

**IN AN ARBITRATION PURSUANT TO THE
CENTRAL AMERICA—DOMINICAN REPUBLIC—UNITED STATES
FREE TRADE AGREEMENT**

**TCW GROUP, INC. AND
DOMINICAN ENERGY HOLDINGS, L.P.**

CLAIMANTS,

VERSUS

THE DOMINICAN REPUBLIC

RESPONDENT.

CLAIMANTS' COUNTER-MEMORIAL ON JURISDICTION

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PRELIMINARY STATEMENT

1. The objections contained in Respondent's Memorial on Jurisdiction ("Respondent's Memorial") is part of the Republic's larger "shell game" by which it is attempting to evade responsibility for its repeated violations of Chapter 10 of the CAFTA-DR¹ and its responsibility for the catastrophic damage that it continues to inflict on Empresa Distribuidora de Electricidad del Este, S.A. ("EDE Este").
2. Contrary to the Republic's assertions in its Memorial, the Tribunal possesses jurisdiction over all of the facts and claims that TCW Group, Inc. ("TCW") and Dominican Energy Holdings, L.P. ("DEH") (together, the "Claimants") have alleged in their Amended Statement of Claim. First, Claimants have properly submitted their claims to this Tribunal and should be allowed to proceed on the merits of those claims because:
 - a. Claimants have submitted a proper waiver of their rights in accordance with the express language of CAFTA-DR Article 10.18.2;
 - b. Claimants' independent rights to bring this CAFTA-DR Arbitration (the "Arbitration") are not extinguished by the rights of other claimants who are not a party to this Arbitration; and
 - c. Respondent's unreasonable refusal to consolidate arbitrations bars the Republic from preventing Claimants from proceeding with their claims in this Arbitration.

¹ The Central America—Dominican Republic—United States Free Trade Agreement 5 Aug. 2004 (also referred to in this Memorial as the "Treaty"). All portions of CAFTA-DR Chapters (including the preamble) that are referenced or quoted in this Memorial are included in Claimants' Authorities 1. (Cl. Auth. 1)

3. Second, the Tribunal possesses jurisdiction over this dispute as defined by CAFTA-DR Chapter 10 because:
 - a. the dispute between Claimants and the Republic constitutes an “investment dispute” between the Dominican Republic and investors of the United States;
 - b. Claimants own and control a “covered investment,” which is EDE Este; and
 - c. Under CAFTA-DR, the “covered investment” is *not* the consideration that was paid to AES for EDE Este in November 2004.

4. Third, subject to the Republic’s other objections, the Parties agree that the Tribunal possesses jurisdiction over:
 - a. all acts and omissions by the Dominican Republic from no later than March 1, 2007 to the present; and
 - b. Claimants’ causes of action for the Republic’s alleged violations of CAFTA-DR for violations of (a) Fair and Equitable Treatment, (b) Full Protection and Security, (c) Most-Favored-Nation Treatment, (d) National Treatment, and (e) the prohibition on the denial of justice.²

5. Fourth, the Tribunal should not dismiss Claimants’ CAFTA-DR Article 10.7 expropriation claim because:
 - a. the allegations contained in the Amended Statement of Claim constitute a valid claim for direct and indirect expropriation for which the Tribunal should issue an award in favor of Claimants; and

² See Respondent’s Jurisdictional Memorial ¶¶ 6, 46-55 (requesting that the Tribunal refuse jurisdiction over Claimants’ expropriation claim, but no other claims).

- b. At this jurisdictional phase of the Arbitration, the Tribunal should not finally determine whether Claimants meet the standard for expropriation, which requires a fact-intensive, case-by-case analysis that is best reserved for the merits.
6. Fifth, Respondent's argument that the Tribunal categorically lacks jurisdiction *ratione temporis* over the Republic's acts before March 1, 2007 should be rejected. This Tribunal is competent to consider all claims based on the Republic's acts and omissions that occurred **before** March 1, 2007, the date CAFTA-DR entered into force for the Dominican Republic, because:
 - a. a continuing breach of CAFTA-DR, including acts that have "a continuing character extend[ing] over the entire period during which the act[s] continue[] and remain[] not in conformity with the international obligation[]," constitutes a valid claim under the Treaty;³ and
 - b. the Republic's acts and omissions constitute continuing and composite course of conduct and violations of CAFTA-DR.
7. This Arbitration should therefore proceed to a hearing on the merits of the facts and claims alleged in Claimants' Statement of Claim.

³ See United Nations International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 13, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) (the "Draft Articles on State Responsibility") Art. 14(2) (Cl. Auth. 38).

RESPONDENT'S UNREASONABLE REFUSAL TO CONSOLIDATE ARBITRATIONS

8. Respondent's Memorial repeatedly refers to of the "oppressive," "vexatious," and "abusive" arbitrations that Société Générale and its subsidiaries have brought against the Dominican Republic for its violations of its obligations under various treaties and contracts.⁴ In support of its allegations, Respondent claims that "TCW is pursuing other arbitrations predicated on precisely the same measures at issue in this arbitration" and that TCW is "attempting to use this case and the two other arbitrations to secure an unwarranted windfall."⁵
9. In truth, **it is the Republic** — not the Claimants — that is responsible for the multiple arbitrations against the Republic and it is the Republic that seeks to take advantage of those multiple arbitrations. In its Jurisdictional Memorial, Respondent **never once mentions** that at the outset of the arbitration proceedings, Société Générale and its subsidiaries sought to consolidate their disputes with the Republic and its instrumentalities into a single arbitration — and **the Republic has repeatedly refused to consolidate.**⁶ Consolidation of

⁴ See Respondent's Jurisdictional Memorial ¶¶ 2, 3 & 18 ("TCW, both in its own name and through its parent and subsidiary companies, is vexatiously pursuing three arbitrations based on virtually identical facts and allegations and seeking effectively the same relief.")

⁵ See Respondent's Jurisdictional Memorial Headers above ¶ 18 & 21; *see also id.* ¶¶ 21-22 (accusing TCW of a "brazen attempt at 'treble dipping' through which TCW cumulatively seeks to recover over US\$1.8 billion").

⁶ Letter from P. Thomas to J. Profazer dated 21 Dec. 2007 (refusing to consolidate arbitrations) (Cl. Ex. 1); Letter from C. Dugan to Members of the Tribunal and Counsel for the Dominican Republic dated 15 Jan. 2008 (acknowledging Respondent's refusal to consolidate and withdrawing the request to the tribunal) (Cl. Ex.2). *See also Société Générale in Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic* (Award on Preliminary Objections to Jurisdiction), UNCITRAL, LCIA Case No. UN 7927 ¶ 6 (19 Sept. 2008) (referring to "a request from the Claimant to consolidate this arbitration with other proceedings beginning at the time, which was not accepted.") (Cl. Auth. 28).

all disputes would have been much more efficient and would have benefited all parties to this complex and wide-ranging dispute.

10. Since unreasonably refusing to consolidate, the Republic has serially tried to reject the competence of **any** international arbitral tribunal to decide **any** of the disputes pending between the Republic and its instrumentalities, on the one hand, and Société Générale and its subsidiaries on the other.
11. Although the arbitrations brought by Claimants, Société Générale and EDE Este against the Republic and its instrumentalities are predicated on similar facts, each claimant is a distinct juridical entity with distinct legal rights and interests that arise from different sources of law, and each is entitled to file separate arbitral claims to vindicate those rights.
12. As this Tribunal is surely aware, in a pair of arbitrations against the Czech Republic, both Ronald Lauder (an individual investor) and CME (a company he owned) brought separate investment claims under different investment treaties against the Czech Republic arising from similar factual circumstances.⁷ When the second arbitration was filed, the claimants offered to consolidate the arbitrations, but the Czech Republic — like the Dominican Republic in this case — refused.⁸
13. When the Czech Republic later challenged the multiple arbitrations on jurisdictional grounds, the *Lauder* tribunal (the tribunal hearing the individual claim) rejected the Czech Republic's jurisdictional challenges, stating:

⁷ See *CME Czech Republic B.V. (The Netherlands) v. Czech Republic* (Partial Award), UNCITRAL (13 Sept. 2001) (Cl. Auth. 9); *Lauder v. Czech Republic* (Final Award), UNCITRAL (3 Sept. 2001) (Cl. Auth. 16).

⁸ See *CME* (Partial Award) ¶ 412 (Cl. Auth. 9); *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, (Review by Svea Court of Appeal), 71 (15 May 2003) (Cl. Auth. 10); *Lauder* (Final Award) ¶ 173 (Cl. Auth. 16).

Respondent's recourse to the principle of *lis alibi pendens* [is] of no use, since all the other court and arbitration proceedings involve different parties and different causes of action....

...

... Only this Arbitral Tribunal can decide whether the Czech Republic breached the Treaty towards Mr. Lauder, and only the arbitral tribunal in the parallel Stockholm Proceedings can decide whether the Czech Republic breached the Dutch/Czech bilateral investment treaty in relation to CME. As a result, CME has neither a better — nor a worse — claim in the parallel arbitration proceedings than Mr. Lauder's claim in the present arbitration proceedings. It only has a different claim.⁹

14. The *Lauder* tribunal reached this decision even though it expressly recognized that two awards may conflict or “damages [may] be concurrently granted by more than one court or arbitral tribunal.”¹⁰ To resolve this issue, the tribunal (rightly) observed that “the second deciding court or arbitral tribunal could take this fact into consideration when assessing the final damage,”¹¹ and that the additional time and expense, as well as risk of conflicting awards, would have been “greatly reduced” if the Czech Republic had agreed to consolidation.¹²
15. When the *CME* tribunal issued its award, that tribunal likewise rejected the Czech Republic's challenge to parallel proceedings, finding that “[t]here is also no abuse of the Treaty regime,” when “claims are brought by different claimants under separate treaties.”¹³ In responding to the Czech Republic's argument, the tribunal stated that:

⁹ *Lauder* (Final Award) ¶¶ 171, 177 (Cl. Auth. 16).

¹⁰ *Id.* ¶ 172.

¹¹ *Id.*

¹² *Id.* ¶ 178.

¹³ *CME* (Partial Award) ¶ 412 (Cl. Auth. 9). Compare Respondent's Reply ¶ 12 (“It is not the intent of the system of investment treaties to allow an investor to bring multiple, duplicative claims against the State.”).

The Czech Republic did not agree to consolidate the Treaty proceedings, a request raised by the Claimant (again) during these arbitration proceedings. The Czech Republic asserted the right to have each action determined independently and promptly. This has the consequence that there will be two awards on the same subject which may be consistent with each other or may differ. Should two different Treaties grant remedies to the respective claimants deriving from the same facts and circumstances, this does not deprive one of the claimants of jurisdiction, if jurisdiction is granted under the respective Treaty.¹⁴

16. Moreover, after the *Lauder* and *CME* tribunals issued their awards, the Czech Republic moved to annul the *CME* award in the Svea Court of Appeal in Stockholm, Sweden, where it argued that the *CME* tribunal lacked jurisdiction due to the existence of parallel proceedings. The Swedish court firmly rejected the Czech Republic's jurisdictional claim regarding *res judicata*. That court held that the two cases involved different claimants, different treaties, and different injuries.¹⁵ Significantly, the court also stated that the Czech Republic's refusal to consolidate — despite its opportunity to do so — was the cause of the parallel proceedings and resulted in the waiver of its objections.¹⁶
17. Although the frequently confidential nature of commercial arbitration makes finding common practice somewhat difficult, it is nevertheless clear that these parallel proceedings are not an isolated example. For example, Exxon-Mobil, a single claimant, has pursued both an ICSID arbitration against Venezuela under the United States-Venezuela Bilateral

¹⁴ *CME* (Partial Award) ¶ 412 (emphasis added) (Cl. Auth. 9).

¹⁵ *See CME* (Review by Svea Court of Appeal), at 69-71 (Cl. Auth. 10).

¹⁶ *See id.* at 71.

Investment Treaty as well as an ICC arbitration under a related contract based on what publicly appears to be the same set of facts and conduct by Venezuela.¹⁷

18. The Republic's allegation that "TCW is the controlling hand and mind behind all three arbitrations,"¹⁸ and that R. Blair Thomas, the President of the Board of Directors of EDE Este plays a significant role,¹⁹ is a curious *deus ex machina* that appears to be designed to prevent the Claimants from independently pursuing their rights against the Republic.²⁰ Indeed, in the France-Dominican Republic Bilateral Investment Treaty Arbitration (the "France-DR BIT Arbitration"),²¹ the Republic also tried to prevent Société Générale from pursuing its rights against the Republic by asserting that it was mainly TCW's officers who

¹⁷ See *Mobil Cerro Negro, Ltd. v. PDVSA Cerro Negro S.A.* (Complaint), No. 07-cv-11590 (S.D.N.Y. Dec. 27, 2007) ¶¶ 1, 35 (Cl. Auth. 21).

¹⁸ See Respondent's Jurisdictional Memorial Header above ¶ 19.

¹⁹ For example, to the extent that Respondent's allegation that "Mr. Thomas has been responsible for EDE Este's contact with the government since the acquisition" is intended to imply that only Mr. Thomas has been responsible for EDE Este's contact with the Government, such a statement is completely false. See Respondent's Jurisdictional Memorial ¶ 13. Since November 2004, numerous representatives of EDE Este, including other members of the Board of Directors of EDE Este, have been responsible for contact with the government of the Dominican Republic. Moreover, as the President of the Board of Directors of EDE Este, it is not surprising that Mr. Thomas would speak for EDE Este on important occasions such as at Board Meetings. See Respondent's Jurisdictional Memorial ¶ 13 n.18.

²⁰ Respondent's suggestion that EDE Este brings the Concession Agreement Arbitration illegitimately over the objection of EDE Este's minority shareholder, Fondo Patrimonial de Empresas Reformadas ("FONPER"), also should be rejected. See Respondent's Jurisdictional Memorial ¶ 13. The board of EDE Este debated, deliberated, and took a proper decision to bring the Concession Agreement Arbitration in the best interest of EDE Este. Indeed, on several occasions, FONPER, an instrumentality of the Republic, has engaged in conduct that is contrary to the best interests of EDE Este. Moreover, it is not unusual for the judgment of board members to differ, and the fact that FONPER was ultimately out-voted does not in any way render the Board's decision to protect EDE Este's rights improper.

²¹ See *Société Générale* (Award on Preliminary Objections on Jurisdiction) (Cl. Auth. 28).

put together and executed the share purchase transaction²² and by claiming that Société Générale and DEH are merely a “conduit”²³ and “vehicle,”²⁴ respectively, for TCW to pursue its claims.²⁵ But the fact that representatives of TCW were primarily involved in the purchase of EDE Este or have had the primary role in managing EDE Este at the Board level has no bearing whatsoever on the legal rights and status of Société Générale or DEH. That legal status irrefutably confers on claimants the right to bring a separate treaty claim as the France-DR BIT Tribunal’s Award on Jurisdiction expressly recognized with respect to Société Générale.²⁶

19. Claimants own and control EDE Este and, as such, are specifically authorized under the language of CAFTA-DR to bring a claim for the Republic’s treatment of its Investment.²⁷ Given the Republic’s repeated refusal to consolidate, there should be no doubt that Claimants, as well as their related entities, are entitled to independently pursue all their rights under the treaties, contracts, and sources of law available to them.

²² See Respondent’s Jurisdictional Memorial ¶ 11.

²³ See *id.* ¶¶ 18, 21.

²⁴ See *id.* ¶ 12.

²⁵ See *id.*

²⁶ See *Société Générale* (Award on Preliminary Objections to Jurisdiction) ¶¶ 117-121 (Cl. Auth. 28).

²⁷ See CAFTA-DR Art. 10.28 (Definitions) (“investment means every asset that an investor owns or controls, directly or indirectly ... [and] investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party.”) (Cl. Auth. 1); see also *id.* Art. 10.16.1(a) (“In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim ...”). (Cl. Auth. 1).

20. The Respondent's allegations that Claimants and their related companies are "vexatiously pursuing three arbitrations" and "seeking effectively the same relief"²⁸ appears to be a willful misunderstanding of both international law and the power and judgment of international tribunals. The tribunal in *Lauder v. Czech Republic* quickly rejected this argument, stating that "[t]he only risk ... is that damages be concurrently granted by more than one court or arbitral tribunal, in which case the amount of damages granted by the second deciding court or arbitral tribunal could take this fact into consideration when assessing the final damage."²⁹
21. Moreover, although Respondent again fails to mention it, Société Générale, in the France-DR BIT Arbitration, already expressly disavowed multiple damages recoveries in the parallel arbitrations,³⁰ and the Tribunal in that arbitration has quite effectively addressed this issue in its jurisdictional award.³¹ For the avoidance of doubt, however, **Claimants**

²⁸ See Respondent's Jurisdictional Memorial ¶ 18.

²⁹ *Lauder* ¶ 172 (Cl. Auth. 16); see *Camuzzi International S.A. v. Argentine Republic* (Decision on Objection to Jurisdiction), ICSID Case No. ARB/03/2 (11 May 2005) ¶ 91 (rejecting Argentina's argument that concurrent BIT arbitration and domestic proceedings on contract claims might result in double recovery, the tribunal stated that "international law and decisions offer numerous mechanisms for preventing the possibility of double recovery.") (Cl. Auth. 8).

³⁰ See *Société Générale in Respect of DR Energy Holdings Ltd. and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic* (Claimant's Rejoinder to Respondent's Reply Memorial on Jurisdiction), LCIA Case No. UN 7927 (21 Mar. 2008) ¶ 18 (Cl. Ex 3).

³¹ See *Société Générale* (Award on Preliminary Objections to Jurisdiction) ¶ 121 ("It follows from the above, that the Claimant's nationality will indeed protect its interest, but limited by three factors: its percentage of participation in TCW at a given time; its percentage of TAMCO's participation in TCW Energy Advisors LLC (50.1%) and percentage of remuneration of the latter as the General Partner in Dominican Energy Holdings LP (90% of available cash as calculated in the Partnership Agreement (Cl. Auth. 28). Interests beyond these participations are not protected under the Treaty between France and the Dominican Republic on account of their different nationalities.") See also *id.* ("The Tribunal has jurisdiction ... to the extent of [Société Générale's] rights in the chain of interests in the investment ... [and] to the extent of [Société Générale's] interests as a protected French national.")

hereby represent to this Tribunal and to the Republic that they do not seek double recovery and waive any right to double recovery. Respondent's hyperbolic rhetoric regarding the alleged "brazen attempt" at "treble dipping" is therefore untrue.³²

22. In sum, the Tribunal should reject Respondent's attempt to employ this "shell game," in which the Republic refuses to consolidate arbitrations, serially represents to each arbitral tribunal that the other has jurisdiction, and then asks each tribunal to dismiss all the claims against the Republic so that it may escape any responsibility for the catastrophic harm that it has inflicted on EDE Este.

