RECENT BIT DECISIONS AND COMPOSITE ACTS STRADDLING THE DATE A TREATY COMES INTO FORCE

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Abstract The success of an international claim impugning a series of State acts, or a 'composite act', straddling the date a treaty comes into force can depend on the weight the tribunal gives to the elements of the composite act occurring before that date. Recent bilateral investment treaty decisions highlight ambiguities on this critical issue. One tribunal practically ignored State acts occurring before the treaty came into force in finding that there had been no breach of the treaty, whereas another tribunal considered those previous acts in reaching the opposite conclusion. This paper identifies steps to ensure future tribunals give consistent weight to the elements of a composite act occurring before a treaty comes into force.

I. INTRODUCTION

In the 1990s the Spanish company, Técnicas Medioambientales, TECMED SA, or Tecmed, obtained a permit to operate a landfill in the Mexican state of Sonora. Tecmed subsequently claimed that the local authority's actions, including its ultimate failure to renew the permit, contrary to representations on which Tecmed had relied, breached Mexico's obligations in the Mexico–Spain bilateral investment treaty ('BIT'). Specifically, Tecmed claimed that Mexico breached its obligations not to expropriate without compensation and to treat foreign investors fairly and equitably through a series of acts, or a 'composite' act, straddling the date the treaty came into force.

Mexico responded that the Tribunal could not consider those actions occurring before the treaty came into force. The Tribunal disagreed and, examining Mexico's conduct both before and after the treaty came into force, found that Mexico had breached its BIT obligations.

Shortly after the *Tecmed* decision, another BIT Tribunal considered a claim impugning acts both before and after the treaty came into force. In 1993 the US company, Generation Ukraine, obtained approval for the construction of an office building in Kyiv. Local administrative authorities interfered with the

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[*ICLQ* vol 56, July 2007 pp 491–514] doi: 10.1093/iclq/lei180

https://doi.org/10.1093/iclq/lei180 Published online by Cambridge University Press

development of the project and, by 2000, the building had still not been constructed. Generation Ukraine claimed compensation from the Ukraine under the US–Ukraine BIT. The company alleged that the Ukraine breached its treaty obligations by gradually expropriating the investment through a series of acts, or a 'composite' act, from 1993 until at least the end of 1997.

The US–Ukraine treaty had only come into force on 16 November 1996, more than three years after the Ukraine had allegedly begun to expropriate the US company's investment. The composite of acts alleged to breach the treaty, therefore, straddled the date that the BIT came into force. In response to an objection similar to that raised by Mexico in the *Tecmed* case, the *Generation Ukraine* Tribunal focused only on events occurring after the treaty came into force in finding that there was no expropriation.

Behind the apparent conflict between the *Tecmed* and *Generation Ukraine* decisions lies an unresolved conflict in international law on the effect of composite acts straddling the date a treaty comes into force. The resolution of this conflict has significant implications for the outcome of BIT disputes. Depending on the approach of the tribunal, a State that has destroyed a foreign investment can avoid breaching the BIT and paying compensation if key acts occurred before the treaty came into force. Conversely, another tribunal could transform seemingly innocuous conduct occurring after the treaty comes into force through the effect the tribunal gives to the State's conduct before that date. This article examines and suggests means to resolve the conflict over the effect of composite acts straddling the date a treaty comes into force.

II. COMPOSITE ACTS

A. Generally

Composite acts are several acts which, taken together, amount to a breach of an international law obligation. Article 15 of the ILC's *Articles on State Responsibility* captures the principle of composite acts. The Article says:

> *Breach consisting of a composite act*
> 1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
> 2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

B. Types of composite act

Within the general field of composite acts, it is possible to delineate three, and maybe four, sub-categories. First, there are acts in which both the separate acts

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and the composite act breach the same international law obligation. The European Court of Human Rights explored this type of act in the *Ireland v United Kingdom* case. In that case, Ireland claimed that the UK breached Article 3 of the *European Convention on Human Rights*. Article 3 provides that 'no one shall be subject to torture or to inhuman or degrading treatment or punishment'. Ireland alleged that the UK breached the article through the accumulated effect of five techniques used against detainees suspected of terrorism in Ireland. Detainees were subject to standing in a stressful position against a wall, wearing a hood, noise, sleep deprivation, and food and drink deprivation.

In accepting jurisdiction over this claim, the Court said:

> A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system; a practice does not of itself constitute a violation separate from such breaches.[1]

The Court went on to hold that the use of the five techniques constituted a practice of inhuman and degrading treatment in breach of Article 3.

Some international tribunals have specifically been given jurisdiction over acts in which both the separate acts and the composite act breach the same international law obligation. For example, Resolution 1503, adopted on 27 May 1970 by the UN Economics and Social Council, recognizes the competence of the Human Rights Committee to study or enquire into 'a consistent pattern of . . . violations of human rights and fundamental freedoms . . .'

Whereas the first type of composite act addresses situations where both the separate acts and the composite acts breach the *same* international law obligation, the second type of composite act addresses situations where the composite act amounts to a *different* breach of international law than the individual acts. Genocide is an example of such a composite act. A single murder of someone from an ethnic race might breach an international obligation but does not constitute genocide. A State does not commit genocide until it has murdered sufficient numbers from that ethnic group that the intention and effect of targeting that ethnic group emerges.[2]

The third type of composite act is where the State acts against several individuals and those separate actions, of themselves, are not breaches of any international obligation, but the sum of the actions constitutes a breach. The commentary to the ILC *Articles on State Responsibility* gives the example of discrimination against a nationality, prohibited by a trade agreement, as an

[1] *Ireland v UK*, Series A, No 25, 1978, para 159.

[2] The ILC gives a similar example of State A expropriating mining concessions given to nationals of State B. The individual expropriations might breach State A's treaty obligation not to expropriate assets belonging to nationals from State B. Taken as a whole, the series of expropriations might breach State A's separate obligation to generally permit participation by nationals of State B in the exploitation of State A's mineral resources (ILC, *Yearbook 1998* 227).

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example of such a composite act.[3] Such discrimination only emerges after the State has discriminated against several people from that country.

