PCA Case No. 2023-20

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT, SIGNED ON 27 AUGUST 1993, AND ENTERED INTO FORCE ON 11 MAY 1997

(the "Treaty")

- and -

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (1976)

(the "UNCITRAL Rules")

- between -

LYNTON TRADING LTD. (UNITED STATES OF AMERICA)

(the "Claimant")

- and -

THE REPUBLIC OF ECUADOR

(the "Respondent", and together with the Claimants, the "Parties")

FINAL AWARD

Tribunal
Prof. Eduardo Siqueiros Twomey (Presiding Arbitrator)
Mr. Adolfo E. Jiménez
Prof. Jorge Viñuales

Registry and Secretary
Mr. Julian Bordaçahar
Permanent Court of Arbitration

26 September 2025

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LIST OF DEFINED TERMS AND ABBREVIATIONS

TERM	DEFINITION
2011 Executive Order	The Executive Order No. 873 (*Decreto Ejecutivo No. 873*), titled 'Reglamento del Régimen de Transición de los Juegos de Azar Practicados en Casinos y Salas de Juego', issued by the administration of Rafael Correa on 16 September 2011
Agreement between the Parties	Agreement between the Parties whereby they agreed that: (i) the PCA would administer the case; (ii) Paris would serve as the seat of the arbitration; (iii) the arbitration would be conducted under the 1976 UNCITRAL Rules; and (iv) the Tribunal would determine the language(s) to be used in the arbitration
Alleged 29 April 2011 Transfer	The alleged transfer of Sircontena's shares in Grupo C to Lynton on 29 April 2011
Alleged 5 July 2010 Transfer	The alleged transfer of shares in WWTS Ecuador from Sircontena to Grupo C and Orange Business on 5 July 2010
Alleged 5 June 2010 Transfer	The alleged transfer of Sircontena's shares in Grupo C to Lynton on 5 June 2010
Arbitration	The present arbitration proceedings
Claimant or Lynton	Lynton Trading Ltd.
Claimant's Statement of Costs	Claimant's attorneys' fees and cost submission for Hearing on Jurisdiction of 25 March 2025
Claimant's Answers to the Tribunal's Questions	Claimant's answers to the Tribunal's questions of 28 February 2025, submitted on 14 March 2025
Contracting Parties	The Republic of Ecuador and the United States of America
Counter-Memorial	The Claimant's counter-memorial on jurisdiction dated 8 November 2024
Ecuadorian Companies	Grupo C S.A. C-Group, WWTS Ecuador S.A., Tesupe S.A. and Rusiensa S.A.
Extension Request	The Claimant's request dated 13 November 2023, whereby it requested a 49-day extension to file its Statement of Claim
First Alleged Divestiture	The alleged divestiture of the Claimant in the Ecuadorian Companies, dated 8 December 2009
Funder	The funder of the Claimant
Funding Agreement	The funding agreement between the Claimant and the Funderc.
Grupo C	Grupo C S.A. C-Group, a company established under the laws of the Republic of Ecuador
Hearing on Bifurcation	Hearing on bifurcation held by videoconference on 22 April 2024

Hearing on Jurisdiction	Hearing on jurisdiction held in the Peace Palace from 17 to 19 February 2025
LLC	A Nevada's Limited Liability Company
LLC Continuation after Dissolution Statute	Section 86.505 of the Nevada Statutes
LLC Dissolution Statutes	Sections 86.505 and 86.521 of the Nevada Statutes
LLC Reinstatement Statute	Section 86.276 of the Nevada Statutes
LLC Revival Statute	Section 86.580 of the Nevada Statutes
LLC Revocation Statute	Section 86.274 of the Nevada Statutes
Measures	The alleged actions taken by the Respondent against the Claimant's purported investments in Ecuador's gambling industry, that are the subject matter of the Arbitration
Memorial	The Respondent's memorial on jurisdiction dated 13 September 2024
Notice of Arbitration	Notice of Arbitration dated 17 June 2022
NRAI Services	NRAI Services, Inc.
Orange Business	Orange Business LLC, a limited liability company established under the laws of the State of Florida, United States of America
Parties	The Claimant and the Respondent
PCA	Permanent Court of Arbitration
PGE	*Procuraduría General de Estado de la República del Ecuador, Dirección de Asuntos Internacionales y Arbitraje*
Pre-Hearing Conference	Pre-hearing conference held on 22 January 2025 to discuss the organization of the Hearing on Jurisdiction
Procedural Order No. 1	Procedural Order No. 1 dated 12 June 2023
Procedural Order No. 2	Procedural Order No. 2 dated 19 January 2024
Procedural Order No. 3	Procedural Order No. 3 dated 21 February 2024
Procedural Order No. 4	Procedural Order No. 4 dated 18 April 2024
Procedural Order No. 5	Procedural Order No. 5 dated 6 May 2024
Procedural Order No. 6	Procedural Order No. 6 dated 20 June 2024
Procedural Order No. 7	Procedural Order No. 7 dated 12 July 2024
Procedural Order No. 8	Procedural Order No. 8 dated 6 December 2024

Procedural Order No. 9	Procedural Order No. 9 dated 5 February 2025
Rejoinder	The Claimant's rejoinder on jurisdiction dated 6 January 2025
Reply	The Respondent's reply on jurisdiction dated 9 December 2024
Reply to the Request for Bifurcation	Claimant's reply to Respondent's request to bifurcate the proceedings dated 8 April 2024
Request for Bifurcation	Respondent's request to bifurcate the Arbitration dated 11 March 2024
Request for Disclosure	Respondent's request for the Tribunal to order the Claimant to disclose the Funding Agreement and its respective annexes
Respondent or Ecuador	The Republic of Ecuador
Respondent's Answers to the Tribunal's Questions	Respondent's answers to the Tribunal's Questions of 28 February 2025 submitted on 14 March 2025
Respondent's Statement of Costs	Respondent's Statement of Costs and Comments on Cost Allocation submitted on 25 March 2025
Response to the Notice of Arbitration	The Respondent's Response to the Notice of Arbitration dated 31 August 2022
Second Alleged Divestiture	The alleged transfer of Lynton's shares in Grupo C to Mr. Fuentealba on 11 May 2011
Sircontena	Sircontena S.A.
Statement of Claim	Claimant's statement of claim dated 18 December 2023
Statutes on Business License	Sections 76.100, 76.130 and 76.180 of the Nevada Statutes
Terms of Appointment	Terms of Appointment dated 12 June 2023
Treaty	Agreement between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, signed on 27 August 1993, and entered into force on 11 May 1997
Tribunal	The arbitral tribunal in the present proceedings
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law, approved in 1976
WWTS Ecuador	WWTS Ecuador S.A., a company established under the laws of the Republic of Ecuador
WWTS Group	WWTS Group Inc., a Florida-based corporation
WWTS LLC	WWTS LLC, a limited liability company established under the laws of the State of Florida, United States of America

I. INTRODUCTION

A. THE PARTIES TO THE ARBITRATION

1. The Claimant in these proceedings (the "**Arbitration**") is Lynton Trading Ltd. (the "**Claimant**" or "**Lynton**").

2. The Claimant is represented by:

José A. Ortiz
Anthony DiBlasi
Raquel Toral
Homer Bonner Jacobs Ortiz
1200 Four Seasons Tower
1441 Brickell Avenue
Miami, Florida 33131
United States of America

Jorge A. Mestre
Andrés Rivero
Rivero Mestre LLP
2525 Ponce de Leon, Blvd., Suite 1000
Miami, Florida 33134
United States of America

Michael A. Fernández (until 31 January 2024)
Rivero Mestre LLP
565 Fifth Avenue, 7th Floor
New York, NY 10017
United States of America

Ramón Echaiz
Echaiz y Asociados
La Piazza, Samborondon, 4-C, 5-C
Guayaquil, Ecuador

3. The respondent in these proceedings is the Republic of Ecuador (the "**Respondent**" or "**Ecuador**", and jointly with the Claimants, the "**Parties**"). The Respondent is represented by:

Juan Carlos Larrea
Ana María Larrea
Lily Díaz Granados
Marco Teran
Gary López Vélez
Nicole Vásconez (until 30 August 2024)
Julia Rovello (until 14 May 2025)
Office of the Attorney General of Ecuador
Av. Amazonas No. N39-123 y Arízaga
Quito, Ecuador

María Kostytska
Winston & Strawn (W&S SELARL)

68 rue du Faubourg Saint-Honoré
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France

Francisco Paredes
Lauden Americas Consulting
10901 Amherst Avenue
Silver Spring MD
20902 Of. 143
Washington DC, United States of America

B. BRIEF SUMMARY OF THE DISPUTE

4. The present dispute arises from the alleged actions taken by the Respondent against the Claimant's purported investments in Ecuador's gambling industry (the "**Measures**"). In particular, the Measures include: (i) the Executive Order No. 873 (*Decreto Ejecutivo No. 873*), titled '*Reglamento del Régimen de Transición de los Juegos de Azar Practicados en Casinos y Salas de Juego*', issued by the administration of Rafael Correa on 16 September 2011 (the "**2011 Executive Order**");[1] and (ii) the nationwide seizure of gambling equipment and closure of all gambling operations, allegedly carried out by the national police pursuant to the 2011 Executive Order.[2] The Claimant asserts that the Measures constitute multiple breaches of the Treaty by the Respondent.[3]

[1] Notice of Arbitration, ¶¶ 5-8.

[2] Notice of Arbitration, ¶ 56.

[3] Statement of Claim, ¶ 88.

II. PROCEDURAL HISTORY

A. COMMENCEMENT OF THE ARBITRATION

5. On 17 June 2022, the Claimant submitted its Notice of Arbitration under the United Nations Commission on International Trade Law ("**UNCITRAL**") Arbitration Rules ("**UNCITRAL Rules**"), as amended in 2010, with the new Article 1(4) adopted in 2013,[4] and Article VI of the Treaty between the Republic of Ecuador and the United States concerning the Encouragement and Reciprocal Protection of Investments, signed on 27 August 1993 and entered into force on 11 May 1997 (the "**Treaty**").[5] The Notice of Arbitration was submitted in English. In its Notice of Arbitration, the Claimant, *inter alia,* proposed that: (i) the dispute be adjudicated by a panel of three arbitrators appointed under the UNCITRAL Rules; and (ii) the Parties mutually designate the Secretary General of the PCA as Appointing Authority.[6]

6. On 31 August 2022, the Respondent submitted its Response to the Notice of Arbitration, in which it, *inter alia*: (i) objected to the arbitration being conducted under the 2010 version of the UNCITRAL Rules, asserting that the applicable UNCITRAL Rules at the time the Treaty was drafted were those of 1976;[7] (ii) accepted the Claimant's proposal that the Secretary General of the PCA act as the Appointing Authority;[8] (iii) concurred with the Claimant that the dispute should be decided by a panel of three arbitrators to be appointed in accordance with the applicable UNCITRAL Rules,[9] but proposed that the arbitrators appointed by the Parties be granted 60 days, rather than 30, to appoint the presiding arbitrator, with the possibility of extension; [10] (iv) asserted that the language of the arbitration should be Spanish, as it is the official language of Ecuador and stated that "the Claimant accepted the Spanish language when it decided to come to Ecuador" (in its Spanish original: "[l]a Demandante aceptó el idioma espanol cuando decidió venir a Ecuador");[11] (v) proposed France as seat of the Arbitration, given that the Claimant had not

[4] Notice of Arbitration, p. 1.

[5] Notice of Arbitration, ¶¶ 1-2; Treaty between the Republic of Ecuador and the United States of America concerning the Encouragement and Reciprocal Protection of Investments, 11 May 1997 (**C-1**).

[6] Notice of Arbitration, ¶¶ 74-76.

[7] Response to the Notice of Arbitration, ¶¶ 2.1-2.2.

[8] Response to the Notice of Arbitration, ¶ 3.1.

[9] Both the 1976 and 2010 versions of the UNCITRAL Rules provide that if three arbitrators are to be appointed, (i) each party shall appoint one arbitrator, and (ii) the two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal within thirty days after the appointment of the second arbitrator (Article 7(1)-(3) in the 1976 version and Article 9(1)-(3) in the 2010 version).

[10] Response to the Notice of Arbitration, ¶ 4.1

[11] Response to the Notice of Arbitration, ¶¶ 5.1-5.2.

proposed one;[12] and (vi) expressly reserved all its procedural and substantive rights, including the right to request bifurcation of the proceedings.[13]

B. THE ARBITRATION AGREEMENT

7. The Arbitration was commenced under Article VI of the Treaty, which reads as follows (in its English version):

> Article 6
>
> 1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged broach of any right conferred or created by this Treaty with respect to an investment.
>
> 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:
> a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
> b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
> c) in accordance with the terms of paragraph 3 of this Article.
>
> 3. a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
> i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID convention"), provided that the Party is a party to such Convention; or
> ii) to the Additional Facility of the Centre, if the Centre is not available; or
> iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or
> iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.
> b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.
>
> 4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:
> a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

[12] Response to the Notice of Arbitration, ¶ 8.1.

[13] Response to the Notice of Arbitration, ¶ 9.1.

> b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").
>
> 5. Any arbitration under paragraph 3(a)(ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.
>
> 6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.
>
> 7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.
>
> 8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention.

C. CONSTITUTION OF THE TRIBUNAL AND THE AGREEMENT BETWEEN THE PARTIES

8. On 17 June 2022, in its Notice of Arbitration, the Claimant appointed Mr. Adolfo E. Jiménez, an American national, as the first arbitrator. His contact details are as follows:

> **Mr. Adolfo E. Jiménez**
> 701 Brickell Avenue, Suite 3300
> Miami, FL 33131
> United States of America
> E-mail: adolfo.jimenez@hklaw.com

9. In its Response to the Notice of Arbitration, the Respondent appointed Prof. Jorge Viñuales, an Argentinian and Swiss national, as the second arbitrator. His contact details are as follows:

> **Prof. Jorge Viñuales**
> *University of Cambridge*
> 10 West Road
> Cambridge CB3 9DZ
> United Kingdom
> E-mail: jev32@cam.ac.uk

10. The co-arbitrators appointed Prof. Eduardo Siqueiros, a Mexican national, as presiding arbitrator. His contact details are as follows:

Prof. Eduardo Siqueiros Twomey
ARB-INTER, S.C.
Paseo de los Tamarindos, 150-PB
Bosques de las Lomas
05120 Mexico City
Mexico
E-mail: esiqueiros@arbinter.mx

11. By email dated 1 April 2023, the Presiding Arbitrator informed the Permanent Court of Arbitration (the "**PCA**") that, as of that date, the Parties had agreed to the following: (i) the PCA would administer the case; (ii) Paris would serve as the seat of the arbitration; (iii) the arbitration would be conducted under the 1976 UNCITRAL Rules; and (iv) the Tribunal would determine the language(s) to be used in the arbitration (the "**Agreement between the Parties**").[14]

12. By letter dated 6 April 2023, the PCA notified the Parties of its acceptance of the designation as the institution administering the Arbitration.[15]

13. On 12 June 2023, the Tribunal issued the **Procedural Order No. 1** and the **Terms of Appointment**, signed by the Parties and all the members of the Tribunal. In the Terms of Appointment, the Parties confirmed, *inter alia*, that all members of the Tribunal had been validly appointed in accordance with the Treaty, the Agreement of the Parties, and the UNCITRAL Rules. The Parties also confirmed that they had no objection to the appointment of any member of the Tribunal on the grounds of a conflict of interest, lack of independence or impartiality in respect of matters known at the time of signing the Terms of Appointment.[16]

14. The members the Tribunal further confirmed their impartiality and independence from the Parties, that to the best of their knowledge, they had disclosed any circumstances that might give rise to justifiable doubts regarding their independence or impartiality and committed to promptly disclose any such circumstances arising in the future.[17]

15. On 15 January 2024, the Respondent informed the Tribunal, pursuant to Article 4.2 of the Terms of Appointment, that it had retained the law firms of Winston & Strawn (W&S SELARL) and Lauden Americas Consulting to act as counsel for the Respondent, in conjunction with the Office of the Attorney General of Ecuador. In this regard, the Respondent requested that the following lawyers be added as co-counsels: Ms. María Kostytska, Mr. Ricardo Ugarte and Mr. Francisco Paredes. On 8 February 2024, the Tribunal informed the Parties that based on the appointment of counsel, the three arbitrators had: (i) conducted an additional review for potential conflicts of

[14] E-mail from Prof. Siqueiros to the PCA, 1 April 2023.
[15] Letter from the PCA to the Parties, 6 April 2023.
[16] Terms of Appointment, ¶¶ 5.4, 5.6
[17] Terms of Appointment, ¶ 5.5.

interest; (ii) reaffirmed their impartiality and independence from the Parties; and (iii) confirmed that, to the best of their knowledge and belief, there were no circumstances to disclose that might give rise to justifiable doubts as to their impartiality or independence.

D. LANGUAGE AND PLACE OF THE ARBITRATION

16. Pursuant to the Terms of Appointment[18] and Procedural Order No. 1,[19] the languages of the Arbitration are English and Spanish. Accordingly, this Award is rendered in both Spanish and English.[20] While both versions are equally authoritative, for practical purposes the Tribunal prepared the original version in English. Where applicable,[21] the English version of the Award cites the English hearing transcripts (HT(EN)), while the Spanish version cites the Spanish hearing transcripts (HT(ES)). This explains why certain references in the footnotes may differ between the two versions of the Award.

17. Upon agreement of the Parties, and as stipulated in the Terms of Appointment,[22] the place or seat of the Arbitration shall be Paris, France.

E. REGISTRY AND CASE ADMINISTRATION

18. As reflected in the Terms of Appointment, the Parties agreed that the PCA would act as registry and case administrator in the Arbitration. They further agreed that Mr. Julian Bordaçahar, PCA Senior Legal Counsel, would act as Registrar and Secretary to the Tribunal.[23]

F. TRANSPARENCY OF THE PROCEEDINGS

19. Section 11 of Procedural Order No. 1, concerning confidentiality and transparency of the Arbitration, provides as follows:

> 11.1 In accordance with Article 25.4 of the UNCITRAL Rules, the hearings will be held *in camera* unless the Parties agree otherwise.
>
> 11.2 The existence of the proceedings (including the names of the Parties, counsel and the Tribunal) and all awards may be disclosed and shall be published in the PCA's Case Repository. After the issuance of each award, and prior to its publication, the Tribunal will consult with the Parties regarding the need to redact any sensitive information contained therein, and shall take a decision thereafter.

[18] Terms of Appointment, ¶ 7.1.

[19] Procedural Order No. 1, ¶ 2.1.

[20] Procedural Order No. 1, ¶ 2.2.

[21] Please note that complete transcripts in both English and Spanish are available only for the second day of the hearing on jurisdiction. Specifically: (i) for the first day of the hearing, the majority of the transcript exists only in English, with a minimal portion available exclusively in Spanish; and (ii) for the third day of the hearing, the transcript is available solely in English.

[22] Terms of Appointment, ¶ 6.1.

[23] Terms of Appointment, ¶ 8.1.1.

> 11.3 Unless the Parties expressly agree in writing to the contrary, any other information or materials in the proceedings created for the purpose of the arbitration together with all other documents produced by the other Party in the proceedings not otherwise in the public domain shall remain confidential—save and to the extent that disclosure may be required of a Party (i) by legal duty and subject to the provisions of the law applicable to the relevant Party, (ii) to protect or pursue a legal right, or (iii) to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority, and save to their shareholders and advisers so long as they too keep the information and material confidential.
>
> 11.4 Additional confidentiality protections may be sought by either Party with respect to especially sensitive documents on a case-by-case basis.

G. PRELIMINARY PROCEDURAL STEPS IN THE ARBITRATION

20. On 26 April 2023, the Tribunal circulated to the Parties a draft Procedural Order No. 1, which outlined the procedural rules of the Arbitration. The Tribunal invited the Parties to consult on the content of this document and submit their comments thereon.

21. By communications dated 15 and 16 May 2023, the Parties submitted their respective comments.

22. On 17 May 2023, the Tribunal held a first procedural meeting with the Parties by videoconference to discuss, *inter alia*, the content of Procedural Order No. 1. One significant point of disagreement between the Parties was whether or not the arbitration should be bifurcated. While the Respondent proposed that the Arbitration be bifurcated into two phases, one on jurisdiction and one on the merits, the Claimant proposed addressing arguments on jurisdiction and the arguments on the merits in a single phase.

23. On 2 June 2023, after considering the positions of the Parties, the Tribunal, in accordance with Article 21 of the UNCITRAL Rules and the common practice in international arbitration, proposed to the Parties that the calendar be structured so that the Claimant would first file its Statement of Claim, followed by a procedural phase to discuss bifurcation, should the Respondent still request it. The Tribunal reasoned that this structure of the procedural calendar would have allowed the Claimant to know the Respondent's allegations and their supporting facts before deciding whether to request bifurcation. It would also have allowed the Tribunal to have more information before determining whether to proceed with bifurcation. In addition, the Tribunal proposed to defer a decision on the necessity of a hearing to discuss bifurcation ("**Hearing on Bifurcation**") until after both Parties had submitted their bifurcation-related arguments. Finally, the Tribunal invited the Parties to submit their respective positions on this proposed structure. [24]

[24] Letter from the Tribunal to the Parties, 2 June 2023.

24. By communications dated 9 June 2023, the Parties accepted the Tribunal's proposals regarding the procedural calendar structure and the deferral of the decision on the usefulness of the Hearing on Bifurcation.

25. On 12 June 2023, the Tribunal issued **Procedural Order No. 1**, which contained Rules of Procedure and the Procedural Calendar, and also reflected the Parties' and the Tribunal's agreement on the bifurcation phase.

26. Following consultations with the Parties, the Tribunal determined, through communications dated 23 June 2023 and 1 and 30 August 2023, that if a motion for bifurcation were filed, the Hearing on Bifurcation would take place on 1 April 2024. In the event the motion for bifurcation were granted, the hearing on jurisdiction (the "**Hearing on Jurisdiction**") would be scheduled for 1-3 September 2025. The Parties agreed that the location of the hearing, whether in Europe or the United States, would have been determined at a later date, but no later than 60 days before the respective hearings. Accordingly, the Procedural Order No. 1 was amended as of 1 August 2023 to update the Procedural Calendar.

H. THE CLAIMANT'S FUNDING AGREEMENT

27. On 15 June 2023, the Respondent requested that the Tribunal order the Claimant to disclose whether it has received third-party funding for the costs of the Arbitration and, if so, to disclose the identity of the funder. According to the Respondent, "[t]he disclosure by the Claimant of the existence of any third-party funding arrangements will contribute to the transparency and integrity of the proceedings by allowing the Parties and the Arbitrators to become aware of potential conflicts of interest that would have gone unnoticed prior to disclosure".[25] On 16 June 2023, the Tribunal invited the Claimant to respond to the Respondent's request by 23 June 2023. On that date, the Claimant requested, and the Tribunal granted, an extension until 30 June, which had already been agreed with the Respondent.

28. On 30 June 2023, the Claimant informed the Tribunal that the Parties had reached a preliminary agreement on the Respondent's request. Specifically, the Claimant noted that it had informed the Respondent of ongoing negotiations with a funder and that, if an agreement were finalized, it would disclose the funder's identity solely for purposes of the Arbitration and under conditions ensuring confidentiality. The Claimant further stated that it was awaiting confirmation from the Respondent that the identity of the funder would remain confidential.

29. On 1 November 2023, the Respondent requested that the Tribunal order the Claimant to disclose both the identity of the funder and the funding agreement, and to keep the Tribunal and the

[25] Respondent's Letter to the Tribunal, 15 June 2023.

Respondent "continuously" informed of the status of the funding agreement.[26] In this communication, the Respondent stated that: (i) on 21 July 2023, the Claimant had informed the Respondent that it had entered into an agreement with a funder and intended to negotiate a confidentiality agreement with the Respondent before disclosing the funder's identity; and (ii) on 24 July 2023, the Respondent agreed to keep the identity of the funder confidential. However, the Respondent alleged that, at that date, the Claimant had not disclosed the funder's identity yet.

30. On the same day, the Respondent confirmed its agreement to "maintain the name of the funder confidential" addressing the Claimant's concerns regarding the disclosure of the funder's identity.[27]

31. On 9 November 2023, the Claimant objected to the disclosure of the funding agreement, and requested that the Tribunal order disclosure of the funder's identity solely for conflict-check purposes. The Claimant also reiterated that the Respondent had to maintain the funder's identity confidential.

32. On 15 November 2023, the Tribunal rejected the Respondent's request for additional information on the Claimant's funder, stating that any such request would need to be justified separately. The Tribunal also ordered the Claimant to disclose the identity of the funder and any subsequent changes thereto. Furthermore, the Tribunal informed the Parties that, pursuant to Section 11.3 of Procedural Order No. 1, the identity of the funder would remain confidential.

33. On 16 November 2023, as directed by the Tribunal, the Claimant disclosed the identity of its funder (the "**Funder**").

34. On 21 November 2023, the Tribunal informed the Parties that the three arbitrators had conducted a new review for potential conflicts of interest based on the identity of the Funder. Following this review, the Tribunal confirmed that all its members remained impartial and independent of the Parties and that, to the best of their knowledge and belief, there were no circumstances requiring disclosure that could give rise to justifiable doubts as to their impartiality or independence.

35. On 29 November 2023, the Respondent again requested – this time on the basis of a written submission containing additional arguments – that the Tribunal order the Claimant to disclose the funding agreement and its respective annexes (the "**Funding Agreement**"). Alternatively, the Respondent requested that the Claimant produce the Funding Agreement and its annexes for the Tribunal's analysis. This would have allowed the Tribunal to provide the Respondent with any information deemed necessary for its defense in the Arbitration, subject to redaction of confidential information (the "**Request for Disclosure**"). The Respondent's Request for

[26] Procedural Order No. 3, ¶ 4.

[27] Procedural Order No. 3, ¶ 5.

Disclosure was based primarily on concerns regarding the Claimant's potential insolvency and the possibility that the Funder had not undertaken any obligation to cover a potential decision on adverse costs. Consequently, the Respondent argued that disclosure of the Funding Agreement's terms could inform its decision on whether to seek security for costs.[28]

36. On 1 December 2023, the Tribunal invited the Claimant to submit its comments on the Respondent's Request for Disclosure by 27 December 2023.

37. On 15 December 2023, the Claimant requested an extension to submit its comments on the Request for Disclosure. On 19 December 2023, the Tribunal granted the Claimant's request for an extension. On 15 January 2024, the Claimant submitted its comments opposing the Request for Disclosure. The Claimant argued that the Respondent had failed to provide sufficient justifications for the disclosure of the Funding Agreement, which contained confidential information, and asserted that the Respondent was using the request as a means to secure assistance in obtaining security for costs.[29]

38. On 21 February 2024, the Tribunal issued **Procedural Order No. 3**, rejecting the Request for Disclosure. The Tribunal reasoned that, given the confidential nature of the Funding Agreement, its disclosure in whole or in part could only be ordered under exceptional circumstances. In this case, the Tribunal found that no such exceptional circumstances had been demonstrated or justified.[30]

I. THE STATEMENT OF CLAIM AND THE REQUEST FOR BIFURCATION

39. On 13 November 2023, the Claimant requested a 49-day extension to file its statement of claim, seeking to extend the deadline from 27 November 2023 to 15 January 2024 (the "**Extension Request**"). The Claimant also informed the Tribunal that it had consulted with Ecuador regarding the Extension Request. However, Ecuador had only agreed to a two-week extension.

40. With leave of the Tribunal, on 16 November 2023, the Respondent submitted its observations on the Extension Request. The Respondent opposed the request, deeming it unjustified, and in any event, unreasonably long. Alternatively, the Respondent requested the Tribunal to grant the Claimant a maximum 15-day extension and requested an equal extension for its own submission.

41. On 21 November 2023, the Tribunal granted the Claimant a 21-day extension to file its Statement of Claim, setting the new deadline as 18 December 2023. To ensure procedural fairness, the Tribunal also granted the Respondent a corresponding extension for its written submission. In the

[28] Request for Disclosure, ¶ 1.
[29] Response to the Request for Disclosure, pages. 4, 7.
[30] Procedural Order No. 3, ¶¶ 45-47.

same communication, the Tribunal informed the Parties that it would subsequently issue a procedural order setting out a revised procedural calendar.

42. On 18 December 2023, the Claimant filed its statement of claim with the Tribunal ("**Statement of Claim**").

43. On 19 December 2023, the Tribunal circulated a draft of the Procedural Order No. 2 to the Parties, proposing adjustments to the revised procedural calendar. The Tribunal invited the Parties to submit comments by 15 January 2024. Neither Party raised objections or provided comments on the draft.

44. On 20 January 2024, the Tribunal issued **Procedural Order No. 2**, which incorporated the revisions to the procedural calendar. Pursuant to this Order, if requested, the Hearing on Bifurcation would take place on 22 April 2024.

45. Pursuant to the revised procedural calendar, the Respondent filed a request for bifurcation of the Arbitration proceedings ("**Request for Bifurcation**") on 11 March 2024. In its Request for Bifurcation, the Respondent argued that the Tribunal lacked jurisdiction based on the following objections: (i) *ratione materiae*, because the Claimant neither owned nor controlled the alleged investment during its revocation and at the time of the arbitration commencement; (ii) *ratione personae*, because the Claimant had been revoked from the Nevada business register and lacked standing at the time of the Notice of Arbitration; (iii) by virtue of the denial of benefits clause in Article I(2) of the Treaty; (iv) because the corporate restructuring undertaken by the Claimant constituted an abuse of rights, barring the Tribunal's jurisdiction; (v) *ratione materiae* because the Claimant's alleged investment was not made in accordance with Ecuadorian law.[31]

46. On 8 April 2024, the Claimant submitted its reply to the Request for Bifurcation ("**Reply to the Request for Bifurcation**"), objecting to the bifurcation on all the grounds raised by the Respondent.

47. By letter dated 12 April 2024, the Tribunal informed the Parties that it believed it had sufficient information to render a decision on bifurcation. However, the Tribunal sought the Parties' views on whether they considered it necessary to hold a Hearing on Bifurcation. By letters dated 15 April 2024, (i) the Claimant stated that it did not consider it necessary to hold a Hearing on Bifurcation, whereas (ii) the Respondent requested that such a hearing be held.

48. By letter dated 16 April 2024, after reviewing the Parties' submissions, the Tribunal decided to hold the Hearing on Bifurcation. In addition, the Tribunal addressed certain logistical issues

[31] Request for Bifurcation, ¶¶ 4-10.

related to the organization of the hearing and invited the Parties to consult with each other and submit their comments.

49. On 18 April 2024, the Tribunal issued **Procedural Order No. 4**, formally convening the Hearing on Bifurcation and detailing the arrangements for conducting the hearing, reflecting the Parties' comments submitted on 15 April 2024.

50. On 21 April 2024, the Respondent submitted additional legal authorities for the Hearing on Bifurcation and requested the Tribunal's permission to include them in the record. The Claimant objected to this request, due to the late submission. On the same day, the Tribunal denied the Respondent's request, noting that the submission was made one day before the Hearing and coincided with a public holiday.

J. THE HEARING ON BIFURCATION

51. On 22 April 2024, the Hearing on Bifurcation was held between the Parties and the Tribunal entirely by videoconference.

52. The following persons attended the Hearing on Bifurcation:

The Tribunal
Prof. Eduardo Siqueiros Twomey (Presiding Arbitrator)
Mr. Adolfo E. Jiménez
Prof. Jorge Viñuales

For the Claimant
Mr. José A. Ortiz, Homer Bonner Jacobs Ortiz
Ms. Raquel Toral, Homer Bonner Jacobs Ortiz
Mr. Jorge A. Mestre, Rivero Mestre LLP
Mr. Ramon Echaiz, Echaiz y Asociados

For the Respondent
Ms. Ana Maria Larrea, Office of the Attorney General of Ecuador
Ms. Lily Díaz Granados, Office of the Attorney General of Ecuador
Mr. Gary López, Office of the Attorney General of Ecuador
Mr. Marco Terán, Office of the Attorney General of Ecuador
Ms. Julia Rovello, Office of the Attorney General of Ecuador
Ms. Maria Kostytska, Winston & Strawn
Mr. Spencer Churchill, Winston & Strawn
Ms. Dariia Mokhnachova, Winston & Strawn
Mr. Ivan Yavnych, Winston & Strawn
Mr. Francois Bourget, Winston & Strawn
Mr. Francisco Paredes, Lauden Americas Consulting
Ms. Isabel Sanchez, Lauden Americas Consulting

Registry: Permanent Court of Arbitration
Mr. Julián Bordaçahar, PCA Senior Legal Counsel and Secretary to the Tribunal
Ms. Valeria Bonechi Rocha, PCA Assistant Legal Counsel
Ms. Sofía Boqué, PCA Case Manager

Court Reporter
Ms. Claire Hill

K. BIFURCATION OF THE PROCEEDINGS AND THE DOCUMENT PRODUCTION PHASE

53. By letter dated 6 May 2024, the Tribunal: (i) issued **Procedural Order No. 5**, bifurcating the proceedings into two phases, one on jurisdiction and one on the merits; (ii) decided to address all the Respondent's objections during the jurisdictional phase, except for the objection concerning the legality of the investment under the Ecuadorian law, which the Tribunal preferred to consider together with the merits; and (iii) invited the Parties to consult and attempt to agree on shortening the timeframes between the procedural milestones for the jurisdictional phase.

