

# JURISDICTION *RATIONE TEMPORIS* UNDER NAFTA ARTICLE 1116(2)

Rocío Digón<sup>1</sup>

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<sup>1</sup> J.D. 2008, Yale Law School, LL.M., public international law, Leiden University, 2005.

## Abstract

The interpretation of “continuing breaches” for the purposes of determining jurisdiction *ratione temporis* has taken on particular importance in the past several years. Most bilateral and multilateral treaty instruments include clauses that establish temporal limitations on jurisdiction, but they do not explicitly address “continuing breaches.” Recently, NAFTA tribunals have considered this question under the three year time limitation of NAFTA Article 1116(2), but the issue still remains largely unresolved. This paper will analyze “continuing breaches” in both investment law and general international law and conclude that “continuing breaches” are not valid exceptions to established time limitations in investment treaties. Section I will introduce policy considerations; Section II will analyze the specific language of Article 1116(2) in accordance with the Vienna Convention on the Law of Treaties (hereinafter VCLT); Section III will consider international law on jurisdiction *ratione temporis* and extinctive prescription more broadly, with particular focus on Article 14 of the International Law Commission’s Articles on State Responsibility and the concept of “continuing violations” in international law; Section IV will review the existing jurisprudence of the European and Inter-American human rights systems with respect to “continuing violations;” Section V will examine existing NAFTA jurisprudence that has considered this question; and Section VI will offer general conclusions and prudential considerations on jurisdiction *ratione temporis*.

## I. Introduction and Policy Considerations

Timely actions on claims are fundamental to law's role in furthering the stability of our political economy, particularly in the area of international investment law. The notion that a party could revive a claim from years past destabilizes the very regime the law seeks to uphold. Stale claims disrupt the rights of parties seeking to act in good faith, render the political economy volatile, and wreak havoc upon one of the basic expectations of parties entering into bilateral and multilateral agreements—timely filing and resolution of any disputes that may arise. I will take up these considerations through an analysis of NAFTA Article 1116(2)<sup>2</sup> jurisprudence, which includes discussion of jurisdiction *ratione temporis*.

From a general standpoint, it bears note that the response of the law has varied based on the cause of delay in filing the claim. If the defendant or the respondent is responsible, there is only one possible legal response as it would be unfair to reward a party for a double delict. But in situations in which the delay is caused by the plaintiff's or the claimant's inaction, there are two different legal responses. If the delay is attributed to the doctrine of laches, courts are unsympathetic. But where the delay can

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<sup>2</sup> For the purposes of this paper, the interpretation of NAFTA Article 1116(2) applies equally to NAFTA Article 1117(2). However, it bears note that a subtle distinction in the meaning of "constructive knowledge" may arise as to the two articles. Consider the instance of a company located within the jurisdiction in which the alleged damage is occurring as against that of a company located outside the jurisdiction in which the alleged damage is occurring. The mere fact of the former company's closer proximity to the alleged breach *may* lead it to acquire "constructive knowledge" sooner than that of the latter company. Or, consider the instance of a parent company filing a claim as against that of an individual shareholder filing a claim. It is likely that they will acquire knowledge at different moments. The resulting conclusion is that "constructive knowledge" supports a functionalist standard; "constructive knowledge" should not be held to an absolute standard, but instead to one that relies on factors such as type of investor.

attributed to an inability to file the claim, as in the *Cayuga Indians*<sup>3</sup> arbitration where standing prevented the plaintiffs from filing their own claim, courts have reason to be more sympathetic. Given the nature of disputes under NAFTA, it would seem reasonable to predict that the cause of delay in filing a claim would not (and *should* not) elicit sympathy from tribunals.

## **II. Article 1116(2) of NAFTA**

Article 1116(2) is the specific provision of NAFTA that must be interpreted when considering questions of jurisdiction. In accordance with the rules of interpretation set forth in Article 31 of the VCLT, I will consider this article first as to its plain meaning and second as to its object and purpose. NAFTA Article 1116(2) provides, in relevant part, “An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.” The plain meaning is clear: the onset of the three years occurs at the moment when the investor “first acquires” or “should have first acquired” (1) knowledge of the alleged breach and (2) knowledge that the investor has incurred loss or damage. I will discuss the interpretation of “first acquires” at Section IV of this paper. NAFTA does not provide any explicit exceptions to this general three year prescription in either Article 1116(2) or elsewhere in the Treaty.

Nor does the “context” or the “object and purpose” of NAFTA provide support for any exception to the three year time limitation. NAFTA is a “forward-looking treaty”

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<sup>3</sup> *Cayuga Indians (Great Britain) v. United States*. Reports of International Arbitral Awards. 22 January 1926. Volume VI, pp. 173-190.

that generally recognizes the important connection between “timing and subject matter.”

Coe provides:

Events occurring in 1994 for example, even if constituting flagrant breaches of NAFTA, are now a decade old, and would at a minimum challenge the fact-finding mechanisms available to disputants and the tribunal. The composition of governments change, documents are archived and destroyed, and witnesses become unavailable. These considerations arise in legal systems, and are dealt with by statutes of limitation and repose; and so it is with Chapter 11.<sup>4</sup>

This assessment of the consequences of admitting a claim that dates back to the entry into force of NAFTA—January 1, 1994—likewise would apply to claims arising from “continuing breaches” which the investor “first acquired” knowledge of more than three years prior to submitting the claim.

In his broader discussion of NAFTA’s overall purpose, Coe again refers to the problems arising from outdated claims, which NAFTA seeks to avoid:

[M]any BITs and NAFTA are forward looking, giving power to convene tribunals to assess responsibility for events occurring—in the case of NAFTA—from January 1, 1994, onward. Under Chapter 11, there is moreover a connection between timing and subject matter. Rather than creating general jurisdiction to consider alleged violations of international law—whether customary or treaty-based—NAFTA authorizes Chapter 11 tribunals to assess only breaches of NAFTA. Both as a matter of pure logic and treaty interpretation, only claims arising after NAFTA’s entry into force are actionable. With the passage of time, allegations that a claim has arisen before NAFTA came into effect will presumably subside, but in the absence of further limits, problems of stale claims would recur.<sup>5</sup>

NAFTA is a narrowly tailored and specialized treaty whose interpretation should respect the general principle of extinctive prescription in international law. These broad considerations support the thesis that NAFTA tribunals should strictly enforce the three year time limitation of Article 1116(2). There should be no distinction between

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<sup>4</sup> Jack J. Coe, Jr., *The Mandate of Chapter 11 Tribunals – Jurisdiction and Related Questions*, in *NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS* 215, 246 (Todd Weiler ed. 2004), p. 246.

<sup>5</sup> *Ibid.*

“continuing breaches” lasting more than three years whether they began before or after NAFTA’s entry into force; both represent situations outside the temporal limitation of Article 1116(2).

### **III. Extinctive Prescription in International Law**

The general international law doctrine of extinctive prescription further confirms the above interpretation of NAFTA Article 1116(2). There is a general principle, first confirmed as early as 1885 in international law jurisprudence, that claims may be extinguished by the passage of time. The 1885 *Williams Case* held that “On careful consideration of the authorities on the subject we are of the opinion that by their decided weight—we might say by very necessity—prescription has a place in the international system and it is to be regarded in these adjudications.”<sup>6</sup> Further, this principle has been embraced in arbitral jurisprudence as early as 1903. Umpire Ralston, in the oft-cited *Gentini* case observed:

The permanent court of arbitration has never denied the principle of prescription, a principle well recognized in international law, and it is fair to believe it will never do so ... The universal opinion of publicists and lawgivers has been that the statutes of prescription or “limitation,” as they have come to be called, were equitable and the outgrowth of a general desire for the attainment of justice ... [T]he principle of prescription finds its foundation in the highest equity—the avoidance of possible injustice to the defendant, the claimant having had ample time to bring his action, and therefore if he has lost, having only his own negligence to accuse.<sup>7</sup>

The doctrine of extinctive prescription promotes the fair exercise of justice; claimants should not be rewarded for negligence.

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<sup>6</sup> *Williams Case*, Claims Commission under the Convention of 1885 between the United States and Venezuela as cited by H. Lauterpacht, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW, 2002.