RELEVANT FACTUAL BACKGROUND

23. In their Amended Statement of Claim, Claimants set forth, in both general and specific terms, the facts that form the basis for the Republic's continuing and composite violations of CAFTA-DR. As Respondent appears to admit,³³ for purposes of determining the facts upon which the preliminary question of jurisdiction is based, the Tribunal:

shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.³⁴

24. In addition, CAFTA-DR provides that to assert jurisdiction over the dispute, the Tribunal need only satisfy itself that Claimants have submitted claims for which the Tribunal may

³² See Respondent's Jurisdictional Memorial ¶¶ 21-22.

³³ See *id.* ¶ 8 ("In conclusion, Respondent notes that it bears no burden to dispute at this jurisdictional phase the facts that Claimants allege.")

³⁴ See CAFTA-DR Article 10.20.4(c) (Cl. Auth. 1).

make an award in favor of Claimants under the Treaty³⁵ — or, in other words, that Claimants have alleged facts that *prima facie* bring the dispute under the provisions of the Treaty.³⁶ Claimants’ Amended Statement of Claim unquestionably establishes jurisdiction under this standard. Nevertheless, the numerous misstatements contained in Respondent’s Memorial — although irrelevant to jurisdiction — must be corrected.

I. CLAIMANTS OWN AND CONTROL AN INVESTMENT IN THE DOMINICAN REPUBLIC THAT CAFTA-DR PROTECTS

A. The US\$2 Purchase Price is *Not* the Claimants’ Investment

25. Respondent opens the Facts section of its Memorial with the jurisdictionally irrelevant assertion that “[t]he premise of this arbitration is that TCW made an investment in the Dominican Republic on November 12, 2004, by acquiring indirectly, through the special purpose vehicle DEH LP, the Class B shareholding in EDE Este from AES Corporation” and that “[r]eflecting the negligible value of the EDE Este shareholding, TCW paid AES the nominal sum of U.S. \$2 for the shares.”³⁷
26. This reflects Respondent’s effort to muddle what properly should be a straightforward analysis of whether Claimants possess an investment under CAFTA-DR. As a matter of law, the *amount* that was paid to AES for EDE Este’s shares is legally irrelevant to whether

³⁵ See CAFTA-DR Article 10.20.4 (“a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26”) (Cl. Auth. 1).

³⁶ See *Ethyl Corp. v. Canada* (Award on Jurisdiction), NAFTA/UNCITRAL (24 June 1998) ¶ 61 (Cl. Auth. 12).

³⁷ See Respondent’s Jurisdictional Memorial ¶ 9 (emphasis added) (footnotes omitted).

Claimants have an investment and this Tribunal has jurisdiction.³⁸ As a matter of law, the US\$2 is not the “Investment”: the Investment for CAFTA-DR purposes is the 50% of the shares of EDE Este and all the legal rights associated with those shares, including the Concession Agreement and all claims and interests that EDE Este possesses that have economic value.

27. This distinction between the amount that AES received for EDE Este and the asset that was actually purchased is critical: When the Claimants acquired their interests in DREH and EDE Este, they acquired and became the beneficiary of all the legal rights held by those assets, just as in any other acquisition. Some of these acquired rights were enshrined in the Basic Contracts, which include the Concession and Subscription Agreements.³⁹ Yet nowhere in its Memorial does the Republic recognize that the legal rights created by those Agreements are some of the key assets that Claimants bought when they purchased the shares in EDE Este.
28. For example, the Concession Agreement expressly incorporates the laws and regulations of the Republic as they existed at the time of the execution of the Concession Agreement into the Treaty.⁴⁰ The Concession Agreement grants certain rights to EDE Este, including the right to “build and operate electric power works, under the conditions set forth in the

³⁸ See *Société Générale* (Award on Preliminary Objections to Jurisdiction) ¶ 36 (“The purchase of property for a nominal price is a normal kind of transaction the world over when there are other interests and risks entailed in the business.”) (Cl. Auth. 28); see also Declaration of R. Blair Thomas dated 12 February 2009 (“Thomas Decl.”) ¶ 7. In addition, as discussed below, the US\$2 purchase price was only a small part of the entire transaction, and the total consideration for AES was approximately US\$50-60 million. See Thomas Decl. ¶¶ 4-5.

³⁹ See Amended Statement of Claim ¶¶ 57-71.

⁴⁰ See *id.* ¶¶ 66-69.

contract and in conformity with this resolution *and other legal provisions in force*”⁴¹ and to “[r]eceive the other benefits that are granted by the laws of the Dominican Republic that regulate the electric sub-sector.”⁴² Moreover, Article 13 of the Concession Agreement contains a stabilization clause, which provides that the Concession Agreement ““has the force of law between the parties and, by virtue of Article 47 of the Constitution of the Dominican Republic, it shall not be affected by any new law, regulation or administrative provision, and may only be altered by written agreement between the parties.””⁴³ When Claimants indirectly purchased 50% of EDE Este, they obtained the protection of, and became the beneficiary to, many different sets of legal rights. The Republic’s acts and omissions that violate those legal rights are the real premise of this Arbitration.

B. The Total Consideration for EDE Este Was Approximately US\$50 to US\$60 Million

29. As Respondent acknowledges,⁴⁴ Claimants’ interest in EDE Este is the product of a complex transaction,⁴⁵ and the consideration that AES received for DREH and EDE Este was far greater than Respondent’s somewhat simplistic notion of US\$2. As an initial matter, it is important to understand AES’ motives in selling EDE Este. Nowhere in the Republic’s Memorial does the Republic acknowledge that because of its continuing failure

⁴¹ See *id.* ¶ 67.

⁴² See *id.* ¶ 67(b) (quoting Art. 4(d) of the Concession Agreement).

⁴³ See *id.* ¶ 68 (quoting Art. 13 of the Concession Agreement).

⁴⁴ See Respondent’s Jurisdictional Memorial ¶ 12.

⁴⁵ See *Société Générale* (Award on Preliminary Objections to Jurisdiction) ¶ 45 (“While many arbitrations have been confronted with complex corporate structures, which have become a normal feature of international business, few have reached the complexity of this case.”) (footnote omitted) (Cl. Auth. 28). See also Thomas Decl. ¶ 18.

to honor its promises, AES was trapped in an investment that had become an economic albatross. By causing EDE Este to incur very large operating losses, the Republic was literally bleeding AES dry,⁴⁶ for AES was required by its corporate structure to consolidate onto its own books the operating losses that EDE Este was suffering.⁴⁷ Because of this duress — which the Republic created by its wrongful acts and omissions — AES was not a willing seller, but a desperate one.⁴⁸ Paradoxically, because of the financial duress, AES stood to gain enormous value by disposing of EDE Este, regardless of the amount of the consideration.⁴⁹ This was an unusual situation that presented a unique opportunity for AES, Claimants, Société Générale and the Republic — but not one that the Republic can criticize because it was the Republic’s broken promises that gave rise to the sale.

30. Consideration is commonly defined as anything of value provided to another party.⁵⁰ Indeed, if the purchase price for an investment were the only element of consideration, then many investments would be deemed to have little value for the parties involved.⁵¹ As a matter of law and finance, AES’s consideration was not only the amount of money that it was paid for the shares of EDE Este, but everything of value that it received.
31. The acquisition of EDE Este was a complex transaction that involved far more than the nominal purchase price. The total consideration to AES included the right of first refusal

⁴⁶ See Thomas Decl. ¶¶ 5, 8.

⁴⁷ See *id.* ¶ 5.

⁴⁸ See *id.* ¶ 5.

⁴⁹ See *id.* ¶¶ 5, 8.

⁵⁰ See BLACK’S LAW DICTIONARY 131 (2d Pocket ed. 2001) (defining “consideration” as “Something of value (such as an act, a forbearance, or a return promise) received by a promisor from a promisee.”) (Cl. Auth. 33).

⁵¹ See Thomas Decl. ¶ 7.

that TCW gave to AES, the value of the deferred purchase fee that was reflected in AES's management contract with EDE Este, and the purchase price. The total value of this consideration was US\$50 to US\$60 million.⁵²

32. In addition to the consideration it received from Société Générale and its subsidiaries, AES realized substantial additional value from the sale. By ridding itself of EDE Este's endemic operating losses, AES immediately increased its shareholder and market value. Moreover, as part of the deferred purchase fee arrangement, AES retained managerial control of EDE Este. That put it in a position to focus on and protect its electricity generation assets in the Dominican Republic.⁵³
33. The transaction also greatly benefited the Republic: If it were not for Société Générale and its subsidiaries, AES might well have had to abandon EDE Este, which would have been a major embarrassment for the Republic and created exceptional difficulties for the distribution of electricity in the eastern portion of the country.⁵⁴
34. The purchase price for the shares of DREH and EDE Este also reflected, among other things, TCW's substantial costs in conducting its own extensive due diligence rather than receiving a more customary set of representations, warranties, and covenants of the type typically issued by sellers of similar operating assets.⁵⁵ Consequently, the US\$2 purchase price is not only irrelevant to the jurisdictional issues before this Tribunal, but it is the wrong benchmark for the value of the EDE Este transaction.

⁵² See *id.* ¶ 4.

⁵³ See *id.* ¶¶ 4-5.

⁵⁴ See *id.* ¶ 9.

⁵⁵ See *id.* ¶ 23.

II. EDE ESTE IS CLAIMANTS' LEGITIMATE INVESTMENT

35. Respondent's Memorial speculates regarding Claimants' alleged motives for the purchase of EDE Este. This speculation is legally irrelevant to whether an investment exists and factually wrong as well.
36. First, Société Générale and TCW are serious investors with a long history of business activity in the Dominican Republic, where they have invested hundreds of millions of dollars,⁵⁶ as representatives of the Republic have previously recognized. For example, TCW invested in the Andrés electricity generating facility in the Dominican Republic.⁵⁷ Moreover, as noted above, Claimants created millions of dollars in value to AES and the Dominican Republic by purchasing EDE Este from AES, which the Dominican Republic was driving into bankruptcy.⁵⁸ Similar to the other investments of Société Générale and TCW, their purchase of EDE Este was a valid and legitimate transaction that had the approval of the Republic.⁵⁹
37. Second, Respondent's allegations that "TCW never intended to invest in EDE Este or in the Republic's electricity sector" and that Claimants have never made "any capital contributions to EDE Este" or any "other commitment to the financial welfare of EDE Este" are wrong.⁶⁰ At the time of the purchase, the focus and rationale was on turning EDE Este around and on the possibility that the Dominican government would finally start

⁵⁶ See *id.* ¶ 19.

⁵⁷ See *id.* ¶ 19.

⁵⁸ See *id.* ¶ 19.

⁵⁹ See *id.* ¶ 17.

⁶⁰ See Respondent's Jurisdictional Memorial ¶¶ 14, 16.

honoring its promises; additional investment would follow.⁶¹ Moreover, from 2004 to the present, Claimants have directed EDE Este to reinvest more than US\$100 million back into EDE Este.⁶²

38. One risk that Claimants were reluctant to assume in 2004 was to themselves pour more capital into EDE Este. Claimants expressed such concerns to Republic government officials, stating that the Republic would first need to meet its own obligations to the electricity sector, and to EDE Este in particular.⁶³ In light of the Republic's refusal to implement the promised reforms, it would have been imprudent for an owner to invest without concrete signs of a change in policy and practice by the government. However, if the Republic had honored its many promises, Claimants were more than willing to consider additional capital investments in EDE Este.⁶⁴

39. Third, like any prudent investor, although Claimants worked to structure the acquisition of EDE Este to **minimize** risk, this did not mean that Claimants “insulate[d] [themselves] from all economic, legal, or reputational risk associated with the EDE Este shareholding.”⁶⁵ It is common and legitimate to structure an investment as Claimants did in EDE Este.⁶⁶

⁶¹ See Thomas Decl. ¶ 22.

⁶² See *id.* ¶ 22. Criticizing the fact that Claimants have not independently committed additional capital ignores the very reason for this decision: the Republic’s ongoing failure to keep its promises.

⁶³ See *id.* ¶ 22.

⁶⁴ See *id.* ¶ 22.

⁶⁵ See Respondent’s Jurisdictional Memorial ¶ 15 (“More specifically, TCW structured the transaction to insulate itself from all economic, legal, or reputational risk associated with the EDE Este shareholding.”); *id.* ¶ 22 (“in a transaction structure deliberately designed to be risk-free.”).

⁶⁶ Compare M. FOUZUL KABIR KHAN & ROBERT J. PARRA, FINANCING LARGE PROJECTS 260 (Pearson Prentice Hall 2007) (It is common for an investor to “insulate itself from the risks and liabilities inherent in the project . . . by having each sponsor’s ownership interests flow from a

(continued...)

This is particularly true in light of the dramatic operating losses that AES had suffered from EDE Este's operations from 1999 to 2004.⁶⁷

40. Moreover, contrary to Respondent's assertions, DREH and EDE Este were and are subject to macroeconomic and other risk, including reputational and "headline risk",⁶⁸ business risk,⁶⁹ sovereign risk,⁷⁰ potential conflict with other TCW energy investments,⁷¹ and the risk that EDE Este's losses could be consolidated onto the balance sheets of Société Générale or its subsidiaries.⁷² No investment is risk-free — despite every prudent

(...continued)

limited liability company, which will be incorporated in the host country or, more commonly, a tax haven country.") (Cl. Auth. 36) with Respondent's Jurisdictional Memorial ¶ 10 ("structur[ing] the transaction by which it acquired its controlling interest in EDE Este through several layers of subsidiary entities based in the United States and the Cayman Islands."). *See also Société Générale* ¶ 48 ("As long as the business undertaken and the pertinent legal arrangements are lawful, as is the case here, there will be no reason to refuse the protections of the Treaty. This in the end is the reason why investment law has always searched for the economic interest underlying a given transaction and if it is compatible with the terms of the law and the Treaty, such interest is recognized as entitled to protection.") (Cl. Auth. 28) To the extent that Respondent seeks to challenge the use of the corporate structure surrounding Claimants' investment in EDE Este, Claimants continue to reserve all their rights to address Respondent's assertion, including the right to introduce expert testimony.

⁶⁷ *See* Thomas Decl. ¶¶ 6-7.

⁶⁸ *See id.* ¶¶ 21-22. Indeed, this risk has materialized. *See* Cl. Ex. 4 at Minutes 9:20-9:40 (Videoclip from June 4, 2008 press conference following occupation of EDE Este and seizure of EDE Este property in which Radhames Segura publicly refers to TCW as "almost an enemy of the state").

⁶⁹ *See Société Générale* (Award on Preliminary Objections to Jurisdiction) ¶ 38 ("The Claimant has also convincingly argued that the transaction is not exempt from business risks. The mere fact of taking over a business that had heavy losses, which had significantly affected AES as the former investor is a risk the Claimant undertook in the hope of seeing the value of those assets increase in the near future. To see that objective frustrated or worse to see that the value kept deteriorating is a risk associated with the transaction.") (Cl. Auth. 28).

⁷⁰ *See* Thomas Decl. ¶¶ 21-22.

⁷¹ *See id.* ¶¶ 21-22.

⁷² *See id.* ¶¶ 22.

investor's best efforts to make it so — and Claimants' investment in EDE Este was no different.

41. Fourth, the Republic does not dispute (but rather appears to agree with)⁷³ a key reason why the purchase price was so low: As set forth in the Amended Statement of Claim, the Republic had created conditions in which the value of EDE Este was being destroyed by the Republic and its policies and actions. The Republic now euphemistically refers to the “difficulties in the Dominican Republic electricity sector,” meaning, of course, its long history of broken promises.⁷⁴

III. SINCE JANUARY 2005, THE REPUBLIC HAS BEEN ENGAGING IN A CREEPING EXPROPRIATION OF CLAIMANTS' INVESTMENT

42. As set forth in Claimants' Amended Statement of Claim, the Republic has, from 1999 to the present, made and breached its repeated representations and promises regarding (a) the level of tariffs to be applied to the distribution of electricity, and (b) the indemnification that the Republic promised to compensate EDE Este for the Republic's repudiation of its own representations and promises.⁷⁵ These measures are ongoing and have, among other things, effected a creeping expropriation of Claimants' investment.

⁷³ See Respondent's Jurisdictional Memorial ¶ 5 (noting that the “difficulties in the Dominican Republic electricity sector were well known.”).

⁷⁴ See *id.* ¶¶ 5 & 43.

⁷⁵ See Amended Statement of Claim ¶¶ 9(b) and (c), 60, 62-72, 113, 116, 118, 123, 132, 134, 135.

A. The Republic's Failure to Implement the Promised Tariffs is the First Step in the Creeping Expropriation

43. In 1999 and thereafter, the Republic promised to implement, consistent with the central goals of the capitalization reform, an electricity tariff that allowed the distributors to pass through to their customers the total costs of the distribution of electricity (the "Total Cost Tariff"). At the time the Concession Agreement and other Basic Contracts were entered into, the resolutions regulating the Dominican Republic's electricity sector provided a Total Cost Tariff that guaranteed that the "rate level must be high enough to cover the total long-term cost" of the distribution company.⁷⁶ The resolutions supplying the regulatory structure of the electricity sector also provided that a rate of return would be provided to the private investors.⁷⁷ Law 125-01 (the "General Electricity Law"), which was enacted in 2001 and remains the enforceable electricity law in the Dominican Republic, also guaranteed to the distribution companies a Total Cost Tariff and a rate of return on the distribution companies' investment.⁷⁸

⁷⁶ See Resolution 235-98, Article 57 (Cl. Ex. 5); Amended Statement of Claim ¶¶ 54-57, 62-72.

⁷⁷ See Resolution 235-98, Article 65 (Cl. Ex. 5).

⁷⁸ See Law 125-01, Art. 111 ("The rates to public service users will be set by The Superintendency. The same will be composed of the cost of the supply of electricity to the distributor companies established competitively, referred to the points of connection with the distribution installations plus the value added due to the distribution costs, adding them via the indexed rate formulas that represent a combination of said.") (Cl. Ex. 6). See also Law 125-01 Art 115 ("The value added of distribution will be determined every four (4) years, on the basis of the incremental costs of development and the total long-term cost of the distribution service in efficiently sized systems. The structure of rates will be based on the incremental cost of development. The level of rates must be sufficient to cover the total long-term cost. The value added of distribution and the rate levels will be established by the Superintendency of Electricity.") (Cl. Ex. 6). See also Law 125-01, Arts. 123 (Cl. Ex. 6).

