

**UNDER THE UNCITRAL ARBITRATION RULES AND SECTION B OF  
CHAPTER 10 OF THE DOMINICAN REPUBLIC - CENTRAL AMERICA -  
UNITED STATES FREE TRADE AGREEMENT**

BETWEEN:

**SPENCE INTERNATIONAL INVESTMENTS, LLC, BOB F. SPENCE,  
JOSEPH M. HOLSTEN, BRENDA K. COPHER, RONALD E. COPHER,  
BRETT E. BERKOWITZ, TREVOR B. BERKOWITZ, AARON C.  
BERKOWITZ AND GLEN GREMILLION**

INVESTORS / CLAIMANTS

AND

**THE REPUBLIC OF COSTA RICA**

PARTY / RESPONDENT

**ICSID CASE NO. UNCT/13/2**

**EXPERT OPINION OF PROFESSOR EMERITUS MAURICE MENDELSON**

**QC**

3 February 2015

## Table of Contents

Introduction and Qualifications .....	3
Executive Summary.....	4
The Relevant Facts .....	6
Analysis .....	10
I.    The Claimants did not acquire knowledge of breach and loss until a date within three years of the Notice of Arbitration.....	11
The indirect expropriations .....	13
The direct expropriations .....	18
The fair and equitable treatment claims .....	21
II.   The Respondent adopted and/or maintained the measures that have given rise to each breach after CAFTA came into force .....	23
The indirect expropriations .....	25
The direct expropriations .....	28
The fair and equitable treatment claims .....	34
Conclusion .....	35

## Introduction and Qualifications

1. I have been asked by the Claimants in the above matter to express my independent opinion on certain questions related to the jurisdiction of the present Tribunal. I have read the pleadings of the Claimants and the Respondent, and also the Expert Opinion of Judge Stephen M. Schwebel, submitted on behalf of the Respondent.
  
2. My full qualifications are set out in my curriculum vitae **attached** # to this Opinion. In brief:
  - a. I have a first class BA in Jurisprudence, an MA and a D.Phil. in international law, all from the University of Oxford. I am an Emeritus Professor of International Law at the University of London, having held the Chair of International Law at University College London from 1986 to 2001. Previously I was a Fellow and University Lecturer in Law at St. John's College, University of Oxford. I have also held visiting professorships at universities in the United States (twice), France (twice), and Australia, and have been invited to lecture on international law in several other countries. The subjects I have taught include international investment law and customary international law (at master's and doctoral levels), and I have published widely on both topics, as well as many others. I am also a member of various learned societies and have chaired two international committees of the International Law Association. I am a member of the Board of Editors of (amongst others) the British Year Book of International Law, and was formerly Moderator-in-Chief, and now Consultant Moderator, of OGEMID, a leading internet forum on international arbitration and investment.
  
  - b. For most of my professional life, and up to the present, I have at the same time been a full-time barrister, specialising in public international law. I was called to the Bar of England and Wales in 1965, entered practice (in my present Chambers, one of the

top three in England) in 1970; was appointed QC in 1992; and was elected a Master of the Bench of Lincoln's Inn in 2000. I have acted for, and against, numerous States, not to mention international organisations and corporations. My practice has covered virtually the whole gamut of public international law, but international investment law has formed a large portion of it. I have appeared as counsel before both national and international courts and international tribunals, including the International Court of Justice and ICSID tribunals. I have also given expert evidence in the courts of Canada, Germany, Namibia and the United States of America. And finally, I have sat as an ICSID arbitrator.

### **Executive Summary**

3. The question on which I have been asked to opine is whether the matters complained of by the Claimants are outside the jurisdiction of this Tribunal *ratione temporis*. This is, according to the Respondent's objection,<sup>1</sup> because the limitation period set out in the Central America - Dominican Republic - United States Free Trade Agreement ("CAFTA" or "the Agreement") has been exceeded, and/or because the matters or events complained of preceded the entry into force of the Agreement for Costa Rica on 1 January 2009.
  
4. In preparing my Opinion I have naturally paid careful attention to the Opinion of Judge Schwebel, the expert witness for the Respondent, particularly in view of the eminence that he has attained in various fields of endeavour in international law. However, with the greatest respect I have to disagree with him on his conclusions that the present claims are outside the Tribunal's jurisdiction, and on much of his reasoning, as I explain below.
  
5. First, and with respect to the limitation period, Judge Schwebel ignores the plain terms of Article 10.18(1) of CAFTA by focusing simply on the dates on which the takings may have

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<sup>1</sup> Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, para 8.

taken place. But the unequivocal terms of Article 10.18(1) are clear that the limitation period does not begin to run until the date on which the Claimants first knew, or should have known, about *both* the breaches *and* the loss incurred. Judge Schwebel also ignores the reality of the particular claims being advanced in this case, when he treats those claims as all arising out of simple, instantaneous acts. The claims are, essentially, not that the takings themselves were contrary to CAFTA, but rather that breaches of CAFTA arose subsequently because of the delay in the payment of adequate compensation and the inadequacy of the compensation in those few cases where it has been finally determined. Thus even though all the takings themselves took place more than three years before the date of the claim, the dates of those takings are not the critical dates. Rather, it seems clear that the Claimants did not acquire knowledge of *both* the particular breaches relied on in respect of the delayed and inadequate compensation *and* the loss incurred as a result of those particular breaches until a date less than three years before the Claimants' filing of their Notice of Arbitration.

6. Second, and with respect to the non-retroactivity of CAFTA, Judge Schwebel again ignores the reality of the particular claims being advanced in this case when he treats those claims as all arising out of simple, instantaneous acts. The reality seems clear that the Respondent either adopted and/or maintained the measures that have given rise to each breach after CAFTA came into force. This is especially clear with respect to the indirect expropriations which were themselves completed, the Claimants persuasively maintain, after CAFTA entered into force. But even with respect to the direct expropriations which were completed before CAFTA entered into force, and likewise if, *arguendo*, the indirect expropriations are held to have been completed before CAFTA entered into force, the particular measures relied on as giving rise to the breaches claimed – the inadequate compensation in those cases where compensation has been paid and the delayed compensation in all of the cases – all either took place after CAFTA entered into force or, if they began before CAFTA entered into force, continued thereafter. I base this view on the principles enunciated in Article 28 of the Vienna Convention on the Law of Treaties 1969 (“VCLT”) and 10.1(3) of CAFTA, both discussed in more detail below.

7. Third, the above conclusions relate equally to the Claimants' claims for breach of the fair and equitable standard of treatment as to their other claims of breach. Even if, *arguendo*, the claims about the delay, absence or inadequacy of compensation were to fail for any reason, the claims for breach of the fair and equitable treatment standard are not merely parasitic on, or extensions of, those claims, but stand in their own right and do not fall foul of either of the *ratione temporis* objections.

### **The Relevant Facts**

8. In the Introduction to his Opinion,<sup>2</sup> Judge Schwebel states "I have no independent knowledge of the facts of the case and, for the purposes of this opinion, accept the facts as alleged by Respondent, although I have taken into account the facts alleged by Claimants." With respect, this does not appear to be a correct approach. Of course, an expert can always state that he has been instructed that such-and-such is the case; but no such statement appears in Judge Schwebel's Opinion. Hence, there is no justification for privileging the account of the facts put forward by those instructing the expert. Indeed, in at least certain respects the burden of making good an objection *ratione temporis* rests on the respondent, as *Pope and Talbot v Canada*, discussed below,<sup>3</sup> shows.
9. As it happens, the key historic facts relevant to this objection are not, for the most part, in dispute. What is in dispute is their characterisation, or the inferences to be drawn from them.

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<sup>2</sup> Para 7.

<sup>3</sup> Para 21.