<sup>7</sup> *Gentini*. H. Ralston and W. Doyle. Venezuelan Arbitrations of 1903, Italian-Venezuelan Mixed Claims Commission (1904), 720.

In addition, Umpire Ralston relies on and cites to Savigny, who indicates that there should be few exceptions to this doctrine: “Mais la prescription, quoique de droit positif, n’en est pas moins une institution des plus bienfaisantes, et nous ne devons pas, à cause de son origine, affaiblir ou même annuler son efficacité par des restrictions sans fondement.”<sup>8</sup> It would appear that reading an exception into the three year time limitation of NAFTA Article 1116(2) would do nothing but “*affaiblir*” the doctrine of extinctive prescription. As I will discuss later, there are valid exceptions to this doctrine; however, they typically arise for breaches of obligations *erga omnes* and not in the context of NAFTA.

The *raison d’être* for the doctrine of extinctive prescription is set forth in Bin Cheng’s classic study. According to Cheng, the reason for extinctive prescription reflects:

The concurrence of two circumstances:—

1. Delay in the presentation of a claim;
2. Imputability of the delay to the negligence of the claimant.<sup>9</sup>

Both of these circumstances have both practical and theoretical value. From a practical standpoint, the doctrine helps ensure fairness as a “long lapse of time inevitably destroys or obscures the evidence of the facts and, consequently, delay in presenting the claim places the other party in a disadvantageous position.”<sup>10</sup> Similarly, the second factor, negligence, supplies a reason for extinctive prescription because where a claimant has “suffered matters to proceed to such a state that there would be a *danger of mistaking the*

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<sup>8</sup> Savigny, Volume V, Section 245.

<sup>9</sup> BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 378-79 (1953).

<sup>10</sup> *Id.* at 380.

*truth*, prescription operates and resolves such facts against him.”<sup>11</sup> These are precisely the reasons offered by Coe in support of the general enforcement of NAFTA’s forward-looking application and three-year time limitation. Abiding by these two principles helps ensure the successful pursuit of substantive justice: “In every case, where such circumstances [justifying extinctive prescription’s *raison d’être*] exist, conformity with the principle is regarded as bringing about *substantive justice*, while departure therefrom works *injustice*.”<sup>12</sup>

While scholars have clearly established the general principle of extinctive prescription as set forth above, they have emphasized that the period of prescription is subject to the terms of the treaty, and in its absence, to the discretion of the tribunal.

Brownlie provides,

The lapse of time in presentation may bar an international claim in spite of the fact that no rule of international law lays down a time limit. Special agreements may exclude categories of claim on a temporal basis, but otherwise the question is one for the discretion of the tribunal. The rule is widely accepted by writers and in arbitral jurisprudence ... prescription is a “universal” basis of inadmissibility.<sup>13</sup> NAFTA is one such “special agreement” and its three year time limitation should be upheld.

In general terms, “continuing breaches” are not valid exceptions to this principle. Prior to discussing the possible exceptions to principle, I will first define a “continuing breach.” As NAFTA does not supply this definition, I will rely on the definition under general international law. Article 14 of the International Law Commission’s Articles on State Responsibility, *Extension in time of the breach of an international obligation*, defines a “continuing breach” as:

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*Id.* at 381 (internal quotation marks and citations omitted; emphasis added).

<sup>12</sup> CHENG, *supra* note 9, at 386 (emphasis added).

<sup>13</sup> Ian Brownlie, *Principles of Public International Law*, Sixth Edition, 2003.



1. The breach of an international obligation by an act of State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.<sup>14</sup>

Thus, a breach of an international obligation is completed at one of two instances. If the breach is instantaneous, the breach will be completed at the conclusion of the act's performance; however, if the breach is continuing, the breach will extend from the inception of the illegal act through the entire period of its non-conformity. In order to further elucidate this distinction, Crawford's commentary provides:

Examples of continuing wrongful acts include ... unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination ... Whether a wrongful act is completed or has a continuing character will depend on both the primary obligation and the circumstances of the given case ... Moreover, the distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person can be returned to the next of kin. In essence a continuing wrongful act is one which has been commenced but has not been completed at the relevant time.<sup>15</sup>

This Article, while defining "continuing breach," does not provide any evidence that instantaneous and continuing breaches should be subject to different rules of jurisdiction/admissibility, particularly in the context of international investment law.

Both types of breaches can be time-barred under extinctive prescription as long as one of the few exceptions to the principle has not been met.

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<sup>14</sup> JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 136 (2002).

<sup>15</sup> *Ibid.*

There are certain instances in which “continuing breaches” provide an exception to an otherwise stated time limitation or to extinctive prescription. Both scholars and international law tribunals have sought to define the specific contours of these limited exceptions. As Bin Cheng notes, exceptions to this general principle should be subject to the maxim *cessante ratione legis cessat ipsa lex*; it “does not apply” where “these justifying circumstances are not present.” One such instance in which the “justifying circumstances are not present” is when the “continuing breach” represents a peremptory norm of international law. The origins of peremptory norms and their non-derogability trace back to the principle of *jus naturale necessarium* (necessary natural law) from the Roman law. The first modern codification of this principle can be found in Article 53 of the VCLT, which provides:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Under the VCLT, an entire treaty is held invalid if it is found to be in violation of a peremptory norm, and the recognition of a norm as such is held to a “stringent” standard.

Crawford’s commentary to the Articles on State Responsibility provides

The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all of the criteria for recognition as a norm of international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. So far, very few peremptory norms have been recognized as such.<sup>16</sup>

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<sup>16</sup> *Id.* at Commentary to Article 26, ¶ 5.

Since this 1969 codification in the VCLT, the concept of a peremptory norm has been adopted and transformed in the Restatements of Foreign Relations, the ILC Articles on State Responsibility, and international human rights law more generally. Comment *k* to the Restatement (Third) of Foreign Relations, which mirrors the Vienna Convention, states:

Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character. It is generally accepted that the principles of the United Nations Charter prohibiting the use of force (Comment *h*) have the character of *jus cogens*.<sup>17</sup>

Likewise, the commentary to Article 55 of the Articles on State Responsibility, which reflects the maxim *lex specialis derogat legi generali*, reflects a similar commitment to the primacy of peremptory norms in international law even in the face of a *lex specialis*. Peremptory norms displace both the *lex specialis* and other doctrines of general international law, such as extinctive prescription. Article 55 of the Articles on State Responsibility provides,

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.<sup>18</sup>

Notwithstanding the primacy of the *lex specialis*, Crawford's commentary indicates that "States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of

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<sup>17</sup> REST 3d FOREL §102, Comment K.

<sup>18</sup> *Ibid.*

general international law.”<sup>19</sup> Thus, the terms of the *lex specialis*—in this instance NAFTA—prevail over the terms of the Articles on State Responsibility and the peremptory norms of international law prevail over both of these instruments.

International human rights law has transformed the original conception of *jus cogens* as originally codified in the Vienna Convention. In this area, there has been an attempt to expand *jus cogens* beyond the prohibition on the use of force. This shift is implicit in the Reporter’s Notes to the Restatement (Third) of Foreign Relations which provides:

It has been suggested that norms that create “international crimes” and obligate all states to proceed against violations are also peremptory. Such norms might include rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights, and perhaps attacks on diplomats.<sup>20</sup>

Despite this expansion in the area of human rights, it is important to highlight that peremptory norms are narrowly circumscribed and represent the most egregious violations of international law. These norms threaten the fundamental values of individual human life, freedom, and dignity:

the major distinguishing feature of such rules is their relative indelibility. They are rules of customary international law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule or contrary effect. The least controversial examples of the class are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy.<sup>21</sup>

Brownlie goes on to emphasize the supremacy of *jus cogens* norms and the inappropriateness of applying a strict period of repose:

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<sup>19</sup> *Ibid.*

<sup>20</sup> *Id.* at Reporter’s Notes 6. Internal citations omitted.

<sup>21</sup> BROWNLIE, *supra* note 13.

