ICSID Secretariat File No. UNCT/13/2

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 GOVERNMENT OF THE REPUBLIC OF COSTA RICA

PARTY / RESPONDENT

CLAIMANTS' REJOINDER ON JURISDICTION

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4 February 2015

Dr. Todd Weiler
#19 - 2014 Valleyrun Blvd.
London, ON N6G 5N8
Canada

Ms. Tina Cicchetti
Mr. D. Geoffrey Cowper, Q.C.
Ms. Tracey Cohen
Ms. Alexandra Mitretodis
FASKEN MARTINEAU DUMOULIN LLP
2900 - 550 Burrard Street
Vancouver, BC V6C 0A3
Canada

Lic. Vianney Saborío Hernández
Barrio Maynard #56
San Rafael, Escazú
San José
Costa Rica

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I. INTRODUCTION

1. The Tribunal's determination of the facts will be dispositive of the Respondent's jurisdictional objections. The Respondent has alleged that the Claimants' claims (a) result from measures that occurred before the entry into force of the CAFTA on 1 January 2009 and (b) are out of time because the Claimants allegedly knew or should have known of the breaches (and had suffered a loss) on or before 10 June 2010, being the date three years before the filing of their claims. To demonstrate that the Tribunal lacks jurisdiction *ratione temporis*, the Respondent must prove that measures responsible for each claim were adopted before the coming into force of the CAFTA and were not maintained after that date. To demonstrate that the Claimants cannot receive compensation for their losses under CAFTA, the Respondent must prove that Claimants knew, or should have known, that the basic facts underlying each of their disputes with the Respondent (i.e. both evidence of breach and evidence of loss) was present before 10 June 2010.

2. The Respondent bears the burden of proof with respect to CAFTA Article 10.6 (the limitation argument). It has argued that the Tribunal should not accept the Claimants' evidence as to when each became aware of a potential breach but, instead, find that the Claimants should have known of the breaches before 10 June 2010.

3. In making this determination about what each knew or should have known, the Tribunal must approach the facts from the Claimants' perspective. The Respondent's submission does not attempt to discharge that burden. Rather, the Respondent has attempted to: (1) recast the nature of the dispute between it and each Claimant; and (2) claim the benefit of hindsight and thus abandon the facts about what each Claimant actually knew at any given time before 10 June 2010.

4. In order for the Claimants to have a claim under the Agreement, they had to know that they had been effectively and essentially irrevocably deprived of their property rights. The Claimants' claims are not claims for expropriation *per se*; instead they are claims for delay and, for those properties directly taken, inadequate compensation. In cases of direct expropriation, the Claimants submit that occurs when title is transferred, as this is the only clear point in time that their property rights are finally taken and that they can assess whether they have suffered a loss. Until the title transfers, there is no completed act of expropriation. In this case, title was transferred for only one lot before the claim was filed and no titles were transferred before

10 June 2010. This is not a case where the State transferred title before a treaty came into effect, but the would-be claimants waited to bring their claims to the detriment of the State. For nine of the lots in issue, the Respondent had dispossessed the Claimants of their rights upon payment of an administrative appraisal, but the Claimants were still engaged in a process that the Respondent maintains to this day would provide them with adequate compensation. For the purposes of jurisdiction *ratione temporis*, the timing of the particular measure complained of must be determined. In the cases of direct expropriation, that measure only amounts to a final taking (or a completed act) when title transfers to the State. Judge Schwebel constructs his opinion on the jurisdictional objection on the basis of an admission that was not made. The Claimants do not rely upon the date of dispossession as the final act of expropriation for the purposes of jurisdiction.

5. In cases of indirect expropriation, the Claimants say that the relevant point in time to determine whether a party has a claim is the point at which a party knows that a series of measures taken over time have effectively deprived them of their rights such that there has been a breach of the Agreement and that they have suffered a loss as a result. For the lots that had completed the judicial process, the Claimants say this occurred once a final valuation had been determined, and then only if that valuation was less than fair market value. For all of the other lots, the Claimants say that the relevant point in time is the one at which their property rights were substantially affected and they had no reasonable basis to hope that a loss could be avoided.

6. The Claimants submit that neither they nor any other investor in their shoes could have known that there had been a breach of the treaty and that they had suffered a loss more than three years before they brought their claims. The events which occurred before 10 June 2010 demonstrate the ongoing nature of the expropriation process and each Claimant's reasonable apprehension that the Respondent would fulfil its treaty obligations or that no loss would occur. Even after certain lots were noticed for expropriation and the judicial phase commenced, owners with properties within the boundaries of the Park were negotiating with the Government, including the President and Minister of the Environment, who were in support of passing a new law. The proposed law would have reversed the Court's extension of the Park's boundaries, stopped the expropriation process; and adopted an environmental approval process that would have permitted development of the Claimants' lots in a manner consistent with the protection of the Leatherback nesting sites. This bill was still being discussed as late as the spring of 2010 and was never formally abandoned. This is not a case where the Claimants have been sitting on their treaty rights for

years, such that it would be unfair for the Respondent to have to defend itself against these claims. What would be unfair would be to deprive the Claimants of their claims in circumstances where they did not bring them sooner because they had a reasonable expectation that the Respondent would honour its treaty obligations, or the loss would be avoided in its entirety.

7. The Claimants object to the introduction of Judge Schwebel's expert opinion in this arbitration on two grounds. First, the Claimants submit that this expert opinion was submitted too late. Judge Schwebel's opinion repeats the arguments set out in the Respondent's Objection to Jurisdiction. It is accordingly unclear why, if the Respondent thought it necessary to provide the Tribunal with an expert opinion on international law to support its arguments, it did not provide such an opinion on 15 July 2014. Had the Schwebel opinion been provided at that time, the Claimants would have had sufficient time to both object to its introduction and, if deemed necessary, to obtain an expert to provide a response - without being prejudiced for want of time in obtaining it.

8. Second, the Claimants submit that an expert opinion on international law is unnecessary in a dispute that is governed exclusively by the CAFTA and applicable international law. This Tribunal has been charged with the responsibility to construe and apply the Agreement and applicable rules of international law, and it was with this responsibility in mind that each arbitrator was chosen - for his own knowledge and expertise in the area. Any expert legal opinion that purports to provide the Tribunal with the answer to the decision its members have been appointed to make is unnecessary and, as regards the party that introduced it, nothing short of improper.

9. In any event, in light of the limited time available to the Claimants for the preparation of this Rejoinder, and a desire to focus the Tribunal on the merits of the dispute, the Claimants will not force the issue by requesting the Tribunal to rule on their objection to the Respondent's introduction of the Schwebel opinion. Out of an abundance of caution, they have obtained their own expert opinion from another esteemed publicist and jurist, Professor Maurice Mendelson, Q.C., which has been included with this Rejoinder Memorial on Jurisdiction. The Claimants nevertheless maintain that this type of evidence should be regarded as an unnecessary burden and submit that they should not have been put to the expense of having had to obtain it. As such, they reserve the right to make costs submissions on this issue at the appropriate time.

10. This Rejoinder Memorial on Jurisdiction is composed of four sections, not including this brief introduction. The Claimants begin with an attempt to narrow the issues for the Tribunal by

recalling where consensus appears to have emerged on key issues in contention, and where disagreement remains. Next they provide a restatement of the claims made in this case, stripped down to the bare elements, so as to focus on the manner in which the Respondent's jurisdictional objections relate to them. The final substantive section responds to the expert report submitted by Judge Schwebel. As noted below, the focus of this section will be on the factual errors it contains, and what those errors might mean for Judge Schwebel's analysis, as the legal arguments it contains largely mirror those made in the Respondent's Memorial on Jurisdiction, and have already been addressed. The final section records certain 'housekeeping' matters, largely devoted to correcting the record.

11. In addition to the expert opinion of Professor Mendelson, three witness statements are included with this Rejoinder Memorial on Jurisdiction. Each contains evidence that is responsive to factual allegations and omissions relied upon by the Respondent in its Reply Memorial on Jurisdiction.

II. PRIMARY POINTS OF AGREEMENT AND DISAGREEMENT

12. After two rounds of thorough briefings, the points of agreement and disagreement are now clear.

13. The Parties agree that:

(a) there has been no objection raised to the standing of the Claimants as investors of a Party to the CAFTA who held property rights in land, which qualify as investments, in the territory of Costa Rica during the period in which the Agreement was in force between Costa Rica and the United States of America;

(b) the Respondent will subject all of these investments to direct expropriation at some future date;[1]

(c) for all but a few cases, the Claimants have yet to receive full compensation for the expropriation of their investments,[2] although they differ as to the details as to why that might be, and probably as to what constitutes "full" in any given case;

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1 The Respondent made this position clear in its Memorial on Jurisdiction and Counter-Memorial on the Merits ("Respondent's Memorial and Counter-Memorial"), at ¶ 76.

2 See Appendix 2 (updated from last filing) and Annex A to RWE-10, Witness Statement of Georgina Chavez dated 22 December 2014 ("Chavez WS1").

(d) more than one half of the investments at issue (18) have been the subject of a formal decree of public interest, but only nine of those have been the subject of a decree of expropriation;

(e) the 1995 Park Law authorizes expropriation within its boundaries and that landholders whose investments the State is authorized to expropriate are supposed to retain title to their lots and enjoy the property rights associated with them until the expropriation has been completed with the full payment of compensation (although they disagree as to the extent to which such rights can be abridged in the meantime, i.e. before expropriations have been completed);

(f) on 19 March 2010, the Minister of the Environment caused an order to be issued that purported to annul any issued environmental assessments; halt the processing of any pending applications for such permits; and make permanent what had been a series of 'temporary' bans (adopted annually since 2005) on the acceptance of new permit applications in the Park;[3] and

(g) that the CAFTA came into force, as between the United States and Costa Rica, on 1 January 2009, and that a certain number of the Claimants' respective investments had received formal decrees of expropriation before that same date.

14. The Parties disagree as to the following issues:

(a) whether Resolution 2008-018529 issued by the Court on 16 December 2008 can be characterized as having had immediate effect vis-à-vis all citizens, or whether it was only binding "*ergo omnes*" upon the Government – such that it established an obligation for the Government to implement the Court's instructions, found at the bottom of its judgment, on an expeditious basis. The Claimants' position is the latter. In this arbitration, the Respondent has taken the former position. The Claimants submit that the

[3] The Respondent has not taken a position on the fact that the Minister ordered SETENA to temporarily suspend processing twice in 2005, or on SETENA's documented compliance therewith. Resolución No. 2238-2005 SETENA indicates that a "special power to decree cautionary measures" was not to be exercised in a manner consistent with "ordinary procedures, due to the urgent, temporal and exceptional nature of the circumstances." The decree recognizes that this authority would be "exhausted" within one year, and indicated an expectation that all expropriations would be completed by then. It ends by saying that, nevertheless, it will refuse to conduct any more environmental assessments until the Court permits it. It is worth noting that SETENA was only contemplating that the Court would render a decision, not that one was pending, even though it purported to prospectively suspend assessments for which a request had not even been made. See Exhibit C-1f and ¶¶ 155-156 of Claimants' Memorial on the Merits.

Respondent is estopped from taking such a position, however, because it is contradicted by the position the Respondent took about the same measure in its 64-page Statement of Preliminary Objections in *Unglaube* v. *Costa Rica*, dated 23 January 2009.[4]

(b) Second, the Claimants do not believe that the Court's decision of 16 December 2008 constituted either the last link in a chain of creeping expropriation or an expropriatory measure in and of itself. As explained further below, the evidence indicates that there are at least two more suitable candidates for that title: the 27 March 2009 response by the Court to petitions for clarification made by both SETENA and MINAE in 23 January 2009,[5] as well as the aforementioned order, issued to SETENA by the Environment Minister on 10 March 2010.

(c) Also in contention between the parties is whether the Respondent has demonstrated any consistency with respect to its designs on the area it claims to have been a park since 1991. The Claimants submit that the evidentiary record refutes the Respondent's claim to have declared a park in 1991 and, with perfect consistency, moved towards the ultimate goal of the park's "consolidation." The Claimants submit that the Respondent's position on the proposed park only solidified in June 2010, following the installation of President Chinchilla and her Administration.

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[4] At ¶ 5 of its pleading, the Respondent referred to the Court's judgment of 27 May 2008, stating:

> The Supreme Court also ruled that Claimant is entitled to an expeditious disposition of the current status of her property. In addition to the compensation that Claimant will receive for any harm that she may have suffered due to delays in the expropriation proceedings, Claimant will also receive compensation from the State for her property, in accordance with domestic law and the Costa Rica-Germany Treaty, **if and when the** relevant portion of her property that is inside the Park is expropriated.

At ¶ 37 of the same pleading, the Respondent refers to the Court's judgment of 16 December 2008 as follows:

> 37. And again, as recently as last month, in an *amparo* action brought by an environmentalist against the Ministry of the Environment and others, the Supreme Court reaffirmed the State's obligation to expropriate the private properties within the Las Baulas National Park…

And at ¶ 97 of the same pleading, the Respondent refers again to the May 2008 judgment as follows:

> Costa Rica is presently taking steps to implement the Supreme Court's decision, both with respect to the portion of Claimant's property that lies within the boundaries of the Las Baulas National Park, and with respect to the portion that is outside the Park.

In light of the Court's communication to both MINAE and SETENA, on 27 March 2009, in which it disavowed having purported to mandate action from the Executive Branch, which is discretionary under Costa Rica's Constitution, it is apparent that the position first taken by the Respondent, in its pleading before the *Unglaube* Tribunal, is the only possible finding of fact that can be made in this case.

[5] In this regard, it should be recalled that the two agencies of the Respondent's national government were asking the Court for clarification of the apparent conflict between its judgments of 24 May 2008 and 16 December 2008, at the very same time that another agency of the national government, COMEX drafted its pleading for the ICSID Tribunal in *Unglaube v. Costa Rica*, without providing so much as a hint that the Respondent, itself was confused about whether it had the authority or was being strictly mandated by the Court, to expropriate land within the alleged boundaries of its new marine park.

(d) The parties also disagree with respect to the expectations that the Claimants were entitled to hold in respect of the use and enjoyment of their respective investments. The Respondent claims that the investors should have known better than to invest in land located within a national park. The Claimants say that none of the lots, in which their respective investments were made, were located inside the boundaries of a national park. Their claims are grounded in the evidence on the record, which reveals that the 1995 Park Law did not declare any of the land in which they invested as being even potentially inside the boundaries of a future park. Moreover, this same legislation stipulated that owners of land located within the future park's boundaries (such as Cerro el Morro) would enjoy all of their property rights unless their land became the subject of an expropriation decree. As further proof of the real situation on the ground, during which all of the investments were made, the Respondent was still issuing construction permits for lots located in the area it now claims to have been parkland.

(e) Another source of significant disagreement is the manner in which the Claimants' investments have been treated within the Respondent's municipal expropriation regime. The Claimants' evidence demonstrates that the system provides results so divergent as to be nothing short of arbitrary, and that its operation has been so glacial that they have been effectively denied access to the kind of compensation process that meets international minimum standards. For its part, the Respondent insists that the Claimants have been treated fairly and efficiently and that, so as to ensure that they continue to enjoy the same, or better, quality of service – once the rest of their lots have finally become the subject of their own expropriation decrees – the Respondent actually suspended inducting new lots into the system at some point between 2008 and 2010. Once it has finished "implementing" reforms recommended by an auditing agency, the Respondent has assured the Claimants and the Tribunal that it will start issuing new expropriation decrees. Unfortunately, despite being given ample opportunities to do so, the Respondent has not actually indicated when that resumption date might be, or explained how it could have possibly taken five to seven years to implement the most intricate recommendations for reform.

(f) The final point of critical divergence between the parties concerns the amount of compensation that should be paid to the Claimants for the expropriation of their investments. The Claimants have presented the conservative figures provided to them by

independent experts in real estate appraisal. The Respondent has retained a generalist valuator experienced in the forum but not the subject matter, who has critiqued the methodology employed by the Claimants' experts, without providing a serious basis upon which to recommend a credible alternative.

15. The Tribunal's resolution of the issues in contention between the Parties will resolve the jurisdictional objections. The Tribunal must make the findings of fact to allow it to determine the appropriate dates, both concerning the date upon which the Agreement came into force, 1 January 2009, and the date demarcating the three-year limitation period, 10 June 2010. To demonstrate that the Tribunal lacks jurisdiction *ratione temporis*, the Respondent must prove that measures responsible for each claim were adopted before 1 January 2009 and that none were maintained thereafter. To demonstrate that the Claimants cannot receive compensation for their losses, the Respondent must also prove that Claimants actually knew, or should have known, that the basic facts underlying each of their disputes with the Respondent (i.e. both evidence of breach and evidence of loss or damage) was present before 10 June 2010. If the Tribunal concludes that the Respondent has failed to provide the evidence required to prove either, its objections must be dismissed.

16. The Respondent has subtly attempted to avoid its burden of proof with respect to CAFTA Article 10.6 (the "limitation argument"). It has done so by advocating an alternative viewpoint for the Tribunal to adopt in assessing the relevant evidence. The only way the Tribunal can properly determine what each Claimant knew, or what any Claimant should have known, about the events that constituted the relevant breach and/or loss that gave rise to the dispute, is to put itself into the Claimants' shoes. To avoid meeting a burden that it cannot possibly meet, the Respondent has instead attempted to: (1) recast the nature of the dispute between it and each Claimant; and (2) claim the benefit of hindsight, by inviting the Tribunal to abandon the Claimants' contemporaneous vantage point, and gloss over what was, or was not, actually known by them at any given time before 10 June 2010.