10. In 1977 a Law was created which designated the first 50 metres of land running inland from the mean high tide line along Costa Rica's entire coastline as a "public zone" of non-transferable (inalienable) property of the state.<sup>4</sup> In July 1991 an Executive Decree envisaged the creation of a national park in the Guanacaste region, the boundaries of which would include a 125-metre strip of land consisting of the 50 metre "public zone" plus an additional 75 metre strip of land from the ordinary high tide.<sup>5</sup> On 10 July 1995 a Law was passed creating the Las Baulas National Maritime Park (the "Maritime Park Law", creating the "National Maritime Park") and defining the boundary of that National Maritime Park as 125 metres "*aguas adentro*" (seaward), rather than landward, from the mean high tide line.<sup>6</sup> Between August 2003 and May 2007 the Claimants purchased 26 beachfront lots, all of which lie beyond the 50 metre "public zone" and within 125 metres landward of the mean high tide line.<sup>7</sup> On 23 December 2005 the *Procuradoria* interpreted Article 1 of the Park Law as including within the area of the National Maritime Park a strip of 125 metres of land extending inland from the mean high tide line rather than seaward ("*aguas adentros*") as the Law itself says, on the (perhaps surprising) ground that the wording was mistaken.<sup>8</sup> On 23 May 2008 the Supreme Court accepted this interpretation<sup>9</sup> and on 16 December 2008 the Supreme Court ordered the permanent suspension of processing permits inside the National Maritime Park and ordered the expropriation of lots within the National Maritime Park to proceed.<sup>10</sup> Acts of Dispossession had been made in respect of nine of the Claimants' properties in May and December 2008. As to the status of the remaining 17 properties, uncertainty appears to have persisted and the Ministry for the Environment, Energy, Mines and Telecommunications ("MINAE") unsuccessfully sought further clarification of the issue from the Supreme Court.<sup>11</sup> Finally, on 19 March 2010 the Minister for the Environment, Energy, Mines and Telecommunications (the "Minister for the

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<sup>4</sup> Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, para 22.

<sup>5</sup> Claimants' Memorial, para 65; Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, para 21.

<sup>6</sup> Claimants' Memorial, para 66; Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, paras 23-26.

<sup>7</sup> Claimants' Memorial, paras 23-47.

<sup>8</sup> Claimants' Memorial, para 212(b); Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, para 34.

<sup>9</sup> Claimants' Memorial, para 249; Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, paras 39-40.

<sup>10</sup> Claimants' Memorial, para 212(g); Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, para 51. There is some dispute between the parties as to the implications of that Supreme Court judgement, see below para 48.

<sup>11</sup> Claimants' Memorial, paras 152-166.

Environment”) issued an order to terminate any and all granted or outstanding permits within the National Maritime Park.<sup>12</sup>

11. The Claimants, who filed their Notice of Arbitration on 10 June 2013, allege that the Respondent has maintained measures tantamount to expropriation with respect to seventeen of the Claimants’ lots.<sup>13</sup> The Respondent has submitted that the date of those indirect expropriations is 16 December 2008, when the National Environmental Technical Secretariat (abbreviated in Spanish to “SETENA”) halted the processing of environmental assessment permits inside the National Maritime Park in response to a Supreme Court decision of that date.<sup>14</sup> This is disputed by the Claimants, who submit that SETENA had since as early as 2005 initiated what became a prolonged suspension in the processing of those permits<sup>15</sup> and that the Respondent’s measures giving rise to the indirect expropriations did not crystallise until the order of the Minister for the Environment on 19 March 2010, in which he finally ordered his staff to terminate all pending environmental viability permit applications, and never accept another, for lots deemed to be inside of the National Maritime Park’s 125 metre restricted zone.<sup>16</sup> What is not disputed is that none of these properties have received final determinations of compensation and that they remain subject to the Respondent’s domestic expropriation process.<sup>17</sup> The Claimants claim breaches, which are ongoing, of Article 10.7(2)(a) of CAFTA with respect to the Respondent’s failure to pay adequate compensation without delay for those indirect expropriations.<sup>18</sup>

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<sup>12</sup> Claimants’ Memorial, para 220.

<sup>13</sup> Claimants’ Memorial, para 192.

<sup>14</sup> Respondent’s Memorial on Jurisdiction and Counter-Memorial on the Merits, para 135; Respondent’s Reply on Jurisdiction and Rejoinder on the Merits, para 134.

<sup>15</sup> Claimants’ Memorial, paras 147-162.

<sup>16</sup> Claimants’ Memorial, para 192; Claimants’ Reply on the Merits and Counter-Memorial on Jurisdiction, paras 286(b) and 296. And see below para 48 for why the Claimants submit that is the critical date for the indirect expropriations.

<sup>17</sup> Compare Claimants’ Memorial, Appendix 2 and Respondent’s Reply on Jurisdiction and Rejoinder on the Merits, Annex B.

<sup>18</sup> Claimants’ Reply on the Merits and Counter-Memorial on Jurisdiction, paras 287(c) and 300.

12. The Claimants allege that the remaining nine lots were subjected to measures of direct expropriation, with the Respondent taking possession of the lots by way of Acts of Dispossession between 12 March 2008 and 9 December 2008.<sup>19</sup> The fact of and dates of those Acts of Dispossession are not disputed.<sup>20</sup> Nor is it disputed that final determinations of compensation have been made for only four of those properties and that none of those final determinations were made until July 2011 at the earliest,<sup>21</sup> nor that the other properties have not received final determinations of compensation and remain subject to the Respondent's domestic expropriation process.<sup>22</sup> The Claimants claim breaches of Article 10.7(2)(b) and (c) with respect to the inadequacies of the compensation that has been paid,<sup>23</sup> as well as breaches, which are ongoing, of Article 10.7(2)(a) with respect to the delays in the compensation process.<sup>24</sup>
13. It is also not disputed, with respect to the Respondent's domestic expropriation process, that it was reasonable for the Claimants to pursue that process in the expectation of obtaining adequate compensation without delay.<sup>25</sup> Costa Rica's Law on Expropriation provides for the payment of fair market value<sup>26</sup> as well as interest at the prevailing legal rate from the moment of dispossession until the time of payment,<sup>27</sup> and it sets down a series of strict time limits for the conclusion of the compensation process.<sup>28</sup> What is in dispute is whether the Respondent's conduct in the context of its domestic compensation process has fallen short of that required under CAFTA.

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<sup>19</sup> Claimants' Memorial, para 193.

<sup>20</sup> Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, paras 137-138.

<sup>21</sup> Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, para 291. Respondent's Reply on Jurisdiction and Rejoinder on the Merits, Annex B.

<sup>22</sup> Claimants' Memorial, Appendix 2; Respondent's Reply on Jurisdiction and Rejoinder on the Merits, Annex B.

<sup>23</sup> Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, para 287(a)

<sup>24</sup> Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, para 287(c)

<sup>25</sup> Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, para 307; Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, paras 65-74 and paras 161-192.

<sup>26</sup> Law on Expropriation, Article 1, cited in Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, para 67.

<sup>27</sup> Law on Expropriation, Article 11, cited in Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, para 67.

<sup>28</sup> Claimants' Memorial, paras 105-106.

14. The Claimants finally allege that the Respondent's conduct, with respect to the manner in which it has employed its municipal expropriation process and in particular regarding the delays and inconsistencies within that process, constitutes a breach of the fair and equitable treatment standard in Article 10.5 of CAFTA.<sup>29</sup>

### Analysis

15. The Respondent alleges that that the present proceedings, which were instituted on 10 June 2013, fall foul of the limitation period set out in Article 10.18.1 of CAFTA. The Respondent also alleges, further or alternatively, that the acts relied upon by the Claimant occurred before the entry into force for Costa Rica of the Agreement on 1 January 2009, and thus fall foul of the principle of non-retroactivity of treaties set out in Article 28 of the VCLT.
16. In both instances, it is necessary, to a considerable extent, to characterise the facts that occurred or to make inferences about them. For instance, for the purposes of Article 10.18(1) of CAFTA, when did a party know, or when should it have known, that it had suffered both breach *and* loss or damage as a result of the alleged breach? And for the purposes of the non-retroactivity rule, when did a situation cease to exist? As will be seen, there is a substantial overlap in the characterisations etc. required for both the non-retroactivity rule and the limitation period; regrettably, this will entail some unavoidable repetition, especially in light of the fact that in some cases the expropriation process has been completed, whilst in others not.
17. I shall begin by considering CAFTA's limitation period, and then turn to the question of non-retroactivity.