54. By letter dated 27 May 2024, the Claimant submitted to the Tribunal a draft procedural order no. 6 agreed upon by the Parties, setting forth the procedural calendar following the Hearing on Bifurcation. On May 30, 2024, the Tribunal ratified the Parties' agreement and informed them that the relevant procedural order would be issued promptly.

55. After consulting with the Parties, the Tribunal decided that the Hearing on Jurisdiction would be held at the PCA premises at the Peace Palace in The Hague, the Netherlands, from 24 to 26 February 2025. Accordingly, the Tribunal issued **Procedural Order No. 6** on 20 June 2024.

56. By letter dated 19 July 2024, the Claimant, after consulting with the Respondent, requested that the Hearing on Jurisdiction be rescheduled to 17-19 February 2025. Following the Claimant's confirmation, the Tribunal acknowledged the Parties' agreement and issued a revised Procedural Order No. 6 on 1 August 2024, reflecting the updated hearing dates.

57. Pursuant to the Parties' agreement on the revised procedural calendar, on 31 May 2024, both Parties submitted their respective requests for the production of documents related to the jurisdictional phase.

58. On 14 June 2024, each Party submitted objections to the other Party's requests for document production, and complied with the other Party's unopposed requests for document production.

59. On 28 June 2024, the Parties submitted rebuttals to the objections raised against their respective requests for document production.

60. On 12 July 2024, the Tribunal issued **Procedural Order No. 7**, providing its ruling on each Party's requests for the production of documents.

61. On 16 August 2024, each Party complied with the Tribunal's orders by producing the required documents to the opposing Party.

L. THE SUBMISSIONS ON JURISDICTION

62. On 13 September 2024, the Respondent submitted its memorial on jurisdiction ("**Memorial**"), together with related factual exhibits and legal authorities.

63. On 8 November 2024, the Claimant submitted its counter-memorial on jurisdiction ("**Counter-Memorial**"), together with the third witness statement of Mr. Roberto Cuadrado (CWS-3), the Expert Report of Professor Andrea Bianchi (CER-3), the Expert Report of Professor Merritt Fox (CER-4) and all the related factual exhibits and legal authorities.

64. On 5 December 2024, the Respondent, on behalf of both Parties, requested the Tribunal to amend the procedural calendar set forth in the Procedural Order No. 6 to modify the filing dates for the second rounds of memorials on jurisdiction as follows: (i) Respondent's Reply on Jurisdiction to be filed on 9 December 2024 (instead of 6 December 2024); and (ii) Claimant's Rejoinder on Jurisdiction to be filed on 6 January 2025 (instead of 3 January 2025). The Respondent confirmed that the other procedural steps outlined in that procedural calendar would not be "impacted by this variance".[32]

65. On 6 December 2024, the Tribunal informed the Parties that it had no objection to this modification. Thus, the agreed changes were approved. For good order, the Claimant was invited to confirm its agreement with the Respondent's message. The same day, the Claimant confirmed its agreement to the changes in the Procedural Calendar.

66. On 6 December 2024, the Tribunal issued **Procedural Order No. 8** setting forth a revised procedural calendar, reflecting the new dates for the second round of submissions on jurisdiction.

67. On 9 December 2024, the Respondent filed its reply memorial on jurisdiction ("**Reply**"), together with the expert reports of Mr. Jordan Smith (RER-1) and Mr. Marco Lopez (RER-2) and all the related factual exhibits and legal authorities.

68. On 6 January 2025, the Claimant filed its rejoinder memorial on jurisdiction ("**Rejoinder**"), with the related legal authorities.

M. THE PRE-HEARING CONFERENCE AND THE HEARING ON JURISDICTION

69. On 14 January 2025, the Tribunal circulated a draft version of the Procedural Order No. 9 concerning procedural and other technical and ancillary matters pertaining to the Hearing on Jurisdiction and invited the Parties' comments thereon.

[32] E-mail from the Respondent to the Tribunal, 5 December 2024.

70. On 15 January 2025, the Respondent notified the witnesses and experts to be examined at the Hearing, while the Claimant did not present any notification.

71. On 20 and 21 January 2025, the Parties sent their comments to the draft version of the Procedural Order No. 9. With the same communication, the Respondent sent an amended notification of witnesses and experts to be examined at the Hearing on Jurisdiction.

72. On 22 January 2025, the Tribunal, the Parties and the PCA held a pre-hearing conference to discuss pending matters related to the organization of the Hearing on Jurisdiction ("**Pre-Hearing Conference**"). Among the others, the discussion addressed: (i) the language of the examination of Messrs. Fuentealba and Cuadrado during the Hearing on Jurisdiction; and (ii) the duration of the re-direct examination of Messrs. Fuentealba and Cuadrado.

73. With various communications between 27 January and 3 February 2025, the Parties and the Tribunal addressed some organizations issues for the Hearing on Jurisdiction that had not been resolved during the Pre-Hearing Conference.

74. On 3 February 2025, each Party communicated to the Tribunal its list of participants to the Hearing. Subsequently, on 5 February 2025, the Claimant amended its list.

75. On 5 February 2025, the Tribunal issued the **Procedural Order No. 9** on the organization of the Hearing on Jurisdiction.

76. The Hearing on Jurisdiction was held between 17 and 19 February 2025 at the Peace Palace, The Hague, Netherlands.

77. The following persons attended the Hearing:

The Tribunal

Prof. Eduardo Siqueiros Twomey (Presiding Arbitrator)
Mr. Adolfo E. Jiménez
Prof. Jorge Viñuales

The Claimant

Mr. Roberto Cuadrado
Mr. Luis Fuentealba
Lynton Trading Ltd.

Mr. José A. Ortiz
Ms. Raquel A. Toral
Homer Bonner Jacobs Ortiz

Mr. Jorge Mestre
Rivero Mestre

Mr. Ramon Echaiz

Echaiz y Asociados

Mr. Jesse Francis
TrialTech Support LLC

The Respondent

Ms. Ana María Larrea
Ms. Lily Díaz Granados*
Mr. Marco Teran*
Ms. Julia Rovello*
Mr. Gary López*
Procuraduría General del Estado

Ms. Maria Kostytska,
Ms. Dariia Mokhnachova
Mr. Ivan Yavnych*
Ms. Victoria Martynkova*
Winston & Strawn LLP

Mr. Francisco Xavier Paredes
Ms. Isabel Sánchez
Lauden

Mr. Jordan T. Smith*
Pisanelli Bice PLLC.

* Participant appeared remotely

Permanent Court of Arbitration

Mr. Julián Bordaçahar
Ms. Sofía Bouqué
Ms. Mireia Solés López
Ms. Anna Chiara Amato*

Court Reporters

Mr. Trevor McGowan [ENG]
Trevor McGowan CR

Mr. Dante Rinaldi [SPA] *
Ms. Elizabeth Cicoria [SPA] *
Ms. Virginia Masce [SPA] *
D-R Esteno

* Participant appeared remotely

Interpreters

Ms. Marina Gaiteri *
Ms. Verónica Santos *

* Participant appeared remotely

N. POST-HEARING MATTERS

78. Following consultation with the Parties during the Hearing on Jurisdiction, at its conclusion the Tribunal informed the Parties that it would issue a list of additional questions, and would provide guidance regarding the next steps of the proceedings.

79. On 28 February 2025, the Tribunal, *inter alia*,: (i) issued a list of additional questions for the Parties to respond by 14 March 2025; (ii) requested the Parties to indicate the date by which they would submit the jointly agreed corrections to the transcripts of the Hearing on Jurisdiction; (iii) invited the Parties to liaise and attempt to agree on the scope, format and deadlines for the Submissions on Costs for the jurisdictional phase; and (iv) initiated the process of closing the proceedings under Article 29 of the UNICTRAL Rules.

80. On 7 March 2025, the Parties agreed to submit consolidated corrections to the Hearing transcripts by 17 March 2025. Additionally, the Parties also agreed to (i) file their simultaneous Submissions on Costs on 21 March 2025; (ii) submit proof of their costs in the form of summary monthly invoices for attorneys' fees, invoices for experts' fees, and proof of travel/hearing expenses; and (iii) have an opportunity to simultaneously comment on each other's Submission on Costs by 28 March 2025.

81. On 14 March 2025, the Claimant and the Respondent sent their respective answers to the Tribunal's questions of 28 February 2025 (the "**Claimant's Answers to the Tribunal's Questions**" and the "**Respondent's Answers to the Tribunal's Questions**").

82. On 17 March 2025, the Parties sent their consolidated corrections to the Hearing transcripts. The Parties essentially agreed on all corrections, except they differed on one translation point in the English version, which they left for the Tribunal's decision.

83. On 21 and 24 March 2025, the Parties communicated their agreement to extend the deadlines for the Submissions on Costs until 25 March 2025.

84. On 25 March 2025, the Parties sent their respective Submissions on Costs. The following day, the Respondent sent an amendment to its Submission on Costs.

85. On 28 March 2025, the Tribunal issued **Procedural Order No. 10**, whereby it: (i) resolved the translation disagreement between the Parties concerning the English version of the Hearing transcripts; and (ii) updated the procedural calendar to incorporate the deadlines for the post-Hearing matters as agreed upon by the Parties and the Tribunal.

86. On 1 and 2 April 2025, the Parties communicated their agreement to extend the deadlines for the comments on each other's Submission on Costs until 15 April 2025.

87. On 2 April 2025, the Tribunal circulated the final version of the English Hearing transcripts, reflecting the Parties' consolidated corrections and its decision in Procedural Order No. 10.

88. On 15 April 2025, the Parties sent their comments to each other's Submission on Cost.

89. On 7 July 2025, the Tribunal: (i) transmitted the Spanish versions of Procedural Orders Nos. 4-10 (previously issued in English) and the English versions of Procedural Orders Nos. 2-3 (previously issued in Spanish); and (ii) confirmed that the only remaining procedural and administrative steps had been completed. Having found that all procedural stages of the bifurcated jurisdictional phase had been duly fulfilled, that due process had been observed, and that the Parties had been afforded full opportunity to present their respective cases, the Tribunal declared the hearings and arbitral proceedings in the jurisdictional phase closed, in accordance with Article 29 of the UNCITRAL Rules. Lastly, the Tribunal provided an update regarding the progress of the Award on Jurisdiction, advising the Parties that it aimed to issue its bilingual Award in August, and informed that the Award would be issued first electronically, with hard copies to follow, pursuant to Article 32(6) UNCITRAL Rules.

90. On 27 August 2025, the Tribunal informed the Parties that it was close to finalizing the drafting of the Award on Jurisdiction; and (ii) requested the Parties to make an additional deposit to ensure that the costs corresponding to the current bifurcated phase of the Arbitration would be duly covered prior to the issuance of the Award. On 17 September 2025, the Tribunal informed the Parties that it was in the final stage of reviewing the Award on Jurisdiction and it was finalizing the necessary details for its prompt issuance.

III. THE PARTIES' REQUESTS FOR RELIEF

A. THE RESPONDENT'S REQUEST FOR RELIEF

91. In its Memorial (as confirmed in the Reply), the Respondent has requested the Tribunal to:[33]

> a) declare that Ecuador is entitled to deny the benefits of the BIT to Claimant and that the Tribunal lacks jurisdiction over the case;
> b) declare that Claimant did not own or control the alleged investment during its revocation and at the time of the commencement of the arbitration, and that the Tribunal lacks jurisdiction *ratione materiae*;
> c) declare that Claimant lacked standing (*ius standi*) at the time of the notification and initiation of the arbitration under the BIT and that the Tribunal lacks jurisdiction *ratione personae*;
> d) declare that Claimant's corporate restructuring in 2010 was an abuse of rights that deprived the Tribunal of jurisdiction;
> e) dismiss the case for lack of jurisdiction under the BIT; and
> f) order Claimant to pay the costs incurred by Ecuador, including the costs of legal representation and assistance.

B. THE CLAIMANT'S REQUEST FOR RELIEF

92. In its Counter-Memorial, the Claimant has requested the Tribunal to issue an award containing:

> a. A declaration that the dispute is within the jurisdiction and competence of the Arbitral Tribunal;
> b. A declaration summarily dismissing Respondent's jurisdictional challenges contained in its Memorial on Jurisdiction;
> c. An order directing that the dispute will immediately proceed to the merits phase;
> d. An award directing Respondent to pay all of Lynton's costs, with interest, relating to the present bifurcation and arbitration proceedings, including all of its attorneys' fees
> and expenses; and
> e. An award granting any further relief the Arbitral Tribunal deems just and proper under the circumstances.[34]

[33] Memorial, ¶ 199.

[34] Counter-Memorial, ¶ 194. The Claimant did not include a request for relief in its Rejoinder.

IV. FACTUAL BACKGROUND

93. The following account of facts is provided solely for contextual purposes, considering the Parties' arguments and, in particular, the evidence submitted in relation to the Respondent's jurisdictional objections at this stage of the Arbitration. Accordingly, this account does not seek to comprehensively describe the factual background, nor does it prejudge its relevance in understanding and assessing the merits of the dispute. This is without prejudice to the Tribunal's duty to appropriately assess and make the necessary factual determinations regarding those facts relevant for resolving the Respondent's jurisdictional objections.

94. With these preliminary clarifications, this section provides background on the following aspects: (**A**) the Claimant, its purported investment in Ecuador's gambling industry and its activities in the United States; (**B**) the Nevada law on limited liability companies; (**C**) Lynton's status under Nevada law; (**D**) Lynton's divestiture of its shares in Grupo C; and (**E**) the circumstances around the 2011 Executive Decree.

A. THE CLAIMANT, ITS PURPORTED INVESTMENT IN ECUADOR'S GAMBLING INDUSTRY AND ITS ACTIVITIES IN THE UNITED STATES

95. Lynton is a company incorporated under the laws of Nevada. Lynton is wholly owned by Mr. Cuadrado, a Spanish citizen, and Mr. Fuentealba Meier, a Chilean citizen.[35]

96. Lynton was created in 2006 to serve as shareholding company. According to the Claimant, its purpose was "to consolidate the gaming investments of its entrepreneur co-founders in Ecuador and explore any other opportunities – including in the United States – that might be profitable".[36]

97. In particular, throughout the time, Lynton acquired direct shareholding in Grupo C S.A. C-Group ("**Grupo C**") and indirect shareholding in WWTS Ecuador S.A. ("**WWTS Ecuador**"), Tesupe S.A., and Rusiensa S.A. (collectively referred to as the "**Ecuadorian Companies**").[37]

98. The Claimant produced the table below to explain Lynton's alleged ownership structure of the Ecuadorian Companies at the time of the 2011 Executive Decree.[38]

[35] Notice of Arbitration, ¶¶ 10, 28; Response to the Request for Bifurcation, ¶ 1; Memorial, ¶ 40; First Witness Statement of Mr. Cuadrado, ¶ 16 (**CWS-1**); Witness Statement of Mr. Fuentealba, ¶ 15 (**CWS-2**).

[36] Statement of Claim, ¶ 2; Notice of Arbitration, ¶¶ 33-34. First Witness Statement of Mr. Cuadrado, ¶ 16 (**CWS-1**); Witness Statement of Mr. Fuentealba, ¶ 15 (**CWS-2**).

[37] Notice of Arbitration, ¶ 3.

[38] Statement of Claim, ¶ 21.

Name of Company	Shareholders at Time of Expropriation	Percentage	Nationality
WWTS Ecuador S.A.	Orange Business LLC[24]	60%	USA
	Grupo C S.A. C-Group	40%	Ecuador
Grupo C S.A. C-Group	Lynton Trading Ltd.	99.98%	USA
	Robert Cuadrado	0.001%	Spain
	Luis Fuentealba Meier	0.001%	Chile
Tesupe S.A.	Grupo C S.A. C-Group	66.66%	Ecuador
	Bauchi Investments S.A.	33.33%	Chile
Rusiensa S.A.	Grupo C S.A. C-Group	100%	Ecuador

99. The Claimant's position is that Orange Business LLC ("**Orange Business**") was also owned by Lynton.[39] The Respondent's position is that the Claimant has failed to prove it.[40]

100. The Ecuadorian Companies had operations of 18 casinos, gaming salons, and other types of gaming businesses throughout Ecuador. According to the Claimant, Lynton's investment in Ecuador's gaming industry, includes the Ecuadorian Companies as well as capital, personnel, training and management resources it had to put in.[41]

101. As to Lynton's business in the U.S., the Claimant's position is that, between 2006 and 2024, it did carry out business activities there.[42] On the other hand, the Respondent's position is that there is nothing in the record showing that Lynton carried out substantial business activities in the U.S.[43]

B. THE NEVADA LAW ON LIMITED LIABILITY COMPANIES

102. This summary is prepared based on the submissions of the Parties. Under Sections 76.100, 76.130 and 76.180 of the Nevada Statutes ("**Statutes on Business License**"):

a. A business license issued by the Secretary of State is required to conduct business in Nevada (section 76.100(1));

b. An entity holding a business license must pay an annual state business license fee and, should it fail to do so, will pay a penalty of USD 100 and will be deemed not to have complied with its annual list filing requirement for the purposes of default or revocation, when applicable (section 76.130(4));

[39] First Witness Statement of Mr. Cuadrado, n. 3 (**CWS-1**).

[40] Memorial, ¶ 96.

[41] Notice of Arbitration, ¶ 18; Statement of Claim, ¶¶ 3-4; First Witness Statement of Mr. Cuadrado, ¶ 24 (**CWS-1**).

[42] Counter-Memorial, ¶ 52, pp. 17-31.

[43] Memorial, ¶¶ 44-47.

c. An entity that continues to do business without renewing its license before its renewal date is subject to a fine between USD 1,000 and 10,000 to be recovered in court and can be subject to investigations (section 76.130(5), section 76.180(1)-(2)).

103. Under Section 86.274 of the Nevada Statutes ("**LLC Revocation Statute**):

a. "revocation" occurs when a limited liability company ("**LLC**") is in default, for more than one year, of its obligations to file the documents required under the law (specifically, section 86.263 of the same Statutes) or to pay the required fee to the Nevada Secretary of State;

b. In case of revocation, the LLC's right to transact business is forfeited (paragraph 2). Accordingly, all the property and assets of the revoked LLC must be held in trust by the managers or, if none, by the members of the company (paragraph 5).[44] Also, "the same proceedings may be had with respect to [the revoked LLC's] property and assets as apply to the dissolution of a limited-liability company pursuant to the [Nevada Revised Statutes] 86.505 and 86.521", *i.e.*, the revised statutes on dissolution ("**LLC Dissolution Statutes**").[45]

104. According to the LLC Dissolution Statutes, after its dissolution, a company has two years to bring actions based on facts it knew or should have known before dissolution, and three years for any other remedy or cause of action. After that, the claims are barred.[46] In particular, under Section 86.505 of the LLC Dissolution Statutes ("**LLC Continuation after Dissolution Statute**"):

a. The dissolution of a limited-liability company does not impair any remedy or cause of action available to or against it or its managers or members commenced, within 2 years after the effective date of the articles of dissolution, with respect to any remedy or cause of action as to which the plaintiff learns, or in the exercise of reasonable diligence should have learned of, the underlying facts on or before the date of dissolution, or within 3 years after the date of dissolution with respect to any other remedy or cause of action.

b. Any such remedy or cause of action not commenced within the applicable period is barred.

c. A dissolved company continues as a company for the purpose of prosecuting and defending suits, actions, proceedings and claims of any kind or nature by or against it and of enabling it gradually to settle and close its business, to collect and discharge its obligations, to dispose of and convey its property, and to distribute its assets, but not for the purpose of continuing the business for which it was established.

105. Under Section 86.276 of the Nevada Statutes ("**LLC Reinstatement Statute**"):

a. If a revoked LLC complies with the missed filing and fee requirements within 5 years from its revocation, "the Secretary of State shall reinstate" it and "shall restore to the company its right to carry on business" (paragraph 1);

[44] Nevada Revised Statutes, § 86.274 (**R-004**); Request for Bifurcation, ¶¶ 34, 58; Memorial, ¶ 67.

[45] Nevada Revised Statues, § 86.274(5) (**R-004**); Request for Bifurcation, ¶¶ 34, 45; Memorial, ¶ 127.

[46] Nevada Revised Statutes, § 86.505 (**C-082**); Counter Memorial, ¶¶ 110-112; Rejoinder, ¶ 28; Respondent's Answers to the Tribunal's Questions, ¶¶ 2-3.

b. Such reinstatement would "relate[] back to the date on which the company forfeited its right to transact business […] and reinstates the company's right to transact business as if such right had at all times remained in full force and effect" (paragraph 5);

c. Once the company remains revoked for a period of 5 consecutive years, reinstatement is not possible anymore (paragraph 4).[47]

106. Under Section 86.580 of the Nevada Statutes ("**LLC Revival Statute**"), the "renewal or revival" of "a limited-liability company which did exist or is existing" under Nevada law, is also possible. In this scenario, revival "relates back to the date on which the limited-liability company's charter […] was revoked and […] revives the limited-liability company's charter and right to transact business as if such right had at all times remained in full force and effect".[48]

C. LYNTON'S STATUS UNDER NEVADA LAW

107. On 27 February 2006, Lynton filed its Articles of Organization with the Nevada Secretary of State and the company was constituted in Nevada. In 2007 and 2008 Lynton complied with its filing duties.[49]

108. In March 2010, Lynton's charter was revoked. According to the Respondent, since the Nevada Business Portal does not contain any information as to Lynton's filing of the required documents in 2009, "[i]t can be inferred" that the Claimant did not comply with its filing requirement that year and therefore, pursuant to the LLC Revocation Statute, it was revoked.[50]

109. On 12 August 2010, a certificate of reinstatement for Lynton was filed. On 17 August 2010, Lynton obtained a new business license.[51]

110. On 28 February 2011, Lynton's license expired.[52] Respondent's position is that, since Mr. Cuadrado testified that, on that date, "Lynton administratively expired",[53] "it can be inferred" that on 28 February 2011 Lynton did not comply with its filing requirements and accordingly, on 1 March 2012, pursuant to the LLC Revocation Statute, its charter was revoked again.[54]

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[47] Nevada Revised Statues, § 86.276 (**C-072**); Counter-Memorial, ¶¶ 102-103.

[48] Nevada Revised Statutes, § 86.580 (**C-073**); Answer to the Request for Bifurcation, ¶¶ 23-39; Counter-Memorial, ¶¶ 107-108.

[49] Extract from the Nevada Business Portal as of 23 January 2024 (**R-005**); Request for Bifurcation, ¶ 38; Lynton's Articles of Organization (**C-107**).

[50] Request for Bifurcation, ¶ 38.

[51] Request for Bifurcation, ¶ 38; Memorial, ¶ 71; Extract from the Nevada Business Portal as of 23 January 2024 (**R-005**); Nevada State Business License issued to Lynton on 17 August 2010 (**R-044**); Documents regarding Lynton's registered agent, managers and managing members of 12 August 2010 (**R-045**).

[52] Request for Bifurcation, ¶ 38; Nevada State Business License issued to Lynton on 17 August 2010 (**R-044**).

[53] First Witness Statement of Roberto Cuadrado, ¶ 17, n. 1 (**CWS-1**); HT(EN), Day 2, p. 17, 3-12.

[54] Request for Bifurcation, ¶ 38; Memorial, ¶ 72.

111. Respondent also stresses the fact that, as of 16 June 2023, Lynton resulted being "permanently revoked" on the Nevada Business Portal.[55]

112. Lynton was reinstated/revived on 17 August 2023.[56]

D. LYNTON'S DIVESTITURE OF ITS SHARES IN GRUPO C

113. It is undisputed between the Parties that Lynton divested its shares in Grupo C, at some point. However, the Parties disagree on when – and how many times – this occurred.[57]

114. According to the Respondent, the first divestiture in the Ecuadorian Companies took place on 8 December 2009 (the "**First Alleged Divestiture**), when Lynton transferred its entire holding in Grupo C to Sircontena S.A. ("**Sircontena**"). The transfer was registered on 4 June 2010 with *Superintendecia de Compañias* (*i.e*., the Ecuadordian government entity that oversees companies and other entities in Ecuador). On 8 December 2009, the General Manager of the WWTS Ecuador also notified *Superintendencia* about the transfer of shares in WWTS Ecuador from Orange Business to Sircontena.[58] On 29 April 2011, Sircontena registered a transfer of its shares in Group C back to Lynton (the "**Alleged 29 April 2011 Transfer**").[59] The Respondent mentions another transfer of shares that it considers relevant, *i.e*., a transfer of shares in WWTS Ecuador from Sircontena to Grupo C and Orange Business dated 5 July 2010, and registered on 3 August 2010 (the "**Alleged 5 July 2010 Transfer**").[60]

115. According to the Claimant, however, the First Alleged Divestiture was only part of an internal restructuring, since Sircontena was in turn owned by Grupo C, that, in turn, continued to be owned by Lynton.[61] The Claimant defines the operation as "an error", as it resulted in Grupo C owning Sircontena and Sircontena owning Grupo C. According to the Claimant, it only realized the error

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[55] Extract from the Nevada Business Portal as of 16 June 2023 (**R-001**); HT(EN), Day 1, p. 21, 19-25.

[56] First Witness Statement o Roberto Cuadrado, ¶ 17, n. 1 (**CWS-1**); Lynton's corporate documents regarding annual lists and a business license of 18 March 2024 (license valid from 18 March 2024 to 28 February 2025; **R-052**,); Lynton's documents related to accomplishment of corporate formalities before the Nevada Secretary of State, 17 August 2023 (license valid from 17 August 2023 to 28 February 2024; **R-053**).

[57] Reply, ¶ 150; Counter-Memorial, ¶¶ 91-92.

[58] Memorial, ¶ 170-172; HT(EN), Day 3, p. 90, 2-14; Letter from Grupo C to Superintendencia on transfer of shares from Lynton to Sircontena, 8 December 2009 (**R-077**); Letter from WWTS to Superintendencia on transfer of shares from Orange Business to Sircontena, 8 December 2009 (**R-079**); Extract from Ecuador's Companies Register (*Superintendencia de Compañías*) for Grupo C S.A. C-Group (**R-009**); Superintendencia report following the inspection of Grupo C of 21 July 2010 (**R-090**).

[59] Memorial, ¶ 176; Extract from Ecuador's Companies Register (Superintendencia de Compañías) for Grupo C S.A. C-Group (**R-009**).

[60] Memorial, ¶ 176; Note regarding transfer of shares in WWTS from Sircontena to Orange Business and Grupo C of 19 July 2010 (**R-078**); Extract from Ecuador's Companies Register (Superintendencia de Compañías) for WWTS Ecuador S.A. (**R-10**)

[61] Response to the Request for Bifurcation, ¶¶ 93-94.

on 4 June 2010, when registering the transfer with the *Superintendencia*. Accordingly, the next day, on 5 June 2010, the transfer was revoked and all the shares of Grupo C returned to Lynton (the "**Alleged 5 June 2010 Transfer**").[62] The Claimant alleges that the operation was registered in the corporate books on 12 June 2010 but, since it was an internal operation, it was notified to the *Superintendencia* only on 29 April 2011.[63] According to the Claimant, no share transfer occurred on that date: the Alleged 29 April 2011 Transfer was merely the registration of the Alleged 5 June 2010 Transfer.

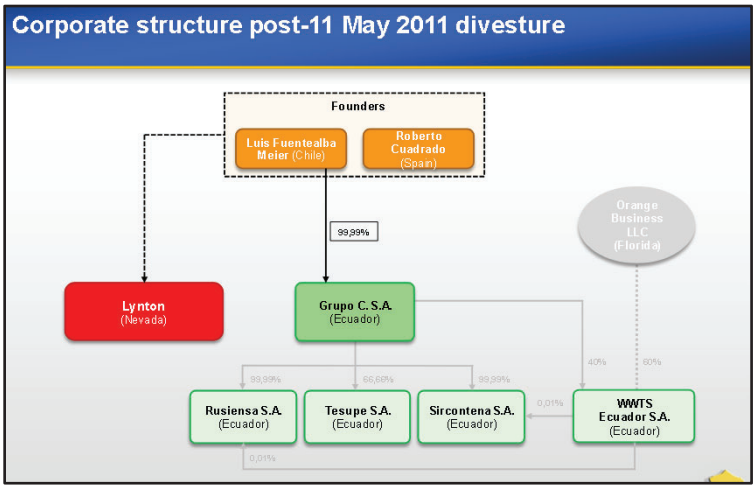
116. As to the second divestiture, the Respondent also argues that, on 11 May 2011, Lynton transferred all its shares in Grupo C to Mr. Fuentealba (the "**Second Alleged Divestiture**").[64] In support of its position, the Respondent produced an extract from the *Superintendencia* records for Grupo C noting that the transfer was registered in Grupo C's books on 11 May 2011 (R-009) as well as a *Carta de Transferencia de Acciones* of the same date (R-008). Since the Respondent argues that Lynton did not own Orange Business, its position is that, following the Second Alleged Divestiture, the Claimant no longer had any ownership interest in the Ecuadorian Companies.[65]

[62] Response to the Request for Bifurcation, ¶ 94; Counter-Memorial, ¶ 175; Rejoinder, ¶ 54; Escritura de protocolización de documentos que ha solicitado el abogado Clemente Miranda García, Acta de la Junta General Extraordinaria y Universal de Accionistas de la Compañia Grupo C S.A. C-Group, 5 June 2010, pp. 6-7 (**C-080**).

[63] Response to the Request for Bifurcation, ¶ 94; Counter-Memorial, ¶ 175; Rejoinder, ¶ 54; Superintendencia de Compañías, Valores y Seguros, Kardex de Accionistas Grupo C S.A., 4 April 2024 (**C-012**,); Letter from Grupo C S.A. to the Superintendencia de Compañías, Valores y Seguros, 28 April 2011 (**C-144**). According to the letter, the Sircontena's transfer of Grupo C shares back to Lynton was recorded in its books on "June 12, 2011". The Claimant position is that the year "2011" is a clerical error and should be read as "2010" as the Superintendencia would not have recorded a transaction that had not yet occurred (Counter-Memorial, fn. 186).

[64] Request for Bifurcation, ¶ 65, Memorial, ¶¶ 87-88; Carta de transferencia de acciones del Grupo C S.A. C-Group, 11 May 2011 (**R-008**); Extract from Ecuador's Companies Register (Superintendencia de Compañías) for Grupo C S.A. C-Group (**R-009**).

[65] Memorial, ¶¶ 98-105; First Witness Statement of Roberto Cuadrado, ¶ 30 (**CWS-1**); Corporate documents of Orange Business, Articles of Organization of Orange Business LLC of 2009, art. 5 (**R-073**); Certificate of Orange Business on foreign shareholder of 28 May 2010 (**R-074**).



Source [66]

117. The Claimant argues, on the other hand, that the Second Alleged Divestiture was never formalized, "as evidenced by the fact that it does not appear in the records of the *Superintendencia*" and the Claimant remained listed as owner of Grupo C's shares until 2016.[67] In its Counter-Memorial, the Claimant explains that the operation was not a transfer but a "pledge [of] Grupo C's shares to Mr. Fuentealba as security for the debt", which was incurred by WWTS Ecuador to buy gaming equipment in Ecuador, which "Mr. Fuentealba had personally guaranteed". Accordingly, la *Carta de Transferencia de Acciones* was signed and "served as a guarantee" for the debt, but the shares were not transferred. Since the debt was properly satisfied, there was no need to register the share transfer.[68] According to the Claimant, the same *Carta de Transferencia de Acciones* was later used in 2016, when Mr. Fuentealba decided to invest in a nightclub venture in an old location owned by Grupo C and Mr. Cuadrado agreed to transfer the Grupo C shares to him.[69]

118. It is not disputed by the Parties that this shares-transfer was registered in the *Superintendencia* public records only in 2016.

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[66] Respondent's presentation for the opening submission at the Hearing, slide 40.

[67] Response to the Request for Bifurcation, ¶ 95; HT(EN), Day 1, p. 102, 3-22; Superintendencia de Compañías Valores y Seguros, Nómina de Accionistas de Grupo C S.A. C-Group, 2011 (**C-148**); Superintendencia de Compañías Valores y Seguros, *Nómina de Accionistas de Grupo C S.A. C-Group*, 2012 (**C-149**); Superintendencia de Compañías Valores y Seguros, *Nómina de Accionistas de Grupo C S.A. C-Group*, 2013 (**C-150**); Superintendencia de Compañías Valores y Seguros, *Nómina de Accionistas de Grupo C S.A. C-Group*, 2014 (**C-151**); Superintendencia de Compañías Valores y Seguros, Nómina de Accionistas de Grupo C S.A. C-Group, 2015 (**C-152**); Superintendencia de Compañías Valores y Seguros, *Nómina de Accionistas de Grupo C S.A. C-Group*, 2016 (**C-153**); Letter from the Superintendencia de Compañías Valores y Seguros to Grupo C regarding ownership of Grupo C S.A. C-Group, 28 May 2012 (**C-154**).