17. When viewed appropriately, from the Claimant's perspective, it is obvious that nobody in their shoes – interpreting the Respondent's acts and omissions in real time – could have been expected to know that it was time to bring their claims, rather than waiting to see how crucial events played out. To be sure, had the Claimants been able to travel forward in time, and read the categorical statements the Respondent has made in its two memorials (and ignoring the contrary statements it made in 2009 when defending against the *Unglaube* ICSID claim), they could have brought their

claims sooner. They did not have the benefit of hindsight between 2008 and 2010, however. All they had to go on were the facts on the ground before them – such as the fact that the President of Costa Rica was so interested in avoiding a dispute that he sponsored two bills in the Legislature that would have reversed the Court's extension of the PNMB's boundaries, stopped any expropriations in their tracks, and adopted an environmental approval process that would have permitted development without threatening a single Leatherback. Hindsight is indeed 20/20.

18. Given how the case that the Respondent had to meet was almost exclusively about the evidence, and given the contents of its original Memorial on Jurisdiction, the Claimants not only say that it will end up being unnecessary for the Tribunal to consider the expert opinion of Judge Schwebel to decide the case, but that if there was an appropriate time for the Respondent to buttress its arguments on jurisdiction it was not on 22 December 2014, the day Judge Schwebel's expert opinion was submitted.

19. The Claimants accordingly object to the introduction of Judge Schwebel's expert opinion in this arbitration on two grounds. First, the Claimants submit that this expert opinion was submitted late. Judge Schwebel's opinion repeats the arguments set out in the Respondent's Objection to Jurisdiction. It is accordingly unclear why, if the Respondent really thought it needed to provide the Tribunal with an expert opinion on international law to support its arguments, it did not provide such an opinion on 15 July 2014. Had the Schwebel opinion been provided at that time, the Claimants would have had sufficient time to both object to its introduction and, if deemed necessary, to obtain an expert to provide a response – without being prejudiced for want of time in obtaining it.

20. Second, the Claimants submit that an expert opinion on international law is unnecessary in a dispute that is governed exclusively by the CAFTA and applicable international law. That the contents of Judge Schwebel's opinion consisted mostly of a recitation of long established notions of customary international law on expropriation, provides powerful proof of the waste of time and resources it has occasioned for both parties, and potentially for the Tribunal as well. This Tribunal has already been charged with the responsibility to construe and apply the Agreement and applicable rules of international law, and it was with this responsibility in mind that each arbitrator was chosen – for its own knowledge and expertise in the area. Any expert legal opinion that purports to provide the Tribunal with the answer to the decision its members have been appointed to make is manifestly unnecessary and, as regards the party that contrived to introduce it, nothing short of improper.

21. In any event, in light of the limited time available to the Claimants for the preparation of this Rejoinder, and a desire to focus the Tribunal on the merits of the dispute, the Claimants will not force the issue by requesting the Tribunal to rule on their objection to the Respondent's introduction of the Schwebel opinion. And, out of an abundance of caution, they have obtained their own expert opinion from another esteemed publicist and jurist, Professor Maurice Mendelson, Q.C., which has been included with this Rejoinder Memorial on Jurisdiction. The Claimants nevertheless maintain, however, that this type of evidence should be regarded as an unnecessary burden and submit that they should not have been put to the expense of having had to obtain it in the first place. As such, they reserve the right to make costs submissions on this issue at the appropriate time.

III. RESTATEMENT OF CAFTA VIOLATIONS

22. In both of its Memorials, the Respondent has attempted to recast the Claimants' claims and arguments, to better suit its jurisdictional objections. The Claimants will not repeat what is contained in its previous submissions, but the Tribunal cannot do its job if there is confusion as to the specific claims before it. The Claimants have sought to narrow the issues for decision, first by setting out their understanding of the primary facts upon which there is either agreement or discord, then by restating the five types of claim, and ending with a section addressing the Respondent's introduction of a statement of legal opinion from Judge Stephen Schwebel.

23. Attached, at Appendix 1, are five flow charts that graphically represent the decision process to be undertaken for each of the claims, in light of the Respondent's jurisdictional objections. These five claims are the following:

(a) Endemic Delays in Providing Compensation for Expropriation [Articles 10.5(1) and/or 10.7(2)(a)];

(b) Failure to Pay FMV for Past Expropriations [Articles 10.7(1) and 10.7(2)(b)&(c)];

(c) New Measures that Delay Payment of Compensation [Articles 10.7(2)(a) and/or 10.5(1)];

(d) Arbitrariness of Municipal Expropriation Regime [Article 10.5(1)]; and

(e) Frustration of Legitimate Expectations [Article 10.5(1)].

24. In the interests of clarity, the Claimants have also identified the decisions that the Tribunal will need to make on the merits of their claims, although none are elaborated in this Rejoinder Memorial on Jurisdiction.

25. In addition, the Claimants have noted the additional questions that would have to be answered by the Tribunal in each scenario with respect to Article 10.11. The parties have already briefed the Tribunal with respect to their contrasting positions on the proper construction of Article 10.11. The Respondent claims that Article 10.11 exempts from liability any act or omission committed by a CAFTA party in the interests of environmental welfare. The Claimants argue that the provision is hortatory, because it indicates that nothing in the Chapter will prevent a party from "adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter." The Claimants do not wish to give the impression that they have intentionally omitted anything from their description of the decisions before the Tribunal. Hence, they have also formulated the two questions that would need to be answered in respect of each of the five basic claims and included them on the flow charts.

A. Endemic Delays in Providing Compensation for Expropriation [Articles 10.5(1) and/or 10.7(2)(a)]

26. The parties appear to fundamentally disagree about the nature and scope of Article 10.7(2)(a), which provides that compensation shall be paid without delay. The Respondent implicitly treats this provision as being part and parcel of the customary international law standard for expropriation, which it claims to have been memorialised in Article 10.7 as a whole. The Claimants submit that Article 10.7(2) reflects additional, ongoing obligations, separate and distinct from the customary international law standard for expropriation, which is only memorialised in the first paragraph of Article 10.7.

(i) Does sub-paragraph (a) of Article 10.7(2) constitute a discrete prohibition against delay, in relation to the CIL obligation memorialized in Article 10.7(1)?

27. Implicit in the Respondent's arguments, and as reproduced in its expert report, is the argument that Article 10.7 constitutes a restatement of the customary international law prohibition on uncompensated takings. The Respondent contends that it is customary international law that any expropriatory measure must be treated as a single event in time; never as a composite or continuing measure. This is inconsistent with the text of Annex 10-C:

> The Parties confirm their shared understanding that:
> 1. Article **10.7.1** is intended to reflect customary international law concerning the obligation of States with respect to expropriation [**Emphasis added**].

28. Even without this explicit acknowledgement, that only the first paragraph of Article 10.7 is considered reflective of custom, the principle of effectiveness in treaty interpretation demands that distinct terms be accorded distinct meanings. If paragraph (2) was also reflective of custom, or added nothing to the rules contained in paragraph (1), there would have been no reason to include it in the text.

29. Moreover, to construe paragraph (2) as having no independent meaning from the customary rule found in paragraph (1) could lead to the absurd result that all the host State needed to do to avoid responsibility was wait for the 3-year time limitation to run out before informing the investor of the compensation it was prepared to pay for the expropriation of her land. Unless "prompt" means more than just a commitment to ensure that the investor has an opportunity to commence the compensation process not too long after the taking,[6] "without delay" is required to prevent this absurd scenario from being realized.

30. Indeed, as Vandevelde explained in his history of U.S. investment treaty practice, the U.S. position on customary international law evolved throughout the 20th century. At the start of the century, the U.S. position was that, for an expropriation to be lawful, payment was required in advance of the seizure. Obviously that position was never accepted by other members of the international community, and therefore did not obtain the status of custom. Its next attempt to advance custom was Secretary of State Hull's declaration, to his Mexican counterpart, that lawful takings involved the payment of 'prompt, adequate and effective' compensation.[7]

31. That was the last time the U.S. attempted to advance customary international law on the expropriation issue, and it would not be until the 1980's, at the earliest, before consensus actually began to emerge. During the middle decades of the century U.S. negotiators believed the following about the term 'prompt,' within the expropriation context:

> 12) The term "prompt" does not necessarily mean instantaneous. The intent is that the government diligently carry out orderly and nondilatory procedures that may be established to ensure correct compensation and make payment as soon as possible. It is not considered an instruction to the courts but rather as a

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6 *Mondev International Limited v. United States*, Award, ICSID Case No ARB(AF)/99/2, IIC 173 (2002), (2004) 6 ICSID Rep 181, (2004) 6 ICSID Rep 192, (2003) 42 ILM 85, (2004) 125 ILR 110, (2003) 11 October 2002, at ¶¶ 71-72.

7 K. Vandevelde, *U.S. International Investment Agreements* (Oxford: OUP, 2009) at 466.

> general prescription to all the authorities concerned that matters relating to expropriation should be pursued expeditiously. It also could be taken as a reminder to the legislature not to be dilatory in making appropriations.[8]

32. In the meantime, U.S. officials pursued another common policy tack: adding language to its model treaties that would elevate the obligations owed by a host State above those required by custom.[9] With respect to the expropriation standard, that meant adding language very similar to CAFTA Article 10.7(2), to fortify the 'prompt, adequate and effective' standard. As Vandevelde notes, "In amplification of the requirements of 'prompt' and 'just,' the modern FCNs further specified that compensation 'shall represent the full equivalent of the property taken' and that 'adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof." [10] In 1994, a second paragraph was added to the model treaty's expropriation provision, which was almost identical to the CAFTA version.[11]

33. The US Model BIT was the starting point for negotiations on CAFTA Chapter 10,[12] which is why U.S. practice can be illuminating on this issue. It was clearly a deliberate choice for the U.S. to convince the other CAFTA parties to go so far as to agree that Article 10.7(1) represented binding custom, just as it was a choice not to increase the 'ask' by obtaining the same standing for the contents of paragraph (2). As the Tribunal in *Mondev, supra,* observed: "[T]here is still a significant difference, substantive and procedural, between a NAFTA claim and a diplomatic protection claim for conduct contrary to customary international law."

34. Indeed, the Respondent has admitted, through its own practice, its recognition of the distinction between customary rules on expropriation and additive treaty norms. In *Unglaube* v. *Costa Rica*, the Respondent made the following argument concerning the expropriation proceedings it had twice commenced against that investor:

> Claimant will also receive compensation from the State for her property, in accordance with domestic law and the Costa Rica-Germany Treaty, if and when the relevant portion of her property that is inside the Park is expropriated… Only if and when Costa Rica fails to pay adequate compensation or otherwise

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8 Sullivan, *Treaty of Friendship, Commerce and Navigation: Standard Draft: Evolution Through January 1, 1962, 112* (United States Department of State, 1971) at 116.

9 Weiler, at 284-285.

10 Vandevelde, at 467.

11 Vandevelde, at 477.

12 J. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford: OUP, 2013) at 351.

> abide by the Treaty in those proceedings will Claimant potentially have a claim that is ripe for arbitration [emphasis added].[13]

(ii) Could endemic delays in the provision of compensation for expropriation, in spite of the seeming availability of a process ostensibly designated to provide prompt access to it, constitute a continuing breach of Article 10.7?

35. The proposition that expropriation must be a one-time, or "completed," event has been criticized in recent texts. It cannot be the case that the host State can avoid international responsibility simply by ensuring that it takes longer than the applicable treaty limitation period to pay compensation. For example, after noting the various ways in which treaty drafters can place temporal conditions on the payment of compensation for expropriation, Newcombe and Paradell observed:

> It remains unclear, however, at what point non-payment of compensation will render the expropriation illegal. For example, if the government accepts liability for expropriation and offers to pay just compensation, but fails to do so, or there is an undue delay, then arguably the conditions for a lawful expropriation have not been met.[14]

36. In answering this question, Professor Mendelson has referred to the *UPS* v. *Canada* Tribunal's decision on jurisdiction,[15] in which it was confirmed:

> "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] 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. The Feldman tribunal's conclusion on this score buttresses our own."[16]

As both parties have averred, NAFTA Article 1116 is very similar to CAFTA Article 10.16.

37. Indeed, the same elemental logic used by the claimant in *UPS* v. *Canada* has been observed by the Claimants in this case: an investor cannot possibly know whether a CAFTA Party will continue the conduct that constitutes an alleged breach before the Party determines whether it will end or continue the conduct. As with international law more generally, the only logical

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13 *Marion Unglaube v. Costa Rica*, ICSID Case No. ARB/08/1 (Germany – Cost Rica Bilateral Investment Treaty), Respondent's Preliminary Objections, 23 January 2009, at 5.

14 at 396, footnote 465.

15 Expert Report of Maurice Mendelson dated February 4, 2015 (the "Mendelson Opinion") at ¶ 29-30, 42.

16 *United Parcel Service of America Incorporated v. Canada*, Award, Ad Hoc Tribunal (UNCITRAL), IIC 306 (2007), 24 May 2007, at ¶ 28.

conclusion to reach is that "… continuing acts are treated as continuing violations of international law obligations (and of [CAFTA obligations as well]), such that time bars do not begin until the conduct has concluded."[17]

38. Not unlike the Respondent in this case, the Respondent in the *UPS* case also attempted to rely upon the *dicta* in *Mondev v. U.S.A.*, for the proposition that "continuing acts do not extend the time bar if the claimant first knew (or should have known) about the acts more than three years before the claim was filed."[18] In this regard, the *UPS* tribunal, which was chaired by Sir Kenneth Keith, and included Yves Fortier, Q.C., explained:

> Canada's argument based on *Mondev* is not well taken. The tribunal in *Mondev* did not find a continuing course of conduct time–barred. Indeed, it rejected the United States' argument that claims at issue were time–barred. The dicta that Canada points us to are neither dispositive of the contentions in *Mondev* nor on point for this decision. The dicta do not relate to a continuing course of conduct that began before and extended past three years before a claim was filed. Instead, the dicta relate to a state action that was completed but was subject to challenge in state court. In that instance, the state's action was completed and the information about it known — including the fact that the investor would suffer loss from it — before subsequent court action was complete. The fact that the exact magnitude of the loss was not yet finally determined would not have been enough, in that tribunal's judgment, to avoid the time bar if the time bar otherwise would have applied. As it was, there was no time bar and no continuing course of conduct — nothing in short that would shed any light or have any precedential consequence for disposition of the matter before us.[19]

39. The same approach can be seen in the *Pac Rim* v. *El Salvador* award, in which the Tribunal distinguished the *Commerce Group* v. *El Salvador* case with a rationale that applies equally to the instant case:

> In this Tribunal's opinion, the present case differs significantly from the Commerce Group arbitration. The relevant measure here at issue is not a specific and identifiable governmental measure that effectively terminated the investor's rights at a particular moment in time (i.e. the termination of a permit or license, denial of an application, etc.), but, rather the alleged continuing

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17 *Ibid.,* at ¶26.

18 *Ibid.,* at ¶ 28.

19 *Ibid.,* at ¶ 29. The Tribunal in *LG&E v. Argentina* came to a similar conclusion about the host State's abrogation of the fundamental guarantees contained within a gas tariff regime. The Tribunal in *Chevron & Texaco v. Ecuador* also came to a similar conclusion in a case involving an ongoing denial of effective access to a judicial system, primarily due to inordinate delays, citing both the *Mondev* case and *Feldman v. Mexico*, which involved an ongoing practice of applying tax enforcement measures more stringently to the foreign investor than to Mexican enterprises in a similar position. See: *LG&E Energy Corporation et al v. Argentina*, Award, ICSID Case No ARB/02/1, IIC 295 (2007), 25 July 2007, at ¶ 85; and *Chevron Corporation and Texaco Petroleum Corporation* v *Ecuador*, Interim Award, IIC 355 (2008), 1 December 2008 at ¶ 294.

> practice of the Respondent to withhold permits and concessions in furtherance of the exploitation of metallic mining investments [Emphasis added].[20]

40. Thus, as demonstrated above, and confirmed by Professor Mendelson's expert opinion, it is simply inaccurate to contend that every expropriatory measure must be conceived of as a single event in time. The authorities overwhelming demonstrate this point of law. Even one of the awards relied upon by the Respondent, *Pey Cassado* v. *Chile*, indicates that indirect expropriations should be distinguished from direct expropriations on this very score.[21]

41. James Crawford has made similar observations in relation to the ILC Articles on State Responsibility, such as: "The question whether a wrongful taking of property is a completed or a continuing act likewise depends to some extent on the content of the primary rule said to have been violated." Professor Crawford also observed that the position on "creeping' or disguised occupation, however, may well be different."[22] That was not Professor Crawford's last word on the subject, however. In his latest treatise, he has added:

> Such questions depend very much on the facts of each case and the precise basis of claim. An outright, acknowledged expropriation (e.g. by decree or judicial decision) may well occur and be completed on a given day, whereas a 'creeping' expropriation consisting of a series of acts together amounting to virtual deprivation is in a different category – even though the source of the obligation may be the same. *A fortiori* if what is complained about is not expropriation but refusal of access to property, such as with a freezing order, the consequences may differ.[23]

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[20] *Pac Rim Cayman LLC v. El Salvador*, Decision on the respondent's jurisdictional objections, ICSID Case no ARB/09/12, IIC 543 (2012), 1 June 2012, at ¶ 3.43. By way of further example, and as a former counsel for the Government of Canada Nick Gallus, noted in a 2008 publication on temporal issues in international investment law, support also exists for the proposition that a host State's failure to pay an acknowledged debt also constitutes a continuing act for purposes of determining jurisdiction *ratione temporis*. See: N. Gallus, *The Temporal Scope of Investment Protection Treaties* (London: BIICL, 2008) at 55, citing the awards in *SGS v. Philippines* and *Impregilo* v. *Pakistan*. See, also the *African Holding* case, where the host State was found responsible for a 15-year-old failure to pay for services received under contract. See: *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo,* ICSID Case No ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, 29 July 2008

[21] *Pey Casado and Président Allende Foundation v. Chile*, Award, ICSID Case No ARB/98/2, IIC 324 (2008), 22 April 2008, at ¶ 607.