The first three types of composite act all address situations where the state acts against different individuals. The fourth type of composite act, and most important act for the purposes of this article, is where several acts against the *same* individual amount to a breach of an international obligation.[4]

C. Composite acts and international law claims

Claimants in BIT cases consistently argue that respondent States breach their treaty obligations through this fourth type of composite act. In *Waste Management v Mexico*, for example, the claimant argued that 'various Mexican agencies conspired together to frustrate the concession, and that the sum of this conduct was greater than its various component parts in terms of causing a violation of Article 1105'.[5] The Tribunal dismissed the claim, finding no evidence of such a conspiracy.[6]

Similarly, in *Jan de Nul and Dredging International v Egypt*,[7] the claimant alleged Egypt breached its obligations in the Belgo–Luxembourg–Egypt BIT through a composite of acts affecting its investment in a project dredging the

[3] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, Cambridge, 2002) 141. See also Wolfram Karl, 'The Time Factor in the Law of State Responsibility' in United Nations, *Codification of State Responsibility*, eds Marina Spinedi and Bruno Simma, from p 95 at n 30 at p 100: 'Although expropriation of foreign property is not in itself illegal, especially if adequate compensation is paid, discriminatory expropriation based on a government's intention would seem to constitute a composite wrongful act.'

[4] This is certainly a 'composite' act, within the ordinary meaning of that word. Some commentary suggests that it does not amount to a composite act for the purposes of international law. For example, Karl (n 3 at 100) describes composite acts as 'a series of individual acts, of a sequence of separate courses of conduct *adopted in separate cases*' (emphasis added). He goes on to explain that '[t]hese courses of conduct are linked by the same intention, content and effects and thereby form an aggregate whole.' The ILC gives a similar description, describing a composite act as 'an act consisting of a systematic repetition of actions or omissions *relating to separate cases*' ('Report of the International Law Commission on its twenty-eighth session', *Yearbook of the International Law Commission 1976*, vol II, Part Two at 88, emphasis added). The ILC goes on at 93 to describe it as 'an act made up of a series of separate actions or omissions *which relate to separate situations* but which, taken together, meet the conditions for a breach of a given international obligation' (emphasis added). There is also commentary suggesting that such a composite act committed against an individual is classified as a composite act for the purposes of international law. For example, the ILC discarded the concept of complex acts because they fall within the concept of composite acts ('Report on the ILC's 51st session in 1997', para 211), yet complex acts are committed against the same individual. Ultimately, the classification of a series of acts as composite, or otherwise, is irrelevant. There are no legal consequences flowing from the definition alone. All that matters is that the State breaches its international law obligation, through the accumulated effect of several actions against the same individual.

[5] *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3, Final Award, 30 Apr 30 2004, para 137.

[6] ibid (n 5) paras 138–9.

[7] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction, 16 June 2006.

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Suez Canal. The claimant appeared to allege that Egypt breached its obligations in the treaty through the composite effect of Egypt negotiating in bad faith, fraudulently misrepresenting facts relevant to the evaluation of the cost of the project[8] and the decisions of Egyptian courts.[9] The Tribunal did not consider that aspect of the claim in its decision on jurisdiction,[10] but may in its decision on the merits, which had not been given at the time of writing this article.

In *Telenor Mobile v Hungary*,[11] the claimant alleged that Hungary expropriated its investment in breach of the Norway–Hungary BIT through a 'series of acts over a period of time . . . all of which together produced the effect of expropriation'.[12] The ICSID Tribunal accepted the claim in principle but found on the facts that the series of acts impugned by the claimant did not amount to an expropriation.[13]

Claimants have not only consistently claimed that the State breached BIT obligations through composite acts but they have occasionally been successful. In *Tecmed v Mexico*, for example, the Tribunal found that Mexico breached its obligation to provide fair and equitable treatment through a composite of acts interfering with Tecmed's development of a landfill.[14]

The *Azurix v Argentina* decision provides another good example. After describing an Argentine province's refusal to allow the claimant to increase water tariffs or terminate the water concession contract as well as the province's attempts to prevent locals from paying their water bills, the Tribunal concluded that '[c]onsidered together, these actions reflect a pervasive conduct of the Province in breach of the standard of fair and equitable treatment.'[15] *Siemens v Argentina* and *PSEG v Turkey* also found that States breached their BIT obligations through composite acts.[16]

[8] ibid (n 7) para 34.

[9] ibid (n 7) para 57.

[10] ibid (n 7) para 122: 'Having concluded that the dispute arose after the entry into force of the 2002 BIT, the Tribunal does not need to consider the Claimants' fall back argument that the alleged breaches by Egypt occurred through a composite act within the meaning of Article 15 of the ILC Articles on State Responsibility . . .'

[11] *Telenor Mobile Communications AS v Republic of Hungary*, ICSID Case No ARB/04/15, Award, 13 Sept 2006.

[12] ibid (n 11) para 38.

[13] ibid (n 11) para. 63: 'there may be 'creeping' expropriation involving a series of acts over a period of time none of which is itself of sufficient gravity to constitute an expropriatory act but all of which taken together produce the effects of expropriation;' and para 79: 'it is evident that the effect of the measures by Hungary of which Telenor complains fall far short of the substantial economic deprivation of its investment required to constitute expropriation.'

[14] *Técnicas Medioambientales, TECMED S.A ('Tecmed') v Mexico*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, para 172.

[15] *Azurix Corp v Argentine Republic*, Award, ICSID Case No ARB/01/1, 14 July 2006, para 377.

[16] *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey*, ICSID Case No ARB/02/5, Award, 19 Jan 2007, para 253: 'the aggregate of the situations explained raise the question of the need to ensure a stable and predictable business environment for investors to operate in, as required . . . by the Treaty;' *Siemens AG v The Argentine*

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Tribunals not hearing BIT claims have also found that States breached international obligations through the accumulation of acts affecting an individual. In *Papamichalopoulos v Greece*, for example, the European Court of Human Rights found that Greece breached its European Convention on Human Rights obligation to ensure the enjoyment of property through the accumulation of various administrative and executive acts affecting the applicant's property over 28 years.[17] Similarly, in *Sporrong and Lonnroth v Sweden*, the European Commission on Human Rights found that Sweden breached the same provision through the accumulation of renewed delays of expropriation affecting the applicants' property.[18]

This author is unaware of the PCIJ or ICJ holding a State liable for the effect of a composite of acts on an individual, but at least one State appearing before the court based its claim on such a breach. In the *Barcelona Traction* case,[19] Belgium alleged that Spain breached its international law obligations through a composite act affecting the same group of Belgian shareholders. In arguing that Spain committed a denial of justice *lato sensu*, Belgium argued:

> Considering that a large number of decisions of the Spanish courts are vitiated by gross and manifest error in the application of Spanish law, by arbitrariness or discrimination, constituting in international law denials of justice lato sensu.[20]

The Court did not need to consider this argument because it found Belgium did not have standing to claim.