44. The Republic cannot deny that continues to fail to implement the promised Total Cost Tariff.⁷⁹ This failure has resulted in catastrophic financial losses to EDE Este because it requires EDE Este to distribute electricity below cost.⁸⁰

B. The Republic's Repeated Failure to Pay the Promised Indemnification is the Next Step in the Creeping Expropriation

45. The Republic does not deny that as compensation for its failure to implement the Total Cost Tariff, it repeatedly agreed to indemnify EDE Este and other distribution companies for the losses the Republic was inflicting. Paragraph 83 of the Amended Statement of Claim sets forth a timeline showing the span of the Republic's conduct:

83. To compensate EDE Este for its inability to charge the tariffs expressly provided for in 1998, the Republic repeatedly has agreed to indemnify EDE Este for the difference between the new regulated price and the price at which EDE Este was entitled to distribute electricity as set forth in the 1998 Tariff Resolutions. For example:

...

(c) On March 31, 2003, the President of the Republic issued Presidential Decree No. 302-03. Decree No. 302-03 again formalized the Republic's promise to indemnify EDE Este. This Decree also created a "Special Rate Stabilization Fund" (the "Stabilization Fund"), to fund the indemnity for EDE Este for the increases in the First-Phase Tariffs until the Second-Phase Tariffs were to enter into force. In late 2003, the Republic began to make

⁷⁹ See, e.g., Dominican Republic Country Economic Memorandum: The Foundations of Growth and Competitiveness, Document of the World Bank, September 2006, at 145, ¶ 281 (reaffirming commitment to cover the difference between indexed [*full cost*] and actual tariffs); *id.* at 148, ¶ 294 (reaffirming restructuring efforts of 1997-2002) (the "2006 World Bank Memorandum") (Cl. Ex. 7); Letter of Intent and Annex to the Technical Memorandum of Understanding dated 24 Apr. 2006 at 7, ¶ 19 (the "Letter of Intent (April 2006)") (Cl. Ex. 8); Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding dated 31 Jan. 2007 at 7, ¶ 11 (stating that deviations from a tariff structure that passes through costs is merely "temporary") (the "Letter of Intent to the IMF (January 2007)") (Cl. Ex. 9).

⁸⁰ See Thomas Decl. ¶ 26.

partial payments to EDE Este from the Stabilization Fund that continued through 2005, but it has subsequently failed to make payments from the Stabilization Fund in a timely manner or to make them at all.

(d) On February 11, 2004, in a memorandum entitled the “Points of Framework Agreement for the Sustainability of Electric Generation in the Republic” (“Puntos de Acuerdo Marco Para La Sostenibilidad de Generación Eléctrica en La República Dominicana”), the Republic memorialized its agreement to indemnify EDE Este for its losses as a result of the Republic’s unilateral modification of the regulatory structure it established in 1998. In Article 1 of that agreement, the Republic “and its bound entities” recognized and accepted responsibility for indemnifying the private electricity distributors for the losses. Article 1 specifically recognized the goal of “regain[ing] the economic balance necessary to maintain sustainability in the National Interconnected Electric System in proportion to their participation in the same.” In the Points of Framework Agreement, the Republic agreed to indemnify the electricity companies for US\$32.5 million as a result of its failure to pay previous indemnities, and specifically promised that EDE Este would receive US\$10 million of this amount. See Section 4.

(e) In March 2005, EDE Este signed a General Sector Agreement with the Republic. This General Sector Agreement (1) stated that the accumulated debt of sector participants would be frozen until the end of 2005, (2) committed stakeholders to stay current on payment obligations arising in 2005, including interest on outstanding debt, and (3) promised a US\$350 million government indemnity to the electricity sector to fill the projected sector deficit.⁸¹

Although the Republic’s promises to indemnify and its repeated repudiations of those promises are complex matters and those facts continue to be developed, the Republic has made at least four sets of promises, each of which had its own mechanism for indemnification.

⁸¹ Amended Statement of Claim ¶ 83.

1. Promise to Indemnify EDE Este for US ½ Cent Per Kilowatt Hour For 14 Years

46. In 2001, fuel prices rose and the Republic made the political decision to postpone increases in rates to the customer. To compensate the distribution companies, the Republic agreed to increase the cost of distribution component of the tariff by approximately 1/2 cent (in US Dollars) per Kilowatt hour beginning in August 2003 and continuing for 14 years.⁸²
47. EDE Este has repeatedly asked for the implementation of this US 1/2 cent increase in the cost of distribution component, but has yet to receive the increase or an explanation from the Republic.⁸³ The continuing failure to pay this US 1/2 cent per Kilowatt hour has caused significant losses to EDE Este. This amount should have been part of the Total Cost Tariff that EDE Este was allowed to pass through, but was not permitted to do so by the Republic.

2. The Establishment of the Stabilization Fund and The Republic's Repudiation of Indemnification from the Fund

48. As set forth in paragraph 83(c) of the Amended Statement of Claim, on March 31, 2003, the Republic issued Presidential Decree 302-03, which created a Stabilization Fund to indemnify EDE Este for losses resulting from the Republic's failure to implement the 1998 Tariff Resolutions.⁸⁴
49. After Decree 302-03 was implemented, the Republic ratified its promise to pay with partial payments to EDE Este in November 2003, February 2004, October 2004, November 2004

⁸² See SEIC Resolution 113-01 at 3 ("For a period of fourteen (14) years, commencing in the month of August 2003, in other words until August 2017, the Superintendence of Electricity or whomsoever replaces it in its electricity market regulatory functions, shall recognize the additional cost of the Distributors referred to in this Resolution...") (Cl. Ex. 10); Presidential Decree 102-01 (Cl. Ex. 11); SEIC Resolution 007-01 (Cl. Ex. 12).

⁸³ See Letter from Aníbal Mejía to SIE dated 21 July 2005, at 5 (Cl. Ex. 13).

⁸⁴ See Amended Statement of Claim ¶ 83(c).

and in February 2005.⁸⁵ Since that time, the Republic has not made any payments from the Stabilization Fund.⁸⁶ It now owes EDE Este well over US\$65 million from it.

3. The Representations Contained in the “Points of Framework Agreement for the Sustainability of Electric Generation” and the Republic’s Repudiation of That Agreement

50. As set forth in paragraph 83(d) of Claimants’ Amended Statement of Claim, on February 11, 2004, the Republic memorialized its agreement to pay no less than \$10 million to EDE Este in the “Points of Framework Agreement for the Sustainability of Electric Generation in the Republic.”⁸⁷
51. As of the present date, the Republic has not paid this amount or the substantial interest that has accrued on it.⁸⁸

4. The Representations Contained in the General Sector Agreements of 2005, 2006, 2007 and 2008 and the Republic’s Repudiation of those Agreements

52. The Republic has repeated — and broken — its promises to indemnify EDE Este on many occasions **after** CAFTA-DR came into force on March 1, 2007.⁸⁹
53. Beginning in 2005, and consistent with its legal obligation to oversee the sector,⁹⁰ the Republic agreed to indemnify the distribution companies through a series of General Sector Agreements.

⁸⁵ See Thomas Decl. ¶ 16.

⁸⁶ See *id.* ¶ 16.

⁸⁷ See Amended Statement of Claim ¶ 83(d).

⁸⁸ See *id.* ¶ 87.

⁸⁹ See “Reconocen deuda con Edeeste,” *El Nacional*, 18 Jan. 2005 (SIE recognized that the government undoubtedly owes AES for nonpayment of subsidy, contradicting CDEEE’s denials of that debt. The SIE representative said he did not know why those amounts were not paid promptly, and noted that they prevented EDE Este from adjusting its tariff) (Cl. Ex. 14).

54. In each agreement, the sector participants agreed to (1) freeze the accumulated debts of sector participants for a set period of time⁹¹ and (2) stay current on payment obligations arising in the upcoming year, including interest on outstanding debt.⁹²
55. In addition, the Republic promised a government indemnity to the electricity sector to fill the projected sector deficit.⁹³ The Republic promised that monthly payments made to electricity distributors would come from (1) collections from consumers and “Government Institutions Not Subject to Cuts,” and (2) “contributions” from the Republic via the National Budget designated to cover the cash deficit.⁹⁴
56. The Republic has repeatedly breached these post-2004 promises to indemnify EDE Este. Instead, although it has made many substantial payments to EDE Este, the Republic refuses to allow EDE Este to record such payments in its financial statements as an indemnity — *i.e.*, as revenue. The Republic has insisted, in breach of its representations, that EDE Este treat the payments not as an indemnity, but as loans, offsets or other accounts payable to the Republic.⁹⁵

(...continued)

⁹⁰ See Law 125-01, Art. 4 (Cl. Ex. 6).

⁹¹ See Amended Statement of Claim ¶ 83(e); 2005 General Sector Agreement, Art. 4 (Cl. Ex. 15); 2006 General Sector Agreement, Art. 5 (Cl. Ex. 16); 2007 General Sector Agreement, Art. 5 (Cl. Ex. 17); 2008 General Sector Agreement, Art. 5 (Cl. Ex. 18).

⁹² See 2005 General Sector Agreement, Arts. 3 & Art. 4(I) (Cl. Ex. 15); 2006 General Sector Agreement, Arts. 3 & 5(I) (Cl. Ex. 16); 2007 General Sector Agreement Arts. 3 & 5(III) (Cl. Ex. 17); 2008 General Sector Agreement, Arts. 3 & 5(III) (Cl. Ex. 18).

⁹³ See 2005 General Sector Agreement at Addendum III (Cl. Ex. 15); 2006 General Sector Agreement Art. 3(III)(B) (Cl. Ex. 16); 2007 General Sector Agreement Whereas Clause #4, Art. 3(V) (Cl. Ex. 17); 2008 General Sector Agreement, Arts. 3(V)(B) & 5(IV) (Cl. Ex. 18).

⁹⁴ See 2005 General Sector Agreement, Art. 3(III) (Cl. Ex. 15); 2006 General Sector Agreement Art. 3(III) (Cl. Ex. 16); 2007 General Sector Agreement, Art. 3(III) (Cl. Ex. 17); 2008 General Sector Agreement, Art. 3(V) (Cl. Ex. 18).

⁹⁵ See Amended Statement of Claim ¶ 87; Thomas Decl. ¶¶ 27-29.

57. The Republic's "loans" have resulted in a growing debt for EDE Este.⁹⁶ The cumulative total of these "loans," purported accounts payable to the Republic and other unpaid indemnification as of December 2008 exceeds US\$440 million.⁹⁷ This "debt" will continue to grow so long as the Republic continues to refuse to implement the Total Cost Tariff.⁹⁸
58. The Republic's plan is clearly to force EDE Este into bankruptcy.⁹⁹ In part because the Republic insists on treating its payments as loans, the accumulated Shareholders Deficit is now RD\$23,918,753,000 — approximately US\$680 million.¹⁰⁰ Upon liquidation, the Republic will attempt to position itself as EDE Este's largest creditor, and as a creditor, its rights will be legally superior to Claimants' rights as equity owners. The Republic will thus assume total ownership of EDE Este — an economic seizure that effectively has already occurred — entirely displacing Claimants' equity interest.¹⁰¹
59. Moreover, Respondent is actively pursuing its plan to re-nationalize EDE Este illegally by exploiting the debt it forced upon EDE Este as an excuse to assume operational control and extinguish Claimants' rights under the Concession Agreement.¹⁰² Despite its representations to the tribunal in the arbitration in *Société Générale v. Dominican*

⁹⁶ See Thomas Decl. ¶¶ 27 & 28; Amended Statement of Claim ¶¶ 75, 87.

⁹⁷ See Thomas Decl. ¶ 28.

⁹⁸ See *id.* ¶¶ 27 & 28.

⁹⁹ See *id.* ¶¶ 27-29.

¹⁰⁰ See *id.* ¶ 30.

¹⁰¹ See *id.* ¶ 30.

¹⁰² See Letter of Ing. Radhames Segura to Sr. R. Blair Thomas and Sr. Fernando Rosa dated February 7, 2009 (Cl. Ex. 19). See also Letter from Christopher F. Dugan to Members of the Tribunals (17 Jan. 2009); Letter from John J. Kerr, Jr. to the Members of the Tribunals (20 Jan. 2009 (Cl. Ex. 20).

Republic,¹⁰³ the Republic represented to the tribunal in the parallel ICC Concession Agreement arbitration that it intends to intervene and re-nationalize EDE Este.¹⁰⁴ The Republic's efforts to intervene and re-nationalize EDE Este constitute a consistent course of conduct whereby the Republic seeks to prevent Claimants from running EDE Este profitably. By seeking to extinguish Claimants' rights under the Concession Agreement and take control of EDE Este, the Republic now seeks to effect an expropriation through improper and illegal means.

60. Consequently, as discussed below, the Republic's insistence on treating its payments as a loan — and its sustained effort to illegally re-nationalize EDE Este — have resulted in a “creeping” expropriation of Claimants' equity investment in EDE Este. This creeping expropriation — by creating a huge and growing debt for EDE Este — would not have been possible if the Republic had honored its promises to implement a Total Cost Tariff or indemnify EDE Este.

IV. CLAIMANTS' AMENDED STATEMENT OF CLAIM AND THIS COUNTER-MEMORIAL PROVIDE ABUNDANT AND DETAILED FACTUAL ALLEGATIONS IN SUPPORT OF JURISDICTION

61. In an improper effort to undermine the factual allegations that Claimants set forth in their Amended Statement of Claim, Respondent complains that “Claimants' Statement of Claim relies on vague and speculative statements which pointedly avoid specifying the dates on

¹⁰³ See Transcript of Proceedings on Jurisdiction (15 Apr. 2008) at 413 (Kerr: Let me state right now that the Government has no plan to force EDE Este into liquidation.) (Cl. Ex. 21).

¹⁰⁴ See Letter from Christopher F. Dugan to Members of the Tribunals (17 Jan. 2009; Letter from John J. Kerr, Jr. to the Members of the Tribunals (20 Jan. 2009)) (Cl. Ex. 20); see also Letter of Ing. Radhames Segura to Sr. R. Blair Thomas and Sr. Fernando Rosa dated February 7, 2009 (Cl. Ex. 19);

which the acts and events allegedly took place.”¹⁰⁵ These are curious arguments, particularly in light of the detailed allegations that Claimants set forth in their 152-paragraph Amended Statement of Claim. Respondent’s position is both unsupported by legal precedent and inaccurate.

62. First, Respondent’s assertions ignore established legal precedent, which requires only “notice” pleadings and allows **both** parties to augment and develop their factual and legal theories as the proceedings advance. As articulated by the Tribunal in *UPS v. Canada*, Article 18(2) of the UNCITRAL Arbitration Rules requires that a statement of claim:

must be specific enough to put the respondent properly on notice so that it can reply adequately in its statement of defence. The tribunal also must be able to understand the essence of the claim. **An exhaustive statement of the facts or of the evidence supporting the claim is not required.**¹⁰⁶

63. Likewise, claimants — such as the claimants in this case — are entitled and expected to develop and expand upon claims set forth in their Amended Statement of Claim.¹⁰⁷ The Republic cites no legal authority that requires a Statement of Claim to detail each and every

¹⁰⁵ See Respondent’s Jurisdictional Memorial ¶ 23.

¹⁰⁶ See *UPS v. Canada* (Award on Jurisdiction), UNCITRAL/NAFTA (22 Nov. 2002) ¶ 127 (emphasis added) (Cl. Auth. 30). See also DAVID D. CARON, LEE M. CAPLAN, & MATTI PELLONPÄÄ, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* 396 (2006) (noting that a heightened pleading requirement of a “full statement of facts and a summary of evidence supporting the facts” was considered — and rejected — by the drafters of the UNCITRAL Rules in favor of a “more general description of the alleged facts” at the jurisdictional stage) (Cl. Auth. 34).

¹⁰⁷ See ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* ¶ 6-53 (4th ed. 2004) (“The UNCITRAL Rules clearly envisage that the initial written pleadings submitted by the parties are not to be considered as final and definitive statements of the parties’ respective positions.”) (Cl. Auth. 37); see also *RosInvestCo UK Ltd. v. Russian Federation* (Award on Jurisdiction), SCC Case No: Arbitration V 079/2005 (Oct. 2007) ¶¶ 53-55 (finding that even the inclusion of an entirely new claim does not require an amendment of the statement of claim where a party has adequate opportunity to respond to an issue raised by an opposing party) (Cl. Auth. 26).

date, fact or subsidiary legal theory it will rely upon; indeed the authorities are to the contrary.¹⁰⁸

64. Second, Claimants' Amended Statement of Claim provides abundant and specific factual allegations and even evidence that are sufficient to put the Republic on notice of its actions, demonstrate the continuing and composite nature of the Republic's actions and omissions. Claimants have far exceeded their "notice" pleading requirement and provided factual detail that goes well beyond the burden required at this jurisdictional phase of the Arbitration.
65. Third, the examples that Respondent cites in its Memorial merely prove Claimants' point: out of the hundreds of sentences in the Amended Statement of Claim, Respondent points to only nine that allegedly are vague.¹⁰⁹ At the very least, Respondent must therefore agree that those *other* portions of the Amended Statement of Claim are satisfactory. Moreover, many of the examples that Respondent points to as vague are merely because they are continuing and composite violations that are ongoing, as discussed further below.
66. Fourth, as discussed above, the Respondent's attempt to dismiss as "vague and speculative"¹¹⁰ the Claimants' factual allegations — which are buttressed by uncontroverted evidence — must be rejected because the Claimants are not required to **prove** but only **allege** facts at this jurisdictional stage. Claimants have therefore met the

¹⁰⁸ Article 18 of the UNCITRAL Rules requires a Claimant to include "points at issue" in the Statement of Claim. *See* United Nations Commission on International Law Arbitration Rules, Art. 18(2)(c) (1976) (Cl. Auth. 3). This requirement "does not necessitate a final elaboration of the legal theories supporting the claim." *See* DAVID D. CARON, *supra*, note 102, at 396 (Cl. Auth. 34).

¹⁰⁹ *See* Respondent's Jurisdictional Memorial ¶¶ 24-25.

¹¹⁰ *See id.* ¶¶ 23-25.

standard of alleging claims that fall under Chapter 10 of CAFTA-DR, thus providing this Tribunal with jurisdiction over the claims set forth in their Amended Statement of Claim.