[22] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (Cambridge: CUP, 2002) at 136, Paragraph (4), Commentary on ILC's ASR Article 14.

[23] J. Crawford, *State Responsibility: The General Part* (Cambridge: CUP, 2013), at 258. One of the cases Crawford had in mind, when he made the observations above, was *Loizidou* v. *Turkey*, to demonstrate how takings need not be regarded as "completed acts." The *Loizidou* case involved land, which was located on the wrong side of the 'Green Line' that separates Greek and Turkish Cyprus. The rightful landholder had been attempting to regain access to her land for a number of years, in order to develop it, but Turkish authorities had consistently refused her. Finding in the applicant's favour, the Grand Chamber construed Turkey's conduct as an on-going practice, which prevented her from obtaining lawful access to her land. See: *Loizidou v. Turkey* (1996) 108 ILR 443.

42. The current arbitration involves evidence of host State conduct not unlike the type Professor Crawford appears to have had in mind, in referring to potential "freezing" measures. Here, the Respondent adopted a series of temporary measures suspending SETENA's consideration of applications for environmental assessments (which are one of the prerequisites for obtaining a construction permit). These temporary suspensions appear to have been renewed every year from the spring of 2005 until the spring of 2010. That was when the Environment Minister issued his order on 19 March 2010 (over a year after the CAFTA came into force), which purported to make the suspension of consideration for environmental permits for land 'in the [so-called] park' permanent.

43. The Respondent has also touted, as an alternative argument, the fact that the Claimants still retain title to most of their lots. The Respondent proffers this state of affairs as evidence that it has not expropriated most of the Claimants' lots.[24] ECHR jurisprudence can be instructive in this regard. For example, *Sporrong and Lönnroth v. Sweden* involved two Swedish citizens whose land had been encumbered by long-term expropriation authority granted by the Swedish Government to the City of Stockholm, as well as an interim prohibition on its development. Although official expropriation of their land was never pursued, both its threat and the 'interim' development freeze remained for a seemingly indefinite period of time. As such, the property holders were unable to alienate their investments for what might otherwise have been FMV.

44. Finding in favour of Sporrong and Lönnroth, the ECHR's Grand Chamber first confirmed that neither a *de jure* nor a *de facto* taking had occurred, noting: "although the right in question lost some of its substance, it did not disappear." Nevertheless, the Court observed that there had been a breach of the right to peaceful enjoyment of possessions under the first sentence of Article 1(1) of the *First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, on the following grounds:

> Although the expropriation permits left intact in law the owners' right to use and dispose of their possessions, they nevertheless in practice significantly reduced the possibility of its exercise. They also affected the very substance of ownership in that they recognised before the event that any expropriation would be lawful and authorised the City of Stockholm to expropriate whenever it found it expedient to do so. The applicants' right of property thus became precarious and defeasible.[25]

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[24] Respondent's Memorial on Jurisdiction and Counter Memorial on the Merits ("Respondent's Memorial and Counter-Memorial"), at ¶ 190.

[25] *Sporrong and Lönnroth v. Sweden* [GC], App. No. 7151/75, Decision of 23 September 1982 at ¶ 60.

45. Similar reasoning can be found in other ECHR cases, such as *Skibinscy v. Poland*,[26] which involved the adoption of a land development plan with an open-ended power to expropriate certain tracts for a potential, future road. Although the applicants retained title to their lands, they were significantly impaired in their ability to meaningfully exercise their property rights. Relying on *Sporrong*, the Court found that the State had impinged upon the applicants' right to peaceful enjoyment of possessions, on the grounds that the "… applicants' right to property [had] become precarious and defeasible."[27] The Court also relied upon the reasoning in *Sporrong* to vindicate the same fundamental freedom, to hold and enjoy property rights, in *Ayangil v. Turkey*. The case involved the designation of a school zone for an area that encompassed the applicants' land. Over the years, the applicants had been notified that their land would be expropriated, but transfer of title was never affected. Nevertheless, with the threat of expropriation permanently attached to their land, "the applicants' right of property thus became precarious and defeasible over a long period of time."[28]

46. This line of ECHR "blight" cases is instructive for understanding the Claimants' situation in Costa Rica. At some point soon after President Chinchilla took office, the Respondent took, and has since maintained, a hard-line stance assuring the Claimants that their lots will be expropriated at some unspecified, future date.[29] Of course the Respondent has been sure to stress that it has not yet deprived the Claimants of title to most of their land, apart from having 'temporarily' suspended the processing of applications for environmental certification from SETENA annually from 30 August 2005 until 19 March 2010.[30] The Respondent has thus blighted the Claimants' property rights, which has resulted in dramatic (i.e. near total) devaluation of their investments. Recently, some judges working within the Respondent's municipal expropriation process have started prospectively relying upon the inevitability of blight (i.e. dramatically diminished valuation for lots allegedly located within a "park"), as a *post facto* methodology for significantly reducing the final valuation awarded by the court. Such conduct has added insult to injury.

47. To be sure, the current arbitration is not a marginal example of the phenomenon of 'planning blight.' The level of deprivation rises to the level of expropriation because the Claimants have

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26 Application no. 52589/99, 14 November 2006.

27 *Ibid*., at ¶ 79.

28 *Ayangil v. Turkey*, Application No. 33294/03, 6 December 2011 at ¶ 42.

29 Respondent's Reply on Jurisdiction and Rejoinder on the Merits ("Respondent's Reply and Rejoinder") at ¶ 13.

30 As noted elsewhere, it was on the latter date that MINAE officials appear to have stopped abusing the precautionary authority, available to any public agency under section 4 of the Law on Expropriation, to issue annual suspensions, in favour of what purported to be a permanent ban on any further consideration, or granting, of environmental assessments for the development of lots located within the redrawn borders of the PNMB.

been stripped of any meaningful manner to develop or alienate their investments for FMV ('temporarily' from 10 March 2005 until 19 March 2010, and 'permanently' thereafter).[31] The same reasoning that supports the results in the ECHR's *Sporrong* line of cases is *apropos* for the Tribunal's analysis of the Respondent's obligations under Articles 10.5 and 10.7 in the instant case. Even if the level of interference with the Claimants' property rights was not substantial, which it is, the *Sporrong* cases demonstrate how egregiously unfair and inequitable long-term, open-ended regulatory blight can be for property holders.

48. Indeed, the Respondent has already been held internationally responsible for indirect expropriation through blight. In *Santa Elena v Costa Rica*, a tribunal composed of Yves Fortier, Professor Lauterpacht, and the late Professor Weil, considered the concept of blight as part of the valuation analysis, explaining:

> As is well known, there is a wide spectrum of measures that a state may take in asserting control over property, extending from limited regulation of its use to a complete and formal deprivation of the owner's legal title. Likewise, the period of time involved in the process may vary—from an immediate and comprehensive taking to one that only gradually and by small steps reaches a condition in which it can be said that the owner has truly lost all the attributes of ownership. It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title. What has to be identified is the extent to which the measures taken have deprived the owner of the normal control of his property. A decree which heralds a process of administrative and judicial consideration of the issue in a manner that effectively freezes or blights the possibility for the owner reasonably to exploit the economic potential of the property, can, if the process thus triggered is not carried out within a reasonable time, properly be identified as the actual act of taking[32] [Emphasis added].

49. The *Santa Elena* case involved US investments in coastal land located approximately 80 kilometres north of Playa Grande. The Respondent issued a decree for its expropriation in 1978. The appropriate level of compensation was disputed, with the matter dragging before the courts of Costa Rica for over 20 years, until the United States and Costa Rica agreed to refer the matter to arbitration. The fact of the expropriation was not in dispute – only the level of compensation. In the process of determining a valuation date, the Tribunal also considered the appropriate expropriation date. The Tribunal determined that expropriation occurred in 1978, when the expropriation decree was issued. Although, under Costa Rican law at that time, the landholder

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[31] See: Claimants Memorial on the Merits, at ¶ 147. Please note that the noted date "10 March 2008" contains a typographical error, as indicated by the document cited at footnote 156 of that document. It should read: "10 March 2005". Also see note 1, above.

Santa Elena v. Costa Rica, Final Award, 17 February 2000 at ¶¶ 76-77; ¶ 81.

retained title, it was from that date that "the practical and economic use of the Property by the Claimant [had been] irretrievably lost". On that date the "Claimant's ownership of Santa Elena was effectively blighted or sterilised because the Property could not, thereafter, be used for the development purposes for which it was originally acquired (and which, at that time, were not excluded) nor did it possess any significant resale value."[33]

50. Finally, the Claimants must note another ICSID case also involving Costa Rica: *Unglaube* v. *Costa Rica*. In its first substantive pleading in that case, dated 23 January 2009, the Respondent made the following statement in relation to the claimant in that case:

> The Supreme Court also ruled that Claimant is entitled to an expeditious disposition of the current status of her property. In addition to the compensation that Claimant will receive for any harm that she may have suffered due to delays in the expropriation proceedings, Claimant will also receive compensation from the State for her property, in accordance with domestic law and the Costa Rica-Germany Treaty, if and when the relevant portion of her property that is inside the Park is expropriated. As to the remainder of the property, pursuant to the Supreme Court's ruling, the competent authorities have resumed the processing of Claimant's requests to develop her land. Both proceedings are ongoing. Only if and when Costa Rica fails to pay adequate compensation or otherwise abide by the Treaty in those proceedings will Claimant potentially have a claim that is ripe for arbitration.[34]

51. Nowhere in this document did the Respondent mention the "completed act" theory that it seeks to have applied to any sort of expropriation in this arbitration. Rather, the Respondent appeared to have little difficulty contemplating expropriation as a composite or continuing measure. Ironically, the Respondent even cited the *SGS* v. *Philippines* [35]award, *supra*, as support for the proposition that Ms. Unglaube had brought her case too early, rather than too late:

> The ICSID tribunal in SGS v. Philippines declined to hear claims against the Philippines because the claimant was able to exercise its rights in domestic courts to resolve the underlying dispute. The tribunal ultimately held that "[t]he Philippine courts are available to hear SGS's contract claim. Until the question of the scope or extent of the Respondent's obligation to pay is clarified ... a decision by this Tribunal on SGS's claim to payment would be premature" The tribunal suspended the proceeding, but in effect dismissed the claims as stated and left the door open only to a denial of justice claim-that is, the SGS v. Philippines tribunal indicated that it would allow SGS to resume its case under the applicable treaty only if there were grounds to assert that the Philippines court denied SGS justice in those domestic proceedings.[36]
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> [Emphasis added. Footnotes omitted.]

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34 Respondent's Unglaube Pleading (2009) at ¶ 5.

35 Respondent's Unglaube Pleading (2009) at ¶ 37.

36 *Ibid.*, at ¶¶ 111-112.

52. Given the above, the Claimants submit that endemic delays in providing compensation for expropriation, whether executed directly or by indirect means, could certainly constitute a continuing breach of Article 10.7(2)(a). The same logic applies regardless of whether paragraphs (1) and (2) of Article 10.7 are considered as expressing autonomous but related standards (as the Claimants have demonstrated), or as the expression of a single, customary international law standard (which is implied in the Respondent's argument).

(iii) Could endemic delays in the provision of compensation for expropriation, in spite of the seeming availability of a process ostensibly designed to provide prompt access to it, constitute a continuing breach of Article 10.5(1)?

53. The above analysis also applies to alleged breaches of Article 10.5(1), which provides for fair and equitable treatment. In this context, the Claimants' argument is that the Respondent acted in a manner contrary to the fair and equitable treatment standard (as an expression of the customary international law minimum standard of treatment of aliens) by having withheld access to a functional compensation mechanism. For the avoidance of doubt, the Claimants do not deny that the Respondent maintains an ostensibly suitable mechanism. Unfortunately, the operation of this system has resulted in the Claimants experiencing intolerable delays in obtaining compensation for the near-total deprivation of their property rights in the subject land.

54. Of course, for the purposes of Article 10.5(1), the level of deprivation need not reach that of a taking, although in this case it has done. The Respondent's refusal, or inability, to provide the Claimants with access to a suitable compensation mechanism (here measured by the length of time the Respondent has already had since it directly and indirectly expropriated their investments) is tantamount to a denial of justice under the customary international law doctrine of the same name.

55. The Respondent would have the Tribunal believe that the doctrine of denial of justice only applies to a failure of the judicial branch of a host State, and that – in order to plead a breach of this norm – the Claimant must prove that it has exhausted recourse to all local remedies. Neither of these contentions is accurate.

56. In his celebrated treatise on the topic, Professor Paulsson has taken an unequivocal position on the first issue. He says that attempts to limit the doctrine to the conduct of judicial officials are "indefensible. If justice has been denied by officials whose conduct is imputable to the state, it makes no sense to exclude liability because those officials do not have a particular title as a

matter of national regulation."[37] He is not alone amongst publicists in advocating this position. Thirty years ago, Garcia Amador observed that what he described as the wider approach to the doctrine "is the one prevailing with respect to the circumstances in which the State's conduct can be properly styled as a 'denial of justice," adding that it was also "clearly reflected in the jurisprudence of arbitral claims commissions and international courts and tribunals."[38]

57. Eminent 19th century publicists, such as Sir Travers Twiss, once observed:

> International justice may be denied in several ways (1) By the refusal of a nation either to entertain the complaint at all, or to allow the right to be established before its tribunals; (2) or by studied delays and impediments, for which no good reason can be given, and which are in effect equivalent to a refusal; or (3) by an evidently unjust and partial decision."[39]

58. With regard to Twiss' second ground, Freeman once gave the following explanation of the effects of burdensome delay in civil and administrative judicial proceedings, which Paulsson has shown to apply equally to other forms of civil and administrative adjudication in the host State:

> Like direct refusal of access it may effectively bar the claimant from obtaining the relief to which he is justly entitled. In some respects, delay in the conduct of the proceedings may be even more ruinous than an absolute refusal of access or wrongful rejection of the alien's petition. For, in the later case, the claimant knows exactly where he stands and may appeal to his government for assistance immediately… without the possible pecuniary prejudice resulting from haplessly protracted litigation, whereas in the former hypothesis, the drawn-out conduct of the proceedings may itself be a source of additional, irreparable injury. But disregarding this possible element of damages, it is obvious that the failure to conduct proceedings with reasonable diligence and despatch may produce the same dire effects for the claimant as though he had been denied a judicial remedy altogether.[40]

59. Professor Paulsson also cautions host States against relying on pleas of limited resources to justify unreasonable delays, citing from the decision of a chamber of the Anglo-Mexican Claims Commission in the *El Oro Mining and Railway Case*: "the amount of work incumbent on the Court, and the multitude of lawsuits with which they are confronted, may explain, but not excuse the delay. If this number is so enormous as to occasion an arrear of nine years, the conclusion

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37 J. Paulsson, *Denial of Justice in International Law* (Cambridge: CUP, 2005) at 44, et seq. 44-48.

38 F.V. Garcia Amador, *The Changing Law of International Claims* (New York: Oceana, 1984) at 173 & 176.

39 T. Twiss, *Law of Nations, Considered as Independent Political Communities* (Oxford: Clarendon, 1825), 2d ed., Part I, at 36-37.

40 A. Freeman, *The International Responsibility of States for Denial of Justice* (London: Longman, 1938) at 244. Pages 242-244 were cited by Paulsson, *supra*, at 177.

cannot be other than that the judicial machinery is defective."[41] One chamber of the Inter-American Court of Human Rights seems to have adopted a similar approach in a case that involved the expropriation of land for use in a proposed park:

> The denial of the access to justice is related to the effectiveness of the remedies, since it is not possible to say that an existing recourse within the legal system of a State, which does not solve the merits of the issue raised due to an unjustified delay in the proceedings, can be considered an effective remedy.
>
> The Court considers that, due to the lack of a final resolution of the subjective remedies filed by the alleged victim, the social interest alleged by the State to justify the deprivation of the property is uncertain, and this puts not only the public interest existing on the Metropolitan Park at risk, but also the real benefit to which the community as a whole is being subjected before the possibility of an unfavorable resolution in this sense.[42]

60. Justice delayed is justice denied. In having undertaken the obligation to accord fair and equitable treatment to CAFTA investors, the Respondent must now ensure that anybody it maintains for the determination of rights held by individual investors, of whatever nature, functions in a manner consistent with a level of procedural fairness suited to accomplish its assigned tasks. As Travers Twiss explained in 1861, there is no type of case in which untenable delays cannot constitute a denial of international justice.