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<sup>29</sup> Claimants' Memorial, para 196.

**I. The Claimants did not acquire knowledge of breach and loss until a date within three years of the Notice of Arbitration**

18. The Respondent objects to the Tribunal’s jurisdiction on the basis that the Claimants knew or should have known of the alleged breaches more than three years before they submitted their Notice of Arbitration.<sup>30</sup> The objection is based on Article 10.18(1) of CAFTA, the terms of which it is important to set out in full:

No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 *and knowledge that the claimant* (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) *has incurred loss or damage*. (Emphasis added.)<sup>31</sup>

19. Neither the Respondent, nor Judge Schwebel who supports this objection, address, still less base their reasoning on, the plain terms of Article 10.18(1). Those plain terms make it clear that the relevant starting point for the time bar is when the Claimants first acquired knowledge (actual or constructive) of *both* the breach *and* the loss or damage incurred. The use of the conjunctive “and”, rather than the disjunctive “or”, clearly demonstrates that the knowledge of those elements must be cumulative; in other words, Article 10.18(1) produces a two-fold knowledge requirement.<sup>32</sup> In the present case, it appears that more than three years have not elapsed since this two-fold knowledge requirement was fully satisfied; and in the present situation, where knowledge of loss came later than the taking, the later date is obviously the starting point.

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<sup>30</sup> Respondent’s Memorial on Jurisdiction and Counter-Memorial on the Merits, para 8.

<sup>31</sup> For present purposes, it makes no difference whether the claims are brought under Article 10.16(1)(a) or (b).

<sup>32</sup> The provision thus covers also those cases where, although an investor is aware of a breach, knowledge of loss is not reasonably ascertainable until a later date. This may be particularly common in cases of expropriation, where a breach may take place on one date, but knowledge of loss may not become reasonably ascertainable until a later date such as when a State determines the compensation it will (or will not) award to the investor.

20. This plain meaning has been confirmed by the tribunal in *Pope & Talbot v Canada*,<sup>33</sup> in interpreting the materially identical provision in Article 1116(2) of NAFTA.<sup>34</sup> In *Pope & Talbot*, the tribunal accepted that the investor may have known about the breach for more than three years before it initiated the claim, but emphasised that, for the claim to be time-barred, the investor must also have known, or should have known, that it had incurred loss for more than three years before it initiated the claim.<sup>35</sup>

Before time can begin to run in terms of NAFTA Article 1116(2) in respect of a claim by an Investor, two matters must have come to its actual, or properly imputed, knowledge: knowledge of the breach and knowledge that it has incurred loss or damage thereby.

21. The tribunal further explained that “[t]he critical requirement is that the loss has occurred and was known or should have been known by the investor, not that it was or should have been known that loss could or would occur”.<sup>36</sup> The tribunal also emphasised that the burden was on the respondent to establish that the claimant knew, or should have known, of both breach and loss more than three years before the claim was initiated.<sup>37</sup>
22. Turning to the objection made in the present case, the Respondent, and its expert Judge Schwebel, have approached this objection on the basis that the starting point for the time bar runs from the dates of the expropriations, which they date to no later than 19 March 2010 (the Claimants’ date for the purposes of this objection) for the indirect expropriations and March and December 2008 for the direct expropriations, all of which dates are before the critical date of 10 June 2010.<sup>38</sup>

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<sup>33</sup> *Pope & Talbot v Canada*, UNCITRAL, Preliminary Award, 24 February 2000, 7 ICSID Reports 64 at para 12.

<sup>34</sup> NAFTA Article 1116(2) provides that: “An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage”.

<sup>35</sup> Para 11.

<sup>36</sup> Para 12.

<sup>37</sup> Para 11.

<sup>38</sup> Respondent’s Reply on Jurisdiction and Rejoinder on the Merits, paras 146-147; Schwebel, Opinion, para 23.

23. But the Respondent, and Judge Schwebel, ignore the reality of the particular claims being advanced in this case when they treat those claims as all arising out of simple, instantaneous acts. The essence of the claim is not that the takings themselves were contrary to CAFTA, but rather that breaches of CAFTA arose subsequently because of the delay in the payment of adequate compensation and inadequacy of the compensation in those few cases where it has been finally determined. The critical date is thus not the date of the expropriations but rather the date on which the Claimants knew, or should have known, that it had suffered *both breach and loss*. The correct approach to this jurisdictional objection may be best examined by separately addressing the alleged indirect and the direct expropriations.

*The indirect expropriations*

24. The Respondent and Judge Schwebel do not address the date by which the Claimants alleging indirect expropriations knew or should have known that *both breach and loss* had occurred. As emphasised above, this knowledge requirement is cumulative. Thus, even if the Respondent could establish that the Claimants' knew or should have known of an indirect taking before 10 June 2010, that would still not suffice for time to begin to run. Time would not begin to run until the Respondent could establish the Claimants knew or should have known that loss had *also* occurred. The Claimants could not have known that *both breach and loss* had occurred until some time after 19 March 2010. The Claimants were taking part in or awaiting the application of Costa Rica's domestic compensation regime operating pursuant to Costa Rica's Law on Expropriation and were entitled to expect that they would be fully compensated through that process. If they had been, there would have been no breach of CAFTA, and therefore no knowledge of breach and no knowledge of loss. But some time had to elapse before they became aware that there was no reasonable prospect of their being fully compensated in a timely manner. The Respondent has itself continued to assert that its domestic regime is capable of awarding compensation to investors in a manner consistent with its international obligations under Article 10.7 of CAFTA.<sup>39</sup> It was therefore reasonable that the Claimants took part in or awaited the

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<sup>39</sup> Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, paras 65-74 and paras 161-192.

application of Costa Rica's domestic compensation process on the understanding that they would be fully compensated for their loss within a reasonable time. Even if there were some delay in the conclusion of the compensation process, it was at least the understanding of the Claimants that they would be compensated for that delay under the terms of Costa Rica's Law on Expropriation. Given those understandings, it seems implausible that the Claimants would have known that they had suffered both breach *and* loss at the time the indirect expropriations culminated in March 2010.

25. It was only at a date some time after the expropriations themselves that it would have become evident to the Claimants that Costa Rica's domestic compensation process was, despite the terms of Costa Rica's Law on Expropriation, not going to provide them with compensation at fair market value, plus interest for the delay, within a reasonable period of time or perhaps at all. In terms of the precise date by which the Claimants did know or should have known that they have suffered both breach and loss, it is, as stated above and as exemplified by the tribunal's approach in *Pope & Talbot*, for the Respondent to prove this date. At this stage, it does not appear to be the case that the Respondent has done this; and in my view, it would be difficult to establish that such a realisation of both breach and loss occurred in the short period between 19 March and 10 June 2010. It was reasonable for the Claimants to continue to take part in or await the application of Costa Rica's domestic compensation process on the understanding that they would be fully compensated and they cannot have known, nor should they have known, that breach or loss had occurred at this stage. And even if one takes the earlier, 2008 date put forward by the Respondent for the culmination of the indirect expropriation, the domestic dispossession and compensation process had not run its course before 10 June 2010 (or, indeed, even today).
26. In addition, the state of affairs facing the Claimants alleging indirect expropriation may be viewed as a continuing state of affairs giving rise to a continuing breach, both in the sense that the indirect expropriations are continuing, given that the Respondent has still not issued Acts of Dispossession and taken control of those properties, and given also that the failure of the Respondent to compensate the Claimants without delay continues. The importance of this characterisation is that there is good authority to support the proposition that where a

continuing breach is concerned, time only begins to run for the purposes of a limitation period when that breach ceases to exist. As Joost Pauwelyn has summarised: “The general principle is that a claim can only be inadmissible on the ground of lapse of time once the breach has ceased to exist, that being the earliest date from which any time limit can possibly start to run”.<sup>40</sup> The same view was taken by the International Law Commission in the context of its work on State responsibility, when it concluded that “in the case of a “continuing” wrongful act ... this *dies* can be established only *after* the end of the time of the commission of the wrongful act itself” (emphasis original).<sup>41</sup>

27. By way of analogy, there is considerable support in the jurisprudence under the European Convention of Human Rights for the proposition that the time limit does not commence until a continuing situation ceases to exist. Thus in *De Becker v Belgium*,<sup>42</sup> the European Commission of Human Rights explained that:<sup>43</sup>

... when the Commission receives an application concerning ... a permanent state of affairs ... the problem of the six months period specified in Article 26 can arise only after this state of affairs has ceased to exist; whereas in the circumstances, it is exactly as though the alleged violation was being repeated daily thus preventing the running of the six months period.