III. COMPOSITE ACTS BEGINNING BEFORE A TREATY COMES INTO FORCE

Regardless of the type of composite act, the individual elements of that composite act can straddle the date that a treaty comes into force. To take the example of discrimination, a State could discriminate against members of another country both before and after they are obliged not to discriminate under international law. In such a situation, can an international tribunal hearing a claim that the composite act breached the international treaty consider acts occurring before the treaty came into force or only those elements of the act occurring after that date? To answer this question, we must first understand the temporal rule in international law.

Republic, ICSID Case No ARB/02/8, Award, 6 Feb 2007 at para 264: 'We are dealing here with a composite act in the terminology of the [ILC] Draft Articles [on State Responsibility]' and para 271: 'The Tribunal has identified a series of measures . . . [that] stand as part of a gradual process which . . . culminated in the expropriation of Siemens' investment.'

[17] *Papamichalopoulos v Greece*, ECHR (1993) Series A, No 260-B.

[18] *Sporrong and Lonnroth v Sweden* (1983) 5 EHRR 35.

[19] *Case Concerning the Barcelona Traction, Light and Power Company, Ltd.*, Judgment of 5 Feb 1970, reprinted in (1970) 9 ILM 227.

[20] *Barcelona Traction* (n 19) 244.

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IV. THE TEMPORAL RULE

The temporal rule was famously described by Judge Huber in the *Island of Palmas* case in the following manner:

> a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.[21]

In addressing this passage, Judge Higgins of the International Court of Justice has said that '[f]ew arbitral *dicta* have been more widely cited, or have come to assume a more important place in international law.'[22] The principle identified by Judge Huber in this famous passage has come to be known as the temporal rule.[23] The temporal rule is a manifestation of the general principle of domestic legal systems that an individual cannot be held criminally liable for an act which was not prohibited at the time when he or she committed it (*nullum crimen sine lege praevia*).[24]

Article 13 of the Articles on State Responsibility for Internationally Wrongful Acts of the International Law Commission ('ILC') reflects the principle enunciated by Judge Huber. It says:

> 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.

The temporal rule expressed in Article 13 addresses the relationship between State acts and *both* international obligations that are yet to come into force *and* obligations that have ceased to exist. That is, the rule says that a State's acts occurring before a treaty comes into force cannot breach that treaty and the State's acts occurring after the treaty is no longer in force can also not breach that treaty. It is the first part of the rule with which we are interested in this article.

Article 28 of the Vienna Convention on the Law of Treaties reflects this first part of the temporal rule; that is, the part of the temporal rule applying to acts occurring before a treaty comes into force. That Article says:

[21] *Island of Palmas* case (1949) II UNRIAA 829, 845.

[22] Rosalyn Higgins, 'Time and the Law: International Perspectives on an Old Problem' (1997) 46 ICLQ 501, at 515.

[23] For a general discussion of the rule in international law, see JT Woodhouse, 'The principle of retroactivity in international law', The Grotius Society, *Transactions for the Year 1955* (London); Bindschedler-Robert, 'De la retroactivite en droit international public,' Melanges P Guggenheim (Geneva, 1965).

[24] See 'Report of the International Law Commission on its twenty-eighth session', *Yearbook of the International Law Commission 1976*, vol II, Part Two, 90; Geraldo Eulalio do Nascimento e Silva, 'Le Facteur Temps et les Traités,' 154 (1977-I) Recueil des cours 215 at 271; JT Woodhouse, 'The principle of retroactivity in international law', The Grotius Society, *Transactions for the Year 1955* (London) 73. Also note Art 11(2) of the Universal Declaration of Human Rights and Art 7 of the European Convention on Human Rights, which both provide that 'no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at the time it was committed . . .'

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> 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.[25]

The ILC has described the purposes behind this aspect of the temporal rule as follows:

> The reasons for its existence are obvious: first, since the main function of rules imposing obligations on subjects of law is to guide their conduct in one direction and divert it from another, this function can only be discharged if the obligations exist before the subjects prepare to act; secondly, and more important, the principle in question provides a safeguard for these subjects of law, since it enables them to establish in advance what their conduct should be if they wish to avoid a penal sanction or having to pay compensation for damage caused to others.[26]

Several tribunals interpreting BITs have endorsed the part of the temporal rule applying to acts occurring before a treaty comes into force. In *Feldman v United Mexican States*, the Tribunal said:

> 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.[27]

After citing this passage, the *Mondev* Tribunal said:

> The basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach.[28]

Similarly, the *Salini v Jordan* Tribunal noted the Italy–Jordan BIT does not give the substantive provisions of the treaty 'any retrospective effect' and, therefore, 'the normal principle stated in Article 28 of the Vienna Convention' applies.[29]

[25] See also Art 4 of the Vienna Convention which reinforces Art 28 by providing that the Vienna Convention will not apply retroactively: `Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.'

[26] ILC (n 24) 90.

[27] *Feldman v United Mexican States*, ICSID Case No ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 Dec 2000, reprinted in (2001) 65 ILM 615 at para 62. While a NAFTA decision and, therefore, not technically a decision under a *bilateral* investment treaty, for convenience we will describe *Feldman* and other NAFTA decisions as BIT decisions. Also note that the *Feldman* Tribunal's view, that conduct occurring before the treaty came into force is irrelevant is controversial and will be addressed later in the article.

[28] *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award, 11 Oct 2002, para 68.

[29] *Salini Construttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 29 Nov 2004, para 177. It is important to note that the Tribunal went on to find that the alleged facts breaching the treaty arose after the entry into force

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The temporal principle has not only been widely cited in BIT cases, some treaties include the principle as a provision. For example, Article 2(3) of the 2004 US Model BIT says:

> For greater certainty, this Treaty does not bind either 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 Treaty.[30]

V. THE TEMPORAL RULE AND CONTINUING ACTS

While the temporal rule prevents a State from breaching an international obligation through an act occurring *entirely* before the obligation came into force, the rule does not prevent a State breaching an international obligation if the act, while beginning before the obligation comes into force, continues past that date.