Apart from the law of treaties the specific content of norms of this kind involves the irrelevance of protest, recognition, and acquiescence: prescription cannot purge this type of illegality. Moreover, it is arguable that *jus cogens* curtails various privileges, so that, for example, an aggressor would not benefit from the rule that belligerents are not responsible for damage caused to subjects of neutral states by military operations.<sup>22</sup>

The continuing violation of a *jus cogens* norm is a clearly defined exception to the general rule of prescription.

It is also worth mention that the two *raison d'être* advanced by Cheng become less compelling or applicable when applied to *jus cogens* norms of international human rights. Responsibility for the continuing violation of a *jus cogens* norm cannot be avoided with the invocation of a time limitation from the *lex specialis* or the doctrine of extinctive prescription from general international law. Concerns arising from delay may give way due the gravity of the situation and the claimant may be physically unable to present the claim. For example, in the paradigmatic case of a disappearance, it is clear that the applicant bears no responsibility for the delay in the presentation of his or her claim; to the contrary, it is precisely because of the state's malfeasance, not the claimant's negligence, that the claim could not be presented earlier. These particular circumstances—the violation of a *jus cogens* norm—present a situation in which departure from the general principle of extinctive prescription should be “regarded as bringing about *substantive justice*.” There are presently no other established exceptions in international law to the doctrine of extinctive prescription.

As such, it is possible to arrive at the general conclusion that an alleged “continuing breach” of NAFTA does not warrant an exception to Article 1116(2)'s time limitation or to extinctive prescription. The necessary conditions simply do not exist; it is

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<sup>22</sup> *Id.* at 514.

unlikely that breach of a NAFTA measure<sup>23</sup> would violate a *jus cogens*, thus it seems plausible that the only reason for the claimant's delay would be negligence. Claims arising from investment disputes typically do not rise to the high level of gravity of an international human rights violation. "Continuing breaches" of NAFTA do not typically involve violations of *jus cogens* norms, nor is its outright purpose to establish the rights of protection for these norms, as would a human rights treaty. NAFTA's legal context is best understood as one of a "BIT inserted into a free trade agreement. While Chapter 11's similarity to recent U.S. BITs is apparent, close examination reveals features that render it more complex than most bilateral instruments."<sup>24</sup> Given these broad differences in the purpose of the treaties as well as the general presumption in favor of enforcing both the *lex specialis* and the principle of extinctive prescription, I will now turn to consider how human rights and investment law jurisprudence have interpreted jurisdictional challenges arising from "continuing breaches."

#### **IV. Human Rights Jurisprudence**

Together, the European Court of Human Rights and the Inter-American Commission of Human Rights have generated the largest existing body of jurisprudence on "continuing violations." But it is important to note that this body of jurisprudence does not create a general presumption that allegations of "continuing violations" are exempt from time limitations; the general presumption is, in fact, to the contrary. This body of

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<sup>23</sup> NAFTA defines measure as including "any law, regulation, procedure, requirement, or practice" and Article 1101 provides "This Chapter applies to measures adopted or maintained by a Party relating to: (a) the investors of another party; (b) the investments of investors of another Party in the territory or the Party; (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party."

<sup>24</sup> Coe, *supra* note 4, at 217.

jurisprudence affirms that (1) the particular nature of continuing violations of *jus cogens* norms requires an exception to the otherwise enforceable period of repose; (2) the definition of “continuing violation” is distinct as interpreted within the ambit of international human rights law; and (3) an exact parallel cannot be drawn between claims brought before the European and Inter-American systems and those before the NAFTA system given the fundamental differences in institutional structure and operative treaties.

As (1) will be confirmed in the analysis of particular cases, I will first turn to (2) and (3). The particularized nature of this area of the law is reflected in the *opinio juris* manifested via various legal instruments adopted by states. These legal instruments include the Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity, the Inter-American Declaration of the Forced Disappearance of Persons, and the U.N. Declaration on the Protection of all Persons from Forced Disappearance. The preamble to the former instrument clarifies that it is the *gravity* of the violations—the nature, that is, of the relevant primary obligation—that militates against the application of a limitations period for the prosecution of war crimes and crimes against humanity:

Considering that war crimes and crimes against humanity are among the gravest crimes in international law,

Convinced that the effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security,

Noting that the application to war crimes and crimes against humanity of the rules of municipal law relating to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes,

Recognizing that it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application, . . . .<sup>25</sup>

Article 17 of the U.N. Declaration on the Protection of All Persons from Forced

Disappearance thus provides:

1. Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified.
2. When the remedies provided for in article 2 of the International Covenant on Civil and Political Rights are no longer effective, the statute of limitations relating to acts of enforced disappearance shall be suspended until these remedies are re-established.
3. Statutes of limitations, where they exist, relating to acts of enforced disappearance shall be substantial and *commensurate with the extreme seriousness of the offence*.<sup>26</sup>

Both of these instruments, which came into force after the European and Inter-American Conventions, provide *explicit* reference to the suspension of the time limitation due to the particular severity of the acts in question. NAFTA does not concern such acts, nor does it provide any explicit reference to instances in which the time limitation should be suspended. If anything, the explicit language in the two quotations above confirms the exceptional nature of a suspension. NAFTA entered into force two years after the U.N. Declaration on the Protection of All Persons from Forced Disappearance.

There are important distinctions between the human rights systems and the NAFTA system at three levels of specificity: system, treaty, and article. The purpose of the European human rights system, and by extension the Inter-American system, is to

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<sup>25</sup> Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity pmbL., G.A. Res. 2391 (XXIII), Annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968).

<sup>26</sup> U.N. Declaration on the Protection of All Persons from Forced Disappearance art. 17, G.A. Res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992) (emphasis added).



assess claims of individuals against a particular State under the European Convention.

According to Pauwelyn,

The European Commission mostly deals with claims of individuals against a State and supervises a public order of Europe ... Arangio-Ruiz indicated that the European institutions are more municipal adjudication bodies, concerned with acts of national authorities towards individuals within a municipal legal system, rather than an international tribunal considering the complex wrongful act of a State in its external relations with another State.<sup>27</sup>

Thus, even though the European Court is a regional body, its role is more focused on maintaining domestic compliance within the European public order. As Pauwelyn further indicates with respect to the European Court system, contextual analysis—of the facts and the relevant Convention—are critical:

From the outset, one of the decisive elements in the Commission's decision on whether a continuing situation exists has been whether the position in which the victim is placed represents a continuing situation in violation of the Convention or, on the contrary, a violation of its rights and freedoms which clearly dates from the past (i.e. an instantaneous fact). In other words, the Commission focuses on the *effects* on the *victim* of the act (*in casu* the individual), taking into account all relevant circumstances of the case, rather than on the objective qualification of the *act* as such or the subjective intentions of its *author* (*in casu* the State). In this sense all rights and freedoms protected by the Convention can be the object of a continuing violation.<sup>28</sup>

A characterization of the NAFTA treaty affirms the distinction between each system.

NAFTA's "legal context" is somewhat different. The Treaty itself resembles a BIT within a trade agreement and the claims are more easily likened to considerations of "the complex wrongful act of a State in its external relations with another State."<sup>29</sup>

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<sup>27</sup> Pauwelyn, J. "The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems", 66 *The British Yearbook of International Law* 415 (1996) at 430.

<sup>28</sup> Pauwelyn, *supra* note 36, at 421.

<sup>29</sup> *Ibid.*

The final level, that of the specific articles on jurisdiction in each treaty, reinforces the different mandate of the courts as compared to that of the tribunal. The plain language of the relevant articles in the European Convention on Human Rights (as well as the Inter-American Convention) frames jurisdiction *ratione temporis* within the ambit of the *kompetenz-kompetenz* of the Court. Article 26 of the European Convention provides,

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.<sup>30</sup>

The first two words of the Article are “The Commission.”

In contrast, NAFTA Article 1116(2) frames jurisdiction *ratione temporis* in terms of the rights themselves. As quoted at the outset, Article 1116(2) provides

An investor may not make a claim if more than three years have passed from the date on which the investor acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage

The first two words of the NAFTA article are “An investor;” there is no reference to the tribunal.

