IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE DOMINICAN REPUBLIC—CENTRAL AMERICA—UNITED STATES FREE TRADE AGREEMENT

-and-

THE UNCITRAL ARBITRATION RULES 1976

-between-

1. TCW GROUP, INC.
2. DOMINICAN ENERGY HOLDINGS, L.P.

(Claimants)

-and-

THE DOMINICAN REPUBLIC

(Respondent)

RESPONDENT'S MEMORIAL ON JURISDICTION

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PRELIMINARY STATEMENT

1. This case is part of a broader scheme by Claimant TCW Group, Inc. ("TCW") through its pursuit of multiple arbitrations against the Republic to reap a massive and undeserved windfall from an acquisition of shares for which it paid only U.S. $2 in 2004. In this arbitration, Claimants allege "catastrophic losses" to their subsidiary company Empresa Distribuidora De Electricidad Del Este, S.A. ("EDE Este") purportedly caused by measures taken by the Dominican Republic. It is but one of several cases brought by Claimant TCW or at its behest by one of its affiliates in which the same claims are made.

2. Indeed, the Respondent and its agency, the Corporación Dominicana de Empresas Eléctricas Estatales ("CDEEE"), are now confronted with no fewer than three arbitrations predicated on virtually identical facts and allegations and seeking effectively the same relief. Through these multiple arbitration proceedings, TCW and its affiliates seek to recover collectively over U.S. $1.8 billion with respect to their 50 percent interest in EDE Este. Claimants embarked upon this abusive course of action when the Republic declined to purchase Claimants' EDE Este shares at an exorbitant price.

3. This proliferation of parallel proceedings not only is oppressive and vexatious; it also creates a fundamental bar to the Tribunal's jurisdiction over the claims in this arbitration. Article 10.18 of the Dominican Republic-Central America-United States Free Trade Agreement[1] ("CAFTA-DR" or "Treaty") requires as a precondition to the submission of claims to arbitration and the Tribunal's assertion of jurisdiction that Claimants waive the right to initiate or continue any other proceeding with respect to any measure alleged to be a breach of the Treaty. In this way, Article 10.18 expresses the Contracting Parties' intent that host States should not be subjected to circumstances such as those here where the duplicative proceedings are inherently unfair and pose the risk of multiple damages recoveries.

[1] The Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004 ("CAFTA-DR") (Respondent's Authority ("Resp. Auth.") 2).

4. Claimants pay lip service to the requirement of a waiver, but their actions fly directly in the face of CAFTA-DR's express prohibition on the pursuit of parallel proceedings. Although they purport in their Amended Statement of Claim to waive their right to initiate or continue other proceedings, TCW and its affiliated companies continue to pursue two other arbitrations premised on ***precisely the same measures*** that they claim in this case are in breach of the Treaty. Accordingly, the waiver tendered in Claimants' submission is invalid. CAFTA-DR's express terms prevent Claimants from pursuing multiple proceedings in an effort to obtain multiple recoveries, and on this basis alone the Tribunal must dismiss these claims.

5. Further, Claimants' shareholding in EDE Este is not an investment within CAFTA-DR's terms. Only interests having the characteristics of a true investment—a "commitment of capital", an "expectation of gain or profit", an "assumption of risk"—come within the Treaty's protections. In circumstances where Claimants paid the negligible sum of U.S. $2 to acquire the EDE Este shareholding at a time when the difficulties in the Dominican Republic electricity sector were well known, where Claimants have made no capital contributions to improve EDE Este, and where TCW structured its acquisition of the EDE Este stake specifically to protect itself from any risk, the suggestion that Claimants possess a qualifying investment is untenable. On this additional basis, the Tribunal must dismiss the entirety of Claimants' claims.

6. In the event that the Tribunal decides to go further to consider additional jurisdictional arguments, the Tribunal should decline jurisdiction over Claimants' claim that the Republic's actions constitute an expropriation under Article 10.7 of CAFTA-DR. Claimants fail in the Amended Statement of Claim to allege facts that are capable of constituting either a direct or an indirect expropriation. Claimants do not—and indeed cannot—assert that there has been a transfer of their title over the EDE Este shares, and thus

they cannot claim that there has been a direct expropriation. Moreover, Claimants' efforts to assert an indirect expropriation must similarly fail because Claimants cannot deny that they maintain full ownership of and control over those shares. Consequently, the Tribunal should decline jurisdiction over the alleged violation of Article 10.7 of the Treaty.

7. Finally, a fundamental obstacle to the Tribunal's assertion of jurisdiction over Claimants' claims under CAFTA-DR is that the key acts and events upon which Claimants rely precede the entry into force of CAFTA-DR on March 1, 2007. The Treaty states explicitly that it does not apply retroactively and, therefore, the Tribunal cannot assert jurisdiction over those acts and events. Realizing that the conduct underlying their allegations occurred before March 1, 2007, Claimants attempt to elude the Treaty's non-retroactivity by characterizing actions as "continuing wrongful conduct" and "ongoing violations" extending beyond the Treaty's entry into force. Even as pleaded in the Amended Statement of Claim, however, it is evident that those acts and events are not of a continuing character and do not create a seamless web spanning the period before and after the Treaty entered into effect. Rather, Claimants' allegations refer to one-time acts and events occurring and completed at a time before CAFTA-DR entered into force. Pursuant to the principle of non-retroactivity of treaties, the Tribunal cannot assert jurisdiction over these acts and events.

8. In conclusion, Respondent notes that it bears no burden to dispute at this jurisdictional phase the facts that Claimants allege. However, at this stage Respondent alerts the Tribunal to the fact that Claimants' one-sided portrayal of acts and events in its Amended Statement of Claim is inaccurate and misleading. In the event that the Tribunal determines that any of Claimants' claims should proceed to a determination on the merits, Respondent will vigorously dispute Claimants' allegations and show that Claimants' claims are baseless.

RELEVANT FACTUAL BACKGROUND

I. TCW ACQUIRED ITS CONTROLLING INTEREST IN EDE ESTE FOR THE NOMINAL SUM OF U.S. $2

A. Claimants Acquired the EDE Este Shareholding in November 2004 for the Nominal Sum of U.S. $2

9. The premise of this arbitration is that TCW made an investment in the Dominican Republic on November 12, 2004,[2] by acquiring indirectly, through the special purpose vehicle DEH LP, the Class B shareholding in EDE Este from AES Corporation.[3] AES, the original investor in EDE Este in 1999,[4] had written down the value of its EDE Este shareholding to zero before selling it.[5] Reflecting the negligible value of the EDE Este shareholding, TCW paid AES the nominal sum of U.S. $2 for the shares.[6]

B. TCW Made Its Acquisition Through a String of International Subsidiaries

10. TCW structured 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.[7] Through its string of international subsidiaries including Claimant DEH LP, TCW acquired a 100 percent share of a Cayman Islands company—AES Distribución

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[2] As set forth below, Respondent denies that Claimants have made an investment within the Treaty's terms. *See* Argument, Part II, *infra*. Respondent's references to "investment," "investor" and "invest" are without prejudice to Respondent's arguments regarding the existence of a qualifying investment over which the Tribunal can assume jurisdiction.

[3] *See* Respondent's Exhibit ("Resp. Ex.") 5 (Purchase Agmt. Among Dominican Energy Holdings L.P., as Purchaser, and AES DR Holdings, Ltd., as Seller, July 12, 2004 ("Share Purchase Agreement")). *See also* Am. SOC ¶ 3.c.

[4] In 1999, as part of the capitalization process which partially privatized the electricity sector in the Dominican Republic, U.S. company, AES Corporation, through its subsidiary AES Distribución Dominicana, Ltd., acquired the 50 percent ownership interest in EDE Este through the acquisition of the Class B shares. In November 2004, AES Corporation sold its 100 percent stake in AES Distribución Dominicana, Ltd. to DEH LP. *See* Am. SOC ¶ 3.c. *See also* Resp. Ex. 5 (Share Purchase Agreement).

[5] *See* Resp. Ex. 9 (*TCW Group Buys AES' Dominican Stake*, Electric Power Daily, Nov. 18, 2004, at 1) (stating that AES had written off the investment and classified EDE Este as a discontinued operation).

[6] *See* Resp. Ex. 5 (Share Purchase Agreement), Art. II (reflecting the U.S. $2 purchase price).

[7] *See* Resp. Ex. 5 (Share Purchase Agreement), Preamble and Art. II.

Dominicana, Ltd. (subsequently renamed DR Energy Holdings Ltd. ("DREH"))—and thereby an indirect 50 percent share of EDE Este.

11. TCW's Group Managing Director, R. Blair Thomas, orchestrated TCW's acquisition of the EDE Este shareholding in 2004.[8] Mr. Thomas structured the transaction so that he and his fellow executives at TCW would have a significant personal financial stake in EDE Este through a company by the name of Sosa Partners LLC—a Delaware corporation having a 49.9 percent stake in TCW Energy Advisors LLC—the general partner of Claimant, DEH LP.[9]

12. Documents revealing the history and identity of DEH LP make it apparent that Claimant DEH LP is merely the vehicle by which ***TCW*** executed the share transfer.[10] In order to avoid any potential liability in connection with the EDE Este shareholding, TCW made its acquisition of the EDE Este shares via a complex web of intermediary subsidiary corporations and special purpose vehicles based in the United States and the Cayman Islands.[11] DEH LP was created by TCW for the sole purpose of serving as an intermediary

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[8] *See* Resp. Ex. 15 (Letter from T. Dickinson to R. Segura, Feb. 28, 2007, attaching Declaration of R. B. Thomas, dated Feb. 26, 2007, and schematic of EDE Este corporate structure as Exhibit 2); *see also* Resp. Ex. 7 (TCW Energy and Infrastructure Presentation, authored by Thomas) (sent to the government as part of information about the shareholder composition of DEH LP). Note that this schematic was attached to an Oct. 14, 2004 letter from AES to the Superintendencia de Electricidad ("SIE"), which responded to a Sept. 30, 2004 request from the SIE requesting more information about the acquiring entities). *See* Resp. Ex. 8 (Letter from J. Nebreda to F. Mendez, Oct. 14, 2004); Resp. Ex. 6 (Letter from F. Mendez to J. Nebreda, Sept. 30, 2004).

[9] *See Société Générale v. The Dominican Republic* (Award on Preliminary Objections to Jurisdiction), LCIA Case No. UN 7927 (Sept. 19, 2008) ("*Société Générale*"), Annex 1 (reflecting the 49.9 percent interest of Sosa Partners LLC in TCW Energy Advisors LLC, the General Partner of DEH LP) and ¶ 118 (acknowledging that Sosa Partners LLC is owned by a group of TCW's employees and officials, including Mr. Thomas) (Resp. Auth. 26). Mr. Thomas' personal stake in this arbitration amounts to no less than a 22 percent share of any award of damages.

[10] DEH LP is a mere shell entity formed on the same day that the share transfer agreement was signed on June 30, 2004. *See* Resp. Ex. 2 (Certificate of Limited Partnership of Dominican Energy Holdings L.P., June 30, 2004) (reflecting that DEH LP was formed on June 30, 2004).

