

Spence International Investments LLC et al.

v.

The Republic of Costa Rica

Opening Submissions of the Claimants - Admissibility and Jurisdiction -

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CAFTA Articles 10.15, 10.16 & 10.18

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Article 10.15: Consultation and Negotiation

In the event of **an investment dispute**, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures such as conciliation and mediation.

CAFTA Articles 10.15, 10.16 & 10.18

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Article 10.16: Submission of a Claim to Arbitration

1. In the event that a disputing party considers that **an investment dispute** cannot be settled by consultation and negotiation:

(a) **the claimant**, on its own behalf, **may submit to arbitration** under this Section **a claim**

(i) **that the respondent has breached**

(A) **an obligation under Section A ...**

and

(ii) **that the claimant has incurred loss or damage** by reason of, or arising out of, **that breach.**

CAFTA Articles 10.15, 10.16 & 10.18

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Article 10.18: Conditions and Limitations on Consent of Each Party

1. 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.**

Constructive Knowledge of Costa Rica's **7 Breaches** of CAFTA Articles 10.5(1), 10.7(1) & 10.7(2)

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1. Failure to provide prompt compensation for expropriation, as required under customary international law and provided under Article 10.7(1).
2. Failure to provide adequate compensation for expropriation under the customary standard recalled under CAFTA Article 10.7(1).
3. Failure to provide adequate compensation for expropriation under CAFTA Article 10.7(2)(b).
4. Delaying the payment of adequate and effective compensation, contrary to Article 10.7(2)(a).

Constructive Knowledge of Costa Rica's **7 Breaches** of CAFTA Articles 10.5(1), 10.7(1) & 10.7(2)

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5. Adopting measures that have indefinitely delayed the process for payment of adequate compensation, contrary to Article 10.5(1).

6. Maintaining a municipal expropriation process that has systematically produced arbitrary, unfair and inequitable results, and which also constitute a *de facto* denial of justice, contrary to Article 10.5(1).

7. Detrimental reliance upon legitimate expectations, reasonably held by the Claimants about the host State's treatment of their investments, evidencing a denial of fair and equitable treatment.

1. Failure to provide prompt compensation for expropriation, as required under customary international law and provided under Article 10.7(1).

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- * The Respondent says expropriation – whether direct or indirect – always constitutes a single act in time, so failure to pay promptly is merely a ‘subsequent effect.’
- * If the Respondent’s argument were true, host states could always avoid liability by:
 - * merely declaring a direct expropriation, but then indefinitely refraining from paying compensation; or
 - * by committing a creeping expropriation without ever formally recognizing it (by transfer of title).

1. Failure to provide prompt compensation for expropriation, as required under customary international law and provided under Article 10.7(1).

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IO European Group BV v. Venezuela, Award, 10 March 2015

- * Cited by the United States in its written submission (at page 11).
- * Four years after the host State had issued its expropriation decree, a final determination on compensation from municipal expropriation regime remained outstanding.
- * Although, *prima facie*, the host State's expropriation law appeared adequate, it did not meet international minimum standards in performance.
- * The Tribunal accordingly determined that Venezuela had acted inconsistently with the host State's treaty obligation to provide compensation for expropriation "without delay."

1. Failure to provide prompt compensation for expropriation, as required under customary international law and provided under Article 10.7(1).

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* **IO European Award at para. 425:**

The Tribunal concludes that the Bolivarian Republic has not offered a plausible explanation justifying the delay of more than four years in fixing at least the fair value owed in compliance with the LECUPS, which implies that it cannot be considered to satisfy the requirement of Art. 6(c) of the [treaty] that compensation be paid ‘without undue delay.’

* See, also: *Goldenberg Case* (Germany v. Romania), 2 R.I.A.A. 901, 909 (Sept. 27, 1928), cited at footnote 43 of the US submission (pages 11-12).

1. Failure to provide prompt compensation for expropriation, as required under customary international law and provided under Article 10.7(1).