With these various distinctions in mind, I now turn to the interpretation of “continuing violations” in the European system, separating general violations of international human rights from disappearances. The 1962 *De Becker*<sup>31</sup> case before the European Commission was the first to introduce the concept of a “continuing violation.” In this case, the Commission sustained its competence *ratione temporis* to consider

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<sup>30</sup> European Convention on Human Rights, Article 26. Article 49 further indicates, “In the event of dispute as to whether the Court has the jurisdiction, the matter shall be settled by decision of the Court.”

<sup>31</sup> *De Becker Case*, 2 Y.B. EUR. CONV. ON H.R. 214, 234 (Eur. Comm’n on H.R.).

Belgium's alleged violations of the applicant's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention").

Specifically, the Commission held that a provision of the Belgian Penal Code, which restricted the applicant's right to continue to practice his career as a journalist based on a prior conviction for collaboration with Nazi Germany, could be examined even though it had been enacted before the Convention entered into force because it created "a continuing situation in respect of which he claims to be the victim of a violation of the right to freedom of expression;" or as the Court later explained "the Applicant had found himself in a *continuing situation* which had no doubt originated before the entry into force of the Convention in respect of Belgium (14 June 1955), but which had continued after that date, since the forfeitures in question had been imposed 'for life.'"<sup>32</sup> On the date of the challenge, Belgium arguably continued to breach the relevant primary obligation, which stemmed from a breach of the legal provision. This case is important as it articulated the first definition of "continuing violation;" however, I would argue that the continued evolution of jurisprudence on "continuing violations" since 1962 may not support the Commission's decision to sustain its jurisdiction *ratione temporis*.

The Court has continued to develop the concept of a continuing violation to enable it to appraise the compliance of states with their primary obligations under the Convention. In *Loizidou v. Turkey*<sup>33</sup>, the Court sustained its jurisdiction *ratione temporis* to consider the allegations of a Greek Cypriot woman whose property had been seized after Turkish troops invaded northern Cyprus in 1974 and after the unrecognized Turkish Cypriot government purported to expropriate her property by decree in 1985, even

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Loizidou v. Turkey (Merits)*, 1996-VI Eur. Ct. H.R. 2216 (1996); see also CRAWFORD, *supra* note 14, at 135 n.252 (collecting ECHR jurisprudence on point).

though Turkey had not accepted the Court's jurisdiction under Article 46 of the Convention until 22 January 1990. The Court itself emphasized the special position of the European Declaration on Human Rights as a *human rights* treaty and its reasoning proceeded as follows: because Turkey had no lawful right to the property, its refusal to permit the applicant access to and enjoyment of that property constituted a continuing violation of her property rights under the Convention.<sup>34</sup>

The *Loizidou* judgment refers to its prior jurisprudence in *Papamichalopoulos* and *Agrotexim* as support for its jurisdiction over “continuing violations,” yet it bears notice that the court found itself *incompetent* to hear the applications of the parties in each of these instances. In *Papamichalopoulos* the Court “note[d] merely that the applicants’ complaints relate to a continuing situation, which still obtains at the present time,” and held “there has been and there continues to be a breach of Article 1 of Protocol No. 1 (P1-1)” without discussion of what the consequences of a “continuing situation” were for the purposes of jurisdictional competence because it “declare[d] the Government estopped from pleading the applicants’ lack of victim status and on failure to exhaust domestic remedies.”<sup>35</sup> *Agrotexim* exhibits comparable reasoning: there is a brief sentence concerning “continuing violations” and subsequently a finding that the Court cannot hear the application due to non-compliance with a separate jurisdictional requirement. Specifically, the *Agrotexim* Court noted

A preliminary study of the case leads the Court to conclude that it may be possible to regard the successive actions of the Athens Municipal Council as a series of steps amounting to a continuing violation ... It does not, however, consider it necessary to give a final ruling on this issue, because it must first examine the objection based on the applicant companies’ lack

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<sup>34</sup> *Id.*

<sup>35</sup> *Case of Papamichalopoulos and Others v. Greece*, 260 Eur. Ct. H.R. (Ser. A) 55 (1993). Judgment of 24 June 1993.

of the status of “victim”, which is more fundamental than the objection of lack of jurisdiction *ratione temporis*.<sup>36</sup>

Indeed, the Court held the following with respect to the “victim” status of the applicants:

In sum it has not been clearly established that at the time when the application was lodged with the Commission it was not possible for Fix Brewery to apply through its liquidators to the Convention institutions in respect of the alleged violation of Article 1 of Protocol No. 1 (P1-1) which is the basis of the applicant companies’ complaint. It follows that the latter companies cannot be regarded as being entitled to apply the Convention institutions.

This conclusion makes it unnecessary to examine the other objections raised by the Government in relation to the alleged violation of Protocol No. 1<sup>37</sup>

Thus, the two prior applications *Loizidou* relies on fail to establish a clear link between jurisdiction *ratione temporis* and “continuing violations.” Notwithstanding this fact, the *Loizidou* court framed the question of a continuing violation as “Accordingly, the present case concerns alleged violations of a continuing nature if the applicant, for purposes of Article 1 of Protocol No. 1 (P1-1) and Article 8 of the Convention (art. 8), can still be regarded—as remains to be examined by the Court—as the legal owner of the land.”<sup>38</sup> Yet no legal authority—the *lex specialis*, general principles of international law, or prior jurisprudence—is offered as reasoning for the (incorrect) conclusion that *any* continuing violation automatically signals jurisdictional competence. Even acknowledging that human rights institutions have expanded jurisdiction under *some* circumstances of “continuing violations” where *jus cogens* norms are implicated, this general conclusion in *Loizidou* is unwarranted and unsupported. The right to enjoyment of property—does not rise to the level of a *jus cogens* norm, even in consideration of the expanded definition in

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<sup>36</sup> *In the Case of Agrotexim and Others v. Greece*, Judgment, 330 Eur. Ct. H.R. (Ser. A) 3 (1995).

<sup>37</sup> *Id.*

<sup>38</sup> *Loizidou*, *supra* note 33.

human rights law described above. In *Loizidou* the so-called “continuing violation” began almost 20 years prior to Turkey’s acceptance of the Court’s jurisdiction. It is striking, and perplexing, that this decision is so frequently cited for its jurisprudential value. Were other human rights institutions and courts to grant jurisdiction under such a standard, the floodgates to stale claims would be opened and the established principle of non-retroactivity of treaties would be turned on its head.

A series of European Court cases since 2000 have elucidated the distinction between an “instantaneous violation” and a “continuing violation” in the human rights context, and in doing so, have more carefully circumscribed the exceptions to the six month time limitation. Two cases have refused to sustain jurisdiction *ratione temporis* for “instantaneous violations”: *McDaid & Others v. United Kingdom*<sup>39</sup> and *Obadasi v. Turkey*<sup>40</sup> and one case, *Jecius v. Lithuania*<sup>41</sup>, found detention to be an exception to the time limitation. In *McDaid*, the Court rejected the Claimant’s petition that the effects of Bloody Sunday gave rise to a “continuing violation:”

the concept of a “continuing situation” refers to a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims. Since the applicants’ complaints have as their source specified events which occurred on identifiable dates, they cannot be construed as a “continuing situation” for the purposes of the six months rule. While the Commission does not doubt that the events of Bloody Sunday continue to have serious repercussions on the applicants’ lives, this however can be said of any individual who has undergone a traumatic incident in the past. The fact that an event has significant consequences over time does not itself constitute a continuing situation.<sup>42</sup>

In order for there to be a continuing violation, and for jurisdiction to be granted in excess of the six month period prescribed by the Convention, the applicant must be in a

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<sup>39</sup> *McDaid & Others v. United Kingdom* (Application 25681/94), 22 EHRR CD 197 (1996).

<sup>40</sup> *Obadasi and Kocak v. Turkey*, Application 50959/99, Decision rendered 21 February 2006

<sup>41</sup> *Jecius v Lithuania* (2002), 35 E.H.R.R. 16.