[11] *See Société Générale*, Annex 1 (Corporate Structure of the investment reflecting the multiple intermediaries between TCW and EDE Este, including DEH LP) (Resp. Auth. 26). TCW consistently has failed to be transparent in its dealings with the Government as concerns the ownership structure of the EDE Este shareholding notwithstanding repeated requests from the Government under applicable Domincan Republic law. TCW's representative under oath provided a false description of the

liability barrier between TCW and EDE Este.[12] TCW Energy Advisors LLC, as the sole general partner of DEH LP,[13] has the power to make ***all*** decisions for DEH LP.[14] Moreover, the authorized signatory on DEH LP's certificate of formation is Mr. Thomas.[15]

13. After the share purchase was executed, Mr. Thomas became President of EDE Este, giving him *de facto* management control over EDE Este.[16] Under Mr. Thomas' direction, DREH—using its control of EDE Este's board—forced through a board resolution to have EDE Este commence a concession agreement arbitration against CDEEE over the objections of the other shareholder.[17] Mr. Thomas has been responsible for EDE Este's contact with the Government since the acquisition.[18]

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ownership structure to the CDEEE in February 2007. *See* Resp. Ex. 15 (Letter from T. Dickinson to R. Segura, Feb. 28, 2007, attaching Declaration of R. B. Thomas, dated Feb. 26, 2007, and schematic of EDE Este corporate structure as Exhibit 2).

12 *See* Resp. Ex. 3 (Delaware Division of Corporations, "Entity Details" for Dominican Energy Holdings L.P., June 30, 2004) (reflecting that: (i) since DEH LP was formed on June 30, 2004 the entity has not made any additional filings, and (ii) the Company's registered agent is the same as for TCW Energy Advisors LLC).

13 *See* Resp. Ex. 2 (Certificate of Limited Partnership of Dominican Energy Holdings L.P., June 30, 2004) (reflecting that TCW Energy Advisors LLC is the partnership's general partner). *See also* Resp. Ex. 4 (Delaware Division of Corporations, "Entity Details" for TCW Energy Advisors LLC, June 30, 2004).

14 *See* DEL. CODE ANN. tit. 6 § 17–403(c) (characterizing the general partner's transferable rights as the power to "manage and control the business and affairs of the limited partnership") (Resp. Auth. 1).

15 *See* Resp. Ex. 2 (Certificate of Limited Partnership of Dominican Energy Holdings L.P., June 30, 2004).

16 *See* Resp. Ex. 12 (EDE Este Shareholder Meeting Minutes, Feb. 23, 2005) (reflecting R. B. Thomas as President of EDE Este). He retains this position to this day. *See* Resp. Ex. 24 (EDE Este Shareholder Meeting Minutes, July 29, 2008) (reflecting R. Blair Thomas as President of EDE Este).

17 *See* Resp. Ex. 18 (EDE Este Board Minutes, June 28, 2007). Pursuant to EDE Este's bylaws, DREH has the right to appoint the majority of directors to EDE Este's board of directors.

18 *See, e.g.*, Resp. Ex. 14 (Letter from R. B. Thomas to L. Fernández Reyna, dated May 24, 2006).

C. TCW Never Intended to Invest in EDE Este or in the Republic's Electricity Sector

14. From the outset, TCW never intended to invest in EDE Este or in the Republic's electricity sector.[19] Not only did TCW pay a nominal purchase price for its EDE Este shareholding,[20] but TCW also structured the transaction to avoid any real or long-term commitment to the vitality and progress of either EDE Este in particular or the Republic's electricity sector in general.

15. More specifically, TCW structured the transaction to insulate itself from all economic, legal or reputational risk associated with the EDE Este shareholding.[21] TCW admits to having put in place a structure that shields it from exposure to the risk of absorbing any financial losses that may be generated by EDE Este.[22] It now appears that TCW saw the acquisition of shares as an opportunity to obtain a U.S. $2 option on the upside with little or no downside. Indeed, TCW was not even exposed to reputational risk because the prior owner AES was to remain the public face of the company's distribution business in the Dominican Republic.[23]

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19 *See* Resp. Ex. 21 (Letter from J. Bolinaga to F. Rosa, Nov. 15, 2007) (confirming that the last capital contributions to EDE Este occurred in June 2003 before Claimants acquired the EDE Este shareholding). *See also* Resp. Ex. 1 (EDE Este Shareholder Meeting Minutes, June 30, 2003) (confirming a capital increase of over 7.3 million pesos).

20 *See* Resp. Ex. 5 (Share Purchase Agreement), Art II (reflecting U.S. $2 purchase price).

21 *See Société Générale*, Annex 1 (showing the various intermediaries shielding TCW from losses), and ¶ 25 (explaining that Claimant was to be paid by means of a management contract with TAMCO with all liabilities remaining elsewhere) (Resp. Auth. 26).

22 *See id.* at ¶ 25 (describing Claimant's position that it chose a corporate structure that would shield Société Générale and TCW both from the possibility of having to consolidate EDE Este's losses on their own books and from other adverse tax, accounting or legal consequences) (Resp. Auth. 26).

23 *See* Resp. Ex. 13 (Letter from R. B. Thomas and M. Dubuc to F. Méndez, Oct. 27, 2005, attaching a "Summary of Sale by AES of Its Indirect Ownership Interest in EDE Este to TCW") (providing information on the acquisition of the EDE Este shareholding and stating the key features of the operations and management agreement by which AES will provide "day to day management of E[DE] Este"); *see also* Resp. Ex. 11 (*AES sells 50% of shares*, Caribbean Update, Jan. 1, 2005) (stating that despite selling its EDE Este shareholding, AES would continue operating the company); *see also* Resp. Ex. 10 (*Electrifying the Electorate to Save the Government*, Noticien: Central American & Caribbean Affairs, Dec. 16, 2004) (noting that despite the sale of the EDE Este to TCW, AES would continue to operate the company).

16. Moreover, TCW never intended to make—and has never made—any capital contributions to EDE Este.[24] In devising multiple layers of liability shield, TCW created a structure in which it had no contractual or legal obligation to provide any capital support to EDE Este.[25] Furthermore, TCW has made no other commitment to the financial welfare of EDE Este. Consistent with its intention to make no contribution to EDE Este, TCW has disassociated itself from the company's distribution operations. Instead, TCW left AES with the responsibility for operating the company's distribution business.[26]

17. TCW's lack of any commitment to EDE Este is reflected in the fact—admitted by TCW—that it has been seeking to have the Government repurchase its stake in EDE Este.[27]

II. TCW IS PURSUING OTHER ARBITRATIONS PREDICATED ON PRECISELY THE SAME MEASURES AT ISSUE IN THIS ARBITRATION

18. This arbitration is but one of three cases in which these same claims are made. 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.[28] In the other two arbitrations, claims are pursued (1) by TCW in

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[24] *See* Resp. Ex. 21 (Letter from J. Bolinaga to F. Rosa, Nov. 15, 2007) (confirming that the last capital contributions to EDE Este occurred before Claimant acquired its shareholding). Moreover, TCW has never made any capital contribution to DEH LP. Rather, it is DEH LP's limited partner, PESTE LLC—a Nevada corporation unaffiliated with TCW—that is the only entity to have committed capital to DEH LP.

[25] *See Société Générale*, Annex 1 (Corporate Structure of the investment reflecting the multiple intermediaries between TCW and EDE Este) (Resp. Auth. 26).

[26] *See* Resp. Ex.11 (*AES sells 50% of shares*, Caribbean Update, Jan. 1, 2005) (stating that despite selling its EDE Este shareholding, AES would continue operating the company); *see also* Resp. Ex.10 (*Electrifying the Electorate to Save the Government*, Noticen: Central American & Caribbean Affairs, Dec. 16, 2004 (noting that despite the sale of the EDE Este to TCW, AES would continue to operate the company).

[27] *See* Am. SOC ¶ 114.

[28] TCW's subsidiaries EDE Este and DR Energy Holdings Ltd. ("DREH") also served two additional arbitration demands pursuant to project contracts under the UNCITRAL Arbitration Rules, even though those contracts specifically provide for arbitration under the ICC Rules. TCW appears to have abandoned those arbitrations, although it has not withdrawn the notices of arbitration. *See* Respondent's Reply to Amended Notice of Arbitration and Statement of Claim ¶ 3. *See also* Resp. Ex.

the name of its parent Société Générale under the France-Dominican Republic Bilateral Investment Treaty ("France-DR BIT"),[29] and (2) by TCW's subsidiary EDE Este under its concession agreement,[30] violations of which are also invoked here.[31] Despite TCW's subsequent commencement of this arbitration, Société Générale continues to pursue in the France-DR BIT arbitration nearly identical claims based on the same measures as those at issue in this arbitration. Similarly, despite the pendency of this arbitration, EDE Este brings almost identical claims in the concession agreement arbitration based on the same measures as those underlying Claimants' claims here.

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22 (Letter from J. Kerr to F. Orrego Vicuña, B. Cremades and R. Bishop, Feb. 8, 2008). Both EDE Este and DREH acknowledged that each of these arbitrations arose out of the same contracts as those at issue in the other arbitrations. *See* Resp. Ex. 19 (Notice of Arbitration and Statement of Claim, *Empresa Distribuidora de Electricidad Del Este, S.A. v. Corporación Dominicana de Empresas Eléctricas Estatales, Superintendencia De Electricidad, and The Dominican Republic*, Nov. 9, 2007), ¶¶ 11–15; Resp. Ex. 20 (Notice of Arbitration and Statement of Claim, *DR Energy Holdings Ltd. v. Corporación Dominicana de Empresas Eléctricas Estatales, Superintendencia De Electricidad, and The Dominican Republic*, Nov. 9, 2007), ¶¶ 14–18. Respondent includes these notices of arbitration and statements of claim as exhibits to this memorial solely to enable the Tribunal to compare the measures challenged therein with those alleged to constitute breaches of CAFTA-DR in the Amended Statement of Claim.

29 *See* Resp. Ex. 17 (Notice of Arbitration and Statement of Claim, *Société Générale v. The Dominican Republic*, Mar. 15, 2007) ("Société Générale SOC"). Respondent includes the Société Générale SOC as an exhibit to this memorial solely to enable the Tribunal to compare the measures alleged to constitute breaches of the France-DR BIT arbitration with those alleged to constitute breaches of CAFTA-DR in the Amended Statement of Claim. Respondent notes that Société Générale's and Claimants' counsel has refused to agree to allow Respondent to rely in this memorial on documents produced to it by Société Générale in the France-DR BIT arbitration notwithstanding that such documents are already in Respondent's possession and are relevant to Respondent's arguments on jurisdiction in this case. Most of those documents came from TCW's files. Claimants have taken the position that Respondent may use these documents in this case only after Claimants have produced them in this case. Respondent intends to request these documents during the forthcoming period for document exchange in the jurisdictional phase of this case and to rely on these documents in its reply memorial on jurisdiction.

30 *See* Resp. Ex. 23 (Request for Arbitration, *Empresa Distribuidora de Electricidad Del Este, S.A. v. Corporación Dominicana de Empresas Eléctricas Estatales, as Successor to Corporación Dominicana de Electricidad*, July 25, 2008) ("EDE Este RFA"). Respondent includes the EDE Este RFA as an exhibit to this memorial solely to enable the Tribunal to compare the measures alleged to constitute breaches of the concession agreement in that arbitration with those alleged to constitute breaches of CAFTA-DR in the Amended Statement of Claim.