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The Correct Approach:

- * The **date of breach** is the date upon which an investor knew, or should have known, that an expropriation occurred without the payment of **prompt, adequate and effective compensation**, which must be provided “**without delay.**”

1. Failure to provide prompt compensation for expropriation, as required under customary international law and provided under Article 10.7(1).

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Direct Expropriations:

- * Even if the entire process involved in a **direct** expropriation could be treated as a single moment in time – deemed to be the date of commencement – none of the Investors’ claims would be affected anyway.
- * Under Costa Rican law, expropriation occurs when title passes (Law on Expropriation, Article 49)
 - * As of 4 February 2015, title had only passed to Costa Rica in **three** cases:
A40, SPG2 and B3
 - * Title passed for Lot A40 first, on **29 June 2012**.

1. Failure to provide prompt compensation for expropriation, as required under customary international law and provided under Article 10.7(1).

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Indirect Expropriations:

- * As applied to indirect expropriations, the Respondent's '*single moment in time*' theory is inconsistent with the overwhelming weight of legal authority.
- * In the case of indirect expropriation, it would be illogical to determine that a breach occurred before the last of the measures, which cumulatively contributed to permanent and substantial interference with the foreign investor's property rights, in fact occurred.
- * For the avoidance of any doubt, the Claimant distinguishes between the date of breach and the date of expropriation for purposes of valuation, which must reflect the status quo ante circumstances of the investment to ensure that its fair market value can be properly established.

1. Failure to provide prompt compensation for expropriation, as required under customary international law and provided under Article 10.7(1).

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Prof. Mendelson's Rationale on Passage of Legal Title in Indirect Expropriation:

- * In response to the Claimants' indirect expropriation case, Costa Rica maintained that – because the Claimants still retained title in all but three of their lots – it was elementary that the majority of their expropriation claims were premature.
- * Considering the Respondent's position on the passage of title, Professor Mendelson observed:
 - * The *sine qua non* of any expropriation must accordingly be the transfer of legal title in an investment from the foreign investor to the host State.
 - * In cases of creeping expropriation, tribunals typically stipulate that the successful claimant must transfer title in her investment to the host State.
 - * It therefore follows that time limitation provisions cannot logically apply in cases of indirect expropriation – because the timing of the culminating act, as advocated by the Respondent (i.e. transfer of title to the host State), will always lie exclusively within the discretion of the host State.

1. Failure to provide prompt compensation for expropriation, as required under customary international law and provided under Article 10.7(1).

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- * SETENA adopted the first of a series of temporary, annual moratoriums on its consideration of environmental compliance review applications in 2005, while at the same time as the Municipal Government maintained its practice of issuing construction permits (only stopping in 2008.)
 - * Under international law, both of these entities represent the Costa Rican State.
- * On 29 March 2009, the Constitutional Court answered MINAE and SETENA's requests for it to clarify conflicting judgments it issued in May and December 2008, recalling that the executive branch retains exclusive constitutional authority to implement its decisions concerning land expropriation within the boundaries the Court had set for the PNMB.
 - * The discretion to determine the timing and order of expropriations thus remained in executive branch hands from the first day the CAFTA came into force for American investors.

1. Failure to provide prompt compensation for expropriation, as required under customary international law and provided under Article 10.7(1).

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- * The Environment Minister subsequently exercised this constitutional authority, by ordering the permanent cessation of all permitting, on 19 March 2010.
 - * At the same time both he and the President were actively supporting legislation to re-designate the affected areas – which would have forestalled the expropriations and permitted development.
- * Because the Minister did not also then proceed expeditiously with a wholesale agenda of mass expropriation, title has still yet to pass to Costa Rica in the vast majority of cases.
- * The Minister's decree of 19 March 2010 constitutes the last in a line of measures contributing to the permanent and substantial deprivation of the Claimants' property rights. Because Costa Rica has not since provided prompt, adequate and effective compensation for such deprivation, it has acted inconsistently with Article 10.7(1).
- * Ascertaining the exact date upon which such breaches occurred is not simple, but less than three months stands between 19 March 2010 and 10 June 2010, the cut-off date under CAFTA Article 11.6(3).