[68] Counter-Memorial, ¶ 91; Third Witness Statement of Roberto Cuadrado, ¶ 23 (**CWS-3**).

[69] Counter-Memorial, ¶ 92; Third Witness Statement of Roberto Cuadrado, ¶ 23 (**CWS-3**).

E. THE CIRCUMSTANCES AROUND THE 2011 EXECUTIVE DECREE

119. On 17 January 2011, the Ecuadorian President Correa requested the Constitutional Court to approve a *Consulta Popular* to abolish gaming in Ecuador.[70] According to the Respondent, President Correa had announced its intention to prohibit gambling during a radio appearance on 22 June 2010.[71]

120. On 15 February 2011, a closely divided Constitutional Court issued its opinion concerning the proposed question's propriety and required Correa to reformulate the question to elicit any emotional language.[72] The Constitutional Court also clarified that the opinion did "not imply a material statement with regard to later rulemaking actions, which as a consequence of the popular mandate may be made" (in its Spanish original: "*no implica un pronunciamiento material respecto de actos normativos posteriores que, como consecuencia del mandato popular se expidan*").[73]

121. On 20 April 2011, in preparation of the Consulta Popular, a national survey was carried out and it predicted that people would have voted to abolish gambling business in Ecuador.[74]

122. On 7 May 2011, the Consulta Popular was held and Ecuadorian citizens were asked to vote on the following topic "are you in favor of a national ban on for profit gaming, including casinos and gaming salons?".[75] The specific content of the question was: "Do you agree that businesses devoted to games of chance, such as casinos and gaming halls, should be banned in the

[70] Notice of Arbitration, ¶ 39.

[71] Memorial, ¶ 174; El Universo, *Correa dijo que eliminará juegos de azar en el país*, 23 June 2010 (**R-012**); El Mundo, *Ecuador quiere prohibir los juegos de azar*, 23 June 2010 (**R-013**); El Tiempo, '*Creo que los juegos de azar y el consumo de alcohol disminuyen el nivel de vida en una sociedad', dijo el presidente Rafael Correa*, 22 June 2010 (**R-011**); BBC News Mundo, *Ecuador: Domingos sin licor, excepto en restaurantes*, 4 July 2010 (**R-014**).

[72] The original text of President Correa's proposal read: "*con la finalidad de evitar que los juegos con fines de lucro se conviertan en un problema social, especialmente en los segmentos más vulnerables de la población, ¿Está usted de acuerdo en prohibir en su respectiva jurisdicción cantonal los negocios dedicados a juegos de azar, tales como casinos y salas de juego*?" (translation: "In order to prevent games of chance for profit from becoming a social problem, especially in the most vulnerable segments of the population, do you agree to prohibit businesses dedicated to games of chance in your respective cantonal jurisdiction, such as casinos and card rooms) (Notice of Arbitration, ¶¶ 39-40); Rafael Correa Delgado, Presidente Constitucional de la República, Oficio No. T.5715-SNJ-11-55, 17 January 2011 (**C-015**).

[73] Notice of Arbitration, ¶¶ 45-46; Corte Constitucional del Ecuador, Dictamen No 001-DCP-CC-2011, Caso No. 0001-11-CP, 15 February 2011 (**C-024**).

[74] Memorial, ¶ 181; Yogonet Latinoamérica, *Ecuador: las encuestan dan ganador a Correa y dejan pocas aspiraciones a los casinos*, 25 April 2011 (**R-018**).

[75] Notice of Arbitration, ¶ 44, 47; Registro Oficial 49, Resultados del Referéndum y Consulta Popular 2011, 13 July 2011 (**R-019**).

country?".[76] The majority of the population gave an affirmative answer.[77] On the very same day, President Correa affirmed that the ban was not going to be "sudden" and the procedure could have taken one or two years.[78]

123. However, (i) on 29 July 2011, the vice Minister of Internal security ordered searches, confiscations and raids on premises conducting gambling activities;[79] and (ii) on 9 September 2011, Correa issued the 2011 Executive Order providing that:

> *Para el caso de casinos ubicados dentro de los hoteles de lujo y primera categoría, o en locales que tengan acceso directo o desde los hoteles formando una sola unidad turística, así como para el caso de las salas de juego (bingo -mecánicos) que se dediquen exclusivamente al juego mutual de bingo, que cuenten con registros vigentes y autorizados por el Ministerio de Turismo para su funcionamiento, tendrán el plazo máximo improrrogable de hasta seis meses, contados a partir de la publicación del presente decreto ejecutivo en el Registro Oficial, para el cese de sus actividades de negocio o comerciales y consiguiente cierre de sus establecimientos*.
>
> Translation: In the case of casinos located inside luxury and first-class hotels, or in premises that have direct access or from hotels forming a single tourist unit, as well as in the case of gaming halls (bingo - machines) that are dedicated exclusively to the mutual game of bingo, which have current registrations and are authorized by the Ministry of Tourism for their operation, a maximum non-extendable period of up to six months, counted from the publication of this executive decree in the Official Registry, for the cessation of their business or commercial activities and consequent closure of their establishments shall be granted.[80]

124. On 12 October 2011, the Ecuadorian *Asamblea Nacional* initiated work on a legislative reform of the existing gaming law (referred to as "Tourism Law"), as the authorization of the gaming under the current law was no longer aligned with the will of the population.[81] The legislative project was referred to the Permanent Special Commission of Justice and Structure of the State that confirmed that the *Asamblea Nacional* was the competent body to revoke the Tourism Law. However, the legislative project revoking the Tourism Law was never approved by the *Asamblea Nacional*.[82]

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[76] Notice of Arbitration, ¶ 45; Corte Constitucional del Ecuador, Dictamen No 001-DCP-CC-2011, Caso No. 0001-11-CP, 15 February 2011 (**C-024**).

[77] Notice of Arbitration, ¶ 47; First Witness Statement of Roberto Cuadrado, ¶ 43 (**CWS-1**).

[78] Notice of Arbitration, ¶ 48; Statement of Claim, ¶ 33; El Telegrafo, *Ecuador será el segundo país en Latinoamérica en prohibir los casinos***,** El Telégrafo, 21 May 2011, (**C-010**).

[79] Statement of Claim, ¶ 34; First Witness Stament of Roberto Cuadrado, ¶ 43 (**CWS-1**); El Universo, *Intendencias ya aplican la pregunta 7 de la consulta*, El Universo, 3 August 2011 (**C-016**).

[80] Notice of Arbitration, ¶ 49.

[81] Notice of Arbitration, ¶ 52; Statement of Claim, ¶ 36; Memorando No. PAN-FC-01-220, Proyecto de Ley Derogatoria en materia de casinos y salas de juego, 8 December 2012 (**C-018**).

[82] Notice of Arbitration, ¶¶ 52-55; Comisión Especializada Permanente de Justicia y Estructura del Estado, Informe para primer debate del Proyecto de Ley Derogatoria en Materia de Casinos y Salas de Juego, Oficio No. 805-CEPJEE-P, 13 March 2012 (**C-019**).

125. The Claimant alleges that, approximately six months after the 2011 Executive Order, President Correa sent the national police to seize all gaming equipment and to shut down all gaming businesses around the country, including those of the Ecuadorian Companies.[83] Specifically, according to Mr. Cuadrado, on 9 March 2012, the Ecuadorian police entered Lynton's premises, seized and destroyed the gaming equipment, and consequently shut down all operations, which have remained suspended since that date.[84]

126. The Claimant's position is that "Ecuador's conduct completely shut down Lynton's operations", "eliminated Lynton's investments and gaming businesses in Ecuador and, equally, its business opportunities in Mexico and the United States".[85] Accordingly, on 17 November 2020, Lynton notified the dispute arising out of the Measures to Ecuador.[86]

[83] Notice of Arbitration, ¶ 56; Video of National Police Seizing Gaming Businesses and News Coverage (**C-071**).

[84] First Witness Statement of Mr. Cuadrado, ¶¶ 49-51 (**CWS-1**).

[85] Statement of Claim, ¶ 41.

[86] Notice of Arbitration, ¶ 76; Letter to Dr. Íñigo Salvador Crespo, Procurador General de la República del Ecuador, from José A. Ortiz, Attorneys for Lynton, 17 November 2020 (**C-003**).

V. THE RESPONDENT'S JURISDICTIONAL OBJECTIONS

127. Through the Procedural Order No. 5, the Tribunal decided to bifurcate four jurisdictional objections raised by the Respondent, specifically asserting that the Tribunal lacks jurisdiction: (**B**) pursuant to the denial of benefits clause contained in Article I(2) of the Treaty; (**C**) *ratione personae* because the Claimant lacked standing (*ius standi*) at the time of the Notice of Arbitration; (**D**) *ratione materiae* because the Claimant neither owned nor controlled the alleged investment at the time of the Notice of Arbitration; and (**E**) because the corporate restructuring carried out by the Claimant constitutes an abuse of rights that precludes the Tribunal's jurisdiction.

128. As a preliminary matter, the Parties' positions on the burden of proof, applicable law and relevant time in relation to the four jurisdictional objections are addressed in section **A** below.

A. BURDEN OF PROOF, APPLICABLE LAW AND RELEVANT TIME WITH RESPECT TO THE TRIBUNAL'S JURISDICTION

1. The Respondent's position

(a) The burden of proof

129. The Respondent acknowledges that it bears the burden of substantiating its jurisdictional objections.[87] However, it asserts that, having established these objections *prima facie* during the bifurcation phase, as required under the *Glamis Gold* standard, the burden shifted back to the Claimant. The latter, Respondent contends, is now compelled to provide evidence to rebut these objections according to the standard preponderance of evidence.[88] In support of its position, the Respondent cites, among the others, the *Philip Morris* case, where the Tribunal held that "to the extent that Respondent has established a prima facie case [for its objections] the Claimant [has] to rebut this evidence".[89]

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[87] Memorial, ¶¶ 11-12; *Cascade Invs. NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, 20 September, ¶ 357 (**RL-053**); *Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 495 (**RL-037**); *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Philippines* [II], ICSID Case No. ARB/11/12, Award of 10 December 2014, ¶ 299 (**RL-041**).

[88] Memorial, ¶¶ 13-15; *Glencore Int'l A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 669 (**RL-055**); *PJSC DTEK Krymenergo v. Russian Fed'n,* PCA Case No. 2018-41, Award of 1 November 2023, ¶ 568 (**RL-056**); *PNG Sustainable Dev. Program Ltd. v. Indep. State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award, 5 May 2015, ¶ 255 (**RL-057**).

[89] Memorial, ¶ 16; *Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 495 (RL-037); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [II]*, ICSID Case No. ARB/11/12, Award of 10 December 2014, ¶ 299 (**RL-041**).

130. It is the Respondent's case that the burden of proving key jurisdictional facts, for the purpose of establishing positively that all *rationae materiae* and *rationae personae* jurisdictional requirements are met, lies without any doubt on Lynton.[90] According to the Respondent, this was also confirmed by the Tribunal's Procedural Order No. 7, where it was stated that it was Claimant's burden to establish "its legal incorporation and status" as well as its "legal title or control over the Ecuadorian companies".[91]

131. The Respondent also argues that the Claimant failed to establish the essential jurisdictional facts of its case. It adds that, since the Claimant did not produce evidence related to these facts, despite the Tribunal's order for document production, the Tribunal should draw adverse inferences.[92]

132. Similarly, the Respondent argues that, although it initially bore the burden of proof regarding the denial of benefits and abuse of rights, this burden shifted from the Respondent to the Claimant after the Respondent convinced the Tribunal that its jurisdictional objections appear, *prima facie*, to be serious and substantial.[93]

133. With specific reference to the abuse of process objection, the Respondent argues that the burden-shifting is necessary because "it is the claimant who normally has access to the relevant and material evidence" and, thus, "[a]bsent rebuttal evidence from the claimant, the proper fact-finding method is adverse inference".[94]

134. The Respondent rejects the Claimant's position that the burden can shift only after the Respondent "satisfies" its burden of proof. The Respondent contends such interpretation would mean that burden-shifting cannot occur until after a final determination of the case, which, it argues, is illogical.[95]

135. The Respondent also opposes the Claimant's reliance on the *Chevron* and *Pac Rim* cases to assert that the Respondent must disprove the Claimant's allegations on jurisdiction. The Respondent

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[90] Memorial, ¶¶ 10-14; Reply ¶ 33; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* [II], ICSID Case No. ARB/11/12, Award, 10 December 2014 , ¶ 299 (**RL-041**); *Kimberly-Clark Corp. v. Bank Markazi Iran, Novzohour Paper Indus., Gov't of the Islamic Republic of Iran*, IUSCT Case No. 57, Award No. 46-57-2, 25 May 1983, ¶ 15 (**RL-050**); *Abaclat and Others (formerly Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011, ¶ 678 (**RL-051**); *Tulip Real Estate and Dev. Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue of 5 March 2013, ¶ 48 (**RL-052**); *Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility of 17 December 2015, ¶ 495 (**RL-037**).

[91] Reply, ¶ 34; Procedural Order No. 7, Tribunal's Decision on Claimant's Requests, 12 July 2024, ¶¶ 7 and 21.

[92] Reply, ¶ 36; Procedural Order No. 7, Tribunal's Decision on Claimant's Requests, 12 July 2024, ¶¶ 7, 10, 21.

[93] Memorial, ¶¶ 15-20; 197; Reply, ¶ 35; *Alverley Invs. Ltd. and Germen Props. Ltd. v. Romania*, ICSID Case No. ARB/18/30, Award of 16 March 2022, ¶ 364 (**RL-039**).

[94] Reply, ¶ 322.

[95] Reply, ¶ 35; Counter-Memorial, ¶ 6.

argues that: (i) in *Chevron,* the tribunal accepted *a prima facie* approach only on whether the alleged breaches fell under the applicable treaty's scope, whereas, in this case, the Claimant has failed to establish the jurisdictional prerequisites under the Treaty; and (ii) the *Pac Rim* tribunal explicitly held that "all relevant facts" supporting the tribunal's jurisdiction "must be established by the Claimant" and not "merely assumed".[96]

(b) The law applicable to jurisdictional objections

136. The Respondent argues that the Tribunal's jurisdiction is derived solely from the provisions of the Treaty, which outlines the specific prerequisites for jurisdiction. These provisions are to be interpreted in light of international law, including its general principles. It also acknowledges that certain Treaty's terms require *renvoi* to domestic law, which provides the substantive content for those terms while ensuring consistency with the Treaty's purpose and international law. The Respondent notes that scholars as Monique Sasson and Zachary Douglas have emphasized this interplay, illustrating that domestic law defines the scope and existence of rights under investment treaties' categories, which are then validated by international law. This is particularly useful where corporate rights are involved, since these rights are "creatures" of domestic law. The Respondent clarifies that, while *renvoi* to Nevada law helps define terms like the "good standing" and "legal capacity to sue" of a Nevada's LLC, the Tribunal's determination of jurisdiction and legal standing of the Claimant ultimately relies on the Treaty and international law, countering the Claimant's misinterpretation of the Respondent's position.[97]

137. Moreover, the Respondent asserts that the Claimant's position on this issue appears "inconsisten[t]". In the Respondent's view, while arguing that the Treaty is the sole source of law, the Claimant simultaneously admits – without offering any authority – that national law may be used only to "supplement" the Treaty. However, throughout if briefs, the Claimant refers to Nevada law to support its position.[98] The Respondent further contends that the case law cited by the Claimant does not substantiate its arguments.[99]

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[96] Memorial, ¶¶ 21-23; *Pac Rim Cayman v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections of 1 June 2012, ¶¶ 2.8-2.10 (**CL-018**); *Chevron Corp. (USA) and Texaco Petroleum Co. (USA) v. The Republic of Ecuador (I)*, PCA Case No. 34877, Interim Award, 1 December 2008, ¶¶ 93, 98, 102-103 (**CL-020**).

[97] Memorial, ¶¶ 25-28; Reply, ¶ 25; HT(EN), Day 1, p. 14, 8-13; p. 15, 2-9; M. Sasson, *Substantive law in investment treaty arbitration: the unsettled relationship between international law and municipal law* (2nd ed., 2017) (**RL-050**), Z. Douglas, *The Hybrid Foundations of Investment Treaty Arbitration,* 2003 British Yearbook of International law, pp. 197-213 (**RL-060**).

[98] Reply, ¶¶ 21-22, 30.

[99] In particular the Respondent notes that: (i) *ELSI* and *Link Trading* concern the interpretation and application of substantive standards of treatments of the applicable treaty and only explain that national law cannot be used to shield responsibility under international law; and (iii) *Middle East Cement* acknowledges that there might be situations where it is appropriate to make *renvoi* to domestic law (Reply, ¶¶ 26-29).

(c) The relevant time to assess jurisdictional requirements

138. The Respondent contends that, under the theory of "offer and acceptance", the relevant time to assess whether a claimant satisfies the jurisdictional requirements of an investment treaty is the date the arbitration is initiated through the filing of the notice arbitration. According to the Respondent, it is through this notice that an investor accepts the host State's offer to arbitrate, as contained in the relevant treaty. If any of the jurisdictional requirements are not met on that date, consent to arbitrate and the tribunal's jurisdiction are not established. Consequently, the Respondent argues that lack of jurisdiction at the commencement of arbitration cannot later be remedied by unilateral actions of one of the parties.[100]

139. The Respondent further clarifies that a claimant's legal standing (*ius standi*) is a jurisdictional requirement and must also be assessed at the time the arbitration is initiated.[101]

140. In response to the Claimant's attempt to move the relevant date for assessing the Tribunal's jurisdiction to the time of the alleged breaches of the Treaty, the Respondent argues that the case law cited by the Claimant are inapplicable due to the differences in the underlying factual circumstances.[102] Specifically, the Respondent notes that, in the cases cited by the Claimant,

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[100] Memorial, ¶¶ 29-37; Reply, ¶¶ 12-20; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 409 (**RL-061**); *Border Timbers Ltd., Timber Products Int'l (Private) Ltd., and Hangani Dev. Co. (Private) Ltd. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Award, 28 July 2015, ¶¶ 198-199 (**RL-062**); *Methanex Corp. v. United States of Am*., Partial Award, 7 August 2002, ¶ 120 (**RL-063**); *Giovanni Alemanni and Others v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014, ¶ 305 (**RL-064**); *National Grid PLC v. The Argentine Republic*, Decision on Jurisdiction, 20 June 2006, ¶ 49 (**RL-065**); *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic* (I), PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, ¶¶ 220-223 (**RL-066**); *Alcor Holdings Ltd. v. The Czech Republic,* PCA Case No. 2018-45, Award of 2 March, ¶¶ 251-254 (**RL-068**); *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia (I)*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006 , ¶ 159 (**CL-003**); *AIG Capital Partners, Inc. and CJSC Tema Real Estate Co. v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, ¶ 9.3.4, at 31 (**RL-069**); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 (Buergenthal, Alvarez, Hossain), ¶ 255 (**RL-070**); *Arrest Warrant Case (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports 2002, ¶ 26 (**RL-067**); *Finley Resources Inc., MWS Mgmt. Inc., and Prize Permanent Holdings, LLC v. United Mexican States*, ICSID Case No. ARB/21/25, Decision on Claimant Application for Interim Measures, 26 January 2022, ¶¶ 35, 34, 41-42 (**RL-071**); *Detroit Int'l Bridge Co. v. Gov't of Canada*, PCA Case No. 2012-25, Award on Jurisdiction, 2 April 2015, ¶ 321 (**RL-072**); *The Renco Group, Inc. v. Republic of Peru (I),* ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction of 15 July 2016, ¶¶ 158-160 (**RL-073**); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan I*, ICSID Case No. ARB/03/29, Award on Jurisdiction of 14 November 2005, ¶ 178 (**RL-074**).

[101] Memorial, ¶¶ 120-124; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, ¶¶ 60-61 (**RL-032**); *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ¶ 31 (**CL-012**); *Alcor Holdings Ltd. v. The Czech Republic,* PCA Case No. 2018-45, Award, 2 March 2022, ¶¶ 251, 252, 273, 283 (**RL-068**).

[102] Reply, ¶¶ 209-214; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶¶ 142, 145, 153 (**CL-174**); *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, ¶¶ 117-118, 124; *Link-Trading Joint Stock Company v. Department for*

where tribunals assessed jurisdiction based on the date of the applicable treaty's violations, exceptional circumstances existed. For instance, those cases involved situations where the investor's loss of jurisdictional requirements resulted directly from the host state's treaty violations.[103] In contrast, the Respondent asserts that in the present case – similarly to the leading cases *Alcor Holdings Ltd. v. Czech Republic* and *Aven v. Costa Rica* – the Claimant's failure to meet the jurisdictional requirements at the time the Arbitration was initiated stemmed from its own actions, including the divestiture process from the Ecuadorian Companies and its failure to maintain the corporation's good standing in Nevada. Thus, the Respondent contends that, as recognized by the tribunals in *Alcor* and *Aven*, there is no justification to anticipate the relevant date for jurisdictional assessment based on "special circumstances".[104]

141. The Respondent also rejects the Claimant's reliance on Article VI(8) of the Treaty, arguing that it is "completely irrelevant" and "inapplicable" because it serves only to establish the foreign nationality of local companies subject to foreign control in ICSID arbitrations.[105]

142. The Respondent further asserts that the same temporal rules apply to the conditions for a denial of benefits clause, as these relate to the Tribunal's jurisdiction as well.[106] The Respondent refers to, *inter alia*, the decision in *Ulysseas v. Ecuador*, which dealt with the same denial of benefits provision under the same Treaty. In that case, the tribunal determined that the conditions must be met as of the date of the notice of arbitration.[107] Conversely, the Respondent disputes the relevance of the *Big Sky* decision cited by the Claimant, arguing that it provides no basis for assessing this

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Customs Control of the Republic of Moldova, Ad Hoc (UNCITRAL), Final Award of 18 April 2002, ¶¶ 1, 43, 55 (**CL-022**).

[103] Reply, ¶¶ 137-148; *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 22 March 2013, ¶ 139-141, 251-252 (**CL-173**); *B-Mex, LLC Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award of 19 July 2019, ¶ 145, 151-152; *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction of 6 July 2007, ¶¶ 174-184 (**CL-056**); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006, ¶¶ 123-132 (**CL-194**)

[104] Reply, ¶ 134; HT(EN), Day 1, p. 16, 12-24; p. 30, 8-24; p. 32, 12-24; *Alcor Holdings Ltd. v. The Czech Republic,* PCA Case No. 2018-45, Award, 2 March 2022, ¶¶ 251-257, 283 (**RL-068**); *David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, Giacomo A. Buscemi, David A. Janney and Roger Raguso v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018, ¶¶ 274, 296-301 (**RL-076**).

[105] Reply, ¶¶ 215-216; HT(EN), Day 1, p. 108, 3-24; p. 109, 1-8; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 165 (**CL-027**); C. H. Schreuer, *The ICSID convention. A commentary* (2013), ¶¶ 760-769 (**RL-102**).

[106] Reply, ¶¶ 69-79.

[107] Memorial, ¶ 76; Reply, ¶ 73; *Ulysseas, Inc. v. The Republic of Ecuador*, PCA Case No. 2009-19, Interim Award, 28 September 2010, ¶¶ 172-174 (**RL-019**); *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 250 (**RL-100**); *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Award of 28 February 2024, ¶¶ 6, 164 (**RL-101**).

issue or supporting the Claimant's position that it is sufficient for the conditions rendering a denial of benefits clause inapplicable to be satisfied at any point during the life of the investment.[108]

143. Moreover, the Respondent emphasizes that the present tense wording of the denial of benefits clause in Article I(2) of the Treaty indicates that the determination of the host State's entitlement to deny benefits must be made at the time consent to arbitration is formed.[109]

2. The Claimant's position

(a) The burden of proof

144. The Claimant argues that the Respondent retains the ultimate burden to prove all its jurisdictional objections and relies on the decisions in *Pac Rim* and *Fraport* to supports its position. The Claimant clarifies that "the burden does not shift until Respondent satisfies its burden of proof regarding its jurisdictional objections".[110]

145. Against the Respondent's argument that the Tribunal's decision to bifurcate its jurisdictional objections implies that these objections are *prima facie* proven and that the burden of disproving them has shifted, the Claimant emphasizes that, in Procedural Order No. 5 on the Request for Bifurcation, the Tribunal explicitly clarified that "[n]othing asserted in this Procedural Order is to be understood as a final determination by the Tribunal on any matters other than the issue of bifurcation".[111]

146. With specific reference to the abuse of process jurisdictional objection, the Claimant relies, among the others, on the *Chevron* case, where the Tribunal held that: "[a] claimant is not required to prove that its claim is asserted in a non-abusive manner; it is for the respondent to raise and prove an abuse of process as a defense".[112]

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[108] Reply, ¶¶ 76-77; Counter-Memorial, ¶¶ 29-30; *Big Sky Energy Corporation v. Republic of Kazakhstan*, ICSID Case No. ARB/17/22, Award, 24 November 2021 (Cremades, Alexandrov, Tomka), ¶¶ 276, 281, 287-288 (**CL-164**).

[109] Reply, ¶¶ 70-71; *Nasib Hasanov v. Georgia*, ICSID Case No. ARB/20/44, Decision on Respondent's Inter-State Negotiation Objection, 19 April 2022 (Shore, Alexandrov, Rowley), ¶ 88(i) (**RL-099**).

[110] Counter-Memorial, ¶¶ 3-6; *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.11 (**CL-147**); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶ 299 (**CL-162**).

[111] Counter-Memorial, ¶ 4; Procedural Order No. 5, ¶ 17.

[112] Counter Memorial, ¶¶ 164-167; *Chevron Corp. (USA) and Texaco Petroleum Co. (USA) v. The Republic of Ecuador (I)*, PCA Case No. 34877, Interim Award, 1 December 2008, ¶ 139 (**CL-020**).; *UAB E energija v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of the Tribunal, 22 December 2017, ¶ 541 (**CL-187**); *Immunities and Criminal Proceedings (Equatorial Guinea v. France),* Preliminary Objections Judgment, 6 June 2018, 2018 ICJ Rep. 282, ¶ 150 (**CL-188**); *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Separate opinion of Judge Higgins, 6 November 2003, 2003 ICJ Rep. 234, ¶ 33 (**CL-189**).

147. Similarly, with respect to the denial of benefits clause, the Claimant asserts that it is the Respondent's burden to affirmatively prove the prerequisites for the clause to apply, while the Claimant "is not required to prove a negative, but rather has only to defend against the Respondent's supposed proofs".[113]

(b) The applicable law

148. The Claimant asserts that the Respondent's position regarding the applicable law is "inconsistent" and emphasizes that the dispute is governed the Treaty and international law, as provided by Article VII(1) of the Treaty. To support this position, the Claimant references various cases underscoring that domestic law cannot supersede the Treaty and international law. However, the Claimant acknowledges that interpreting certain legal terms within the Treaty may occasionally require "supplement[ation]" from national law.[114]

(c) The relevant time to assess jurisdictional requirements

149. The Claimant relies on Article VI(8) of the Treaty providing that:

> For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof that immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25 (2) (b) of the ICSID Convention.

150. The Claimant argues that Article VI(8) of the Treaty is clear in establishing that the relevant time to assess whether a company qualifies as a foreign investor under the Treaty is "immediately before" the alleged violations of the Treaty. According to the Claimant, this implies that all jurisdictional requirements, including the Claimant's standing, shall be assessed on that day.[115]

151. The Claimant contends that the Respondent's position – asserting that Article VI(8) applies solely to ICSID arbitration – is inconsistent with the text of the Article. Specifically, the provision explicitly refers to "an arbitration held under paragraph 3", *i.e.,* arbitrations conducted under the ICSID Rules, the UNCITRAL Rules on "any other arbitration rules".[116]

152. The Claimant further contends that the reference to Article 25(2)(b) of the ICSID Convention within Article V(8) merely reflects the Treaty's adoption of the definitional framework under

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[113] Counter-Memorial, ¶ 26; Expert Report of Professor Andrea Bianchi, ¶ 11 (**CER-3**).

[114] Counter-Memorial, ¶¶ 7-13; *Elettronica Sicula S.p.A*. (ELSI) (United States of America v. Italy), Judgment, 20 July 1989, ¶ 73 (**CL-163**); *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, Ad Hoc, Final Award, 18 April 2002, ¶ 62 (**CL-150**); *Middle East Cement Shipping and Handling Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 87 (**CL-075**).

[115] Counter-Memorial, ¶¶ 132-134.

[116] Rejoinder, ¶ 13; HT(EN), Day 1, p. 60, 11-25

Article 25(2)(b) for determining a "National of another Contracting State". However, the Claimant argues that this reference does not limit the temporal scope outlined in Article VI(8) to ICSID arbitrations. Instead, the Claimant emphasizes that the broader language of the Treaty supports its application beyond ICSID-specific contexts.[117]

153. Additionally, the Claimant references case law supporting the view that, in certain circumstances, a tribunal should assess the jurisdictional elements based on the date of the treaty's breach rather than the date of the notice of arbitration. Among others, the Claimant cites the *Aven* and *Alcor* cases, where those tribunals recognized that an expropriation causing an investor to lose its investment constitutes a "special circumstance". In such cases, the tribunals assessed jurisdiction as of the date of the breach, reasoning that failing to do so would "allow the defendant State to profit from its own wrong" since the loss of jurisdictional requirements resulted from the respondent's actions.[118] Similarly, in the *Kim v. Uzbekistan case* and *Gea v. Ukraine*, the tribunals held the relevant time for an investor to demonstrate ownership of investments was the date of the breach, not the date arbitration was initiated, while the *Link Trading v. Moldova* award identified the date of the expropriation as the critical moment to determine the claimant's standing.[119]

154. The Claimant asserts that the circumstances of the present case qualify as "special circumstances" because the Respondent prohibited and closed the Claimant's business in Ecuador, effectively preventing the Claimant from seeking redress in Ecuadorian courts. As a result, the Tribunal is the only forum where Claimant can pursue its claim.[120]

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[117] Rejoinder, ¶¶ 15-16.

[118] Rejoinder, ¶¶ 20-21; Counter-Memorial, ¶¶ 137-139; HT(EN), Day 1, p. 16, 12-22; *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2008, ¶ 301 (**CL-177**); *Alcor Holdings Ltd. v. The Czech Republic*, PCA Case No. 2018-45, Award, 2 March 2022, ¶¶ 275-275 (**RL-68**); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 113 (**CL-174**); *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 22 March 2013, ¶ 251 (**CL-173**); *B-Mex, LLC Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶ 145 (**CL-175**); *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, ¶ 182 (**CL-056**); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 ¶ 628 (**CL-100**).

[119] Counter-Memorial, ¶¶ 77-84; *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 22 March 2013, ¶ 251 (**CL-173**); *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, Ad Hoc, Final Award, 18 April 2002, ¶ 55 (**CL-150**); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 113 (**CL-174**); *B-Mex, LLC Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶ 145 (**CL-175**); *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, ¶ 124 (**CL-152**); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006, ¶ 131 (**CL-194**).

[120] Rejoinder, ¶¶ 21-22; Counter-Memorial, ¶ 141; Expert Report of Marritt Fox, pp. 30-37 (**CER-4**).

155. Regarding the denial of benefits clause, the Claimant opposes the Respondent's argument that the relevant date to assess its requirements is the filing of the notice of arbitration. The Claimant points to the *Big Sky* case, where the tribunal rejected an identical argument from the Respondent reasoning that such an approach would allow a host State to annihilate the business activities of a foreign investor and then shield itself from liability through the denial of benefits clause.[121]

156. The Claimant also argues that a good faith interpretation of the Treaty, in accordance with Article 31(1) of the Vienna Convention on the Law of the Treaties, leads to the same conclusion. Specifically, interpretating the denial of benefits clause as requiring the foreign investor to have a substantial business in the host State at the time the arbitration is initiated would effectively bar claims if those business activities ceased due to the host state's breaches. Therefore, according to the Claimant, once "substantial business activities have been ascertained at any point during the life of the investment", the denial of benefits clause should not be invoked.[122]

157. In light of the foregoing, the Claimant asserts that the relevant date to assess the jurisdictional requirements in the Arbitration is the date of the alleged expropriation, *i.e.*, when the 2011 Executive Order was issued or, at most, the date of the radio communication by President Correa (22 June 2010).[123]

B. THE APPLICATION OF THE DENIAL OF BENEFITS CLAUSE UNDER ARTICLE I(2) OF THE TREATY

158. The Respondent argues that the Tribunal lacks jurisdiction under Article I(2) of the Treaty, which provides:

> 2. Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.

159. According to this provision, a Party has the right to deny the benefits of the Treaty to a company of the other Party if that company: (i) is controlled by nationals of a third country, and (ii) does not have substantial business activities in the country of incorporation.

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[121] Counter-Memorial, ¶¶ 29-30; *Big Sky Energy Corporation v. Republic of Kazakhstan*, ICSID Case No. ARB/17/22, Award, 24 November 2021, ¶ 276 (**CL-164**).