ANALYSIS AND ARGUMENT

I. FOR PURPOSES OF JURISDICTION, THIS TRIBUNAL SHOULD DETERMINE ONLY WHETHER CLAIMANTS ALLEGE *PRIMA FACIE* CLAIMS THAT THE REPUBLIC HAS VIOLATED CAFTA-DR

67. As the Republic recognizes, the Tribunal’s power to assert jurisdiction *ratione materiae* over the dispute derives from the Treaty and UNCITRAL Arbitration Rules.¹¹¹
68. First, as the Republic also acknowledges, the Tribunal’s task at jurisdiction is not to consider the merits or particular legal standards of Claimants’ claims, but solely to determine whether the claims fall under the Treaty.¹¹² CAFTA-DR specifically provides that a claimant need only present a *prima facie* case supporting its claims at the jurisdiction phase of arbitration, and the tribunal “shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof)[.]”¹¹³
69. Second, Article 10.22 of CAFTA DR provides that “when a claim is submitted ... the tribunal shall decide the issues of the dispute in accordance with this [Treaty] and

¹¹¹ See Respondent’s Jurisdictional Memorial ¶¶ 46-47.

¹¹² See *id.* ¶ 46 n. 102 (“When considering its jurisdiction to entertain the Treaty Claims, the Tribunal considers that it must not make findings on the merits of those claims, which have yet to be argued, but rather **must satisfy itself that it has jurisdiction over the dispute, as presented by the Claimant.** This has been recognized by the ICJ and by arbitral tribunals in many cases.”) (quoting *Impregilo S.p.A. v. Islamic Republic of Pakistan* (Decision on Jurisdiction), ICSID Case No. ARB/03/3 (22 Apr. 2005) ¶ 237) (emphasis added) (Cl. Auth. 13); see also *Pope & Talbot, Inc. v. Canada* (Award on Motion to Dismiss re: Whether Measures “Relate “ to the Investment), NAFTA/UNCITRAL (26 Jan. 2000) ¶ 25. (Cl. Auth. 23).

¹¹³ See CAFTA-DR Art. 10.20.4(c) (Cl. Auth. 1). See also *Ethyl Corp.* ¶ 61 (Cl. Auth. 12).

applicable rules of international law.”¹¹⁴ Thus, the Tribunal possesses jurisdiction over the “issues of the dispute” as presented in Claimants’ claims.

II. CLAIMANTS HAVE PROPERLY WAIVED THEIR RIGHTS UNDER CAFTA-DR ARTICLE 10.18.2

70. The Republic attempts to deny the Claimants a forum for their claims by inaccurately asserting that “Claimants’ purported waiver of rights to pursue other proceedings with respect to the measures at issue in this case is invalid.”¹¹⁵ Respondent’s position should be rejected.

A. The Republic May Not Bypass the Express Language of CAFTA-DR Article 10.18.2

71. Consistent with the ordinary meaning of CAFTA-DR Articles 10.18.2 and 10.16.1(a), Claimants have properly waived their rights to initiate or continue any other proceedings with respect to any measures alleged to be a breach of CAFTA-DR.¹¹⁶ The Republic’s contention to the contrary is based on the false premise — contradicted by the language and structure of Article 10.18.2 and the Treaty — that an arbitration initiated or continued by **different claimants** in different arbitrations invalidates Claimants’ waivers with respect to their own rights under CAFTA-DR.

72. Article 10.18.2 of DR-CAFTA expressly requires that “**the claimant**” waive its own rights to other proceedings with respect to a measure alleged to constitute a breach of CAFTA-

¹¹⁴ See CAFTA-DR Art. 10.22 (Cl. Auth. 1); Respondent’s Jurisdictional Memorial ¶¶ 46-47.

¹¹⁵ See Respondent’s Jurisdictional Memorial, Header above ¶ 35. See also *id.* ¶¶ 18, 29-38.

¹¹⁶ See Claimants’ Amended Statement of Claim ¶ 24; see also CAFTA-DR Arts. 10.18.2, 10.16.1(a) (Cl. Auth. 1).

DR. Respondent's objection to Claimants' waiver is fatally flawed because Respondent tries to bypass this express language and focus only on whether the measures at issue in this Arbitration are the same "measures" at issue in other arbitrations.¹¹⁷

73. The language and structure of Article 10.18.2 make clear that the waiver applies to the Claimants' own rights and **not** to the rights of other potential claimants who are not parties to this CAFTA-DR Arbitration. Article 10.18.2 ("Conditions and Limitations on Consent of Each Party") — which Respondent never quotes in full in its Memorial perhaps so that it may try to hide this fact — provides:

2. No claim may be submitted to arbitration under this Section unless:

(a) **the claimant** consents in writing to arbitration in accordance with the procedures set out in this Agreement; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 10.16.1(a), by **the claimant's** written waiver, and

(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

3. Notwithstanding paragraph 2(b), **the claimant** (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that

¹¹⁷ See Respondent's Jurisdictional Memorial ¶ 34 ("Thus, the Tribunal's task when interpreting Article 10.18(2) is simple: it need inquire only whether the same measures form the basis of the claims in this [arbitration] and the several proceedings that Claimants are pursuing in parallel.").

seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.¹¹⁸

74. CAFTA-DR Article 10.16 ("Submission of a Claim to Arbitration"), like Article 10.18.2, gives a claimant the option of submitting a claim either on its own behalf or on behalf of the investment. Article 10.16 reads in relevant part:

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
 - (a) **the claimant, on its own behalf**, may submit to arbitration under this Section a claim ...
 - (i) that the respondent has breached
 - (A) an obligation under Section A,
 - (B) an investment authorization, or
 - (C) an investment agreement; and
 - (ii) that **the claimant** has incurred loss or damage by reason of, or arising out of, that breach; and
 - (b) **the claimant, on behalf of an enterprise** of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim¹¹⁹

¹¹⁸ CAFTA-DR Art. 10.18.2 (emphasis added) (Cl. Auth. 1). Chapter 2, Article 2.1 of CAFTA-DR defines "enterprise" as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association." *Id.* Art. 2.1.

¹¹⁹ CAFTA-DR Art. 16.1(a)-(b) (Cl. Auth. 1). *See id.* Annex 10-E (recognizing the distinction between claims brought on a claimant's own behalf, and claims brought on behalf of an enterprise).

The enterprise here is EDE Este, and Claimants expressly have **not** made a claim on behalf of EDE Este.

75. Claimants have expressly initiated claims pursuant to Article 10.16.1(a) and **only on their own behalf** — and not on behalf of Société Générale or EDE Este.¹²⁰
76. Claimants need only waive their own claims and not the claims of other potential claimants. CAFTA-DR Article 10.18.2 specifically acknowledges this legal distinction. It states that a claimant that submits a claim pursuant to Article 10.16.1(a) need only submit a waiver “on its own behalf,” whereas a claimant who submits a claim pursuant to Article 10.16.1(b) submits a waiver **both** on its own behalf **and** “on behalf of an enterprise.”¹²¹ There would be no need for the parties to CAFTA-DR to distinguish in Article 10.18.2 between the waiver requirements for claimants submitting on their own behalf under Article 10.16.1(a), and claimants submitting on behalf of their investments under Article 10.16.1(b), if CAFTA-DR did not intend for the waiver requirements to apply only to the entity or entities on whose behalf a claim is brought.¹²²

¹²⁰ See Claimants’ Amended Statement of Claim ¶ 21 (“Claimants bring claims **on their own behalf** pursuant to CAFTA-DR Article 10.16.1(a) for the Republic’s violations of obligations under Section A, Chapter 10 of CAFTA-DR.”) (emphasis added). See also *id.* ¶ 24.

¹²¹ See CAFTA-DR Art. 10.18.2(b)(i) and (ii) (Cl. Auth. 1).

¹²² See e.g., *Asian Agriculture Products Ltd. v. Republic of Sri Lanka* (Final Award), ICSID Case No. ARB/87/3 (27 Jun. 1990) ¶ 40 (“Rule (E) – ‘Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. This is simply an application of the more wider legal principle of ‘*effectiveness*’ which requires favouring the interpretation that gives to each treaty provision ‘*effet utile*’.”) (citation omitted) (Cl. Auth. 5).

77. The decisions in *Waste Management Inc. v. United Mexican States and Railroad Development Corp. v. Republic of Guatemala*, upon which Respondent relies,¹²³ both recognize this crucial distinction and clearly support Claimants. Respondent cites those awards for the proposition that proceedings brought by the local enterprise under domestic law defeat the investor’s NAFTA (or CAFTA-DR) waiver.¹²⁴ However, in both of those arbitrations, the claimants brought claims not only on their own behalf **but also on behalf of the local investment**.¹²⁵ Accordingly, the findings by the tribunals in *Waste Management* and *Railroad Development* that domestic proceedings **pursued by the same claimants that brought the NAFTA/CAFTA-DR claims** invalidated the waiver with respect to those claims are neither surprising nor supportive of Respondent’s position in this Arbitration. Respondent’s attempt to rely on those arbitral awards must fail, because in those arbitrations, the claimants bringing domestic proceedings were the same claimants bringing NAFTA/CAFTA-DR claims.¹²⁶ That is not the case here.

¹²³ See *Waste Mgmt. Inc. v. United Mexican States* (Arbitration Award), ICSID Case No. ARB(AF)/98/2 (2 Jun. 2000) ¶ 11 (Cl. Auth. 31); *Railroad Dev. Corp. v. Republic of Guatemala*, (Decision on Jurisdiction), ICSID Case. No. ARB/07/23 (17 Nov. 2008) ¶ 1 (Cl. Auth. 24).

¹²⁴ See Respondent’s Jurisdictional Memorial ¶¶ 31-36, 38.

¹²⁵ See *Waste Mgmt.* (Arbitration Award) ¶ 11 ([N]otice, in the present case, was served by Waste management **on its own behalf and on behalf of Acaverde ...**) (emphasis added) (Cl. Auth. 31); *Railroad Dev. Corp.* (Decision on Jurisdiction) ¶ 1 (“[T]he Railroad Development Corporation ... filed with the International Centre for Settlement of Investment Disputes ... a Request for Institution of Arbitration Proceedings against the Republic of Guatemala ... **on its own behalf and on behalf of its Compañía Dessarrolladora Ferroviaria, S.A.**, which does business as Ferrovías Guatemala (‘FVG’), a Guatemalan company majority owned and controlled by RDC...” (emphasis added) (Cl. Auth. 24).

¹²⁶ For example, Respondent asserts that domestic proceedings brought by Waste Management’s investment vehicle in the host-State invalidated Waste Management’s waiver under NAFTA. However, Respondent fails to point out that Waste Management’s claims were brought on behalf of both Waste Management *and* the local investment vehicle, and therefore the waiver in that case applied to both companies. See Respondent’s Jurisdictional Memorial ¶ 36 n.77.

78. Moreover, the CAFTA-DR waiver requirement differs from the NAFTA requirement on exactly this critical point. Under NAFTA, a claimant who submits a claim only on its own behalf under NAFTA Article 1116¹²⁷ — and not on behalf of an enterprise under Article 1117¹²⁸ — still must waive its right to pursue proceedings on behalf of itself **and** the enterprise pursuant to NAFTA Article 1121 (“Conditions Precedent to Submission of a Claim to Arbitration”). NAFTA Article 1121 provides in relevant part that:

[a] disputing investor may submit a claim under Article 1116 only of:

(b) **the investor and**, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, **the enterprise**, waive the right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement proceedings....¹²⁹

Whereas NAFTA expressly requires that an investor waive rights on behalf of an investment/enterprise even when it submits a claim only on its own behalf, CAFTA-DR — which was drafted after NAFTA — expressly permits an investor submitting a claim on its own behalf to waive only its own rights to pursue other proceedings. As noted above, basic principles of treaty interpretation compel the Tribunal not to deny the meaning of this distinction.¹³⁰

79. Claimants have expressly submitted valid waivers that comply with Article 10.18.2 with respect to their own rights and their own claims that relate to measures at issue in the

¹²⁷ See North American Free Trade Agreement, U.S.-Can.-Mex., 17 Dec. 1992 (NAFTA) Art. 1116 (“Claim by an Investor of a Party on its Own Behalf”) (Cl. Auth. 2).

¹²⁸ See NAFTA Art. 1117 (“Claim by an Investor of a Party on Behalf of An Enterprise”) (Cl. Auth. 2) .

¹²⁹ See *id.* Art. 1121 (emphasis added).

¹³⁰ See *e.g.*, *Asian Agriculture* ¶ 40 (Cl. Auth. 5).

Arbitration,¹³¹ and they have continued to comply with their waivers since initiating the Arbitration.

B. Claimants' Interests in this Arbitration are Distinct from Other Claimants' Interests in Other Parallel Arbitrations

80. Although Article 10.18.2 of CAFTA-DR requires a claimant to forgo other dispute settlement proceedings with respect to claims brought under Chapter 10, it does not require that Claimants forgo their right to bring any claims under the Chapter simply because other claimants also are pursuing their rights in other arbitrations. Claimants' interests in this CAFTA-DR Arbitration are distinct from the claimants' interests in other arbitrations that concern the Republic's treatment of EDE Este.¹³²

81. First, the Arbitral Tribunal's Jurisdiction Award in *Société Générale v. Dominican Republic* underscores this point.¹³³ The tribunal in that arbitration specifically limited the jurisdiction of the tribunal to the French claimant Société Générale, and not to other companies in the ownership chain, including Claimants.¹³⁴ The Tribunal's award stated that "[t]he tribunal has jurisdiction *ratione materiae* to the extent of the **Claimant's rights in the chain of interests and investment**; ... The Tribunal has jurisdiction *ratione personae* to the extent of the Claimant's interest as a **protected French national**[.]"¹³⁵

Therefore, although Respondent attempts to conflate as one claimant Société Générale,

¹³¹ See Claimants' Amended Statement of Claim ¶ 24.

¹³² See CAFTA-DR Art. 10.18.2 (Cl. Auth. 1).

¹³³ See *Société Générale* (Award on Preliminary Objections to Jurisdiction) ¶¶ 117 -121(Cl. Auth. 28).

¹³⁴ *Id.*

¹³⁵ *Id.* ¶ 121 (emphasis added).

TCW, DREH and EDE Este — even though each is acting on its own behalf with respect to its own interests and claims in different arbitrations — the tribunal in *Société Générale v. Dominican Republic* has rejected such a conflation by excluding all interests except Société Générale’s from any damages award in that arbitration.

82. Second, as Respondent knows, its alleged concern about multiple recovery has already been addressed, as discussed above. To the extent that the different arbitrations that the Republic has created might result in duplicative damages for the different companies with different interests in EDE Este, Société Générale and its subsidiaries, including Claimants, have stipulated that they will not seek duplicative recovery.¹³⁶
83. Third, the Republic’s alleged concern that Claimants’ Arbitration may potentially result in multiple recoveries or conflicting awards is belied by Respondent’s own actions.¹³⁷ As discussed above, Respondent has unreasonably refused to consolidate the parallel arbitrations, which involve different claimants, different interests, different treaties or legal instruments, and different legal claims.¹³⁸ The allegedly “abusive” and “vexatious”¹³⁹ arbitrations could have easily been settled in a single arbitration if the Republic had acted in accordance with its own rhetoric and agreed to consolidate disputes into a single proceeding. The proliferation of proceedings is the fault of Respondent, not the Claimants.

¹³⁶ See *Société Générale in Respect of DR Energy Holdings Ltd. and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic* (Claimant’s Rejoinder to Respondent’s Reply Memorial on Jurisdiction), LCIA Case No. UN 7927 (21 Mar. 2008) ¶ 18 (Cl. Ex. 3).

¹³⁷ See Respondent’s Jurisdictional Memorial ¶¶ 33 n.70.

¹³⁸ See Letter from P. Thomas to J. Profaizer dated 21 Dec. 2007 (Cl. Ex. 1); Letter from J. Kerr to Members of the Arbitral Tribunal dated 17 Jan. 2008 (Cl. Ex. 22); Letter from J. Kerr to Members of the Arbitral Tribunal dated 8 Feb. 2008 (Cl. Ex. 23).

¹³⁹ See Respondent’s Jurisdictional Memorial ¶ 18.

84. Fourth, Respondent's objection to Claimants' waiver of rights is simply yet another attempt to deny EDE Este's owners any forum for their disputes with the Republic.¹⁴⁰ The Republic's agenda is made clear by the fact that the Republic has objected to the jurisdiction of every tribunal constituted to hear any claims with respect to the Republic's treatment of EDE Este, as well as by the fact that the Republic refused to consolidate the disputes even when doing so was clearly in the interest of efficiency, fairness, and the parties' costs. In this instance, the clear terms of CAFTA-DR Articles 10.18.2 and 10.16.1 support the validity of Claimants' waiver and require the Tribunal to reject Respondent's over-reaching attempt to have the Tribunal deny jurisdiction because other claimants continue to pursue their claims against Respondent. Respondent's refusal to consolidate arbitrations demonstrates that Respondent, not the Claimants, is the cause of the parallel proceedings, and that refusal estops Respondent from objecting to the proceedings in this Arbitration.
85. Finally, if the Tribunal were to deem Claimants' waiver defective in any way with respect to any claim (which it is not), Claimants respectfully request that they be permitted to (1) pursue the Arbitration with respect to claims for which the waiver is valid¹⁴¹ and (2) remedy any alleged defect and re-submit their Amended Statement of Claim.¹⁴²

¹⁴⁰ See *Empresa Distribuidora de Electricidad del Este, S.A. v. Corporación Dominicana de Empresas Eléctricas Estatales* (Respondent's Answer to the Request for Arbitration of Empresa Distribuidora de Electricidad del Este and Counterclaim), ICC Case No. 15749/JRF (4 Nov. 2008) (objecting to the ICC Tribunal's jurisdiction over EDE Este's claims) (Cl. Ex. 24); see also *Empresa Distribuidora de Electricidad del Este, S.A. v. Corporación Dominicana de Empresas Eléctricas Estatales* (Claimant's Reply to Respondent's Counterclaims), ICC Case No. 15749/JRF (12 Dec. 2008) ¶ 10 (Cl. Ex. 25).

¹⁴¹ See *Railroad Dev. Corp.* (Decision on Jurisdiction) ¶ 72 (holding that the Arbitration can proceed, even if a waiver is defective with respect to specific claims) (Cl. Auth. 24); see also *Railroad Dev. Corp. v. Republic of Guatemala* (Decision on Clarification Request of the Decision (continued...))

III. CLAIMANTS OWN AND CONTROL AN “INVESTMENT” IN THE DOMINICAN REPUBLIC OVER WHICH THIS TRIBUNAL SHOULD ASSUME JURISDICTION

86. Respondent asserts that “CAFTA-DR protects only investments having ‘the characteristics of an investment’” and that Claimants cannot show that their interest in EDE Este possesses those characteristics.¹⁴³ Respondent’s argument should be dismissed.