31 *See, e.g.,* Am. SOC ¶¶ 76, 80, 96.

A. TCW Is the Controlling Hand and Mind Behind All Three Arbitrations

19. Although the three arbitrations are brought in the names of different claimants, even a cursory review of the pleadings in the three arbitrations reveals that they are an orchestrated attempt by one party—TCW—to make duplicative claims seeking multiple damages awards based on exactly the same underlying measures. There are numerous almost verbatim passages in each of the Amended Statement of Claim, the Statement of Claim in the France-DR BIT arbitration and the Request for Arbitration in the concession agreement arbitration.[32] This is no surprise given that the same law firm, Paul, Hastings, Janofsky & Walker LLP, represents each of the named claimants.

20. TCW has admitted that it is behind the France-DR BIT arbitration. In an October 2008 press release, ***TCW*** announced that "[a]n arbitration tribunal constituted under the France-Dominican Republic Bilateral Investment Treaty released an award . . . in a claim ***brought by TCW*** and its parent company."[33] The press release goes on to say that "***TCW*** and parent company Société Générale have consented to the Dominican Republic to make the full award public."[34] Notably, it was not a Société Générale official, but rather ***TCW's Group Managing Director***, R. Blair Thomas, who provided the only comment in that press release on the award. Mr. Thomas—a TCW executive—was also the only fact witness to give testimony on behalf of Société Générale in the France-DR BIT arbitration. That TCW and Mr. Thomas are the controlling forces behind these duplicative arbitrations is hardly

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[32] *Compare, e.g.*, Resp. Ex. 17 (Société Générale SOC) ¶¶ 47–60 *with* Am. SOC ¶¶ 59–73 *and* Resp. Ex. 23 (EDE Este RFA) ¶¶ 49–63 (containing virtually verbatim factual allegations regarding the basic contracts); Resp. Ex. 17 (Société Générale SOC) ¶¶ 73–79 *with* Am. SOC ¶¶ 90–96 *and* Resp. Ex. 23 (EDE Este RFA) ¶ 72 (containing virtually verbatim factual allegations regarding the tariff resolutions).

[33] *See* Resp. Ex.25 (*International Tribunal Allows US$680 Million Investment Claim Against Dominican Government to Proceed to Final Hearing*, PR-Insider.com, Oct. 6, 2008). Tellingly, the press release concludes with a detailed description of ***TCW*** and its business, not of Société Générale's.

[34] *Id.*

surprising given the pivotal role that they played in the acquisition and subsequent management of EDE Este.[35]

B. Claimants Are Attempting to Use This Case and the Two Other Arbitrations to Secure an Unwarranted Windfall

21. Claimants are asserting claims in this arbitration for more than ***U.S. $600 million*** in damages to an "investment" in shares to which a value of zero had been attributed by their prior owner when TCW acquired them.[36] TCW paid what it has acknowledged to be a negligible ***U.S. $2*** for its 50 percent EDE Este shareholding.[37] TCW is now trying to turn these shares into a fortune, not by investing resources in EDE Este to improve the company, but by opportunistically bringing this claim under the newly ratified CAFTA-DR.

22. Having acquired the EDE Este shares for the nominal sum of U.S. $2, TCW now seeks in this case alone to reap an unwarranted windfall of U.S. $600 million—over ***300 million times*** the purchase price. Moreover, TCW's prosecution of three arbitrations based on the same measures and seeking effectively the same damages is a brazen attempt at "treble dipping" through which TCW cumulatively seeks to recover over U.S. $1.8 billion for a stake in EDE Este that it purchased four years ago for just U.S. $2 in a transaction structure deliberately designed to be risk-free.[38]

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35 *See* Relevant Factual Background, Part I.B, *supra.*

36 *See* Am. SOC ¶ 152; s*ee also* Resp. Ex.9 (*TCW Group Buys AES' Dominican Stake*, Electric Power Daily, Nov. 18, 2004, at 1) (stating that AES had written off the investment and classified EDE Este as a discontinued operation).

37 *See* Resp. Ex.5 (Share Purchase Agreement), Art II.

38 Am. SOC ¶ 152(b)(i), (d) (requesting not less than U.S. $606 million); Resp. Ex. 17 (Société Générale SOC) ¶ 135(b)(2) (requesting not less than U.S. $680 million); Resp. Ex. 23 (EDE Este RFA) ¶ 112(b) (requesting not less than U.S. $680 million). Claimants' Amended Statement of Claim does not qualify its damages claim to take into account any recoveries in the other arbitrations. *See* Am. SOC ¶ 152. Nor does either of the Société Générale Statement of Claim or EDE Este Request for Arbitration qualify the damages claims to take into account any potential recovery in this arbitration. *See* Resp. Ex. 17 (Société Générale SOC) ¶ 135; Resp. Ex. 23 (EDE Este RFA) ¶ 112.

III. CLAIMANTS' STATEMENT OF CLAIM RELIES ON VAGUE AND SPECULATIVE ASSERTIONS WHICH AVOID IDENTIFYING THE DATES ON WHICH ACTS PURPORTEDLY TOOK PLACE

23. Claimants' Statement of Claim relies on vague and speculative statements which pointedly avoid specifying the dates on which the acts and events allegedly took place. In the rare instances in which Claimants do provide the specific dates of alleged breaches, Claimants rely on acts and events occurring before March 1, 2007—the date on which CAFTA-DR entered into force.

24. Most of Claimants' assertions of "fact" are vague and fail to identify with any specificity the purported acts and events on which the alleged Treaty violations are based. Several assertions fail even to point to a particular act or event taking place on a particular date, such that it is impossible to ascertain what Respondent is alleged to have done and when. By way of example, Claimants make only generalized assertions about and fail to identify the dates of the following alleged acts and events,[39] upon which Claimants rely in support of their claims that CAFTA-DR was violated:

- "[T]he Republic has failed to contribute the required amounts and full and valid legal title of all property to EDE Este."[40]
- "The Republic has failed to enforce the laws criminalizing the theft of electricity."[41]
- The Republic refuses "[t]o pay EDE Este the proper amounts owed for energy consumed by government facilities to which EDE Este was not allowed to cut service."[42]
- "The Republic has either rejected or ignored EDE Este's request for reconsideration."[43]

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39 The lack of specific allegations and dates is a critical deficiency because Claimants cannot assert claims based on events occurring before CAFTA-DR became effective. *See* Argument, Part IV, *infra.*

40 *See* Am. SOC ¶ 99.

41 *See* Am. SOC ¶ 102.

42 *See* Am. SOC ¶ 105(i).

43 *See* Am. SOC ¶ 94.

- "The Republic's intended channels for redress have failed to respond to EDE Este's numerous requests for relief."[44]

25. To the extent that Claimants do provide specific dates of alleged breaches, Claimants reference individual acts and events that occurred ***before*** CAFTA-DR entered into force on March 1, 2007. By way of example, Claimants allege that Respondent:

- In promulgating Law 125-01, "***abrogated*** the regulatory regime enacted in the late 1990s"[45]—yet, as Claimants admit, this alleged act occurred in ***July 2001***;[46]

- In issuing Presidential Decree 749-02, "effectively granted retroactive immunity to thousands of individuals who were in breach of their contracts to pay EDE Este's electricity bills and wrongly interfered with EDE Este's accounts with these consumers"[47]—yet, as Claimants admit, this alleged act occurred in ***2002***;

- In promulgating SIE 31-2002, "announced that it would implement a 'Transition Tariff' different from that previously guaranteed"[48]—yet, as Claimants admit, this alleged act occurred in ***September 2002***;[49] and

- In a declaration, "[e]ncourag[ed] the population not to pay its electric bills"[50]—yet, as Claimants admit, this alleged act occurred on ***July 30, 2002***.[51]

Each and every one of these allegations is based on alleged acts occurring ***before*** the Treaty entered into force, over which the Tribunal cannot assert jurisdiction under the Treaty.[52]

APPLICABLE LAW

26. Pursuant to Article 33(1) of the UNCITRAL Arbitration Rules, the Tribunal "shall apply the law designated by the parties as applicable to the substance of the dispute."[53]

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44 *See* Am. SOC ¶ 109.

45 *See* Am. SOC ¶ 79.

46 *See id.*

47 *See* Am. SOC ¶ 105.h.

48 *See* Am. SOC ¶ 81.

49 *Id*.

50 *See* Am. SOC ¶ 105.e.

51 *See id*.

52 *See* Argument, Part IV, *infra*.

In their Amended Statement of Claim, Claimants acknowledge that Article 10.22 of CAFTA-DR sets forth the law governing this dispute.[54] Accordingly, the parties are agreed that, pursuant to Article 10.22(1), "the tribunal shall decide the issues in dispute in accordance with [CAFTA-DR] and applicable rules of international law."[55]

27. Additionally, Article 31 of the Vienna Convention requires that CAFTA-DR be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In particular, in ascertaining the ordinary meaning of CAFTA-DR's provisions, the Tribunal must examine the Treaty's context, including its preamble,[56] which sets out its objectives.[57]

28. Thus, the "main task" of the Tribunal in interpreting the provisions of the Treaty "can be described as the duty of giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances."[58] The Tribunal must interpret the provisions of CAFTA-DR in accordance

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53 UNCITRAL Arbitration Rules, Art. 33(1) Resp. Auth. 3).; Am. SOC ¶ 31.

54 Am. SOC ¶ 32. *See also Wena Hotels, Ltd. v. Arab Republic of Egypt* (Award), ICSID Case No. ARB/98/4 (Dec. 8, 2000), ¶ 79, 41 I.L.M. 896, 911 (noting that the provisions of the treaty are "the first rules of law to be applied by the Tribunal"), *aff'd, Annulment Proceeding*, 41 I.L.M. 933 (Jan. 28, 2002) (Resp. Auth. 28).

55 CAFTA-DR, Art. 10.22 (Resp. Auth. 2).

56 Vienna Convention on the Law of Treaties 1969, 1155 U.N.T.S. 322 ("Vienna Convention"), Art. 31(2) ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes . . . .") (Resp. Auth. 5).

57 *See, e.g.*, Vienna Convention, Art. 31(1) (Resp. Auth. 5); Ian Sinclair, *The Vienna Convention on the Law of Treaties* 116 (2d ed. 1984) ("Every text, however clear on its face, requires to be scrutinised in its context and in the light of the object and purpose which it is designed to serve.") (Resp. Auth. 38); Arnold Duncan McNair, *The Law of Treaties* 365 (1969) ("[T]he main task of any tribunal which is asked to apply or construe or interpret a treaty . . . can be put in a single sentence: it can be described as the duty of giving effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances.*") (italics in original) (Resp. Auth. 30).