[122] Counter-Memorial, ¶¶ 31-32; *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶ 170 (**CL-165**); *Nuclear Test Case (Australia v. France),* Judgment, 20 December 1974, 1974 ICJ Rep. 253, § § 46-49 (**CL-166**).

[123] Rejoinder, ¶¶ 17-19.

160. The fact that the Claimant is controlled by a national of Chile and a national of Spain (*i.e.*, third countries with respect to the Parties to the Treaty) is not disputed by the Parties.[124]

161. However, the Parties disagree on whether the Claimant has or has had substantial business activities in the United States.

1. The Respondent's position

(a) The applicability of the denial of benefits clause to holding companies

162. The Respondent rejects the Claimant's argument that the latter qualifies as a "traditional U.S. holding company" of "the exact type" the BIT "was designed to protect" and, therefore, does not fall within the scope of Article I(2) of the Treaty.[125] According to the Respondent, holding companies that merely passively hold shares, without actively performing corporate functions, are fully encompassed within the scope of Article I(2).[126]

163. In particular, the Respondent refers to the U.S. Submittal Letter to the Treaty, where it was explicitly provided that:

> either country may deny the benefits of the Treaty to investments by companies established in the other one that are owned or controlled by nationals of a third treaty if […] the company is a mere shell, without substantial business activities in the home country".[127]

164. According to the Respondent, the U.S. Submittal Letter to the Treaty "does not say that benefits can only be denied to a shell company". Instead, such benefits "can also be denied to something more than a shell that has no substantial business activities in its home country".[128]

165. The Respondent asserts that, being the Claimant a U.S. holding company whose principal activity is to hold shares of companies that are outside the U.S and lacking "business activities" in the United States, it should be denied the benefit of the Treaty.[129]

166. The Respondent argues that its position aligns with established case law. In particular, in *Pac Rim v. El Salvador*, the tribunal denied the benefits of the treaty because: (i) the claimant's principal activities involved holding companies outside the U.S., and it did not even have any subsidiary in the US; (ii) the claimant lacked its own business activities; and (iii) it could not "aggregate to itself the separate activities of other natural or legal persons" just to avoid the invocation of the

[124] Notice of Arbitration, ¶ 28; Response to the Request for Bifurcation, ¶ 1; Memorial, ¶ 40.

[125] Memorial, ¶ 50; Response to the Request for Bifurcation, ¶ 1.

[126] Reply, ¶¶ 80-81.

[127] Memorial, ¶ 50; Submittal Letter of the Ecuador-United States BIT,7 September 1993, p. 4 (**R-003**).

[128] HT(EN), Day 1, p. 17, 1-9.

[129] Memorial, ¶ 51.

denial of benefits clause.[130] The tribunal further noted that Pac Rim was not a traditional holding company but more akin to a shell company, with no employees, no office space, no bank accounts, no board of directors and only two managers.[131]

167. Similarly: (i) in *IC Power v. Peru* and other cases, the tribunal refused to apply the denial of benefits clause to holding companies only after such companies demonstrated substantial business activities *in loco*. These included the presence of locally-based employees, office spaces, bank accounts, contracts with service provides and meeting of directors and shareholders;[132] and (ii) in *Plama v. Bulgaria* and *Aris Minign v. Colombia*, the tribunals emphasized that the claimants did not engage in substantial business activities in their country of registration. Those tribunals also held that this deficiency could not be remedied by the activities of their subsidiaries abroad.[133]

168. Based on the foregoing case-law, the Respondent asserts that Lynton does not fulfill the standard since, as confirmed during the cross-examination of Mr. Cuadrado, Lynton had no employees and no bank account in Nevada, it never paid any taxes or prepared any accounts, there was no lease agreement made in Lynton's name, and it conducted no corporate functions directed at its subsidiaries in the United States. The personal business endeavors of Mr. Cuadrado were completely unrelated to the corporate functions of Lynton in the United States and could not be used to prove Lynton's nature as holding company.[134]

169. The Respondent also notes that the Claimant's expert, Professor Bianchi, does not contest the aforementioned case law. Conversely, according to the Respondent, the expert presented by the Claimant confirms that to avoid the application of a denial of benefits clause, a party must prove activities with "a business character" that go "beyond the activities that are required merely to guarantee its corporate existence" under the applicable law.[135]

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[130] Memorial, ¶ 51; HT(EN), Day 1, p. 115, 1-16; HT(EN), Day 3, p. 19, 5-21; Respondent's Answers to the Tribunal's Questions, ¶ 36; *Pac Rim Cayman v. El Salvador,* ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶¶ 4.63-4.66, 4.74 (**CL-147**); *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, ¶ 169 (**RL-075**).

[131] Reply, ¶ 84*;* HT(EN), Day 1, p. 26, 7-25; *Pac Rim Cayman v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶¶ 4.72, 4.73-4.75, 4.78, 4.92. 7.1 (**CL-147**).

[132] Reply, ¶ 85; Respondent's Answers to the Tribunal's Questions, ¶ 36; *IC Power Ltd and Kenon Holdings Ltd v. Republic of Peru*, ICSID Case No. ARB/19/19, Award, 3 October 2023, ¶¶ 225-230 (**CL-170**); *9REN Holding S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, ¶¶ 174-182 (**CL-168**); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018m ¶¶ 224-229, 253 (**CL-167**).

[133] Reply, ¶¶ 95-96; *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 169 (**RL-075**); *Aris Mining Corp. (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020, ¶ 138 (**RL-022**).

[134] Respondent's Answers to the Tribunal's Questions, ¶¶ 34-36; HT(EN), Day 2, p. 10, 23-24; p. 13, 25; p. 14: 1-2, 24-25; p. 15, 1-2, 18-25; p. 16, 1-2.

[135] Reply, ¶¶ 86-87; Expert Report of Professor Andrea Bianchi, ¶ 14 (**CER-3**).

170. Furthermore, the Respondent rejects that the discussion on holding companies by Professor Fox, the other expert presented by the Claimant, supports the Claimant's position. According to the Respondent, Professor Fox failed to indicate the elements to distinguish a holding company from a shell and seemed to concede that merely holding shares is insufficient; rather additional elements in terms of operation, control and coordination are necessary.[136]

(b) Lynton's business activities in the United States

171. The Respondent contends that the Claimant failed to provide evidence of substantial business activities in the United States, instead relying in its briefs on vague and unsupported assertions. For instance, the Claimant references the witness statements of Mr. Cuadrado, who mentions living part-time in Florida and pursuing gaming operations. However, according to the Respondent, this statement lacks corroboration through concrete evidence of actual business activities.[137]

172. Moreover, according to the Respondent, even if Mr. Cuadrado was conducting business in the United States, this could not be attributable to Lynton because Mr. Cuadrado was a "member", not a "manager" of Lynton. According to Lynton's Articles of Organization, Lynton is a manager-managed LLC and, therefore, only its manger, namely Aldyne Ltd., could conduct business exclusively on its behalf.[138] The Respondent asserts that: (i) Mr. Cuadradro knew very well the difference between a manager and a member because he was the manager of WWTS LLC – the limited liability company established under the laws of the State of Florida, United States ("**WWTS LLC**") and, in this capacity, conducted some business activities on behalf of WWTS LLC in the United States;[139] (ii) Mr. Cuadrado incorrectly referred to himself as President of Lynton in his witness statements, as this title would be incompatible with the authority of the

[136] Reply, ¶ 82; Expert Report of Professor Fox, pp. 3, 8-9 (**CER-4**).

[137] The Respondent contends that the email exchanges cited in the witness statement of Mr. Cuadrado contains only generic language about potential opportunities, without naming any specific company, project, or follow-up actions. Memorial, ¶ 42; First Witness Statement of Mr. Cuadrado, ¶¶ 37-39 (**CWS-1**); Email from M. Gaughan, Cantor Fitzgerald to R. Cuadrado, 19 January 2011; Email from J. Rein, Cantor Fitzgerald to R. Cuadrado, 27 January 2011; Email from J. Rein, Cantor Fitzgerald to R. Cuadrado (**C-008**).

[138] Respondent's Answers to the Tribunal's Questions, ¶¶ 17-26; Articles of Organization of Lynton Trading Ltd., 27 February 2006, at 2 (**R-050**); Lynton's State of Nevada Annual List and Business License Application and Business License, 18 March 2024-28 February 2025, at 3 (**R-052**); Lynton's State of Nevada Annual List and Business License Application, Business License, and Certificate of Revival, 17 August 2023, at 4 (**R-053**); Operating Agreement of Lynton Trading Ltd., 27 February 2006, arts. 6.2, 6.9 (**R-051**).

[139] Respondent's Answers to the Tribunal's Questions, ¶¶ 27-28; Electronic Articles of Organization for WWTS LLC , 9 March 2012 (**R-058**); 2013 Annual Report of WWTS LLC, 1 May 2013 (**R-059**); 2014 Annual Report of WWTS LLC, 1 May 2014 (**R-060**); 2015 Annual Report of WWTS LLC, 30 April 2015 (**R-061**); 2016 Annual Report of WWTS LLC, 25 April 2016 (**R-062**); Certificate of Reinstatement of WWTS LLC, 14 November 2017 (**R-063**); 2018 Annual Report of WWTS LLC, 1 May 2018 (**R-064**); 2019 Annual Report of WWTS LLC, 26 April 2019 (**R-065**); 2020 Annual Report of WWTS LLC, 14 April 2020 (**R-066**); 2021 Annual Report of WWTS LLC, 28 April 2021 (**R-067**); 2022 Annual Report of WWTS LLC, 29 April 2022 (**R-068**); 2023 Annual Report of WWTS LLC, 13 April 2023 (**R-069**); 2024 Annual Report of WWTS LLC, 18 April 2024 (**R-070**).

manager, Aldyine, and, as emerged during the Hearing, is not supported by any evidence in Lynton's corporate books;[140] and (iii) during his cross-examination, Mr. Cuadrado only referred to business opportunities in the United States conducted in the name of WWTS LLC or in his own name, but not in Lynton's name.[141]

173. The Respondent further emphasizes that the Claimant's document production did not substantiate its claims of substantive business activities in the U.S. In this connection, the Respondent contends that, despite being ordered by the Tribunal to produce "[a]ll documents and communications regarding Lynton's business activities in the United States",[142] the Claimant failed to produce any documentation demonstrating engagements in business activities in the U.S. Instead, the Respondent states that the Claimant produced:

a. As to Lynton, documents relating to its creation in 2006, a 2011 shareholder agreement noting its ownership of WWTS Group Inc. ("**WWTS Group**"), and corporate filings from 2024. According to the Respondent, these documents only refer to Lynton's corporate existence, but not to its substantial business.[143]

b. Corporate documents relating to WWTS Group and WWTS LLC and some proof of their activities, including a letter agreement between WWTS LLC and a company named Cantor Fitzgerald, together with related communications from an e-mail address with WWTS.net domain that appears to have been used by Mr. Cuadrado between 2011-2013, including to communicate with Cantor Fitzgerald.[144] However, the Respondent further contends that:

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[140] Respondent's Answers to the Tribunal's Questions, ¶ 28; HT(EN), Day 2, p. 10, 15-22.

[141] HT(EN), Day 3, p. 25, 14-21; Respondent's Answer to the Tribunal's Questions, ¶¶ 25-26; 30-34; 39-41; Agreement between Cantor Fitzgerald & Co. and WWTS LLC, 17 January 2013 (R-035); HT(EN), Day 2, pp. 21-24; p. 26, 8-13; p. 27, 25; p. 28, 1-16; p. 43, 10-16; p. 44, 1-5; p. 46, 22-25; p. 47, 1-16; Email exchange between Roberto Cuadrado and Jon Rein of Cantor Fitzgerald & Co., 13-18 April 2011 (**R-039**); Agreement between Cantor Fitzgerald & Co. and WWTS LLC, 17 January 2013 (**R-035**); Email Exchange between Roberto Cuadrado on behalf of the Lynton Group, and Jose Luis Castro of American Merchant Banking Group, Inc., 22-24 October 2011 (**R-040**); Email Exchange between Roberto Cuadrado on behalf of Lynton and also Camille CheeAwai of Cari Bloom Holdings, LLC , 21 February 2012 (**R-042**).

[142] The Respondent emphasizes that it specified that the document production request included "(1) lease contracts for office premises and contracts with business partners, service providers, and employees, (2) documents concerning payment of salaries and social security contributions, (3) bank statements, financial statements, and federal and state tax returns, and (4) minutes of meetings held by Claimant's members or managers" (Memorial, ¶ 53; Respondent's Redfern Schedule, Request No. 1).

[143] Reply, ¶ 100 (iv); Respondent's Answers to the Tribunal's Questions, ¶¶ 42, 46; Membership certificates of R. Cuadrado and L. Fuentealba Meier of 27 February 2006 (**R-046**); Membership certificates of R. Cuadrado and L. Fuentealba Meier, 27 February 2006 (**R-047**); Lynton's corporate documents regarding members, managers and the resident agent of 2006 (**R-048**); Memorandum of Inaugural Meeting of Lynton, 27 February 2006 (**R-049**); Lynton's corporate documents of 2006 (**R-050**); Operating Agreement for Lynton, 27 February 2006 (**R-051**); Shareholder agreement between Lynton Trading and WWTS Group Inc., 4 May 2011 (**R-055**); Electronic Articles of Incorporation for WWTS Group Inc. of 15 April 2011 (**R-056**); Extract from Florida Division of Corporations for WWTS Group Inc., 8 July 2024 (**R-057**); Lynton's corporate documents regarding annual lists and a business license, 18 March 2024 (**R-052**).

[144] Reply, ¶ 100(i)-(iii); Electronic Articles of Incorporation for WWTS Group Inc. of 15 April 2011 (**R-056**); Electronic Articles of Organization for WWTS LLC of 9 March 2012 (**R-058**); 2013 Annual Report of WWTS LLC, 1 May 2013 (**R-059**); 2014 Annual Report of WWTS LLC, 1 May 2014 (**R-060**); 2015 Annual Report of WWTS LLC, 30 April 2015 (**R-061**); 2016 Annual Report of WWTS LLC, 25 April 2016 (**R-062**); Certificate of

> (i) there is no evidence of the Claimant's ownership of WWTS LLC, but only of WWTS Group; (ii) the documents do not reflect that any of these companies engaged in any substantial activities; (iii) the limited activities carried out by WWTS LLC or Mr. Cuadrado reflected in the aforementioned emails date back to a time that is not relevant for jurisdictional purposes; (iv) some of the mentioned emails refer to activities in Mexico and Chile, which are irrelevant for jurisdictional purposes.[145] The Respondent further emphasizes that, in its Counter-Memorial and with the Second Witness Statement of Mr. Cuadrado, the Claimant "fabricate[d]" the term "Lynton Group" to appropriate the activities of Mr. Cuadrado, WWTS LLC and WWTS Group as indicated in those documents.[146]

174. Moreover, according to the Respondent, the Claimant failed to mention that during most of the relevant times, the license of Lynton had expired and the company had been revoked.[147]

175. The Respondent further contends that adverse inferences should be drawn from the paucity of documents produced by the Claimant during the document production phase. The Respondent emphasizes that, under Nevada law and the Claimant's operating agreement, the Claimant was required to maintain comprehensive records of its activities, including tax returns, financial statements, and other business documents.[148] According to the Respondent, the Claimant's failure to produce such records raises significant doubts about the existence of substantial business activities in the U.S.

176. The Respondent highlights that the Claimant attempted to excuse its failure to produce relevant documents by alleging the seizure of "documents, computers and computers servers" in its Ecuadorian offices by the Respondent. However, the Respondent asserts that these allegations are unsubstantiated for the following reasons: (i) the Claimant's submissions only vaguely referenced

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Reinstatement of WWTS LLC, 14 November 2017 (**R-063**); 2018 Annual Report of WWTS LLC, 1 May 2018 (**R-064**); 2019 Annual Report of WWTS LLC, 26 April 2019 (**R-065**); 2020 Annual Report of WWTS LLC, 14 April 2020 (**R-066**); 2021 Annual Report of WWTS LLC, 28 April 2021 (**R-067**); 2022 Annual Report of WWTS LLC, 29 April 2022 (**R-068**); 2023 Annual Report of WWTS LLC, 13 April 2023 (**R-069**); 2024 Annual Report of WWTS LLC, 18 April 2024 (**R-070**); Exchange of emails between R. Cuadrado and M. Gaughan and J. Rein of January 2011 (**R-034**); Letter agreement between Cantor Fitzgerald and WWTS LLC, 17 January 2013 (**R-035**); Exchange of emails between J. Rein and R. Cuadrado, February 2011 (**R-037**); Screenshots from email box regarding a call of R. Cuadrado with J. Rein of April 2011 (**R-038**); Exchange of emails between J. Rein and R. Cuadrado of April 2011 (**R-039**); Exchange of emails between R. Cuadrado and J. Castro of October 2011 (**R-040**); Draft letter agreement between Cantor Fitzgerald and WWTS LLC, 10 December 2012 (**R-041**); Exchange of emails between R. Cuadrado and C. Chee Awai of February 2012 (**R-042**); Documents on exchanges between R. Cuadrado and R. Rivas of December 2010-July 2011 (**R-043**); Exchange of emails between R. Cuadrado and M. Gaughan and J. Rein of January 2011 (**R-034**); Letter agreement between Cantor Fitzgerald and WWTS LLC, 17 January 2013 (**R-035**); Exchange of emails between J. Rein and R. Cuadrado of February 2011 (**R-037**); Draft letter agreement between Cantor Fitzgerald and WWTS LLC of 10 December 2012 (**R-041**); Emails from Seth Gordon to Roberto Cuadrado of May 2012 (**R-036**).

[145] Memorial, ¶ 47; Reply, ¶¶ 99-109.

[146] Reply, ¶¶ 102-103; HT(EN), Day 1, p. 25, 9-16; HT(EN), Day 2, p. 19, 17-21; HT(EN), Day 3, p. 23, 21-25; p. 24, 1-23. (HT(EN), Day 3, p. 25, 14-21).

[147] Reply, ¶ 104.

[148] Memorial, ¶¶ 52-56; Operating Agreement for Lynton of 27 February 2006, arts. 2, 8 (**R-051**); Nevada Revised Statutes (Chapter 86 – extracts), ¶ 86.241(2) (**R-071**).

the alleged seizure of gaming equipment and Mr Cuadrado's testimony on such seizure is hearsay, as he was not present during the supposed seizure;[149] (ii) the Claimant has not identified any specific documents or records as lost or destroyed, nor does it appear to know which records were affected;[150] and (iii) the Claimant's inability to explain why it failed to maintain duplicate records in its U.S. office – *i.e.*, the place where it was incorporated – undermines its argument and supports the Respondent's position that no substantial business activities occurred in the U.S.[151]

177. Finally, the Respondent argues that the Claimant's assertion that adverse inferences are inappropriate on the ground that the Respondent "has access to the evidence that corroborate or contradicts the inference sought" due to its alleged seizure of corporate record is unfounded. According to the Respondent, the argument fails because: (i) it is based on an alleged seizure that the Claimant has failed to prove; (ii) there is no evidence or specific allegations regarding the content of the purportedly seized records, leaving no basis to claim that such records would "corroborate or contradict the inference sought"; and (iii) the Claimant's suggestion that the Respondent could access to the record directly contradicts the Claimant's prior claim that that the record was "lost or destroyed" by the Respondent.[152]

(c) Lynton's status under Nevada Law

178. The Respondent claims that "Nevada law provide a separate and independent basis for the conclusion that Claimant did not and could not have had any business activities in the United States" both at the time of the alleged expropriation and at the time of the arbitration's initiation.[153]

179. The Respondent emphasizes that: (i) the Claimant's business license expired on 28 February 2011 and it was renewed only on 17 August 2023; and (ii) the Claimant was revoked pursuant to the LLC Revocation Statute on 1 March 2012 for having failed to file its annual list and fee and was reinstated only on 17 August 2023.[154] Respondent stresses that Mr. Cuadrado admitted that

[149] Memorial, ¶ 57; Notice of Arbitration, ¶¶ 56-58; Statement of Claim, ¶¶ 40, 117; El Universio, *Intendencias ya aplican la pregunta 7 de la consulta*, 3 Agosto 2011 (**C-016**); El Universo, *Gobierno subastará las máquinas tragamoneda*s, 22 Octubre 2011 (**C-029**); Video of National Police Seizing Gaming Businesses and News Coverage, 18 December 2023 (**C-071**); First Witness Statement of Roberto Cuadrado, ¶ 50 (**CWS-1**).

[150] Memorial, ¶ 58-59. Respondent also notes that, with one of its requests of document production, Claimant sought documents "sufficient to identify the location and number of the documents, computers, and computer servers that Ecuador seized from Lynton's offices located in Ecuador between the years of 2011 through 2012" (Claimant's Redfern Schedule, Request No. 13).

[151] Memorial, ¶ 60; Reply, ¶¶ 38-44; HT(EN), Day 1, p. 27, 1-20; Day 3, p. 21, 14-25; p. 22, 1-3.

[152] Reply, ¶ 46; Counter-Memorial, ¶¶ 61, 63-64; Procedural Order No. 7 at 53, 57, 61, 64, 67, 68.

[153] Reply, ¶¶ 114-115.

[154] Reply, ¶¶ 114-116.

Lynton was "administratively expired" for "twelve and a half years", including during the time when the alleged business activities carried out by Mr. Cuadrado were conducted.[155]

180. The Respondent asserts that, according to the Statutes on Business License, the Claimant was prohibited from conducting business during the period in which it did not hold a business license. The Respondent also emphasizes that Nevada courts regard the absence of an active business license as probative evidence that the entity is not conducting business.[156]

181. The Respondent further contends that the Claimant's revocation was an additional barrier from conducting business activities at the time of the arbitration's initiation. While the LLC Reinstatement and Revival Statutes provides a legal fiction whereby a company's reinstatement has retroactive effects, the Respondent argues that the critical fact remains: at the relevant times the Claimant lacked a business license and could not conduct business because it was revoked.[157]

182. Finally, the Respondent emphasizes that the foregoing circumstances demonstrates that the Claimant's lack of business activities in the U.S. was not caused by the Respondent's alleged violations of the Treaty – as the Claimant seeks to suggest – but was instead a result of the Claimant's own actions and failure to comply with Nevada Law.[158]

(d) The application of the denial of benefits clause to the Claimant

183. In light of all the circumstances indicated in the previous paragraphs, the Respondent concludes that the denial of benefits clause applies to the Claimant as the latter: (i) is owned by nationals of third countries; and (ii) lacks substantial activities in the U.S. both as a matter of fact and as a matter of law.[159]

2. The Claimant's position

(a) The applicability of the denial of benefits clause to holding companies

184. The Claimant argues that the Respondent cannot avoid jurisdiction through the application of the denial of benefits clause merely because Lynton is a holding company. According to the Claimant, the definition of "investor" within the Treaty is broad enough to encompass holding companies.[160]

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[155] Respondent's Answers to the Tribunal's Questions, ¶¶ 37-38; HT(EN), Day 2, p. 17, 6-12; p. 23, 15-18; p. 25, 7-19; p. 43, 1-9; p. 46, 22-25; p. 47, 1-9; p. 55, 22-25; p. 56, 1-6.

[156] Reply, ¶ 119; HT(EN), Day 1, p. 19, 21-25; Expert Report of Jordan T. Smith, ¶¶ 16, 22 (**RER-1**); Nev. Rev. Stat. (Chapter 76), ¶¶ 76.130(4)–(5), 76.180(1)-(2) (**R-072**).

[157] Reply, ¶ 120; HT(EN), Day 1, p. 23, 18-23; Expert Report of Jordan T. Smith, ¶ 31 (**RER-1**).

[158] Reply, ¶ 79; Counter-Memorial, ¶ 33.

[159] Memorial, ¶¶ 40-41.

[160] Counter-Memorial, ¶¶ 34-36; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, ¶¶ 67, 321-323 (**CL-124**); *Aguas del*

185. The Claimant relies on the expert report of Professor Bianchi and supporting case law to assert the following points: (i) the purpose of denial of benefits clauses is to "counter the phenomenon of so-called 'shell' […] companies", *i.e*. companies with no activity beyond what is necessary to maintain their corporate existence, not holding companies;[161] (ii) the determination of whether a company is a mere shell is fact-specific and depends on the substance of the company's activities, not their form or magnitude;[162] and (iii) the threshold to avoid the application of the denial of benefits clause is not high and does not require the company to have the majority of its business activities and connections in the state of incorporation; rather it requires evidence of some genuine activity.[163]

186. During the Hearing, the Claimant placed particular emphasis on the holdings in the *Aris Mining* and *Big Sky* cases. In those cases, the tribunals affirmed that: "[a] business activity may not be cursory, fleeting or incidental, but must be of sufficient extent and meaning as to constitute a genuine connection by the company to its home state".[164] The Claimant also highlighted that the BIT in the *Aris Mining* case, like the Treaty, formulates the denial of benefits clause in negative terms ("no substantial business activities") and that the Tribunal in that case provided a detailed explanation of this language, finding that:

> The word "no," which qualifies "substantial business activities," makes clear that the inquiry is not about whether Canada is the jurisdiction with which [the Claimant] might have the most substantial connections. Companies may have business activities in many jurisdictions, including both the country in which they are registered and other countries in which they choose to conduct operations. [The denial of benefits clause] does not require a comparative analysis, weighing these various activities against each other to determine the single jurisdiction in which the enterprise has its

Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent' Objections to Jurisdiction, 21 October 2005, ¶ 245 (**CL-161**).

[161] Counter Memorial, ¶ 38; Rejoinder, ¶ 46; HT(EN), Day 3, p. 63, 1-21; Expert Report of Professor Bianchi, ¶¶ 10-14 (**CER-3**).

[162] Counter Memorial, ¶¶ 43-45; *Limited Liability Company ATMO v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, ¶ 69 (**CL-025**); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, ¶¶ 253-54 (**CL-167**); *Big Sky Energy Corporation v. Republic of Kazakhstan*, ICSID Case No. ARB/17/22, Award, 24 November 2021, ¶ 286 (**CL-164**); *9REN Holding S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, ¶ 182 (**CL-168**).

[163] Counter-Memorial, ¶¶ 47-50; HT(EN), Day 3, p. 66, 17-19; Rejoinder, ¶ 44; *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on Bifurcated Jurisdictional Issue, 23 November 2020, ¶¶ 136-137 (**CL-169**); Expert Report of Professor Andrea Bianchi, ¶¶ 14, 116, fn. 123 (**CER-3**); *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶¶ 301-302 (**CL-171**).

[164] HT(EN), Day 3, p. 67, 9-19; *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on Bifurcated Jurisdictional Issue, 23 November 2020, ¶ 137 (**CL-169**); *Big Sky Energy Corporation v. Republic of Kazakhstan*, ICSID Case No. ARB/17/22, Award, 24 November 2021, ¶ 279.

> most extensive or dominant connections. It simply requires that a Canadian-registered company have some substantial business activity in Canada.[165]

187. The Claimant considers the Respondent's reliance on *Pac Rim* to be "unavailing" in arguing that Lynton lacks business activities in the U.S. The Claimant highlights the distinct circumstances of that case, emphasizing that Pac Rim did not even own shares in subsidiaries conducting business in the U.S. Moreover, the Claimant emphasizes that the tribunal in *Pac Rim* explicitly acknowledged that a traditional holding company conducting business in a country through its subsidiaries would be protected under the applicable investment treaty.[166] The Claimant further cites the *IC Power v. Peru* decision, where the Tribunal – noting that Mr. Siqueiros was a member – referred to *Pac Rim* and held that:

> [I]n that case the tribunal clearly stated that it was not deciding, in general terms, that a 'traditional holding company' can never meet the 'substantive business operations requirement, but merely that, in the specific case before it, the claimant had failed to meet that standard, as the company did not have 'a board of directors, board minutes, a continuous physical presence and a bank account' in its State of incorporation.[167]

(b) Lynton's business activity in the United States

188. The Claimant asserts that it conducts substantial business activities in the United States and therefore does not qualify as a shell company.[168] To support this position, with its Counter-Memorial, the Claimant submitted an over-10-page table listing documents purportedly evidencing Lynton's activities in the United States between February 2006 and April 2024.[169] During the Hearing, the Claimant showed some of the foregoing documents.[170]

189. The Claimant acknowledges that some of those documents in the table refer to activities conducted by Mr. Cuadrado, WWTS LLC or WWTS Group, but rejects the Respondent's assertion that the Claimant "cannot aggregate to itself any separate activities of Mr. Cuadrado or WWTS LLC or WWTS Group", as was allegedly held in *Pac Rim*. The Claimant argues that the circumstances in this case differ significantly from *Pac Rim* because, unlike the claimant in that case, Lynton, have a physical presence in the U.S., and both and WWTS LLC and WWTS Group

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[165] *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on Bifurcated Jurisdictional Issue, 23 November 2020, ¶ 136. (**CL-169**); HT(EN), Day 3, p. 68, 1-21.

[166] Rejoinder, ¶ 48; HT(EN), Day 1, p. 70, 12-24; *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 4.74 (**CL-147**).

[167] Counter-Memorial, ¶ 54; *IC Power Ltd. & Kenon Holdings Ltd v. Republic of Peru*, ICSID Case No. ARB/19/19, Award, 3 October 2023, ¶ 226 (**CL-170**).

[168] HT(EN), Day 3, p. 64, 9-13.

[169] Counter-Memorial, pp. 17-30.

[170] HT(EN), Day 1, pp. 67-80.

are U.S.-based entities.[171] Moreover, during the Hearing, the Claimant explained that: (i) Mr. Cuadrado was conducting business activities in the United States from a business office in Florida (that was also the headquarters of WWTS LLC) on behalf of Lynton, as evidenced by the emails on record in which he refers to a "group", which, according to the Claimant, can only refer to Lynton; and (ii) the ownership of three companies in the United States, namely Orange Business, WWTS Group and WWTS LLC, constituted a "direct business activity" by Lynton and demonstrated its presence in its home State.[172]

190. Finally, the Claimant opposes the Respondent's request for the Tribunal to draw adverse inferences from the Claimant's alleged failure to produce documents proving substantial activities in the U.S. The Claimant contends that after "having seized Lynton's records, essentially at gunpoint, Ecuador expects the Tribunal to penalize Lynton for not producing the records Lynton no longer has". According to the Claimant, arbitral tribunals should not draw adverse inferences if the requesting party has evidence contradicting the inference but has failed to provide it. This principle applies even more strongly when the requesting party's actions actively prevented the other party from producing the evidence, as in the present case.[173]

(c) The application of the denial of benefits clause to the Claimant

191. In light of all the circumstances indicated in the previous paragraphs, the Claimant asserts that the Respondent cannot invoke the denial of benefits clause under the Treaty to avoid the Tribunal's jurisdiction. According to the Claimant, the requirements for the denial of benefits clause to apply are not satisfied since the Claimant was conducting substantial business activities in the U.S. at the relevant times.[174]

C. OBJECTION *RATIONE PERSONAE* BASED ON THE CLAIMANT'S ALLEGED LACK OF *IUS STANDI*

1. The Respondent's position

192. The Respondent argues that, at the time the Claimant initiated the Arbitration – the relevant moment for assessing its standing[175] – it lacked the legal capacity to do so under Nevada law.[176]

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[171] Counter-Memorial, ¶¶ 53-56.

[172] HT(EN), Day 3, p. 70, 3-17; Day 1, p. 73, 19-25; Claimant's Answers to the Tribunal's Questions, pp. 10-11; Second Witness Statement of Roberto Cuadrado, ¶¶ 6, 11, 21 (**CWS-6**).

[173] Counter-Memorial, ¶¶ 61-66; J. K. Sharpe, *Drawing Adverse Inferences from the Non-production of Evidence*, 22(4) Arbitration International (2006) 549, p. 554 (**CL-172**).

[174] Rejoinder, ¶ 42.

[175] *See* section V.A.1 above.

[176] Memorial, ¶¶ 120-125.