61. It is accordingly correct to conclude that endemic delays in providing compensation for expropriation, whether executed directly or by indirect means, can constitute a continuing breach of Article 10.5(1). Should the Tribunal reject both of the two aforementioned grounds for finding Costa Rica responsible for its treatment of the Claimants as CAFTA investors, the Respondent could still be held liable for the delays it has visited upon the Claimants, which are inconsistent with its obligation to accord fair and equitable treatment under Article 10.5(1).

(iv) Does Article 10.1(3) preclude a tribunal from finding - as a background fact - that expropriations occurred prior to 1 January 2009, when it determines whether conduct that occurred after that date violated the Article 10.7(2)(a) prohibition against delay?

62. The first paragraph of CAFTA Article 10.1 provides, in part, that the Chapter "applies to measures adopted or maintained by a Party… [Emphasis added]." Paragraph (3) of the same provision reads: "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

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41 Paulsson, *supra*, at 178.

42 *Salvador Chiriboga v. Ecuador*, IACHR Judgment of 6 May 2008, at ¶¶ 88-89.

this Agreement [Emphasis added]." On their face, these terms account for the probability that measures will be maintained by the parties following the coming into force of the Agreement and that, provided "any situation" brought about by the maintenance of such measures, apart from situations that terminated [as between Costa Rica and the United States] prior to 1 January 2009.

63. The doctrine on this question is unambiguous. Adjudicators may have regard to events that transpired before a treaty came into force. Such facts are integrated into the factual matrix constructed by a tribunal to determine whether the measures at issue are ongoing or not, whether the acts or facts occurring after the treaty came into force indicate that the respondent has acted inconsistently with its obligations, or to assign the appropriate value to an investment when calculating damages.

64. As indicated in the recent *Apotex Inc.* v. *U.S.A.* award, which cited from *Glamis Gold v. U.S.A.*, claimants are entitled to refer to facts that predate the three-year time limit found in NAFTA Article 1116 (an analogue of CAFTA Article 10.16) as background for its claims.[43] In *Grand River Enterprises* v. *U.S.A.*, the Tribunal also recognized how the *Mondev* and *Feldman* Tribunals had applied the same logic in considering evidence of events that took place before the treaty came into force as background facts.[44] The *Pac Rim* Tribunal also reached the same conclusion under CAFTA Article 10.16.[45] It is thus manifest that such practice is well established in arbitral practice.

(v) Does Article 10.7(2)(a) prohibit a CAFTA Party from imposing or allowing the kinds of delay experienced by the Claimants?

65. The Claimants have already fully argued their position on the merits of their claim for delay. However, with respect to the interpretation of delay, the Claimants observe how, when the World Bank Guidelines on Foreign Investment were being drafted, considerable efforts were made to address the "exceptional circumstances" in which the expropriating host State is in the midst of a severe foreign exchange crisis. In such cases, it was agreed that the State could pay compensation

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43 *Apotex Inc. v. U.S.A.*, Award on Jurisdiction and Admissibility, IIC 598 (2013), 14 June 2013, Ad hoc (UNCITRAL) at ¶ 333, citing: *Glamis Gold, Ltd.* v. *U.S.A.*, NAFTA/UNCITRAL, Procedural Order No. 2, 31 May 2005, ¶ 19.

44 *Grand River Enterprises Six Nations Limited et al, and on behalf of Native Wholesale Supply v. U.S.A.*, Decision on Objections to Jurisdiction, IIC 128 (2006), 20 July 2006, at ¶ 86, citing: *Feldman* v. *Mexico*, Award, ICSID Case No. ARB (AF)/99/1, 16 December 2002.

45 *Pac Rim Cayman LLC* v *El Salvador*, Decision on Jurisdiction, ICSID Case no. ARB/09/12, IIC 543 (2012), 1 June 2012, at ¶ 2.105. See, also: *Bayindir Insaat Turizm Ticaret ve Sanayi AŞ* v *Pakistan*, Award, ICSID Case No ARB/03/29, IIC 387 (2009), 24 August 2009, at ¶ 132; *RosInvest Co UK Ltd* v *Russian Federation*, Final Award, SCC Case No 079/2005, IIC 471 (2010), 12 September 2010, at ¶ 407 ; and *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, Interim Award, IIC 355 (2008), 1 December 2008, at ¶ 283.

by instalment, albeit only "for a period which will be as short as possible and which will not in any case exceed five years from the time of the taking, provided that reasonable, market-related interest applies to the deferred payments in the same currency [Emphasis added]."[46]

66. Costa Rica's Law on Expropriation plainly vests sole authority to commence the judicial phase of expropriation proceedings in the Respondent's hands. Only the Respondent gets to choose whether compensation claims are prosecuted efficiently, or at all. It thus lies for the Respondent to explain the current state of affairs with respect to each of the Claimants' lots. The Tribunal will likely want to establish a baseline against which to measure relative periods of delay. By no means are the Claimants offering the World Bank's "exceptional circumstances" concession for that baseline. They are suggesting, however, that – if five years is the absolute longest period of time that members of the World Bank are prepared to even countenance in the most dire of circumstances for a host State – "prompt" must mean less than five years.

67. During the expropriation process for those lots in the judicial phase, owners in the area were in discussions and negotiations with the Government. The Government wished to avoid having to spend half a billion dollars or more on PNMB expropriations and the Claimants wanted to develop their properties in an environmentally responsible manner.[47] In May 2010, the legislation they had worked with senior officials to draft (and which the President and Environment Minister of the day both personally and publicly supported), failed to reach the floor for a vote before a new Administration and Congress were installed.[48] Some Claimants began seriously considering the CAFTA option within six months. Others were prepared to await the results of the expropriation cases commenced by the Respondent in 2007. By the 18-month point, however, all of them were considering the CAFTA option. By the 24-month point, drafting of the Notices of Intent was well underway. Based upon their collective experience – and ignoring all of the delays they had suffered before the failure of the Respondent's second legislative attempt to solve the problem – the Claimants submit that "prompt" should not mean any more than between six and eighteen months, and "without delay" should not mean more than six months (and, in no circumstances, longer than one year).

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46 I. Shihata, *Legal Treatment of Foreign Investments* (The Hague: Martinus Nijhoff, 1993), Appendix I, World Bank Guidelines, Article 4, at para. 8.

47 Witness Statement of Ana Facio dated 4 February 2015 ("Facio WS1") at ¶¶ 8-13; Witness Statement of Brett Berkowitz dated 4 February 2015 ("Berkowitz WS3") at ¶¶ 7-13; Witness Statement of Bob Reddy dated 4 February 2015 ("Reddy WS3") at ¶¶ 13-18; Exhibits C-1zj, C-117, C-118, C-119, C-121, C-122, C-123.

48 Exhibit C-112g.

68. If the Respondent and other World Bank members could agree that there were simply no circumstances in which it would be acceptable for compensation to take more than five years to be paid – and then only in times of extreme financial crisis (along with payments by instalment plus compensatory interest) – it is submitted that, judging from the Claimants' own experiences, any period longer than six to eighteen months, to pay compensation for expropriation in normal circumstances, is simply inconsistent with international norms.

B. Failure to Pay Fair Market Value for Past Expropriations [Articles 10.7(1) and 10.7(2)(b)&(c)]

69. In the nineteen months since the Claimants served the notices of arbitration upon Costa Rica, only four cases have finally produced a final result for any Claimants – although only one has received the entirety of the quantum assigned for the taking.[49] As demonstrated in the analysis provided by FTI for each of these lots, the valuation amount offered by Costa Rica is not equivalent to the amount due pursuant to the standards set out in subparagraphs (b) or (c) of CAFTA Article 10.7(2).

(i) Do sub-paragraphs (b) & (c) of Article 10.7(2) represent discrete compensation obligations in relation to the CIL obligation memorialized in Article 10.7(1)?

70. For all of the reasons provided in section A.(i)1, above, the Claimants submit that the proper construction of Article 10.7(2), and its sub-paragraphs, involves attributing meanings to them that are consistent with the plain text, consistent with the object and purpose of the Chapter and Agreement (which is to promote and protect investment in the CAFTA area), and consistent with the context of the treaty (i.e. located in a different location than the provisions of customary law they are intended to embellish). In observing this methodology, the only conclusion that can reasonably be drawn is that sub-paragraphs (b) and (c), the requirements to provide FMV unaffected by the fact of the expropriation constitute distinct obligations, which are likely to breached later in time from the date on which total deprivation occurs.

(ii) Could the eventual failure to pay sufficient compensation constitute a continuing breach of Article 10.7?

71. In the alternative, the Claimants submit that a CAFTA Party engages in the maintenance and adoption of a composite measure when it fails to pay sufficient compensation for an expropriation, regardless of whether it was direct or indirect, and even in the absence of any

[49] For the current status of the Claimants' lots see Appendix 2; Berkowitz WS3 at ¶¶ 4-6; and Reddy WS3 at ¶¶ 19-24.

evidence that there was something deficient about the compensation process made available to the expropriated investor. Inasmuch as Article 10.7(2)(b) should be construed as an obligation of result, so – traditionally – is the customary obligation requiring the payment of compensation for expropriation.

72. The same approach was observed in *Chiriboga* v. *Ecuador*, in which the Inter-American Court of Human Rights noted: "the State alleged, in order to justify the payment of the compensation, that it made a 'provisional payment' of the value of the property subjected to condemnation," just as the Respondent has argued in this case. The Court refused to accept the argument, on the logical basis that the required amount of compensation is that which conforms to international standards. Compliance is never achieved with half-measures.[50] Mrs. Chiriboga had waited 15 years for the host State to fix the final value for her expropriated land. The IACHR regarded the wrong to Mrs. Chiriboga as contemporaneous, rather than informing her that – as the expropriation appeared valid *prima facie* valid – there was nothing else related to the taking for which it held any obligation.

73. For these reasons, as well as for those stated above in section 1(b), it is manifest that, insofar as the few lots for which the Respondent has actually provided a final valuation are concerned, how much it proposes to pay does matter. The Respondent cannot say that expropriation is a single act, but the obligations to pay adequate compensation promptly are the consequences of that completed act. If that were true, all any host State would need to do, so as to avoid responsibility, would be to take longer that the applicable treaty's time limitation provision to announce the compensation owing. It is submitted that this result can simply not be countenanced for a provision contained in an Agreement with the object and purpose of protecting and promoting foreign investment.

(iii) Does Article 10.1(3) preclude a tribunal from finding - as a background fact - that expropriations occurred prior to 1 January 2009, when considering whether conduct that occurred after that date violated the Article 10.7(2) prescriptions for valuation?

74. As demonstrated above, CAFTA Article 10.1(3) cannot be used to exclude acts or facts occurring before the treaty came into force, or circumstances remaining thereafter. The factual matrix for this case cannot be dictated by a 'what is past is past' approach to relevant events that occurred before 1 January 2009. The Tribunal can and should take cognizance of when Declarations of

[50] *Salvador Chiriboga v. Ecuador*, IACHR Judgment of 6 May 2008, at ¶ 110.

Public Interest and Expropriation were issued for the lots that have received final decisions on compensation owing, just as it should consider the lot-specific valuation information provided for each in the Claimants previous submissions. The Claimants have been careful, throughout, to provide the Tribunal with balanced, conservative figures for each lot. They seek no more, and no less, than amounts that are consistent with appropriate international and professional standards, which they should already have received for every single one of their lots, years ago.

75. The case that confronted the *Chevron* tribunal is not dissimilar from the instant matter. Both reveal inexplicable and unacceptable delays experienced by investors before local adjudicatory bodies, and in neither case could the respondent even provide undertakings as to how or when the respective processes would conclude. Confronted with this scenario, the *Chevron* tribunal, which was chaired by V.V. Veeder, with Professors Grigera Naon and Lowe as co-arbitrators, was prepared to regard the host State's failure to provide the foreign investor with a credible and efficient process for vindicating its rights as both treatment of a continuing character and as a composite measure, composed of the investor's individual interactions with the host State's dysfunctional adjudicatory regime. In this latter regard, the Tribunal observed:

> As for composite acts, the Respondent cites the commentary to Article 15 of the ILC Draft Articles for the idea that a composite act must be based exclusively on post-BIT conduct. While the commentary seems superficially to support this position, it is in light of the wording of Article 15 that the Commentary must be read. Article 15 reads as follows:
>
> > **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.
>
> In the present case, the "acts" alleged here are the actions and inaction of the Ecuadorian courts in relation to the Claimants' lawsuits. Article 15(1) thus establishes that a BIT breach can only have arisen when the actions or inaction of the Ecuadorian judiciary, when "taken with [its] other actions or omissions," became sufficient to constitute a denial of justice. In accordance with Article 13 of the ILC Draft Articles, that breach must have arisen, if at all, after the BIT entered into force. Meanwhile, Article 15(2) merely provides that the denial of justice persists for as long as the Ecuadorian courts continue and repeat the actions or omissions alleged. In light of the above, the commentary cited by the Respondent merely clarifies that the alleged breach commenced upon the occurrence of the action or inaction that consummated the denial of justice. As

> discussed in the preceding section, it does not, however, establish that pre-BIT acts may not be taken into account in evaluating when the denial of justice arose. Thus, the Tribunal finds that, if true, the Respondent's alleged conduct could constitute a composite act giving rise to a denial of justice within its jurisdiction.[51]

76. The *Chevron* Tribunal's reasoning applies easily to the instant case. There must be cases in which even a direct expropriation should be treated as a composite, rather than completed, act. Otherwise, there would be no check on a host State deliberately delaying its own compensation process, or maintaining a process to give just as poor a result, long enough so that time limitation provisions would apply, thereby effectively expunging the responsibility to compensate. The scenario is not complicated. Construed as a composite measure, expropriation begins with a formal, governmental measure that declares expropriation. The expropriation will be consistent with international law if it is accompanied by the availability of a municipal system for providing prompt, adequate and effective compensation. If that system works as advertised, the expropriation is construed as a "completed" or "single" act. If, however, the municipal compensation mechanism is absent or woefully inadequate, the need may arise to treat the expropriation as a composite act instead.

77. When expropriation is [implicitly or explicitly] construed as a composite act, the first component is what would be construed as the only component (i.e. the "completed act"), had things not gone wrong. Assume that there was no unreasonable delay, but that the compensation determined was woefully inadequate. Under the Respondent's postulation, the foreign investor would have no redress. Construe the expropriation as a composite act – with the manifestly insufficient compensation decision as the final component, and redress is not inequitably withheld. Now assume that there has been no compensation decision at all, and that a reasonable amount of time has passed since one should have been forthcoming. In this scenario, undue delay becomes the latter component of the composite act instead.

78. As far as the CAFTA is concerned, however, these scenarios are rendered moot, because the Parties did not rely exclusively on the prompt, adequate and effective standard alone. Rather than relying on what they deemed to represent customary international law (the prompt, adequate and effective standard, represented in the language of Article 10.7, paragraph (1)), the CAFTA Parties added some autonomous, but complementary, standards in paragraph (2) as well. Accordingly, rather than having to construe an expropriation as a composite act, NAFTA investors can seek

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[51] *Chevron v. Ecuador*, Interim Award, IIC 355 (2008), 1 December 2008, at ¶¶ 300-301.

redress for insufficient compensation or undue delays by recourse to Article 10.7, paragraph (2). In any event, even if the Tribunal decided to treat both paragraphs (1) and (2) of Article 10.7 as a coterminous expression of the customary rule on expropriation, it would still need to decide whether the expropriation of any Claimant's should be construed as a composite, rather than a completed, act. That analysis would necessarily need to be undertaken with a keen awareness of the object and purpose of this kind of treaty (or FTA chapter), i.e.: the promotion and protection of foreign investments.

(iv) Was the amount actually paid to any of the Claimants sufficient to satisfy the compensation standards set out in Article 10.7(2)?

79. This is a merits question, which will not be addressed in this Rejoinder Memorial on Jurisdiction.

(v) Has the Respondent proved that, as of 10 June 2010, every Claimant knew, or should have known, that the Respondent breached its obligations under Article 10.7(2)(b) & (c), by not providing sufficient compensation for the expropriation of any of their investments in 2013, 2014 or 2015?

80. The Respondent's Spartan approach to Article 10.16 basically requires the Tribunal to merely decide that – as a group – the Claimants should have known they had suffered *some* loss or damage in relation to the expropriations (direct or indirect) before 10 June 2010. The bottom line, however, is that language of Article 10.16 simply will not support it. To begin, the Tribunal must also consider the subjective side of the question. Does the evidence indicate that the Claimants knew about the breaches they have alleged (or any corresponding losses) before 10 June 2010? The subjective aspect of this provision reminds the interpreter that she must place herself into the shoes of the Claimants who have made the allegations at issue. Even when the objective aspect of this provision is considered, the interpreter must not lose her sense of time and place. Her task is to consider how a reasonable person would think in context, not from ten thousand feet above, and certainly not in hindsight.