28. The position taken by the European Commission in *De Becker* has also been taken in cases concerning the interference with property rights. Thus the Commission has explained that where the complaint is not of a single expropriatory act, but rather the “grievances result more gradually with the passing of time from the accumulation of renewed delays of expropriation combined with prohibition on construction which affect the ... property owners”, then “the state of affairs complained of ... is neither a thing of the past, nor was it

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<sup>40</sup> Joost Pauwelyn, “The Concept of a ‘Continuing Violation’ of an International Obligation: Selected Problems” (1995) 66 BYIL 415, 431.

<sup>41</sup> International Law Commission, “Report of the International Law Commission on the work of its thirtieth session, 8 May – 28 July 1978”, in *Yearbook of the International Law Commission*, 1978, vol. II, Part Two, A/33/10, p 91, n 437.

<sup>42</sup> *De Becker v Belgium*, Application No. 214/56, Yearbook of the European Convention on Human Rights 2 (1958-9) 214.

<sup>43</sup> Page 244.

created by the latest decisions referred to by the respondent Government or by any other particular decision or event.”<sup>44</sup> In those circumstances the time bar in the European Convention of Human Rights has been applied so as not to begin until the continuing situation and breach ceases to exist. This approach was also taken in *Loizidou v Turkey* where Turkey’s continued possession of a Greek Cypriot applicant’s property was a state of affairs that had not ceased to exist for the purposes of the time bar, which therefore continued to run.<sup>45</sup>

29. Several authorities from the investment arbitration context also support this approach. In *UPS v Canada*,<sup>46</sup> the tribunal was confronted with the limitation period in Article 1116(2) of NAFTA (materially identical to Article 10.18(1) of CAFTA, as we have seen<sup>47</sup>). Canada objected to the tribunal’s jurisdiction on the basis that the measures being challenged were introduced more than three years before the claim was initiated. The tribunal rejected the submission that the claim was time-barred. It explained that:<sup>48</sup>

... continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly. This is true generally in the law, and Canada has provided no special reason to adopt a different rule here. The use of the term “first acquired” [in NAFTA Article 1116(2) (and CAFTA Article 10.18(1))] is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquires further information confirming the conduct or allowing more precise computation of loss.

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<sup>44</sup> *Sporrong v Lönroth v Sweden*, Application Nos. 7151/75 & 7152/75, European Commission of Human Rights Decisions and Reports, vol. 15, p 15 at pp 20-21. See further below, para 65 and n 70.

<sup>45</sup> *Loizidou v Turkey*, Application 15318/89 (1991) (Commission Decision), para 55, available at <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-2621>>. And see below, para 65, the European Court of Human Rights has also held that the failure to pay compensation for an expropriation was a continuing situation for the purpose of non-retroactivity and the Court’s jurisdiction *ratione temporis*.

<sup>46</sup> *UPS v Canada*, UNCITRAL, Award, 24 May 2007, available at <<http://www.italaw.com/sites/default/files/case-documents/ita0885.pdf>>.

<sup>47</sup> Above, n 34.

<sup>48</sup> At para 28.

30. The *UPS* tribunal also noted that “[t]he *Feldman* tribunal's conclusion on this score buttresses our own.”<sup>49</sup> In *Feldman v Mexico*,<sup>50</sup> the tribunal was confronted with the limitation period in Article 1117(2) of NAFTA (and which is again materially identical to Article 10.18(1)) of CAFTA). The investor complained that Mexico had breached NAFTA by its continual refusal to rebate certain tax expenses. That refusal began more than three years before the investor initiated its claim and so Mexico submitted that the claim was time-barred. Although it did not directly discuss the idea of a continuing breach, the tribunal did not bar the claim and ultimately concluded that Mexico had breached its NAFTA obligations.<sup>51</sup>

31. The award in *Tecmed v Mexico* supports this approach as well:<sup>52</sup>

If the acts under review are deemed by the Arbitral Tribunal to be a part of more general, and not merely isolated conduct, the Arbitral Tribunal reserves the power to consider that the time when it will assess whether such acts have caused losses or damage for the purposes of Title II(4) of the Appendix to the Agreement, or whether they were deemed by the Claimant to be a breach of the Agreement or damaging within the three-year term provided for in Title II(5), will not be earlier than the point of consummation of the conduct encompassing and giving an overarching sense to such acts.

32. In other words, and consistent with the approach taken in *UPS v Canada*, time does not begin to run until the alleged wrongful conduct ceases.

33. The Respondent and Judge Schwebel essentially characterise the expropriation here not as a continuing act, but rather as an instantaneous act that is completed at the time it is carried out.<sup>53</sup> On this view, only the “prolonged or lingering effects” of the expropriation continued after the dates of the expropriation. But, as has been explained above, the indirect

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<sup>49</sup> At para 28.

<sup>50</sup> *Feldman v Mexico*, ICSID Case No ARB(AF)/99/1, Interim Decision on Preliminary and Jurisdictional Issues, 6 December 2000, 7 ICSID Reports 327 at paras 39-49; Award, 16 December 2000, *ibid.* 341 at para 187.

<sup>51</sup> Para 187.

<sup>52</sup> *Tecmed v Mexico*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, 10 ICSID Reports 130 at para 74.

<sup>53</sup> Respondent's Reply on Jurisdiction and Rejoinder on the Merits, para 152 ff; Schwebel, Opinion, paras 23, 27.

expropriations in this case and the breaches they give rise to can clearly not be characterised as “instantaneous”.

*The direct expropriations*

34. Similarly to the to the question of the *indirect* expropriations, the Respondent and Judge Schwebel do not address the date by which the Claimants alleging *direct* expropriations knew or should have known that *both* breach *and* loss had occurred. As emphasised above, this knowledge requirement is cumulative. Thus, even if the Respondent could establish that the Claimants’ knew or should have known of breach before 10 June 2010, that would still not suffice for time to begin to run. Time would not begin to run until the Respondent could establish the Claimants knew or should have known that *both* breach *and* loss had occurred. The Claimants could not have known that *both* breach *and* loss had occurred until some time *after* the dates in March or December 2008 when the Acts of Dispossession were made and the properties expropriated. The Claimants proceeded to take part in Costa Rica’s domestic compensation regime operating pursuant to the Law on Expropriation and were entitled to believe that they would be fully compensated through that process. If they had been, there would have been no breach of CAFTA, and therefore no knowledge of breach and no knowledge of loss; but some time had to elapse before they became aware that there was no reasonable prospect of their being fully compensated in a timely manner. As with the indirectly expropriated Claimants, discussed above,<sup>54</sup> in view of the terms of the Law on Expropriation it was reasonable that the directly expropriated Claimants took part in Costa Rica’s domestic compensation process on the understanding that they would be fully compensated for their loss within a reasonable time. Even if there were some delay in the conclusion of the compensation process, it would have been a reasonable understanding of the Claimants that they would be compensated for that delay under the terms of the Law. Given those understandings, it seems reasonable that the Claimants did not know that they

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<sup>54</sup> Para 24.

had suffered both breach and loss at the time of the direct expropriations in March or December 2008.