A. Claimants Own and Control an Investment in the Dominican Republic: EDE Este

87. Article 10.1 of CAFTA-DR provides that Chapter 10 broadly “applies to measures adopted or maintained by [the Republic] **relating to** investors . . . [and] covered investments” of the United States.¹⁴⁴ Claimants are clearly “investors” of the United States as defined in Article 10.28 of CAFTA-DR with an “investment” as defined by that same Article. Article 10.28 of CAFTA-DR defines “investor of a Party” as:

... a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality[.]¹⁴⁵

(...continued)

on Jurisdiction) ¶ 13 ICSID Case. No. ARB/07/23 (13 Jan. 2009) (noting that “Article 10.5 provides for the minimum standard of treatment under customary international law. This is a general and wide ranging standard of treatment that may cover claims based on other measures taken by Respondent beyond those at issue in the local arbitrations.”) (Cl. Auth. 25).

¹⁴² See *Waste Mgmt. Inc. v. United Mexican States* Mexico’s Preliminary Objection Concerning the Previous Proceedings (Decision of the Tribunal), ICSID Case No. ARB(AF)/00/3 (26 Jun. 2002) ¶ 37 (recognizing claimant’s right to remedy a defective waiver and resubmit its claim); see also *id.* ¶ 28 (quoting Respondent’s memorial in *Methanex Corp. v. United States* (Memorial on Jurisdiction and Admissibility of Respondent United States of America) (13 Nov. 2000) at 77, acknowledging the same (Cl. Auth. 32).

¹⁴³ See Respondent’s Jurisdictional Memorial ¶ 39.

¹⁴⁴ CAFTA-DR Art. 10.1 (emphasis added) (Cl. Auth. 1).

¹⁴⁵ *Id.* Art. 10.28.

88. Claimants are “enterprise[s]” constituted and organized under the law of the States of Nevada and Delaware (respectively) of the United States of America with headquarters located in the United States.¹⁴⁶ EDE Este is a legal entity incorporated in the Dominican Republic in accordance with its legislation and is indirectly owned and controlled by Claimants.

89. Claimants also possess “investments” as defined under CAFTA-DR by virtue of their ownership interest in, and control of, EDE Este. Although Respondent does not acknowledge it in its Memorial, Article 10.28 of CAFTA-DR defines “investment” as:

every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) **an enterprise;**
- (b) **shares, stock, and other forms of equity participation in an enterprise;**
- (c) bonds, debentures, other debt instruments, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, **management**, production, **concession**, revenue-sharing, **and other similar contracts;**
- (f) intellectual property rights;
- (g) **licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;** and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges[.]¹⁴⁷

¹⁴⁶ See *id.* Under Article 10.28, “‘enterprise’ means an enterprise as defined in Article 2.1 (Definitions of General Application), and a branch of an enterprise.” Article 2.1 states that “‘enterprise’ means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association[.]” *Id.* Art. 2.1.

¹⁴⁷ *Id.* Art. 10.28 (internal footnotes omitted) (emphasis added).

90. Claimants expressly fulfill four of the specific definitions of “investment” under subparts (a), (b), (e) and (g) of Article 10.28. Specifically:
- a. Under Article 10.28(a), Claimants indirectly own and (to the extent possible in the circumstances) control “an enterprise,” namely, EDE Este;
 - b. Under Article 10.28(b), Claimants indirectly own and control 50% of the “stock[] and other forms of equity participation” in EDE Este, a legal entity incorporated in the Dominican Republic in conformity with its legislation;
 - c. Under Article 10.28(e), Claimants’ controlling interest in the 40-year Concession Agreement by virtue of their controlling interest in EDE Este clearly qualifies as Claimants’ “investment”; and
 - d. Under Article 10.28(g), Claimants, through their controlling interest in the 40-year Concession Agreement and the other Basic Contracts, possess “licenses, authorizations, permits and similar rights conferred pursuant to domestic law.”
91. Claimants are plainly investors of the United States with an investment — EDE Este — in the Dominican Republic. As demonstrated above, the Investment is not the price that was paid, but the assets that were purchased. Nowhere in the definition of “Investment” under CAFTA-DR is the purchase price paid for the Investment. Under the express terms of the Treaty, it is the asset that Claimants purchased — the majority ownership of EDE Este and its accompanying rights — not the purchase price that constitutes the Investment. Indeed, Claimants are aware of no tribunal decision that holds that it is the purchase price, and not

the asset, that reflects the Investment.¹⁴⁸ Thus, it should be clear that, for jurisdictional purposes, Claimants' ownership and control of EDE Este — which includes the Concession Agreement and all other interests in EDE Este — is clearly the “Investment” in this Arbitration.

B. EDE Este Clearly Possesses the Characteristics of an Investment

92. Claimants' investment in the Dominican Republic — EDE Este — also possesses the characteristics of an “investment” as defined by Article 10.28 of CAFTA-DR.
93. Although Respondent fails to accurately quote Article 10.28,¹⁴⁹ Claimants nevertheless indirectly own and control assets that “**includ[e]**¹⁵⁰ such characteristics as [1] the commitment of capital **or other resources**, [2] the expectation of gain or profit, **or** [3] the assumption of risk.” EDE Este has all three of these characteristics of an investment — and at least two more that Respondent acknowledges are relevant but that not expressly set forth in the definition.
94. First, Claimants' investment in EDE Este reflects a commitment of “capital or other resources.” Although Respondent tries to evade the “or other resources” words in the

¹⁴⁸ See, e.g., *Mihaly Int'l Corp. v. Democratic Socialist Republic of Sri Lanka* (Award), ICSID Case No. ARB/00/2 (15 Mar. 2002) ¶ 51 (“the question whether an expenditure constitutes an investment or not is hardly to be governed by whether or not the expenditure is large or small.”) (Cl. Auth. 20).

¹⁴⁹ See CAFTA-DR, Art. 10 (Section C) (emphasis added) (Cl. Auth. 1). Respondent fails to quote the full definition of “investment” in its Memorial by, among other things, dropping “or other resources” from the definition and replacing the key “or” in the definition with an “and.” See Respondent's Jurisdictional Memorial ¶ 40.

¹⁵⁰ As Respondent admits, this list is intended to non-exhaustive. See Respondent's Jurisdictional Memorial ¶ 40 and 90 (emphasis added).

treaty,¹⁵¹ as demonstrated above, Claimants have committed substantial “other resources” in the form of board-level management time and through numerous efforts to operationally improve EDE Este.¹⁵² For example, Claimants have invested management time and efforts by, among other things, working to make EDE Este more efficient, to improve distribution within EDE Este’s concession area, and to make improvements into the system notwithstanding the Republic’s grossly damaging acts to EDE Este.¹⁵³ These efforts have resulted in operational improvements to, and better operational performance for, EDE Este.¹⁵⁴

95. Moreover, Respondent’s allegation that Claimants have never made “any capital contributions to EDE Este” nor any “other commitment to the financial welfare of EDE Este” is utterly wrong.¹⁵⁵ From 2004 to the present, Claimants have directed EDE Este to reinvest more than US\$100 million back into EDE Este.¹⁵⁶ In addition, the consideration paid for EDE Este — itself a “commitment of capital” — was between US\$50 and US\$60

¹⁵¹ For example, in paragraph 4 of its Memorial, Respondent drops the “or other resources” clause altogether. *See* Respondent’s Jurisdictional Memorial ¶ 4.

¹⁵² *See* Thomas Decl. ¶¶ 15, 24-25.

¹⁵³ *See id.* ¶¶ 15, 24-25.

¹⁵⁴ *See id.* ¶¶ 15, 24-25.

¹⁵⁵ *See* Respondent’s Jurisdictional Memorial ¶¶ 14, 16.

¹⁵⁶ *See* Thomas Decl. ¶ 22. *See Aguas del Tunari, S.A. v. Republic of Bolivia* (Decision on Respondent’s Objections to Jurisdiction), ICSID Case No. ARB/02/3 (21 Oct. 2005) ¶ 247 (The BIT is intended to stimulate investment by the provision of an agreement on how investments will be treated, that treatment including the possibility of arbitration before ICSID. If an investor cannot ascertain whether their ownership of a locally incorporated vehicle for the investment will qualify for protection, then the effort of the BIT to stimulate investment will be frustrated.”) (Cl. Auth. 4).

million.¹⁵⁷ Claimants' investment therefore reflects both a commitment of capital resources as well as other resources, financial and otherwise.

96. Second, Respondent advances the odd argument that "Claimant can have had no reasonable expectation of gain or profit in connection with their interest in EDE Este."¹⁵⁸ This is incorrect. The expectation of gain or profit in Claimants' ownership of EDE Este was precisely the reason why they purchased EDE Este in November 2004.¹⁵⁹ Indeed, the Republic has admitted as much in other portions of its Memorial,¹⁶⁰ and the Tribunal in the France-DR BIT Arbitration has expressly acknowledged this, as well.¹⁶¹
97. Nevertheless, in support of its odd proposition, Respondent observes that AES had written down the shares of DREH and EDE Este to zero and euphemistically refers to the "difficulties facing the Dominican Republic electricity sector."¹⁶² Neither of these facts support Respondent's unusual conclusion. The fact that AES had written down the shares to zero is belied by the fact that when it sold the shares, AES took a US\$17 million gain.¹⁶³ Furthermore, the fact that the Republic had impaired EDE Este from 2000 to 2004 certainly

¹⁵⁷ See Thomas Decl. ¶ 4.

¹⁵⁸ See Respondent's Jurisdictional Memorial ¶ 43.

¹⁵⁹ See Thomas Decl. ¶¶ 6, 10, 13, 31.

¹⁶⁰ See Respondent's Jurisdictional Memorial ¶ 15 ("It now appears that TCW saw the acquisition of shares as an opportunity to obtain a US\$2 option on the upside with little or no downside.").

¹⁶¹ See *Société Générale* (Award on Preliminary Objections to Jurisdiction) ¶ 34 ("It is quite evident that in this case the principal objective of the transaction was the potential profitability of the investment in the hope that the electricity sector in the Dominican Republic would become financially viable, particularly since Société Générale is a financial services company and TCW an investment fund."). (Cl. Auth. 28)

¹⁶² See Respondent's Jurisdictional Memorial ¶ 5.

¹⁶³ See The AES Corporation, 10-K, FYE December 31, 2004, p. 124. (Cl. Ex. 26).

does not mean that Claimants had no expectation of gain or profit for the future. Claimants reasonably expected a gain and profit from EDE Este precisely because there was a reasonable and legitimate expectation that the Republic would begin to abide by its own laws, and because of Claimants' efforts to improve EDE Este even in the difficult circumstances that they have faced.¹⁶⁴ That expectation remains today.¹⁶⁵

98. Third, as demonstrated in detail above, Claimants' purchase of EDE Este represented "an assumption of risk." As discussed above, Respondent's assertions that Claimants did not assume any risk is simply wrong: Claimants have and continue to experience economic risk, legal risk, and reputational risk, among other risks.¹⁶⁶

99. Fourth, as Respondent acknowledges, the characteristics of an investment that are set forth in the definition of "investment" are non-exhaustive.¹⁶⁷ For example, Respondent observes that "investments" have "a certain duration and significance for the host State's development."¹⁶⁸ Such is the case with EDE Este, the last private electricity distribution company in the Dominican Republic. In assuming majority ownership of EDE Este, Claimants have made a substantial commitment to the Dominican Republic and the

¹⁶⁴ See Thomas Decl. ¶¶ 6 & 12-15, 31.

¹⁶⁵ See *id.* ¶¶ 13 & 15.

¹⁶⁶ See also *Société Générale* (Award on Preliminary Objections to Jurisdiction) ¶ 38 "The Claimant has also convincingly argued that the transaction is not exempt from business risks. The mere fact of taking over a business that had heavy losses, which had significantly affected AES as the former investor is a risk the Claimant undertook in the hope of seeing the value of those assets increase in the near future." (Cl. Auth. 28).

¹⁶⁷ See Respondent's Jurisdictional Memorial ¶ 40 n.90.

¹⁶⁸ See *id.*

electricity sector. Claimants' investment was made on November 12, 2004, over three years ago, and the Concession Agreement has a duration of 40 years.¹⁶⁹

100. Moreover, EDE Este unquestionably contributes to the economic development of the Dominican Republic in numerous ways. Electricity is, of course, a necessary utility for any country, and the supply of electricity is imperative for a country's functioning. Claimants' ownership and control of EDE Este contributes to the solution of what has been documented to be its single greatest obstacle to investment in the country — the electricity crisis — because it has allowed EDE Este to continue distributing electricity to the population at a time of crisis in the electricity sector in the Dominican Republic.¹⁷⁰
101. Therefore, under Chapter 10 of CAFTA-DR, Claimants are investors that own and control a covered investment that is protected by the treaty.

IV. CLAIMANTS POSSESS A VIABLE EXPROPRIATION CLAIM UNDER CAFTA-DR ARTICLE 10.7

102. Respondent's Memorial asks the Tribunal to dismiss Claimants' expropriation claim because the supporting facts are allegedly "incapable of constituting" an expropriation.¹⁷¹ The Tribunal should reject Respondent's request.

¹⁶⁹ See Amended Statement of Claim ¶ 66.

¹⁷⁰ See Thomas Decl. ¶¶ 9, 33.

¹⁷¹ See Respondent's Jurisdictional Memorial ¶¶ 51-53.

A. Claimants Have Properly Stated an Expropriation Claim Under CAFTA-DR Article 10.7

103. CAFTA-DR prevents Respondent from illegally expropriating Claimants' investment either directly or indirectly.¹⁷² Claimants' unquestionably have alleged facts capable of constituting both of these tests.

1. Claimants Have Properly Alleged a Direct Expropriation

104. CAFTA-DR Annex 10-C provides that a direct expropriation occurs "where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure."¹⁷³

105. Respondent is currently engaging in a direct expropriation of EDE Este through its attempts to assume an equitable or similar title over EDE Este and through outright seizure. The Republic is illegally requiring EDE Este to distribute electricity below cost and refusing to acknowledge its payments to EDE Este for that electricity as subsidies instead of loans.¹⁷⁴ Through this course of action, the Republic intends to position itself as the equitable title holder of EDE Este.¹⁷⁵ On January 15, 2009, the Republic announced that it would use the sea of debt by which it has been trying to take control of EDE Este for precisely this purpose,¹⁷⁶ and it further confirmed its plan to do so on February 7, 2009.¹⁷⁷ The

¹⁷² See CAFTA-DR Art. 10.7.1 (Cl. Auth. 1).

¹⁷³ See *id.* Annex 10-C.3; see also Respondent's Jurisdictional Memorial ¶ 51.

¹⁷⁴ Thomas Decl. ¶¶ 26-30.

¹⁷⁵ See Amended Statement of Claim ¶¶ 9(c), 87, 127; Thomas Decl. ¶¶ 26-30.

¹⁷⁶ See Letter of Christopher F. Dugan to France-DR BIT, CAFTA-DR and ICC Tribunals dated January 17, 2009 (Cl. Ex. 20).

¹⁷⁷ See Letter of Ing. Radhames Segura to Sr. R. Blair Thomas and Sr. Fernando Rosa dated February 7, 2009 (Cl. Ex. 19).

Republic's ongoing efforts to control and re-nationalize EDE Este constitute a course of conduct whereby the Republic seeks to extinguish Claimants' rights under the Concession Agreement and take control of EDE Este. This constitutes a direct expropriation using improper and illegal means.

106. Unless Respondent declares that it will abandon its ongoing efforts to classify the subsidies that it provides to EDE Este as loans or to abandon its attempts to intervene in the operation of EDE, it cannot credibly deny the Claimants have pled a valid expropriation claim.

2. Claimants Have Properly Alleged an Indirect Expropriation

107. As set forth in Claimants' Amended Statement of Claim and this Counter-Memorial, the Republic's conduct also constitutes an indirect expropriation of Claimants' Investment in the Dominican Republic. The Republic's systematic and continuous refusal to implement the laws concerning tariffs and theft, combined with its illegal efforts to force EDE Este to treat CDEEE's subsidies to EDE Este as loans and its threats to take over EDE Este, are effecting an expropriation of Claimants' interests in EDE Este, including its concession rights, equity value, and future profits.
108. The Republic's actions constitutes an indirect or creeping expropriation under Article 10-7 of CAFTA-DR. Annex 10-C.4(a) of the CAFTA-DR ("Expropriation") states that "the determination of whether an action or series of actions by a Party, in a **specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry...**"¹⁷⁸

¹⁷⁸ CAFTA-DR Annex 10-C.4(a) (emphasis added) (Cl. Auth. 1). *See also Tecnicas Medioambientales Tecmed S.A. v. United Mexican States* (Award), ICSID Case No. ARB(AF)/100/02 (29 May 2003), ¶ 114 (noting that indirect or creeping forms of expropriation (continued...))

109. Annex 10-C.4(a) enumerates a non-exclusive list of “factors” to be considered in the inquiry¹⁷⁹ that a tribunal should consider when determining whether a host State has indirectly expropriated a foreign investors’ investment. These non-exclusive factors are:

- (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
- (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
- (iii) the character of the government action.¹⁸⁰

110. Based on this illustrative list, which does not represent all factors the Tribunal may consider, Claimants’ expropriation claim clearly is capable of constituting an indirect expropriation. First, as Claimants will demonstrate at a hearing on the merits, and as the Republic appears to agree, the Republic’s actions have caused catastrophic harm to EDE Este. Respondent’s expropriation has occurred through a series of ongoing acts and

(...continued)

“do not have a clear or unequivocal definition” but it is generally understood that they materialize through actions or conduct that has the effect of depriving one of rights or assets.) (Cl. Auth. 29).

¹⁷⁹ CAFTA-DR Annex 10-C.4(a) states:

“the determination ... requires ...[an] inquiry that considers, among other factors:

- (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
- (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
- (iii) the character of the government action.”

¹⁸⁰ CAFTA-DR Annex 10-C.4(a) (Cl. Auth. 1).

omissions which, in the aggregate, have the effect of depriving Claimants of the reasonably expected economic benefit of their investment.¹⁸¹

111. Second, the Republic's actions have substantially interfered with Claimants' reasonable investment-backed expectations. The Republic is attempting, with an illegitimate purpose and through wrongful methods, to enlarge its ownership and control of EDE Este and attempting to seize EDE Este's market share, thereby putting itself in a position in which it is laying claim to own and control all of EDE Este.

a. The Republic's refusal to implement a Total Cost Tariff, as well as its repeated refusals to pay promised indemnification, constitute an indirect expropriation of Claimants' investments in the Dominican Republic. The Republic represented and promised, through the Concession Agreement and the legal structure that it implemented and that is still in effect, that EDE Este would be permitted to charge a Total Cost Tariff. The Republic cannot deny that it has failed to implement the Total Cost Tariff, or that its failure to implement a Total Cost Tariff has resulted in catastrophic financial losses to EDE Este. These catastrophic financial consequences are due to two reasons: first, because the Republic is violating its own laws (the General Electricity Law), and second, because the Republic is

¹⁸¹ See CAFTA-DR Annex 10-C.4(a) (Cl. Auth. 1); see also *Metalclad Corp. v. United Mexican States* (Award), ICSID Case No. ARB(AF)/97/1 (30 Aug. 2000) ¶ 103 (“Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”) (Cl. Auth. 19).

forcing EDE Este to distribute electricity below its actual costs.¹⁸² By forcing EDE Este to distribute electricity below cost and in violation of the General Electricity Law, the Republic is expropriating Claimants' investment through a confiscatory rate structure.¹⁸³ This is in violation of Article 5 of Chapter 10 of CAFTA-DR.