193. In particular, the Respondent notes that: (i) the LLC Revocation Statute incorporates the LLC Dissolution Statutes when addressing the consequences of revocation; (ii) the LLC Dissolution Statutes – specifically, the LLC Continuation after Dissolution Statute – state that a company loses its legal capacity to initiate proceedings three years after its dissolution; and (iii) consequently, through the incorporation *sub* (i), the three-year limitation applies equally to revoked companies, as confirmed by Nevada courts.[177] In support of this last point, the Respondent asserts that in the case *Luv N' Care, Ltd. v. Laurain*, a Nevada court applied the three-year limitation statute to a revoked LLC "in the exact same manner as Ecuador does in this case".[178] In response to the Claimant's assertion that the *Luv N' Care* case is irrelevant because it was decided by a trial court and involved a dissolved LLC, the Respondent rebuts that the defendant in that case was a revoked LLC that sought dismissal of claims based on the expiration of the three-year statutory limitation period following revocation. Moreover, it argues that a "Nevada trial court decision interpreting and applying Nevada law provides persuasive guidance to this Tribunal as to how Nevada law operates".[179]

194. The Respondent further contends that this interpretation aligns with the basic principles of public policy. It argues that, if this were not the case, revoked LLCs would have the perpetual right to file lawsuits, while dissolved LLCs only have a three-year period.[180] According to the Respondent, retroactively restoring the legal capacity would lead to "several policy problems" including creating "asymmetrical rights by allowing an LLC to manipulate its legal capacity to serve its own interests" and "a perverse incentive for LLCs not to file the dissolution paperwork required by Nevada law when they go out of business" in order to preserve their capacity to sue indefinitely.[181]

195. In response to the Claimant's argument that its legal capacity was retroactively reinstated following its revival on 17 August 2023 under the LLC Revival Statute, the Respondent notes that the statute only restores an LLC's right to transact business retroactively. It does not explicitly

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[177] Memorial, ¶¶ 126-137; Reply, ¶¶ 226-227, 230-234; Respondent's Answers to the Tribunal's Questions, ¶¶ 3-6; Expert Report of Jordan T. Smith, ¶ 37-42 (**RER-1**); *Appeal of Factek, LLC*, 2007-1 B.C.A. (CCH) P33,568, 166283 (A.S.B.C.A.), 23 April 2007 (**RL-085**); *Ghiorzi v. Whitewater Pools & Spas, Inc.*, 2011 U.S. Dist. LEXIS 70139 (D. Nev.) 28 June 2011, p. 8 (**RL-086**,); *Luv N' Care, Ltd. v. Laurain*, 2019 U.S. Dist. LEXIS 165053 (D. Nev.) 26 September 2019, p. 3 (**RL-087**); *Clipper Air Cargo, Inc. v. Aviation Prods. Int'l, Inc.,* 981 F. Supp. 956, 959 (D.S.C., 1997) (applying a similar provision of the Nevada Revised Statute on dissolved corporations to revoked corporations even without an explicit incorporation of such provision within the regime of revoked corporations) (**RL-088**).

[178] HT(EN), Day 3, p. 41, 10-12.

[179] Respondent's Answers to the Tribunal's Questions, ¶¶ 7-10, 13.

[180] Memorial, ¶¶ 138-139; Reply, ¶ 235; Expert Report of Jordan T. Smith, ¶ 42 (**RER-1**); Respondent's Answers to the Tribunal's Questions, ¶ 15.

[181] Reply, ¶¶ 255-259; HT(EN), Day 1, p. 49, 1-14; Respondent's Answers to the Tribunal's Questions, ¶ 14.

address legal capacity. In the absence of such language, the Respondent argues that an LLC's capacity to sue is presumed to be restored only prospectively.[182]

196. The Respondent cites several court decisions applying Nevada law and similar statutes from other states, which distinguish between the right to transact business and the capacity to sue. It emphasizes that retroactive restoration of the former does not imply retroactive restoration of the latter as well. In particular, the Respondent references the *AA Primo* case, the most recent decision from a Nevada court discussing the restoration of a revoked LLC's capacity to sue. In that case, the Nevada Supreme Court held that "the right to 'transact business' […] does not normally include an LLC's capacity to sue and be sued".[183]

197. The Respondent rebuts the Claimant's reliance on the same case, explaining that, differently from the present case, the LLC claim in *AA Primo* was valid because the three-year limitation period from revocation had not expired yet.[184]

198. Additionally, the Respondent challenges the Claimant's use of the *Herrick* and *Executive Management* cases arguing that: (i) the *Herrick* case was based on an incorrect premise – rejected by the Supreme Court in *AA Primo* – that the right to transact business includes the capacity to sue, and thus both could be retroactively restored by the LLC Revival Statute; and (ii) the *Executive Management* case did not apply the relevant statutes governing LLCs in the present dispute.[185]

199. Based on these arguments, the Respondent asserts that the Tribunal lacks jurisdiction *ratione personae* over this case. The Claimant's revocation as of 1 March 2012 resulted in the loss of its legal capacity on 1 March 2015. Therefore, the Claimant lacked *ius standi* under the Treaty to bring claims on 17 June 2022, when the Arbitration was initiated. Furthermore, the Claimant also lacked *ius standi* to validly notify Ecuador of the dispute on 17 November 2020, rendering that notification ineffective. This failure prevents compliance with the Treaty's prerequisites for arbitration, including the mandatory six-month negotiation period stipulated in Article VI.[186]

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[182] Reply, ¶¶ 240-243; Expert Report of Jordan T. Smith, ¶¶ 48-49 (**RER-1**).

[183] Reply, ¶¶ 244-246; Memorial, ¶¶ 145-155; *AA Primo Builders*, *LLC v. Washington*, 126 Nev. 578, (Nev. 2010) ¶¶ 585-587 (**CL-181**); Expert Report of Jordan T. Smith, ¶ 48 (**RER-1**); *Luv N' Care, Ltd. v. Laurain*, 2019 U.S. Dist. LEXIS 165053 (D. Nev.), , 26 September 2019,¶¶ 4-5 (**RL-087**); *Matter of Cnty. Route 20 Post Office, LLC v. Cnty. of Greene*, 2008 NY slip op. 30663(U) (N.Y. Sup. Ct.), 7 March 2008, ¶¶ 3-5 (**RL-089**); *GC Quality Lubricants v. Doherty, Duggan, & Rouse Insurors*, 697 S.E.2d 871(Ga. Ct. App. 2010), ¶¶ 871-873 (**RL-090**).

[184] Reply, ¶¶ 237-238, 250; HT(EN), Day 1, p. 123, 1-11; *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, (Nev. 2010) ¶ 580 (**CL-181**).

[185] Reply, ¶¶ 248-252.

[186] Memorial, ¶¶ 160-163.

2. The Claimant's position

200. The Claimant maintains that the relevant date for assessing standing is the time of the alleged expropriation. Nonetheless, the Claimant also contends that, contrary to the Respondent's position, it did have legal standing at the time the Arbitration was initiated.[187]

201. Specifically, the Claimant argues that the revocation of its charter under the LLC Revocation Statute did not affect its capacity to sue, which, in any event, would have been retroactively reinstated under the LLC Revival Statute, as confirmed by the Nevada Supreme Court in *AA Primo*.[188]

202. According to the Claimant, in *AA Primo* the Nevada Supreme Court held that: (i) the forfeiture of the right to transact business due to charter revocation does not include the loss of capacity to sue as penalty; (ii) the reinstatement of a LLC retroactively restores its capacity to sue; and (iii) for public policy reasons, courts should not dismiss an LLC's claims without first providing the entity with the possibility to reinstate its charter.[189]

203. In support of the position *sub* (iii), the Claimant also references the *Herrick* and *Executive Management* cases, where Nevada courts chose not to dismiss claims brought by an LLC and a foreign company, respectively. The courts held that the entities retroactively cured their capacity defects by addressing their filing issues.[190] The Claimant disputes the Respondent's argument that the reasoning in *Herrick* has been dismissed by more recent case law, emphasizing that the case has been cited in subsequent court decisions.[191]

204. The Claimant also opposes the Respondent's assertion that the reference to the LLC Dissolution Statutes within the LLC Revocation Statute implies that three-year limit for dissolved LLCs to sue also applies to revoked LLCs. According to the Claimant, this reference merely provides revoked LLCs the option to follow the LLC Dissolution Statutes, but it is not mandatory as the underlying circumstances of the two statutes differ significantly. The Claimant emphasizes that the LLC Dissolution Statutes apply only when specific procedural steps have been taken, such as

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[187] Counter-Memorial, ¶¶ 130-131.

[188] Counter-Memorial, ¶ 123.

[189] Rejoinder, ¶¶ 24-26; HT(EN), Day 1, p. 86, 9-25; *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, (Nev. 2010) ¶ 585 (**CL-181**).

[190] Counter-Memorial, ¶¶ 118-123; *The Herrick Group & Associates LLC v. K.J.T., L.P.*, No. 07-0628, 2009 U.S. Dist. LEXIS 74375 (E.D. Pa.), 20 August 2009, pp. 3, 8, 13-15 (**CL-144**); E*xecutive Mgmt., Ltd. v. Ticor Title Ins. Co*., 38 P.3d 872, 876 (Nev. 2002), pp. 48-49, 52 (**CL-145**).

[191] Counter-memorial, ¶¶ 125-126; *Phillips v. TDI Lakota Holdings*, LLC, No. 10-cv-782, 2011 U.S. Dist. LEXIS 165835(E.D. Pa. Apr. 29, 2011), ¶ 4 (**CL-184**); *Springhead, LLC v. Crowell*, No. 13 C 0436, 2013 U.S. Dist. LEXIS 175847(N.D. Ill. Dec. 16, 2013), ¶¶ 3-4 (**CL-185**,).

the filing of Articles of Dissolution with the Secretary of State. In this case, however, Lynton was never formally dissolved; it was merely suspended and later revived.[192]

205. Furthermore, the Claimant contends that applying the LLC Dissolution Statutes automatically to a revoked LLC is logically flawed. Such an interpretation would preclude the possibility of reviving a revoked LLC, which is expressly permitted under Nevada law. Therefore, equating revocation with dissolution undermines the statutory framework allowing for revival.[193]

206. Additionally, the Claimant asserts that the case law cited by the Respondent to support its interpretation is not applicable to the present dispute.[194] In particular, during the Hearing, the Claimant challenged the relevance of the *Luv N' Care* case cited by the Respondent, arguing that: (i) it is merely "a discovery order in a trial court in the US"; (ii) it contains limited discussion on the statute of limitations, as the primary focus was on "a discovery issue on responding to a subpoena"; and (iii) the case concerns a dissolved entity, not a revoked one, thereby rendering it distinguishable from the present circumstances.[195]

D. OBJECTION *RATIONE MATERIAE* REGARDING THE REQUIREMENT OF OWNERSHIP AND CONTROL OF THE INVESTMENT

1. The Respondent's position

207. The Respondent argues that the Tribunal lacks jurisdiction *ratione materiae* because the Claimant did not own or control the alleged investment at the time the Arbitration was initiated.

208. The Respondent relies on Article I(1)(a) of the Treaty to assert that it requires the investment to be "owned or controlled" by the investor for the latter to access the Treaty's protection.[196] Article I(1)(a) of the Treaty provides that:

> 1. For the purposes of this Treaty,
>
> (a) "investment' means every kind of investment in the territory of one Party **owned or controlled** directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes […] (emphasis added)

209. According to the Respondent, this Article sets outs the jurisdictional prerequisites for a Tribunal to have jurisdiction over a dispute between a foreign investor and the Host State. Article I(1)(a)

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[192] Claimant's Answer to the Tribunal Questions, pp. 1-3; Second witness statement of Roberto Cuadrado, ¶ 26 (**CWS-3**); Certificate of Revival issued by the Secretary of State of the State of Nevada, 17 August 2023 (**C-001**).

[193] Claimant's Answer to the Tribunal Questions, pp. 4-5.

[194] Rejoinder, ¶¶ 27-35; Counter-Memorial, ¶¶ 109-117; HT(EN), Day 1, p. 85, 6-16.

[195] HT(EN), Day 3, p. 94, 1-13.

[196] Request for Bifurcation, ¶ 52.

explicitly stipulates that the foreign investor must own or control the investment.[197] Consequently, as confirmed by the *Aven* tribunal, the "ownership or control" requirement for the investment is a jurisdictional requirement.[198]

210. The Respondent's position is that, at the time the Arbitration was initiated, the Claimant neither owned nor controlled the Ecuadorian Companies, whether as a matter of fact or under Nevada Law.[199]

211. As a matter of fact, the Respondent claims that, following the Second Alleged Divestiture, through which it dismissed all its shares in Grupo C, the Claimant lost all its direct and indirect shares in the Ecuadorian Companies. The Respondent's position is that the Second Alleged Divestiture took place on 11 May 2011, *i.e.,* before the initiation of the Arbitration. The Respondent relies on:

a. Exhibit R-9, i.e., the *Superintendencia* records indicating 11 May 2011 as the day the transfer was registered in the Grupo's C corporate book and December 2016 as the time it was also reported to the *Superintendencia*.

b. Exhibit R-8, i.e., a *Carta de Transferencia de Acciones* of 11 May 2011, informing the general manager of Grupo C that the Second Alleged Divestiture took place.[200]

212. In response to the Claimant's argument that the Second Alleged Divestiture was not completed in 2011 – asserting that at that time it was merely intended to guarantee a debt of Lynton towards Mr. Fuentealba and it was only finalized in 2016 – the Respondent notes that:

a. This argument was presented for the first time by the Claimant in its Counter-Memorial and the exhibits R-8 and R-9 do not support this narrative;[201]

b. The Claimant failed to produce "documents and communications concerning the 2011 transfer of shares in Grupo C" to Mr. Fuentealba, notwithstanding it had been ordered to do so during document production, nor did it produce any evidence of the alleged transaction giving raise to the debt towards Mr. Fuentealba;[202]

c. The Claimant did not adequately explain why it would make sense to use a *Carta de Transferencia de Acciones* dated 11 May 2011 for a transfer that allegedly took place in

[197] Memorial, ¶¶ 79-82.

[198] Memorial, ¶ 81; *David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, Giacomo A. Buscemi, David A. Janney and Roger Raguso v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award of 18 September 2018, ¶¶ 270, 289-301 (**RL-076**).

[199] In line with its position on the law applicable to the jurisdictional requirements (see section V.A.1(b) above), Respondent explain that, since the concepts of ownerships or control are not defined under international law, renvoi to the relevant national law – here Nevada law – is necessary (Memorial, ¶ 83).

[200] Memorial, ¶¶ 88-92; Reply, ¶¶ 151-155; HT(EN), Day 1, p. 39, 5-14; Carta de transferencia de acciones del Grupo C S.A. C-Group of 11 May 2011 (**R-008**); Extract from Ecuador's Companies Register (Superintendencia de Compañías) for Grupo C S.A. C-Group (**R-009**).

[201] Reply, ¶¶ 157, 165.

[202] Memorial, ¶ 95; Reply, ¶¶ 160, 164; Procedural Order No. 7, Tribunal's Decision on Respondent's Requests No. 2, 12 July 2024, p. 55.

2016, nor why the date of 11 May 2011 is recorded in the *Superintendencia* records as date of registration in the corporate books.[203]

d. While the Claimant relies on a letter of the Grupo C's general manager dated 28 May 2012 confirming that Lynton was still a shareholder, the primary evidence of the date of transfer lies in the corporate books.[204]

e. It would have been economically irrational for Mr. Fuentealba to accept Grupo C's shares as guarantee of the debt considering that in 2011 the future prohibition of gambling in Ecuador was foreseeable and, therefore, the shares were not a reasonable security.[205] Moreover, when cross-examined "Mr. Fuentealba did not provide a clear explanation [of] what was the economic sense of this transaction".[206]

213. The Respondent also contends that the Claimant cannot assert that it maintained a shareholding in the Ecuadorian Companies (specifically in WWTS Ecuador) through Orange Business, as it failed to produce any documentation demonstrating its ownership of that company.[207] Furthermore, the Respondent argues that the Tribunal should draw adverse inferences from the Claimant's failure to produce all non-privileged documents and communications related to its "acquisition, holding, transfers and/or divestiture of an ownership interest in Orange Business LLC from 2009 to the present", despite having agreed to do so during document production.[208]

214. The Respondent notes that there are only four documents on the record relating to the ownership of Orange Business and none of them prove that the Claimant was the owner of the company at the jurisdictionally relevant times. In particular: (i) the Orange Business's Articles of Organization of 2009, that identify Mr. Eligio Rodriguez, resident in Panama as the sole owner; (ii) a 28 May 2010 certificate filed with the *Superintendencia*, that identifies Mr. Rodriguez as "Administrador Unico" and Naria LLC as the owner;[209] (iii) a document called "Resignation of Organization Rights", according to which on 4 August 2009 the organizer of Orange Business relinquished all its rights in the company to Lynton; and (iv) a shareholder's list indicating that Lynton became shareholder on 4 August 2009.[210]

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[203] Reply, ¶ 166.

[204] Reply, ¶ 169; HT(EN), Day 1, p. 41, 5-19; Expert Report of Marco Lopez, ¶ 38 (**RER-2**).

[205] Reply, ¶ 167.

[206] HT(EN), Day 3, p. 34, 2-10; p. 35, 8-10; p. 36, 4-8.

[207] Memorial, ¶¶ 96-97.

[208] Memorial, ¶ 103; Reply, ¶ 174. *See* Procedural Order No. 7, Claimant's Response to the Respondent's Request No. 3, 12 July 2024, pp. 56-58.

[209] Memorial, ¶¶ 99-102; Corporate documents of Orange Business, Articles of Organization of Orange Business LLC of 2009, art. 5 (**R-073**); Certificate of Orange Business on foreign shareholder of 28 May 2010 (**R-074**).

[210] Reply, ¶ 176; Superintendencia de Compañías, Valores y Seguros, Orange Business LLC Informe de Sociedad Extranjera, 2009, p. 12 (**C-086**); Superintendencia de Compañías, Valores y Seguros, Orange Business LLC Informe de Sociedad Extranjera, 2010, p. 5 (**C-085**).

215. While the documents *sub* (i) and (ii) identifies parties other than the Claimant as the owners,[211] the documents *sub* (iii) and (iv) fail to meet the requirements under Florida law (the place of incorporation of Orange Business) for the inclusion of new members in the ownership of Orange Business and therefore do not constitute probative evidence. In any case, these latter two documents do not establish ownership of Orange Business as of the date the Arbitration was commenced, *i.e.*, 17 June 2022.[212]

216. In light of that, the Respondent's position is that, as a matter of fact, the Claimant did not own or control the Ecuadorian Companies on 17 June 2022 because Lynton: (i) had divested from Grupo C as early as in 2011; and (ii) did not maintain some shares in them through Orange Business.

217. As a matter of law, the Respondent argues that on 17 June 2022 Lynton was a revoked company and, as such, lacked capacity to "own and control" any property or asset. In particular, the Respondent relies on the LLC Revocation Statute providing that, when an LLC is revoked, its property and assets "must be held in trust".[213] According to the Respondent, "holding property in trust means that legal title and control are no longer retained by the revoked company", but are held by the trustee(s), as also confirmed by the Claimant's expert, Professor Fox.[214]

218. In this sense, against the Claimant's allegation that, under the LLC Revocation Statute, some requirements must be fulfilled for property to be held in trust, the Respondent notes that the trust at stake would be "an implied or constructive [one] created by operation of the law".[215]

219. In response to the Claimant's argument that its ownership and control of its property would have been reinstated retroactively upon revival under the LLC Revival Statute, the Respondent contends – similar to its position on the issue of legal capacity[216] – that Nevada law provides for the retroactive restoration of the right to transact business only. The restoration does not extend to the ownership and control of a revoked LLC's investment. Interpreting the law otherwise, the

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[211] The Respondent rejects the Claimant's argument that Mr. Rodriguez made a mistake and meant to refer to NRAI Services (and not Naria LLC) in the 28 May 2010 certificate. The Respondent stresses that Mr. Rodriguez was a manager of Orange Business (and not an agent of Lynton's Panamanian Lawyers as the Claimant depicts him) and it would be an "astonishing" mistake (Reply, ¶¶ 184-186; citing Counter-Memorial, ¶ 87).

[212] Reply, ¶¶ 178-182; HT(EN), Day 1, p. 44, 1-22; Day 3, p. 37, 25.

[213] Memorial, ¶ 107, citing Section 86.274(5) of the Nevada Revised Statutes.

[214] Memorial, ¶¶ 107-111; Reply, ¶¶ 193-195; HT(EN), Day 1, p. 37, 1-7; Expert Report of Jordan T. Smith, ¶ 35 (**RER-1**); *TRP Fund IV v. Ocwen Loan Servicing*, 2018 Nev. Dist. LEXIS 1117 (8th Jud. Dist. Nev.), 17 April 2018, p. 9 (**RL-034**); American Jurisprudence: Trusts (2nd ed.), ¶ 2 (**RL-035**); *Gale v. Carnrite*, 559 F.3d 359 (5th Cir.), 2009, pp. 363-64 (**RL-036**); Nevada Rev. Stat. (extracts), ¶ 86.274(2) (**R-004**); Expert Report of Merritt B. Fox, p. 31 (**CER-4**).

[215] HT(EN), Day 1, p. 119, 5-11; Day 3, p. 87, 11-23.

[216] See section V.C.1 above.

Respondent argues, would lead to extreme consequences, such as retroactively invalidating any transfer of the trustees' property made during the period of revocation. [217]

220. Additionally, as a reaction to Claimant's position that, even absent retroactive restoration, it would have still indirectly owned or controlled the Ecuadorian Companies since the assets would have been held in trust for Lynton's benefit, the Respondent asserts that: (i) as a holding company, its ability to exercise control is "necessarily dependent on holding/owning the shares of its subsidiaries", which was not the case here;[218] and (ii) according to the Nevada Supreme Court case *Tsai v. Hsu* "the trust property is controlled by the trustees and they, not the trust beneficiaries, are the appropriate parties in any dispute over trust property"'.[219]

221. Finally, the Respondent reaffirms that, in any event, international law does not allow retroactive fixing of lack of jurisdiction.[220]

2. The Claimant's position

222. The Claimant asserts that the Treaty does not impose a strict requirement of direct ownership or control of the investment, as its definition is very broad and includes indirect ownership. According to the Claimant, this interpretation is supported by the preamble of the Treaty[221] and by relevant caselaw.[222]

223. Based on this understanding, the Claimant argues that, contrary to the Respondent's position, it owned and controlled the Ecuadorian Companies at the relevant jurisdictional time – specifically, the time of the 2011 Executive Order – as a holding company.

224. The Claimant argues that the Second Divestiture was not formalized on 11 May 2011, "as evidenced by the fact that it does not appear in the records of the Superintendencia".[223] The Claimant explains that the operation was not a transfer but a "pledge [of] Grupo C's shares to Mr. Fuentealba as security for the debt" that was incurred by WWTS Ecuador to buy gaming

[217] Memorial, ¶¶ 113-116; Reply, ¶¶ 196-197; HT(EN), Day 1, p. 23, 18-23; *Gale v. Carnrite*, 559 F.3d 359 (5th Cir.), 2009, pp. 363-364 (**RL-036**).

[218] HT(EN), Day 1, p. 46, 1-8.

[219] HT(EN), Day 3, p. 36, 1-8.

[220] Memorial, ¶ 117-120; Reply, ¶¶ 199-200; HT(EN), Day 1, p. 37, 8-14.

[221] According to the Claimant: "[t]he Treaty's definition of investment is broad, recognizing that investment can take a wide variety of forms. It covers investments that are owned or controlled by nationals or companies of one of the Treaty partners in the territory of the other. **Investments can be made either directly or indirectly through one or more subsidiaries, including those of third countries**. Control is not specifically defined in the Treaty. Ownership of over 50 percent of the voting stock of a company would normally convey control, but **in many cases the requirement could be satisfied by less than that proportion**" (Counter-Memorial, ¶ 71 (emphases added)).

[222] Counter-Memorial, ¶¶ 72-73; *International Thunderbird Gaming Corp. v. United Mexican States*, ad hoc, Arbitral Award, 26 January 2006, ¶ 108 (**CL-151**).

[223] Response to the Request for Bifurcation, ¶ 95;HT(EN), Day 1, p. 102, 1-25, p. 103, 1-15.

equipment in Ecuador, which "Mr. Fuentealba had personally guaranteed". Accordingly, la *Carta de Transferencia de Acciones* referenced by Respondent was signed and "served as guarantee" for the debt but the shares not transferred. Since the debt was properly satisfied, there was no need to finalize nor register the transfer of shares.[224] According to the Claimant, the *Carta de Transferencia de Acciones* was only used in 2016 when Mr. Fuentealba decided to invest in a nightclub venture in an old location owned by Grupo C and Mr. Cuadrado agreed to transfer the Grupo C shares to him for this purpose.[225] Accordingly, only in 2016 was the transfer of shares finalized and, thus, registered in the *Superintendencia* public records.[226]

225. In any event, should the Tribunal accept the Respondent's argument that the Second Alleged Divestiture took place in 2011, the Claimant argues that the transfer of the shares of Grupo C to Mr. Fuentealba would not impact the Tribunal's jurisdiction since: (i) the investment "never left the ownership structure" as Mr. Fuentealba owned 50% of Lynton;[227] and (ii) the Claimant's maintained partial ownership of the Ecuadorian Companies through Orange Business.[228]

226. In relation to the argument *sub* (ii) above, the Claimant rejects the Respondent's position that Lynton never actually owned Orange Business and holds that "Respondent has documents that conclusively demonstrate that Lynton owns" Orange Business and hid them "while knowingly advancing false statements to the contrary".[229] In particular, the Claimant refers to: (i) a document showing that on August 4, 2009, Melissa Tomelden, Orange Business' organizer and an employee of its registered agent NRAI Services, Inc. ("**NRAI Services**"), relinquished all rights, title and interest in Orange Business to Lynton;[230] and (ii) the Orange Business's register of members as of 4 August 2009 identifying Lynton as its sole member.[231]

227. Against the Respondent's reliance on a letter from Mr. Rodriguez, an agent of Lynton's Panamanian lawyer, identifying Naria LLC as owner of Orange Business, the Claimant's explain

[224] Counter-Memorial, ¶ 91; Second witness statement of Roberto Cuadrado, ¶ 23 (**CWS-3**).

[225] Second witness statement of Roberto Cuadrado, ¶ 23 (**CWS-3**); Counter-Memorial, ¶ 92.

[226] During the Hearing, the Claimant went through various exhibits showing that, in the public records, Lynton remained owner of Grupo C until 2016 (HT(EN), Day 3, p. 61, 1-25).

[227] Counter-Memorial, ¶ 94; *Ulysseas, Inc. v. The Republic of Ecuador*, PCA Case No. 2009-19, Interim Award, 28 September 2010, ¶ 181 (**CL-148**); Lynton's Membership Certificates, 27 February 2006 (**C-104**).

[228] Counter-Memorial, ¶ 98.

[229] Counter-Memorial, ¶ 85.

[230] Counter-Memorial, ¶ 64, Superintendencia de Compañías, Orange Business LLC Informe de Sociedad Extranjera, 2010, p. 5 (**C-085**); Second witness statement of Roberto Cuadrado, ¶ 8 (**CWS-3**).

[231] Superintendencia de Compañías, WWTS Ecuador S.A. Informe de Sociedades Extranjeras Presentados por la Compañía (**C-084**); Superintendencia de Compañías, Orange Business LLC Informe de Sociedad Extranjera, 2010, p. 5 (**C-085**); Superintendencia de Compañías, Orange Business LLC Informe de Sociedad, 2009, p. 12 (**C-086**); Second witness statement of Roberto Cuadrado, ¶ 8 (**CWS-3**); HT(EN), Day 3, p. 75, 6-10.

that this was just a mistake and Mr. Rodriguez wanted to refer to NRAI Services, the registered agent of Lynton.[232]

228. Finally, the Claimant opposes the Respondent's argument that, as a revoked LLC, Lynton could now own or possess the Ecuadorian Companies under Nevada Law on four grounds.

229. *First*, the Claimant argues that Nevada Law does not apply because the investment requirements for treaty protections are set out in the Treaty itself, and the Claimant satisfies them.[233]

230. *Second*, the Claimant contends that Nevada Law permits the retroactive revival of a revoked LLC "as though [the company] had *never* been revoked".[234] This applies to the ownership and company control of assets too. The Claimant also argues that the case law cited by the Respondent does not contradict this interpretation.[235]

231. *Third*, even if the LLC Revocation Statute provides that "all the property and assets of the revoked company must be held in trust", this does not occur automatically upon revocation. Instead, "certain requirements" must be fulfilled for this purpose. These requirements were not fulfilled with respect to the property of Lynton.[236]

232. *Fourth*, even if the property of Lynton had been held in trust during its revocation, Lynton would still have been the beneficial owner of that trust and, as such, would have indirectly owned the property. This would still qualify as an "investment" under the Treaty.[237]

E. THE ALLEGED ABUSE OF RIGHTS IN RELATION TO THE CORPORATE RESTRUCTURING OF LYNTON

1. The Respondent's position

233. The Respondent notes that "it is well established" that corporate restructuring aimed at gaining investment treaty protection constitutes an abuse of rights precluding an arbitral tribunal from exercising jurisdiction over the case.[238]

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[232] Counter-Memorial, ¶ 87.

[233] Counter-Memorial, ¶ 101; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 136 (**CL-174**); *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 22 March 2013, ¶ 244 (**CL-173**).

[234] Counter-Memorial, ¶¶ 102-128.

[235] Rejoinder, ¶¶ 38-39; *Gale v. Carnrite*, 559 F.3d 359 (5th Cir. 2009), pp. 363-364 (**RL-036**).

[236] Rejoinder, ¶ 37; HT(EN), Day 1, p. 88, 15-23.

[237] Rejoinder, ¶ 41; HT(EN), Day 1, p. 89, 17-25; p. 90, 1-8; HT(EN), Day 3, p. 60, 7-14; p. 95, 8-17.

[238] Memorial, ¶ 164; *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 588 (**RL-037**); *Cascade Invs. NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award,20 September 2021, ¶¶ 444, 462 (**RL-053**); *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award,15 April 2009, ¶ 144 (**RL-038**); *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction,18 July 2013, ¶ 423 (**RL-091**).

234. According to the Respondent, to determine abuse of process, the Tribunal shall assess:

a. The timing of the corporate restructuring, specifically, whether it occurred when the dispute could reasonably have been foreseen. According to the Respondent, a dispute becomes foreseeable when there is a reasonable prospect that the State's measures at issue in the dispute will take place.[239]

b. The reason for the corporate restructuring, specifically whether its main reason was to obtain treaty protection. While this does not exclude the possibility of secondary economic motives,[240] the Respondent disputes the Claimant's argument – based on Professor Bianchi's opinion – that gaining treaty protection need to be "the sole purpose" of corporate restructuring.[241] The Respondent supports its position by referencing various cases in which tribunals determined that gaining treaty protection needed only to be the "principal," "main," or "decisive" reason for the restructuring.[242]

235. The Respondent rejects the Claimant's position, which is again based on Professor Bianchi's opinion, that also a finding of fraud or malice is necessary for establishing an abuse of right claim. The Respondent notes that Professor Bianchi did not cite any case law to support his position. On the contrary, the Respondent argues that jurisprudence consistently holds that "a finding of abuse does not require a showing of bad faith".[243]

236. In light of the foregoing, the Respondent asserts that the Claimant conducted an abuse of process through restructuring because, after the First Alleged Divestiture, it reacquired its shares in the

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[239] Memorial, ¶¶ 165-167; HT(ES), Day 1, p. 21, 10-18; *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, ¶¶ 136-138 (**RL-038**); *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction,18 July 2013, ¶ 416 (**RL-091**); *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶¶ 555-569 (**RL-037**).

[240] Memorial, ¶ 168; *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶¶ 570-584 (**RL-037**); *Alverley Investments Ltd. and Germen Props. Ltd. v. Romania*, ICSID Case No. ARB/18/30, Award, 16 March 2022, ¶ 376 (**RL-039**); *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 142 (**RL-038**); *Cascade Invs. NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, 20 September 2021, ¶ 340 (**RL-053**); *Alverley Invs. Ltd. and Germen Props. Ltd. v. Romania*, ICSID Case No. ARB/18/30, Award, 16 March 2022, ¶ 376 (**RL-039**).

[241] Counter-Memorial, ¶ 144, citing Expert Report of Professor Andrea Bianchi, ¶ 166 (**CER-3**); Counter-Memorial, ¶ 167, citing Expert Report of Professor Andrea Bianchi, ¶ 155 (**CER-3**).

[242] Reply, ¶¶ 274-281; *Alverley Invs. Ltd. & Germen Props. Ltd. v. Romania*, ICSID Case No. ARB/18/30, Award of 16 March 2022, ¶ 376 (**RL-039**); *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd. & Mobil Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶ 190 (**CL-165**); *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, ¶ 415 (**RL-091**); *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Award, 16 July 2012, ¶ 390 (**RL-107**); *Pac Rim Cayman v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.41 (**CL-147**); *Alverley Investments Ltd. & Germen Props. Ltd. v. Romania*, ICSID Case No. ARB/18/30, Award, 16 March 2022, ¶¶ 442, 451 (**RL-039**); *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 588 (**RL-037**).

[243] Reply, ¶¶ 291-298; Expert Opinion of Professor Andrea Bianchi, ¶¶ 153-155 (**CER-3**); *BRIF TRES d.o.o. Beograd & BRIF-TC d.o.o. Beograd v. Republic of Serbia*, ICSID Case No. ARB/20/12, Award, 30 January 2023, ¶¶ 200, 223 (**RL-108**); *Cascade Invs. NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, 20 September 2021, ¶¶ 344, 444, 462 (**RL-053**); *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶¶ 537, 539 (**RL-037**).

