difference is relevant for the award of interests.

1035. *Third*, the prohibition under Guatemala law to award compound interest is not irrelevant,[2409] even less, a "last-ditch" argument.[2410] Claimants argue that national rules on interest do not apply in investment arbitration cases. However, the tribunals in *Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador*[2411] and *Desert Line Projects LLC v. Republic of Yemen*[2412] dismissed claims regarding compound interest based on the fact that such form of calculation was prohibited under local law, which was not contested by Claimants.

1036. For the reasons set out above, if the Tribunal were to find that Claimants are entitled to payment of

[2403] Irmgard Marboe, ¶ 6.258. (**CL-0247-R**).
[2404] Claimants' Reply, ¶ 701.
[2405] *See also* CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Final Award (March 14, 2003) (**RL-0260**).
[2406] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award (November 21, 2007), ¶ 296 (**CL-0195**).
[2407] *Autopista Concesionada de Venezuela v Venezuela*, ICSID Case No.ARB/00/5, Award (Sept. 23, 2003) (**RL-0261**).
[2408] *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Award (Nov. 16, 2012) (**RL-0262**).
[2409] Guatemala's Counter-Memorial, ¶ 927.
[2410] Claimants' Reply, ¶ 705.
[2411] *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19, Award, (August 18, 2008), ¶457 (**CL-0202**).
[2412] *Desert Line v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award (February 6, 2008), ¶¶ 295-298 (**CL-0216**).

interest, it should (i) apply a risk-free interest rate and (ii) award simple interest.

VIII. COUNTERCLAIM

1037. In the Counter-Memorial, Guatemala submitted a USD 2 million counterclaim for Claimants' violations of CAFTA-DR Articles 10.9.3.c and 10.11.[2413] Claimants have now responded that the counterclaim fails as a matter of jurisdiction and fact. Both arguments are misplaced.[2414]

A. The Tribunal has Jurisdiction over Guatemala's Counterclaim

1038. According to Claimants, the references to "claimant" and "respondent" in Article 10.16—as defined in Article 10.28—limit CAFTA-DR to claims filed by investors.[2415] In light of this language, Claimants believe the Tribunal does not have jurisdiction to consider counterclaims.

1039. That position totally ignores the series of unequivocal conclusions made by the *Aven* tribunal, specifically that (i) investors "have the obligation" to abide by measures taken by the host State to protect the environment; (ii) this obligation is set out in Section A of Chapter 10; (iii) arbitration proceedings under Chapter 10 are only limited to breaches of Section A; thus (iv) foreign investors can be held liable in arbitration for breaching a Section A obligation, "particularly in the field of environmental law."[2416] The decision confirms in express terms that the tribunal "has *prima facie* jurisdiction" over counterclaims filed under CAFTA-DR.[2417]

1040. None of the cases cited by Claimants contradict these conclusions because none of those cases proceeded under CAFTA-DR. Each case proceeded under a different treaty with different language, and the tribunals acknowledged those differences. In *Oxus Gold v. Uzbekistan*, for instance, the treaty's arbitration agreement was limited to disputes "concerning an obligation of the [State Party.]"[2418] This limiting language does not exist in CAFTA-DR.

1041. The same can be said for *Iberdrola II*. The tribunal made an express distinction between the Spain-Guatemala BIT and CAFTA-DR, finding that CAFTA-DR's arbitration clause was "neutral as to the party entitled to bring proceedings," while the Spain-Guatemala BIT was not.[2419] The treaties discussed in *Karkey v. Pakistan* (Pakistan-Turkey BIT) and *Anglo American v. Venezuela* (Venezuela-UK BIT) contain similar

[2413] Guatemala's Counter-Memorial, ¶ 930.
[2414] Claimants' Reply, ¶ 588 *et seq.*
[2415] Claimants' Reply, ¶ 589.
[2416] *See David Aven v. Costa Rica*, ICSID Case No. UNCT/15/3, Final Award (September 18, 2018), ¶739 (**RL-0031**).
[2417] *David Aven v. Costa Rica*, Award ¶ 742 **(RL-0031)**.
[2418] *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Final Award (December 17, 2015) ¶ 942 **(CL-0291)**.
[2419] *Iberdrola Energía S.A. v. Republic of Guatemala II*, UNCITRAL/PCA Case 2017-41, Award (August 24, 2020) ¶¶ 386, 389 **(CL-0292)**.

limiting language not present in CAFTA-DR. Both tribunals relied on this limiting language to reject jurisdiction over the counterclaim.[2420] CAFTA-DR, however, is not affected by these limitations.[2421]

1042. Claimants argue that Guatemala failed to identify a Section A obligation breached by Claimants. That is simply not true. The Counter-Memorial identifies Articles 10.9.3.c and 10.11 as the Section A obligations breached. While the *Aven* tribunal held that Articles 10.9.3.c and 10.11 "do not—in and of themselves—impose any affirmative obligation upon investors,"[2422] the tribunal also recognized that Articles 10.9.3.c and 10.11 incorporate a State Party's environmental laws and raise them to the level of a treaty breach.[2423] So, if an investor has breached the laws of a CAFTA-DR State designed to protect the environment, then that investor has also breached Section A of CAFTA-DR.