- b. As set forth in Claimants' Amended Statement of Claim,¹⁸⁴ to compensate EDE Este for the Republic's failure to implement the Total Cost Tariff, the Republic has repeatedly agreed to indemnify EDE Este (as well as other distribution companies) for the losses due to the forced distribution of electricity below actual costs. The Republic's unilateral treatment of its payments to EDE Este as debt rather than the promised indemnification and its efforts to drive EDE Este into bankruptcy likewise constitute an indirect and creeping expropriation.¹⁸⁵

112. Third, as Claimants contend is *prima facie* evident from the facts alleged in their Amended Statement of Claim, and as demonstrated above, the character of Republic's action is in the nature of indirect expropriation, particularly in light of the fact that the Republic is actively

¹⁸² See Thomas Decl. ¶ 26.

¹⁸³ See, e.g., *Bluefield Waterworks & Improvement Co. v. Public Serv. Comm'n of West Virginia*, 262 U.S. 679, 690 (1923) ("Rates which are not sufficient to yield a reasonable rate of return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property....") (Cl. Auth. 7).

¹⁸⁴ See Amended Statement of Claim ¶¶ 9(b) and (c), 75, 83-88, 125-32.

¹⁸⁵ This indirect expropriation falls well within the scope of expropriations recognized by other tribunals. For example, the tribunal in *Tecmed* recognized that an expropriation can occur where "measures adopted by a State, whether regulatory or not ... if the assets or rights subject to such measure have been affected in such a way that '...any form of exploitation thereof ...' has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed." See *Tecmed* ¶ 116 (Cl. Auth. 29).

and unlawfully trying to control EDE Este.¹⁸⁶ Claimants have therefore clearly asserted facts capable of resulting in an award under CAFTA-DR in favor of Claimants.

B. The Tribunal Should Not Finally Decide Whether an Expropriation Has Occurred at this Preliminary Stage of the Arbitration

113. Under CAFTA-DR Article 10.20, the Tribunal shall assume all facts as presented by Claimants to be true, and shall “address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim **for which an award in favor of the claimant[s] may be made[.]**”¹⁸⁷ The ordinary meaning of CAFTA-DR’s directive to decide whether “an award in favor of the claimant[s] may be made” is that the Tribunal must decide whether the facts that Claimants allege could support an award in Claimants’ favor. In other words, the Tribunal need not, and should not, at this stage of the proceedings, finally decide whether Claimants’ alleged facts may satisfy the particularities of specific substantive legal requirements.¹⁸⁸ Instead, the Tribunal should, more broadly, decide whether Claimants’ allegations support **any** award for Claimants under the Treaty.¹⁸⁹

¹⁸⁶ See Letter of Christopher F. Dugan to France-DR BIT, CAFTA-DR and ICC Tribunals dated January 17, 2009 (Cl. Ex. 20); Letter of Ing. Radhames Segura to Sr. R. Blair Thomas and Sr. Fernando Rosa dated February 7, 2009 (Cl. Ex. 19).

¹⁸⁷ CAFTA-DR Art. 10.20 (emphasis added) (Cl. Auth. 1).

¹⁸⁸ *Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan* (Decision on Jurisdiction), ICSID Case No. ARB/03/29 (14 Nov. 2005) ¶ 260 (leaving the question of the viability of the claimant’s specific claims for the merits phase of the proceeding and accepting jurisdiction because “the Tribunal cannot rule out that there may have been a sufficient involvement by the State in the alleged taking of Bayindir’s investment so as to amount to an expropriation under the BIT”) (Cl. Auth. 6).

¹⁸⁹ See *Impregilo S.p.A. v. Islamic Republic of Pakistan* (Decision on Jurisdiction), ICSID Case No. ARB/03/3 (22 Apr. 2005) ¶ 237 (Cl. Auth. 15). See also *CME* (Partial Award) ¶ 392 (affirming jurisdiction over an expropriation claim on the basis that the dispute relates to

(continued...)

114. To determine whether an award may be made in favor of Claimants, the Tribunal should inquire as to whether Claimants have alleged facts that constitute an “investment dispute” pursuant to CAFTA-DR Articles 10.15 and 10.16(a) and not specific substantive claims under Chapter 10.¹⁹⁰
115. Moreover, as Annex 10-C.4(a) of CAFTA-DR confirms, an indirect or “creeping” expropriation is not clearly or unequivocally defined and must be evaluated in the context of the facts of a dispute. In this case, the nature of the expropriation and legal standards involved cannot properly be assessed without the benefit of a full analysis of the merits of the dispute. The Parties to the CAFTA-DR expressly contemplated that expropriation claims should not be dispensed with as preliminary legal questions, but must be determined by an analysis of all the specific facts. This should be done at a hearing on the merits, when all of the facts are before the Tribunal.

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claimant’s investment because “[i]t is the Claimant’s case that the Respondent, in breach of the Treaty, expropriated [Claimant’s joint venture’s] legal and commercial assets and rights. Such an expropriation of assets and, in particular, legal rights and entitlements of [the joint venture] ... could and allegedly did affect the value of CME’s shares in the joint venture, such shares clearly being an ‘investment’ in accordance with Article 1 of the Treaty.”) (Cl. Auth. 9); *LG&E Energy Corp. v. Argentine Republic* (Decision of the Arbitral Tribunal on Objections to Jurisdiction), ICSID Case No. ARB/02/1 (30 Apr. 2004) ¶¶ 63, 68 (determining for purposes of jurisdiction that the claimants should be considered foreign investors and that “the fact that the Claimants have demonstrated *prima facie* that they have been adversely affected by measures adopted by the Respondent is sufficient for the Tribunal to consider that the dispute ... is admissible and that it has jurisdiction to examine it on the merits”) (Cl. Auth. 17); *CMS Gas Transmission Co. v. Republic of Argentina* (Decision of the Tribunal on Objections to Jurisdiction), ICSID Case No. ARB/01/8 (17 July 2003) ¶¶ 65, 68 (determining for purposes of jurisdiction that claimant’s shares constitute an investment and that a “dispute arises directly from the investment made and that therefore there is no bar to the exercise of jurisdiction”) (Cl. Auth. 11).

¹⁹⁰ See Respondent’s Jurisdictional Memorial ¶ 47 (“Section B of CAFTA-DR confers jurisdiction upon the Tribunal with respect to ‘investment disputes’ ...”).

V. THE REPUBLIC'S WRONGFUL ACTS AND OMISSIONS FROM THE INCEPTION OF THE INVESTMENT IN 1999 TO THE PRESENT ARE ACTIONABLE UNDER CAFTA-DR

A. At a Minimum, This Tribunal Possesses Jurisdiction Over the Republic's Acts and Omissions Since March 1, 2007

116. Subject to Respondent's objections regarding waiver and investment, Respondent's Memorial does not deny that this Tribunal has jurisdiction over all acts and omissions by the Republic from no later than March 1, 2007 to the present. Therefore, this Tribunal should proceed to hearing on the merits of all claims based on at least the Republic's acts and omissions since March 1, 2007. As set forth in Claimants' Amended Statement of Claim and this Counter-Memorial, this includes, but is not limited to:

- (1) the Republic's failure to implement the Total Cost Tariff;
- (2) the Republic's subsequent refusal to indemnify EDE Este, as repeatedly promised, for EDE Este's losses incurred as a result of the Republic's failure to implement the promised tariff regime;
- (3) the Republic's refusal to implement or enforce measures against theft, as promised repeatedly from 1999 to the present;
- (4) the Republic's continuing refusal to provide capital contributions; and
- (5) the Republic's ongoing refusal to accord to EDE Este treatment as favorable as the treatment accorded to EDE Norte and EDE Sur.¹⁹¹

Each of the acts and omissions listed above and described in the Amended Statement of Claim occurred (and continue to occur) from March 1, 2007 through the present.

B. The Republic's Conduct Constitutes Continuing and Composite Acts and Omissions That Have Not Ceased to Exist Since March 1, 2007

117. Although the general presumption under international law is that treaties do not apply retroactively, as the Republic admits,¹⁹² the doctrines of continuing and composite acts, set

¹⁹¹ See Amended Statement of Claim ¶¶ 9, 72-117.

forth in the Draft Articles on State Responsibility, empower tribunals to consider acts and omissions pre-dating a treaty's entry into force so long as those acts and omissions continue and do not cease to exist after the date of entry into force, or they form part of a "composite" treaty violation that crystallizes after the date of entry into force.¹⁹³ As alleged in the Amended Statement of Claim, the Republic's conduct is both continuing and composite. It is therefore subject to the jurisdiction of the Tribunal.

1. The Tribunal Possesses Jurisdiction Over the Republic's Continuing Acts and Omissions

118. Article 14 of the Draft Articles on State Responsibility ("Extension in Time of the Breach of an International Obligation") establishes that an act or omission that breaches an international obligation, including a treaty obligation, remains a violation and is thus actionable so long as the conduct remains "not in conformity" with the international obligation.¹⁹⁴ Article 14(2) of the Draft Articles states:

[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.¹⁹⁵

(...continued)

¹⁹² See Respondent's Jurisdictional Memorial ¶ 63.

¹⁹³ Draft Articles on State Responsibility Arts. 14, 15 (Cl. Auth. 38).

¹⁹⁴ See *id.* Art. 14(2).

¹⁹⁵ *Id.*

Thus, wrongful conduct that may not have had an international remedy prior to a treaty's entry into force is nevertheless actionable once the treaty enters into force, even if the conduct commenced months or years before the obligation attached.¹⁹⁶

119. Investment tribunals have unanimously affirmed that continuing conduct is subject to treaty protections, and that conduct that pre-dates the entry-into-force of a treaty is relevant to decide an investor's claims. The Tribunal in *Tecmed* concluded:

conduct, acts or omissions of the Respondent which, though they happened before the entry into force, may be considered a constituting part, concurrent factor or aggravating or mitigating element of conduct or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal's jurisdiction.¹⁹⁷

¹⁹⁶ See JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY, INTRODUCTION, TEXT AND COMMENTARIES* (Cambridge Univ. Press 2005) (the "Commentaries on Draft Articles on State Responsibility") Commentary to Art. 14(2) at 138 ¶ 12 ("[C]onduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue to give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including State Responsibility.") (Cl. Auth. 35); see also *id.* at 144 ¶ 11.

¹⁹⁷ *Tecmed* ¶ 68 (Cl. Auth. 29). Respondent suggests that *Marvin Roy Feldman Karpa v. United Mexican States* (Interim Decision on Preliminary Judicial Issues), ICSID Case No. ARB(AF)/99/1 (6 Dec. 2000), supports the proposition that a tribunal cannot assert jurisdiction over any conduct pre-dating the treaty. (Cl. Auth. 13) (See Respondent's Jurisdictional Memorial ¶ 75 n. 151.) However, the very *Feldman* quotation upon which Respondent relies has been distinguished by the very case Respondent cites as support. In *Mondev International Ltd. v. United States* the tribunal interpreted the language in the *Feldman* decision that Respondent cites and commented:

it does not follow that events prior to the entry into force of NAFTA may not be relevant to the question of whether a NAFTA Party is in breach of its Chapter 11 obligations by conduct of that Party after NAFTA's entry into force. **To the extent that the last sentence of the passage from the *Feldman* decision ... appears to say the contrary, it seems to the present Tribunal to be too categorical, as indeed the United States conceded in argument.**

(emphasis added). See *Mondev Int'l Ltd. v. United States* (Award), ICSID Case No. ARB(AF)/99/2 (11 Oct. 2002) ¶ 69 (Cl. Auth. 22) Moreover, Respondent cites only the first part of
(continued...)

Furthermore, *M.C.I. Power v. Ecuador*,¹⁹⁸ the award upon which Respondent relies for its argument that tribunals may not assert jurisdiction over past conduct in fact affirms the position stated in *Tecmed* in support of Claimants.¹⁹⁹

120. It is well-settled that when acts and omissions that occur before a treaty enters into force form the factual basis of a claim that is submitted after the date of entry into force, tribunals will take into account the preceding facts to properly decide that claim.²⁰⁰ The Republic is accountable for its ongoing wrongful acts and omissions that began before the date of entry into force and “remain not in conformity with [its international] obligations.”²⁰¹
121. Moreover, the Commentaries on Draft Articles on State Responsibility expressly affirm that continuing wrongful acts include “the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State.”²⁰² Accordingly, Claimants’ claims that are based on the Republic’s legislative acts and omissions that are incompatible

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the *Mondev* quotation and omits the latter part where the tribunal distinguishes *Feldman*. See Respondent’s Jurisdictional Memorial ¶ 75 n.151.

¹⁹⁸ See Respondent’s Jurisdictional Memorial ¶ 61.

¹⁹⁹ See *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador* (Award), ICSID Case No. ARB/03/6 (31 Jul. 2007) ¶ 93 (“[p]rior events may only be considered by the Tribunal for **purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force.**”) (emphasis added) (Cl. Auth. 18).

²⁰⁰ See *SGS Société Générale de Surveillance S.A. v. Philippines* (Decision on Jurisdiction), ICSID Case No. ARB/02/6 (29 Jan. 2004) ¶ 167 (Cl. Auth. 27); *Mondev* (Award) ¶¶ 69-70 (Cl. Auth. 22); *Tecmed* ¶ 66 (Cl. Auth. 29); *Helnan Int’l Hotels A/S v. Arab Republic of Egypt* (Decision on Objection to Jurisdiction), ICSID Case No. ARB/05/19 (17 Oct. 2006) ¶¶ 49-50 (Cl. Auth. 14). See also Commentaries on Draft Articles on State Responsibility at 144 ¶ 11 (Non-retroactivity “need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent)”) (Cl. Auth. 35).

²⁰¹ Draft Articles on State Responsibility Art. 14(2) (Cl. Auth. 38).

²⁰² See Commentaries on Draft Articles on State Responsibility at 136 ¶ 3 (Cl. Auth. 35).

with its Treaty obligations — including the Republic’s renunciation of the 1999 regulatory framework — meet the classic definition of a continuing act and are actionable under CAFTA-DR.

122. Thus, Respondent’s wrongful conduct that began before March 1, 2007 and that continues to the present is subject to the jurisdiction of this CAFTA-DR Tribunal.

2. The Tribunal Possesses Jurisdiction Over the Republic’s Composite Acts and Omissions That Form a Breach Occurring After the Treaty Entered Into Force

123. In their Amended Statement of Claim, Claimants have also made numerous allegations regarding acts and omissions that are composite in nature and scope. A composite treaty violation occurs when acts and omissions pre-dating a treaty’s entry into force combine with acts and omissions occurring after the treaty’s entry into force to form a violation. Acts and omissions that form a composite violation are not necessarily treaty violations in and of themselves, but constitute a violation in the aggregate. The Draft Articles on State Responsibility define a composite violation of an international obligation:

Article 15

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.²⁰³

²⁰³

Draft Articles on State Responsibility Art 15 (Cl. Auth. 38).

124. The Commentaries to the draft Articles explain:

In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the “first” of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. **This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).**²⁰⁴

125. The *Tecmed* tribunal applied this concept of composite violation to find that acts and omissions pre-dating the entry into force of the relevant investment treaty formed part of Mexico’s expropriation of the claimant’s investment.²⁰⁵ Other tribunals also have affirmed that acts and omissions which pre-date an international obligation can breach that obligation if, taken in aggregation with post-dating conduct, they constitute a violation of the treaty in question.²⁰⁶

3. The Amended Statement of Claim Properly Demonstrates Continuing and Composite Acts and Omissions in Violation of CAFTA-DR

126. Claimants clearly allege acts and omissions that constitute continuing and composite violations of Chapter 10 of CAFTA-DR.

a. Claimants’ Amended Statement of Claim Properly Alleges Continuing and Composite — Not Individual — Acts and Omissions

127. In their Amended Statement of Claim, the Claimants repeatedly and in good faith demonstrate that the Republic’s “continuing course of wrongful conduct vis-à-vis EDE

²⁰⁴ Commentaries on Draft Articles on State Responsibility at 144 ¶ 11 (emphasis added) (Cl. Auth. 35).

²⁰⁵ See *Tecmed* ¶¶ 66, 151 (Cl. Auth. 29).

²⁰⁶ See *Mondev* ¶¶ 57, 69-70 (Cl. Auth. 22); *Tecmed* ¶¶ 66, 68 (Cl. Auth. 29); *Helnan* ¶¶ 49-50 (Cl. Auth. 14).

Este has deprived the Claimants of rights they relied upon in acquiring EDE Este.”²⁰⁷ This is plainly sufficient, at this stage of the proceedings and under the applicable jurisdictional standard, to sustain jurisdiction over the allegations contained in the Amended Statement of Claim.

128. The Republic’s attempt to characterize the conduct alleged in Claimants’ Amended Statement of Claim as “individual acts” with possible continuing effects ignores the substance of Claimants’ allegations and must be rejected.²⁰⁸ According to Article 14(1) of the Draft Articles, a breach of an international obligation does not have “continuing character” if it occurs “at the moment when the act is performed, even if its effects continue.”²⁰⁹ The allegations made in Claimants’ Amended Statement of Claim constitute continuing and composite **acts and omissions** — not continuing effects from prior conduct.
129. The Republic ignores the Claimants’ broader allegations by taking out of context and labeling as “individual acts” a few examples of conduct described in the Amended Statement of Claim.²¹⁰ In fact, such acts are ongoing, and form part of a pattern of continuing and composite violations.²¹¹

²⁰⁷ See, e.g., Amended Statement of Claim ¶¶ 11, 19, 74-75, 81, 86-88, 98, 101-02, 105, 107, 108, 115, 121, 132, 135, 138-140, 147 and 150.

²⁰⁸ See Respondent’s Jurisdictional Memorial ¶¶ 62-71.

²⁰⁹ See Draft Articles on State Responsibility Art. 14(1) (Cl. Auth. 38).