35. It was only at a date significantly later than the expropriations themselves that it would have become evident to the Claimants that Costa Rica's domestic compensation process was, despite the terms of the Law on Expropriation, not going to provide them with compensation at fair market value, plus interest for the delay, within a reasonable period of time, if ever. In terms of the precise date by which the Claimants did know or should have known that they have suffered both breach and loss, it is, as stated above and as exemplified by the tribunal's approach in *Pope & Talbot*, for the Respondent to prove this date. At this stage, it does not seem that the Respondent has done this.
  
36. Whatever that precise date may be, it seems very unlikely on the facts that the Claimants, at the time of the critical date on 10 June 2010, knew or should have known that they had suffered both breach and loss. It was therefore reasonable for the Claimants to continue to take part in Costa Rica's domestic compensation process on the understanding that they would be fully compensated and they cannot have known, nor should they have known, that both breach and loss had occurred at this stage. Even though the Claimants alleging the direct expropriations had been taking part in Costa Rica's domestic compensation process for a longer period of time than those Claimants alleging indirect expropriations, they were still awaiting final determinations of the amount of compensation they would be offered. For those few Claimants who did receive final determinations, those determinations were not made until at least July 2011.<sup>55</sup> They were therefore also not in a position to know whether they had suffered breach and loss as at 10 June 2010. It should again be emphasised that not only is knowledge of loss (or constructive knowledge of loss) an express requirement of Article 10.18(1) of CAFTA, but also that, in the case of a taking otherwise compliant with the requirements of Article 10.7, where the sole outstanding issue concerns compensation, there is no breach if compensation meeting the standards of Art.

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<sup>55</sup> Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, para 291; Respondent's Reply on Jurisdiction and Rejoinder on the Merits, Annex B.

10.7(2) is provided, and time must necessarily elapse before it can be ascertained if that condition is satisfied.

37. In addition, and as discussed above with respect to the indirect expropriations, the Respondent's failure to compensate the Claimants without delay is also continuing with respect to those Claimants alleging direct expropriations who have not yet been compensated.<sup>56</sup> The importance of this characterisation is that, as also discussed above, there is considerable authority to support the proposition that where a continuing breach is concerned, time only begins to run for the purposes of a limitation period when that breach ceases to exist.
38. The Respondent and Judge Schwebel essentially characterise expropriation not as a continuing breach but rather as an instantaneous breach that is completed at the time it is carried out.<sup>57</sup> On this view, only the "prolonged or lingering effects" of the expropriation continued after the dates of the expropriation. But while this may be the case with expropriations where the alleged breach arises from a complaint that the expropriation was not undertaken for a public purpose or was discriminatory, and so was unlawful *ab initio*, that approach does not logically apply to an expropriation where the alleged breach relates to the failure to compensate the investor adequately and promptly. This cannot be merely a separate and lingering effect of a completed expropriation because the compensation requirement is part of the primary obligation that the Claimants allege has been breached. Moreover, the concept of "delay" is, as the Claimants' point out, necessarily a "temporal phenomenon,"<sup>58</sup> and not a single point in time. It therefore follows that the continuing breach analysis that has been accepted by tribunals more generally in the context of investment arbitrations, as well as in the context of the European Convention of Human

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<sup>56</sup> So far as concerns the four who have been paid (but in an amount that they consider inadequate), since the earliest such payment was made on 14 December 2011, on the Respondent's own admission (See Reply on Jurisdiction and Rejoinder on the Merits, Annex B), the question of whether the breach still continues after is immaterial to the question of the limitation period, since the requisite knowledge was acquired, and the breach consummated, within the limitation period.

<sup>57</sup> Respondent's Reply on Jurisdiction and Rejoinder on the Merits, para 152 ff; Schwebel, Opinion, paras 23, 27.

<sup>58</sup> Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction, para 287(c).

Rights, can also be applied to the particular breaches claimed in this case in respect of those who were directly (as well as those indirectly) expropriated.<sup>59</sup>

*The fair and equitable treatment claims*

39. Still on the subject of the limitation period, so the fair and equitable treatment claims under Article 10.5 also do not appear to be time-barred by Article 10.18(1). At the outset, it must be clarified that these claims are not parasitic upon the expropriations themselves, but are rather based on the way in which the Respondent treated the Claimants during the subsequent compensation process. Judge Schwebel has nonetheless characterised the fair and equitable treatment claims as being “derivative”, stating that by “pointing to the very same facts and acts alleged in their expropriation claims”, the Claimants are “dressing up the lingering effects of the expropriation as a fair and equitable treatment claim”.<sup>60</sup> But there is nothing abnormal or improper about the Claimants’ fair and equitable treatment claims. The claims are, to repeat, based not on the expropriations themselves, but on the way in which the Respondent subsequently treated the Claimants during its domestic compensation process. In fact, the ability of an investor to challenge the manner in which a State carries out an expropriation by way of a fair and equitable treatment claim is expressly recognised in Article 10.7(1)(d) of CAFTA, which provides that “No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except: ... in accordance with due process of law and Article 10.5”. CAFTA itself, therefore, clearly anticipates the close relationship between the standards of treatment in Articles 10.5 and 10.7 and that an investor may simultaneously claim under both. That the underlying factual situation may ultimately derive from, or be related to, an expropriation does not mean that the date of expropriation becomes the date from which time runs for the purposes of Article 10.18(1).

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<sup>59</sup> And see below, para 65, the European Court of Human Rights has also held that the failure to pay compensation for an expropriation was a continuing situation for the purpose of non-retroactivity and the Court’s jurisdiction *ratione temporis*.

<sup>60</sup> Schwebel, Opinion, para 35.

As discussed above, the relevant date depends, as provided for in Article 10.18(1), on the date at which the Claimants knew, or should have known, of both the particular breaches of the fair and equitable standard that they are alleging, *and* of the loss that they are claiming.

40. First, to the extent that the acts relied on to establish the breaches took place after 10 June 2010, obviously no time bar can arise.
  
41. Second, even if acts taking place before 10 June 2010 are relied on to establish breach, it must again be recalled that the Respondent must prove that the Claimants knew, or should have known, of both breach *and* loss. As was the case in the context of both the indirect and direct expropriations, the Respondent has not proven the date at which the Claimants knew, or should have known, that they had suffered both breach of the fair and equitable treatment standard and loss. Whatever that precise date may be, and as discussed above,<sup>61</sup> it seems unlikely on the facts that any of the Claimants, on the critical date of 10 June 2010, knew or should have known that they had suffered loss.
  
42. In addition, the acts relied on by the Claimants to establish the breaches of fair and equitable treatment could also be viewed as part of one continuing or composite act, with the consequence that time only begins to run from the “point of consummation” of that conduct. That, as noted above,<sup>62</sup> was the approach taken in *Tecmed v Mexico*, with the same approach also being taken by the tribunals in *UPS v Canada* and *Feldman v Mexico*. All three cases involved claims for breach of fair and equitable treatment. In the present case, the earliest point of consummation of the treatment complained of would be the date of final determinations of compensation with respect to those properties that have received such determinations (which dates are all after 10 June 2010); while with respect to those properties that are still subject to the domestic compensation process, the continuing or

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<sup>61</sup> Paras 25 and 36.

<sup>62</sup> Paras 29-31.

composite act may be viewed as still ongoing, with the consequence that time continues to run for the purposes of Article 10.18(1). In either case, the claims are not time-barred.

**II. The Respondent adopted and/or maintained the measures that have given rise to each breach after CAFTA came into force**

43. The Respondent, supported by Judge Schewebel, further or alternatively submits that the acts of which the Claimants complain occurred before CAFTA entered into force for Costa Rica, on 1 January 2009, and thus the Tribunal lacks jurisdiction over the Claimants' claims. But the argument seems unsound. In both cases, it seems clear that the Respondent adopted and/or maintained the measures that have given rise to each breach after CAFTA came into force.