<sup>42</sup> *Mcdaid*, *supra* note 39.

continuous situation as victim. It is insufficient, for jurisdictional purposes, for an incident to have continued after-effects. The Court recently affirmed its *McDaid* finding on instantaneous violations in the 2006 *Obadasi* case, in which the Court rejected the notion that a death threat gave rise to a continuing violation: “the basis of the complaint is a specific incident and [the Commission] cannot find that the complaint can be considered to concern a continuing violation of the Convention.”<sup>43</sup> Both of these cases demonstrate that even in the area of international human rights, the European Court is careful to narrowly define the area of law in which jurisdiction *ratione temporis* will be sustained in excess of six months.

Of the three cases, *Jecius v. Lithuania* is the only one which found a “continuing violation.” The Court found that preventive detention and detention on remand must be taken as a whole for the purpose of applying the six months rule of the Convention and that there were no visible signs of change in the applicant’s status over the course of his detention:

In respect of a complaint about the absence of a remedy for a continuing situation, such as a period of detention, the six months’ time-limit under article 35 starts running from the end of that situation, such as a release from custody . [...] As the applicant was still remanded in custody [...] the case cannot be dismissed as being out of time.<sup>44</sup>

The Court’s conclusion that *Jecius* could not have exceeded the time limitation while in custody is consistent with the exceptions to the principle of extinctive prescription established above. Not only is unlawful detention considered by many to be a violation of a *jus cogens* norm, but Cheng’s “justifying circumstances” are not present when an individual is incapable of filing a claim through no fault of his own. Had *Jecius* been out

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<sup>43</sup> *Obadasi*, *supra* note 40.

<sup>44</sup> *Jecius*, *supra* note 41.

of custody for more than six months and then sought to file his claim, the claim would have been time-barred, as his own negligence would have caused the delay.

Finally, I will turn to the European Court jurisprudence on disappearances, which represents the most clearly delineated exception to the strict enforcement of a time limitation. The case of *Cyprus v. Turkey*<sup>45</sup> was the first to address the notion of disappearances as continuing violations before the European Court. Cyprus filed an application with the Commission in 1994 on behalf of over 1,400 Greek-Cypriots missing since 1974 when Turkey began military operations in Northern Cyprus. In its 2001 decision, the Court held that the disappearances of the Greek-Cypriots represented continuing violations of Articles 2, 3, and 5 of the Convention and that the six month time bar began on the date in which the situation constituting the continuing violation ended. In particular, the Court's discussion of Article 5, "conclude[d] that, during the period under consideration, there has been a continuing violation of Article 5 of the Convention by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of the missing Greek-Cypriot persons in respect of whom there is an arguable claim that they were in custody at the time they disappeared."<sup>46</sup> The Court found that the State has engaged in procedural negligence against these missing persons by not investigating their disappearances. Further on in its Article 5 analysis the Court noted the particular severity of disappearances:

There is no indication of any records having been kept of either the identities of those detained or the dates or location of their detention. From a humanitarian point of view, this failing cannot be excused with reference either to the fighting which took place at the relevant time or to

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<sup>45</sup> *Cyprus v. Turkey*, 23 EHRR 244 (1997).

<sup>46</sup> *Id.* at ¶ 150.



the overall confused and tense state of affairs ... Notwithstanding the impossibility of naming those who were taken into custody, the Respondent State should have made other inquiries with a view to accounting for the disappearances. As noted earlier, there has been no official reaction to new evidence that Greek-Cypriot missing persons were taken into Turkish custody.<sup>47</sup>

The Court also reiterated the exceptional circumstance of a disappearance when considering the standing a relative of a missing person in bringing a claim:

The Court recalls that the question of whether a family member of a “disappeared person” is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give the suffering of the person concerned a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation ... The Court further recalls that the essence of such a violation does not so much lie in the fact of the disappearance of the family member but rather in the authorities’ reactions and attitudes in respect of the latter that a relative may claim directly to be a victim of the authorities’ conduct ... For the Court, the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3.<sup>48</sup>

According to this quotation, disappearances are more egregious than even “serious human-rights violation[s].” The Court has subsequently affirmed the unique position of disappearances in later cases including *Kurt v. Turkey*.<sup>49</sup>

### | *Inter-American Court*

Like the European Court, the Inter-American Court has established that disappearances are “continuing violations” that are exceptions to the otherwise strict time limitation imposed by the American Convention. As the reasoning and findings of both courts is comparable as it relates to disappearances, I will only briefly highlight two key cases from the Inter-American Court: *Velázquez-Rodríguez*<sup>50</sup> and *Blake. Velázquez-*

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<sup>47</sup> *Id.* at ¶ 148.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Kurt v. Turkey*, (1999) 27 EHRR 373.

<sup>50</sup> *Velázquez Rodríguez v. Honduras*, IACtHR 29 July 1988, Ser. C. No.4 (1988).

*Rodriguez* is considered the seminal Inter-American case on disappearances, as it was the first to explicitly assert the continuing nature of disappearances. The Court indicated, “forced disappearances of human beings is a multiple and continuous violation of many rights under the Convention that State Parties are obligated to respect and guarantee.”<sup>51</sup>

This definition and its effect on jurisdiction *ratione temporis* was further developed in the *Blake* case<sup>52</sup>, which concerned the alleged abduction, murder and disappearance by the Guatemalan state of Nicolas Blake, a US citizen and journalist living in Guatemala. More specifically, Blake’s abduction and disappearance occurred in 1985 and it was not until 1992 that his whereabouts were established. The government argued that Blake’s detention and death occurred in 1985 prior to Guatemala’s acceptance of the Court’s jurisdiction. Notwithstanding, the Court found that the question was not one of murder and deprivation of liberty, but of forced disappearance:

In the judgment on the preliminary objections ... the Court decided that the acts of deprivation of Mr. Blake’s freedom and his assassination were completed in March 1985, that those events could not *per se* be considered to be of a continuing nature, and that the Court was incompetent to decide on the State’s responsibility for those acts ... Inasmuch as in this case Mr. Nicolas Blake’s fate or whereabouts were not known until June 14, 1992, after the date on which Guatemala accepted the contentious jurisdiction of this Tribunal, the Court considers itself competent to hear the case with regard to the possible violations which the Commission imputes to the State in connection with those effects and actions.<sup>53</sup>

From the date which Guatemala accepted the jurisdiction of the Court and onwards, the State committed an ongoing breach of its obligation to the victim with respect to his unknown whereabouts. In its analysis, the Court relied on Article II of the Inter-American Convention on Forced Disappearances of Persons as well as Article 17(1) of

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<sup>51</sup> *Id.* at ¶ 155.

<sup>52</sup> *Blake v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 36, at 1 (2 July 1996).

<sup>53</sup> *Id.* at ¶¶ 53-54.

the UN Declaration on the Protection of all Persons from Forced Disappearance. The Court noted that

Forced or involuntary disappearance is one of the most serious and cruel human rights violations, in that it not only produces arbitrary deprivation of freedom but places the physical integrity, security and the very life of the detainee in danger. It also leaves the detainee utterly defenseless, bringing related crimes in its wake. Hence, it is important for the State to take all measures as may be necessary to avoid such acts, to investigate them and to sanction those responsible, as well as to inform the next of kin of the disappeared person's whereabouts and to make reparations where appropriate.<sup>54</sup>

Thus, the Inter-American Court, like the European Court, emphasizes the egregious and particularized nature of a disappearance.

#### *Conclusions on Human Rights Jurisprudence*

This review of both the European and Inter-American systems' jurisprudence on "continuing violations" in the international human rights context confirms the following conclusions: (1) disappearances constitute "continuing violations" and are an exception to the six month time limitation; (2) breaches of *jus cogens* norms, as defined in the area of international human rights law, constitute "continuing violations" and are an exception to the six month time limitation; and (3) the obvious differences between the mandate and applicable treaties, types of claimants and adjudicatory bodies of the European and Inter-American courts, and those of the NAFTA system are a limiting factor on the direct transferability of the findings. Simply stated, the jurisprudence of the European and Inter-American systems confirms that there is *no* existing rule that if there is a continuing violation, then a claim automatically satisfies jurisdiction *ratione temporis*.

#### **V. NAFTA Jurisprudence**

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<sup>54</sup> *Id.* at ¶ 66.