Article 28 of the *Vienna Convention* reflects this principle. It says that a treaty's provisions do not bind a State to the extent that the conduct 'ceased to exist before the date of entry into force of the treaty'. Consequently, conduct that began before the entry into force of the treaty and which does not cease to exist before this date, but continues, is subject to the treaty. The commentary to the *Vienna Convention* confirms this interpretation of Article 28. The commentary says that when 'an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty'.[31]

Implicitly recognizing that they are acting consistent with the temporal rule, a number of decisions interpreting BITs have confirmed that a State beginning an action before the treaty comes into force can still breach the treaty if the action continues after that date. In *Feldman*, for example, the Tribunal said that

of the BIT. See also *Tradex Hellas SA v Albania*, ICSID Case No ARB/94/2, Decision on Jurisdiction, 24 Dec 1996, 14 ICSID Review—FILJ 161 (1999); *Generation Ukraine, Inc v Ukraine*, ICSID Case No ARB/00/9, Award, 15 Sept 2004, para 11.2: 'The obligations assumed by the two state parties to the BIT relating to the minimum standards of investment protection (including the prohibition against expropriation) did not become binding, and hence legally enforceable, until the BIT entered into force on 16 November 1996. It follows that a cause of action based on one of the BIT standards of protection must have arisen after 16 November 1996.'

[30] Note that States can waive the temporal rule. Art 25 of the *Vienna Convention* recognizes that a State will be bound by a treaty before it comes into force, if the treaty so provides. Art 25(1) says:

> 'A treaty or a part of a treaty is applied provisionally pending its entry into force if:
> a. the treaty itself so provides; or
> b. the negotiating States have in some other manner so agreed.'

[31] Ralf Günter Wetzel, Dietrich Rauschning, *The Vienna Convention on the Law of Treaties: Travaux Préparatoires* (1978) 220, para 3.

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> if there has been a permanent course of action by Respondent which started before January 1, 1994 [the date the NAFTA came into force] and went on after that date . . . that post-January 1, 1994 part of Respondent's alleged activity is subject to the Tribunal's jurisdiction . . .'.[32]

Similarly, in *Mondev*, the Tribunal said:

> For its part the Tribunal agrees with the parties both as to the non-retrospective effect of NAFTA and as to the possibility that an act, initially committed before NAFTA entered into force, might in certain circumstances continue to be of relevance after NAFTA's entry into force, thereby becoming subject to NAFTA obligations.[33]

After endorsing the *Mondev* Tribunal's comments, the *SGS v Philippines* Tribunal said 'it is clear that [the BIT] . . . applies to breaches which are continuing at' the date the treaty came into force.[34]

The *SGS* Tribunal made these comments in considering a single continuing act—the Philippines' failure to pay what it owed under a contract. The Philippines' failure to pay before the treaty came into force did not affect whether the failure to pay after that date breached the treaty. Indeed, in this sense, single continuing acts beginning before a treaty comes into force present relatively few temporal problems. The nature of the act examined only after the treaty came into force is not affected by the nature of the act before that date. All that matters is that there is an act which viewed in isolation from events occurring before the date the treaty came into force, breached the international obligation.

In contrast to single continuing acts, continuing acts that are made up of several individual acts—or composite acts—present considerably more problems.[35] Viewed in isolation from acts occurring before the treaty came into force, the acts occurring after that date may not breach the treaty. The Tribunal's ability to examine that previous conduct is, therefore, often decisive. It is to this issue—the focus of this article—to which we now turn.

[32] *Feldman* (n 27) para 62.

[33] *Mondev* (n 28) para 58.

[34] *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 Jan 2004, para 167. On the application of the temporal rule to continuing acts in BIT disputes, see generally Stanimir Alexandrov, 'The "baby boom" of treaty-based arbitrations and the jurisdiction of ICSID tribunals: shareholders as "investors" and jurisdiction *ratione temporis*', (2005) 4 The Law and Practice of International Courts and Tribunals 19.

[35] The second paragraph of Art 15 of the ILC's Articles on State Responsibility says that a State's breach of an international obligation through a composite act continues from the first of the acts and 'lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation'.

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VI. THE EFFECT OF ELEMENTS OF A COMPOSITE ACT OCCURRING BEFORE A TREATY COMES INTO FORCE

A. The temporal rule

The first step in identifying the effect of elements of a composite act occurring before a treaty comes into force is to recognize that the breach cannot begin from the time those elements occur. Such an effect would be inconsistent with the temporal rule, as expressed in Article 13 of the ILC Articles, that '[a]n 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.'

While the temporal rule ensures that tribunals cannot consider elements of a composite act occurring before a treaty comes into force as the beginning of a breach of the treaty, the rule does not explain whether tribunals can consider those elements for other purposes. The *reasons* for the temporal rule also do not preclude tribunals considering those elements for other purposes. Recall from above that the temporal rule both enables the law to direct States' actions by ensuring States know the law before they act and also safeguards States by establishing what their conduct should be to avoid sanction.[36] So long as the law is in force before the State performs the later elements of a composite act which convert the act into a breach, a tribunal can consider previous elements of the composite act and still act consistent with the purposes of the temporal rule.

While both the temporal rule and its purposes allow a tribunal to *examine* elements of a composite act occurring before a treaty comes into force (so long as those elements are not part of the actual breach), they do not explain the *circumstances* under which a tribunal can examine those elements. International tribunals have taken advantage of this ambiguity to reach different conclusions on the circumstances under which they can examine elements of a composite act occurring before the treaty comes into force. Before examining these decisions, it is helpful to examine what commentators and the ILC have said about the issue.

B. Commentary

There is little commentary on the effect of elements of a composite act occurring before a treaty comes into force. Two commentators have argued that the temporal rule prevents tribunals from 'taking into account' elements of a composite act occurring before a treaty comes into force.[37] However, it is

[36] ILC (n 24) 90.