58 McNair at 365 (Resp. Auth. 30).

with their "ordinary meaning,"[59] but this rule of interpretation "cannot be allowed to obstruct the essential quest in the application of treaties, namely to search for the real intention of the contracting parties in using the language employed by them."[60]

ARGUMENT

I. CLAIMANTS' CLAIMS ARE NOT PROPERLY SUBMITTED TO ARBITRATION BECAUSE CLAIMANTS ARE IN VIOLATION OF THE WAIVER REQUIREMENT OF CAFTA-DR, ARTICLE 10.18(2)

29. Under Article 10.18(2) of CAFTA-DR, "no claim may be submitted to arbitration" unless Claimants waive their right to initiate or continue "any proceeding with respect to ***any measure*** alleged to constitute a breach" of the Treaty.[61] In their Amended Statement of Claim, TCW and DEH LP purport to waive their right to bring any other proceeding with respect to any measures alleged in this case to be a violation of CAFTA-DR.[62] Notwithstanding their purported waiver, TCW and its affiliated companies continue to pursue two other arbitrations premised on ***precisely the same measures*** as are at issue here. Consequently, the waiver tendered in Claimants' submission is invalid. Claimants' failure to satisfy this fundamental prerequisite to the submission of a claim to arbitration set forth in Article 10.18 of CAFTA-DR precludes the Tribunal from asserting jurisdiction over this dispute.

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59 *See, e.g.*, Vienna Convention, Art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty . . . .") (Resp. Auth. 5).

60 McNair at 366 (Resp. Auth. 30).

61 *See* CAFTA-DR, Art. 10.18.2, Art. 10.18.2(b) (emphasis added) (Resp. Auth. 2).

62 Am. SOC ¶ 24 (". . . Claimants hereby consent to arbitration and waive Claimants' right to initiate or continue before any administrative tribunal or court under the law of any Party, or under any other dispute settlement procedure available to Claimants, any proceeding with respect to any measure that constitutes a violation of Chapter 10 of CAFTA-DR.").

A. The Tribunal's Jurisdiction Is Conditional upon Claimants' Waiver Under Article 10.18(2) of the Right to Pursue Any Other Proceeding with Respect to the Measures They Allege to Be in Breach of CAFTA-DR

30. The Republic's consent to arbitrate a dispute under CAFTA-DR is subject to certain conditions with which Claimants must comply in order to submit a claim to arbitration under the Treaty. In particular, Article 10.18(2) of the Treaty, which is captioned "Conditions and Limitations on Consent of Each Party," states that:

> No claim may be submitted to arbitration under this Section unless: . . .
>
> (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.[63]

Accordingly, Article 10.18(2)(b) makes it a precondition to the submission of these Treaty claims to arbitration that Claimants give up their right to initiate or continue ***any*** proceeding under ***any*** dispute settlement procedure arising out of ***any*** measure at issue in this case.[64]

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[63] CAFTA-DR, Art. 10.18(2) (emphasis added) (Resp. Auth. 2).

[64] *See Waste Management, Inc. v. United Mexican States* (Award), ICSID Case No. ARB(AF)/98/2 (June 2, 2000) ¶¶ 13–14, 17 (emphasis in original) (considering the almost identical waiver requirement in Article 1121 of the North American Free Trade Agreement ("NAFTA"), and stating that: "NAFTA Chapter XI, Section B, Article 1121 lays down a series of conditions precedent to submission of a claim to arbitration proceedings . . . . Under NAFTA Article 1121, a disputing investor may submit to arbitration proceedings, to quote literally "*Only if*" certain prerequisites are met, comprising, in general terms, consent to and waiver of determined rights. In light of this Article, it is fulfilment of NAFTA Article 1121 conditions precedent by an aggrieved investor that entitles this Tribunal to take cognisance of any claim forming the subject of arbitration . . . any analysis of the fulfilment of the prerequisites established as conditions precedent to submission of a claim to arbitration under NAFTA Article 1121 calls for the utmost attention, since fulfillment thereof opens the way, *ipso facto*, to an arbitration procedure in accordance with the commitment acquired by the parties as signatories to [NAFTA].") (Resp. Auth. 27). *See also International Thunderbird Gaming Corp. v. United Mexican States* (Award), UNCITRAL (NAFTA) (Jan. 26, 2006), ¶ 115 ("Article 1121 of the NAFTA is

31. This precise issue was considered in *Waste Management, Inc. v. United Mexican States* ("*Waste Management*") in the context of the almost identical waiver requirement under Article 1121 of the North American Free Trade Agreement ("NAFTA").[65] In that case, the claimant argued that the waiver required by NAFTA did not apply to litigation and arbitration proceedings not alleging a breach of NAFTA or international law, but "involving allegations that [Mexico] has violated duties imposed by other sources of law."[66]

32. Rejecting the claimant's argument, the *Waste Management* tribunal acknowledged that "one and the same measure may give rise to different types of claims in different courts or tribunals," [67] and confirmed that Article 1121 was not limited to a waiver of claims equivalent to, or based upon, breaches of NAFTA.[68] Instead, Article 1121 extends

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concerned with conditions precedent to the submission of a claim to arbitration. One cannot therefore treat lightly the failure by a party to comply with those conditions.") (Resp. Auth. 14).

65 *See also Railroad Development Corp. v. Republic of Guatemala* (Decision on Jurisdiction), ICSID Case No. ARB/07/23 (Nov. 17, 2008), ¶¶ 55–56, 73 (stating that "[i]t is evident that CAFTA Article 10.18 and NAFTA Article 1121 have the same general rationale and purpose", and that those provisions have similar effect and that "differences in drafting [between the provisions] are immaterial.") (Resp. Auth. 25).

66 *See Waste Management*, ¶¶ 4–5 (Resp. Auth. 27). In *Waste Management*, the U.S. claimant's Mexican subsidiary, Acaverde S.A. de C.V., initiated two lawsuits in Mexico against the Mexican state bank Banco Nacional de Obras y Servicios Públicos, S.N.C. (Banobras) and commenced a domestic arbitration against the City Council of Acapulco (Acapulco) under the concession agreement granted by Acapulco to the claimant Waste Management and Acaverde. Actions of Banobras and Acapulco were at issue in the NAFTA proceedings. Waste Management submitted a waiver to the NAFTA tribunal waiving the right "to initiate or continue before any . . . dispute settlement procedures, any proceedings with respect to the measures taken by [Mexico] that are alleged to be a breach of NAFTA Chapter Eleven and applicable rules of international law," but stated that the waiver "does not apply to any dispute settlement proceedings involving allegations that [Mexico] has violated duties imposed by sources of law other than Chapter Eleven of NAFTA, including the municipal law of Mexico." *See Waste Management*, ¶¶ 4–5 (Resp. Auth. 27). Having considered the domestic litigation and arbitration claims of Waste Management's subsidiary, Acaverde, the tribunal determined that they were based upon the same measures that were "also invoked in the present arbitral proceedings as breaches of NAFTA provisions." *See id.* ¶ 27. By pursuing several claims in parallel with respect to the same measures underlying the NAFTA proceeding, Waste Management failed to satisfy the waiver condition in Article 1121, leading the tribunal to dismiss the NAFTA claims for lack of jurisdiction. *See id.* at ¶ 31.

67 *Id.* at ¶ 27(a).

68 *Id.* ("It is clear that one and the same measure may give rise to different types of claims in different courts or tribunals. Therefore, something that under Mexican legislation would constitute a series of

to ***any claims***, irrespective of their legal basis, that are derived from or concern the ***measures*** forming the basis of the investment treaty claim.

33. Indeed, Article 1121 of NAFTA and Article 10.18(2) of CAFTA-DR reflect the Contracting Parties' expressed intention to prevent duplicative and vexatious proceedings being brought that would result in unfairness to the host State and the potential for multiple recoveries of damages.[69] As the *Waste Management* tribunal acknowledged:

> In effect, it is possible to consider that proceedings instituted in [another] forum may exist which do not relate to those measures alleged to be in violation of the NAFTA by a member state of the NAFTA, in which case, it would be feasible that such proceedings could coexist simultaneously with an arbitration proceeding under the NAFTA. However, when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent ***risk that the Claimant may obtain the double benefit in its claims for damages***. This is ***precisely what NAFTA Article 1121 seeks to avoid***.[70]

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 case and the

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breaches of contract expressed as non-payment of certain invoices, violation of exclusivity clauses in a concession agreement, etc., could, under the NAFTA, be interpreted as a lack of fair and equitable treatment of a foreign investment by a government (Article 1105 of NAFTA) or as measures constituting "expropriation" under Article 1110 of the NAFTA.").

69 *See* Campbell McLachlan, Laurence Shore, Matthew Weiniger and Loukas Mistelis, *International Investment Arbitration: Substantive Principles* 109 (2007) (emphasis added) (". . . the formulation in Article 1121 focuses on the State measure—the governmental act—which has given rise to the dispute, and not on the claims to which such a measure may give rise. This language is apt to include both municipal law claims and international law claims. Such an approach also seems consonant with the policy of Article 1121: ***to prevent any other court or tribunal from considering the investor's complaint at the same time as the NAFTA tribunal; and to ensure no double recovery of damages***.") (emphasis added) (Resp. Auth. 31).

70 *Waste Management*, ¶ 27(b) (emphasis added) (Resp. Auth. 27). *See also id.* ¶ 28; *Thunderbird*, ¶ 118 ("In construing Article 1121 of the NAFTA, one must take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.") (Resp. Auth. 14); Christopher F. Dugan, Don Wallace, Jr., Noah Rubins and Borzu Sabahi, *Investor-State Arbitration* 370 (2006) (stating that "waiver provisions . . . are primarily designed to prevent duplicative dispute resolution activity, which is viewed as potentially abusive and unfair to the host state.") (Resp. Auth. 33).

several proceedings that Claimants are pursuing in parallel.[71] Once the Tribunal has established that this is the case, arbitral jurisdiction under CAFTA-DR can exist ***only if*** Claimants have effectively waived their right to pursue any other claims with respect to those measures, irrespective of the legal basis of those claims.[72] As set forth below, Claimants fail to establish that this is the case.

B. Claimants' Purported Waiver of Rights to Pursue Other Proceedings with Respect to the Measures at Issue in This Case Is Invalid

35. Paragraph 24 of Claimants' Amended Statement of Claim purports to be a written waiver under CAFTA-DR 10.18(2) stating that Claimants waive the "right to initiate or continue . . . under any other dispute settlement procedure available to Claimants, any proceeding with respect to any measure that constitutes a violation of Chapter 10 of CAFTA-DR."[73] However, Claimants' post-waiver conduct runs afoul of the material requirements of Article 10.18(2) of CAFTA-DR. In particular, Claimants and their affiliates have failed to take the "**formal and material act** . . . of either dropping or desisting from initiating parallel proceedings before other courts or tribunals."[74]

36. To the contrary, Claimants and their affiliates have shown ***no intention of abandoning*** their rights to initiate or continue proceedings before other courts or tribunals

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[71] *See Waste Management*, ¶ 27(b) (Resp. Auth. 27); *Railroad Development Corp.*, ¶ 48 ("The key questions for the Tribunal are whether the measures before the domestic arbitrations are the same measures which are 'alleged to constitute a breach referred to in Article 10.16', and, if so, what is the effect on the validity of the waiver and the jurisdiction of the Tribunal.") (Resp. Auth. 25).