To date, five NAFTA tribunals have addressed the time bar under Articles 1116(2) or 1117(2): *Feldman v. United Mexican States*, *Mondev International Limited v. United States of America*, *Glamis v. United Mexican States*, *Grand River Enterprises v. United States*, and *UPS v. Canada*. Excluding *UPS v. Canada*, which I will demonstrate was inadequately reasoned, the other four awards affirm that the three year time limitation under Article 1116(2) has general application and that any deviation from this limitation would require exceptional circumstances. Even though NAFTA does not establish a system of precedent,<sup>55</sup> I would note that these four awards deserve respectful consideration as an indication that the NAFTA time bar should be enforced with few, if any, exceptions. I will consider all five awards in chronological order.

The Tribunal in *Mondev v. United States*<sup>56</sup>—a dispute arising from a commercial real estate development contract and a subsequent Massachusetts Supreme Judicial Court ruling—highlighted two significant aspects of jurisdiction *ratione temporis* under NAFTA. First, the Tribunal noted NAFTA’s prospective application from January 1, 1994 onwards (the date of its entry into force) and found that any breach or conduct occurring prior to this date is only admissible in support of claims that are within the proper time limitation. Applying this to the particular facts of *Mondev*, the Tribunal held that it only had jurisdiction over *Mondev*’s denial of justice claim:

[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 be possible to point to *conduct of the State after that date which is itself a breach*. In the present case the only conduct that could possibly constitute a breach of

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<sup>55</sup> NAFTA art. 1136(1); *see also* Grand River Jurisdictional Decision ¶ 36 (“As NAFTA Article 1136(1) makes clear, NAFTA arbitral awards do not constitute binding precedent.”)

<sup>56</sup> *Mondev International Ltd. v. United States of America*, Case No. ARB(AF)/99/2, October 11, 2002, 42 ILM 811 (2003).

any provision of Chapter 11 is that comprised by the decisions of the [Massachusetts Supreme Judicial Court] and the Supreme Court of the United States, which between them put an end to [the claims of a wholly owned limited partnership of claimant Mondev] under Massachusetts law. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist Mondev. The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.<sup>57</sup>

The final two sentences of the above quotation capture both the essence of a treaty's prospective application as generally established in VCLT Article 28 and the distinction between continuing breaches in investment arbitration and international law.

The Tribunal further clarified this latter point when it specifically distinguished a NAFTA claim from a diplomatic protection claim.

74. Nor do Articles 1105 or 1110 of NAFTA effect a remedial resurrection of claims a Canadian investor might have had for breaches of customary international law occurring before NAFTA entered into force. It is true that both Articles 1105 and 1110 have analogues in customary international law. But there is still a significant difference, substantive and procedural, between a NAFTA claim and a diplomatic protection claim for conduct contrary to customary international law (a claim which Canada has never espoused).

75. For these reasons, the Tribunal concludes that the only arguable basis of claim under NAFTA concerns the conduct of the United States courts in dismissing LPA's claims. Moreover it is clear that Article 1105(1) provides the only basis for a challenge to that conduct under NAFTA.<sup>58</sup>

In order for a tribunal to find jurisdiction outside of a treaty's time limitation requires exceptional circumstances; one such circumstance is a diplomatic protection claim. As mentioned *supra*, even though the exceptional circumstances that would give rise to

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<sup>57</sup> *Id.* at ¶ 70 (emphasis added).

<sup>58</sup> *Id.* at ¶¶ 74-75.

jurisdiction exceeding a time limitation are not *ejusdem generis*, investment claims would generally not fall under this category.

Kinnear characterizes the Tribunal's findings as ones in which The Tribunal agreed that NAFTA was non-retrospective, but that it was possible for an act, initially committed before the NAFTA's entry into force, to continue to be of relevance and thus give rise to a NAFTA violation ... The *Mondev* tribunal described the language in the *Feldman* tribunal decision as "too categorical" to the extent the language held otherwise. Yet in order to find a NAFTA violation a tribunal must be able to point to conduct of the State that occurred after the obligation had commenced and which was in itself a breach. In *Mondev*, the only actionable post-January 1, 1994 conduct was the decisions by the U.S. courts.<sup>59</sup>

Unfortunately, the clause "to continue to be of relevant and thus give rise to a NAFTA violation" in the above quotation misrepresents the tribunal's findings in *Mondev*. The *Mondev* tribunal expressly found that acts committed prior to NAFTA's entry into force were relevant only as far as establishing a baseline of state behavior to determine if the State *subsequently* committed a breach, but that these acts could *not* "give rise to a NAFTA violation."<sup>60</sup>

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<sup>59</sup> Kinnear, Meg. Annotated Guide to NAFTA Chapter 11 (June 2006). 30-1116. Jurisdiction *ratione temporis*.

<sup>60</sup> The *Mondev* tribunal's discussion of breaches occurring more than three years prior to the filing of a claim as they relate to jurisdiction *ratione temporis* does not consider the related question of breaches occurring more than three years prior to the filing of a claim as they relate to valuation or compensation for damages. Consider the hypothetical instance in which the Claimant alleges creeping expropriation, beginning after NAFTA's entry into force but more than three years prior to the filing of the claim. The Respondent first takes a measure "tantamount to expropriation" five years prior to the Claimant's request for arbitration and an outright expropriation occurs in the same year the request was filed. The question here is not one of jurisdiction *ratione temporis* under Article 1116(2), but one of fair compensation. Assuming the tribunal finds that there has been a creeping expropriation, from what moment should the tribunal calculate compensation? Should the calculation be circumscribed within the three year limitation established in Article 1116(2) or may the additional period be considered? There is currently no readily apparent answer. It is clear that a strict enforcement of the three year time limitation should be applied to questions of jurisdiction *ratione temporis*, as demonstrated in this paper; however, its application to the measure of damages is as yet undetermined. Articles 1116 and 1110 of NAFTA do not address this issue, nor does any existing jurisprudence. The Tribunal in *Gami Investments, Inc. and United Mexican States*, the only NAFTA claim which would have required consideration of this question, found that all of the Claimant's allegations failed – including one of expropriation – and thus did not consider the calculation of damages. For a broader discussion

The *Mondev* tribunal, satisfied that only Article 1105 claims as concerned the decisions of the US courts were admissible, briefly addressed an investor’s knowledge of “loss or damage” under Article 1116(2). In dicta, the Tribunal provided, “If it had mattered, however, the Tribunal would not have accepted *Mondev*’s argument that it could not have had ‘knowledge of... loss or damage’ arising from the actions of the City and BRA prior to the United States court decisions. A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.”<sup>61</sup> Thus, assuming that a claim passes the first cumulative requirement of Article 1116(2)— knowledge of the alleged breach—the second cumulative requirement—knowledge of the loss or damage incurred—is met without precise calculation of the loss.

The Final Award in *Feldman v. United Mexican States*—a dispute concerning CEMSA’s entitlement to tax rebates from cigarette purchases it would export to from Mexico—echoes the above findings in *Mondev*. In its Interim Decision on Jurisdiction, issued prior to the *Mondev* award, the *Feldman* tribunal joined two key questions under Article 1117(2) to its future examination of the merits. This jurisdictional decision restricted itself to an assessment of the meaning of “make a claim” under Article 1117(2). Curiously, however, the *Feldman* tribunal inserted one isolated paragraph—the penultimate one in the decision and separate from the discussion of “make a claim”—on broad considerations of jurisdiction under Article 1117(2). Paragraph 62 of the decision provides,

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of the calculation of damages for “creeping expropriation,” see, e.g. W. Michael Reisman and Robert D. Sloane, “Indirect Expropriation and its Valuation in the BIT Generation,” 74 *The British Year Book of International Law* 2003 115 (2004).

<sup>61</sup> *Mondev*, *supra* note 56.

Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994. However, this also means that if 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.<sup>62</sup>

This paragraph, which appears to come as an afterthought at the end of the award, is confusing and potentially contradictory. It is nearly impossible to discern the tribunal's meaning, although the last sentence of the paragraph implies agreement with the *Mondev* tribunal: evidence of breaches prior to NAFTA's entry into force are relevant only as supporting evidence of breaches occurring after NAFTA's entry into force and within the three year time limitation. This interpretation is supported in the Final Award.