[37] See Eric Wyler, 'Quelques reflexions sur la realization dans le temps du fait internationalement illicite', 896: 'Autrement dit, seules doivent entrer en ligne de compte les decisions rendues pendant que l'obligation internationale était en vigeur'; and Joost Pauwelyn, 'The concept of a "continuing violation" of an international obligation: selected problems' (1995) 66 BYIL 415, 447: 'if the court took into account acts *prior* to the date of entry into force of the obligation and

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difficult to tell from the context of the commentators' comments whether the commentators advocate that tribunals completely ignore these elements or simply do not take those elements into account as constituting part of the act breaching the treaty. The commentary to the ILC Articles provides a little more direction.

C. Commentary to Article 15 of the ILC Articles

Recall that Article 15 of the ILC Articles on State Responsibility, which addresses composite acts, says:

> 1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
> 2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

The ILC elaborated on the temporal consequences of the Article in its official commentary, saying:

> The word 'remain' in paragraph 2 is inserted to deal with the intertemporal principle set out in article 13. In accordance with that principle, the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the 'first' of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence.[38]

So far the commentary just applies the temporal rule of Article 13 to composite acts, explaining that the breach cannot begin with elements of the composite act occurring before the treaty comes into force. However, the commentary goes further, explaining:

> This need not prevent a court taking into account earlier actions or omissions for other purposes.[39]

The ILC, therefore, recognizes that tribunals can 'take into account' elements of the composite act occurring before the treaty comes into force. This appears inconsistent with earlier ILC views on the issue. The ILC seems to have orig-

found that a practice has been established, it would automatically act contrary to the principle of non-retroactivity since the breach would then start on a date at which the obligation was not yet in force . . .' (emphasis in original).

[38] Crawford (n 3) 144.
[39] ibid.

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inally supported the view that, where the acts constituting a composite act straddle the date a treaty comes into force, the State's actions occurring before the obligation came into force could not be taken into account at all. In a draft article that was since discarded from their Articles on State Responsibility, the ILC said:

> If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted *by the actions or omissions occurring within the period during which the obligation is in force for that State*.[40]

The commentary to this draft confirmed that the ILC believed international tribunals could not consider the parts of the composite act occurring before the treaty came into force:

> Some of the actions or omissions which in the aggregate would probably constitute an act conflicting with what is required by the international obligation invoked, may have occurred before the obligation was laid on the State. . . . [In such a case] *the only actions or omissions to be taken into consideration are those which occurred while the obligation was incumbent on the State*. If these actions or omissions, taken together, although less than the whole are nevertheless sufficient by themselves to constitute an act prohibited by the obligation, it must be concluded that the obligation has been breached; if not, the opposite conclusion must be reached.[41]

The previous ILC view that actions or omissions occurring before the treaty comes into force are not 'to be taken into consideration' has been replaced with the view that those actions or omissions can be 'taken into account'. But what does 'take into account' mean? It seems that there is a spectrum of ways to interpret the phrase. The ILC's direction that tribunals can 'take into account' conduct occurring before a treaty comes into force may, therefore, not bring us much closer to understanding the precise circumstances under which a tribunal can consider such elements of a composite act occurring before a treaty comes into force.

D. The ambiguity of 'take into account'

Jurisprudence on the related temporal issues arising from the application of duration obligations illustrates how differently the phrase 'take into account'

[40] ILC (n 24) 87, emphasis added.

[41] ibid (n 24) 94, emphasis added. The ILC went on to say: 'To revert to the example of an obligation which prohibits the State from engaging in a discriminatory practice with regard to the admission of foreign nationals to certain professions, it seems evident that if, during the period for which the obligation was in force, foreigners have been denied admission to those professions in only one or two cases, there can be no question of a "discriminatory practice" and, consequently, no breach of the obligation. This holds good even if a great many such cases occurred before the entry into force of the obligation for the State . . .'

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can be interpreted. Several international law obligations contain a duration element. Under these obligations, it is not a specific State act, which breaches the obligation, but the performance of an act beyond a certain duration. For example, Article 5(3) of the European Convention on Human Rights provides that detainees 'shall be entitled to trial within a reasonable time'. Consequently, States failing to try detainees within a reasonable time breach the obligation. Similarly, Article 6(1) of the Convention provides that those charged with a criminal offence are entitled to a 'hearing within a reasonable time'. Consequently, States not providing a hearing within a reasonable time breach the obligation.

States continue to breach their obligation while they continue their act beyond the time specified in the obligation. For example, a State breaching Article 5(3) of the European Convention on Human Rights by failing to try a detainee within a reasonable time continues to breach the Article while it continues to detain without trial.[42]

Issues arise where the State acts inconsistently with its duration obligation for a period that straddles the date the obligation comes into force and the period after the treaty came into force is not long enough to breach the obligation. For example, a State might have detained someone without trial for 50 years before their obligation under Article 5(3) came into force, but only detained them for several months after that date. The several months of detention after the treaty came into force is not enough to establish a breach of Article 5(3). This raises the issue of whether the period of detention prior to the obligation coming into force should, in some way, be taken into account in determining whether the State has breached their obligation. Framing the question in a general sense: should the State's actions before the obligation came into force be *taken into account* when determining breaches of duration obligations?

The issue has been extensively considered in jurisprudence under the European Convention on Human Rights. While earlier decisions of the European Commission of Human Rights refused to consider the previous period, [43] the Court has since discarded this view. Importantly for this paper, the Court says it can 'take into account' the previous period.[44] Even more

[42] See eg Pauwelyn (n 37) 426.

[43] eg in *Roy and Alice Fletcher v UK*, Application No 3034/67, Decision of 19 Dec 1967, reprinted in Council of Europe, Collection of Decisions of the European Commission of Human Rights, Strasbourg, No 25 (May 1968) 76, 86, the Commission said: `insofar as the complaint relates to the period before 14th January 1966, under the terms of the United Kingdom's declaration of that date recognising the Commission's competence to accept petitions under Article 25 of the Convention, the United Kingdom only recognizes the Commission's competence to accept petitions so far as they relate to acts or decisions, facts or events occurring or arising after 13th January, 1966; whereas it follows that an examination of this part of the Application is outside the competence of the Commission ratione temporis.' See also European Commission decision in Application 342/57, Yearbook of the European Convention on Human Rights, 2 (1958–9), 455.