2 & 3. Failure to provide adequate compensation for expropriation under paragraphs (1) and 10.7(2)(b) of Article 10.7

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- * The Respondent has failed to meet its evidentiary burden by not demonstrating how or why a reasonable investor –operating within the same, historical circumstances of this case as the Claimants – could or should have known on 19 March 2010, rather than at some point after 10 June 2010, that the Respondent would not be honouring its promises of the payment of compensation on a prompt, adequate or effective basis.
- * As late as 4 February 2015, the Claimants had still only alleged three breaches of the customary standard of adequate compensation and/or the more particularized FMV standard of compensation provided in Article 10.7(2)(b) (viz. Lots A40, B3 and B8)
- * The **date of breach** – for each of these three lots – would have been the date upon which title passed to Costa Rica in each case.
- * In none of these three cases did title pass before 10 June 2010.

2 & 3. Failure to provide adequate compensation for expropriation under paragraphs (1) and 10.7(2)(b) of Article 10.7

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- * The Claimants have had no way of knowing whether the compensation that Costa Rica might ultimately provide to them – for any given lot – will actually be consistent with either the “adequate” element of the of customary international law standard or the clarifying provision of CAFTA Article 10.7(2)(b).
 - * Costa Rica has consistently refrained from providing any Claimants with any meaningful information as to when the expropriations will be completed and compensation stipulated.
- * The Claimants can thus only wait for the remaining expropriation proceedings to finally be commenced, and then for the courts to finally issue final determinations some more years thereafter.

4. Delaying the payment of adequate and effective compensation, contrary to Article 10.7(2)(a)

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- * Costa Rica does not explain its methodology for ignoring paragraph (2) of CAFTA Article 10.7.
 - * It only insists that Article 10.7 reflects customary international law, before turning to the authorities that it claims reflect custom.
- * The Respondent's approach fails for two reasons:
 1. It renders paragraph (2) inutile, contrary to the applicable rules of customary international law on treaty interpretation – which govern interpretation under CAFTA Article 10.22(2)(b)(ii).
 2. It is inconsistent with the explicit terms of Annex 10-C, paragraph (1), which specifies: “Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.”

4. Delaying the payment of adequate and effective compensation, contrary to Article 10.7(2)(a)

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* **The Correct Approach:**

- * The **date of breach** for Article 10.7(2)(a) is the date upon which the investor knew, or should have known, that Costa Rica had unreasonably delayed payment of adequate compensation – either by act or omission – with respect to the process it must maintain to promptly provide FMV compensation for any given lot.
- * The Respondent has not adduced evidence to prove that the Claimants should have known that claims lay for breach based upon such delay before 10 June 2010.

5. Adopting measures that have indefinitely delayed the process for payment of adequate compensation, contrary to Article 10.5(1)

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- * The Claimants were only indirectly notified of the existence of these measures, apparently adopted between 2008 and 2010, and maintained thereafter, on 15 July 2014 – when the Respondent submitted its Counter Memorial on the Merits.
- * The first measure was a pre-emptive decision to suspend the expropriation process for all lots not yet at the “judicial phase” in the expectation that the Contraloria would so order (although it did not).
- * The second measure was a *post hoc* decision to maintain the general suspension, allegedly until compliance with all of the recommendations contained within the Contraloria’s 2010 report had been addressed.
 - * Chief among the Contraloria’s findings were that SINAC had no proper expropriation policy and had been responsible for inexcusable delays;
 - * Chief among the Contraloria’s recommendations was for new legal actions to be pursued to invalidate title to lots subject to expropriation, thus to avoid payment.