81. More importantly, the Respondent's approach subverts the object and purpose of the CAFTA, by ignoring the explicit text of Article 10.16(1). Sections (i) and (ii) of subparagraph (1)(a) provide the basis for the "breach" and "loss or damage" questions, but not in the abstract. Both are subordinated to a more fundamental question: has the investor decided that the "investment dispute," which she defined in her Notice of Intent, "cannot be settled by consultation and negotiation?" By that point, her decision will already have been conditioned by the Article 10.15 obligation to "initially seek to resolve the dispute through consultation and negotiation." If that

does not work, the questions about "breach" and "loss or damage" will be asked, but only in relation to the "investment dispute" that could not be resolved. It is this specific "investment dispute" – the one that the investor has decided to bring to arbitration – that defines how the questions about "breach" and "loss or damage" can be asked.

82. The Respondent would apparently prefer the Tribunal not to give a second thought to the way that the term "investment dispute" dictates the Article 10.16 analysis. Be that as it may, it is the investor *cum* claimant who decides what the "investment dispute" shall be, and that decision is made when her Notice of Intent is drafted and submitted. Sub-paragraphs (b), (c) and (d) of Article 10.16(2) demonstrate how this is a decision for the investor to make, not the Respondent:

> (b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
> (c) the legal and factual basis for each claim; and
> (d) the relief sought and the approximate amount of damages claimed.

83. The two Notices of Intent filed in this voluntarily consolidated arbitration were unequivocal in defining the "investment dispute" being considered by the Tribunal. They state, in relevant part:

> 3. If not resolved, this will be a claim about the Respondent's failure to provide prompt, adequate and effective compensation for its de facto and de jure takings of valuable residential real estate located on its Northwestern (Pacific) Coast of its territory. It is similarly about the Respondent's failure to provide the Claimants with access to any administrative or judicial means for the prompt review of its de facto expropriation of this prime beachfront land, thereby depriving the Claimants of a unique development opportunity, which had already come to fruition when the acts constituting such takings transpired.
>
> 25. The effect of the current Government's apparent policy – of simply refusing to subject the vast majority of the Claimants' lots to official expropriation, while simultaneously refusing to grant the necessary permits for development to proceed – has been the de facto taking of their property rights in the affected beachfront lands. By means of interminable delay – contrary to the explicit instructions of its own Constitutional Court – the Government has managed to effectively expropriate the Claimants' lands without having paid prompt, adequate or effective compensation to them for the losses occasioned thereby.
>
> 51. Since 1 January 2009, has the Government of Costa Rica failed to provide the Claimants with prompt, adequate and effective compensation, representing fair market value for their investments, for the Respondent's de facto and de jure takings of land affected by the fixing of the boundaries of the Park in 2008 or by the commencement of expropriation proceedings at some earlier date?
>
> 52. Since 1 January 2009, has the Government of Costa Rica failed to provide the Claimants with prompt review of either the de facto or the de jure taking of lands affected by the fixing of the boundaries of the Park in 2008, as well as prompt, good faith valuation of the lands so affected?

[Emphasis added]

84. As Professor Mendelson has observed, the Respondent bears the burden of proving that the Claimants knew or should have known about the ***breaches that they actually articulated*** as the basis of their claims.[52] The evidentiary record is equally clear concerning all of the effort expended by the Claimants in pursuing consultation and negotiation with the Respondent since 2008. The Claimants were also the ones who prepared to meet with the Respondent on its own terms, still hoping to negotiate a resolution to the "investment dispute" as defined in their Notices of Intent, submitted on 12 October 2012.[53] If the Respondent's objections are to be granted, it must be able to do so on the basis of the "breaches" and "loss or damage" lying at the heart of the "investment dispute" brought by the Claimants, not the basis of the "breaches" to which it thinks it can actually attribute subjective or objective knowledge.

85. The Claimants submit that the Respondent has utterly failed to demonstrate that the Claimants knew, or should have known, about the breaches actually alleged in their Notices of Intent one day earlier than the day they were submitted: 12 October 2012. On that date, the Claimants effectively notified the Respondent that they had waited long enough. As far as they were concerned, it had breached its CAFTA obligations by failing to provide prompt, adequate and effective compensation for rendering their investments virtually worthless. They were equally as clear in notifying the Respondent that, in their opinion, it had delayed paying the fair market compensation that they were due far too long. There is nothing in the record that the Respondent can use to prove that any of the Claimants had actually decided that the investment dispute articulated in their Notices of Intent existed one day earlier than they were delivered.

86. On the basis of elementary logic, and a proper understanding of Article 10.16, Professor Mendelson has concluded that none of the Claimants knew, or could have known, whether a final determination yet to be issued by the Respondent might conform with the standards set out in Article 10.7. The same is obviously true for the question of when undue delay passes the threshold of reasonableness. Delay is a temporal phenomenon, incapable of being confined to a single, "completed act."

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52 Mendelson Opinion at ¶¶ 8, 21.

53 The Claimants and their counsel flew to San Jose to meet the Respondent's representatives early in 2013. Once there, the Claimants offered to work with the Respondent in finding a means and method of payment that might work best for it. The Respondent indicated that it was not prepared to negotiate.

C. New Measures That Have Further Delayed Payment of Compensation [Articles 10.7(2)(a) and/or 10.5(1)]

87. The Claimants submit that the Respondent admitted new measures that amount to further delay in its Counter-Memorial on the Merits.[54] The Claimants begin by noting that the Respondent has waived the right to object to the Claimants' addition to their claims in respect of these new delay measures, which the Respondent's pleadings suggest were made at some point between 2008 and 2010. The Respondent has not indicated precisely when these measures – which continue to freeze any further expropriation proceedings for Playa Grande and Playa Ventanas – might be revoked.

88. Thus, the Respondent has waived any objection to this Tribunal's consideration of the SINAC suspension decisions, either as component parts of a systemic practice of delay or as independent measures. Estoppel by waiver applies in this case because the Claimants provided ample warning of their intent to add these measures to their pleadings, either as measures of the same kind and character of those originally complained of in the Notices of Intent and Arbitration, or – with leave from the Tribunal – by means of an amendment to their claims under UNCITRAL Arbitration Rule 22.[55]

89. The Claimants first learned of this measure on 15 July 2014, which was the date they received the Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits, and the Loáiciga witness statement, which was attached thereto.[56] At that time, the Respondent represented that "SINAC decided to suspend the initiation of any new expropriation procedures in order to comply with recommendations that the Contraloría (Costa Rica's government inspection and oversight agency) would issue."[57] The Respondent could have taken the opportunity presented in its last filing to remedy this problem for its case. It did not do so. Instead, it restated its position.[58] Nowhere in the record is there support for the notion that the Contraloría ordered SINAC to suspend the expropriation process.

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54 Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction ("Claimants' Reply and Counter-Memorial"), at ¶¶ 13-26.

55 Claimants' Reply and Counter-Memorial, at ¶¶ 25-27.

56 Respondent's Memorial and Counter-Memorial, at ¶¶ 87 and 89-91; Respondent's Reply and Rejoinder, at ¶¶ 107-111.

57 Respondent's Memorial and Counter-Memorial, at ¶ 41, et sub. at ¶¶ 41-45.

58 Respondent's Reply and Rejoinder, at ¶ 103.

90. Regardless of whether the Contraloría formally requested suspension (for which no evidence exists) or informally communicated a message to that effect, the fact remains that – at some point after copies of the Contraloría's report arrived at SINAC, somebody there made the decision to maintain the suspension apparently adopted in 2008. This fact is certain because the suspension remains in force today.

91. There remains much more to learn about the SINAC's two suspension decisions. Even with the submission of a second Loáiciga witness statement, we still do not know precisely when either decision was made, or by whom. We do not have a record of whether anybody weighed the potential costs and benefits of abridging every PNMB beachfront landholder's right to prompt, adequate and effective compensation (under municipal law, customary law, the CAFTA or any of Costa Rica's other BITs). There is no record of whether any alternatives were considered, or if any other factors were under consideration. The Respondent undoubtedly has had, in its care, custody and control, all of the documents needed to answer these questions and more, but it has elected not to produce them. Based on the limited information provided by the Respondent, it appears likely that the first suspension decision was taken in 2008, after the Contraloría's investigation was well underway. Given that SINAC apparently received its first copies of the Contraloría's report early in 2010, the decision to maintain the suspension in place was likely made around that time.

92. The Respondent has not actually explained why the ongoing suspension was or remains necessary. It has only proffered reasons that allegedly justify the measure under municipal law. Otherwise, the Respondent simply maintains that it has not yet finished complying with the Contraloría's requests.

93. It is an established principle of international law that a host State cannot rely upon alleged compliance with its own municipal law to defeat claims of non-compliance with its international obligations. This principle is supported by the language of CAFTA Article 10.22(1), which provides that the governing law for this investment dispute is: (1) the Agreement; and (2) applicable rules of international law. Self-determined administrative or constitutional laws of the host State that are inconsistent with those rules are not a valid option.

94. In its submissions, the Respondent has assured the Claimants that the expropriation process for the lots subject to this suspension[59] will be resumed once SINAC has complied with all 13 recommendations made by the Controlaría.[60] The Respondent's witness, Julio Jurado, advises that 9 of the 13 recommendations have been met and that SINAC is working to comply with the other four.[61] Although the Respondent assures this Tribunal that the Claimants will receive FMV for their lots, the Claimants note that one of the remaining recommendations that is ongoing, requires legal proceedings, as it is a process designed to challenge and invalidate the titles granted over 40 years ago.[62] Annulment would result in the State acquiring the properties at issue without payment to the owners. Thus, not only does the SINAC suspension perpetuate the delay suffered by the Claimants, it also has been taken in order to minimize the State's cost of consolidating the Park at the owners' expense.

(i) Did the Respondent's decisions to suspend the official expropriation process for designated PNMB landholders constitute "measures" within the meaning of Article 2.1?

95. Given the broad and remedial definitions accorded by the CAFTA parties to the term "measure" there can be no doubt that the two SINAC suspension decisions, probably of 2008 and 2010, constitute measures for the purposes of Articles 10.1, 10.5 10.7 or 10.16 of the CAFTA.

96. CAFTA Article 2.1 provides that "measure includes any law, regulation, procedure, requirement, or practice." In addition, in interpreting the meaning of the word 'measure', recourse can be had to the customary international law rules of interpretation (as memorialized at Article 31(1) of the *Vienna Convention on the Law of Treaties*), which stipulates, among other things, that "context" should be considered as a means of better construing the meaning of terms found in different provisions of the same Agreement. In this regard, the Claimants note the liberal references made by the parties to the term "measure" in CAFTA Chapter 18, which is titled: Transparency.[63] As indicated in Article 18.2 ("Publication"), it appears that the Parties consider the term "measure" to be an expansive categorization of virtually all manner of governmental activity (or an absence thereof), including: "laws, regulations, procedures, and administrative rulings of general

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59 Lots V30, V31, V32, V33, V38, V39, V40, V46 and V47 have all been stalled at the administrative stage of the proceedings with no payment having been deposited by the State as a result.

60 Respondent's Reply and Rejoinder at ¶ 193-196.

61 RWE-6, at ¶ 15.

62 RWE-6, at ¶ 15; R-97 at pp. 4-5; See C-124 for the English translation of R-97.

63 For the avoidance of any confusion, the Claimants confirm that nothing in Chapter 18 should be construed as imposing a binding obligation upon the Respondent, at least not that could be enforced by an investor under the dispute settlement mechanism provided in Chapter 10.

application respecting any matter covered by this Agreement,"[64] as well as a "requirement or practice."[65]

(ii) Were the measures a proximate cause of the loss or damage alleged by the Claimants in relation to their respective investments?

97. The Claimants submit that the imposition of delay measures that have had the effect of stalling the process through which the Respondent has committed to providing prompt and adequate compensation for six years (and counting) has resulted in those investments being held hostage by the State without any compensation. The Respondent has no obligation to pay any interest for this delay, as the judicial phase of the process has not yet commenced. In the meantime, the Claimants remain obligated to pay property taxes to the State for the lots which they no longer have effective ownership rights.

(iii) Does Article 10.1(3) preclude the Tribunal from finding, as a background fact, that expropriations had occurred, to which these measures were directly related?

98. It is undisputed that the 2008 decision to suspend was made in anticipation of a potential demand from the Office of the Contraloría, which never came. In any event, the Respondent has admitted the nexus between SINAC's suspension decision and the recommendations that were expected to be included in an audit report to be prepared in 2009 and released in 2010. Logic dictates that, once that report was released – in 2010 – it was necessary for somebody with sufficient authority at SINAC to make a decision as to whether the anticipatory suspension should be maintained or

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64 As further indicated in Article 18.6 ("Definitions"), the Parties appear to consider the term, "administrative ruling of general application [to mean] an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct."

With respect to these transparency provisions, the Claimants are reminded of claims found at paragraph 10 of the second witness statements of both Mr. Jurado and Ms. Solano. Both take issue with the Claimants' position that they did not receive proper notification of either opinion and, thus, cannot be construed to have known about them at the time. Both suggest that Mr. Jurado's two opinions should have been uploaded to a public, online database maintained by his department. For the sake of clarity, neither official actually claims that either document actually was posted to this database during the relevant periods of time, nor does either provide any documentary evidence to that effect. The point that the Respondent obviously wishes to make (at paragraph 43 of the Reply Memorial on Jurisdiction and Rejoinder on the Merits), by having its officials include in their witness statements reference to the possible uploading of the Jurado opinions is that the Claimants should have known about them at the time. The Respondent is estopped from making this argument, however, as a function of the obligations it undertook, in CAFTA Article 18.2 to promptly publish "administrative rulings of general application" (which Article 18.6 widened to include "an interpretation") "… or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them." A mere allegation that the Jurado opinions should have been uploaded to a Spanish language legal database (which is presumably used primarily by local lawyers or notaries) does not even satisfy the evidentiary burden to prove compliance with this obligation, much less the standard it sets. Moreover, as per Article 18.2(2), the Respondent was required to make best efforts to publish such measures in advance, and to "provide interested persons and Parties a reasonable opportunity to comment on such proposed measures." The Respondent has not submitted any evidence to so much as hint at its compliance with these obligations, either with respect to the Jurado opinions or with respect to the SINAC's unpublished suspension decisions [likely of 2008 and 2010, respectively].

65 CAFTA Article 2.1.

discarded. It is apparent from the evidence and argument provided by the Respondent that there was a decision made to maintain the measure.

99. The text of Article 10.1(1) leaves no room for debate, as such. A decision was made in 2010 to maintain a suspension that had probably been in place since some point in 2008, although it is not inconceivable that it was not made until early in 2009, upon the completion of the on-site phase of the Contraloría's investigation. Given the evidence (and constructive admissions of the Respondent) on the record, the balance of probabilities unquestionably lies with a finding of fact that these decisions were made by somebody of sufficient seniority at SINAC to make them. The decision to adopt was either made in 2008 or 2009, and the decision to maintain had to have been made no earlier than 2010. To the extent that the Tribunal deems it necessary to find that the adoption decision was made before the Agreement came into force, as between the United States and Costa Rica, the Claimants rely upon the arguments set out above. More particularly, the Claimants submit that the Tribunal can either consider the decision to maintain the suspension a separate measure, in which case the 2008 decision to adopt would be regarded as a background fact that informs the nature of the 2010 measure. Alternatively the 2010 decision to maintain the suspension can either be regarded as the latter half of a measure constituting a continuing breach (as from the date the suspension was adopted), or as one component of a series of acts and omissions, which have resulted in an ongoing failure to satisfy: (i) the promptness component of the customary international law rule on expropriation; (ii) the "without delay" requirement of Article 10.7(2)(a); and/or the Article 10.5(1) obligation to accord fair and equitable treatment.

(iv) Did the dispute over this particular claim arise after 10 June 2010, such that a Claimant knew, or ought to have known, that adoption of the measures would breach a Chapter 10 obligation, and that he/she/it would suffer loss or damage arising from their adoption, earlier than that date?

100. It is uncontested that the Claimants only learned of the existence of these measures on 15 July 2014. As such, it is a logical certainty that none of the Claimants knew, or should have known, that – through its adoption or maintenance of these measures (or measure), which have had the effect of delaying two thirds of the compensation claims by no less than six years, the Respondent had breached a substantive provision of CAFTA Chapter 10.

(v) Was the adoption of these measures inconsistent with either of the standards set out in Article 10.7(2)(a) or Article 10.5(1)?

101. To determine jurisdiction under Article 10.5(1) (fair and equitable treatment), the specific claims being made under it should be clear. The Claimants briefly restate the two kinds of claim they are pursuing under this provision. First, the SINAC suspension decision(s) constitute a constructive denial of justice, which is a concept as applicable to the conduct of executive branch officials as it is to members of the judicial branch. With respect to the new delay measures, the primary target of the Claimants' denial of justice claim is, naturally, SINAC, although other agencies may also be implicated in its conduct, such as the Contraloría. The ground upon which this denial of justice has been (and continues to be) committed is delay.

102. Second, the new delay measures constitute an arbitrary exercise of authority.[66] The Respondent has not even sought to justify its conduct under international law. The Respondent actually appears to justify its ongoing noncompliance with CAFTA Articles 10.5(1) and 10.7(2) on the ground that one of its executive branch agencies feels so obliged to adhere to the directions of another that it was prepared to engage in anticipatory compliance of a suspension order that the other agency actually never made. The sheer incredulity of the Respondent's rationale serves as perhaps the best evidence of why its conduct is "arbitrary" from the perspective of CAFTA investors who expect, and are entitled to, Costa Rica's immediate compliance with its international obligations.