Ecuadorian Companies for the purpose of acquiring protection under the Treaty. In particular, the Respondent notes that: (i) when, on 22 June 2010, President Correa announced its plan to prohibit gambling in Ecuador the Claimant had already carried out the First Alleged Divestiture, which took place on 8 December 2009;[244] and (ii) the Claimant reacquired its investment with the Alleged 5 July 2010 Transfer and the Alleged 29 April 2011 Transfer.[245] The Respondent claims that the Claimant "has failed to articulate any credible economic rationale for these transactions", even after having been ordered to do so during document production.[246] Moreover, when cross-examined, Mr. Cuadrado and Mr. Fuentealba could not recall "why the reversal of transfers took place".[247]

237. According to the Respondent, the Claimant's failure to provide a specific economic rationale for its transactions demonstrates that "the principal," "main" or "decisive" reason for the Alleged 5 July 2010 Transfer and the Alleged 29 April 2011 Transfer was to secure protection under the Treaty.[248] The Respondent asserts that possibility of alternative treaty protection through the nationalities of Messrs. Cuadrado and Fuentealba does not undermine this finding.[249]

238. According to the Respondent, after President Correa's announcement, the measures against gambling business – and, thus the dispute between the Claimant and Ecuador – became foreseeable.[250] Tellingly, a few days after the announcement Sircontena retransferred the shares received through the First Alleged Divestiture to Grupo C and Orange Business through the

[244] HT(EN), Day 3, p. 42, 20-24.

[245] Memorial, ¶¶ 169-170; HT(ES), Day 1, p. 25, 9-22; Letter from Grupo C to Superintendencia on transfer of shares from Lynton to Sircontena of 8 December 2009 (**R-077**); Extract from Ecuador's Companies Register (Superintendencia de Compañías) for Grupo C S.A. C-Group (**R-009**); Note regarding transfer of shares in WWTS from Sircontena to Orange Business and Grupo C, 19 July 2010 (**R-078**); Extract from Ecuador's Companies Register (Superintendencia de Compañías) for WWTS Ecuador S.A. (**R-010**).

[246] Reply, ¶¶ 283, 290; HT(EN), Day 3, p. 44, 12-16; Procedural Order No. 7, Tribunal's Decision on Respondent's Requests, 12 July 2024, pp. 60-70 (Request No.4 related to the transfer of shares in Grupo C from Lynton to Sircontena and from Sircontena to Lynton; Request No. 5 related to the transfer of shares in WWTS from Orange Business to Sircontena and from Sircontena to Orange Business and Grupo C; Request No. 6 related to the reasons for transfers and attempts to cancel, revoke or reverse them; Request No. 7 related to document and communications concerning prohibition of gambling in Ecuador and the consequences of the prohibition for Lynton and related entities); Email from Claimant's counsel to Respondent's counsel of 16 August 2024.

[247] HT(EN), Day 3, p. 91, 16-23.

[248] Reply, ¶¶ 284-288; *Philip Morris Asia Ltd. v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶¶ 580-583 (**RL-037**); *Cascade Invs. NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, 20 September 2021, ¶ 346 (**RL-053**); *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Award, 16 July 2012, ¶ 390 (**RL-107**); *BRIF TRES d.o.o. Beograd & BRIF-TC d.o.o. Beograd v. Republic of Serbia*, ICSID Case No. ARB/20/12, Award, 30 January 2023, ¶ 151 (**RL-108**); *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 50, 140 (**RL-038**).

[249] Reply, ¶ 289.

[250] Memorial, ¶ 175.

Alleged 5 July 2010 Transfer. Moreover, a few days before the *Consulta Popular*, Sircontena transferred its shares in Grupo C to Lynton through the Alleged 29 April 2011 Transfer.[251]

239. The Respondent argues that "the chronology leaves little doubt that Lynton's reinvestment into the Ecuadorian companies" was "triggered by President Rafael Correa's announcement" and "was done for the purpose of gaining access to the benefits" of the Treaty. The Respondent also asserts that the Claimant did not "even attempt to provide" another explanation for that restructuring.[252] Accordingly, the restructuring constituted an abuse of rights and implies the Tribunal's lack of jurisdiction.

240. In response to the Claimant's argument that that internal restructuring was permitted under Article I(3) of the Treaty, the Respondent notes that a situation of divestiture, as the one carried out by Lynton, does not fall under the scope of that Article, referring to "alternation of the form in which assets are invested or reinvested" not "affect[ing] their character as investments".[253] Contrary to the Claimant's suggestion, the argument that the Alleged 5 July 2010 Transfer and the Alleged 29 April 2011 were intra-group operations would not change the fact that the investment did "come outside and then back inside the ownership or control" of the Claimant and affected the nationality of its ownership character.[254]

241. The Respondent asserts that "whether or not this is an intra-group transfer, and whether or not it is permitted by the BIT, are irrelevant" for the purpose of conducting an abuse of rights analysis, also considering that "most of the abuse of rights cases have arisen in the context of internal corporate restructuring".[255]

242. The Respondent also refuses the Claimant's timeline of the events according to which it reacquired its shares in Grupo C with the Alleged 5 June 2010 Transfer, as registered in the corporate books on 12 June 2010, *i.e.*, before the President's announcement. The Respondent denies that the Alleged 5 June 2010 took place and notes that: (i) the Claimant relies solely on a

[251] Reply, ¶¶ 330-339; HT(ES), Day 1, p. 23, 17-21; Note regarding transfer of shares in WWTS from Sircontena to Orange Business and Grupo C of 19 July 2010 (**R-078**); Extract from Ecuador's Companies Register (Superintendencia de Compañías) for WWTS Ecuador S.A. (**R-010**); Extract from the Nevada Business Portal (as of 23 January 2024) (**R-005**); Extract from Ecuador's Companies Register (Superintendencia de Compañías) for Grupo C S.A. C-Group (**R-009**); HT(EN), Day 3, p. 46, 14-20.

[252] Memorial, ¶¶ 183-185.

[253] Memorial, ¶ 188.

[254] Reply, ¶¶ 299-304, 350-353.

[255] Reply, ¶ 300; *Cascade Invs. NV v. Republic of Turkey*, ICSID Case No. ARB/18/4, Award, 20 September 2021, ¶ 353 (**RL-053**); *Mobil Cerro Negro Holding*, *Ltd.*, *Mobil Cerro Negro, Ltd.* & *Mobil Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶¶ 20-22, 190. 205 (**CL-165**); *Koch Minerals Sàrl & Koch Nitrogen Int'l Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, ¶¶ 6.60-6.70 (**CL-192**).

document related to a shareholder meeting on 5 June 2010, which lacks probative value;[256] and (ii) there is evidence in the record showing that the transfer was registered in the corporate books on 12 June 2011 and, in any event, that as of 14 July 2010, Sircontena still held those shares.[257]

243. Finally, the Respondent addresses the Claimant's arguments that, in any event, during the relevant times it: (i) never lost control of Grupo C also in light of the fact that Mr. Cuadrado has always remained the President of Grupo C;[258] and (ii) maintained its ownership in Orange Business which, in turn, held shares in WWTS Ecuador.[259] The Respondent notes that the Claimant has failed to: (i) demonstrate which kind of control it was exercising on Grupo C;[260] (ii) mention that, before President Correa's announcement, Orange Business disinvested itself from its shares in WWTS Ecuador and partially recovered them only after the announcement, with the Alleged 5 July 2010 Transfer.[261]

2. The Claimant's position

244. The Claimant rejects any allegation of abuse of process concerning the Alleged 5 June 2010 Transfer and the Alleged 5 July 2010 Transfer.

245. As a preliminary matter, the Claimant, by referencing the expert report of Professor Bianchi, asserts that:

> international investment law penalizes as an 'abuse of process' only those instances in which a certain conduct is fraudulently or maliciously carried out by the claimant to obtain an advantage which would not be otherwise available under the international investment treaty.[262]

246. The Claimant argues that nothing fraudulent or malicious occurred in the present case and Lynton was organized as it was, and operated as it did, for entirely legitimate business reasons.[263]

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[256] Memorial, ¶ 194; Reply, ¶¶ 342-343; HT(EN), Day 3, p. 92, 13-23; Escritura de Protocolización de Documentos que ha Solicitado El Abogado Clemente Miranda Garcia, Acta de la Junta General Extraordinaria y Universal de Accionistas de la Compañía Grupo C S.A. C-Group, 5 June 2010 (**C-080**).

[257] Reply, ¶¶ 344-345; HT(ES), Day 1, p. 29, 1-6; HT(EN), Day 3, p. 91, 1-11; Superintendencia report following the inspection of Grupo C of 21 July 2010 (**R-090**); Share transfer letter of Grupo C of 28 April 2011 (**R-081**); Report of Grupo C on the shareholding structure for 2010 (**R-082**). Against the argument that the there is a typographical error in R-081 and the date of recording of the Grupo C shares in the corporate books was not 12 June 2011, but 12 June 2010, the Respondent says that there is no proof that the alleged mistake was in the year and not, for instance, in the month (HT(ES), Day 1, p. 27, 7-20).

[258] Reply, ¶¶ 358-359.

[259] Reply, ¶ 360.

[260] Reply, ¶ 359.

[261] Reply, ¶¶ 361-369.

[262] Counter-Memorial, ¶ 154; Expert Report of Professor Andrea Bianchi, ¶ 153 (**CER-3**).

[263] Counter-Memorial, ¶¶ 155, 157.

247. The Claimant emphasizes that, for such a claim to succeed, the Respondent must demonstrate that "the sole purpose of the transaction was to manufacture international jurisdiction for a claim where none would otherwise exist".[264]

248. The Claimant denies that the sole purpose of Alleged 5 June 2010 Transfer and Alleged 5 July 2010 Transfer was to gain protection under the Treaty and highlights three main circumstances to support its position.

249. *First*, the plain text of Article I(3) permits internal corporate restructuring through the transfers of shares.[265] In the context of the First Alleged Divestiture all the relevant transfers occurred within the Lynton corporate structure, they never left the corporate group, and fall within the scope of Article I(3).[266]

250. *Second*, the Claimant notes that, through the First Alleged Divestiture, it did not completely relinquish its investment in the Ecuadorian Companies nor lost control of Grupo C. In particular, notwithstanding the First Alleged Divestiture, the Claimant:

a. Maintained its ownership in Orange Business, which "owned WWTS Ecuador" and these "where major cogs in Lynton's investment in Ecuador". In other words, the Claimant argues that there would have been no reason to undo the First Alleged Divestiture to gain the protections under the Treaty because the Claimant still qualified as foreign investor through its ownership of Orange Business.[267]

b. Maintained its control over Grupo C, since it just transferred the shares to Sircontena, that was, in turn, owned by Grupo C. The Claimant argues that "either directly or indirectly owned both Grupo C and Sircontena" and the fact that it ordered Sircontena to transfer the shares of Grupo C back to Lynton demonstrate that "at a minimum, Lynton controlled both Grupo C and Sircontena".[268]

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[264] Counter-Memorial, ¶¶ 167, 184; Expert Report of Professor Andrea Bianchi, ¶ 155 (**CER-3**); *Philip Morris Asia Limited v Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 539 (**CL-159**).

[265] In particular, Article I(3) of the Treaty provides that: "[a]ny alteration of the form in which assets are invested or reinvested shall not affect their character as investment". *See* Answer to the Request for Bifurcation, ¶¶ 87-89; Counter-Memorial, ¶¶ 159-160; Expert Report of Professor Andrea Bianchi, ¶ 175 (**CER-3**); *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, ¶ 6.70 (**CL-192**).

[266] Counter-Memorial, ¶¶ 147, 178-179, 191; HT(EN), Day 1, p. 92, 6-12.

[267] Counter-Memorial, ¶ 150.

[268] Counter-Memorial, ¶¶ 151, 181-182; HT(EN), Day 3, p. 80, 11-25. On this note, the Claimant stresses the fact that Mr. Cuadrado (co-owner of Lynton) was president of Grupo C from 1999 until after the issuance of the 2011 Executive Decree. *See* Superintendencia de Compañías, Valores y Seguros, Certificado de Administradores Anteriores de Grupo C S.A., 4 April 2024 (**C-093**); Superintendencia de Compañías Valores y Seguros, Nombramiento de Roberto Cuadrado Como Presidente de Grupo C S.A., 7 July 1999 (**C-141**); Superintendencia de Compañías Valores y Seguros, Nombramiento de Roberto Cuadrado Como Presidente de Grupo C S.A., 5 June 2005 (**C-142**); Superintendencia de Compañías Valores y Seguros, Nombramiento de Roberto Cuadrado Como Presidente de Grupo C S.A., 10 June 2011 (**C-143**).

251. *Third*, Mr. Cuadrado and Mr. Fuentealba, as citizens of Spain and Chile – countries with their own bilateral investment treaties *vís-a-vís* Ecuador – could have initiated an arbitration as well. This provides another reason why restructuring for the purpose of "treaty shopping" was unnecessary.[269] The Claimant relies on the *Cervin Investissement* case where, according to its expert Professor Bianchi, the Tribunal rejected a claim for abuse of process through restructuring "attribut[ing] a certain importance to the fact that the relevant investment would be covered" by another investment treaty.[270]

252. In relation to the "foreseeability" element, the Claimant emphasizes that what needs to be foreseeable at the time of the restructuring is a "specific" dispute, namely, the implementation of the specific measures that are the subject of the arbitration.[271] According to the Claimant, the radio announcement of President's Correa was not remotely sufficient to foresee the specific dispute of this case and the measures that the government undertook the following year, including the Consulta Popular, the 2011 Executive Order and its failure to provide compensation for the expropriation of gambling businesses.[272]

253. The Claimant also asserts that, in any event, the Alleged 5 June 2010 Transfer preceded President Correa's announcement and, through that transfer, the Claimant reacquired its shares in Grupo C.[273]

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[269] Counter-Memorial, ¶¶ 146, 152.

[270] Counter-Memorial, ¶ 144; Expert Report of Professor Andrea Bianchi, ¶ 166 (**CER-3**), ¶ 166; *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Decision on Jurisdiction, 15 December 2014, ¶ ¶ 292, 296-297 (**CL-196**).

[271] Counter-Memorial, ¶¶ 169-171, 177; *Pac Rim Cayman v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, June 2012, ¶ 2.99 (**CL-147**); T*idewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, ICSID Case No ARB/10/5, Decision on Jurisdiction, ¶¶ 145-146 (**CL-158**); *Gramercy Funds Management LLC, And Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 426, 431 (**CL-191**); *Elliott Associates L.P. v. Republic of Korea*, PCA Case No. 2018-51, Award, 20 June 2023, ¶ 506 (**CL-190**).

[272] Rejoinder, ¶¶ 50-52.

[273] Counter-Memorial, ¶¶ 175-177; HT(EN), Day 1, p. 94, 4-22; p. 95, 5-13. According to the Claimant, the 5 June 2010 Transfer was registered in Grupo C's corporate books on 12 June 2010 and with Superintendencia on 29 April 2011 (Escritura de Protocolizacion de Documentos que ha solicitado el abogado Clemente Miranda Garcia, Acta de la Junta General Extraordinaria y Universal de Accionistas de la Compañia Grupo C S.A. C-Group, 5 June 2010, ¶ ¶ 3-4 (**C-081**); Letter from Grupo C S.A. to the Superintendencia de Compañías, Valores y Seguros, 28 April 2011 (**C-144)**). The Claimant disputes the Respondent's argument that the relevant date for determining ownership is the registration with the *Superintendencia* on 29 April 2011. The Claimant explains that, under Ecuadorian law, registration with the *Superintendencia* does not affect ownership rights but it serves only for publicity purposes (Counter-Memorial, fn. 185). Furthermore, the Claimant highlights that the Respondent has taken "inconsistent positions on the issue" noting that, in discussing the Second Alleged Divestiture, the Respondent relied on the date of the transfer, rather than the date of registration, as the relevant one (Rejoinder, ¶ 56; HT(EN), Day 1, p. 101, 6-16; HT(EN), Day 3, p. 79, 3-23).

VI. THE TRIBUNAL'S ANALYSIS

A. INTRODUCTION

254. It is the Tribunal's duty to examine its jurisdiction. Article 21(1) of the UNCITRAL Rules provides that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction".

255. The Respondent has challenged this Tribunal's jurisdiction on the basis of five objections. Pursuant to Procedural Order No. 5, containing the Decision on the Respondent's Request for Bifurcation, four of these objections are being examined at this stage of the proceedings. Should the Arbitral Tribunal, after having analyzed such four objections, find that it has jurisdiction, the examination of the fifth one has been reserved for a potential subsequent phase addressing also the merits of the case.

B. SEQUENCE OF THE ANALYSIS

256. The Tribunal will begin by addressing three preliminary elements relevant to the jurisdictional objections, in respect of which there is no agreement between the Parties: (i) the Burden of Proof, (ii) the Applicable Law and (iii) the Relevant Time for Assessing the Objections.

257. Following this, the Tribunal will examine the jurisdictional objections in the sequence in which they have been presented by the Respondent and subsequently addressed by the Claimant in their respective submissions and during the Hearing.

258. Every tribunal is faced with issues of procedural efficiency throughout the course of an arbitration. In deciding to bifurcate the present arbitration through Procedural Order No. 5, the Tribunal was not acting pursuant to any requirement under the UNCITRAL Rules mandating that jurisdictional objections must be addressed as a preliminary matter. Rather, the decision was guided by considerations of efficiency.[274]

259. During the Hearing, the Tribunal posed several questions for the Parties to address during their closing statements. One such question dealt with whether the Parties would expect to have the Tribunal rule on all the objections, or whether – assuming that one of such objections had merit – the Parties' expectation would be for the Tribunal to rule that it lacked jurisdiction through a single objection, without needing to address the other objections. The question was framed as follows:[275]

[274] Procedural Order No. 5, ¶ 121.

[275] HT(EN), Day 2, p. 154, 4-12.

> [T]here are four objections that have been presented by Respondent, and the Tribunal will address, will examine, will study and will decide on the four objections. But if the Tribunal identifies that one of the objections is valid, whether that would satisfy the requirement that the Tribunal no longer has jurisdiction to examine the merits of the case; or whether the Tribunal would require, in the minds of the parties, that the Tribunal examine all four objections.

260. The Parties presented their respective views to the Tribunal. By referring to a "decision-tree" presented during its opening statement, illustrating the procedural path to dismiss Claimant's claims should any of the jurisdictional objections be upheld,[276] the Respondent stated:

> [I]f the Tribunal upholds one of those objections, it would not have jurisdiction to proceed to the merits. Each of them is an independent basis for dismissing the case for lack of jurisdiction, and each of these four objections is a separate jurisdictional hurdle that Claimant needs to overcome in order to proceed to the consideration of the case on the merits".[277]

261. Further, the Respondent stated that "if the Tribunal finds that benefits should be denied to Lynton for lack of substantial business activities in the United States, then it should dismiss the whole case for lack of jurisdiction, and it need not consider the rest of the objections.[278]

262. The Claimant, on the other hand, expressed a different view, stating that: "on the issue of the order and the award, and if you find on one of the clauses or not, our preference would be that we get a full written award, with a full justification for the award on all issues. That would be our preference".[279]

263. In light of the Parties' opposing positions on this issue, the Tribunal is guided by the principle of procedural economy, which both Parties have acknowledged as fundamental to the conduct of these proceedings.[280] In stating its position, during the Hearing, the Respondent made reference to "judicial economy, efficiency, cost-effectiveness and conservation of the […] parties' resources".[281]

264. Accordingly, the Tribunal's approach is to refrain from examining any further jurisdictional objections once it is satisfied that a particular objection is well-founded and dispositive. In adopting this approach, the Tribunal seeks to promote procedural efficiency and economy, as well to preserve the Parties' resources.

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[276] HT(EN), Day 3, p. 13, 1 (making reference to a "decision tree" in slide 3 of its presentation for the opening submission at the Hearing).

[277] HT(EN), Day 3, p. 13, 3-9.

[278] HT(EN), Day 3, p. 29, 19-24.

[279] HT(EN), Day 3, p. 82,11-15.

[280] Response to the Request for Bifurcation, ¶¶ 3 and 10; Request for Bifurcation, ¶¶ 23-24.

[281] HT(EN), Day 3, p. 14, 1-4.

C. THE BURDEN OF PROOF IN RELATION TO THE JURISDICTIONAL OBJECTIONS

265. Both Parties acknowledge the application of Article 24(1) of the UNCITRAL Arbitration Rules, which provides that: "[e]ach party shall have the burden of proving the facts relied on to support his claim or defense". As a general matter, a claimant has the burden to establish the legal basis and conditions for a tribunal to exercise jurisdiction over a claim. If a respondent formulates objections to jurisdiction, it must establish the legal basis and conditions underpinning such objections, which call into question the jurisdictional basis invoked by a claimant.

266. In the present case, although the Respondent does not challenge that it has the burden to prove its jurisdictional objections, it nonetheless contends that such burden shifted back to the Claimant upon having made *prima facie* showing of the validity of its objections in the bifurcation phase of the Arbitration.

267. The Claimant accepts that the burden of proof may shift back, but only after the Respondent has satisfied its burden regarding the jurisdictional objections.

268. This is where the difference among each of the Parties lies. The Respondent's position is that it has already satisfied its burden of proof since the Tribunal accepted to bifurcate the proceedings and decided to examine four jurisdictional objections, highlighting that in the Procedural Order No. 5 the Tribunal required the Claimant to provide evidence of its proper incorporation and status. Instead, the Claimant asserts that the Respondent has not yet met its burden.

269. Furthermore, the Claimant takes the position that it is the Respondent who is required to fully prove the existence of the abuse of process jurisdictional objection.

270. Ordinarily, it is the claimant (or plaintiff) who must support their case with sufficient evidence to enable the tribunal to render a justified decision, including on the existence of jurisdiction. However, just as a claimant must prove its allegations, a respondent (or defendant) must also substantiate its assertions – particularly when its defense involves affirmative claims – in order to have the claim dismissed. Even if arbitral tribunal retain some discretion, in limited circumstances, to request evidence from the parties or to seek assistance from expert witnesses appointed directly by the tribunal,[282] tribunals adjudicating an investment claim under an international treaty, as in the present case, neither possess nor are expected to possess the authority

[282] For example, see Article 24(3) of the UNCITRAL Rules ("At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine ") and article 27(1) ("The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference established by the arbitral tribunal, shall be communicated to the parties").

or means to undertake an inquisitorial process to establish the facts underlying a claim or a defense.

271. This means that a respondent in an arbitration who contends that the relevant arbitrator or tribunal lacks jurisdiction must first persuade it of the validity of such objection. While the evidence provided must be persuasive, it need not be final. Here is where many tribunals have deemed that it will be sufficient to receive evidence that shows *prima facie* the validity of the objection, which is consistent with the principle that the claimant has the burden of proving the legal basis and conditions for the exercise of jurisdiction. At that point the burden should be shifted to the other party to evidence the opposite. It becomes therefore necessary to be able to decide if and when the *prima facie* threshold has been reached since the particulars of each case or allegations require to make a particular analysis. This is a case-specific matter.

272. In the case of a jurisdictional objection, such as those that have been submitted to this Tribunal, it becomes necessary to distinguish the nature of each objection to determine if and when the burden has been satisfied by each Party.

273. It is true, as the Respondent contends, that when examining the Request for Bifurcation and issuing Procedural Order No. 5, the Tribunal stated that the five objections raised by the Respondent appeared to be *prima facie* serious and substantial.[283] That fact, alone, was not sufficient, however, to deem that the five objections should be the subject of bifurcation. The Tribunal also examined two additional elements: whether bifurcation would have the potential to dispose of the case, and whether the objections were separable or so intertwined with the merits that a discussion of the merits would be required to decide on those objections. It was this last consideration that triggered the Tribunal to reject bifurcation of the fifth objection – that dealing with whether or not the Claimant's investment was made or not in conformity with the laws of the Republic of Ecuador pursuant to the relevant provisions of the Treaty.

274. At the time, the Tribunal acknowledged that the first three objections (i.e., denial of benefits, *ius standi* and lack of ownership and/or control over the investment), despite their differences, shared a common element that hinged on whether or not the Claimant was a legally existing company and/or had the ability to own assets under the laws of the State of Nevada, for the reasons outlined in the Procedural Order No. 5.

275. In connection with such objections, the Tribunal also acknowledged that the Parties "shall need to address in a detailed manner the activities undertaken; the applicability of and construction of relevant legislation; as well as the effects of the alleged provisions on revival and retroactivity to

[283] Procedural Order No. 5, ¶ 115.

prior actions, 'as if such right had at all times remained in full force and effect", as alleged by the Claimant'".[284]

276. This entails a duty or burden on both Parties to prove their own allegations.

277. For this reason, the Tribunal did not state in Procedural Order No. 5 that the Respondent had already satisfied the *prima facie* threshold, and, therefore, the burden of proof had not yet shifted to the Claimant.

278. With that in mind, the Tribunal will determine, when analyzing an objection, whether the Parties have satisfied their burden of proof to sustain their respective positions.

D. THE LAW APPLICABLE TO THE JURISDICTIONAL OBJECTIONS

279. The Respondent's position is that, since the Tribunal's jurisdiction derives from the Treaty – which outlines the requisites for jurisdiction – then the provisions of the Treaty should apply, as supplemented by its interpretation in light of international law. Further, since certain Treaty terms call for the consideration of matters governed by the laws of the State of incorporation of the investor, the Respondent posits a *renvoi* to domestic law in the United States, specifically the laws of the State of Nevada.

280. Although the Parties have extensively argued the provisions of the laws of the State of Nevada, United States, to determine whether the Claimant was duly constituted at the relevant time, in good standing, and had the legal capacity to sue, there is no dispute among the Parties that the Tribunal must first apply the provisions of the Treaty to determine its jurisdiction. Nor is there any disagreement regarding the need to interpret the Treaty in accordance with international law.

281. What appears to be the source of dispute, aside from the proper interpretation of the laws of the State of Nevada, is whether these laws "supplement" the Treaty, or whether the Treaty's terms require a *renvoi* to the appropriate domestic law – in this case, that of the State of Nevada. Yet, in both cases, the laws of the State of Nevada are relevant for the examination of the jurisdictional objections.

282. Therefore, the Tribunal concludes that, to determine whether it has jurisdiction, it must apply the Treaty and international law, and it shall also rely – to the extent relevant – on the laws of the State of Nevada to assess the legal existence and capacity to sue of the Claimant.

[284] Procedural Order No. 5, ¶ 116.

E. THE RELEVANT TIME FOR ASSESSING THE JURISDICTIONAL OBJECTIONS

283. The question to be addressed here is whether for determining the status of the Claimant as an investor of the United States, the Tribunal should look at the date of filing of the Notice of Arbitration, or whether the date should be the one immediately before the occurrence of the events that gave rise to the claim itself.

284. Article VI(8) of the Treaty provides:

> 8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention.

285. The Claimant, by referencing the terms "immediately before the occurrence of the event or events giving rise to the dispute" in Article VI(8), argues that jurisdiction must be assessed at the time of the events giving rise to the dispute. The Respondent rejects this interpretation and contends instead that this provision only concerns the nationality requirement of domestic companies. Therefore, according to the Respondent, Article VI(8), in no way detracts from the well-established rule that the existence of jurisdiction must be assessed at the time the dispute is commenced.

286. The Tribunal shares the Respondent's position. *First*, the literal interpretation that the Claimant attempts to make is unsupported grammatically. Indeed, the Tribunal reads this provision differently. Article VI(8) does not address the situation where an investor may bring a claim as long as it was a "company legally constituted under the applicable laws and regulations of a Party [*i.e.,* allegedly, the Claimant] immediately before the occurrence of the event". Rather, it refers to a situation where a "company legally constituted under the applicable laws and regulations of a Party" (for example, a company established in the Republic of Ecuador) was – immediately before the occurrence of the event or events giving rise to the dispute – "an investment of nationals or companies of the other Party" (*i.e*., a company controlled by nationals of the United States). Accordingly, Article VI(8) should be read to cover those instances where a local subsidiary is controlled by an entity from the investor's nationality.

287. To this end, the Tribunal relies on Article 31(1) of the VCLT to interpret the Treaty "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".[285]

[285] VCLT, Art. 31 **(CL-006).** ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").

288. *Second*, the Tribunal agrees that the reason why this provision was incorporated into the Treaty was precisely to address the determination of nationality in arbitration proceedings under the ICSID Convention. This is so because Article 25(2)(b) of the ICSID Convention defines a "National of another Contracting State" to include foreign controlled subsidiaries. Otherwise, the reference to said provision would make no sense.

289. A separate argument regarding the relevant time for the assessment of jurisdiction lies in the Respondent's reference to the "offer and acceptance" theory. During the Hearing on Jurisdiction, the Respondent graphically presented the timing of consent in this arbitration as follows, drawing support from several investment cases:[286]

> - The host State's unilateral OFFER to arbitrate is contained in the BIT
> - The investor ACCEPTS the offer by commencing the arbitration (following its notification) under the BIT
> - CONSENT and AGREEMENT TO ARBITRATE with a particular investor is formed at the time of the commencement of the arbitration
> - Accordingly, the Tribunal's JURISDICTION is determined at the time of the commencement of the arbitration

290. The Claimant acknowledged that a series of cases in public international law that have dealt with the relevant time issue have found that the appropriate date to consider is the date of commencement of the arbitration. However, the Claimant contends that, should the Tribunal deem that, generally, the proper date to consider is that on which the notice of arbitration was submitted, then the Tribunal should treat this as a case where "extraordinary circumstances" exist, because the events that give rise to the claim relate precisely to expropriation. According to the Claimant – quoting from the *Alcor Holdings v. Czech Republic* case – "[t]o prevent a claimant

[286] Respondent's presentation for the opening submission at the Hearing, Slide 9, citing the following cases: *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 409 (**RL-061**); *Giovanni Alemanni and Others v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014, ¶ 305 (**RL-064**); *National Grid PLC v. The Argentine Republic*, Decision on Jurisdiction, 20 June 2006, ¶ 49 (**RL-065**); *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic* (I), PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, ¶¶ 220-223 (**RL-066**); *Arrest Warrant Case (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports 2002, ¶ 26 (**RL-067**); *Alcor Holdings Ltd. v. The Czech Republic,* PCA Case No. 2018-45, Award of 2 March, ¶ 251 (**RL-068**); *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia (I)*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006 , ¶ 159 (**CL-003**); *AIG Capital Partners, Inc. and CJSC Tema Real Estate Co. v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, ¶ 9.3.4, at 31 (**RL-069**); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, ¶ 255 (**RL-070**).

from bringing a case in such circumstances would be to allow the defendant State to profit from its own wrong and frustrate a core object of the treaty".[287]

291. The Tribunal does acknowledge the existence of this and other precedents,[288] and, likewise, acknowledges the need to examine the particulars of a case to determine whether or not any "special" or "extraordinary" circumstances exist to determine the proper date. However, the Tribunal does not find that any such circumstances occurred in this case, nor the Claimant itself has established otherwise. Although the Claimant has alleged that expropriation is a "key factor" in its case,[289] that is clearly not sufficient to establish the existence of extraordinary circumstances justifying a departure from the general rule that jurisdiction must be assessed at the time of commencement of the dispute.

292. In any event, the facts of this case do not assist the Claimant's contention on this point. Indeed, even though the Claimant has argued that the Measures constitute an expropriation, there is no allegation that the Claimant's legal title over its investment was transferred to the Respondent as a result of the Measures. Consequently, the Claimant was in no way precluded, by virtue of the Measures, from satisfying its burden to prove that the conditions for the Tribunal to assert jurisdiction were met at the time the Notice of Arbitration was submitted.

293. Moreover, for the sake of argument, even if an expropriation had occurred, as the Claimant contends, the Tribunal agrees with the Respondent that this would not warrant shifting the relevant date for assessing jurisdiction to the time of the alleged breaches of the Treaty. As the Respondent emphasized, its jurisdictional objections primarily rest on the fact that the Claimant was revoked as an LLC under the laws of Nevada and/or lacked a business license during most of the relevant period. These circumstances were the result of the Claimant's own conduct, including the divestiture process from the Ecuadorian Companies and its failure to maintain the corporation's good standing in Nevada.[290]

294. Absent any "extraordinary circumstances" justifying a departure from the general rule, the Tribunal shares the Respondent's position that the Claimant must show that it met the

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[287] HT(EN), Day 1, p. 61,1–5; *Alcor Holdings Ltd. v. The Czech Republic,* PCA Case No. 2018-45, Award of 2 March, ¶ 276 (**RL-068**) .

[288] Among others cited by the Claimant, *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, ¶ 301 (**CL-177**) ("the relevant case law instructs that in general terms, an investment sold after the date of Notice of Arbitration meets the criteria for an "investment" in terms of DR-CAFTA [the Dominican Republic – Central America Free Trade Agreement]. On the other hand, an investor who disposes of ownership of the investment in question before arbitral proceedings should not be eligible to seek the Treaty's protection, unless special circumstances are present. Such circumstances include, *inter alia*, the loss of the investment by actions of a third party or the retroactive application of a treaty").

[289] HT(EN), Day 1, p. 60, 5–10.