44. It should be noted at the outset that the non-retroactivity article of the VCLT, Article 28, which reflects the position under general international law, is quite nuanced. It says:

Unless a contrary intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place *or any situation which ceased to exist* before the date of the entry into force of the treaty with regard to that party. (Emphasis added.)

45. I particularly draw attention to the last part of this sentence: "or any situation which ceased to exist before the date of the entry into force of the treaty with regard to that party". By necessary implication, this means that if a situation did not cease to exist before entry into force, but continued, it is covered by the treaty. This interpretation is also borne out by the Commentary to the International Law Commission's Final Draft Articles on the Law of

Treaties. Paragraph 3 of the Commentary to Draft Article 24, which became Article 28, says in pertinent part:<sup>63</sup>

If ...an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date.

46. The language of Article 28 of the VCLT is closely echoed (and presumably not by accident) by Article 10.1(3) of CAFTA, which provides: “For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place *or to any situation that ceased to exist* before the date of entry into force of this Agreement.” (Emphasis added.) By parity of reasoning, not only does the Agreement apply if the act or fact post-dates 1 January 2009; it also applies if a situation, which had commenced previously, had not ceased to exist by that date.
47. In the part of his analysis devoted to non-retroactivity,<sup>64</sup> Judge Schwebel attempts to counter this obvious difficulty by asserting that one is not dealing here with a continuing situation, but with acts; and further, that the acts were not composite or continuing ones, but single acts of expropriation that occurred before the entry into force of CAFTA for Costa Rica. In doing so, he relies heavily on Articles 13-15 of the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (“DARSIWA” or “Draft Articles”).<sup>65</sup> I shall attempt below to demonstrate why that analysis is flawed.

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<sup>63</sup> Reproduced in Watts, *The International Law Commission 1949-1998*, (1999), vol. II, p 671.

<sup>64</sup> Sections V-VII.

<sup>65</sup> International Law Commission, ‘Articles on Responsibility of States for Internationally Wrongful Acts’ in *Yearbook of the International Law Commission*, 2001, Volume II, UN Doc A/CN.4/SER.A/2001/Add.1. (Part Two) 31.

*The indirect expropriations*

48. First, and with respect to the indirect expropriations, it should be noted that, contrary to the Respondent and Judge Schwebel, who proceed on the basis that those indirect expropriations were completed on 16 December 2008,<sup>66</sup> the Claimants assert that those expropriations were not completed until 19 March 2010. The Claimants' primary submission is that the MINAE order of 19 March 2010 permanently to cease issuing permits for the relevant properties was the act that gave rise to the indirect expropriations.<sup>67</sup> Although it might at first sight seem plausible to take the 2008 date of the Supreme Court's judgment upholding the (to say the least, surprising) "correction" to the language of the relevant legislation, the fact is, the Claimants say, that this was so confusing in its content and so inconsistent with previous rulings that the MINAE itself, after failing to obtain a further ruling clarifying the situation, had to make the final decision itself; and it was only upon that final decision in 2010 that the matter was concluded.<sup>68</sup> If this is correct (and the Respondent does not appear to have established the contrary), then those expropriations therefore took place after CAFTA's entry into force and are thus within the Tribunal's jurisdiction *ratione temporis*.
49. The Claimants alternatively submit that the indirect expropriations that culminated on 19 March 2010 can be characterised as creeping expropriations comprising a continuing or composite act that began before 1 January 2009 but continued thereafter. In either case, that the measures may have begun before 1 January 2009 does not deprive the tribunal of jurisdiction *ratione temporis* over these expropriations where they culminated in breaches after 1 January 2009. That breaches of an international obligation may take the form of a continuous or composite act is clearly recognised by Articles 14 and 15 of DARSIWA respectively, which Articles Judge Schwebel himself relies on closely:

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<sup>66</sup> Respondent's Reply on Jurisdiction and Rejoinder on the Merits, para 134; Schwebel, Opinion, para 17.

<sup>67</sup> Claimants' Memorial, para 192; Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, para 286(b).

<sup>68</sup> Claimants' Memorial, paras 164-166; Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, para 334.

#### **Article 14. Extension in time of the breach of an international obligation**

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

#### **Article 15. Breach consisting of a composite act**

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

50. The International Law Commission's Commentary to Article 14 itself acknowledges that an indirect expropriation may be characterised as a continuing act.<sup>69</sup> So too does the jurisprudence under the European Convention of Human Rights.<sup>70</sup> An illustration of an investment tribunal being prepared to assert jurisdiction *ratione temporis* over an indirect expropriation that was carried out by a continuing or composite act straddling the date on which the treaty entered into force is provided by the award in *Tecmed v Mexico*.<sup>71</sup> There, the tribunal explained that:<sup>72</sup>

... conduct, acts or omissions of the Respondent which, though they happened before the entry into force, may be considered a constituting part, concurrent factor or aggravating or

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<sup>69</sup> Explaining at para 4 of the Commentary to Article 14: "Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act. The position with a *de facto*, 'creeping' or disguised occupation, however, may well be different."

<sup>70</sup> The jurisprudence of the European Court of Human Rights exemplifies how such indirect, or *de facto*, expropriations may be considered as giving rise to continuing acts or situations: see e.g. *Papamichalopoulos v Greece*, Application 14556/89, Judgment, 24 June 1993, (1993) 16 EHRR 440; and *Loizidou v Turkey*, Application 15318/89, Judgment, 18 December 1996, (1997) 23 EHRR 513.

<sup>71</sup> *Tecmed v Mexico*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, 10 ICSID Reports 130.

<sup>72</sup> Para 68.

mitigating elements of conduct or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal's jurisdiction.

51. The tribunal explained its rationale for this approach in the following terms:<sup>73</sup>

Whether it be conduct that continues in time, or a complex act whose constituting elements are in a time period with different durations, it is only by observation as a whole or as a unit that it is possible to see to what extent a violation of a treaty or of international law rises [sic] or to what extent damage is caused.<sup>74</sup>

52. The Tribunal in the present case could accordingly also appropriately view the totality of the pleaded indirect expropriation in order to determine breach.

53. Even if, *arguendo*, the indirect expropriations were completed before 1 January 2009, as the Respondent asserts, the date of that completion is still not fatal to the Claimants' claims. The Claimants who have had their properties indirectly expropriated are claiming that the Respondent has failed to pay them adequate compensation without delay, contrary to Article 10.7(2)(a). For the same reasons that are discussed in greater detail below with respect to the direct expropriations,<sup>75</sup> which were formally completed before 1 January 2009, the breaches of Article 10.7(2)(a) either did not begin until a date after 1 January 2009, by which time it could be said that there was a "delay" in the payment of adequate compensation; or, if the breaches did begin before 1 January 2009, then because delaying adequate payment is clearly a continuing act and breach, those acts and breaches continued after 1 January 2009 for so long as that delay continued. Either way, the Claimants' claims

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<sup>73</sup> Note 26.

<sup>74</sup> On the subject of composite breach, see para 11 of the Commentary to DARSIIWA, which states that "the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first" of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court from taking into account earlier acts or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent)."