D. Arbitrariness of Municipal Expropriation Regime [Article 10.5(1)]

103. Although the parties agree that Article 10.5(1) must be expressive of the "customary international law minimum standard of treatment of aliens," given that Annex 10-B expressly provides as such,[67] they do not agree as to the substantive content of the provision. The Respondent also

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[66] At ¶ 3 of her witness statement, Ms. Loáiciga appears to have misapprehended the nature of the Claimants' case on this point. First, she appears to assume that the Claimants have characterised SINAC's conduct as arbitrary because – with her first witness statement - she appeared to be giving evidence for a period that was longer than her actual term of employment. While this fact may give reason to give less weight to some of her evidence, it has nothing to do with the Claimants' substantive claims. Second, Ms. Loáiciga alternatively appears to think that, because the decisions were made in compliance with municipal law, they cannot be characterised as arbitrary. While that may well be a sound proposition with respect to the concept of arbitrariness as it is understood within the municipal laws of Costa Rica, the issue is whether SINAC's decision(s) to suspend the expropriation process for six or seven years and counting is arbitrary as a matter of customary international law.

[67] As the first-ever use of the "fair and equitable treatment" treaty standard, in the context of foreign investment protection, was a FCN Treaty concluded between the USA and Ethiopia in 1951, it was impracticable for the CAFTA parties to have deemed this standard as being subsumed in the much older customary international minimum standard of treatment of aliens. See: T. Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum*

argues, in the alternative, that even if the Claimants' interpretation of the provision is correct, the apparatus it employs to provide 'prompt, adequate and effective' compensation to expropriated landholders is fully consistent.

(i) Did the Respondent's conduct constitute "treatment" as per Article 10.5(1)?

104. The Respondent insists that, for the purposes of determining jurisdiction, *everything* related to the specific act of "expropriation" should either be treated as part of a completed act or a mere consequence thereof.[68] As demonstrated above, this statement is unsupported by the authorities with respect to indirect expropriations.[69] The Respondent's position is also inconsistent with the fundamental proposition of customary international law that States exercise the sovereign prerogative to expropriate. The question of whether an expropriation, in and of itself, is lawful, falls outside the scope of inquiry for an international tribunal. Its task is to inquire into *how* the State went about it.

105. In early cases, it was sometimes argued that the act of expropriation itself was unlawful. The modern consensus on expropriation arguably only emerged in the 1980's. As demonstrated in the following passage from an UNCTAD resource entitled *Takings of Property,* published in 2000, today the focus of an inquiry into direct expropriations has shifted from the expropriation itself to the means by which the lawful exercise of a sovereign right to expropriate has been exercised:

> While bilateral investment dispute provisions do mention due process requirements, they usually seem to allude to the requirement only after a taking so that there could be a review of whether proper compensation standards were used in assessing the compensation. They do not face the issue of whether or not a foreign investor should be given an opportunity to show the regulatory authority the reason why measures proposed by it should not be taken against the investor. Indeed, this is a matter of the internal public law of the host State**.** Should proper procedural standards not be followed in such a case, then a different set of questions arises from those relating to the issue of expropriation, in particular, whether an investor has suffered a denial of justice for which no effective domestic remedy exists. That is an issue of State responsibility in general and not an issue related to expropriation as such.[70]

106. As demonstrated in the above passage, the concept of lawful expropriation has been evolving for at least two centuries, which is testament to the organic character of customary international law.

Standards of Treatment in Historical Context (The Hague: Martinus Nijhoff) at 214. The language of Annex 10-B is further complicated by the drafters' importation of the neologism, "customary international law principles."

68 Respondent's Reply and Rejoinder, at ¶ 149.

69 See also Mendelson Opinion at ¶¶ 62 -65.

70 *United Nations Conference on Trade and Development, Taking of Property* (New York: UN Pubs, 2000), at 32.

> In coming to terms with the organic character of customary international law, we are reminded that all sources of international law must be appreciated within their respective, temporal contexts. Today we are blessed with an over-abundance of electronic resources. With so much available at our fingertips, it has become easier to treat everything we find as just another contemporaneous part of a universal "present." But awards, judgments, manuscripts and treaties must all be appreciated within temporal context. When we fail to resist the temptation to cherry pick whatever sounds best for the argument we would like to make, we risk running afoul of the principle of contemporaneity.

107. The above reasoning demonstrates the error in the Respondent's arguments. It has attempted to distill issues that properly belong to the province of State responsibility or, if the BIT so provides, compliance with other standards related to (not subsumed in), the act of expropriation itself. One of the most elementary proofs of how the Respondent is attempting to obscure this distinction is temporal. The time it takes to engage in direct expropriation need not be much longer than the stroke of a pen, and the time it takes to offer access to an acceptable regime for the determination of adequate compensation is not much longer. It takes time, however, before one can determine whether the compensation regime was capable of living up to the assurance given by the host State when such access was offered to it. The Respondent's construction of the customary standard for expropriations, as recalled in the first paragraph of Article 10.7, leads to the bizarre result that an investor accorded access to the worst of compensation regimes (i.e. the one providing the least prompt, the least adequate and the least effective compensation) would have no remedy, because the limitation period would have run out before he received his result.

108. Solutions to this conundrum exist. One could determine that knowledge of both loss and breach is not possible until the system fails to provide a final compensation result. That is clearly the case for four of the investments at issue in this case, because woefully inadequate, final results have been obtained for each, although title has been transferred in only three cases. As the Respondent has admitted, however, this solution is insufficient because it can only be invoked on a *post facto* basis.[71] Alternatively, one could point to the inclusion of Article 10.5(1) in sub-paragraph (d). Because it is a distinct customary standard, Article 10.5(1) could also serve as a claim platform for redress for any unlawful expropriation claim. Article 10.5(1) standards could be applied to cases of direct expropriations too, where the method or means by which the expropriation decision was taken, or the manner in which the compensation process has been administered, fall

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[71] Respondent's Reply and Rejoinder, at ¶188.

below them. The other solution, of course, is to also recognize that the conduct regulated under paragraph (2) of Article 10.7 must also be regarded as analytically distinct from the customary norm – which is why these four "embellishments" were introduced into the US Model BIT a few decades ago.[72]

109. Further evidence of the distinct character of the expropriation decision (i.e. as distinct from other conduct that may be prescribed or proscribed under other treaty provisions) can be found in what was once the common practice of States such as the USSR and the PRC, in which limits were often placed upon what could properly form the subject of investor-State dispute settlement under a given BIT. For example, the Belgium/Luxembourg – USSR BIT provides:

> 1. Any dispute between one Contracting Party and an investor of the other Contracting Party concerning the amount or mode of compensation to be paid under Article 5 of the present Treaty shall be the subject of a written notice, accompanied by a detailed memorandum, to be submitted by the investor to the Contracting Party involved in the dispute. Whenever possible, the parties to this dispute shall endeavour to settle amicably and to their mutual satisfaction.
>
> 2. If such a dispute has not been settled in this way within a period of six months from the date of the written notification mentioned in paragraph 1 of this Article, it shall be submitted at the investor's choice to: [Stockholm Chamber of Commerce or UNCITRAL arbitration]

110. In interpreting this provision, the tribunal in *Berschader v. Russia* noted: "[i]t is only a dispute which arises regarding the amount or mode of compensation to be paid subsequent to an act of expropriation already having been established, either by acknowledgement of the responsible Contracting Party or by a court or arbitral tribunal, which may be subject to arbitration under the Treaty." [73] [Emphasis added] The same conclusion was made about a similar treaty in *RosInvestCo* v. *Russia*, where the Tribunal explained that an express reference "to the amount or payment of compensation [could]… nevertheless be interpreted as a reference also to the earlier sections of Article 5 which deal with expropriation in general and the first two exceptions mentioned in that provision."[74] The treaty provision before the *RosInvestCo* tribunal demonstrates how expropriation is a sequential process, composed of distinct elements and/or phases, which could accordingly be subjected to different standards or different dispute settlement regimes:

> This Article shall apply to any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under

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72 See ¶¶ 28-31, above.

73 *Vladimir and Moise Berschader v. Russian Federation*, SCC Case No 080/2004, Award, 21 April 2006 at ¶ 153.

74 *RosInvestCo UK Ltd. v Russian Federation*, Award on Jurisdiction 2007, SCC Case No Arb V079/2005 at ¶ 112.

> Articles 4 or 5 of this Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement, or concerning the consequences of the non-implementation, or of the incorrect implementation, of Article 6 of this Agreement.[75] [Emphasis added]

111. In *Kardassopoulos* v *Georgia*, both the parties and the Tribunal demonstrated their shared understanding of the difference between the expropriation itself and matters such as the operation of a process established to determine compensation. In that case, the expropriation decree was issued on 20 February 1996 and the compensation process commenced on 23 April 1997. The relevant treaties came into force on 3 August 1996 and 18 February 1997, respectively. Of the two claimants, only one pursued claims of expropriation and fair and equitable treatment, with the latter relying upon fair and equitable treatment alone. The Tribunal concluded that it was "clearly bereft of jurisdiction" to consider the expropriation claim, given how issuance of the decree had antedated the coming into force of the relevant treaty,"[76] but that was not the end of the matter. The Tribunal upheld both fair and equitable treatment claims, all of which arose from the original expropriations.

112. Unlike the instant case, in *Kardassopoulos*, the respondent State actually conceded that that the Tribunal had jurisdiction to hear fair and equitable treatment claims based upon its conduct of the post-expropriation compensation processes.[77] It did object to jurisdiction on a temporal basis, however: *viz.* Georgia said that the claimants had taken too long to bring their claims to arbitration (nine and ten years, respectively). Most notably for the instant case, in dismissing the objection against the second claimant, the Tribunal held that it accepted "testimony offered on cross-examination by Mr. Fuchs, which indicates the good faith belief he held in 1995 — and continued to hold for years thereafter — that an amicable solution could be reached."[78] [Emphasis added]

(ii) Did the dispute over this treatment arise before 10 June 2010, such that any of the Claimants already knew, or ought to have known, that the treatment being received was inconsistent with Article 10.5(1) and that loss or damage was suffered as a result, by that date?

113. Yes, the treatment at issue in this claim took place after 10 June 2010.

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75 *Ibid.*, at ¶ 23, citing Article 8 of the U.K.-U.S.S.R. BIT.

76 *Kardassopoulos v. Georgia*, Decision on jurisdiction, ICSID Case No ARB/05/18, IIC 294 (2007), 6 July 2007 at ¶ 241.

77 *Ibid.*, at ¶ 244.

78 *Ibid.,* at ¶ 262.

(iii) Has the treatment received by one or more of the Claimants, in relation to the subjection of an investment to Costa Rica's municipal expropriation regime, fallen below applicable international standards?

114. This issue has been addressed in the Claimants' Memorial on the Merits[79] and Reply on the Merits[80] and those arguments will not be repeated here.

E. Frustration of Legitimate Expectations [Article 10.5(1)]

115. The parties disagree as to whether a host State can incur international responsibility for frustrating the legitimate expectations of a foreign investor. As above, the Respondent further submits that, even if it was obliged to vindicate the legitimate expectations of foreign investors, the concept would not apply to the Claimants and, if it did, the Claimants would not have been entitled to hold any in relation to their investments.

(i) Are legitimate expectations relevant to the host State's obligations towards foreign investors under Article 10.5(1)?

116. The parties have exchanged arguments on the merits concerning this question without reaching any consensus.[81] The Respondent's first line of defence is that legitimate expectations are not relevant because customary law does not specifically contemplate it. The Claimants have already cited ample authority to reveal this position is simply untenable. The Respondent's fallback position has been, instead, that the doctrine of legitimate expectations does exist, and can be applied for the benefit of investors protected under investment treaties. Instead, the Respondent has attempted to narrow the international law concept of legitimate expectations so thoroughly that it more closely resembles common law planning permission cases.[82]

117. This is not to suggest that municipal public law cannot influence the development of international law. It can. But differences in doctrinal context must be recognized as well. As an expression of the general international law principle of good faith, legitimate expectations lie at the heart of

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79 See ¶¶ 155-298.

80 See ¶¶ 183-197.

81 Claimants' Memorial on the Merits, at ¶¶ 257-266; Respondent's Memorial and Counter-Memorial, at ¶¶ 195-209; Claimants' Reply and Counter-Memorial, at ¶¶ 31, 67, 83-90, 162-173 and 190-194; and Respondent's Reply and Rejoinder, at ¶¶ 204-222.

82 See, e.g.: *R (Reprotech (Pebsham) Ltd) v. East Sussex County Council*, [2002] UKHL 8; [2003] 1 WLR 348 at [35].

international economic law.[83] International law for the protection of foreign investment would not exist if municipal legal regimes were sufficient, in and of themselves. Drawing implicit parallels between municipal and international spheres can be fraught with hidden obstacles. That is likely one of the reasons why NAFTA and CAFTA tribunals have continued to refuse to narrow the ambit of this provision to exclude detrimental reliance claims based upon legitimate expectations formed in respect of the applicable investment and legal regime, rather than just based upon a specific promise:

> Having considered recent investment case law and the good faith principle of international customary law, the concept of "legitimate expectations" relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.
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> The threshold for legitimate expectations may vary depending on the nature of the violation alleged under the NAFTA and the circumstances of the case. Whatever standard is applied in the present case however — be it the broadest or the narrowest — the Tribunal does not find that the Oficio generated a legitimate expectation upon which EDM could reasonably rely in operating its machines in Mexico.[84]
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> Contrary to the submissions of the Respondent, States are liable for failing to respect the investor's legitimate expectations, and the protection of legitimate expectations is a fundamental aspect of the obligation to accord fair and equitable treatment under the customary international law minimum standard of treatment.[85]

118. Investors' expectations are necessarily based upon the character and quality of their investments, which, in turn, are embedded in the municipal legal process. Investments, as such, can be conceived as bundles of rights recognized by municipal law (e.g. rights in property, in contract, in intellectual property as dictated by statute, etc.). A legal system only functions properly when the vast majority of participants in it can hold legitimate expectations with respect to the rights that

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83 See, e.g.: M. Panizzon, *Good Faith in the Jurisprudence of the WTO* (London: Hart, 2006); T. Weiler, "Good Faith and the Promise of Regulatory Transparency: Metalclad , the Reluctant Catalyst" in: T. Weiler, ed., *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London: CMP, 2005) 701; and "Energy Contracts and BITs – Is it Fair and Equitable to be Under the Umbrella?" in: T. Weiler, I. Laird, F. Sourgens & B. Sabahi, eds., *Investment Treaty Arbitration and International Law*, vol. VII (New York: Juris Pubs., 2014) at: Part III.

84 *International Thunderbird Gaming Corporation v Mexico,* Award, IIC 136 (2006), 26 January 2006, Ad Hoc Tribunal (UNCITRAL) ¶¶ 147-148.

85 *Teco Guatemala Holdings LLC v. Guatemala*, Award, ICSID Case No ARB/10/17, IIC 623 (2013), 19 December 2013 ¶ 267; citing: *BG Group v. Argentina Republic*, UNCITRAL Case, Final Award, 2007, (CL-9), ¶ 310, (hereinafter "BG Group Award") which in turn cites: *Waste Management Incorporated* v. *Mexico*, Award, ICSID Case No. ARB(AF)/00/3, (2004) 43 ILM 962, 30 April 2004, at ¶ 98 and *Generation Ukraine, Inc.* v. *Ukraine,* Award, ICSID Case No. ARB/00/9, (2005) 44 ILM 404, 15 September 2003, at ¶¶ 20 and 37.

the system provides or otherwise recognizes. When the system operates in a transparent and predictable manner, in addition to providing for a fair and effective means through which individual rights can be vindicated (even as against the entity responsible for maintaining it), the rule of law is fostered. A legal system in which the rule of law prevails is one in which legitimate expectations about the character and quality of rights recognized within those systems can be held. As noted immediately above, treaties such as the CAFTA recognize bundles of such rights as "investments" in the host State. Host States conclude these treaties to demonstrate their willingness and ability to safeguard the legitimate expectations of foreign investors, by binding themselves to international standards against which the performance of their legal systems, in any given case, can be measured.

119. Thus this Tribunal must have jurisdiction to hear claims based upon the legitimate expectations of investors, because those expectations arise directly from investments they established in the territory of Costa Rica. Fundamentally, to say that one holds property rights in Costa Rica, is to declare one's entitlement to hold certain expectations about the use/enjoyment of land or things located within the territory of Costa Rica, vis-à-vis all others (including the host State). Here, the Claimants held legitimate expectations in respect of the property they held in each lot. Those expectations, for example, included: entitlement to occupy the land and to make improvements to it; power to alienate one's immediate possession of the land by sale or lease to a third party; authority to prevent strangers to the land from trespassing on it; grounds to call upon the host State for assistance in protecting or vindicating these rights (e.g. police to curtail trespass or courts to adjudicate disputes); and, in the event of expropriation, an expectation to receive FMV for the deprivation or extinguishment of the underlying rights.