[290] Reply, ¶ 134; HT(EN), Day 1, p. 16, 12-24; p. 30, 8-24, p. 32, 12-24.

jurisdictional requirements at the date of commencement of this arbitration, namely on 17 June 2022.

295. Naturally, that would not be the end of the jurisdictional inquiry, as the Claimant will also have to prove that it met the relevant jurisdictional conditions at the time of the impugned measures. Otherwise, as a result of the principle of non-retroactivity of treaties, the Treaty would not be applicable (including for questions of jurisdiction *ratione materiae or ratione personae*, as the case may be), and the Respondent would not be bound by any corresponding international obligations towards the Claimant.[291]

F. THE APPLICATION OF THE DENIAL OF BENEFITS CLAUSE UNDER ARTICLE I(2) OF THE TREATY

1. Introduction

296. Article I(2) of the Treaty contains what the Parties have referred to as the "denial of benefits" clause. It reads as follows:

> Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.

297. This provision establishes two cumulative requirements for the exercise of a respondent State's right to deny benefits: *first*, that the relevant company (*i.e*., Lynton, in this particular case) is controlled by "nationals of any third country", and *second*, that "in the case of a company of the other Party" (*i.e.* a company of the United States), said company lacks "substantial business activities" in the territory of such other Party (*i.e.*, substantial business activities in the United States). The alternative condition that the company in question "is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations" is not relevant to the facts of the present case.

298. The rationale of this provision is evident: to ensure that the protection afforded under the Treaty is limited to companies with a real economic link to the treaty-party in which they are constituted or organized, while preventing companies of investors of non-parties or of the denying party from accessing the benefits of the Treaty merely through incorporation in the territory of the other contracting party. In other words, a clause of this nature in an investment treaty is intended to prevent "treaty shopping", whereby an investor channels its investment through a jurisdiction in

[291] *B-Mex, LLC Deana Anthone, Neil Ayervais, Douglas Black and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, paras. 145-147 (**CL-175**).

order to benefit from the protection of that jurisdiction's investment treaty, without maintaining any genuine presence there. As the tribunal in *Guaracachi v Bolivia* indicated:

> Whenever a BIT includes a denial of benefits clause, the consent by the host State to arbitration itself is conditional and thus may be denied by it, provided that certain objective requirements concerning the investor are fulfilled. All investors are aware of the possibility of such a denial, such that no legitimate expectations are frustrated by that denial of benefits.[292]

299. In the present case, there is no dispute regarding the first requirement of the clause, which is clearly met. The Claimant, Lynton, is a Nevada limited liability company, controlled by nationals of a third country, Messrs. Roberto Cuadrado (a national of Spain) and Luis Fuentealba (a national of Chile).

300. The Parties disagree, however, as to whether the second requirement of the clause is met, namely, whether the Claimant had, at the relevant times, "substantial business activities" in the United States. The Parties further disagree on the appropriate point in time at which the requirements of the denial of benefits clause must be assessed. The Respondent argues that the relevant time is the commencement of the arbitration, whereas the Claimant contends that no time limitation is imposed by the Treaty.

301. Therefore, the Tribunal needs to ascertain two separate elements to reach a conclusion on the Respondent's objection of denial of the benefits:

a. Whether Claimant was or was not a company established under the laws of the United States at the relevant time; and

b. Whether the Claimant had substantial business activities in the United States at the relevant time.

302. The Tribunal considers that these two requirements must be met at the date in which the Claimant submitted its Notice of Arbitration. Article I(2) of the Treaty uses the present tense of the verb introducing the relevant condition ("*has* no substantial business activities"), which is consistent with the Tribunal's conclusion in Section E above that, absent special or extraordinary circumstances, the requirements to assert jurisdiction must be met at the time of commencement of the arbitration. This was also the conclusion reached by the tribunal in *Ulysseas v. Ecuador*, specifically in relation to Article I(2) of the Treaty,[293] and by other tribunals,[294] on the basis that

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[292] *Guaracachi A., Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award,31 January 2014, ¶372 (**RL-020**).

[293] *Ulysseas, Inc. v. The Republic of Ecuador*, PCA Case No. 2009-19, Interim Award, 28 September 2010, ¶ 174 (**RL-019**).

[294] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 250 (**RL-100**); *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Award, 28 February 2024, ¶¶ 6, 164 (**RL-101)**.

this is the date on which a claimant seeks to invoke the benefits of the Treaty which the respondent seeks to deny.

303. During the Hearing, the Tribunal requested the Parties to address, as part of their closing arguments, the legal standards under Article I(2) of the Treaty, in order to determine whether a company has "substantial business activities" in the territory of its state of incorporation. The positions of the Parties, both in their written submissions and during their oral pleadings at the Hearing, have been considered. By letter of 28 February 2025, the Tribunal requested the Parties further clarification *inter alia* with respect to some aspects relevant for the assessment of the denial of benefits objection. Both Parties submitted their written views on 14 March 2025, which the Tribunal has also considered in reaching its conclusions.

2. Whether Lynton was a company established under the laws of the United States

304. The Claimant asserts that it is a validly incorporated and existing company, with legal standing and capacity to sue in accordance with the laws of the State of Nevada. The Respondent maintains that the Claimant's license to do business expired on 28 February 2011 – before the events that gave rise to the Claimant's allegations of the Treaty's breaches – adding that the Claimant was subsequently revoked pursuant to the laws of Nevada on 1 March 2012, and reinstated only on 17 August 2023 – after this arbitration was well underway. In response, the Claimant does not dispute the revocation, but it argues that the reinstatement of its charter under Nevada laws had retroactive effects, indicating that, despite the revocation, the company was not dissolved and was able under law to be reinstated or revived without affecting its status.

305. Despite the differences of views, the Respondent has not challenged the existence of the Claimant as a company existing under the laws of the United States in relation to the denial of benefits clause. Rather, the Respondent's argument focuses on the implications of its revocation for the determination of whether the Claimant had, at the relevant time, substantial business activities in the United States as well as in relation to the Respondent's other jurisdictional objections for lack of ownership and control of the investment and lack of *ius standi*.

3. The interpretation of "substantial business activities" under Article I(2) of the Treaty

306. While the positions of the Parties in connection with the concept of "substantial business activities" differ, the Tribunal still identifies some common ground. There is broad convergence in the legal authorities relied on by the two Parties in support of their respective positions – *Pac Rim v. El Salvador, IC Power v. Peru, Plama v. Bulgaria, 9REN v. Spain, Aris Mining v. Colombia* and others – which is an indication that the principles are shared, but their

interpretations on how those principles apply to their case vary. Some findings of the above-mentioned decisions will be discussed below.

307. The main difference amongst the Parties lies on the applications of the foregoing decisions and principles to the present case and on whether the Claimant can be deemed to have "substantial business activities" ("actividades comerciales importantes" in the Spanish version of the Treaty) in the United States as prescribed by the Treaty.

308. In interpreting the scope of the expression in Article I(2) of the Treaty, the Tribunal follows the general rules of interpretation under Article 31(1) of the VCLT, according to which a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The Tribunal finds further guidance in Article 33(3) of the VCLT, according to which "[t]he terms of the treaty are presumed to have the same meaning in each authentic text". Before the signatures of the plenipotentiaries of the two contracting parties, the Treaty specifically provides that, that it is concluded "in the English and Spanish languages, both texts being equally authentic".

309. The Tribunal identifies three relevant elements from Article I(2) of the Treaty which warrant interpretation: (a) the activities must be commercial in nature as denoted by the term "*business* activities" ("*actividades comerciales*" in the Spanish version of the Treaty); (b) the activities must be "substantial" ("*importantes*" in the Spanish version of the Treaty); and (c) since the Treaty utilizes the term activities in plural, in both the English and the Spanish versions, this needs to be taken into account.

310. Commercial Activities. As it is evident, the requirement that the activities must be of a "business" character is related to being engaged in commerce. In the Spanish version of the Treaty, which is equally authentic, the term used to characterize the activities is "comerciales", thereby leaving no doubt that the term "business" in the English version must be understood as "commercial". The Tribunal notes that the Parties did not find it necessary to refer to either English or Spanish dictionaries to define the meaning of "commercial". However, the Tribunal is guided by the need to interpret the Treaty "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose", as required by Article 31(1) of the VCLT. In an effort to ascertain the ordinary meaning of the term "commercial" in a legal context, the Tribunal notes that the definition of this term under Black's Law Dictionary is "relating to or connected with trade and traffic or commerce in general",[295] and, when used as an

[295] *See* definition of "commercial" in the Black's Law Dictionary (https://thelawdictionary.org/commercial/).

adjective, it means making or intended to make a profit.[296] The term is intended to exclude activities that are not concerned with the undertaking of "business" or commerce.

311. There appears to be no dispute among the Parties regarding what constitutes an activity of a "business" or commercial nature. Nonetheless, the Claimant has argued that a commercial activity may include the mere attempt to initiate a new business.[297] For example, a company seeking investments is, in itself, engaging in a business activity. According to the Claimant, the eventual success or failure in securing the investment or carrying out the project is irrelevant for purposes of the Treaty.

312. When discussing the Treaty requirements, the Claimant's expert witness, Professor Bianchi affirms that the business activities must be "genuine", and "must have a business character, such as concluding and performing transactions, and go beyond the activities that are required merely to guarantee its corporate existence under the laws of the home state".[298] During the Hearing, the Respondent agreed with this understanding and explicitly referred to the words of Professor Bianchi.[299]

313. The Tribunal agrees that promotional activities undertaken to secure new business may indeed be of a commercial nature. However, for the purposes of the present inquiry, in such scenario, it must be assessed that the ultimate effort is not exclusively promotional or tentative and that the activities undertaken are in line with the business objectives of the relevant entity. The Tribunal acknowledges that the corporate purpose of a company can be broad, but ultimately there is an activity that it intends to pursue. If this is trade of goods, then the activities securing new business must encompass some trade of goods as well, and not simply be promotional. Similarly, activities merely aimed at maintaining the corporate existence and standing of the relevant company, even if commercial in nature, cannot be sufficient – in and of itself – in the absence of a display of the activities constituting the intended business of that company. This is the case even for a holding company such as the Claimant, the operations of which cannot be simply reduced to its mere corporate existence and good standing for the purpose of fulfilling the Treaty requirements of having "substantial business activities". There are factors that a tribunal examining this threshold will need to assess on a case-by-case basis, in light of, among others, the company at stake, its corporate purpose, its financial condition, and the market in which it operates.

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[296] *See* definition of "commercial" in the Cambridge Dictionary (https://dictionary.cambridge.org/us/dictionary/learner-english/commercial).

[297] HT(EN), Day 3, p. 72,24-25; p. 73, 1-11.

[298] Expert Report of Professor Andrea Bianchi, ¶ 14 (**CER-3)**.

[299] HT(EN), Day 3, p. 17, 20-25; p. 18, 1-12.

314. Substantial Activities. The Treaty requires that "business activities" be "substantial" or, in the Spanish version of the Treaty, "*importantes*". The inclusion of the adjective may be understood, in its ordinary meaning by certain dictionaries as "[b]eing significant or large and having substance",[300] "large in size, value or importance",[301]or "considerable in quantity: significantly great".[302] As indicated above, the Tribunal is guided by Article 31(1) of the VCLT in its effort to identify the ordinary meaning of the term "substantial".

315. The Tribunal does not share the suggestion of the Claimant that this requirement is only meant to distinguish the requisite activities from those of a shell company. Clearly, there is more that is required. As stated by the Respondent during the Hearing, the activities have to be "substantial", or "*importantes*" as used in the Spanish language text of the Treaty.[303]

316. The Claimant's expert, Professor Bianchi, opines that "the requirement of substantial business activity aims to make sure that the business activities are not merely formal. At the same time, substantial does not mean large and it not (sic) it is not the 'magnitude' of these activities, but rather their 'materiality' that matters". He adds that "[it] is that materiality that substantiates 'a genuine and meaningful connection' with the home state".[304] Citing Loukas Mistelis and Crina Baltag,[305] Professor Bianchi further indicates that:

> [T]he object of assessment by an arbitral tribunal is not the magnitude of the business on the territory of the home State but the genuineness of the business. Consequently, in assessing the facts of the case, arbitral tribunals, arguably, should be guided by the elements that can detect whether the activities in the home state are real or legitimate.

317. The Tribunal agrees with Professor Bianchi regarding the requirements of genuineness and materiality.

318. However, the Tribunal does not share the opinion of Professor Bianchi that the "threshold is not high"[306] – especially when this statement is linked to a previous citation of an author, according to whom "unless the investor is a shell company that exists only on paper without any employees, commercial operations, or a physical existence […] the investor is likely to be regarded as having

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[300] *See* definition of "substantial" in the Black's Law Dictionary (https://thelawdictionary.org/substantial/).

[301] *See* definition of "substantial" in the Cambridge Dictionary (https://dictionary.cambridge.org/dictionary/english/substantial).

[302] *See* definition of "substantial" in the Merriam-Webster Dictionary (https://www.merriam-webster.com/dictionary/substantial).

[303] HT(EN), Day 3, p. 15:18 – 19:11, and Day 3, 63:19 – 64:12.

[304] Expert Report of Professor Andrea Bianchi, ¶ 120 (**CER-3)**.

[305] Expert Report of Professor Andrea Bianchi, ¶ 121 (**CER-3)**, citing L. Mistelis and C. Baltag, *Denial of Benefits Clause*, Max Planck Encyclopedia of International Procedural Law, 2019, § 102.

[306] Expert Report of Professor Andrea Bianchi, ¶ 128 (**CER-3)**.

'substantial business activities' in the relevant territory".[307] It would contradict the ordinary meaning of Article I(2) of the Treaty, which uses the term "substantial" in English and "*importantes*" in Spanish, to conclude that unimportant or insubstantial business activities – such as limited promotional efforts without further development – are sufficient to meet the required threshold. There would be no explanation for the selection by the contracting parties of the terms "substantial" and "*importantes*", which are clearly intended to raise the bar for the type of "business activities" ("*actividades comerciales*") that meet the threshold.

319. In reaching its conclusion, this Tribunal is guided by the decisions of other investor-State tribunals that have been relied on by the Parties.[308] For the most part, both the Claimant and the Respondent have relied on and submitted the same legal authorities to support their positions on what constitutes "substantial business activities" in the context of assessing jurisdictional objections raised by a State.

320. In determining whether its business activities in the United States were "substantial" ("*importantes*"), the Tribunal needs to take into consideration that the Claimant is not an operating company, but rather a holding company.

321. In cases where the investor is a holding company, most tribunals have relied on lists of activities carried out in the investor's home State and submitted as evidence to assess whether the threshold of "substantial business activities" has been met. In particular:

- In *IC Power v. Peru,* it was accepted that "a holding company has substantive business operations in its State of incorporation as long as it conducts core corporate functions, rents office spaces, has full-time locally-based employees and bank accounts there".[309]

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[307] Expert Report of Andrea Professor Bianchi, ¶ 123 (**CER-3)**, citing X. Zhang, *Proper Interpretation of Corporate Nationality under International Investment Law to Prevent Treaty Shopping*, 6 *Contemp. Asia Arb. J.* (2013), 49, p. 59. This is especially relevant considering that Prof. Bianchi then quotes Stephen Jagusch and Anthony Sinclair in stating " if a company is carrying out business activities in the territory in which it is organized, one would expect that, at a minimum, it will be engaged in buying, selling, and contracting in that territory beyond the normal activities or functions required merely by the fact of its corporate existence (such as corporate registration and administration, including holding requisite board of shareholders' meetings and the payment of associated taxes and corporate registration fees" (emphasis added) (Expert Report of Andrea Professor Bianchi, ¶ 123 (**CER-3)**, citing S. Jagusch, and A. Sinclair, *Part II– Denial of advantages under Article 17(1)*, in G. Coop and C. Ribeiro (eds.), *Investment Protection and the Energy Charter Treaty* (2008), pp. 20.

[308] In particular, the Parties have made reference to *Pac Rim v. El Salvador* (**CL-147**; Reply, ¶ 84; Rejoinder, ¶ 48), *IC Power v. Perú* (**CL-170**; Reply, ¶ 85)*, 9REN v. Spain* (**CL-168**; Reply, ¶ 90), *Big Sky v. Kazakhstan* (**CL-164**; Claimant's presentation for the closing submission at the Hearing, slide 22.Reply, ¶ 76 (noting that Big Sky addressed the issue of business activities as an obiter dictum)); *Aris Mining v. Colombia* (**CL-169**; **RL-022**; Reply, ¶ 96; Rejoinder, ¶ 44, Claimant's presentation for the closing submission at the Hearing, slide 24); *Masdar v. Spain* (**CL-167**; Reply, ¶ 91).

[309] *IC Power Ltd and Kenon Holdings Ltd v. Republic of Peru*, ICSID Case No. ARB/19/19, Award, 3 October 2023, ¶ 225 (**CL-170**), (referencing *Aris Mining v. Colombia*, ¶ 139 (**CL-169**); *Limited Liability Company Amto v. Ukraine*, ¶¶ 68-69 (**CL-025**); *Masdar v. Spain*, ¶¶ 224, 253-254 (**CL-167**).

- In *Pac Rim v. El Salvador,* the tribunal indicated that generally, "holding companies are passive, owing (sic) all or substantially all of the shares in one or more subsidiary companies which will employ personnel and produce goods or services to third parties. The commercial purpose of a holding company is to own shares in its group of companies, with attendant benefits as to control, taxation and risk-management for the holding company's group of companies. It will usually have a board of directors, board minutes, a continuous physical presence and a bank account".[310] Also of relevance, the tribunal noted that, for the purpose of determining the substantial character of the business activities, a claimant "cannot aggregate to itself the separate activities of other natural or legal persons to increase the level of its own activities: those would not be the enterprise's activities for the purpose of applying [the denial of benefits clause]".[311]
- In *9REN v. Spain* the tribunal acknowledged that "bricks and mortar are not of the essence of a holding company, which is typically preoccupied with paperwork, board meetings, bank accounts and cheque books".[312]

322. In the light of these authorities, the Tribunal considers that the type of commercial activities generally undertaken by holding companies in their home jurisdiction, which could be considered in the assessment of whether there are "substantial" business activities include the following: holding of meetings of the members or directors; opening and/or maintaining bank accounts; preparation of financial statements; payment of federal, state or municipal taxes; employment of individuals and/or engagement of third party services to perform any of the above. These are activities that go beyond the mere maintenance of the legal registration of the entity at issue.

323. The Use of the Plural in the Word "Activities" ("*Actividades*"). The Tribunal deems that the use of plural in the word "activities" is not casual. Certainly, a single business transaction would be insufficient. While two transactions may technically satisfy the plural form of "activities," the ordinary meaning of the term – considered in the Treaty's context and in light of its object and purpose – requires that a company engage in more than minimal or sporadic business operations.

[310] *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 4.72 (**CL-147**).

[311] *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 4.66 (**CL-147**)

[312] *9REN Holding S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, ¶ 182 (**CL-168)** (Tribunal's translation from the Spanish version submitted as **CL-168**).

324. The Claimant cited the *Aris Mining v. Colombia*[313] case to contend that the use of the word "no" preceding "substantial business activities in the territory" should be interpreted as to cover those instances where a company may have business activities in various jurisdictions including both the country in which it is registered and other countries where it chooses to conduct operations, and that it is not necessary to determine the country where the company has its most extensive or dominant connections. Such wording would simply require for the foreign investor to have "some substantial business activity" in the jurisdiction where it is registered. Yet, this interpretation is plainly inconsistent with the terms of the Treaty. The condition to deny benefits which is under discussion refers to circumstances where the relevant company "has no substantial business activities in the territory of the other Party". The plural "activities" and the specific reference to "the territory of the other Party" leave no room for limiting the activities to one single instance or to satisfy either the plural or the substantial character with activities beyond the territory of the home State.

325. The Tribunal is of the view that the term "substantial", as relating to "business activities", should neither be equated with the terms "many" or "numerous" nor with a mere "two" to reach a grammatical plural. To be "substantial", the "business activities" need not be abundant or large in number, but clearly must be beyond a token number. Ultimately, this should be left to the discretion of the relevant tribunal that examines whether the business activities at stake meet the threshold under the Treaty. Once more, this must be carried out on a case-by-case basis.

326. Moreover, the Tribunal notes that the Parties also referred to the Letter of Submittal from the Secretary of State of the United States to the Senate of 7 September 1993, whereby the former requested approval of the Treaty.[314] This letter analyses each article of the Treaty and, in addressing Article I(2), confirms that either country (i.e., either the United States or Ecuador) "may deny the benefits of the Treaty to investments by companies established in the other that are owned or controlled by nationals of a third country if 1) the company is a mere shell, without substantial business activities in the home country, […]". The Letter of Submittal introduces the term "shell", that is not found in the Treaty.

327. The Claimant has argued that the language of the Treaty seeks to deny benefits only to "shell companies" without "substantial business activities".[315] On the other hand, the Respondent contends that the denial of benefits provision "does not require for a company to be a shell or a

[313] *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on Bifurcated Jurisdictional Issue, 23 November 2020, ¶ 136 (**CL-169**).

[314] Submittal Letter of the Ecuador-United States BIT, 7 September 1993, p. 4 (**R-003**).

[315] HT(EN), Day 1, p. 65, 5-12.

sham for a denial of benefits; all it requires is that there are no substantial business activities in its country of incorporation".[316] According to the Respondent, the Letter of Submittal "does not say that benefits can only be denied to a shell company": instead, the benefits "can also be denied to something more than a shell that has no substantial business activities in its home country".[317] The Tribunal agrees with the position of the Respondent: Article I(2) of the Treaty does not require that the investor be a shell company for the denial of benefits clause to apply, and the aforementioned Letter of Submittal cannot be relied upon to introduce an additional requirement.

4. The activities of Lynton in the United States

328. The Tribunal has made a close and detailed analysis of the evidence submitted by each Party in this case to ascertain whether or not the Claimant had, at the legally relevant time, "substantial business activities" in the United States. For the sake of completeness, the Tribunal has examined whether the Claimant had "substantial business activities" at any time from its incorporation and until the filing of the Notice of Arbitration.

329. To further ensure the full evaluation of any such evidence, the Tribunal requested that the Parties address some questions posed by the Tribunal after the Hearing on Jurisdiction. Two of these questions related directly to alleged business activities of the Claimant. In particular the Tribunal asked the Parties: (a) Why should or should not the business activity of Roberto Cuadrado in the United States listed by Claimant in its Memorials be attributable to Lynton Trading (cite to evidence in the record)?; and (b) What business activity did WWTS Group Inc. engage in, if any, during its lifetime based on the record evidence?[318]

330. After the extensive and detailed review of the evidence on the record, the Tribunal has concluded that the Claimant had no "substantial business activities" in the United States, whether at the legally relevant time (*i.e.,* the commencement of the arbitration) or, for completeness, between its date of incorporation until the filing of the Notice of Arbitration. Events after this date are of no relevance for the assessment of the standard under Article I(2) of the Treaty.

331. As will be explained below, there were some activities carried out by Mr. Roberto Cuadrado, some on his own behalf, some purportedly on behalf of WWTS Group Inc. and WWTS LLC, but nothing on the record points to activities that were carried out by or on behalf of the Claimant. In reaching this conclusion, the Tribunal has been guided by the principles discussed previously in respect to the activities having a "genuine character" and on their "materiality and substance",

[316] HT(EN), Day 1, p. 114, 2-6.

[317] HT(EN), Day 3, p. 17, 4-9.

[318] Letter of the Tribunal to the Parties, 28 February 2025.

which are helpful to interpret the standard set by the Treaty in accordance with the rules of interpretation of the VCLT.

332. The Tribunal begins its analysis by identifying the four corporate structures based in the United States which the Claimant contends have undertaken relevant business activities. These are, in addition to the Claimant, one entity in which the Claimant had equity participation formed in the State of Florida (WWTS Group), another entity in which Mr. Cuadrado was the sole member (WWTS LLC), and another entity in which the Claimant also seems to have had equity participation (Orange Business).

333. Lynton. The Claimant was formed on 27 February 2006 as a limited liability company under the laws of the State of Nevada.[319] The members as of such date were Messrs. Roberto Cuadrado and Luis Fuentealba, each with a fifty percent (50%) membership interest in the company.[320] Lynton was established as a manager-managed LLC, and Aldyne Ltd. – a company established in the Republic of Seychelles – was appointed as manager upon execution of its Operating Agreement, and has remained as such since.[321] As its manager, Aldyne had full authority to conduct the business affairs and operations of the Claimant. There is no evidence in the record that shows the appointment of a different manager, or of any delegation of authority from Aldyne to another person, or of the designation of an "attorney-in-fact" for the Claimant.

334. The record shows that after its formation and the holding of an "Inaugural Meeting" whereby the Claimant's members and the manager were confirmed, those members and the manager were far from being diligent in keeping its registrations and business licenses in order in the United States. The record shows that the Claimant's business license and standing in Nevada was lost or revoked after its formation, although the Claimant was reinstated on 12 August 2010, and secured back its license on 17 August 2010. It is also significant that its license expired shortly thereafter on 28 February 2011.[322] For the next twelve years its status was "permanently revoked"[323] until 17 August 2023 when it was revived[324] – when this arbitration was already well underway. It was

[319] Articles of Organization of Lynton Trading Ltd., 27 February 2006 (**R-050/C-107**).

[320] Lynton's Membership Certificates, 27 February 2006 (**C-104**); Lynton's Register of Members, 27 February 2006 (**C-110**).

[321] Lynton's Memorandum of Inaugural Meeting, 27 February 2006 (**C-108**) (whereby Aldyne Ltd was appointed as Manager, MF Corporate Services (Nevada) Limited as Registered Agent, and Messrs. Cuadrado an Fuentealba were confirmed as members); Lynton's Operating Agreement, 27 February 2006 (**C-109**); Lynton's State of Nevada Annual List and Business License Application and Business License, 18 March 2024 - 28 February 2025, p. 3 (**R-052**) (most recent verification that Aldyne Ltd was the manager of Lynton).

[322] Nevada State Business License issued to Lynton on 17 August 2010 (**R-044**).

[323] Extract from the Nevada Business Portal as of 16 June 2023 (**R-001**). The registered agent of the Claimant is shown to have "resigned" by that date, without reference as to the date on which the agent resigned; Certificate of Revival issued by the Secretary of State of the State of Nevada, 17 August 2023 (**C-001**).

[324] Certificate of Revival issued by the Secretary of State of the State of Nevada, 17 August 2023 (**C-001**).

only at that point that the Claimant filed the State of Nevada Annual List and Business License Application,[325] and secured the State of Nevada Business License for 2023.[326] Annual filings were made for 2024 as well.[327]

335. WWTS Group. This was a company organized as per Articles of Incorporation filed with the Florida Secretary of State on 15 April 2011. Mr. Roberto Cuadrado was appointed as the sole director of this company.[328] Although there is no reference to the identity of the shareholder(s) of the company at the time of its incorporation, the Claimant submitted a Shareholder Agreement between WWTS Group and the Claimant dated 4 May 2011, executed in Quito, Ecuador, which identifies Lynton as the sole shareholder.[329]

336. This company was short-lived, as it was "administratively dissolved" on 28 September 2012 for apparent failure to file its annual report with the State of Florida.[330]

337. There is no documentary evidence in the record showing WWTS Group having undertaken any activity in the United States. However, in response to one of the questions that was presented to the Parties after the Hearing and relating to the business activities in which WWTS Group was engaged,[331] the Claimant indicated that Mr. Cuadrado acted on behalf of this company in some of its dealings with Cantor Fitgerald, RBA Capital, Biscayne Americas Advisors and Merchant Banking.[332] This is in conflict with Mr. Cuadrado's own admission during the Hearing that WWTS Group never operated in the United States and was abandoned because it had no use at the time.[333]

338. WWTS LLC. Although there is no documentary evidence in the record on the subject, Mr. Cuadrado has asserted that he formed this limited liability company on 9 March 2012.[334] Mr. Cuadrado nonetheless appears as a co-manager along with Mr. Carlos Vasallo.[335] and this

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[325] Lynton's State of Nevada Annual List and Business License Application, Business License, and Certificate of Revival, 17 August 2023, p. 4 (**C-111/R-53)**.

[326] Lynton's State of Nevada Annual List and Business License Application, Business License, and Certificate of Revival, 17 August 2023, p. 8 (**C-111/R-53).**

[327] Lynton's State of Nevada Annual List and Business License Application and Business License, 18 March 2024 -28 February 2025, p. 3 (**R-052**); Lynton's State of Nevada Annual List and Business License Application, Business License, and Certificate of Revival, 17 August 2023, p. 4 (**C-111/R-53)**.

[328] WWTS Group Inc.'s Articles of Incorporation, 15 April 2011 (**C-120)** (whereby De La Peña Group, P.A. appears as the incorporator and registered agent).

[329] Shareholder agreement between Lynton Trading and WWTS Group Inc., 4 May 2011, (**C-121**).

[330] Extract from Florida Division of Corporations for WWTS Group Inc., 8 July 2024, (**R-057**).

[331] *Supra* ¶ 329.

[332] Claimant's Answers to Tribunal's Questions, p. 13.

[333] HT(EN), Day 2, p. 35, 19-25; p. 36, 1-14.

[334] Third Witness Statement of Roberto Cuadrado, ¶ 6 (**CWS-3**).

[335] WTTS LLC's Articles of Organization, 9 March 2012 (**C-119**).

remained so for the following three years as shown in its annual filings for 2013-2015.[336] WWTS LLC was better at maintaining a corporate license and filing of Limited Liability Annual Reports, which appear to have been regularly made for the State of Florida.[337]

339. However, there is no mention in the record of the Claimant as a member or manager in WWTS LLC's Articles of Organization, or in any filing since.

340. Orange Business. This entity was organized as per Articles of Organization of 3 August 2009, filed with the Florida Secretary of State on 9 August 2009.[338] Its principal office was identified to be located in Panama, and its registered agent and registered office in Florida were NRAI Services, Inc., a company based in Weston, Florida. In addition, according to the Articles of Organization, the sole manager as well as the initial sole member of Orange Business was Mr. Eligio Rodriguez, with an address in Panama. In its 2009 foreign ownership filing before the Ecuador's Superintendencia de Compañias, WWTS Ecuador declared that Orange Business was its shareholder and the filing mentions NARIA LLC in the section relating to members or shareholders.[339] A similar filing for the year 2010 mentions the Claimant in the section relating to members or shareholders.[340] Whereas the record contains evidence that Orange Business held shares of WWTS Ecuador, there is no clear evidence regarding the activities of Orange Business in the United States. In any event, at the Hearing, Mr. Cuadrado confirmed that he abandoned Orange Business, like the other entities in which he was involved, between 2014 and 2017.[341]

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[336] Appointed as manager, together with Mr. Carlos Vasallo. WTTS LLC's Articles of Organization, 9 March 2012 (**C-119/R-58**); WWTS LLC's 2013 Florida Limited Liability Company Annual Report, 1 May 2013 (**C-132**); WWTS LLC's 2014 Florida Limited Liability Company Annual Report, 1 May 2014 (**C-131/R-060)**; WWTS LLC's 2015 Florida Limited Liability Company Annual Report, 30 April 2015 (**C-130/R-061**).

[337] WWTS LLC's 2013 Florida Limited Liability Company Annual Report, 1 May 2013 (**C-132**); WWTS LLC's 2014 Florida Limited Liability Company Annual Report, 1 May 2014 (**C-131/R-060)**; WWTS LLC's 2015 Florida Limited Liability Company Annual Report, 30 April 2015 (**C-130/R-061**); WWTS LLC's 2016 Florida Limited Liability Company Annual Report, 25 April 2016 (**C-129**); WWTS LLC's 2017 Florida Limited Liability Company Annual Report, 14 November 2017 (**C-133**); WWTS LLC's 2018 Florida Limited Liability Company Annual Report, 1 May 2018 (**C-128**); WWTS LLC's 2019 Florida Limited Liability Company Annual Report, 26 April 2019 (**C-127**); WWTS LLC's 2020 Florida Limited Liability Company Annual Report, 14 April 2020 (**C-126**); WWTS LLC's 2021 Florida Limited Liability Company Annual Report, 28 April 2021 (**C-125**); WWTS LLC's 2022 Florida Limited Liability Company Annual Report, 29 April 2022 (**C-124**); WWTS LLC's 2023 Florida Limited Liability Company Annual Report, 23 April 2023 (**C-123**); WWTS LLC's 2024 Florida Limited Liability Company Annual Report, 18 April 2024 (**C-122**).

[338] Articles of Organization of Orange Business LLC, 3 August 2009 (**C-083**).

[339] Superintendencia de Compañías, Orange Business LLC Informe de Sociedad, 2009, pp. 1-3 (**C-086**). The reference to "NARIA LLC" appears to be a mistake in the filing, and this was confirmed by the Claimant in its Counter-Memorial, where it clarified that NRAI Services, Inc. was the registered agent at the time Orange Business was created (¶ 87).

[340] Superintendencia de Compañías, Orange Business LLC Informe de Sociedad Extranjera, 2010, p. 5 (**C-085**).

[341] HT(EN), Day 2, p. 94, 18-25; p. 95, 1-10.