<sup>75</sup> See below para 56 ff.

under Article 10.7(2)(a) with respect to the indirect expropriations are still within the Tribunal's jurisdiction *ratione temporis*.<sup>76</sup>

*The direct expropriations*

54. Turning to the direct expropriations, although these were formally completed in 2008, the acts and breaches relied on by the Claimants either did not emerge until after 1 January 2009, or if, *arguendo*, they did emerge before 1 January 2009, they nonetheless continued thereafter. Either way, the acts and breaches are within the Tribunal's jurisdiction *ratione temporis*.
55. The Claimants allege breaches of Articles 10.7(2)(b) and (c) concerning the inadequacies of the compensation offered by the Respondent for those few properties that have received final determinations of compensation. None of the measures and/or omissions giving rise to those breaches, and therefore none of the breaches themselves, took place until after 1 January 2009. As the Claimants have identified, the decisions made by Costa Rican officials concerning the appropriate value of compensation all took place after 1 January 2009. Even the earliest valuations provided by the Costa Rican courts did not take place before 2010, while the earliest final determinations were not made until July 2011.<sup>77</sup> These claims under Articles 10.7(2)(b) and (c) are thus clearly within the Tribunal's jurisdiction *ratione temporis*.
56. The Claimants also allege breaches of Article 10.7(2)(a) concerning the Respondent's failure to pay adequate compensation "without delay". First, it may be the case that a breach of Article 10.7(2)(a) did not even arise until after 1 January 2009 when a reasonable amount of time for the Respondent to pay adequate compensation had elapsed; only after that

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<sup>76</sup> And see also above, n 70, the recognition by the European Court of Human Rights that indirect expropriations may amount to continuing acts and breaches where they are not formalised by a direct taking.

<sup>77</sup> Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, para 291.

period of time had elapsed was there a “delay”. In those circumstances the relevant acts and breaches did not take place until after 1 January 2009 and no issue of retroactivity arises. Even if, *arguendo*, those acts and breaches did arise before 1 January 2009, this failure to pay compensation without delay has been characterised by the Claimants as a continuing measure or practice. This is entirely logical. Delay is a “temporal phenomenon”<sup>78</sup> and is not a “static concept”.<sup>79</sup> This failure to pay compensation without delay may therefore represent a continuing breach. Even if this omission or practice and the breach it gave rise to did begin before 1 January 2009, it has continued thereafter and thus comes within the Tribunal’s jurisdiction *ratione temporis*.

57. This is supported by the plain terms of CAFTA itself. Article 10.1(1) expressly recognises that: “This Chapter applies to measures adopted *or maintained* by a Party” (emphasis added). Further, as already noted, Article 10.1(3) clarifies that: “For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or *any situation that ceased to exist* before the date of entry into force of this” (emphasis added). CAFTA thus clearly envisages that a Tribunal’s jurisdiction *ratione temporis* covers continuing measures or situations that may give rise to a continuing breach.
58. This is consistent with case law, both in the investment treaty context and beyond. In *SGS v Philippines*, an ICSID case based on the Switzerland-Philippines BIT, involving the allegation that the continued failure to pay a debt incurred before the treaty continued to breach the umbrella clause of the treaty after the treaty entered into force, the tribunal concluded that “it is clear that [the treaty] ... applies to breaches which are continuing at” the date the treaty enters into force.<sup>80</sup> The same approach has also been taken with respect to CAFTA itself. In *Railroad Development Corporation v Guatemala*,<sup>81</sup> the tribunal was faced with an objection that the relevant measure – a certain declaration by the Guatemalan

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<sup>78</sup> Claimants’ Reply on the Merits and Counter-Memorial on Jurisdiction, para 287(c).

<sup>79</sup> Claimants’ Reply on the Merits and Counter-Memorial on Jurisdiction, para 299.

<sup>80</sup> *SGS v Philippines*, ICSID Case No ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, 8 ICSID Rep 518 at para 167.

<sup>81</sup> *Railroad Development Corporation v Guatemala*, ICSID Case No ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, paras 121-125, available at <<http://www.italaw.com/sites/default/files/case-documents/ita0704.pdf>>.

authorities – took place before CAFTA’s entry into force and was thus outside the tribunal’s jurisdiction *ratione temporis*. The tribunal held that the measure took place after CAFTA entered into force, but held alternatively that if the measure were viewed as a process rather than as a single act, then even if it began before CAFTA entered into force the tribunal would still have jurisdiction given that it had continued after CAFTA entered into force.

59. The same approach has been applied more generally. The Permanent Court of International Justice, in the *Mavrommatis Palestine Concessions* case, stated in respect of an alleged breach of the British Mandate in Palestine that the breach “no matter what date it was first committed, still subsists, and the provisions of the Mandate are therefore applicable to it”.<sup>82</sup> The European Court of Human Rights has taken the same approach in the context of Article 5(3) of the European Convention on Human Rights, which provides that detainees “shall be entitled to trial within a reasonable time”. The Court has held that, where the delay begins before the Convention’s jurisdiction applies for the State concerned but continues thereafter, then it does have jurisdiction *ratione temporis* over the claim and, further, can “take into account” the delay that took place before the Convention entered into force.<sup>83</sup> There is therefore ample authority to support the Claimants’ position that this Tribunal has jurisdiction *ratione temporis* over the breaches of Article 10.7.2(a) on the basis that the breaches constitute continuing breaches.
60. As noted above, the same analysis in respect of the alleged breaches of Article 10.7(2)(a) could also be applied to the Tribunal’s jurisdiction *ratione temporis* for those claims brought with respect to the properties that have been indirectly expropriated.

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<sup>82</sup> *Mavrommatis Palestine Concessions (Greece v United Kingdom)*, Judgment No. 2, 1924 PCIJ (ser A) No. 2, p 11 at p 35.

<sup>83</sup> See, for example, *Yagci & Sargin v Turkey* [1995] ECHR 16419/90, (1995) 20 EHRR 505 at para 40; *Kreps v Poland* [2001] ECHR 34097/96 at para 36, available at <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59614>>; *Kalashnikov v Russia* [2002] ECHR 47095/99 at para 124, available at <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60606>>. It is striking that in all three cases the Court took into account the time spent in detention even before the Convention entered into force in order to determine whether the applicants had been brought to court “within a reasonable time”. And see below para 65, the European Court of Human Rights has also recognised that the failure to pay compensation following an expropriation can involve a continuing situation.

61. Contrary to the submission of the Respondent and the opinion of Judge Schwebel, the acts complained of and the breaches alleged in this case are not merely the “lingering effects” of an expropriation completed before CAFTA’s entry into force.<sup>84</sup>
62. Judge Schwebel first relies on the Commentary to the ILC Draft Articles to support the proposition that expropriation is a completed act. He quotes paragraph 6 of the Commentary to Draft Article 14 to the effect that, though the economic effects of an expropriation may be felt afterwards, this relates to the (secondary) obligation of reparation.<sup>85</sup> But as the Commentary itself emphasises, “[w]hether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case”.<sup>86</sup> The analysis of expropriation taken by Judge Schwebel may comfortably apply in cases where the investor claims that the expropriation is unlawful by reason of a lack of public purpose or discrimination, or where it is clear straight away that the required compensation will not be paid. Because in those cases there is a distinct unlawful act from the outset. But the present case, involving its own particular facts, is very different. As discussed above, the alleged breaches of Article 10.7(2)(b) and (c) did not arise immediately upon the expropriation, but only at a later stage. With respect to the alleged breach of Article 10.7(2)(a), the Claimants, as also already discussed, claim a continuing measure or practice and therefore a continuing breach. Furthermore, as discussed above in the section on the limitation period,<sup>87</sup> at the very moment of expropriation (if there were a single moment), it was not clear whether the taking was lawful or not. In a sense, it was conditionally lawful. What made it unlawful was the failure to provide adequate compensation with reasonable speed, and this was something that could only be ascertained after a certain amount of time elapsed and it became clear that the compensation obligation was not being complied with. In other words, it was at that point or points that what had been conditionally lawful became unlawful.

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<sup>84</sup> Respondent’s Reply on Jurisdiction and Rejoinder on the Merits, paras 152ff; Schwebel, Opinion, paras 27 ff.

<sup>85</sup> Schwebel, Opinion, para 30.

<sup>86</sup> Article 14, Commentary 4.

<sup>87</sup> Para 2525.