B. Claimants Violated Guatemalan Law and thereby Violated a Chapter 10 Obligation

1043. Article 48 of Guatemala's Regulation of Evaluation, Monitoring and Environmental Control states: "Failure to comply with the environmental commitments to which the proponent of the project…was made responsible are grounds for suspension of the validity of the approval resolution and will give rise to the corresponding administrative sanctions, without prejudice to other sanctions[.]"[2424] Likewise, Article 49 of the same regulation states that the EIA's approval is conditioned on the proponent's compliance with its "environmental commitments and other requirements established by MARN."[2425] Failure to comply with these commitments will subject the proponent to sanctions. Claimants echoed these commitments in their EIA, which they committed to comply.[2426]

1044. Throughout the operations of the Project and even after these were suspended, MARN and MEM carried

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[2420] *Karkey Karadeniz v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award (August 22, 2017) ¶ 1012 (tribunal quoting Article VII of the BIT) (**CL-0217**); *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award (January 18, 2019) ¶ 526 **(CL-0293)** (tribunal quoting Article 8(3) of the BIT).

[2421] Claimants cite to a few other cases to support their argument. None of those cases however analyzed the neutral language in CAFTA. *See* Reply, ¶ 1759 (citing *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/04, Award (April 15, 2016) **(CL-0166)** and *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (December 7, 2011) **(CL-0174)**). The BITs themselves had distinguishable language, just like the BITs in *Iberdrola II*, *Karkey*, and *Anglo American*. *See Vesty Group*, ¶ 333 **(CL-0166)** (limiting the relevant BIT to disputes concerning an obligation of the state towards the investor); *Roussalis*, ¶¶ 868-69 **(CL-0174)** (same).

[2422] *David Aven v. Costa Rica*, Award, ¶ 743 (**RL-0031**).

[2423] *David Aven v. Costa Rica*, Award, ¶ 734 (**RL-0031**) ("A logical effect of Article 10.11 could be that the "measures" adopted by the host State for the protection of the environment should be deemed to be compulsory for everybody under the jurisdiction of the State, particularly the foreign investors. Therefore, following said interpretation the investors have the obligation, not only under domestic law but also under Section A of Chapter 10 of CAFTA-DR to abide and comply the environmental domestic laws and regulations including the measures adopted by the host State to protect human, animal, or plant life or health.") (emphasis added).

[2424] Regulation of Evaluation, Monitoring and Environmental Control, Article 48 (**C-0413**).

[2425] *Id.* Article 49 (**C-0413**).

[2426] SLR I Report, ¶ 88 ("The holder of the exploitation mining license must fulfill all mitigation measures in the EIA, as well as all recommendations and agreements given by MARN")

out several inspections in which a number of environmental violations were identified, as further described in section VI.B.2 *supra.* Even when the operations were suspended, MEM continually emphasized the need for Exmingua to carry out mitigation measures immediately.[2427] Nevertheless, the Project continues in violation of its environmental obligations.[2428]

1045. Claimants made a commitment to properly close the mine site after the completion or abandonment of the project. And yet Claimants have not indicated in any way that they will fulfill that commitment. Since Claimants have not requested the restitution of their mining rights, but only compensation for the alleged damages, the Project's current site will need complete restoration to avoid deterioration and sources of contamination. In fact, in 2017 MEM had already indicated that several of the Project areas were at risk of becoming an environmental mining liability.[2429]

1046. The closures of the mine is inevitable and the measures and restoration must be implemented in an imperative manner. Claimants have already established a closing cost of USD 2 million. While Guatemala believes that this amount will be insufficient, the Tribunal should at least hold Claimants liable for that amount.

1047. The consequences of doing nothing, which is what Claimants will do, have been well documented. Mine waste can impact the water, air, and soil quality; the surrounding biodiversity may be permanently reduced; and the neighboring communities may need to dramatically change their way of life even after the mining company leaves.[2430] If the company abandons the project, the cost for any sort of remediation activity falls to the government and the community. The financial burden caused by such abandonment can be catastrophic to the government.[2431] Claimants should not be allowed to walk away "scot-free." Thus, the Tribunal should order Claimants to pay at least USD 2 million (which have been recognized by Claimants as the costs of the closure of the mine) plus the *post* award interest that the Tribunal deems to maintain the value of the reparation to remediate the environmental harm until effective payment is made.

IX. COSTS

1048. Regarding the costs of the proceedings, Guatemala refers to its request presented in the Counter Memorial and requests the Tribunal order Claimants to pay all the costs of the proceedings, attorney fees, and any

[2427] MEM Inspection Report, June 6, 2016, p. 19 (**R-0279**).
[2428] MARN Inspection Report dated September 1, 2021 (**R-0285**).
[2429] MEM Field Visit Inspection dated June 14, 2017, p. 8 (**R-0311**) ("a passive mining environment refers to an area where there is a need for restoration, mitigation or compensation for environmental damage or impact not mitigated produced by mining operations that are inactive or abandoned that put at risk health, quality of life and public or private assets").
[2430] Asia-Pacific Economic Cooperation (APEC), *Mine Closure: Checklist for Governments* (2018), p. 2 **(RL-0408)**.
[2431] *Id.*

other expense that Guatemala has had to make in connection with these proceedings, including the preliminary objections phase. Guatemala reserves all rights to submit its arguments and evidence to support its request when the Tribunal considers it appropriate.

X. RELIEF

1049. For the above reasons, Guatemala respectfully requests the Tribunal:

(1) Accept Guatemala's jurisdictional objections and find the Tribunal lacks jurisdiction to hear this case;

(2) Grant Guatemala's defenses, and wholly reject Claimants' claims;

(3) Accept Guatemala's counterclaim and impose a sum of USD 2,000,000.00 against Claimants for damages; and

(4) Impose an award of fees and costs in favor of Guatemala.

Statement regarding translation:

Being fluent in both English and Spanish, I certify that I have read both language versions of the Rejoinder Memorial and that the translation is reasonably faithful to the original.

Katherine A. Sanoja