120. This case is about expectations arising from the property rights that each respective Claimant held in the subject land. Those rights entitled the Claimants to form legitimate expectations about how they would be treated under Costa Rican law, vis-à-vis the host State, in respect of their lands. Possessing those same rights also entitled the Claimants to form legitimate expectations about how they would be treated under the CAFTA, vis-à-vis the host State, also in relation to those same lands. Just as in the *Kardassopoulos* case, the Claimants remain entitled to legitimately expect Costa Rica to provide appropriate compensation within an appropriate time, because that is what the Expropriation Law said it would do; that is what customary law says it will do; and that is what the CAFTA says it must do.

121. Indeed, even when more complex bundles of rights (such as those required to run an oil extraction enterprise in a remote jungle) have been reduced to "claims for money" (in that case: lawsuits related to the former enterprise), they still comprise investments that generate legitimate expectations of how one should be treated by the host State.[86] ECHR jurisprudence is also consistent in this regard. It both recognizes how legitimate expectations arise from the holding property rights in land or things,[87] and it recognizes that such expectations subsist even when those rights are reduced to claims to money.[88]

122. Finally, recalling how the parties have also offered starkly opposed views on the construction of the fair and equitable treatment standard in Article 10.5(1), the Claimants propose a methodology to synthesize the sometimes widely divergent results cited.[89] Regardless of the position taken, however, the Claimants submit that adopting a simple methodology could reconcile the many discordant results from past cases. When the inclusive version of the doctrine of legitimate

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86 *Chevron v. Ecuador*, Interim Award, at ¶¶ 189-192.

87 See, e.g.: *Scutari v. Moldova*, App. 20864/03, 26 July 2005, ¶¶ 45-48 & 52; Kopecký v. Slovakia [GC], Application No. 44912/98, Decision of 28 September 2004 ¶¶ 45, citing: *Pine Valley Developments Ltd and Others v. Ireland*, Judgment of 29 November 1991, Series A no. 222, p. 23, ¶ 51 and *Stretch v. the United Kingdom*, App. No. 44277/98, 24 June 2003, ¶ 35.

88 *Pressos Compania Naviera S.A. and Others v. Belgium,* App. 17849/91, Decision of 20 November 1995; *Broniowski v. Poland* [GC], App. 31443/96, Decision of 19 December 2002, ¶¶ 98-100.

89 So as not to provide the wrong impression, Claimants do note that there have been many more cases decided in which the narrowest approach to interpretation has been adopted (e.g. *Glamis Gold v. USA*). Perhaps the best example is the recent finding of the *Railroad Development* Tribunal:

> The Tribunal notes that the Mixed Commission in the Neer case did not formulate the minimum standard of treatment after an analysis of State practice. After reviewing commentaries by J.B. Moore, De Lapradelle and Politis, the Mixed Commission stated: "Without attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial." (Neer, para. 4) It is ironic that the decision considered reflecting the expression of the minimum standard of treatment in customary international law is based on the opinions of commentators and, on its own admission, went further than their views without an analysis of State practice followed because of a sense of obligation. By the strict standards of proof of customary international law applied in Glamis Gold, Neer would fail to prove its famous statement — "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency" — to be an expression of customary international law.
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> The Tribunal notes further that, as such, arbitral awards do not constitute State practice, but it is also true that parties in international proceedings use them in their pleadings in support of their arguments of what the law is on a specific issue. There is ample evidence of such practice in these proceedings. It is an efficient manner for a party in a judicial process to show what it believes to be the law. The problem, as the Mixed Commission in Neer already recognized, rests in "[…] the difficulty of devising a general formula for determining the boundary between an international delinquency of this type and an unsatisfactory use of power included in national sovereignty." The difficulty in drawing this boundary is at the origin of the diversity of decisions on the minimum standard of treatment.

Railroad Development Corporation v *Guatemala*, Award, ICSID Case No. ARB/07/23, IIC 553 (2012), 29 June 2012, at ¶¶ 216-217.

expectations has been involved, tribunals can be expected to uphold the claim only in cases where they have determined, in light of all the relevant circumstances, that a demonstrably unstable investment environment was the proximate cause of the injuries claimed.[90]

(ii) Is this the right kind of case for a detrimental reliance claim?

123. Based on its submissions to date, the Claimants say that this is the right kind of case for a detrimental reliance claim.

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[90] For the avoidance of doubt, the Claimants offer this observation as a means to categorizing past decisions; not as a roadmap for decision itself. It is offered as an alternative to the Respondent's approach, which has been to cherry-pick the cases with language and/or results that best advance its interests in this arbitration. The Claimants' explanatory approach can be applied to any previous NAFTA or CAFTA case in which a serious claim for detrimental reliance based upon broadly conceived legitimate expectations:

See, e.g.:

Thunderbird International Gaming v. Mexico, supra.

[Gaming was officially banned in Mexico, but certain operators were doing business nevertheless. The Claimant petitioned the Government for approval and received what Arbitrator Wälde called "a negative permission," (an official statement that the activities mentioned by the Claimant were not regulated by gaming authorities). A Majority found that the evidence was insufficient to prove reliance, based on a finding that gambling remained "illegal" in Mexico.]

Grand River Enterprises Six Nations v. USA, supra.

[The investments were in a highly regulated field of commerce (tobacco). Ultimately the Claimants failed to prove reliance, because they had actually managed to work a system not intended for its benefit, and were hard pressed to claim reliance when it was changed]

Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, 16 December 2002.

[The Claimant's investment profited largely from tax arbitrage, so its complaint of frustrated expectations was given short shrift, although it won on Article 1102, national treatment.]

Glamis Gold v. The United States of America (A NAFTA Chapter 11 Arbitration under the UNCITRAL Arbitration Rules before the ICSID Additional Facility) Award of 14 May 2009.

[The investor sought to establish a pit mine using a cyanide-leach extraction process on land claimed by both the Federal Government and the Quechan Tribe. For the latter, this culturally sensitive area was known as the "Trail of Dreams." Given the price of gold at the time, the mine would not have been profitable anyway.]

Mobil Investments Canada Incorporated and Murphy Oil Corporation v. Canada*,* Decision on Liability and on Principles of Quantum, ICSID Case No. ARB/07/4. IIC 566 (2012), 22 May 2012.

[One of the world's largest corporations was engaged in a highly regulated oil exploration enterprise. The injury claimed was dwarfed by the enterprise's value, and a finding of breach was based upon another provision (Article 1106, performance requirements). Nevertheless, it is apparent that there had been a major change in the business and regulatory environment, sufficient to find a breach when local hiring and purchasing requirements were adopted.]

Cargill, Inc. v. Mexico, ICSID Case No. ARB(AF)/05/2, IIC 479 (2009) 13 August 2009.

The Tribunal found for the Claimant on another basis (Article 1102, national treatment). It was the only one of three claimants in separate cases to even pursue a detrimental reliance claim. Nevertheless, it is apparent that there had been a major change in the business and regulatory environment (i.e. the host State was applying heavy sanctions to make their business unprofitable).]

Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, (2001) 16 ICSID Rev. 168; (2001) 40 ILM 36, 25 August 2000.

[An upgrade project for waste transfer station (to waste treatment site) received all necessary approvals until the legal environment suddenly changed. A freeze was improperly obtained from a court based upon the rejection of a construction permit that was only sought as a courtesy at the suggestion of a state official, which was then rejected without a hearing (even though construction had already completed). The freeze was lifted shortly before the governor behind the sudden change was about to leave office. His last act as governor was to issue an order expropriating all of the Claimant's land for use as a rare cactus preserve.]

(iii) Did the Respondent frustrate the Claimants' legitimate expectations as to how their investments would be treated by not ensuring that they received FMV compensation on a timely basis?

124. This is a merits question, which has been addressed in previous submissions and those arguments will not be repeated here.[91]

(iv) Did the Respondent frustrate any Claimant's legitimate expectations before 10 June 2010?

125. This would not be the first time such a finding was made. In the *Pac Rim Cayman* case, the investor was refused a mining permit in 2007. In 2008, the President made a speech in which he revealed that his Administration had been observing a *de facto* ban on the issuance of mining licenses much earlier than when the permit had been denied. The claimant asked for meetings with government officials and believed it was making headway on the issue, but ultimately the talks came to nothing and it filed a CAFTA claim. El Salvador tried to rely on Article 10.16's limitation to escape responsibility, but the Tribunal found that a CAFTA "dispute" did not exist between the parties until the claimant determined it was hopeless to engage in further talks.[92] The finding was consistent with the principle that a State should always be presumed to act in good faith, unless the evidence indicates otherwise.[93] A dispute cannot exist between two parties when only one of them knows that no compromise, no understanding is possible.

126. Similarly, in *Lao Holdings* v. *Laos*, the respondent alleged that the claimant was out of time to bring its case, relying on its previous refusal to renew the enterprise's flat tax agreement. The evidence revealed a different story; it showed that the parties engaged in serious and what the claimant assumed had been good faith efforts to come to terms on a new agreement. While the talks were still ongoing, a company related to Lao Holdings sought arbitration with Laos concerning a different dispute, and so the talks ended unsuccessfully. The Tribunal found that the claimant engaged in the talks in good faith, and that it was reasonable for it to believe that obtaining satisfactory terms, through more talks, remained achievable.[94] As such, the dispute was found not to have occurred until a later date and the objection to jurisdiction *ratione temporis* was dismissed.

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91 Claimants' Memorial on the Merits, at ¶¶ 257-298; Claimants Reply and Counter-Memorial at ¶¶ 161-197.

92 *Pac Rim Cayman v. El Salvador*, Decision on Jurisdiction, at ¶¶ 2.83-2.84

93 B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: CUP, 1953), at 136.

94 *Lao Holdings NV v Lao People's Democratic Republic*, Decision on Jurisdiction, ICSID Case No ARB(AF)/12/6, IIC 633 (2014), 21 February 2014 at ¶¶ 154-156.

127. The same pattern can be seen in the *Railroad Development* v. *Guatemala* case as well. The host State rested its objection to jurisdiction *ratione temporis* upon the results of a discretionary, internal government process that had invalidated a contract critical for the success of the investment. It was also claimed that issuance of the invalidation ("lesivo") decree was not discretionary for the President; allegedly he was compelled by law to execute it. In dismissing the objection, the Tribunal stated:

> The Tribunal has already pointed out that the lesivo procedure has characteristics which may be easily abused by the Government. The alleged inevitability of the process together with "illegality" having equal status with lesividad mean that an extraordinary remedy may become routine once any "illegality" of a Government act has been identified by the Government itself. It is inconceivable that just any illegality would harm the interests of the State without the President's having to exercise his own judgment in the matter. An investor in Guatemala would have no certainty that, at any time within three years of its investment, the State may declare the investment lesivo, if a flaw is discovered by the State in, for instance, the authorization of the investment, irrespective of the flawless performance by the investor of its obligations as part of such authorization.
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> …
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> 235. In the Tribunal's view, the manner in which and the grounds on which Respondent applied the lesivo remedy in the circumstances of this case constituted a breach of the minimum standard of treatment in Article 10.5 of CAFTA by being, in the words of Waste Management II, "arbitrary, grossly unfair, [and] unjust." In particular the Tribunal stresses the following facts, which taken together demonstrate the arbitrary, grossly unfair, and unjust nature of lesivo in this case, including by evidencing that lesivo was in breach of representations made by Guatemala upon which Claimant reasonably relied.[95]

128. Each of the above cases demonstrates how an investor's detrimental reliance on legitimate expectations, as generated within the context of a specific business and regulatory environment, will give rise to an admissible CAFTA claim.

IV. THE SCHWEBEL OPINION

129. Judge Schwebel's opinion dated 20 December 2014 states that it provides "a legal opinion addressing Respondent's objections to jurisdiction *ratione temporis* advanced by it in this case."[96] Those objections were raised in the Respondent's submissions dated 15 July 2014 and were addressed by the Claimants in the Claimants' Reply on the Merits and Counter-Memorial on

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[95] *Railroad Development Corporation v. Guatemala*, Award, ICSID case no ARB/07/23, IIC 553 (2012), despatched 29th June 2012 at ¶¶ 233 & 235.

[96] Expert Report of Judge Stephen Schwebel dated 22 December 2014 (the "Schwebel Opinion") at ¶ 8.

Jurisdiction dated 3 October 2014. Accordingly, those arguments will not be repeated here. The Claimants will instead focus mainly on the factual basis on which the opinion is based.

130. Judge Schwebel has stated that for the purposes of his opinion, he has accepted the facts as alleged by Respondent, although he notes that he has "taken into account the facts alleged by Claimants."[97] The Claimants note that Judge Schwebel's summary of facts (on which he relies) contains a number of contested facts including:

(a) the notion that the Respondent has acted consistently with respect to the Park boundaries;[98]

(b) the use of dates of certain events identified by Claimants in their pleadings for purposes other than jurisdiction to be accepted as the same dates on which those events occurred for jurisdictional purposes, i.e. the Claimants say that the dates have been taken out of context;[99]

(c) whether, for the purposes of determining jurisdiction, the date of dispossession (as opposed to the date of transfer of title) represents a completed act of expropriation;[100] and

(d) whether, for the purposes of determining jurisdiction, the dates of certain court judgments (without reference to the ongoing discussions with the Government) are the appropriate dates constituting indirect expropriation.[101]

131. In particular, at paragraph 16 of his opinion, Judge Schwebel refers to the dates of dispossession of the nine lots subject to direct expropriation. He appears to infer an agreement between the parties as to the legal significance of these dates.[102] Although neither party appears to disagree about what the dispossession dates were for the nine lots in question, there appears to be some confusion as to the significance of these facts in context. The Claimants say that for the purposes of determining jurisdiction over a direct expropriation, the timing of that direct expropriation needs to be determined in the context of the specific facts. In most cases, this one included, the

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97 *Ibid*., at ¶ 7.
98 *Ibid.,* at ¶ 13.
99 *Ibid.,* at ¶¶ 15 and 16.
100 *Ibid.,* at ¶ 16.
101 *Ibid.*
102 *Ibid.*

only clear date on which to rely for a completed act of direct expropriation is the date that title passes to the State. In Costa Rica, the date of dispossession is only the same date as the day title is transferred if the landholder agrees to accept the price offered in the administrative appraisal.[103]

132. Later in his opinion, Judge Schwebel states that the date upon which title passes from the landholder to the host State constitutes a completed act of expropriation.[104] Quoting from paragraph (4) of the commentary to Article 14 of the ILC's Articles on State Responsibility, Judge Schwebel states: "Where an expropriation is carried out by legal process, with the consequences that title to the property concerned is transferred, the expropriation itself will then be a completed act," adding that the *Mondev* tribunal came to the same result.[105] Despite this, he concludes that the nine direct expropriations must be time-barred because the Claimants complained that acts of dispossession occurred before the entry into force of the CAFTA.[106] However, no titles had passed before 1 January 2009 and, in fact, none had yet passed by 10 June 2010.

133. Expropriation, in and of itself, is not a breach of the Agreement. As Claimants' witnesses note, for the purposes of having a claim for illegal expropriation as a result of inadequate compensation, it is necessary to know how much the State will pay for the property rights taken. Until that is known, there can be no completed act of expropriation.[107] In Costa Rica, the timing of the payment of a final value for the property coincides with the date that title is transferred.

134. Of course, unlike a direct expropriation, an indirect expropriation is often characterized by a series of measures that amount to permanent and significant impairment of rights, so as to be tantamount to a direct expropriation. Judge Schwebel assumes that the correct "date of expropriation," for the purposes of determining jurisdiction over properties yet to be formally noticed for expropriation or not yet in the judicial phase of the expropriation process *ratione temporis* was 16 December 2008.[108] The Claimants disagree and their reasons for so doing have already been submitted.[109] The Claimants have explained the difference between the relevant

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103 Respondent's Reply and Rejoinder, at ¶ 109.

104 Schwebel Opinion at ¶ 27.

105 *Ibid.*, at ¶ 27.

106 *Ibid.* at ¶ 28

107 Berkowitz WS3 at ¶ 15.

108 Schwebel Opinion at ¶¶ 15, 17, 23 and 34.

109 Claimants' Counter-Memorial and Reply at ¶¶ 228 to 231; Respondent's Counter-Memorial and Reply at ¶ 135.

date for the purposes of determining valuation versus the relevant date for the purposes of determining jurisdiction *ratione temporis*.[110]

135. Judge Schwebel also twice attributed to the Claimants the position that the relevant date for determining jurisdiction *ratione temporis* should be 19 March 2010.[111] As already stated, the Claimants do not agree with this characterization of their submissions. In stating Respondent's position, Judge Schwebel's opinion says the following:

> Respondent denies that Claimants' properties have been illegally expropriated, but contends that if the Tribunal were to accept Claimants' argument, the date of indirect expropriation is, instead, December 16, 2008, when SETENA halted the processing of environmental assessment permits inside the Park in response to a Supreme Court decision of that same date.[112]

136. Judge Schwebel relied upon a passage in the Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits for this proposition, but the Respondent did not claim that the processing of permits was halted on 16 December 2008.[113] It could not have done so because SETENA stopped processing permits in the spring of 2005. The timing and sequence of the SETENA permit freeze is described in the Claimants' Memorial on the Merits.[114] The Claimants say that SETENA had abused the authority granted under Article 4 of the Law on Expropriation to "temporarily" stop processing any new applications from 30 August 2005 to as late as 19 March 2010 for environmental assessments until the Court said otherwise (with no reference to a particular case and whilst acknowledging that the power invoked was insufficient for this task).[115]

137. Judge Schwebel's assessment of the indirect expropriations does not recognize any distinctions to be drawn between identifying the date most relevant for valuation of damages; identifying the date most relevant for jurisdiction *ratione temporis* concerning the date upon which a treaty came into force; or determining the relevant date for assessing jurisdiction *ratione temporis* concerning the CAFTA Article 10.16 three year rule. As Professor Mendelson has observed,[116] the

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110 Claimants' Reply and Counter-Memorial at ¶ 224.