The Final Award specifically addresses two questions of jurisdiction *ratione temporis*: (a) whether the Parties on or about June 1, 1995 reached an agreement concerning CEMSA's right to export cigarettes and to receive tax rebates on such exports, and whether deviation from this agreement was formally confirmed in February 1998, thus bringing about a suspension of the limitation period for some 32.5 months; and (b) whether the Respondent is equitably estopped from invoking any limitation period because it gave the Claimant assurances that exports would be permitted and rebates paid to CEMSA. The assessment of these two questions required the Tribunal to directly consider whether the ordinary meaning and object and purpose of Article 1117(2) contemplated exceptions to the three year time limitation. In both instances, the Tribunal

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<sup>62</sup> *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Preliminary Decision on Jurisdiction, ¶ 62.



held that the facts did not give rise to suspension or estoppel of the limitation period. NAFTA Articles 1116(2) and 1117(2) “introduce a clear and rigid limitation defense, which, as such, is not subject to any suspension, prolongation or other qualification.”<sup>63</sup> Any derogation from the limitation defense, according to the Tribunal, would occur under “exceptional circumstances.”

Under (a) the Tribunal concluded that suspension or “tolling” of the period of limitations is unwarranted under the *lex specialis* (as the BIT does not provide any express language on tolling or suspension of the limitations period) and international law. Under (b) the Tribunal conducted a similar analysis to that of (a) and concluded that Mexico’s actions did not give rise to a situation of equitable estoppel. These two conclusions highlight the strict enforcement of the three year time bar under investment disputes.

According to the Tribunal, tolling only applies to “continuing violations” in exceptional circumstances, which were not satisfied in *Feldman*:

Even under general principles of international law to be applied by international tribunals, it should be noted that in several national legal systems such suspension is provided only in the final part of the limitation period (e.g. only in the last six months) and only either in cases of acts of God or if the debtor maliciously prevented the right holder from instituting a suit ... At Claimant, appropriately represented by counsel, prevented from taking into consideration all relevant factors. Therefore, the Tribunal confirms April 30, 1996 as the cut-off date of the three-year limitation period under NAFTA Article 1117(2).<sup>64</sup>

The same requirement of “exceptional circumstances” is true as it concerns estoppel:

But any other state behavior short of such formal and authorized recognition would only under exceptional circumstances be able to either bring about interruption of the running of limitation or estop the Respondent State from presenting a regular limitation defense. Such exceptional circumstances include a long, uniform, consistent and effective behavior of competent state

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<sup>63</sup> *Feldman v. Mexico*, Final Award, 16 December, 2002, ¶ 63.

<sup>64</sup> *Id.* at ¶ 58.

organs which would recognize the existence, and possibly also the amount, of the claim.<sup>65</sup>

Thus, the Tribunal's assessment in *Feldman* confirms that derogations from the Article 1117(2) time bar are exceptional and do not give rise to a general principle. The possible derogations for tolling or estoppel are strictly circumscribed. From this, I would conclude that the possible derogations for "continuing breaches" should be likewise circumscribed.

In *Glamis*—a dispute concerning Glamis' investments in federal mining claims and mill sites in California—the Tribunal's Procedural Order No. 2 addressed the issue of a time bar when considering whether the arbitral proceedings should be bifurcated. The Tribunal upheld the principle stated in *Mondev* that breaches outside the scope of the Article 1116(2) time bar could only be relevant (and thereby admissible) to allegations of breaches *within* that scope. As applied to *Glamis*, any actions occurring prior to the January 17, 2001 cut-off date could not be considered as individual claims; these actions could only be submitted in support of other, timely, claims. The Tribunal provided that

[i]t is unclear from the pleadings of Claimant whether the three federal actions to which Respondent directs its objections are asserted as NAFTA claims in and of themselves or as supporting evidence of a later NAFTA claim ... Without prejudice to that question, it is clear that Claimant relies on the January 17, 2001, Department of the Interior Record of Decision and subsequent state and federal acts as a basis for its Chapter 11 claims. The Tribunal notes that even if it were to find the three mentioned federal actions to be time barred, such a finding does not eliminate the Article 1105 claim inasmuch as other federal actions are alleged by Claimant to be a basis for its claim. The potential exclusion of certain events at the merits stage to serve as independent bases of the claim will not in the circumstances of this proceeding exclude the claim in its entirety.<sup>66</sup>

This conclusion affirms the general proposition that individual claims outside the three year time limitation cannot be sustained.

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<sup>65</sup> *Id.* at ¶ 63.

<sup>66</sup> *Glamis Gold Ltd., v. the United States of America*, Procedural Order No. 2, May 31, 2005. at ¶ 19-20.

Turning now to *Grand River Enterprises Six Nations v. United States of America*<sup>67</sup>—a dispute concerning the application the Master Settlement Agreement (MSA) negotiated among tobacco companies—the Tribunal’s jurisdictional analysis represents the most thorough discussion of Article 1116(2) to date. In particular, the *Grand River* tribunal assessed the three year limitation of Article 1116(2) as it pertained to the Claimants’ “knowledge” of the Master Settlement Agreement (MSA) and its related enforcement measures as of March 12, 2001, the relevant cut-off date under the three year time bar. In a well-reasoned decision that began with consideration of general principles and the specific requirements of the *lex specialis*, the Tribunal dismissed the Claimant’s allegations with respect to the MSA, the Escrow Statutes, and related enforcement measures adopted prior to March 12, 2001 (the relevant cut-off date).

The Tribunal first set forth the general practice of extinctive prescription: “The principle of extinctive prescription (bar of claims by lapse of time) is widely recognized as a general principle of international law.” This general principle would imply that departure from this principle should occur under extraordinary circumstances.

Subsequently, the tribunal examined the documentary evidence of claimants’ knowledge and concluded that it was insufficient to establish claimants’ knowledge of the MSA and associated enforcement measures.<sup>68</sup> But the tribunal found that claimants *should* have known, recalling Article 1116(2)’s requirement of either “actual knowledge” or “constructive knowledge.” “Constructive knowledge” of a fact,” the tribunal held, “is imputed to [sic] person if by exercise of reasonable care or diligence, the person would

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<sup>67</sup> *Grand River Enterprises Six Nations, Ltd. v. United States of America*, UNCITRAL (NAFTA), Decision on Objections to Jurisdiction, 20 July 2006.

<sup>68</sup> *Id.* at ¶ 57.

have known of that fact.”<sup>69</sup> In the facts of the case, the industry in question was “heavily regulated and taxed”<sup>70</sup> and “claimants could not have been unaware of the extensive regulation and taxation.”<sup>71</sup> Citing to MTD, Maffezini and Feldman,<sup>72</sup> with respect to the burden on a reasonably prudent investor to inquire and inform itself of local law, the tribunal concluded the claimants “should have known of the MSA and of the Escrow Laws and other state actions taken prior to that date to implement the MSA.”<sup>73</sup> As the Tribunal aptly demonstrates, mere existence of a continuing breach is insufficient to lift the time bar limitation under Article 1116(2); any investor still has responsibility to act in a “reasonably prudent” manner. The investor *should* have known of the MSA and its implementing measures prior to the March 12, 2001 date.

The next cumulative requirement of Article 1116(2)—knowledge that loss or damage is incurred—is subsequently addressed, according to the same “constructive knowledge” standard: “To the extent that these measures necessarily resulted in loss or damage to the Claimants before March 12, 2001, appropriate diligence would have disclosed that fact.” The tribunal relied on *Mondev*’s finding that quantification of damage was not required for a finding of knowledge of damage and concluded:

The Tribunal believes that becoming subject to a clear and precisely quantified statutory obligation to place funds in an unreachable escrow for 25 years, at the risk of serious additional civil penalties and bans on future sales in case of non-compliance, is to incur loss or damage as those terms are ordinarily understood. A party that becomes subject to such an obligation, even if actual payment into escrow is not required until the following spring, has incurred “loss or damage” for purposes of NAFTA 1116 and 1117.<sup>74</sup>

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<sup>69</sup> *Id.* at ¶ 59.

<sup>70</sup> *Id.* at ¶ 62.

<sup>71</sup> *Id.* at ¶ 63.