[72] *See Waste Management*, ¶ 18 ("The requirement of a waiver in any context implies a voluntary abdication of rights, inasmuch as this act generally leads to a substantial modification of the pre-existing legal situation, namely, the forfeiting or the extinguishment of the right. Waiver thus entails exercise of the power of disposal by the holder thereof in order to bring about this legal effect.") (Resp. Auth. 27).

[73] *See* Am. SOC ¶ 24.

[74] *See Waste Management*, ¶ 20 (emphasis in original). *See also id.* at ¶ 24 ([I]t is clear that the waiver required under NAFTA 1121 calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions. Moreover, such an abdication of rights ought to have been made effective as from the date of submission of the waiver . . . .") (Resp. Auth. 27).

with respect to the measures at the root of this case; instead, they persist in pursuing two other virtually identical arbitration proceedings.[75] As described above, TCW, through its parent company Société Générale, continues to pursue an arbitration proceeding under the France-DR BIT based on the same alleged measures and seeking essentially the same relief.[76] Further, ***after*** this CAFTA-DR arbitration was commenced and the purported waiver made, EDE Este—Claimants' subsidiary company in the Dominican Republic—initiated a claim under its concession agreement, which asserts as its basis almost precisely the same measures taken by exactly the same entities (including, most notably, the Republic) that are the bases of claims in this case.[77]

37. Even a brief glance at Claimants' Statements of Claim and Request for Arbitration in the three proceedings reveals that each case is a virtual facsimile of the other.[78] Thus, in each of these arbitrations Claimants assert claims based on the very same alleged measures at the heart of the claims in this dispute. For example, in each of these arbitrations:

- Claimants allege that Respondent failed to implement the First-Phase and Second-Phase Tariffs. In particular, in all three cases Claimants support this claim with the same assertions that the government's enactment of Law 125-01 purportedly abrogated the regulatory regime established in the late 1990s, and that the enactment of SIE 31-2002

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75 *See supra* Relevant Factual Background, Part II.

76 *See supra id.*

77 *See supra* Relevant Factual Background, Part II. Notably, *Waste Management* also involved an effort by the U.S. claimant's investment vehicle in the host State, Acaverde, to pursue proceedings under domestic law with respect to measures at issue in the NAFTA arbitration. Indeed, in that case—like this one—Acaverde initiated a separate arbitration ***after*** the claimant's commencement of the NAFTA arbitration. The *Waste Management* tribunal found this conduct to be in breach of the requirements of a NAFTA Article 1121 waiver. *See Waste Management*, ¶¶ 6, 25–31 (Resp. Auth. 27).

78 *See* Relevant Factual Background, Part II, *supra* (identifying the numerous practically verbatim passages in each of the Amended Statement of Claim, the Statement of Claim in the France-DR BIT arbitration and the Request for Arbitration in the concession agreement arbitration). Indeed, the stark similarity of the tables of contents of the three submissions reveals precisely how these claims are based on the same measures.

allegedly set tariff rates different from that previously guaranteed to be implemented;[79]

- Claimants' allegations that Respondent allegedly failed to indemnify EDE Este for its refusal to implement the First-Phase and Second-Phase Tariffs is based on (1) the claim that Respondent failed to comply with various agreements supposedly promising to compensate EDE Este for EDE Este's inability to charge the tariffs provided for in 1998, including the July 2000 Agreement of Payments and Retentions, the February 2004 Points of Framework Agreement for the Sustainability of Electric Generation in the Republic, and the March 2005 General Sector Agreement, as well as (2) Respondent's supposed non-compliance with Presidential Decree No. 302-03, which Claimants claim formalized Respondent's promise to indemnify EDE Este;[80]

- Claimants' claim that Respondent breached the promise to maintain unregulated users' minimum demand requirements is based on the enactment of Law 125-01, which they allege unilaterally granted the SIE the power to modify these requirements, and of the regulations enacted pursuant to Law 125-01, which provided for the requirements to be phased down over time;[81]

- Claimants claim that Respondent failed to pay required capital contributions to EDE Este and that this failure is in violation of the Subscription Agreement;[82]

- Claimants assert that Respondent failed to enforce the Republic's laws and to protect EDE Este and its representatives through measures such as Respondent's alleged declaration that the executives of EDE Este's co-owners should be "deported" from the Republic, the encouragement of consumers to ignore the timely and full satisfaction of their electricity bills, and the failure to prevent an EDE Este collection office from being burned by protesters;[83] and

- Claimants allege that Respondent failed to redress EDE Este's complaints based on the same supposed failure to respond to appeals filed pursuant to Law 1494 and Administrative Procedure 1494.[84]

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79 Am. SOC ¶¶ 79–81; Resp. Ex. 17 (Société Générale SOC) ¶¶ 66–68; Resp. Ex. 23 (EDE Este RFA) ¶¶ 69–71.

80 Am. SOC ¶ 83; Resp. Ex. 17 (Société Générale SOC) ¶ 63; Resp. Ex. 23 (EDE Este RFA) ¶ 74.

81 Am. SOC ¶¶ 91–93; Resp. Ex. 17 (Société Générale SOC) ¶¶ 74–76; Resp. Ex. 23 (EDE Este RFA) ¶¶ 81–83.

82 Am. SOC ¶¶ 97–98; Resp. Ex. 17 (Société Générale SOC) ¶ 89; Resp. Ex. 23 (EDE Este RFA) ¶ 92.

83 Am. SOC ¶ 105; Resp. Ex. 17 (Société Générale SOC) ¶ 93; Resp. Ex. 23 (EDE Este RFA) ¶ 101.

84 Am. SOC ¶ 109; Resp. Ex. 17 (Société Générale SOC) ¶ 97; Resp. Ex. 23 (EDE Este RFA) ¶ 107.

By pursuing three parallel arbitration proceedings with respect to the same measures underlying this CAFTA-DR proceeding, Claimants and their affiliates have created precisely the kind of situation presenting the risk of duplicative proceedings and multiple recoveries that the Contracting Parties intended Article 10.18(2) to prevent.

38. Claimants' conduct in continuing a prior arbitration and initiating a new proceeding indicate an intention different to that in their purported waiver.[85] This failure to comply with the waiver requirements of Article 10.18(2) necessarily means that Claimants cannot satisfy a necessary precondition to the submission of their claims under the Treaty to arbitration.[86] Accordingly, arbitral jurisdiction under Chapter Ten of CAFTA-DR does not exist and the Tribunal must dismiss this case.

II. CLAIMANTS DO NOT OWN AN INVESTMENT IN THE DOMINICAN REPUBLIC OVER WHICH THE TRIBUNAL CAN ASSUME JURISDICTION

A. The Tribunal Can Assert Jurisdiction Only Over Claims Relating to an Investment Having the Characteristics of an Investment

39. CAFTA-DR protects only investments having "the characteristics of an investment."[87] Accordingly, the Tribunal must "look beyond the 'form' in favour of the economic essence of investment."[88] It is not sufficient that Claimants establish that they have

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85 *See Waste Management*, ¶ 30 ("[I]t is clear that Claimant issued a statement of intent different from that required in a waiver pursuant to NAFTA Article 1121, since it continued with the proceedings initiated against BANOBRAS after the date of submission of the waiver . . . . Likewise, it has also been shown that subsequent to submission of this claim for arbitration, ACAVERDE initiated arbitration proceedings against ACAPULCO, which are still ongoing today . . . .") (Resp. Auth. 27); *Railroad Development Corp.*, ¶ 54 ("It is the fact that two domestic arbitration proceedings exist and overlap with this arbitration as determined by the Tribunal that triggers the defect in the waiver.") (Resp. Auth. 25).

86 As counsel for Claimants in this case has written about the *Waste Management* award, "[a]fter analyzing Waste Management's claims before Mexican courts and in the local arbitration, the tribunal concluded that they were based upon the same government measure that lay at the root of the NAFTA arbitration. Consequently, by continuing the domestic litigation and arbitration after it filed its NAFTA arbitration, Waste Management failed to satisfy the waiver requirement set forth in NAFTA Article 1121." *See* Dugan *et al.*, *Investor-State Arbitration* at 378–79 (Resp. Auth. 33).

87 CAFTA-DR, Art. 10.28 (Resp. Auth. 2).

88 Gilbert Gagné and Jean-Frédéric Morin, "The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT," 9 J. Int'l Econ. L. 357, 368–69 (2006) (addressing the identically worded definition of investment in the U.S. Model BIT) (Resp. Auth. 37).

the type of interest that could constitute an investment. Rather, Claimants must show that their particular interest possesses the characteristics of an investment.[89] They cannot.

B. Claimants' Alleged Investment Does Not Have the Characteristics of an Investment Required by CAFTA-DR

40. Article 10.28 of CAFTA-DR expressly requires that for there to be an investment capable of protection under CAFTA-DR, it must have the characteristics of an investment. Article 10.28 refers to three such characteristics, namely "the commitment of capital or other resources," "the expectation of gain or profit," and "the assumption of risk." Claimants' "investment" has none of these characteristics.[90]

1. Claimants' "Investment" Does Not Involve the Commitment of Capital or Other Resources

41. Unlike in other cases before tribunals that have considered the question of whether a sufficient commitment has been made for the interest at issue to qualify as an investment, Claimants have not made an "extensive" or "substantial" commitment of capital or other resources.[91] Claimants' initial expenditure was a nominal U.S. $2. Since then

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89 Applicable by necessary implication in respect of CAFTA-DR is the guidance expressly provided in the United State-Singapore Free Trade Agreement that "[w]here an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take." United States-Singapore Free Trade Agreement, May 6, 2003, Note 15–1 (Resp. Auth. 4).

90 Nor does Claimants' "investment" have other generally accepted characteristics of an investment. CAFTA-DR provides a non-exhaustive list of examples of the characteristics of an investment. CAFTA-DR, Art. 10.28 (". . . the characteristics of an investment, ***including*** such characteristics as . . ."") (emphasis added). Other generally accepted characteristics of an investment include that the investment must have (1) a certain duration and (2) significance for the host State's development. *See* Christoph Schreuer, *The ICSID Convention: A Commentary* 140 (2001) (Resp. Auth. 32); *see also Fedax N.V. v. Bolivarian Republic of Venezuela* (Decision on Jurisdiction), ICSID Case No. ARB/96/3 (July 11, 1997), ¶ 43 (adopting these criteria) (Resp. Auth. 12). With respect to the second of these other generally accepted characteristics, Respondent notes the express language of the Preamble to CAFTA-DR indicating that an objective of CAFTA-DR is to "[c]reate new opportunities for economic and social development in the region." *See* CAFTA-DR, Preamble (Resp. Auth. 2). Claimants' "investment" has neither of these other generally accepted characteristics.