[44] See eg *Yagci and Sargin v Turkey* (1995) 20 EHRR 505. In that case, the applicants had already been in custody for two years and two months before the Convention came into force with

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importantly, different chambers of the Court appear to have interpreted the phrase 'take into account' in different ways.

Some chambers appear to have interpreted the phrase broadly and have practically added the period of detention before the treaty came into force to the period of detention after that date. The Chamber considering the *Mitap* application is a good example. In that case, the applicant had been detained in Turkey in January 1981 and finally convicted in December 1995. In that period, Turkey recognized the jurisdiction of the European Court of Justice on 22 January 1990. Nevertheless, the Court appeared to consider events before that date in much the same way it considered events after that date, in deciding that Turkey had breached its obligations in the Convention.[45]

The chamber hearing the *Yagci* case appeared to follow a similar approach. In that case, the applicant had been detained in Turkey on November 16, 1987 and released on May 4, 1990. However, noting again that Turkey did not recognize the jurisdiction of the European Court of Justice until 22 January 1990, the Court said:

> [t]he Court can only consider the period of three months and 13 days which elapsed between 22 January 1990, when the declaration whereby Turkey recognized the Court's compulsory jurisdiction was deposited, and 4 May 1990, when the applicants were provisionally released. However, when determining whether the applicants' continued detention after 22 January 1990 was justified under Article 5(3) of the Convention, it must take into account the fact that by that date the applicants, having been placed in detention on 16 November 1987, had already been in custody for two years and two months.[46]

The Court was evidently strongly influenced by the previous detention period of two years and two months when concluding that a relatively short detention period of three months and 13 days breached Turkey's Article 5(3)

regard to Turkey on 22 Jan 1990. The court said at para 525: ` when determining whether the applicants' continued detention after 12 January 1990 was justified under Article 5(3) of the Convention, *it must take into account the fact* that by that date the applicants, having been placed in detention on 16 November 1987, had already been in custody for two years and two months [emphasis added]'. See also: *Kreps v Poland* [2001] ECHR 34097/96, para 36; *Kalashnikov v Russia* [2002] ECHR 47095/99, para 124 and para 133; *Mitap v Turkey* (1996) 22 EHRR 209, para 31: 'the Court can only consider the period of nearly six years that elapsed after 22 January 1990, the date on which the declaration whereby Turkey recognised the Court's compulsory jurisdiction was deposited. Nevertheless, it must take into account the fact that by the critical date the proceedings had already lasted nine years'; and *Trzaska v Poland* [2000] ECHR 25792/94, para 54.

[45] *Mitap v Turkey* (n 45) paras 36–7: 'The Court notes that the proceedings in the Military Court of Cassation, to which the case was automatically referred on 19 July 1989, and then in the Court of Cassation, ended on 28 December 1995; they thus lasted more than six years. It acknowledges that the case was complex, but has not been informed of any circumstances capable of justifying such a lengthy period, especially as account must be taken of the fact that the proceedings at first instance lasted approximately eight years and six months. In conclusion, the length of the criminal proceedings in issue contravened Article 6 para 1.'

[46] *Yagci v Turkey* (n 45) para 49.

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obligation.[47] Despite saying that it could only consider the period after Turkey recognized the Court's jurisdiction, the European Court of Human Rights effectively also considered the period before.

The decisions in *Yagci* and *Mitap* can be contrasted with that in *Motsnik v Estonia*. The Chamber hearing that case appeared to have interpreted the phrase 'take into account' narrowly and practically ignored the period of detention before the treaty came into force, in rejecting the claim that Estonia breached the same obligation.[48]

The decisions of the European Court of Human Rights illustrate that there is a spectrum of ways to interpret a direction that a tribunal 'take into account' events occurring before the treaty came into force. The jurisprudence demonstrates that while the ILC's direction that elements of a composite act occurring before a treaty comes into force can be 'taken into account' is certainly helpful, it does not completely clarify the purposes for which tribunals can consider those elements.

The ILC did provide some more direction by providing examples of the purposes for which a tribunal can consider events occurring before a treaty comes into force. The ILC said that tribunals can consider previous conduct, for example, 'in order to establish a factual basis for the later breaches or to provide evidence of intent'.[49] At first glance, the ILC's commentary provides helpful guidance on the circumstances under which international tribunals can consider elements of a composite act occurring before a treaty comes into force. Further scrutiny suggests otherwise.

E. Considering elements of a composite act occurring before a treaty comes into force to provide evidence of intent

By directing that international tribunals can consider actions before a treaty comes into force 'in order to . . . provide evidence of intent' the ILC, no doubt, supported tribunals considering declarations of intent before a treaty came into force that were only executed after that date. For example, a tribunal consid-

[47] See also *Kudla v Poland*, Application No 30210/96, 26 Oct 2000, where the Court recognized at para 103 that 'as Poland's declaration recognising the right of individual petition . . . took effect on 1 May 1993' but went on to find at para 114: 'given that before being redetained on 4 October 1993 the applicant had already spent nearly a year in detention . . . only very compelling reasons would persuade the Court that his further detention for two years and four months was justified under Article 5(3).'

[48] *Motsnik v Estonia* [2003] ECHR 50533/99 para 39: 'As regards the conduct of the authorities, the Court notes that the preliminary investigation of the criminal case, which had been initiated on 1 June 1994, was complete on 13 January 1995. On 18 January 1995 the case was sent to the City Court where it was stalled for nearly two years—it was only on 7 January 1997 that the applicant was committed for trial. However, as stated above, by reason of its competence ratione temporis the Court can consider only the period after 16 April 1996, while the preceding stage can be taken into account as a background. Following a lack of judicial activity for nearly nine months, counting from the material date . . .'

[49] Crawford (n 3) 144.

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ering a State's declaration before a treaty came into force that it would discriminate against certain nationalities, in order for the tribunal to determine if acts after that date were discriminatory, would appear to be acting consistent with the ILC's direction.

The decision of the European Court of Human Rights in *Agrotexim v Greece*[50] provides a less hypothetical example of a tribunal considering action before a treaty came into force in such circumstances. The applicants in that case owned prime real estate in the centre of Athens, on which they intended to build an office and shopping complex. The local council had other ideas. In 1979, the council announced its plans to convert the site into a public park. The claimants opposed the plans but, in February 1981, they arrived at the site to discover that the Government had planted trees and installed park benches. The claimants unsuccessfully challenged the decision in the local courts and eventually brought a claim before the European Commission for Human Rights in 1988. The claimants alleged a breach of Article 1 of the First Protocol to the European Convention on Human Rights, which guarantees the peaceful enjoyment of property.