²¹⁰ See Respondent’s Jurisdictional Memorial ¶ 65 (citing Claimants’ Amended Statement of Claim ¶ 74, stating that “Respondent’s enactment of Law 125-01 in July 2001 ‘abrogated the regulatory regime enacted in the late 1990s’”); *Id.* ¶ 70 (stating that the Republic’s reduction of unregulated users minimum demand requirements in August 2006 violates Claimants’ rights); *see id.* ¶ 81 stating that the enactment of SIE 31-2002 in September 2002 has created ongoing damage to Claimants. In fact, each of these acts and omissions are ongoing legislative measures that remain not in conformity with Respondent’s Treaty obligations).

²¹¹ See Amended Statement of Claim ¶¶ 72-117.

130. Respondent relies on the result in *Impregilo* for its contention that this Tribunal must decline jurisdiction over “individual acts” that pre-date a treaty’s entry into force.²¹²

However, the situation in *Impregilo* is not analogous to the situation here. The claimant in *Impregilo* named a respondent that the Tribunal specifically determined not to be an entity of the state.²¹³ In those circumstances, the tribunal found, very few of the alleged acts and omissions that were the subject of the dispute were actually attributable to the State.²¹⁴

Drawing on this finding, the tribunal concluded that the few alleged acts and omissions that were attributable to the State — including the “aggravation” of *Impregilo*’s attempts to settle its contract dispute with the private entity²¹⁵ — clearly “occurred at a specific point in time” and could not be adjudicated under the treaty because the treaty was not in force at that time.²¹⁶ However, in that arbitration, the claimant did **not** allege, as here, that the dispute arose from State conduct constituting a pattern of repeated and continuing promises and representations and systematic failures to follow through — or that the respondent owed specific sums of money under a contract.²¹⁷

131. Claimants’ allegations are not akin to those in *Impregilo*. For example, Claimants allege that the Republic is still under an obligation to implement the Total Cost Tariff that it promised in 1999. Its obligation is enshrined in the General Electricity Law, and the Republic has accepted that obligation (and reiterated its commitment) as a long-term goal

²¹² See *Impregilo* ¶ 216 (Cl. Auth. 15). See Respondent’s Jurisdictional Memorial ¶¶ 64, 69.

²¹³ See *Impregilo* ¶ 216 (Cl. Auth. 15).

²¹⁴ See *id.* ¶¶ 262-85.

²¹⁵ See *id.* ¶ 306.

²¹⁶ *Id.* ¶ 313 (distinguishing *SGS v. Philippines*, in which the State was a party to the contract dispute at issue, and acknowledged sums of money due under the contract.)

²¹⁷ See *id.* ¶¶ 311-13.

in its negotiations with the World Bank and the IMF.²¹⁸ The same is true for the Republic's obligations to pay the promised indemnification, and to prevent theft in the sector. Some of these obligations arose before March 1, 2007, but they undeniably continue to this day, obligations that have never ceased to exist. The Respondent not only ignores these allegations, but it never denies that any of the alleged acts and omissions cease to exist.²¹⁹

b. The Republic's Conduct Constitutes Continuing and Composite Violations of Chapter 10 of CAFTA-DR

132. As specifically alleged in the Amended Statement of Claim, and as discussed further below, the Republic's continuing and composite acts and omissions include, but are not limited to:

- (1) the Republic's failure to implement the Total Cost Tariff;
- (2) the Republic's subsequent refusal to indemnify the Claimants, as repeatedly promised, for EDE Este's losses incurred as a result of the Republic's failure to implement the promised tariff regime;

²¹⁸ See Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding dated 14 Jan. 2005 at 1, 15-16, ¶ 37 ("We believe that the policies set forth in the attached [Memorandum of Economic and Financial Policies] are adequate to achieve the objectives of its program, but the Dominican Republic stands ready to take any further measures that may become appropriate for this purpose ... To address the electricity sector crisis, the government has developed a comprehensive electricity sector reform plan, in consultation with the Worldbank, the IDB and USAID . . . the short-term plan includes a timetable for: [] Improving the regulatory framework. By February 2005, tariff regulations will ensure that fluctuations in the exchange rate and crude oil prices will be passed-through automatically to the final consumer tariffs, with a lag of only one month.") (the "Letter of Intent to the IMF (January 2005)") (Cl. Ex. 27).

²¹⁹ Should the Republic represent to this Tribunal that such obligations and commitments to the tariff regime and other sector reforms cease to exist, the IMF and World Bank should be formally notified that the Republic has disavowed the commitments upon which it has sought and obtained millions in loans over the past eight years.

- (3) the Republic's refusal to implement or enforce measures against theft, as promised repeatedly from 1999 to the present;
- (4) the Republic's continuing failure to provide capital contributions; and
- (5) the Republic's ongoing refusal to accord to EDE Este treatment as favorable as the treatment accorded to EDE Norte and EDE Sur.

Each of these allegations constitutes continuing or composite violations of CAFTA-DR that are more than sufficient at this stage to proceed to a hearing on the merits.

i. The Republic's Failure to Implement the Promised Tariff Regime or a Total Cost Tariff Constitutes Continuing And Composite Acts and Omissions in Violation of Chapter 10 of CAFTA-DR

133. In conjunction with the privatization process of certain state-owned enterprises in 1997, the Republic established a comprehensive set of laws, resolutions, and regulations designed to induce potential investors to invest in the electricity sector and to rely on the regulatory framework established by the Republic.²²⁰ The Republic specifically described the legal and regulatory framework:

The tariff structure will be based on the Chilean model and will permit the pass-through of the average energy purchasing price plus the distribution added value for distribution's cost component.²²¹

134. This structure was implemented through the promise of a Total Cost Tariff for an efficient distribution company in the initial regulatory framework.²²² The central structural concept of the Total Cost Tariff was subsequently codified in the General Electricity Law.²²³

²²⁰ See SEIC Resolution 235-98) (Cl. Ex. 5).

²²¹ *Id.* at 20.

²²² See SEIC Resolution 235-98, Arts. 54 & 57 (Cl. Ex. 5).

²²³ See Law 125-01, Art. 115. General Electricity Law Article 115 is almost identical to Article 57 of SEIC Resolution 235-98. Compare Cl. Ex. 6 with Cl. Ex. 5.

135. Since the passage of the General Electricity Law, the Republic has failed to allow EDE Este to recover its total costs, including a reasonable rate of return, and has instead instituted a tariff regime that forces EDE Este to distribute electricity below its actual costs.²²⁴ Despite the existence of this ongoing legal promise, the Republic has continually refused to implement the Total Cost Tariff. As reflected in the Claimants' Amended Statement of Claim, the Republic continues to fail to implement either the promised tariff regime or Total Cost Tariff.²²⁵ For example, in their Amended Statement of Claim, Claimants allege:

- “The Basic Contracts reflect the fulfillment of the Republic’s stated public policy to capitalize the electricity sector by forming joint ventures with foreign investors, to establish a new long-term structure for the electricity sector, and to guarantee certain rights to EDE Este. DREH relied on the long-term regulatory structure and the commitments made by the Republic when making its investment in EDE Este in 1999. The Republic has renewed publicly its commitment to these reforms, and Claimants relied on the Republic’s repeated affirmations when investing in the sector in November 2004[;]”²²⁶
- “The Republic’s continuing course of wrongful conduct vis-à-vis EDE Este has deprived the Claimants of rights they relied upon in acquiring EDE Este[;]”²²⁷
- “The Concession Agreement, which was executed “in conformity with Resolution 235-98” and which “contains a ‘stabilization clause’,” grants certain rights to EDE Este, including but not limited to “build and operate electric power works, under the conditions set forth in the contract and in conformity with this resolution *and other legal provisions in force*” and to “[r]eceive the other benefits that are granted by the laws of the Dominican Republic that regulate the electric sub-sector[;]”²²⁸

²²⁴ See Law 125-01, Arts. 114 & 118 (Cl. Ex. 6).

²²⁵ See Amended Statement of Claim ¶¶ 36-89.

²²⁶ See *id.* ¶ 59.

²²⁷ See *id.* ¶ 74.

²²⁸ See *id.* ¶¶ 67-68.

- “On March 31, 2003, and on numerous occasions thereafter, the Republic promised to indemnify EDE Este for losses resulting from the Republic’s failure to implement the 1998 Tariff Resolutions. However, the Republic’s indemnification payments, which continue through to the present — and which will go on until a pass-through cost structure is put in place — have instead resulted in a growing debt for EDE Este.”²²⁹
- “However, even though the Republic promised to indemnify EDE Este and continues to represent publicly that payments to EDE Este are ‘subsidies,’ the Republic refuses to allow EDE Este to record such payments in its financial statements as revenue. Instead, the Republic has again quietly reneged on its promise to indemnify EDE Este by insisting that the payments it announces publicly as subsidies are actually loans to EDE Este or other debt that EDE Este allegedly owes to CDEEE, and which EDE Este must repay.”²³⁰

136. Claimants clearly have alleged that the Republic’s failure to enact the promised regulatory framework remains “not in conformity” with its international obligations under CAFTA-DR, and must thus be considered a continuing and composite violation at this stage of the proceeding.²³¹

137. As the tribunal in *SGS v. Philippines* expressly held, a continued failure to pay sums due to an investor constitutes a continuing act and omission over which a tribunal possesses jurisdiction.²³² In *SGS v. Philippines*, the tribunal extended jurisdiction over acts and omissions by the Philippines that pre-dated the treaty’s entry into force, insofar as those acts and omissions continued and formed the basis of treaty claims brought after the

²²⁹ See *id.* ¶ 75.

²³⁰ See *id.* ¶ 87.

²³¹ See Draft Articles on State Responsibility Arts. 14(2), 15(2) (Cl. Auth. 38).

²³² See *SGS* ¶ 167 (Cl. Auth. 27).

treaty's entry into force.²³³ There, the claimant alleged that the Philippines failed to make payments promised under a contract formed in 1992 pursuant to a treaty that entered into force in 1999.²³⁴ The tribunal took into account the entire relationship between the investor and the host-State over the life of the investment, determining that "[a]t least it is clear that [the Treaty] applies to breaches which are continuing at [the date of entry into force], and the failure to pay sums due under a contract is an example of a continuing breach."²³⁵

138. Similarly, in *Mondev*, the tribunal considered a NAFTA claim against the United States for failing to compensate the claimant for interfering with its rights in a building project.²³⁶

The tribunal determined that the facts surrounding the interference — which occurred before the treaty's entry into force — were relevant to determining the refusal to compensate, which occurred after the treaty's entry into force.²³⁷

139. Likewise, in *Tecmed*, as noted above, the tribunal exercised its jurisdiction over continuing acts and omissions that formed the relevant factual basis of a claim for a breach that post-dated the treaty's entry into force.²³⁸ In each of these arbitrations, the tribunal unambiguously applied the rule that acts and omissions pre-dating a treaty's entry into

²³³ See *id.* ¶¶ 167-68. ICSID arbitration proceedings are relevant to this non-ICSID investment treaty arbitration only to the extent that the ICSID tribunal is interpreting **only** the investment treaty or chapter at hand.

²³⁴ *Id.* ¶ 50.

²³⁵ *Id.* ¶ 167.

²³⁶ *Mondev* ¶¶ 69-70 (Cl. Auth. 22).

²³⁷ *Id.* ¶ 69 (“[I]t does not follow [from the principle of non-retroactivity] that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of its [] obligations by conduct of that Party after NAFTA’s entry into force.”)

²³⁸ *Tecmed* ¶¶ 66, 68 (Cl. Auth. 29).

force are actionable if they “do not cease to exist” and “remain not in conformity” with international obligations when the relevant treaty enters into force.

140. The Republic cannot deny that its failure to implement the promised Total Cost Tariff is a continuing act. Indeed, the Republic has repeatedly acknowledged and publicly reaffirmed its promise to implement the 1999 framework for a Total Cost Tariff, and has represented that any deviation should be only “temporary.”²³⁹ The Respondent may argue at the merits

²³⁹ Letter of Intent (April 2006) at 7, ¶ 19 (“While we intend for the electricity tariff to fluctuate with oil prices and the exchange rate (in accordance with the regulation published by the Superintendency of Electricity), if the tariff is *temporarily* below the calculated tariff, the resulting higher transfers to the electricity sector will be offset by lower spending in non-priority areas.”) (the “Letter of Intent (April 2006)”) (emphasis added) (Cl. Ex. 8); Letter of Intent to the IMF (January 2007) at 7 ¶ 11 (Reaffirming commitment to reform in the electricity sector, and noting that “[w]e intend, in principle, to allow electricity prices to fluctuate in line with international oil prices and the exchange rate (according to a resolution from the Superintendency of Electricity). However, in the case that electricity prices are *temporarily* lower than the reference prices, we will cover any additional transfers to the electricity sector....”) (emphasis added) (Cl. Ex. 9).

Moreover, in communications with the International Monetary Fund (the “IMF”) from 2003 through 2007, the Republic repeatedly and unequivocally expressed its commitment to the goals of the 1998-2002 reform effort. *See, e.g.*, Letter of Intent, Memorandum of Economic Policies, and Technical Memorandum of Understanding dated 5 Aug. 2003 at 8, ¶ 16 (“A key objective of the government is to improve the efficiency and finances of the electricity sector. . . . To place the sector on viable footing, we aim to increase the price of electricity gradually by 3 percent per month to the level needed to meet costs. . . . Until the tariff structure has been rationalized, fiscal subsidies will be transferred to the distribution companies to compensate them for the losses that result from the compression of tariffs....”) (the “Letter of Intent to the IMF (August 2003)”) (Cl. Ex. 28); Letter of Intent, Supplemental Memorandum of Economic Policies, and Technical Memorandum of Understanding dated 23 Jan. 2004 at 6, ¶ 10 (“We intend to prepare by September 2004 a comprehensive electricity sector reform to be agreed with the World Bank . . . This reform will aim at sharply improving cash recovery by the electricity distribution companies and putting in place a more efficient functioning of the system....”) (the “Letter of Intent to the IMF (January 2004)”) (Cl. Ex. 29); Letter of Intent to the IMF (January 2005) at 16, ¶ 37 (“By February 2005, tariff regulations will ensure that fluctuations in the exchange rate and crude oil prices will be passed-through automatically to the final consumer tariffs, with a lag of only one month.”) (Cl. Ex. 27); Letter of Intent and Technical Memorandum of Understanding dated 29 Sept. 2005 at 8, ¶ 23 (“The government remains committed to taking all necessary steps to minimize slippages in budgetary aid to the energy sector programmed for 2005 and to rehabilitate the sector’s financial position.”) (the “Letter of Intent to the IMF (September 2005)”) (Cl. Ex. 30).

phase that such acts and omission do not actually violate CAFTA-DR — but they have not, and cannot, for purposes of jurisdiction, deny that such conduct continues.

ii. The Republic’s Failure to Fulfill Its Promises to Indemnify EDE Este Constitutes Continuing and Composite Acts and Omissions in Violation of Chapter 10 of CAFTA-DR

141. Claimants’ Amended Statement of Claim and this Counter-Memorial allege in detail that the Republic has **made** and **violated** its repeated representations and promises regarding the indemnification for the operating losses that the Republic’s broken promises have caused.²⁴⁰ The Republic’s failure to follow through on its repeated promises to indemnify EDE Este are not isolated acts, but an uninterrupted pattern — a seamless web of promises and repudiations. These repeated promises to indemnify EDE Este include, but are not limited to the following:

- a. *The Repudiation of the Stabilization Fund.* As demonstrated above, the Republic established the Stabilization Fund by decree in March 2003. The Republic began repudiating its obligation to indemnify shortly thereafter, and that repudiation continues to today.²⁴¹ The Republic’s acts and omissions with respect to the Stabilization Fund constitute both continuing and composite acts and omissions in violation of CAFTA-DR.
- b. *The Repudiation of the Points of Framework Agreement for the Sustainability of Electric Generation.* As discussed in the Amended Statement of Claim and above, the Republic made representations in the “Points of Framework Agreement for the

²⁴⁰ See Amended Statement of Claim ¶¶ 9(b)-(c), 75, 83-88.

²⁴¹ See *id.* ¶ 83(c); Thomas Decl. ¶ 16.

Sustainability of Electric Generation in the Republic” in February 2004 that it has failed to honor.²⁴² The Republic’s acts and omissions with respect to the Points of Framework Agreement for the Sustainability of Electric Generation constitute both continuing and composite acts and omissions in violation of CAFTA-DR.

- c. *The Repudiation of the General Sector Agreements.* As discussed above, the Republic made promises in 2005, 2006 and 2007 and 2008 that it would, among other things, freeze all of EDE Este’s debt and indemnify EDE Este for forcing it to operate below cost. These promises and representations began with the Republic’s January 14, 2005 representation that the Republic would indemnify EDE Este for losses resulting from the Republic’s failure to implement the 1998 Tariff Regulations.²⁴³ Despite the Republic’s repeated promises to indemnify, it has insisted that EDE Este treat the payments not as an indemnity, but as loans or other debt, giving the Republic an increasing, incremental, and wrongful interest in EDE Este. Not only are the improper loans themselves current and continuing violations, but the aggregated conduct is actionable under CAFTA-DR because it constitutes a composite act of creeping expropriation, as discussed above.

142. The Republic has recognized its responsibility to indemnify EDE Este for its losses that result from the Republic’s refusal to implement a Total Cost Tariff. However, the Republic’s ongoing failure to indemnify EDE Este, which must go on until a Total Cost

²⁴² See *id.* ¶ 83(d).

²⁴³ See Letter of Intent to the IMF (January 2005) at 16, ¶ 37 (“By February 2005, tariff regulations will ensure that fluctuations in the exchange rate and crude oil prices will be passed-through automatically to the final consumer tariffs, with a lag of only one month.”) (Cl. Ex. 27).

Tariff is put in place, has instead resulted in a growing debt for EDE Este.²⁴⁴ The Respondent has promised to indemnify the Claimants for preventing EDE Este from implementing a Total Cost Tariff, and yet it continues to insist that EDE Este recognize the payments as a debt to CDEEE. For example, in December 2008, the Republic issued a report to EDE Este seeking to settle accounts and operating under the notion that payments made from the CDEEE to EDE Este from January 2005 to the present are loans, not indemnities.²⁴⁵ The Republic has thereby intentionally and wrongfully created a mechanism through which it, as creditor of EDE Este, is trying to force EDE Este into bankruptcy and acquire the equity of EDE Este—and further implement its scheme to regain control of the Claimants’ investment through this growing imposition of debt.²⁴⁶

143. As demonstrated above, tribunals have affirmed that conduct occurring before and after a treaty’s entry into force that continues or combines to constitute a violation of the treaty is actionable. For example, the tribunal in *Tecmed* accepted the claimant’s position that “conduct of different agencies or entities in the state structure, gradually but increasingly appears to have weakened the rights and legal position of the Claimant as an investor,” and:

The common thread weaving together each act or omission into a single conduct attributable to the Respondent is not a subjective element or intent, but a **converging action towards the same result**, i.e. depriving the investor of its investment, thereby violating the Agreement.²⁴⁷

²⁴⁴ See Thomas Decl. ¶ 27.