(5) Adopting measures that have indefinitely delayed the process for payment of adequate compensation, contrary to Article 10.5(1)

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- * The Claimants could not have reasonably been expected to know that these two unpublished SINAC policy decisions were the alleged reason behind the expropriation process.
- * That the first suspension decision was made well before the Contraloría's investigation was even completed, and the Respondent has refrained from producing a supporting documentary record, it appears that the real reason for these measures was to avoid proceeding with any more expropriations (and paying the deposits that would be required to do proceed).
- * Roughly half of the lots at issue have been inexplicably stalled – by these unknown measures – since the CAFTA came into force on 1 January 2009.

6. Maintaining a municipal expropriation process that has systematically produced manifestly arbitrary, unfair and inequitable results, , and which also constitute a de facto denial of justice, contrary to Article 10.5(1)

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- * None of the examples identified by the Claimants – which, taken together, demonstrate Costa Rica’s systemic failure to provide them with a compensation process consistent with minimum international standards – occurred before 10 June 2010.
- * As demonstrated in the *Mondev Award* – and not contradicted by any independent publicist or legal authority – the host State is responsible for the operation of adjudicatory processes established or maintained after the date upon which jurisdiction *ratione temporis* is established.

7. Detrimental reliance upon legitimate expectations, reasonably held by the Claimants about the host State's treatment of their investments, evidencing a denial of fair and equitable treatment

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- * CAFTA Article 2.1 provides: “**measure** includes any law, regulation, procedure, requirement, or practice.”
- * CAFTA Article 10.1 provides: “This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) covered investments...”
- * Relying on the authority of the *Mondev v. USA Award*, the Tribunal in *Bilcon v. Canada* recently stated:

The legitimate expectations of an investor—a factor that may be part of an overall analysis of whether treatment has breached the minimum standard of fairness—may depend crucially on contracts, assurances or the legal landscape, including existing statutes and judicial and administrative precedents, that existed before an alleged breach took place

7. Detrimental reliance upon legitimate expectations, reasonably held by the Claimants about the host State's treatment of their investments, evidencing a denial of fair and equitable treatment

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- * All government instruments and any other official communications or coordinated efforts undertaken with the Claimants constitute “measures” as the term is understood in the CAFTA.
- * For purpose of establishing jurisdiction *ratione temporis*, **breaches** arise on the date that an investor concludes, or should have concluded, that it has been denied fair and equitable treatment, as demonstrated by the frustration of its legitimate expectations by the host State.

7. Detrimental reliance upon legitimate expectations, reasonably held by the Claimants about the host State's treatment of their investments, evidencing a denial of fair and equitable treatment

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- * The Claimants held legitimate expectations about the property rights they would enjoy under Costa Rica's legal regime, based on measures such as:
 - * Article 2 of the Park Law, which vouchsafed full rights of property even for land designated as being located within park boundaries;
 - * Forty years of government practice, whereby private landholders continued to enjoy their property rights in land located in parks scattered across the country;
 - * Constitutional law and practice, and the promise of prompt, adequate and effective compensation in the event of eventual expropriation, under the Expropriation Law.
 - * Extensive, good faith efforts – undertaken by central government officials between 2008 and 2010, as directed by the Minister of the Environment and the President of the Republic – to preclude expropriation in favour of the environmentally sensitive and sustainable development of their lots.

7. Detrimental reliance upon legitimate expectations, reasonably held by the Claimants about the host State's treatment of their investments, evidencing a denial of fair and equitable treatment

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- * The Berkowitz Claimants also held legitimate expectations about the property rights they would enjoy under Costa Rica's legal regime, based upon Brett Berkowitz's personal communications and meeting with the Minister of the Environment, as confirmed by the documentary record.
- * The Respondent bears the burden of proof to demonstrate that any of the Claimant knew, or should have known, that its conduct determinatively frustrated their legitimate expectations earlier than 10 June 2010.
 - * That burden has not been met, either globally or with respect to an individual claimant.