91 *See Liberian Eastern Timber Corp. v. Republic of Liberia* (Award), ICSID Case No. ARB/83/2 (Mar. 31, 1986), 2 ICSID Rep. 343, 350 (1994) ("[T]he fact is that Liberia's own documents indicate that LETCO paid out extensive amounts for the development of the concession. There is, therefore, no doubt that, based on the Concession Agreement, amounts paid out to develop the concession, as well as other undertakings, this legal dispute has arisen directly from an "investment" as that term is used in the Convention.") (Resp. Auth. 16); *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (Decision on Jurisdiction), ICSID Case No. ARB/00/5 (Sept. 27, 2001), ¶ 101 ("Indeed,

Claimants have never made ***any*** capital contributions to EDE Este nor have they made ***any*** other commitment to the financial welfare of EDE Este.[92]

2. Claimants Had No Reasonable Expectation of Gain or Profit in Respect of Their "Investment"

42. In his concurring opinion in *CME v. Czech Republic*, Professor Brownlie suggested that the expectation of gain or profit is an indispensable element of any true investment, "as a form of expenditure or transfer of funds for the precise purpose of obtaining a return."[93] Professor Brownlie further required in the application of investment treaty provisions "an element of reasonableness."[94]

43. Claimants can have had no reasonable expectation of gain or profit in connection with their interest in EDE Este. First, Claimants were fully aware that they were acquiring company shares whose value had been written down to zero by their previous owner, AES,[95] before they were transferred to Claimants. Further, Claimants acquired the EDE Este shareholding at a time when the difficulties facing the Republic's electricity sector were well known. The purchase price that TCW paid to AES—a negligible U.S. $2—reflected the diminished value of and prospects for EDE Este.[96]

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the performance of the Agreement, which implies substantial resources during significant periods of time, clearly qualifies as an investment . . . .") (Resp. Auth. 6).

92 *See* Resp. Ex. 21 (Letter from J. Bolinaga to F. Rosa, Nov. 15, 2007) (confirming that the last capital contributions to EDE Este occurred before Claimant acquired its shareholding). *See also* Relevant Factual Background, Part I.C, *supra.*

93 *CME Czech Republic B.V. v. Czech Republic* (Separate Opinion of Ian Brownlie Q.C.) UNCITRAL (Mar. 14, 2003), ¶ 34 (Resp. Auth. 9).

94 *Id.*

95 *See* Resp. Ex. 9 (*TCW Group Buys AES' Dominican Stake*, Electric Power Daily, Nov. 18, 2004, at 1) (stating that AES had written off the investment and classified EDE Este as a discontinued operation). *See also* Relevant Factual Background, Part I.A, *supra.*

96 *See* Resp. Ex. 5 (Share Purchase Agreement, Art. II). *See also* Relevant Factual Background, Part I.A, *supra*.

3. Claimants' "Investment" Does Not Involve the Assumption of Risk

44. Tribunals considering the nature of risk associated with an investment have sought "reasons why the risks assumed . . . were anything other than normal commercial risks."[97] Here, it is clear that far from assuming even normal commercial risks, TCW structured the transaction to insulate itself from ***all risks*** with respect to the EDE Este shareholding.[98] TCW shielded itself from any ***economic risk*** beyond its nominal U.S. $2 payment for shares by structuring the transaction to avoid absorbing any of EDE Este's financial losses.[99] TCW also avoided any ***legal risk*** by ensuring that several layers of intermediary entities—including ultimately DEH LP—shield it from any liability arising in connection with the EDE Este shareholding.[100] In turn, the corporate layers below DEH LP shield it too from any such liability. Finally, Claimants insulated themselves from ***reputational risk*** by retaining AES as the operator of EDE Este and thus the public face of EDE Este's distribution business in the Republic.[101]

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97 *See, e.g., Malaysian Historical Salvors SDN, BHD v. Malaysia* (Award on Jurisdiction), ICSID Case No. ARB/05/10 (May 17, 2007), ¶ 112 (Resp. Auth. 18).

98 *See Société Générale*, Annex 1 (showing the various intermediaries shielding TCW from losses), and ¶ 25 (explaining that Claimant was to be paid by means of a management contract with TAMCO with all liabilities remaining elsewhere) (Resp. Auth. 26). *See also* Relevant Factual Background, Part I.C, *supra*.

99 *See Société Générale*, ¶ 25 (describing Claimant's position that it chose a corporate structure that would shield Société Générale and TCW both from the possibility of having to consolidate EDE Este's losses on its own books and from other adverse tax, accounting or legal consequences) (Resp. Auth. 26). *See also* Relevant Factual Background, Part I.C, *supra*.

100 *See Société Générale*, Annex 1 (Corporate Structure of the investment reflecting the multiple intermediaries between TCW and EDE Este, including DEH LP) (Resp. Auth. 26). *See also* Relevant Factual Background, Part I.C, *supra.*

101 *See* Resp. Ex. 13 (Letter from R. B. Thomas and M. Dubuc to F. Méndez, Oct. 27, 2005, attaching a "Summary of Sale by AES of Its Indirect Ownership Interest in EDE Este to TCW") (providing information on the acquisition of the EDE Este shareholding and stating the key features of the operations and management agreement by which AES will provide "day to day management of E[DE] Este"); *see also* Resp. Ex. 11 (*AES sells 50% of shares*, Caribbean Update, Jan. 1, 2005) (stating that despite selling its EDE Este shareholding, AES would continue operating the company); *see also* Resp. Ex. 10 (*Electrifying the Electorate to Save the Government*, Noticien: Central American & Caribbean Affairs, Dec. 16, 2004) (noting that despite the sale of the EDE Este to TCW, AES would continue to operate the company). *See also* Relevant Factual Background, Part I.C, *supra*.

45. Because it does not possess any of the characteristics of an investment required by Article 10.28 of CAFTA-DR, Claimants' interest in EDE Este is not an "investment" within the Treaty's terms. Accordingly, it falls outside of the CAFTA-DR regime and this Tribunal's jurisdiction.

III. THE TRIBUNAL CANNOT ASSERT JURISDICTION OVER THE ALLEGED BREACH OF ARTICLE 10.7 OF CAFTA-DR BECAUSE THE FACTS PLEADED BY CLAIMANTS DO NOT FALL WITHIN THE SCOPE OF ARTICLE 10.7

A. The Tribunal Can Assert Jurisdiction Only Over Purported Violations that Are Capable of Falling Within the Treaty Provision Allegedly Breached

46. As a general matter, the Tribunal must satisfy itself that it has jurisdiction *ratione materiae* over the claims made by Claimants.[102] The Tribunal's power to determine its jurisdiction derives from CAFTA-DR and from Article 21 of the UNCITRAL Arbitration Rules.[103]

47. Section B of CAFTA-DR confers jurisdiction upon the Tribunal with respect to "investment disputes" and states that the Tribunal "shall decide the dispute in accordance with [CAFTA-DR] and applicable rules of international law."[104] Pursuant to Article 31 of the Vienna Convention, this grant of jurisdiction in CAFTA-DR must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context," with the Treaty as a whole—including its substantive investment protection provisions—

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102 *See, e.g.*, *Impregilo S.p.A. v. Islamic Republic of Pakistan* (Decision on Jurisdiction), ICSID Case No. ARB/03/3 (Apr. 22, 2005), ¶ 237 ("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.") (Resp. Auth. 13).

103 *Methanex v. United States of America* (First Partial Award), UNCITRAL (NAFTA) (Aug. 7, 2002), ¶ 106 ("The Tribunal's power to rule on the USA's challenges [to jurisdiction] necessarily derives from Chapter 11 NAFTA.") (Resp. Auth. 20); UNCITRAL Arbitration Rules, Article 21(1) ("The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction . . . .") (Resp. Auth. 3).

104 CAFTA-DR, Art. 10.22.1 (Resp. Auth. 2).

providing the primary context.[105] Accordingly, the Tribunal has jurisdiction only over disputes relating to investments which implicate and fall within the specific provisions of CAFTA-DR that accord substantive protections to investments.

48. This approach has been confirmed by several international law tribunals. In its frequently cited judgment on preliminary objections in the *Oil Platforms Case*, the ICJ articulated the proper approach to determining jurisdiction over treaty claims:

> [The Court] must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2.[106]

49. The ICJ's approach to determining jurisdiction has been readily adopted by arbitral tribunals faced with disputes under investment treaties. In *Impregilo v. Pakistan*, the tribunal expressly stated its agreement with the ICJ's approach.[107] Similarly, in *Bayindir v. Pakistan*, the tribunal confirmed that:

> [T]he Tribunal's first task is to determine the meaning and scope of the provisions which Bayindir invokes as conferring jurisdiction and to assess whether the facts alleged by Bayindir fall within those provisions or are capable, if proved, of constituting breaches of the obligations they refer to.[108]

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105 Vienna Convention, Art. 31(1) and (2) (Resp. Auth. 5).

106 *Oil Platforms Case (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, 1996 I.C.J. Rep. 803, 810 ¶ 16 (Dec. 2, 1996) (addressing jurisdictional objections to Iran's claims under the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States) (Resp. Auth. 23). *See also Legality of Use of Force (Yugoslavia v. Italy)*, Provisional Measures, Order, 1999 I.C.J. Rep. 481, 490 ¶ 25 (June 2, 1999) ("[I]n order to determine, even *prima facie*, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; . . . [It] must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX.") (Resp. Auth. 15).

107 *Impregilo* S.p.A. ¶ 254 (citing *Legality of Use of Force* and noting that "[t]he present Tribunal is in full agreement with the approach evident in this jurisprudence") (Resp. Auth. 13).

108 *Bayindir Insaat Turizm Ticaret ve Sanyai A.S. v. Islamic Republic of Pakistan* (Decision on Jurisdiction), ICSID Case No. ARB/03/29 (Nov. 14, 2005), ¶ 197 (Resp. Auth. 7)..

50. Accordingly, the test that this Tribunal must apply in determining whether it has jurisdiction over Claimants' claims is whether the facts alleged by Claimants are capable of constituting breaches of the provision of CAFTA-DR that Claimants have invoked. It is Claimants' burden to demonstrate that this is the case.[109]

B. The Facts Alleged by Claimants in Support of Their Claim Under Article 10.7 Are Not Capable of Falling Within the Scope of That Provision

51. Article 10.7 of CAFTA-DR protects against both direct and indirect expropriation.[110] The contracting parties to CAFTA-DR expressly confirmed their shared understanding that a ***direct expropriation*** under Article 10.7 requires "a formal transfer of title or outright seizure."[111] Equally, the contracting parties understood that an ***indirect expropriation*** requires an action or series of actions that have "an ***effect equivalent to*** direct expropriation without formal transfer of title or outright seizure."[112] In their Amended

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109 *See id.*, ¶¶ 190, 192 ("In accordance with accepted international (and general national) practice, a party bears the burden of proving the facts it asserts . . . . In the Tribunal's understanding . . . Bayindir has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction."). *See also Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (Award), ICSID Case No. ARB/99/6 (Apr. 12, 2002) ¶ 89 ("In order to accept a claim under the BIT, a breach of its provisions by the Respondent must be found leading to a claim, as for example under Art. 4 (Expropriation) (Resp. Auth. 21). The respective provisions of the BIT confirm what can be considered as a general principle of international procedure—and probably also of virtually all national procedural laws—namely that it is the Claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim.").

110 CAFTA-DR, Art. 10.7.1 ("No Party may expropriate or nationalize a covered investment either directly or indirectly though measures equivalent to expropriation or nationalization . . . .") (Resp. Auth. 2).