341. The fact that there might have been negligent administrative and corporate compliance on the part of one or more of these companies does not by itself disqualify them from the protection of the Treaty. What is under analysis in this section is whether or not the Respondent has a right to deny benefits to the Claimant, and to that end whether or not the Claimant satisfies the requirements under Article I(2) of the Treaty.

342. Accordingly, the Tribunal needs to assess whether (and which) activities were undertaken by the Claimant in the United States, and whether any activities undertaken by WWTS Group, WWTS LLC and/or Orange Business can be deemed attributable to the Claimant.

343. In its Counter-Memorial, the Claimant included a thirteen-page list of "Evidence of Lynton's Continuous Substantial Business Activities in the US", supported by Mr. Roberto Cuadrado's Witness Statement "and other documentation". The list details the type of document/event, date and relevance.[342] The Claimant also asserted that its "business activities ceased entirely only because of Respondent's unlawful, expropriatory conduct".[343] The Tribunal will examine these alleged business activities.

344. The Tribunal is aware that the main purpose of a holding company – such as the Claimant – is precisely to hold shares or other means of equity in another entity, which one would expect will conduct commercial activities, or will, in turn, hold shares or other form of equity in other entities. It is not uncommon that the corporate structure of certain investors may include more than one layer of subsidiaries. But ultimately, one or more controlled subsidiaries will conduct the commercial activities.

345. This principle has been acknowledged by prior tribunals, cited by both the Claimant and the Respondent. These include primarily *Pac Rim v. El Salvador* and *IC Power v. Peru*, where it was acknowledged that the absence of direct commercial activities does not *per se* exclude the protection of the applicable treaty, provided that there is evidence that the entity was not merely a shell company.[344] These tribunals verified that the relevant investor had management, employees, office space, bank accounts, and accounting or legal services performed for them. The holding of meetings of the board of directors or shareholders, and the existence of minutes of any such meetings was equally considered. However, satisfying one or a couple of these

[342] Counter-Memorial, pp. 21-35.

[343] Counter-Memorial, ¶ 33.

[344] *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶¶ 4.72-4.73, 4.75, 4.78, 4.92 (**CL-147**); *IC Power Ltd and Kenon Holdings Ltd v. Republic of Peru*, ICSID Case No. ARB/19/19, Award, 3 October 2023, ¶¶ 225-230 (**CL-170**).

circumstances will likely not be sufficient. As mentioned above, a case-specific analysis must be conducted by the Tribunal to ascertain the existence of "substantial business activities".[345]

346. When questioned by the Respondent in its Reply Memorial as to the actual proof of the existence of "substantial business activities",[346] and the deployment of references to a "Lynton Group", which the Respondent deems to have the "purpose of appropriating for Lynton the activities of Mr. Cuadrado and the alleged U.S. affiliates and creating a false impression of these activities were Lynton's", the Claimant argued in its Rejoinder that the activities were "substantial" and carried out over a period of years, and summarized those that, in its view, have the materiality to demonstrate a genuine connection with the United States.[347] During the Hearing on Jurisdiction, the Claimant again referenced several of such alleged activities in its Opening and Closing presentations.[348]

347. After carefully examining the extensive table of evidence presented by the Claimant, it becomes evident to the Tribunal that there is no record of "substantial business activities" carried out by the Claimant itself, but only of some activities undertaken by Mr. Cuadrado or other related entities, mainly WWTS LLC and, to a less clear extent, WWTS Group and Orange Business.

348. Indeed, the Tribunal has examined each and every one of such events or activities allegedly performed by the Claimant that have been listed and has diligently reviewed each exhibit submitted in support. Many of those listed are activities carried out by Mr. Roberto Cuadrado – such as, for example, various email exchanges and meetings with representatives of Cantor Fitgerald,[349] RBA Capital and Biscayne Americas Advisors LLC,[350] American Merchant Banking Group, Inc.,[351] Cari Bloom Holdings, LLC,[352] or Seth Gordon Initiatives.[353]

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[345] *Supra* ¶¶ 313 and 325.

[346] Reply,¶¶ 100-112.

[347] Rejoinder, ¶ 45.

[348] Claimant's presentation for the opening submission at the Hearing, slide 15; Claimant's presentation for the closing submission at the Hearing, slide 21.

[349] Email exchange between Roberto Cuadrado and Jon Rein of Cantor Fitzgerald & Co., 19-31 January 2011 (**C-134**); Email exchange between Roberto Cuadrado and Jon Rein of Cantor Fitzgerald & Co., 11-16 February 2011 (**C-137)**; Meeting invitation with Roberto Cuadrado on behalf of WWTS LLC, and Jon Rein of Cantor Fitzgerald & Co., 18 April 2011 (**C-138**); mail exchange between Roberto Cuadrado and Jon Rein of Cantor Fitzgerald & Co., 13-18 April 2011 (**C-139).**

[350] Email exchange between Roberto Cuadrado, RBA Capital LLC and BiscayneAmericas Advisors, 22-24 June 2011 (**C-106**).

[351] Email Exchange between Roberto Cuadrado on behalf of the Lynton Group, and Jose Luis Castro of American Merchant Banking Group, Inc., 22-24 October 2011 (**C-118).**

[352] Email Exchange between Roberto Cuadrado on behalf of Lynton and Camille CheeAwai of Cari Bloom Holdings, LLC, 21 February 2012 (**C-116).**

[353] Email exchange between Roberto Cuadrado and Seth Gordon of Seth Gordon Initiatives, 6-10 may 2012 (**C-136**).

349. Mostly, they relate to a small number of contacts and meetings by Mr. Roberto Cuadrado with prospective business associates – some for the purpose of seeking gaming opportunities, while others to seek financial backing for a specific project.

350. In all such instances, the exchanges among Mr. Roberto Cuadrado and the principals or representatives of the firms express only the services said firms provide and how they could assist, but there is no mention of any activity of Mr. Cuadrado or offer or proposal made by him either in the name of Lynton or even of himself. These are essentially email exchanges for the provision of services to Mr. Cuadrado or other agents, and the input by Mr. Cuadrado is very limited (essentially Mr. Cuadrado confirms meeting dates and locations).

351. As part of this review, the Tribunal examined the following agreements: (a) a Mutual Non-Disclosure Agreement of 9 December 2010, entered into between RBA Capital LLC and Mr. Cuadrado;[354] and (b) an Engagement Agreement as Financial Advisor of 17 January 2013 between Cantor Fitzgerald, and Mr. Cuadrado, on behalf of WWTS LLC.[355] It is relevant to note that there is no mention of Lynton in any such exchanges.

352. Those agreements had no subsequent effect. They did not produce any business opportunities of financial cooperation, nor is there evidence that any business was pursued.

353. Although the Claimant has argued that the activities undertaken by Mr. Cuadrado should be attributable to Lynton, the Tribunal finds more persuasive the position expressed by the Respondent that Mr. Cuadrado did not have any authority to represent or contractually bind Lynton.[356] As already indicated above, there is no contention to the fact that Lynton was a manager-managed LLC in Nevada, and that Aldyne Ltd. was appointed as the manager with authority to conduct the business affairs and operations of Lynton. There is no evidence in the record that shows any delegation of authority from Aldyne Ltd. to Mr. Cuadrado that would enable him to represent Lynton. At the Hearing, when asked about the filing of tax returns by Lynton, Mr. Cuadrado deflected the question stating in clear terms that he was not the manager of Lynton ("I am not the manager").[357] Moreover, during the period in which Mr. Cuadrado engaged in such prospection activities, the Claimant as an entity had no license to conduct business and was permanently revoked in Nevada.

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[354] Mutual Nondisclosure Agreement between WWTS Ecuador on behalf of the Lynton Group and RBA Capital LLC, 9 December 2010 (**C-112)**. The Tribunal notes that during the cross-examination of Mr. Roberto Cuadrado, it was evidenced by counsel to the Respondent that, despite this agreement purportedly executed on 9 December 2010, RBA Capital LLC was created only on 21 June 2011 (HT(EN), Day 2, p. 22, 23-25, p. 23, 1-8).

[355] Agreement between Cantor Fitzgerald & Co. and WWTS LLC, 17 January 2013 (**C-135)**.

[356] Respondent's Answers to Tribunal's Questions, ¶¶ 19-21.

[357] HT(EN), Day 2, p. 13, 11-21.

354. As noted earlier, the Tribunal cannot ignore that the Claimant did not have a business license in the United States for the period running from February 2011 (when the business license expired) until August 2023 (when it was reinstated/revived). The Claimant was therefore incapable of legally carrying out commercial activities under the laws of the State of Nevada, although the Tribunal is aware of the retroactive effects of a reinstatement of its business license, as argued by the Claimant.[358] Nonetheless, the extended period during which its business license was revoked is a strong indication that the Claimant did not intend to be active in doing business or in having others conduct business on its behalf. Viewed from this perspective, the lack of a business license – as well as the other procedural irregularities, including the failure to make the necessary filings – cannot be considered as a mere administrative slip without consequence. More than twelve years elapsed.

355. The Respondent's expert, Mr. Jordan T. Smith, testified in his Report that an "habitual failure to file the annual list or pay the annual fee is another strong indicator that an entity does not conduct business", adding that in his experience with Nevada businesses, "especially those related to gaming, only LLCs without any actual intention of operating ignore the annual filing and payment obligations for extended time periods".[359]

356. The Tribunal notes that the Claimant itself acknowledged that, when Nevada revokes the charter of an LLC, the "LLC's 'right to transact business is forfeited'".[360] This confirms the Tribunal's understanding.

357. The Claimant also indicated in its Answers to the Tribunal's Questions that WWTS LLC's activities should be "attributable to Lynton".[361] The record shows, however, that Lynton was neither a member nor a manager of WWTS LLC. The record also shows that when it was intended to have Lynton as member, this was implemented, as was the case with WWTS Group, where there is documentary evidence that Lynton was a member.

358. It is relevant to note that all the events or activities listed by the Claimant that were undertaken by what the Claimant presented as the "Lynton Group" after 2013 relate only to administrative actions dealing with WWTS LLC's Florida Limited Liability Annual Reports,[362] Lynton's

[358] Nev. Rev. Stat. (Chapter 76), ¶ 100(1) (**R-072**) ("A person shall not conduct a business in this State unless and until the person obtains a state business license issued by the Secretary of State").¶

[359] Expert Report of Jordan T. Smith, ¶ 31 (**RER-1**).

[360] Response to the Request for Bifurcation, ¶ 25.

[361] Claimant's Answers to Tribunal's Questions, p. 7.

[362] WWTS LLC's 2013 Florida Limited Liability Company Annual Report, 1 May 2013 (**C-132**); WWTS LLC's 2014 Florida Limited Liability Company Annual Report, 1 May 2014 (**C-131**/**R-060)**; WWTS LLC's 2015 Florida Limited Liability Company Annual Report, 30 April 2015 (**C-130**/**R-061**); WWTS LLC's 2016 Florida Limited Liability Company Annual Report, 25 April 2016 (**C-129**); WWTS LLC's 2017 Florida Limited Liability

Certificate of Revival by the State of Nevada, as well as Lynton's State of Nevada Annual List and State Business License filed in 2023 and 2024.[363]

359. In any event, as the Tribunal noted when characterizing the standard governing the operation of the denial of benefits clause, the relevant "substantial business activities" must be those of the Claimant itself, and not those of third parties. This is so even when such third parties may belong to a related group of entities, unless there are specific circumstances, such as evidence of an overall control whereby the investor would also directly benefit from such activity. Keeping this in mind, the Tribunal has considered for the sake of argument whether, under the assumption that the activities of Mr. Cuadrado and the other entities identified earlier are attributable to Lynton, they could be deemed to be "substantial business activities", as required under Article I(2) of the Treaty.

360. The Tribunal finds that even under such assumption, they would still not meet the threshold of "substantial business activities" ("*actividades comerciales importantes*"). Aside from those exchanges and a small number of preliminary agreements reached by Mr. Cuadrado (none of which were performed, at least according the evidence in the record), the Tribunal finds it relevant that no additional evidence has been submitted in connection with the Claimant's own business activities, including having a place of business (owned or leased in its own name), generating income and paying any taxes, having employees, paying social security contributions, engaging accounting firms and preparing financial statements, and many others.

361. During the document production stage of the arbitration, the Respondent requested the Claimant to produce, among other, information regarding "[a]ll documents and communications regarding Lynton's business activities in the United States from its creation in 2006 to the present".[364] Despite the Claimant's objection that the request was "overly broad and unduly burdensome", and its allegation that the documents requested had been lost or destroyed by Respondent when it unlawfully seized Lynton's documents, computers, and computer servers from Lynton's offices in Ecuador, the Claimant voluntarily agreed to produce a limited number of documents that were meant to prove its substantial business activities in the United States. Thus, the Tribunal granted

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Company Annual Report, 14 November 2017 (**C-133**); WWTS LLC's 2018 Florida Limited Liability Company Annual Report, 1 May 2018 (**C-128**); WWTS LLC's 2019 Florida Limited Liability Company Annual Report, 26 April 2019 (**C-127**); WWTS LLC's 2020 Florida Limited Liability Company Annual Report, 14 April 2020 (**C-126**); WWTS LLC's 2021 Florida Limited Liability Company Annual Report, 28 April 2021 (**C-125**); WWTS LLC's 2022 Florida Limited Liability Company Annual Report, 29 April 2022 (**C-124**); WWTS LLC's 2023 Florida Limited Liability Company Annual Report, 23 April 2023 (**C-123**); WWTS LLC's 2024 Florida Limited Liability Company Annual Report, 18 April 2024 (**C-122**).

[363] Lynton's State of Nevada Annual List and Business License Application, Business License, and Certificate of Revival, 17 August 2023, p. 4 (**C-111**); Lynton's State of Nevada Annual List and Business License Application and Business License. 18 March 2024-28 February 2025 (**C-105**).

[364] Procedural Order No. 7, Annex 2: Decision on Respondent's Requests, 12 July 2024, Request 2.

the Respondent's request and ordered the production of all such information in the possession of the Claimant, which included: "contracts with business partners, contracts with service providers, employment contracts, documents concerning payment of salaries to employees, documents concerning payment of social security contributions for employees, lease contracts for office premises, bank statements, financial statements, federal and state tax returns, minutes of meetings of members, minutes of meetings of the managers, and other documents demonstrating any ongoing business operations in the United States".[365]

362. However, aside from those already examined, the Claimant produced no other documents, although such further documents would have been highly material for the assessment of the denial of benefits objection. During the Hearing, Mr. Cuadrado was repeatedly asked in cross-examination about *inter alia* whether Lynton had filed any tax returns in the United States, whether at the federal level or in Nevada, or whether it had a bank account in Nevada, or kept consolidated financial statements, or had any real estate or lease contract for an office in its own name. To all these questions he replied either "no" or that he did not know and could not point to any evidence.[366]

363. From the review of the record, it is clear to the Tribunal that there is almost no evidence, let alone sufficient evidence, that the Claimant held shareholder or member meetings, nor calls thereto, no lease agreements, no employees, payroll records or social security contributions, no financial statements (whether audited or internal), no financial transactions, no bank accounts, no insurance documents, no evidence of payment of taxes, or engagement of third-party service providers to prepare the above.

364. In this context, guided by the elements that may be derived from the decisions of the tribunals in *Pac Rim v. El Salvador*,[367] *IC Power v Peru*[368] and *9REN v. Spain*[369] regarding interpretation of the threshold of "substantial business activities", the Tribunal concludes that, even under the assumption that the activities listed by the Claimant over the entire period of time since Lynton's creation until the filing of the Notice of Arbitration could be attributed to Lynton, such activities would not reach the requisite threshold of "substantial business activities". This is even less the case if the assessment of "substantial business activities" is conducted at the time of the

[365] *Id*.

[366] HT(EN), Day 2, from p. 13, 6-25, to p. 16, 1-16.

[367] *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 4.72 (**CL-147**).

[368] *IC Power Ltd and Kenon Holdings Ltd v. Republic of Peru*, ICSID Case No. ARB/19/19, Award, 3 October 2023, ¶ 225 (**CL-170**).

[369] *9REN Holding S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, ¶ 182 (**CL-168**).

commencement of the arbitration, as it must be, even if all the activities referred to by the Claimant were *arguendo* attributed to Lynton.

365. Considering the above, the Tribunal concludes that the Claimant did not have "substantial business activities" in the territory of the United States, whether at the relevant time for the assessment of the denial of benefits clause or throughout the entire period since its creation until the filing of the Notice of Arbitration. As a result, the second condition for the exercise of the right to deny benefits under Article I(2) of the Treaty requiring that the Claimant must not have "substantial business activities" in the United States is met and the Respondent is entitled to deny the benefits of the Treaty to the Claimant.

366. For the foregoing reasons, the Tribunal upholds the denial of benefits objection raised by the Respondent and concludes that it does not have jurisdiction to hear the claims brought by the Claimant.

G. OTHER OBJECTIONS

367. Since the Tribunal has decided in the preceding section that it lacks jurisdiction to examine the merits of the claims presented by the Claimant based on the denial of benefits clause under the Treaty, the Tribunal determines that, on the basis of procedural economy, it needs not and shall not address the remaining three objections, *i.e.*, the objection *ratione personae* based on the Claimant's alleged lack of *ius standi*, the objection *ratione materiae* regarding the requirement of ownership and control of the investment, and the objection based on the alleged abuse of rights in relation to the corporate restructuring of Lynton.

VII. COSTS

A. THE RESPONDENT'S COSTS

368. In its Statement of Costs, the Respondent indicates that, in line with the provisions of Article 38 of the UNCITRAL Rules, its costs include "legal representation and assistance includ[ing] the fees and expenses of its outside counsel, W&S and Lauden, as well as the internal costs of the *Procuraduría General de Estado de la República del Ecuador*, *Dirección de Asuntos Internacionales y Arbitraje* ("**PGE**"), the state organ responsible for state representation in international arbitration, incurred in proportion to this case",[370] and identifies its total costs in Annex A thereto.

369. The total amount of costs claimed by the Respondent reaches USD 1,727,301.93, broken down as follows:

a.	Outside Counsel Fees and Expenses[371]	USD 1,453,542.86
b.	PGE Fees[372]	USD 78,289.27
c.	PGE Travel Expenses	USD 3,769.80
d.	Expert fees[373]	USD 41,700.00
e.	PCA Advance costs	USD 150,000.00
	Total:	USD 1,727,301.93

370. On 26 March 2025, the Respondent petitioned the Tribunal to include and consider an additional payment request made by the PCA on 19 December 2024 of USD 150,000.00 as deposit towards the arbitration costs. The Respondent acknowledged that it had not yet made such payment, although Ecuadorian "financial authorities allocated the necessary resources to cover Respondent's obligations, [and] the payment is currently being processed and should be finalized within the following weeks".[374] The payment was duly received by the PCA.[375] Moreover, after having submitted its Statement of Costs, on 12 September 2025, the Respondent made an additional payment of USD 60,000 towards the arbitration costs, pursuant to the Tribunal's request of 27 August 2025.[376]

[370] Respondent's Statement of Costs, ¶ 4.

[371] These include fees of Winston & Strawn and Lauden Americas Consulting.

[372] These include fees for 16 PGE officials who allegedly participated in the arbitration.

[373] These include fees of the Nevada law expert, Jordan Smith and the Ecuadorian expert, Marco López.

[374] Letter from the Respondent to the Tribunal, 26 March 2025, p. 1.

[375] Letter of the Tribunal to the Parties, 13 May 2025.

[376] Letter of the PCA to the Parties, 12 September 2025.

371. In connection with the "costs follow the event" principle under the UNCITRAL Rules, although it accepts that the Tribunal may depart therefrom if the circumstances so require, the Respondent contends that in this case "no circumstances justify the departure" from such principle.[377]

372. Pursuant to the terms of the Procedural Order No. 10, and in accordance with the Parties' agreement contained in an email to the Tribunal of 7 March 2025, the Claimant responded to the Respondent's Statement of Costs on 15 April 2025, objecting to the costs claimed by the Respondent in relation to the PGE Fees (USD 78,289.27) and PGE Travel Expenses (USD 3,769.80). The Claimant argued that the Respondent failed to include proof of such costs in its statement, as had been agreed, and requested that, "to the extent the Respondent is deemed the successful party in this case, and the Tribunal determines that it is entitled to recover its costs, the total award should be reduced by $82,059.07".[378]

373. Moreover, the Claimant objected to the Respondent's petition for the Tribunal to include the additional USD 150,000.00 deposit towards the recoverable costs of arbitration, arguing that the sum had not yet been paid.[379]

374. In response to the Claimant's comments, on 28 April 2025, the Respondent sent a letter to the Tribunal stating that: (i) the additional USD 150,000 deposit toward arbitration costs had already been paid; and (ii) it was willing to submit the documentation substantiating PGE's Fees it "if the Tribunal deems it appropriate".[380]

B. THE CLAIMANT'S COSTS

375. The Claimant submitted its Statement of Costs, indicating that proof thereof had been uploaded to the platform for custody of the case record.

376. The total amount of costs claimed by the Claimant reaches USD 2,421,711.37, broken down as follows:

a.	Outside Counsel Fees[381]		USD 1,994,750.50
b.	Expenses		USD 276,960.87
c.	PCA Advance costs		USD 150,000.00
		Total:	USD 2,241,711.37

377. Although the Claimant made two payments of USD 150,000.00 towards the arbitration costs before submitting its Statement of Costs, the Claimant included the first one in its Statement of

[377] Respondent's Statement of Costs, ¶ 5.

[378] Letter from the Claimant to the Tribunal, 15 April 2025, p. 1.

[379] Letter from the Claimant to the Tribunal, 15 April 2025, p. 2.

[380] Letter from the Respondent to the Tribunal, 28 April 2025, p. 1.

[381] These include fees of Homer Bonner Jacobs Ortiz, Rivero Mestre and Echaiz and Associates legal fees.

Costs. Since this appears to be an involuntary omission by the Claimant to include such payment in its Statement of Costs, and it is a fact in the record that payment was timely made to essentially cover the Tribunal members' fees and expenses and related expenses of the arbitration proceeding, the Tribunal finds no restriction to consider this deposit as well at the time of allocating costs of the arbitration. Moreover, after having submitted its Statement of Costs, on 10 September 2025, the Claimant made an additional payment of USD 60,000 towards the arbitration costs, pursuant to the Tribunal's request of 27 August 2025.[382]

378. Pursuant to the terms of the Procedural Order No. 10, and in accordance with the Parties' agreement contained in an email to the Tribunal of 7 March 2025, the Respondent responded to the Claimant's Statement of Costs on 15 April 2025.[383] While the Respondent did not contest the amounts of the Claimant's attorneys' fees, it deemed that "certain categories of costs claimed by Claimant are unreasonable, disproportionate and lack substantiation".[384]

379. The costs deemed unreasonable include (a) cost graphics (USD 26,960.05) and trial support (USD 13,882.77) for, inter alia, "failure to provide sufficient justification",[385] and (b) expert fees of Professor Andrea Bianchi (USD 110,085.00) and Professor Merrit B. Fox (USD 64,280.00) because, in the opinion of the Respondent, the "retention of the expert on international law [i.e., Professor Bianchi] and the significant costs associated therewith were unnecessary and unreasonable",[386] and in the case of Professor Fox, "only 7 pages are dedicated to the issues of Nevada law raised in this arbitration, namely the LLC charter revocation and revival" while the rest to concepts which are of limited utility to resolving the issues in this arbitration and are therefore "disproportionate and unreasonable".[387] The Respondent also objects to the reasonableness of meal expenses of witnesses and Party representatives, which in its view "by far exceed what can reasonably be considered necessary or appropriate in the context of arbitral proceedings".[388]

380. Therefore, the Respondent requested the Tribunal that, "in the event and to the extent that Claimant prevails in the arbitration, the above-mentioned costs [be considered] unrecoverable by

[382] Letter from the PCA to the Parties, 10 September 2025.
[383] Letter from the Respondent to the Tribunal, 15 April 2025.
[384] Letter from the Respondent to the Tribunal, 15 April 2025, ¶ 3.
[385] Letter from the Respondent to the Tribunal, 15 April 2025, ¶ 6.
[386] Letter from the Respondent to the Tribunal, 15 April 2025, ¶ 11.
[387] Letter from the Respondent to the Tribunal, 15 April 2025, ¶ 12.
[388] Letter from the Respondent to the Tribunal, 15 April 2025, ¶ 13.

Claimant under the Rules, and any costs award in Claimant's favour should be reduced accordingly".[389]

C. THE TRIBUNAL'S ANALYSIS

381. Pursuant to Article 38(1) of the UNCITRAL Arbitration Rules,[390] the arbitral tribunal "shall fix the costs of arbitration in its award". This provision adds that the arbitration costs are to include only: "(a) [t]he fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39; (b) [t]he travel and other expenses incurred by the arbitrators; (c) [t]he costs of expert advice and of other assistance required by the arbitral tribunal; (d) [t]he travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal; (e) [t]he costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; and (f) [a]ny fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague".

382. The UNCITRAL Arbitration Rules establish the "cost follow the event" principle in Article 40(1), but also grants the relevant tribunal discretion in their apportionment:

> Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

383. The same occurs in respect to the "costs of legal representation and assistance" and Article 40(2) provides that the arbitral tribunal, "taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable".

384. The Tribunal has already decided that the Respondent has a right to deny benefits to the Claimant under the Treaty. Article 1(2) of the Treaty grants the State Parties a right to deny the advantages of the Treaty, which each State Party reserves, and may or not exercise. Although it was Ecuador's decision to deny the Claimant the benefits of the Treaty, it did so in the exercise of a right of the State which is specifically contemplated in the Treaty, and which was therefore part of the legal aspects that the Claimant had to consider when deciding whether to bring its claim in the factual circumstances of this case, examined earlier. In doing so, the Claimant took the risk that the Respondent would successfully invoke the denial of benefits objection.

[389] Letter from the Respondent to the Tribunal, 15 April 2025, ¶ 15.

[390] Terms of Appointment, ¶ 3.1.

Consequently, the Tribunal lacks jurisdiction to continue with the analysis and to decide the claims brought by the Claimant against the Respondent.

385. This means that the Tribunal will not have an opportunity to examine the validity of the claims on the merits, or whether the claims are unsubstantiated, or even frivolous. As a result, the Tribunal cannot rely on matters relating to the merits of the case to determine the apportionment of costs. Further, the Tribunal notes that the objection which has been found to be successful deals with a right granted to the Respondent to deny the benefits, and not others that have not even been examined for the reasons stated in this Award, i.e., the lack of standing of the Claimant to bring the claim (jurisdiction *ratione personae*), or that the Claimant did not own or control de investment at the relevant times (jurisdiction *ratione materiae*), or that the Claimant's 2010 restructuring was an abuse of rights, or even that the investment was not made in accordance with Ecuadorian law (jurisdiction *ratione materiae*). Yet, the Tribunal considers that the assessment of the evidence adduced by the Parties in relation to the denial of benefits objection is relevant to determine the apportionment of costs.

386. However, the Tribunal also finds it relevant to consider other circumstances of the case in accordance with Article 40(2) of the UNCITRAL Arbitration Rules. These include the extended requests made by the Respondent in relation with the details of the Funding Agreement between the Claimant and the third-party funder, which were rejected,[391] the rejection of the Respondent's request to bifurcate the proceedings based on the allegation that the Claimant's investment was not made in conformity with Ecuadorian Law,[392] and minor disagreements resolved against the position of the Respondent.[393] Also, given that the Tribunal has decided not to examine the rest of the jurisdictional objections submitted by the Respondent for the reason stated above,[394] it cannot take a position on whether the claim brought by the Claimant is frivolous or *prima facie* unfounded.

387. On this basis, the Tribunal deems fair and reasonable to order the Claimant bears 80% of the total arbitration costs incurred by the Respondent, except for item e) of Article 38 of the UNCITRAL Arbitration Rules, which is addressed separately below. The (partially) awarded costs comprise the Tribunal's fees, the travel and other expenses incurred by the arbitrators, the cost of services required by the Tribunal during the Hearing, and the PCA administrative fees.

[391] Procedural Order No. 3: Decision on the Respondent's Disclosure Request of the Claimant's Funding Agreement, 11 February 2024.

[392] Procedural Order No. 5: Decision on the Respondent's Request for Bifurcation, 6 May 2024, ¶ 132.

[393] For example, disagreements on Hearing Transcript, Procedural Order No. 10,

[394] Section VI(G) of this Award.

388. As to the aforementioned items of Article 38 of the UNCITRAL Rules, the Tribunal notes the following.

- Pursuant to the method of renumeration established in section 12 of the Terms of Appointment, the fees and expenses of the Tribunal are as follows:

    (i) Prof. Eduardo Siqueiros Twomey (president of the Tribunal): USD 170,190.00 (fees) + USD 8,431.88 (costs);

    (ii) Mr. Adolfo E. Jiménez: USD 165,100.00 (fees) + USD 11,510.57 (costs);

    (iii) Prof. Jorge Viñuales: USD 156,451.50 (fees) + USD 3,669.03 (costs).

- The PCA's fees for its services in administering the Arbitration, including registry and secretarial support, amount to the sum of USD 112,017.26.

- The other costs of the Arbitration, including expenses related to the Hearing on Bifurcation and the Hearing on Jurisdiction, as well as printing, telecommunications, banking charges, courier services, etc., amount to USD 92,629.76.

389. Accordingly, the total costs under these items of Article 38 of the UNCITRAL Rules amount to USD 720,000. These costs were covered by the Parties' deposits to the PCA, equal to USD 360,000 from each Party, together USD 720,000.

390. As indicated above in this Section, the Claimant has objected to treating the Respondent's second deposit of USD 150,000 as recoverable, on the ground that the Respondent had neither paid nor considered this amount at the time it submitted its Statement of Costs. The Tribunal finds, however, that this sum is indeed recoverable, insofar as the payment was ultimately made by the Respondent, albeit with delay. In this regard, the Tribunal notes that the Respondent informed it of the delays caused by internal procedures before competent authorities of the Republic Ecuador, including the 2025 fiscal year allocations to the Attorney's General Office, and that the delay was not attributable to negligence or intent.[395]

391. In light of all foregoing, the Tribunal considers that the Claimant should bear 80% of the Respondent's deposit, amounting to USD 288,000.

392. Moving to item e) of Article 38 of the UNCITRAL Rules, the Tribunal rejects the Respondent's request to recover the PGE Fees (USD 78,289.27) and PGE Travel Expenses (USD 3,769.80) insofar as the Respondent failed to include proof of such costs in its statement, as had been agreed to by the Parties in the email communication sent by the Respondent and confirmed by the Claimant on 7 March 2025. Moreover, the Tribunal considers that the bulk of these sums

[395] Letter of the Respondent to the Tribunal, 26 March 2025; Letter of the Respondent to the Tribunal, 5 April 2025.

corresponds to internal costs of Ecuadorian government employees for which there is no evidence that they were additional, i.e., that they would not have been incurred but for this case.

393. In respect to the other fees and expenses claimed by the Respondent, i.e., outside counsel fees and expenses and expert fees, the Tribunal takes "into account the circumstances of the case" and is of the opinion that the Respondent should not bear all of the additional costs — i.e., those additional to the costs of its government employees — of successfully defending its position.

394. Therefore, the Tribunal deems fair and reasonable that the Claimant should bear 80% of the total amount of the Respondent's outside counsel fees and expenses and expert fees, equal to USD 1,196,194.29.

VIII. THE TRIBUNAL'S DECISION

395. For all the reasons indicated above, the Tribunal decides as follows:

(i) As to the Tribunal's jurisdiction:

a) The Tribunal upholds the denial of benefits objection raised by the Respondent and concludes that it does not have jurisdiction to hear the claims brought by the Claimant; and

b) The Tribunal determines that on the basis of procedural economy it needs not and shall not address the remaining three bifurcated objections, i.e., the objection *ratione personae* based on the Claimant's alleged lack of *ius standi*, the objection *ratione materiae* regarding the requirement of ownership and control of the investment, and the objection based on the alleged abuse of rights in relation to the corporate restructuring of Lynton.

(ii) As to the arbitration's costs:

a) The Tribunal determines that the Claimant shall bear the entirety of its own costs.

b) The Tribunal determines that the Respondent shall bear the entirety of its PGE Fees and PGE Travel Expenses.

c) The Tribunal orders the Claimant to pay the Respondent the amount of USD 288,000.00, equal to 80 percent of the advance on costs the Respondent paid to the PCA.

d) The Tribunal orders the Claimant to pay the Respondent USD 1,196,194.29, equal to 80 percent of the Respondent's outside counsel fees and expenses and expert fees.

e) The Tribunal orders that the amounts under c) and d) above be paid within 30 days from the date of notification of this Award.

(iii) Denies any other claim or request for compensation not expressly covered in this operative paragraph.

Place of the arbitration: Paris, France

Mr. Adolfo E. Jiménez
- in dissent -

Date: 26 September 2025

Prof. Jorge E. Viñuales

Date: 26 September 2025

Prof. Eduardo Siqueiros Twomey
(Presiding Arbitrator)

Date: 26 September 2025