²⁴⁵ See Informe Evolutivo del Fondo de Estabilización de la Tarifa Eléctrica, Nov. 2008 (Cl. Ex. 31).

²⁴⁶ See Thomas Decl. ¶ 30.

²⁴⁷ *Tecmed* ¶ 62 (Cl. Auth. 29).

The Republic's "converging action" — its failure to fulfill its promises to indemnify EDE Este — constitutes a common thread that continues to deprive Claimants of their investment.

iii. The Republic's Failure to Implement or Enforce Measures Against Theft, as Repeatedly Promised, Constitutes Continuing and Composite Breaches of Chapter 10 of CAFTA-DR

144. As described in Claimants' Amended Statement of Claim,²⁴⁸ the Republic has on numerous occasions both formally through the codification of the laws and decrees, as well as thorough statements by official representatives, recognized that it has not curtailed the rampant theft of electricity.²⁴⁹

²⁴⁸ See Amended Statement of Claim ¶¶ 9(f)-(g), 102-08, 134, 139.

²⁴⁹ See Law 186-07, Art. 6 (Nov. 2007) (Cl. Ex. 32); 2008 World Bank Loan Appraisal at 1 (Cl. Ex. 33) "The Dominican Government admits weak legal security,"; Dominican Today (23 Feb. 2007) ("Many of the problems that we have been confronting have to do with the lack of application of the rules of the game that are approved," he said, adding that when those firms come to the country under a certain context, 'they are modified soon after.'" (quoting Temístocles Montás, former Technical Secretary of the President) (Cl. Ex. 34); Letter of Intent to the IMF (January 2007) at 6-7, ¶ 11 (Government of the Republic enumerates efforts to curtail theft: "Congress is expected to approve amendments to the General Law on Electricity by end-March 2007 ... including: (i) the identification of criminal acts related to the electricity sector; (ii) the legal obligation of non-contractual users to regularize their financial situation with the distribution companies; (iii) the strengthening of institutions that regulate and supervise the electricity sector; and (iv) the equitable application of sanction against all who commit illegal acts in the electricity sector. In addition, by end-March 2007, we will modify the regulatory framework to eliminate administrative obstacles to our efforts to inspect suspected cases of electricity theft, as well as those that hinder good management practices in distribution companies.") (Cl. Ex. 9); "PAEF advierte aplicará ley robo energía," El Nacional, 26 July 2007 (PAEF Director Delis del Pilar Hernández Peña notes that "with more support we understand that electric fraud can be combated with greater success," also noting that the Dominican Republic has lacked a real legal framework that would permit a successful fight against delinquent acts that affect the development of the national electricity system) (Cl. Ex. 35).

145. Despite the Republic's recognition of the severe and continuing problem of theft in the electricity sector,²⁵⁰ the Republic has failed to combat the problem of theft in the sector and enforce the laws criminalizing the theft of electricity.
146. The Amended Statement of Claim specifically alleges that "[t]he Republic has failed to enforce the laws criminalizing the theft of electricity, which has been a severe and continuing problem in the Republic, as the Republic repeatedly acknowledged,"²⁵¹ and that "[t]he Republic has also failed, and continues to fail, to provide full protection and security by refusing to pay EDE Este for electricity consumed by the Republic [and] by failing to enforce its laws that require EDE Este's customers to pay for the electricity they consume..."²⁵² Rampant theft of electricity from EDE Este continues, as the Republic must admit.²⁵³

²⁵⁰ See "Violación de la Ley causa problemas en sector eléctrico," Hoy (30 Apr. 2004) (President of the National Council of Private Enterprise stated that the failure to apply the General Electricity Law and to sanction violators is the principal cause of the problems affecting the electricity sector) (Cl. Ex. 36).

²⁵¹ See Amended Statement of Claim ¶ 102.

²⁵² See *id.* ¶ 139. See also "Distribuidoras de electricidad perdieron 40% de luz facturada," Listín Diario, 10 Mar. 2005 (Central Bank Report states that energy theft is one of the biggest problems for the electricity sector) (Cl. Ex. 37); "Violación de la Ley causa problemas en sector eléctrico," Hoy, 30 Apr. 2004 (President of the National Council of Private Enterprise stated that the failure to apply the General Electricity Law and to sanction violators is the principal cause of the problems affecting the electricity sector) (Cl. Ex. 36).

²⁵³ The Republic acknowledged as recently as September 2007 that it continues to fail to remedy the problem of theft in the electricity sector. See Overview of Electricity Sector, Dominican Republic Electricity Sector Monitoring Quarterly Report, at 35, Annex 4 (September 2007) ("[a]n extremely high level of non-payment by electricity customers and theft of electricity exists. The combined level of non-payment and theft is higher than any other comparable country in the Caribbean and is among the highest in the world. The Distribution Companies do not recover sufficient revenue to cover their costs of power purchases from generators and their internal operating costs.") (Cl. Ex. 38); 2006 World Bank Memorandum at 154, ¶ 298 ("Weak governance is the fundamental challenge facing the Dominican Republic today. It comprises a lack of transparency, low confidence in public sector institutions, corruption, lack of respect for the
(continued...)

147. Specifically, in November 2007, the Republic enacted Law 186-07, which amended in part the theft and vandalism provisions of the General Electricity Law.²⁵⁴ Law 186-07 reflects an express commitment by the Republic that the reduction of electricity theft is a necessary condition for the successful reform of the electricity sector, and that the existing legal instruments are insufficient and “require[] complementary measures to allow its effective implementation.”²⁵⁵ The Preamble to Law 186-07 states:

CONSIDERING: That [the General Law of Electricity 125-01] has created the necessary legal framework to drive the electrical sector, and requires complementary measures to allow its effective implementation.

CONSIDERING: That the referred to [General Law of Electricity 125-01] sanctions theft and fraudulent use of electricity, which makes it necessary to insert a plan of orientation for the citizens to prevent and fight this crime, given the negative impact that this fact has on the national electricity sector.

CONSIDERING: That the Dominican State considers of public interest the prevention, persecution and sanction of infractions and crimes penalized by Dominican laws.²⁵⁶

148. Law 186-07, which further defined electricity fraud and provided for additional penalties, required the President of the Republic to issue regulations directing the National Energy Commission (the “CNE”) to implement the law.²⁵⁷ However, the President has not issued

(...continued)

rule of law, non-compliance with regulations, ineffective oversight, and high transaction costs.”) (Cl. Ex. 7).

²⁵⁴ See Law 186-07, Art. 6 (Cl. Ex. 32).

²⁵⁵ Law 186-07, Preamble (Cl. Ex. 32).

²⁵⁶ *Id.*

²⁵⁷ Law 186-07, Art. 8 (Poder Ejecutivo tendrá un plazo de noventa (90) días a partir de la promulgación de la presente ley para dictar el Reglamento de aplicación de la misma, el cual deberá ser elaborado por la Comisión Nacional de Energía (CNE)) (Cl. Ex. 32).

any such regulations, and to this date the Republic **has legally refused to put Law 186-07 into effect.**²⁵⁸

149. The Dominican Criminal Code and the General Electricity Law are ongoing legal commitments that the Republic and its officials must honor. The Republic cannot evade the rule of law.

150. The Republic's failure to deter or curtail theft indisputably constitutes a continuing and composite act and omission that has not ceased to exist. The Republic's failure to deter or curtail electricity theft is not a series of individual acts, but a systematic and pervasive problem in the country, amounting to a seamless web of conduct that has prevented EDE Este's viability. For example, the 2005 World Bank Investment Survey reveals that 34% of total electricity consumption was not paid for, and the CRI for EDE Este in 2004 was 51%.²⁵⁹ Moreover, "electricity theft through illegal connections [...] and low bill collection rates" are a main factor of the prolonged electricity crisis.²⁶⁰ Additionally, the

²⁵⁸ See "Dominican Electricity Thieves have only 90 more days," Dominican Today (3 Dec. 2007) ("The authorities, according to Electricity Superintendent Francisco Méndez have decided not to apply [the fines and prison time required under the General Electricity Law], at least for another three months[.]" (Cl. Ex. 39); "Apagones siguen y gobierno tanteea aplicar ley robo energía," Hoy (26 Oct. 2008) (The Superintendent of the SIE, Francisco Méndez, said that he hopes in January 2009 the law criminalizing theft will be applied.) (Cl. Ex. 40); Fitch Ratings, Dominican Republic Electricity: On the Edge of Darkness (4 Aug. 2008) (stating solutions to the crises in the Dominican Republic electricity sector and noting that the Republic should "most importantly, enforce the new electricity law, i.e. **punish end users for electricity theft** and follow the established regulatory framework") (emphasis added) (Cl. Ex. 41).

²⁵⁹ See 2006 World Bank Memorandum at 143, ¶¶ 273-74.

²⁶⁰ *Id.* at 133. See also "Hallan 4,814 conexiones ilegales," El Nacional, 28 July 2007 (The Director of PAEF revealed that there are 4,814 illegal connections, 754 arrests, 141 went to court, and only 12 people served prison time; under the current Director of PAEF, there have been 12,161 inspections. PAEF Director Delis del Pilar Hernández Peña notes that despite PAEF's efforts against electricity fraud, the justice systems sets free most of the accused within a few hours.) (Cl. Ex. 42); "PAEF ve jueces entropocen proceso judicial," El Nuevo Diario, 30 May

(continued...)

World Bank observed in 2008, when appraising a US\$42 million loan, that the sector is “troubled by large theft of electricity, often with [] official connivance” and noted that “mitigating this problem would also improve accountability and governance in the country.”²⁶¹

151. As discussed above, the tribunal in *Tecmed* affirmed that past conduct is relevant where the claimant alleges that the Respondent has “gradually but increasingly ... weakened the rights and legal position of the Claimant as an investor.”²⁶² Accordingly, this tribunal cannot adequately evaluate how the Republic’s failure with respect to theft has weakened EDE Este’s rights and legal position without considering the history and context of the problem. Similarly, the *Mondev* tribunal considered the respondent’s continuing and composite acts and omissions that pre-dated NAFTA’s entry into force to decide whether the respondent violated the fair and equitable treatment standard in denying compensation for an alleged interference of rights that occurred nearly ten years before NAFTA’s entry into force.²⁶³

152. Not only has the Republic reneged on promises to combat theft, at other times the Republic has further aggravated the problem by, among other things, falsely suggesting that EDE Este or its owners — and not the government of the Dominican Republic — is to blame.²⁶⁴

(...continued)

2007 (noting the weakness of the fight against electric fraud, in particular that of the 117 people brought to judicial authorities, only 6 have gone to prison) (Cl. Ex. 43).

²⁶¹ 2008 World Bank Loan Appraisal at 1 (Cl. Ex. 33).

²⁶² See *Tecmed* ¶ 62 (Cl. Auth. 29).

²⁶³ See *Mondev* ¶¶ 69-70 (Cl. Auth. 22).

²⁶⁴ See, e.g., Sesión de Camara de Diputados, 48 PLO 2007, 23 July 2007 at 15, Diputado Pelegrín Horacio Castillo Semán, Fuerze Nacional Progresista (stating that distribution firms, not electricity users and consumers, are practicing fraud) (Cl. Ex. 44). “Agreden brigadas de Edeeste y
(continued...) ”

For example, on June 2, 2008, the Municipality of Santo Domingo Este²⁶⁵ illegally directed unauthorized agents to occupy EDE Este's offices and seize EDE Este's property. After the local police department brought the illegal occupation and seizure to an end, Radhamés Segura called a press conference, declared TCW to be "**almost an enemy of the state,**"²⁶⁶ and intervened in the dispute. Mr. Segura and CDEEE then exploited the dispute between the Municipality and EDE Este to try unsuccessfully to coerce EDE Este into agreeing that the subsidies that CDEEE has paid to EDE Este — **the subsidies that are the very subject of this Arbitration** — are loans.²⁶⁷

153. The Claimants clearly have alleged that the Republic's failure to follow through on promises to deter theft — and its repeated attempts to encourage it — systematically continues to harm Claimants' investment.

(...continued)

policías," *El Nacional*, 4 Apr. 2005 (EDE Este repair teams stoned by protesters in various neighborhoods) (Cl. Ex. 45); "Brigidas de Edeeste son apedreadas en sectores," *Diario Libre*, 4 Apr. 2005 (Cl. Ex. 45); *see also* "Incendian la estafeta de Edeeste," *Listín Diario*, 2 July 2005 (EDE Este collection office to be burned by protesters for alleged failure to provide electricity) (Cl. Ex. 46)

²⁶⁵ *See* JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY, INTRODUCTION, TEXT AND COMMENTARIES*, Chap. II, "Attribution of Conduct to a State" at 93 (Cambridge Univ. Press 2005) ("[I]nternational law does not permit a State to escape its international responsibilities by a mere process of internal sub-division. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.") (Cl. Auth. 35).

²⁶⁶ *See* Video clip from June 4, 2008 Press Conference, minutes 9:20-9:40. Mr. Segura claimed that he had the power to intervene in the dispute based on CDEEE's power as the leader and coordinator of the electricity companies as provided for under Article 138 of Law 125-01 (Cl. Ex. 4).

²⁶⁷ *See* Amended Statement of Claim ¶ 149.

iv. The Republic's Failure to Provide the Promised Capital Contributions Constitutes Continuing and Composite Breaches in Violation of Chapter 10 of CAFTA-DR²⁶⁸

154. Claimants' Amended Statement of Claim asserts that "the Republic's refusal to ... make the capital contributions it promised ... constitute[s] [a] violation[] of the fair and equitable treatment required under international law."²⁶⁹
155. Article 14 of the Reform Law, passed in 1997, provided that the private investor was not to acquire more than 50% ownership of the distribution company.²⁷⁰
156. As part of the July 1999 Share Subscription Agreement, the Republic and EDE Este promised to "approve as many capital increases as necessary for the normal development or progress of the business, in particular when it involves the capital increases to meet the minimum requirements of service quality established by the sector's regulatory authority."²⁷¹
157. On 5 June 2003, the Republic and AES Distribución Dominicana, Ltd. entered into the Agreement for the Increase in Authorized Capital of EDE Este ("2003 Capitalization Agreement").²⁷² The Republic and AES agreed that the Capitalization Agreement was necessary "to inject financial resources into [EDE Este] in accordance with its investment and expansion plan in the concession zone corresponding to it, for the benefit of providing

²⁶⁸ See Amended Statement of Claim ¶¶ 97-101, 134.

²⁶⁹ See *id.* ¶ 134.

²⁷⁰ See Law 141-97, Art. 14, (Cl. Ex. 47).

²⁷¹ See Stock Subscription Agreement in Connection with the Capitalization of Empresa Distribuida de Electricidad del Este, S.A. between Corporacion Dominicana de Electricidad and AES Distribucion Dominicana, Ltd., Article 2.4 (13 July 1999) (Cl. Ex. 48).

²⁷² Agreement for the Increase of the Authorized Capital of EDE Este between the Dominican State and EDE Este dated 5 June 2003, Art. 2.4 (Cl. Ex. 49).

increasingly safe, stable and efficient electrical service, with reasonable economic compensation.”²⁷³

158. Once the 2003 Capitalization Agreement entered into force, AES made an irrevocable contribution for future subscription of shares, which came from the conversion of loans that AES had already made to EDE Este. Pursuant to the 2003 Capitalization Agreement and the declarations recorded and resolutions approved by the Extraordinary Shareholders Meetings of EDE Este held on 30 June 2003, the Republic agreed to invest in EDE Este.
159. The Republic has never matched AES’s capital contribution to EDE Este. Significantly, the tribunal in *SGS v. Philippines* stated that money owed by a host State constitutes a continuing **act or omission** — not an **effect** of an isolated act or omission.²⁷⁴

v. The Republic’s Failure to Accord to EDE Este Treatment Equally Favorable to EDE Norte and EDE Sur Constitutes Continuing and Composite Breaches in Violation of Chapter 10 of CAFTA-DR²⁷⁵

160. In 2003, the Republic stepped in to purchase the Spanish owner of EDE Norte and EDE Sur. Claimants detail this allegation in their Amended Statement of Claim:

In September 2003, after consultations with the Government of the Kingdom of Spain, the Republic re-purchased Unión Fenosa’s 50% ownership in EDE Norte and EDE Sur for approximately US\$700 million.... As a result of the re-nationalization of EDE Norte and EDE Sur, DREH is currently the only foreign owner of an electricity distribution company in the Republic.²⁷⁶

²⁷³ See *id.* at Whereas Clause #1. (Cl. Ex. 49).

²⁷⁴ See *SGS* ¶¶ 166-67 (Cl. Auth. 27).

²⁷⁵ See Amended Statement of Claim ¶¶ 110-114, 147.

²⁷⁶ See *id.* ¶¶ 111, 113.

161. The Republic continues to deny EDE Este treatment no less favorable than it accords to Unión Fenosa in connection with its sale of EDE Norte and EDE Sur. This constitutes a current and continuing violation of CAFTA-DR.

C. The Tribunal Should Finally Decide the Temporal Scope of CAFTA-DR in the Context of Claimants' Specific Claims at the Merits Stage

162. To the extent that any disagreement persists between the parties as to the weight or purpose the Tribunal should assign to the Republic's acts and omissions before March 1, 2007, those questions should be resolved once the Tribunal is able to evaluate the merits of Claimants' claims based on a fully developed factual record.

163. The tribunal's approach in *Tecmed* continues to be instructive. The *Tecmed* tribunal reasoned that it should decide the question of the treaty's application "in light of the claims of the Parties," and that it must not "decide more or less than is necessary to settle the disputes referred to it."²⁷⁷ Based on this principle, the tribunal reasoned that it must determine the application of the treaty in light of specific claims presented at the merits phase of this Arbitration.

²⁷⁷ See *Tecmed* ¶ 56 (Cl. Auth. 29).

CONCLUSION

164. For the reasons set forth in this Counter-Memorial (1) Respondent's request that the Tribunal render an award rejecting Claimants' claims with prejudice should be denied in its entirety, (2) Respondent should be ordered to bear Claimants' costs and attorneys' fees for this phase of the Arbitration, and (3) this Arbitration should proceed to a hearing on the merits.

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