<sup>72</sup> *Id.* at ¶ 67.

<sup>73</sup> *Id.* at ¶ 71.

<sup>74</sup> *Id.* at ¶ 82.

As is apparent, *Grand River* is a well-developed consideration of the interpretation and application of Article 1116(2) that is consistent with the preceding awards regarding (1) the general principle of extinctive prescription and (2) the quantification of loss. This award is the first to consider and apply the “constructive knowledge” requirement to the alleged breach itself.

The final award for consideration, *UPS v. Canada*<sup>75</sup>—a dispute concerning Canada’s alleged unlawful treatment of UPS and UPS Canada relative to Canada Post—not only departs significantly from the analytical framework of and findings in the above-mentioned awards, but contradicts the *lex specialis* and general principles of international law. In an inadequately reasoned award, the Tribunal concludes that “continuing breaches” constitute new, daily violations of the time bar. I will focus on the Tribunal’s conclusions on two of the jurisdictional claims raised by Canada: (1) UPS’ claims were not filed in a timely fashion as required by Article 1116(2) and (2) UPS had not established that it suffered any damage from the actions complained of.

In order to address Canada’s allegation that all UPS claims’ (except for the Fritz Starber claim) were not filed in a timely fashion, the Tribunal divided its analysis into two categories: UPS’ allegation that it did not have “knowledge” of particular aspects of Canada’s “conduct relevant to its claims before April 1997” and UPS’ allegation that Canada’s on-going conduct constituted “a new violation of NAFTA each day so that, for purposes of the time bar, the three year period begins anew each day.” The Tribunal focuses its analysis on the second category.

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<sup>75</sup> United Parcel Service of America, Inc. v. Canada, Award, 24 May 2007 [hereinafter UPS Award].

The key question under the second category is whether an on-going violation constitutes a new violation of NAFTA each day that it recurs or whether the time bar comes into effect at the moment when the investor knew or should have known of the conduct, regardless of its recurrence. The Tribunal's reasoning in this section is both scant and incorrect. One would expect the Tribunal to first set forth the parties' positions with respect to the time bar and to then independently analyze the issue in accordance with the *lex specialis* and general principles of international law. But surprisingly, this does not occur.

In setting forth the parties' positions, the Tribunal immediately accepted the UPS position:

UPS' response to this argument draws on logic and precedent. Its argument on the basis of logic is that an investor cannot know whether a NAFTA Party will continue the conduct that constitutes an alleged breach before the Party determines whether it will end or continue the conduct. Its argument from precedent is that under international law generally, and also under prior NAFTA decisions, continuing acts are treated as continuing violations of international law obligations (and of NAFTA obligations) such that time bars do not begin until the conduct has concluded.<sup>76</sup>

This perfunctory conclusion is flawed in many respects. First, it supports the incorrect statement that a continuing breach can be likened to a continuing violation under international law. Second, it supports the incorrect statement that prior NAFTA jurisprudence treats continuing breaches and continuing violations equally. Third, and most importantly, the above paragraph represents one of six paragraphs purportedly devoted to summarizing the submissions and arguments of the parties; it should hardly suffice as a replacement for the Tribunal's independent reasoning!

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<sup>76</sup> *Id.* at ¶ 26.

The tribunal's independent reasoning follows the six paragraph summary, and is confined to one single conclusory paragraph. Paragraphs 28 and 29 of the Award constitute the tribunal's entire discussion of the Article 1116(2) three year time limitation. It should appear obvious to a reader of the *UPS* award that the few reasons provided to support the tribunal's conclusions are incoherent and that there are glaring omissions in its analysis. Paragraph 28 provides:

The generally applicable ground for our decision is that, as UPS argues, continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitations period accordingly. This is true generally in the law, and Canada has provided no special reason to adopt a different rule here. The use of the term "first acquired" is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquires further information confirming the conduct or allowing more precise computation of loss. The *Feldman* tribunal's conclusion on this score buttresses our own.<sup>77</sup>

In this paragraph, the Tribunal bypasses the ordinary meaning and object and purpose of the *lex specialis* and characterizes jurisdiction for continuing violations as a general principle of international law, ignoring the fact that international law acknowledges continuing violations *only* under exceptional circumstances. Further, the above quotation refers to when the Claimant "first acquires" knowledge, but it does not consider whether the Claimant "should have acquired" this knowledge. A review of the UPS pleadings, to which the Tribunal makes reference, likewise gives incomplete treatment to the matter. Finally, the Tribunal does not further discuss, nor provide any citation to, the section in *Feldman* which "buttresses" its conclusions and which refers only to damages. It is not clear why confirmation of the alleged breach or the claimant's ability to more precisely calculate its damages should have any bearing on the limitations period. Indeed, it is

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<sup>77</sup> *Id.* at ¶ 28.

well-established in NAFTA jurisprudence that a claimant need *not* be able to calculate the precise extent of its damages to initiate arbitration. In this single sentence, the Tribunal abandoned its consideration of “knowledge of breach” under the time bar and switched to consideration of “knowledge of loss or damage,” for the remainder of the Award.

The subsequent paragraph in the Award misrepresents the *Mondev* tribunal’s findings and incorrectly applies to the *UPS* dispute. Additionally, there is almost an immediate topical shift from “continuing violation” to calculation of damages:

The dicta that Canada points us to are neither dispositive of the contentions in *Mondev* nor on point for this decision. The dicta do not relate to a continuing course of conduct that began before and extended past three years before a claim was filed. In that instance, the state’s action was completed and the information about it known—including the fact that the investor would suffer loss from it—before subsequent court action was complete. The fact that the exact magnitude of the loss was not yet finally determined would not have been enough in that tribunal’s judgment, to avoid the time bar if the time bar otherwise would have applied. As it was, there was no time bar and no continuing course of conduct—nothing in short that would shed any light or have any precedential consequence for disposition of the matter before us.<sup>78</sup>

In this paragraph, the tribunal fails to mention that *Mondev* supports the conclusion that a “continuing breach” does not lead to *de facto* jurisdiction in excess of the three year time limitation nor that *Mondev* expressly held that evidence of breaches that exceeded the time bar were relevant *only* to establish a baseline for claims *within* the time limitation. A logical reading of the *UPS* tribunal’s language in paragraph 30 would almost imply agreement with this latter *Mondev* finding:

A continuing course of conduct might generate losses of a different dimension at different times. It is incumbent on claimants to establish the damages associated with asserted breaches, and for continuing conduct that must include a showing of damages not from the inception of the

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<sup>78</sup> *Id.* at ¶ 29.



course of conduct but only from the conduct occurring within the period allowed by Article 1116(2).<sup>79</sup>

If damages should only be awarded for breaches within the time limitation of Article 1116(2), would it not clearly follow that jurisdiction should only be granted to claims originating within the time limitation? The *UPS* tribunal is notably silent on this issue.

### *Conclusions on NAFTA Jurisprudence*

The sometimes contradictory analyses found in these five NAFTA awards that consider jurisdiction *ratione temporis* in the context of continuing breaches are evidence of the unsettled state of the jurisprudence in this area. This confusion in the awards, however, is not reflective of the law, which clearly militates in favor of a strict application of the plain meaning of NAFTA Article 1116(2) and the doctrine of extinctive prescription.

## **VI. Conclusion**

In light of this above review, NAFTA Article 1116(2) should be interpreted in the following terms:

1. NAFTA Article 1116(2) establishes a three year time limitation on jurisdiction *ratione temporis* that should be strictly enforced;
2. The plain meaning of Article 1116(2), the *lex specialis*, and the general principle of extinctive prescription support this strict enforcement;

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<sup>79</sup> *Id.* at ¶ 30.

3. There are few exceptions to the three year time limitation, which have been carefully circumscribed in international law.
4. One exception to prescribed time limitations in treaties is a “continuing violation” that breaches a *jus cogens* norm.
5. This exception for violations of *jus cogens* norms to time limitations is well established in both the relevant jurisprudence and general principles of international law.
6. Given the particular foreign investment nature of NAFTA claims, it is unlikely that allegations of “continuing violations” under NAFTA will fall under this *jus cogens* norm exception.