Greece did not recognize the European Court's jurisdiction under the European Convention on Human Rights until November 1985, by which time the council had confirmed the expropriation in a formal decision and the claimants had unsuccessfully tried to claim in the local courts. Yet, both the Commission and the European Court of Human Rights examined Greece's conduct before November 1985 as 'indicating the existence of a plan' to interfere with the property, which was executed through actions occurring after that date.[51] That is, the Commission and Court considered that facts occurring before Greece recognized the Court's jurisdiction revealed Greece's intent to interfere with Agrotexim's property. While intent is not necessary to find a breach of Article 1 of the First Protocol, the Commission and Court found that, in the circumstances before it, intent helped indicate such a breach.

By considering a State's declaration of intent occurring before the treaty came into force to help interpret actions occurring after that date, the *Agrotexim* decision appears to squarely apply the ILC's direction that international tribunals can consider actions before a treaty comes into force 'in order to . . . provide evidence of intent'. However, express declarations are not the only evidence of intent. Intent can also emerge through a series of actions. For example, there is little doubt that a State that has murdered millions of an ethnic group intends to commit genocide. To take an example more applicable to the BIT context, evidence of intention to discriminate against a particular nationality can emerge from thousands of individual examples of discrimination against that nationality.

[50] *Agrotexim v Greece,* Application No 1480/89, [1995] ECHR 42 (24 Oct 1995).
[51] ibid (n 51) para 58.

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The ILC direction that international tribunals can consider actions before a treaty comes into force 'in order to . . . provide evidence of intent' does not prevent tribunals considering a series of actions before a treaty comes into force as evidence of intent. Indeed, particular tribunals could glean intent from simply one action occurring before the treaty came into force and could take support from the ILC commentary in considering that action. The ILC's direction that international tribunals can consider actions before a treaty comes into force 'in order to . . . provide evidence of intent,' therefore, leaves tribunals with broad scope to consider elements of a composite act occurring before the treaty comes into force.

F. Considering elements of a composite act occurring before a treaty comes into force to establish a factual basis for the later breaches

In addition to saying that tribunals can consider conduct occurring before a treaty comes into force to 'provide evidence of intent', the ILC also said tribunals can examine previous conduct 'in order to establish a factual basis for the later breaches'.[52] There is a spectrum of ways to interpret 'conduct establishing a factual basis for the later breaches' just as there is a spectrum of ways to interpret 'take into account'. At the narrow end of the spectrum, conduct establishing a factual basis for the later breaches can be interpreted to mean conduct, which is not part of the impugned conduct, but which is necessary for the impugned conduct to occur. Initial detention, for example, can be interpreted as the factual basis for subsequently unreasonably long detention.

At the broad end of the spectrum, conduct establishing a factual basis for the later breaches can be interpreted to mean conduct that is actually part of the impugned conduct. Detention for several years, for example, can be interpreted as the factual basis for subsequent detention for several more years.

BIT cases provide several examples of tribunals examining conduct occurring before a treaty comes into force as a 'factual basis for the later breaches', under a narrow interpretation of that phrase. The *Tecmed* Tribunal, for example, considered conduct occurring before the Mexico–Spain BIT came into force for this purpose in determining if Mexico had breached its obligation to provide fair and equitable treatment. After deciding that the obligation to provide fair and equitable treatment protected the investor's 'legitimate expectations', the Tribunal examined the legitimate expectations created by Mexico's conduct before the treaty came into force. The Tribunal identified, in particular, Mexico's representations that it would renew the investor's permit to operate a landfill. The Tribunal found that Mexico's subsequent failure to renew the permit after the treaty came into force failed to fulfil the investor's legitimate expectations and, therefore, breached Mexico's obligation to provide fair and equitable treatment.

[52] Crawford (n 3) 144.

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Mondev can also be seen as an example of a Tribunal considering conduct occurring before a treaty came into force as a factual basis for conduct occurring after that date, according to the narrow interpretation of that phrase. In *Mondev*, the Tribunal addressed a claim that the US breached the NAFTA through two distinct State actions: first, the State's interference with the claimant's rights in a building project; and second, the State's courts' failure to compensate the claimant for that interference.

The State's alleged interference with the claimant's rights in the building project occurred well before the NAFTA came into force. Nevertheless, the claimant alleged that the tribunal should consider this action since the courts' failure to compensate the claimant for that interference occurred after the agreement came into force.

The *Mondev* Tribunal began by accepting the principle that State actions occurring before the treaty came into force can be helpful in determining if conduct after that date breached the treaty.[53] The Tribunal applied this principle to consider the circumstances surrounding the failed construction project occurring before the NAFTA came into force as a factual basis for the litigation occurring after the treaty came into force.

Similarly, in *Generation Ukraine*, the Tribunal can also be seen to have considered events before the treaty came into force as a factual basis for breaches allegedly occurring through later conduct, according to the narrow interpretation of that phrase. The decision in *Generation Ukraine v Ukraine* arose out of a dispute between the US company, Generation Ukraine, and the Ukraine over a failed construction project in Kyiv. In 1993, Generation Ukraine obtained approval for the construction of an office building in the city. Local administrative authorities interfered with the development of the project and, by 2000, the building had still not been constructed. Generation Ukraine brought an ICSID claim under the US-Ukraine BIT. The company alleged that the Ukraine gradually expropriated the investment through a series of acts from 1993 until at least the end of 1997.

Unfortunately for Generation Ukraine, the US–Ukraine treaty did not come into force until 16 November 1996. The tribunal hearing the dispute stated that its 'jurisdiction *ratione temporis* is limited to alleged expropriatory acts which occurred after' this date.[54] Nevertheless, in determining whether the Ukraine expropriated any of Generation Ukraine's property rights through actions occurring after 16 November 1996, the Tribunal determined whether actions occurring before that date created property rights capable of expropriation.[55]

[53] *Mondev* (n 28) para 69: 'On the other hand, it does not follow that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of its Chapter 11 obligations by conduct of that Party after NAFTA's entry into force.'