111 CAFTA-DR, Annex 10-C (Resp. Auth. 2). This is consistent with the concept of direct expropriation in international law generally. *See, e.g., Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica* (Final Award), ICSID Case No. ARB/96/1 (Feb. 17, 2000), ¶ 18 (expropriation decree required transfer to Costa Rica of title to land purchased by investor for development into tourist resort and residential community) (Resp. Auth. 11). *See also* CAFTA-DR, Annex 10-C (confirming that Article 10.7.1 "is intended to reflect customary international law concerning the obligation of States with respect to expropriation") (Resp. Auth. 2).

112 CAFTA-DR, Annex 10-C (emphasis added) (Resp. Auth. 2). *See, e.g.*, *CMS Gas Transmission Company v. Argentina* (Award), ICSID Case No. ARB/01/8 (May 12, 2005), *annulled in part on other grounds*, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (Sept. 25, 2007), ¶¶ 262–63 (finding no indirect expropriation where "the investor is in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment") (Resp. Auth. 10).

Statement of Claim, Claimants fail to allege facts capable of constituting either a direct or an indirect expropriation within CAFTA-DR's terms.

52. Claimants do not—and indeed cannot—allege that there has been a ***direct expropriation*** of their alleged investment as there has been no transfer of title to or outright seizure of Claimants' interest in EDE Este.[113] Claimants instead allege that:

- EDE Este was required to distribute electricity below its actual costs;[114]
- The Republic is depriving Claimants of the value of their investment by treating payments to EDE Este as loans or other accounts receivable;[115]
- The Republic repudiated its promise to keep the threshold for non-regulated users at two megawatts, "effectively expropriating its best customers";[116] and
- The Republic interfered with EDE Este's application of indemnity payments from the Republic and controlled EDE Este's budget process.[117]

53. These facts are also incapable of constituting an ***indirect expropriation*** because they do not—and cannot—result in an effect equivalent to direct expropriation.

54. Instead, Claimants' assertions concern the alleged detrimental economic effect on EDE Este of certain actions by the Government. Such allegations are plainly insufficient to bring Claimants within the scope of Article 10.7 of CAFTA-DR.[118] Rather, as in *CMS v.*

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113 Not only do TCW and DEH LP still own their controlling interest in EDE Este, but also they use that control to take decisions concerning EDE Este unilaterally without consulting or seeking consent of FONPER, which is a minority shareholder of EDE Este. *See also* Relevant Factual Background, Part I, *supra*.

114 Am. SOC ¶ 126.

115 Am. SOC ¶ 127.

116 Am. SOC ¶ 128.

117 Am. SOC ¶ 129.

118 CAFTA-DR, Annex 10-C ("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 investment has occurred") (Resp. Auth. 2).

Argentina in which the tribunal found that there was no indirect expropriation,[119] Claimants retain full ownership and control of the EDE Este shareholding.[120]

55. Accordingly, the Tribunal should decline jurisdiction over the alleged breach of Article 10.7 of CAFTA-DR.

IV. THE TRIBUNAL HAS NO JURISDICTION TO HEAR CLAIMS BASED ON EVENTS THAT OCCURRED PRIOR TO THE ENTRY INTO FORCE OF CAFTA-DR

56. All of the key acts and omissions alleged by Claimants as the basis for their claims of breaches of CAFTA-DR happened many years before March 1, 2007—the date on which CAFTA-DR entered into force for the Republic.[121] CAFTA-DR does not apply retroactively to allow the Tribunal to assert jurisdiction over these acts and events.

A. CAFTA-DR Expressly States That It Does Not Apply Retroactively

57. It is a seminal principle of international law that a treaty, absent an express provision to the contrary, does not have retroactive effect. The Vienna Convention confirms that:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.[122]

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119 *CMS*, ¶¶ 262–63 (Resp. Auth. 10).

120 *See* Relevant Factual Background, Part III.B, *supra*.

121 Importantly, the value of the EDE Este shareholding had been written down to zero in 2004—several years before the Treaty entered into force in March 2007—at a time before Claimants acquired the shares.

122 Vienna Convention, Art. 28 (Resp. Auth. 5); *see also* Draft Articles on Responsibility of State for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10, Ch. IV.E.1 ("Draft Articles on State Responsibility"), Art. 13 (2001) ("An act of a state does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.") (Resp. Auth. 36); *Phosphates in Morocco (Italy v. France)*, Preliminary Objections, Judgment, 1938 PCIJ Ser. A/B, No. 74, p. 10, 23 (June 14, 1938) ("In this case, the terms on which the objection *ratione temporis* submitted by the French Government is founded are perfectly clear: the only situations or facts falling under the compulsory jurisdiction are those which are subsequent to the ratification . . . .") (Resp. Auth. 24); *Case Concerning Right of Passage over Indian Territory (Portugal v. India)*, Judgment, 1960 I.C.J. Rep. 6, 34–36 (Apr. 12, 1960) (confirming that the jurisdiction of the International Court of Justice extended only to "situations or facts subsequent to" the date India stipulated in its declaration accepting the jurisdiction of the Court) (Resp. Auth. 8); *Société*

58. CAFTA-DR incorporates this seminal principle of international law and ***expressly states*** that its obligations apply only prospectively from the date on which it entered into force.

> For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.[123]

59. CAFTA-DR entered into force for the Republic on March 1, 2007.[124] Accordingly, CAFTA-DR does not bind Respondent with respect to acts or omissions predating March 1, 2007.[125]

B. This Tribunal Must Decline Jurisdiction Over Acts or Omissions Alleged by Claimants Occurring Before March 1, 2007

60. As pleaded in the Amended Statement of Claim, all of the key acts and omissions identified by Claimants as the basis for their claims of breaches of CAFTA-DR happened years ***before March 1, 2007***. For example:

- The Republic's issuance of Presidential Decree 749-02, which allegedly prevented distribution companies from collecting the full extent of unpaid invoices from consumers that have committed electricity fraud, occurred in 2002;[126]

Générale, ¶ 80 ("under the general principle the Tribunal would lack jurisdiction over treaty violations in respect of acts and events taking place before the Treaty entered into force") (Resp. Auth. 26).

123 *See* CAFTA-DR, Art. 10.1.3 (Resp. Auth. 2).

124 *See* Resp. Ex. 16 (Statement of U.S. Trade Representative Susan S. Schwab Regarding Entry into Force of the CAFTA-DR for the Dominican Republic dated Mar. 1, 2007) ("I am pleased the President has issued a proclamation to implement the CAFTA-DR for the Dominican Republic as of March 1, 2007").

125 *See Impregilo S.p.A.*, ¶ 311 ("Impregilo complains of a number of acts for which Pakistan is said to be responsible. The legality of such acts must be determined, in each case, according to the law applicable at the time of their performance. The BIT entered into force on 22 June 2001. Accordingly, only acts effected after that date had to conform to its provisions.") (Resp. Auth. 13).

126 Am. SOC ¶ 105.h. Despite Claimants' attempt to frame this individual and isolated act as part of a "pattern" by Respondent, *see id.* ¶ 105, it is clear that continuing acts are not at issue in this case. *See* Part IV.C, *infra*.

- The Republic's alleged denial of EDE Este's right to account for its full costs for distributing electricity purportedly was caused by the promulgation of SIE 31-2002 in 2002;[127]

- The Republic's purported deprivation of EDE Este's ability to adjust its tariffs allegedly was caused by the enactment of Law 125-01 in 2001, which Claimants allege "abrogated" the tariff regime put in place in the late 1990s;[128]

- The Republic's alleged unilateral reduction of unregulated users' minimum demand requirements allegedly was caused by the enactment of Law 125-01 in 2001;[129]

- The Republic's alleged failure to pay required capital contributions during the capitalization of EDE Este occurred in 1999;[130] and

- The Republic's alleged refusal to implement the First-Phase Tariffs occurred in 1999.[131]

61. As the tribunal noted in *M.C.I. Power v. Ecuador*, Claimants' "arguments with respect to the relevance of prior events considered to be breaches of the Treaty posit a contradiction since, before the entry into force of the [Treaty], there was no possibility of breaching it."[132] Accordingly, all of these acts and omissions fall outside the Tribunal's jurisdiction.[133]

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127 Am. SOC ¶ 81.

128 Am. SOC ¶ 79.

129 Am. SOC ¶ 91.

130 Am. SOC ¶ 97.

131 Am. SOC ¶ 83.a.

132 *M.C.I. Power Group L.C and New Turbine Inc. v. Republic of Ecuador* (Award), ICSID Case No. A1213/03/6 (July 31, 2007), ¶ 93 (Resp. Auth. 17).

133 Even if these acts and omissions constituted a breach of customary international law (which Respondent denies), "the existence of a breach of a norm of customary international law before a BIT enters into force does not give one a right to have recourse to the BIT's arbitral jurisdiction." *See id.* at ¶ 96.

C. Claimant's Efforts to Bring Acts and Omissions Within the Tribunal's Jurisdiction by Invoking a Continuous Course of Conduct Must Fail

1. The Acts and Omissions Claimants Allege Are Individual and Isolated Acts that Do Not Have a Continuing Character

62. Recognizing that the facts and events forming the basis of its allegations occurred before March 1, 2007, Claimants attempt to overcome the principle of non-retroactivity by invoking a so-called "pattern" or "course of conduct," suggesting that the alleged conduct as a whole falls within the scope of CAFTA-DR. Notwithstanding Claimants' several conclusory references in the Amended Statement of Claim to Respondent's "continuing wrongful conduct"[134] and "ongoing violations of CAFTA-DR,"[135] in no instance do Claimants invoke anything resembling a continuing breach.

63. The Draft Articles on State Responsibility state that for a continuing breach of a treaty to occur the State's act must "hav[e] a continuing character extend[ing] over the entire period during which the act continues and remains not in conformity with the international obligation."[136] The Commentaries to the Draft Articles on State Responsibility confirm that "[t]he critical distinction for the purpose of Article 14 is between a breach which is continuing and one which has already been completed."[137]

64. International tribunals have recognized the distinction between continuing and individual acts, and have excluded from the scope of their jurisdiction under investment treaties acts occurring before a treaty's entry into force that do not have a continuing

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134 Am. SOC ¶ 6. *See also id.* ¶ 74 ("continuing course of wrongful conduct"); *id*. ¶ 121 ("continuing wrongful actions").

135 Am. SOC ¶ 10. *See also id*. ¶ 19 ("ongoing, intentional, wrongful, willful and reckless violations"); ¶ 124 ("continuing violations").