63. Judge Schwebel also relies heavily on the approach taken in *Mondev v United States* in support of the distinction between a completed expropriation and its “lingering effects”.<sup>88</sup> But, critically, the *Mondev* tribunal itself recognised that the distinction would not always hold.<sup>89</sup>

It is true that the obligation to compensate as a condition for a lawful expropriation (NAFTA Article 1110(1)(d)) does not require that the award of compensation should occur at exactly the same time as the taking. But for a taking to be lawful under Article 1110, at least the obligation to compensate must be recognised by the taking State at the time of the taking, or a procedure must exist at that time which the claimant may effectively and promptly invoke in order to ensure compensation. A “taking” of property, not acknowledged as such by the government concerned and not accompanied by any offer of compensation, is not rendered conditionally lawful by the contingency that the aggrieved party may sue in the local courts for conversion or for breach of contract. There is a distinction between compensation offered or provided for a lawful taking of property and damages for the wrongful seizure of property.

In this respect it should be noted that Article 1110 requires that the nationalization or expropriation be “on payment of compensation in accordance with paragraphs 2 through 6”. The word “on” should be interpreted to require that the payment be clearly offered, or be available as compensation for taking through a readily available procedure, at the time of the taking. That was not the case here, and accordingly, if there was an expropriation, it occurred at or shortly after the rights in question were lost.

64. The tribunal was able, on the particular facts before it, and in particular the allegation of a contractual breach, to characterise the expropriation as a completed act, with the subsequent actions in the US courts for conversion or breach of contract merely involving the “lingering effects” of that completed act. But the tribunal also clearly recognised that in some cases an expropriation would not simply be an instantaneous and completed act, but that the expropriation may be conditionally lawful. It explained that for the expropriation to be conditionally lawful “the obligation to compensate must be recognised by the taking State at the time of the taking, or a procedure must exist at that time which the claimant

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<sup>88</sup> At para 32.

<sup>89</sup> *Mondev v United States*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, 6 ICSID Reports 192 at paras 71-72.

may effectively and promptly invoke in order to ensure compensation.” That was precisely the situation in the present case, and thus it is accurate to describe the taking in the present case as *conditionally* lawful. The Respondent has never denied its obligation to compensate for the properties it has expropriated and there was a procedure in place at the time of expropriation for the Claimants to invoke. It is the way in which that procedure failed that has given rise to the breaches alleged in the present case. Those breaches clearly did not merely relate to the lingering effects of previously completed expropriations.<sup>90</sup>

65. That a complaint with respect to the delay in the payment of compensation following expropriation may involve a continuing situation, and not merely the lingering effects of a previously completed act, has also been clearly recognised by the European Court of Human Rights. In *Garrett, Falcão & Ors v Portugal*<sup>91</sup> the applicants’ land had been expropriated as part of an agrarian reform policy in Portugal; the Portuguese legislation had provided for compensation but it had not been paid after 24 years. The expropriation had taken place before Portugal’s recognition of the Court’s jurisdiction. The Court explained that although the deprivation of property itself may be an instantaneous act, the failure to pay compensation was a continuing act.<sup>92</sup> Thus the Court had jurisdiction *ratione temporis* with respect to the continued failure to pay compensation and it ultimately upheld a breach of the right to peaceful enjoyment of possessions under Article 1 of the First Additional Protocol.
66. That the expropriations took place is merely part of the context of the specific breaches that are being alleged. The *Mondev* tribunal itself confirmed that “events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation,”<sup>93</sup> while in *MCI v Ecuador*, the tribunal explained that it could take into account acts that took place before

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<sup>90</sup> By the same token, the citation by Judge Schwebel at para 31 of the *obiter dictum* of the tribunal in *Pac Rim v El Salvador* begs the question whether we are indeed dealing here with “one-time completed acts”.

<sup>91</sup> *Garrett, Falcão & Ors v Portugal*, Applications nos. 29813/96 and 30229/96, Judgment, 11 January 2000, available at <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58417>>.

<sup>92</sup> Para 43.

<sup>93</sup> Para 70.

the treaty entered into force “for the purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force”.<sup>94</sup> The wide extent to which a tribunal may have regard to acts that took place before a treaty entered into force was also illustrated by the tribunal’s approach in *Tecmed v Mexico*, discussed above.<sup>95</sup>

### *The fair and equitable treatment claims*

67. The same applies in respect of the Claimants’ fair and equitable treatment claims. These claims are again not based on the expropriations themselves, but are rather based on the manner in which the Respondent subsequently conducted the compensation process. The acts during that process that the Claimants rely on to establish the breaches of fair and equitable treatment overwhelmingly took place after 1 January 2009 and are therefore within the Tribunal’s jurisdiction *ratione temporis*. The *Mondev* case illustrates the approach that can be taken. In that case, the investor’s denial of justice claim, which was based on US court actions post-dating NAFTA’s entry into force but brought in respect of the alleged uncompensated expropriations that took place before entry into force, was held to be within the jurisdiction of the tribunal. The *Mondev* tribunal confirmed that “events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.”<sup>96</sup> The Claimants indeed point to conduct of the Respondent after CAFTA’s entry into force which they claim itself amounts to a breach.
68. The same approach was taken in *Kardassopoulos v Georgia*, an ICSID arbitration involving the Energy Charter Treaty and the Greece-Georgia and Israel-Georgia BITs, where the tribunal held that an expropriation took place before the Israel-Georgia BIT came into

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<sup>94</sup> *MCI v Ecuador*, ICSID Case No ARB/03/6, Award, 31 July 2007, para 93, available at <<http://www.italaw.com/sites/default/files/case-documents/ita0500.pdf>>.

<sup>95</sup> Para 50.

<sup>96</sup> Para 70.

force, but because the investor's fair and equitable treatment claim related "solely to the compensation process and not to the expropriation of his investment *per se*,"<sup>97</sup> and that compensation process began after the BIT's entry into force, the tribunal did have jurisdiction *ratione temporis* over that fair and equitable treatment claim under that particular BIT.

69. The same approach can easily be applied to the present case. Even if, *arguendo*, the Tribunal were to hold that some of the expropriations were completed before 1 January 2009, that does not affect the Tribunal's jurisdiction *ratione temporis* over these claims of breach of the fair and equitable treatment standard, given that such claims relate "solely to the compensation process and not to the expropriation of [their] investment[s] *per se*".

## **Conclusion**

70. In conclusion, it is my opinion that the Tribunal has jurisdiction over the Claimants' claims.
71. First, Article 10.18(1) of CAFTA is clear on its terms that the limitation period does not begin to run until the date on which the Claimants first knew, or should have known, about *both* the alleged breaches *and* the loss incurred. It seems clear that more than three years have not elapsed since any of the Claimants first knew, or should have known, about both the alleged breaches and the loss incurred, cumulatively.
72. Second, it seems clear that the Respondent either adopted and/or maintained the measures that have given rise to each breach after CAFTA came into force. With respect to those measures that were maintained after CAFTA's entry into force, as recognised by both Article 28 of the VCLT and Article 10.1(3) of CAFTA, the rule of non-retroactivity on which the Respondent relies does not apply to situations that have not ceased to exist or, in

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<sup>97</sup> *Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Award, 28 February 2010, para 248, available at <<http://www.italaw.com/sites/default/files/case-documents/ita0445.pdf>>.

other words, continue after the date on which the relevant treaty, in this case CAFTA, entered into force.

73. Third, the above conclusions relate equally to the Claimants' claims for breach of the fair and equitable standard of treatment as to their other claims of breach. Even if, *arguendo*, the claims about the delay, absence or inadequacy of compensation were to fail for any reason, the claims for breach of the fair and equitable treatment standard are not parasitic on, or extensions of, those claims, but stand in their own right and do not fall foul of either of the *ratione temporis* objections.
74. On the basis of the above analysis, I therefore conclude that neither of the Respondent's objections *ratione temporis* is well founded.

I certify that this is my independent opinion and represents my honest belief.

A handwritten signature in black ink that reads "Maurice Mendelson". The signature is written in a cursive style with a large, sweeping underline that extends to the right.

Maurice Mendelson QC

Blackstone Chambers

Temple

London EC4Y 9BW

3 February 2015