111 Schwebel Opinion at ¶¶ 15 & 23.

112 Respondent's Counter-Memorial and Reply at ¶ 15.

113 *Ibid.* at ¶ 135.

114 Claimants' Memorial on the Merits at ¶¶ 147-148, 155-156, 161.

115 It may be that MINAE/SETENA's abuse of the 1-year (maximum) precautionary power was only abused until April 2008, when the Court rendered a favourable judgment, which would have provided a potential justification for the freeze (and which would have been preferable to continuing to commit an abuse of right, contrary both under customary international law and the Laws of Costa Rica).

116 Mendelson Opinion at ¶ 22-23.

Respondent has not met its burden to establish that the Claimants knew or ought to have known about Costa Rica's breach of Articles 10.5 and 10.7(2) before 10 June 2010.

138. In their Counter-Memorial on Jurisdiction and Reply on the Merits,[117] the Claimants described the reactions of various Claimants and other Playa Grande and Playa Ventanas landholders to the string of decisions that began emanating from the Court in 2008 (which ranged from immediate, mandatory expropriation [April 2008] to optional expropriation with potential development [May 2008], before moving back to immediate, mandatory expropriation [December 2008] and then finally back to optional expropriation. Some prepared to be expropriated while others worked on demonstrating that development could take place without any impact on the turtles and others sought consultations with officials within the Offices of the President and Minister of the Environment.

139. As the Claimants also stated in the Counter-Memorial on Jurisdiction and Reply Memorial, by that point Playa Grande landholders had been engaged in consultations with the Respondent for well over a year, with both parties working together to remove Costa Rica from the difficult position in which it had been placed by the Court, along with unceasing political pressure from powerful and well-funded transnational environmental groups. There is no evidence of an official discontinuance of these high-level talks. Under the new administration and during the effective period of the CAFTA, the consultations and draft bill were allowed to lapse.[118]

140. Judge Schwebel makes no mention of any of these events, save for the Environment Minister's order of 19 March 2010. As such, he appears not to have considered that – had the legislation that the Respondent and Claimants drafted together been passed into law, neither the Environment Minister's order nor the pending direct expropriation proceedings would have mattered. Indeed, they would have ceased to exist. Despite having meticulously charted the Claimants' alleged admissions with respect to the dates it believes are critical to the issue of jurisdiction *ratione temporis*, set out in a table that has grown to three pages in length,[119] the Respondent does not address at all the facts related to these ongoing negotiations.

141. Towards this end, the Claimants have obtained a witness statement from Ana Facio, one of the landholders who was engaged in consultations with senior officials of the Respondent's

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[117] Claimants' Counter-Memorial and Reply at ¶¶ 50-52, 84-88.

[118] It was not until 2013 that the draft bill was archived. See Exhibit C-112g.

[119] Respondent's Reply and Rejoinder at ¶ 146.

Executive Branch between 2008 and 2010. Ms. Facio has no personal interest in the outcome of this case, and thus the Claimants are certain that she, and the evidence she can provide, will be of assistance to the parties and the Tribunal.

142. Ms. Facio notes in her witness statement that[120]:

> In or about 2008, while expropriation proceedings for some of the lots in Playa Grande were already underway, the Government had not yet paid for any of the expropriations and the Government had announced publicly that they had no money to expropriate... The President was interested in consulting with the landowners in the area and promised to try and fix the dilemma caused by the 1995 Park Law.
>
> We had many meetings throughout 2008 to 2010, which took place at the Presidential House with the President, the Vice President, various ministers, congressmen, lawyers, environmentalists, and landowners.
>
> The proposed solution was that the landowners would work with the Government on land-use restrictions that would still permit us to develop our lands without harming the environment or the turtles. The President liked this idea because the Government could be relieved from having to pay out an extremely large sum to the landowners that the country did not actually have. As result of these consultations, he tried to have legislation passed to change the rules to implement the agreed solution.
>
> We spent approximately two years negotiating and drafting a law to reflect this, which was known as the Proyecto de Ley 17383 (the "Bill")… The terms of the Bill were to turn the Park into a mixed refuge, so that there was no need to expropriate the properties which fell within the boundaries of the Park. Houses and landowners could remain on the property, but there would be regulations in place to protect the environment.
>
> The Bill was presented to the legislature in 2009. Unfortunately, the Bill received very strong opposition from environmental groups, such as the Leather Back Trust. In May 2010, Laura Chinchilla was elected into office as President and distanced herself from the Bill as she did not support the President's vision for the Bill. We were never informed about whether the project had been dropped, but it was quite obvious that our Bill was never filed.

143. Brett Berkowitz explains his understanding of the negotiations between the Government and the landowners in his witness statement[121]:

> While I did not attend any of the meetings at the Presidential House, I was told by those landholders attending the meetings that the reason the expropriations were dragging on was due to the fact that the President was going to introduce the Bill 17.383 (the "Bill") to the Legislature, which would reverse the expropriation decrees. The intent of the Bill was to re-classify the land as a mixed refuge, instead of a national park. By doing so, the land which was being

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120 Facio WS1 at ¶¶ 8-13; Exhibits C-118, C-119, C-1zj.

121 Berkowitz WS3 at ¶ 10; see also ¶¶ 7-13.

> expropriated to protect the turtles, would in fact, be protected via strict parameters described within the text of the Bill, thus making the expropriations unnecessary.
>
> I read press releases stating that at the time, the Minister of the Environment, Jorge Rodriguez, and the Director of the Area of Conservation, Emel Rodriguez were in favour of the President's effort to introduce the Bill

144. Bob Reddy in his witness statement notes the impact that these negotiations had on the landowners[122]:

> The discussions were also well publicized in both the Spanish and English newspapers in Costa Rica at the time. For example, one Tico Times article dated July 17, 2009, quotes Maureen Ballestero, a National Liberation Party legislator and president of the commission at the time, as stating that the Government made a park without paying for it and that an adequate solution to having to pay for the land would be to have people inside the Park.
>
> We were quite hopeful that, because of these negotiations, the Government would come up with an alternative to expropriating our land. We were therefore awaiting the outcome of those discussions before seriously considering starting an international arbitration with the Government. This is the same reason that we delayed withdrawing the administrative appraisal amounts at that time, because we did not want to unnecessarily complicate a potential reversal of the expropriation process for the lots that were in the judicial stage, once the mixed refuge legislation had been passed.

145. As Professor Mendelson has explained in his report, evidence concerning the Claimants' lengthy, good faith consultations with the Respondent, between 2008 and 2010, cannot be overlooked. It demonstrates why the Claimants did not know that Costa Rica would eventually settle on a course of breaching its CAFTA obligations as of 10 June 2010. In hindsight, it seems obvious that the new Administration was bound and determined to incur liability, not only under the CAFTA but also potentially under other bilateral investment treaties, as well as pursuant to its own Expropriation Law. The Respondent had the opportunity to address the Claimants' reliance on these facts in December, but it elected not to even mention them, in spite of the fact that the Respondent bears the burden of proving to the Tribunal that each of the Claimants actually knew or ought to have known of both Costa Rica's breaches of the CAFTA and of the loss or damage flowing therefrom. Instead, the Respondent has chosen to rely, almost exclusively, on a selection of arguments made by the Claimants (that either went to proving the existence of a composite act or proving the correct valuation date), which it chose to re-characterize as admissions on the issue of jurisdiction *ratione temporis*.

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[122] Reddy WS3 at ¶ 16; see also ¶¶ 13-18; Exhibit C-117.

146. As the Claimants explained in their Memorial on the Merits, it is in the nature of a delay in compensation that it continues until compensation is paid or notification of the investment dispute is delivered. As long as the delay continues, it continues happening. Even if the Tribunal determined: (1) that both types of expropriations commenced before the Agreement came into force; (2) that both should be treated as completed acts; and (3) that the only fact it was prepared to find about events that happened before 1 January 2009 was that expropriations did occur, the delays relied upon for each Claimant in this case occurred well after the coming into force of the CAFTA.

147. The good faith efforts that certain of the Claimants expended for over two years, following the Court's series of judgments in 2008, to devise a sound development plan, are relevant. The faith that other Claimants placed in Costa Rica's expropriation regime honour their obligations by payment of fair compensation within a reasonable period of time is also relevant. They are relevant to determining when a "dispute" actually arose between the parties. It was not until after the Claimants had lost their faith in the ability [or, subsequently, the willingness] of the Executive Branch to keep fighting for a reasonable compromise on all sides that they would have known, or should have known, that a dispute had arisen over the steadily increasing delays in receiving compensation. It would not have been until after the Claimants had lost their faith in the system to produce a fair compensation amount that they would have known, or should have known, that a dispute had arisen between themselves both over the ongoing delays and the disappointing results of the first four lots to make it through the process.

148. The meaning of dispute has largely been settled in international investment law. It means: "a disagreement on a point of law or fact, a conflict of legal views or interests between parties."[123] In order to establish that a dispute exists, "[i]t must be shown that the claim of one party is positively opposed by the other."[124] Or, as Zachary Douglas has observed:

> The central interpretive issue arising from the provisions such as this is the proper definition of a 'dispute.' ... Certain refinements or clarifications have been introduced by the International Court. First, 'it must be shown that the claim of one party is positively opposed by the other.' Second, the presence of a dispute is

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123 *Impregilo SpA* v *Pakistan*, Decision on Jurisdiction, ICSID Case No ARB/03/3, IIC 133 (2005), 22 April 2005, at ¶¶ 302-303, citing: *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.J.I. Series A, No. 2, at 11; *Northern Cameroons*, Judgment, I.C.J. Reports 1963, at 27; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, I.C.J. Reports 1988, at ¶ 35. See, also: *MCI Power Group LC and New Turbine Incorporated v. Ecuador*, Award, ICSID Case No ARB/03/6, IIC 296 (2007), 26 July 2007 at ¶ 63.

124 *Ibid*., citing: *South West Africa,* Preliminary Objections, Judgment, I.C.J. Reports 1962, at 328.

> a matter for objective determination for the court or tribunal: 'it is not sufficient for one party to assert that there is a dispute.'[125]

149. The above passage applies in the instant case. Merely asserting the existence of a dispute is not sufficient for the Respondent to establish that the kind of dispute it insists upon for this case actually exists.

150. Recently, Professor Crawford has dispensed the following advice on determining the existence of a dispute, for the purposes of deciding a challenge to jurisdiction *ratione temporis*: "[T]he focus of the inquiry is on the current situation contrary to international law on foot, and its duration."[126] There may not be any better way to express the inquiry. The Tribunal should focus on the current situation alleged by the Claimants to be contrary to international law. Here, that means focusing on undue delay, for all but the three cases for which title has passed to this day.

151. The same test could be applied to the *Pac Rim* case, with the same result. Focus was placed on a *de facto* ban on the issuance of mining permits, which had existed for some period of time beforehand, known only to the Respondent. Pac Rim had been denied a mining permit before changing its corporate nationality. After *Pac Rim* had become a *bona fide* CAFTA investor, it learned that, in a public address, the president trumpeted his Government's *de facto* ban on the issuance of mining licenses. Crawford instructs us to focus on the current situation contrary to international law on foot, and its duration. In *Pac Rim*, the situation contrary to international law was the existence of a ban on issuing mining licenses. What was its duration? The ban apparently commenced before the investor was eligible to pursue a claim and continued thereafter. The ban was considered to be an unlawful, continuous act:[127]

> In the Tribunal's view, on the particular facts of this case as pleaded by the Claimant, an omission that extends over a period of time and which, to the reasonable understanding of the relevant party, did not seem definitive should be considered as a continuous act under international law. The legal nature of the omission did not change over time: the permits and the concession remained non-granted. The controversy began with a problem over the non-granting of the permits and concession; and it remained a controversy over a practice of not granting the mining permits and concession.[128]

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125 Zachary Douglas, *The International Law of Investment Claims* (Cambridge: CUP, 2012) at 336-337, citing: Nuclear Tests (*Australia v. France*; *New Zealand v. France*), 1974 ICJ Rep. 253, 271at ¶ 55, 457, 476 at ¶ 58; Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (1950) ICJ Rep. 65, 74 (First Phase).

126 Crawford (2013), at 260.

127 *Pac Rim v. El Salvador*, at ¶ 2.94.

128 *Ibid*., at ¶ 2.92.

152. In arriving at this conclusion, the *Pac Rim* tribunal recalled two other cases: *African Holdings* and *SGS* v. *Philippines*. The latter involved the host State's ongoing omission to pay a debt to the investor, while the former involved the host State's ongoing refusal to satisfy the terms of a contract with the investor, by withholding payment. The tribunal likened these two cases to its own, in which the omission was an ongoing refusal to approve mining licenses (pursuant to the *de facto* ban adopted at some earlier point by the host State).[129] Obviously, it lies for this Tribunal to liken all three to the situation before it: a *de facto* ban on all development, within the Parks' boundaries, adopted in 2005 and maintained until the present time.

V. HOUSEKEEPING

153. At paragraphs 290-291 of the Claimants' Memorial on the Merits, it is incorrectly stated that title to lots passes by function of Article 31 of the Costa Rican Law on Expropriation. Only possession passes as a function of Article 31, triggered by the Government's deposit of funds equal to the amount of the administrative appraisal, which also commences the judicial phase of the proceedings. As per Article 49 of the Law on Expropriation, title passes once the Government has paid funds, equivalent to any positive difference between the administrative appraisal amount and the final judicial appraisal amount plus applicable interest, into the Court's account for the benefit of the landholder.[130] The landholder is not notified of when this event actually occurs.

154. In the Respondent's Reply and Rejoinder, a map is included[131] that uses coloured dots to indicate the location of the coordinates mentioned in the 1995 Park Law. The Respondent asserts that these coordinates are located inland. Ana Facio who has provided a witness statement addressing the discussions between the owners and the Government regarding legislation which would have permitted sustainable development within the Park boundaries noted that the southernmost coordinate is actually on her property. In the context of other proceedings, she had commissioned a study on the precise location of that coordinate and it was determined that it was submerged at high tide. Thus, this issue is also addressed in the first witness statement of Ana Facio.[132]

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[129] *Ibid.*, at ¶ 293, citing: *74 SGS Société Générale de Surveillance S.A.* v. *Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, at ¶167, and *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L.* v. *Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, 29 July 2008.

[130] Exhibit C-1c.

[131] See Annex A.

[132] Facio WS3 at ¶¶ 14-16; Exhibit C-120.

155. Since the filing of the Respondent's Reply and Rejoinder, the Claimants have learned that the Municipality of Santa Cruz has issued at least two building permits in Playa Grande. This issue is addressed in the third witness statement of Robert Reddy, which is attached to this submission.[133]

156. Also since the filing of the Respondent's Reply and Rejoinder, there have been developments related to the expropriation process for both the Spence and Berkowitz Claimants. With regards to the Spence lots, interest was paid out to Spence Co. for lot SPG2 on 2 December 2014.[134] With regards, to the Berkowitz Claimants, there have been two recent developments. First, the administrative appraisal was paid for lot B3.[135] Second, the court issued the first instance judgment on value for lot B7 on 30 January 2015. This judgment has been included in the record.[136] The Claimants maintain that it does not equate to FMV for this property.

VI. PRAYER FOR RELIEF

157. Claimants respectfully request an award:

(a) declaring that the Republic of Costa Rica has violated its obligations under the Treaty, by taking the measures described in this Memorial against the investments of Claimants;

(b) awarding Claimants compensation for all damages and losses suffered as a result of the conduct of Costa Rica, on the basis of full reparation, in an amount to be determined as of the date of the award to take into account any payments;

(c) awarding Claimants pre- and post-award interest on all sums awarded, in an amount based upon a commercially reasonable rate for Costa Rican colons, such as the Costa Rican Central Bank rate;

(d) awarding Claimants any amount required to pay any applicable tax in order to maintain the integrity of the award;

(e) dismissing the Respondent's jurisdictional objections;

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133 Reddy WS3 at ¶¶ 7-12; Exhibit C-116; Exhibit C-2e.

134 Reddy WS3 at ¶¶ 19-20; Exhibit C-21j-1.

135 Berkowitz WS3 at ¶ 4; Exhibit R-154; Exhibit C-24i-2.

136 Exhibit C-27g-1.

(f) awarding Claimants their costs and expenses of this proceeding, including attorneys' fees, in an amount to be determined in the course of this proceeding by such means as the Tribunal may direct; and

(g) ordering such other and further relief as may be just and appropriate in the circumstances.

Dr. Todd Weiler
#19 – 2014 Valleyrun Blvd.
London, Ontario N6G 5N8
Canada

Fasken Martineau DuMoulin LLP
2900-550 Burrard Street
Vancouver, BC V6C 0A3
Canada

Lic. Vianney Saborío Hernández
Barrio Maynard #56
San Rafael, Escazú
San José, Costa Rica