136 Draft Art. 14(2) (Resp. Auth. 36).

137 *Commentaries to the Draft Articles on State Responsibility*, in James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (2002) ("*Commentaries to the Draft Articles on State Responsibility*"), Commentary to Art. 14 ¶ 2 (Resp. Auth. 34).

character. For example, in *Impregilo v. Pakistan*, the tribunal considered claims regarding alleged acts and omissions by Pakistani government authorities occurring both before and after the entry into force of the relevant investment treaty. The claimant sought to bring all of these acts within the investment treaty's scope by claiming that they formed part of a systematic and continuous pattern of conduct spanning the investment treaty's entry into force, and amounting to a continuing breach of that treaty.[138] The tribunal did not accept the claimant's proposition, but rather held that:

> [I]n the Tribunal's view, the present case is not covered by Article 14 [of the Draft Articles on State Responsibility]. Acts attributed to Pakistan and perpetrated before [the entry into force of the BIT] could without any doubt have consequences after that date. However, the acts in question had no 'continuing character' within the meaning of Article 14; they occurred at a certain moment and their legality must be determined at that moment, and not by reference to a Treaty which entered into force at a later date.[139]

65. Putting aside Claimants' rhetoric, it is clear that continuing acts are not at issue in this case. Rather, even as pleaded in the Amended Statement of Claim, it is evident that the alleged acts and events on which Claimants purport to rely are individual and isolated acts that do not form part of a seamless web spanning from 1999 through 2008. For example, Claimants claim that Respondent's enactment of Law 125-01 in July 2001 "abrogated the regulatory regime enacted in the late 1990s."[140] By their own allegation, Respondent's enactment of Law 125-01 abolished the regulatory regime allegedly promised to TCW's predecessor in the late 1990s. While the Republic rejects any claim that Law 125-01 was a

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138 *Impregilo S.p.A.*, ¶¶ 297–98 (Resp. Auth. 13).

139 *Id.* at ¶ 312. *See also Mondev International Ltd. v. United States of America* (Award), ICSID Case No. ARB (AF)/99/2 (Oct. 11, 2002), ¶¶ 61, 70 ("As to the loss of . . . Mondev's rights in the project as a whole, this occurred on the date of foreclosure and was final. Any expropriation, if there was one, must have occurred no later than 1991. In the circumstances it is difficult to accept that there was a continuing expropriation of the project as a whole after that date.") (Resp. Auth. 22); *id.* at ¶ 73 ("As to these rights or interests, there was no continuing wrongful act in breach (or potentially in breach) of Article 1110 at the date NAFTA entered into force.").

140 Am. SOC ¶ 74.

breach of any obligation, whether based on contract or treaty, there can be no doubt that the act of enacting Law125-01, as alleged by Claimants, was an individual act completed in 2001.[141]

66. As is evidenced by the claims at issue, these and other acts alleged—which include the passing of legislation and the abolition of a tariff scheme—are one-time acts or events, occurring and completed at a date and time before CAFTA-DR entered into force.[142] Consistent with the principle of non-retroactivity of treaties, the Tribunal does not have—and cannot assert—jurisdiction over these acts and events.

2. A Distinction Must Be Made Between Continuing Acts and Acts with Continuing Effects

67. Claimants fail to distinguish continuing acts and omissions from acts and omissions with continuing effects. Some of the acts alleged in the Amended Statement of Claim may at most constitute acts taking place at a given point in time before CAFTA-DR entered into force having ***effects*** enduring after that date.

68. The Draft Articles on State Responsibility set forth the established principle that "[t]he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue."[143] The Commentaries to the Draft Articles on State Responsibility clarify that:

> In accordance with *paragraph 1* [of Article 14], a completed act occurs 'at the moment when the act is performed', even though its effects or consequences may continue. The words

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141 *See* Dictionary.com, http://dictionary.reference.com/browse/abrogate (last visited Nov. 21, 2008) (defining "abrogate" as "1. to abolish by formal or official means; annul by an authoritative act; repeal: *to abrogate a law*. 2. to put aside; put an end to.") (Resp. Auth. 35).

142 For example, in the *Phosphates in Morocco* case, the PCIJ decided that a monopoly, instituted by legislation in 1920 but continuing to operate at the time of the Court's decision in 1938, was "a legal position resulting from the legislation of 1920 . . . and . . . [it] cannot be considered separately from the legislation of which it is the result . . . . [In this legislation] are to be sought the essential facts constituting the alleged monopolization and, consequently, the facts which really gave rise to the dispute regarding this monopolization." *Phosphates in Morocco* at 25–26 (Resp. Auth. 24).

143 Draft Art. 14(1) (Resp. Auth. 36).

> 'at the moment' are intended to provide a more precise description of the time-frame when a completed wrongful act is performed, without requiring that the act necessarily be completed in a single instant . . . . ***An act does not have continuing character merely because its effects or consequences extend in time.*** It must be the wrongful act as such which continues.[144]

69. Accordingly, as tribunals have confirmed, an act does not become a continuing act simply because it has continuing effects or consequences. For example, in *Impregilo v Pakistan*, the tribunal, in determining that what was alleged to be a series of acts was in fact a single act, stated that:

> [T]he current dispute is to be compared with cases of expropriation . . . in which the effects may be prolonged, whereas the act itself occurred at a specific point in time, and must be assessed by reference to the law applicable at that time . . . ."[145]

70. Several of Claimants' own statements are tantamount to admissions that the acts alleged are not continuing, but rather are acts happening at a certain point in time before CAFTA-DR entered into force with continuing effects. For example, Claimants rely on the Republic's reduction of unregulated users' minimum demand requirements in August 2006.[146] In an effort to circumvent the one-off, pre-treaty nature of this reduction, Claimants assert that the reduction "has and will result in a significant financial and structural ***impact*** on EDE Este."[147] Similarly, Claimants complain that the enactment of SIE 31-2002 in September 2002 has created "***ongoing damage***" to Claimants.[148]

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144 *Commentaries to the Draft Articles on State Responsibility*, Commentary to Art. 14 ¶¶ 2, 6 (emphasis added) (Resp. Auth. 34).

145 *Impregilo S.p.A.*, ¶ 313 (Resp. Auth. 13). *See also X. v. The United Kingdom*, App. No. 7379/76 Eur. Comm'n H. R. Dec. & Rep. 211, 212 (1977) (comparing a continuing act with "an act occurring at a given point in time" having "enduring effects" (citing *De Becker v. Belgium*, App. No. 214/56, 1962 Y. B. Eur. Conv. H. R. 215 (Eur. Comm'n H. R.))) (Resp. Auth. 29).

146 Am. SOC ¶ 95 (emphasis added).

147 Am. SOC ¶ 96.

148 Am. SOC ¶ 81 (emphasis added).

71. Claimants' own words reveal, therefore, that their complaints do not concern continuing acts, but rather what they allege are the enduring effects of acts occurring before March 1, 2007. The fact that Claimants maintain that certain acts have effects continuing after the entry into force of CAFTA-DR does not render those acts continuing violations of the Treaty.

3. It Is Undisputed that Acts Beginning Before but Continuing After the Entry into Force of a Treaty Cannot Provide the Basis for a Treaty Breach Until After the Treaty's Entry into Force

72. Even the characterization of an act as a continuing act cannot circumvent the principle of non-retroactivity of obligations under international law. Consequently, acts that are considered to be continuing because they begin prior to the entry into force of an international obligation and continue past that date, do not, and cannot, constitute a breach of that obligation before it comes into effect.

73. Special Rapporteur Ago in his *Fifth Report on State Responsibility* described this principle succinctly as follows:

> There will be a breach of the international obligation with which the conduct of the State is in conflict in so far as, for a certain time at least, the continuance of the act of the state and the existence of the obligation incumbent on it are simultaneous. If the conduct began before the obligation came into force for the State and continues thereafter, there will be a breach of the obligation ***from the moment when it began to exist for the State***.[149]

74. The Commentaries to the Draft Articles on State Responsibility likewise confirm that:

> In accordance with *paragraph 2* [of Article 14 of the Draft Articles on State Responsibility], a continuing wrongful act . . . occupies the entire period during which the act continues and remains not in conformity with the international obligation,

[149] Robert Ago, *State Responsibility: Fifth Report on State Responsibility, reprinted in* II Y. B. Int'l L. Comm'n (1976), U.N. Docs. A/CN.4/291, A/CN.4/291/Add.1, A/CN.4/291/Add.2, U.N. Sales No. E.77.V.5 (Part 1), ¶ 62 (emphasis added) (Resp. Auth. 39).

> ***provided that the State is bound by the international obligation during that period***.[150]

75. The principle that non-retroactivity is not circumvented by continuing acts is recognized in the investment treaty arbitration sphere. In *Feldman v. Mexico*, the tribunal explained that:

> [I]f there has been a permanent course of action by Respondent which started before January 1, 1994 and went on after that date and which, therefore, 'became breaches' of NAFTA Chapter Eleven Section A on that date (January 1, 1994), that post-January 1, 1994 part of Respondent's alleged activity *is* subject to the Tribunal's jurisdiction . . . . Any activity prior to that date, even if otherwise identical to its post-NAFTA continuation, is not subject to the Tribunal's jurisdiction in terms of time.[151]

76. This approach was confirmed in *M.C.I v. Ecuador*, in which the tribunal stated that "in order for a wrongful act or omission to constitute a breach of an international obligation there must have been a breach of a norm of international law in force at the time that the act or omission occurs."[152]

77. Thus, even if any acts alleged by Claimants could be characterized as continuing acts extending past March 1, 2007 (which they cannot), Respondent can have no liability for any acts and events (regardless of their character) occurring before CAFTA-DR entered into force, including to the extent of any damages allegedly resulting therefrom.

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150 *Commentaries to the Draft Articles on State Responsibility*, Commentary to Art. 14 ¶ 3 (emphasis added) (Resp. Auth. 34).

151 *Marvin Roy Feldman Karpa v. United Mexican States* (Decision on Jurisdiction), ICSID Case No.ARB(AF)/99/1 (Dec. 6, 2000), ¶ 62 (Resp. Auth. 19). *See also Mondev International Ltd.*, ¶ 70 ("[E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.") (Resp. Auth. 22).

152 *M.C.I. Power Group L.C. and New Turbine Inc.*, ¶¶ 90, 97, 136 (Resp. Auth. 17). *See also Société Générale*, ¶ 88 (holding that even where an act is continuous, "its legal materialization as a breach occurs when the Treaty has come into force") (Resp. Auth. 26).

CONCLUSION

78. Claimants' claims in this arbitration must be dismissed because their purported waiver under Article 10.18.2 of CAFTA-DR is invalid, and Claimants are not permitted under CAFTA-DR to pursue other arbitrations in respect of the measures alleged to constitute a breach of CAFTA-DR.

79. In any event, the Tribunal must decline jurisdiction because Claimants' alleged "investment" does not have the characteristics of an investment required by Article 10.28 of CAFTA-DR to bring an investment within the scope of the Treaty.

80. Should the Tribunal not dismiss Claimants' claims for their failure to submit a valid waiver and the jurisdictional defects inherent in Claimants' purported "investment," the Tribunal must decline jurisdiction over the alleged breach of Article 10.7 on the ground that not one fact alleged by Claimant in support of its claim of "expropriation," if established, is capable of constituting a breach of Article 10.7.

81. Should the Tribunal not dismiss Claimants' claims for their failure to submit a valid waiver and the jurisdictional defects inherent in Claimants' purported "investment" and in its expropriation claim, the Tribunal must decline jurisdiction over any acts and events alleged to be in breach of CAFTA-DR occurring before March 1, 2007 (the date on which CAFTA-DR entered into force).

82. Respondent requests that the Tribunal (1) render an award rejecting Claimant's claims in their entirety with prejudice, and (2) pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules and Article 10.20.6 of CAFTA-DR order that Claimant bear the costs of this arbitration, including Respondent's costs for legal representation and assistance.

Dated: November 21, 2008

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