[54] *Generation Ukraine, Inc v Ukraine* (n 28) para 11.4.

[55] ibid (n 29) para 18.6: 'It is important . . . to understand the evolution of the Claimant's activities in Ukraine. The following comments on the Protocol of Intentions and List of Potential Sites are thus significant by way of background.' This background included events occurring before the

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The *Tecmed*, *Mondev* and *Generation Ukraine* decisions, therefore, all provide examples of tribunals considering conduct occurring before a treaty came into force, which is not part of the impugned conduct, but which is necessary for the impugned conduct to occur. However, conduct forming the 'factual basis for the later breaches' can also be interpreted more broadly to include conduct that is part of the impugned conduct. Jurisprudence of the European Court of Human Rights provides examples of tribunals interpreting the phrase in such a broad manner. As described above, several chambers of the Court have considered claims that countries breached their European Convention on Human Rights obligations that detainees 'shall be entitled to trial within a reasonable time' and that those charged with a criminal offence are entitled to a 'hearing within a reasonable time'. Several of these chambers have considered claims from applicants whose detention began before the detaining country was bound by the obligation. Those chambers have acknowledged their ability to consider facts occurring before that critical date.

If the Court were strictly limited to considering those facts not part of the impugned conduct, but which are necessary for the impugned conduct to occur, then the Court would only have considered the fact of detention. Yet, the Court has considered the entire period of detention occurring before the critical date and, thereby, considered elements of the impugned conduct itself, which occurred before the State was bound by the obligation. Often, as in the cases of *Mitap v Turkey* and *Yagci v Turkey*, the Court's decision to consider this period has proved decisive.

G. Considering elements of a composite act occurring before a treaty came into force for other purposes

The above review of jurisprudence demonstrates that the ILC's direction that tribunals can consider events occurring before a treaty comes into force 'in order to establish a factual basis for the later breaches or to provide evidence of intent' still leaves tribunals with broad discretion to consider elements of a composite act occurring before a treaty comes into force. Both examples can be interpreted sufficiently broadly to practically enable a tribunal to add elements of a composite act occurring before a treaty comes into force to those elements occurring afterwards.

Not only are the ILC's examples capable of such broad interpretation but the ILC did not specify whether those examples are exhaustive. The ILC, therefore, appears to have left open the possibility that tribunals can consider events occurring before the treaty comes into force for other purposes. At least one BIT Tribunal—that considering the *Tecmed* case—appears to have taken

treaty came into force on 16 Nov 1996. The Tribunal went on to say at para 18.9 that the documents identified in the review 'do not purport to generate legally enforceable rights and obligations, and could not constitute an investment for the purposes of Article I(1)(a) of the BIT, and therefore could not give rise to an expropriation claim before an ICSID Tribunal'.

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advantage of this ambiguity to consider events occurring before the treaty came into force for other purposes.

In *Tecmed,* the investor obtained a permit to operate a landfill in the Mexican state of Sonora. The investor claimed that the local authority's actions, including its ultimate failure to renew the permit, contrary to representations on which Tecmed had relied, breached Mexico's obligations not to expropriate without fair compensation and to treat foreign investors fairly and equitably. In making this claim, the investor relied on actions of the municipality before the treaty came into force. In particular, the investor complained about Mexico's failure to initially grant the investor a longer permit and including the investor in a register 'in terms that could be deemed to be a transfer . . . of the existing unlimited permit' but then 'subsequently revoking it by replacing it with another one, limited in its initial duration'.[56] The Tribunal considered these facts, saying:

> conduct, acts or omissions of the Respondent which, though they happened before the entry into force, maybe considered a constituting part, concurrent factor or aggravating or mitigating elements of conduct or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal's jurisdiction.[57]

The Tribunal confirmed its view elsewhere in its decision:

> Whether it be conduct that continues in time, or a complex act whose constituting elements are in a time period with different durations, it is only by observation as a whole or as a unit that it is possible to see to what extent a violation of a treaty or of international law rises [sic] or to what extent damage is caused.[58]

Indeed, the Tribunal not only considered Mexico's acts occurring before the treaty came into force but relied on those acts in finding that Mexico had breached its BIT obligations through the actions of Mexico's agent, INE. The Tribunal said:

> INE's contradictory and ambiguous conduct at the beginning of the relationship between INE … and Tecmed before the entry into force of the Agreement has the same deficiencies as those encountered in such conduct during the last stage of the relationship, immediately preceding the Resolution. Thus, INE's conduct during such time is added to the prejudicial effects of its conduct during the last stage, which breached Article 4(1) of the Agreement.[59]

The precise purpose for which the *Tecmed* Tribunal considered Mexico's conduct before the treaty came into force is unclear. It is only clear that the Tribunal did not rely on the actions occurring before the treaty came into force to establish Mexico's intent; the Tribunal acknowledged that the actions did

[56] *Tecmed v Mexico* (n 14) para 57.
[57] ibid (n 14) para 68.
[58] ibid (n 14) at n 26, p 19.
[59] ibid (n 14) para 172.

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not indicate any intention to interfere with the landfill.[60] Consequently, the *Tecmed* Tribunal did not rely on the actions to fulfil the first purpose for which the ILC says tribunals can consider actions occurring before a treaty came into force.

The Tribunal can be interpreted as relying on those actions to fulfil the other purpose for which the ILC says tribunals can consider actions occurring before a treaty comes into force. '[A] constituting part, concurrent factor or aggravating or mitigating elements of conduct or acts or omissions . . . which took place after'[61] the treaty came into force could form the 'factual basis' for later breaches, under a broad interpretation of that phrase. Alternatively, the *Tecmed* Tribunal can be interpreted as simply considering actions occurring before the treaty came into force for purposes other than those identified by the ILC.

Regardless of the precise purposes for which the *Tecmed* Tribunal examined Mexico's action occurring before the BIT came into force, the Tribunal relied heavily on that action in finding that Mexico breached the BIT. Indeed, the Tribunal's comments that 'INE's contradictory and ambiguous conduct at the beginning of the relationship . . . is added to the prejudicial effects of its conduct during the last stage' and that 'it is only by observation as a whole or as a unit that it is possible to see to what extent a violation of a treaty or of international law [a]rises' blur the line between elements of a composite act occurring before and after the treaty comes into force.

VII. CONCLUSION

Recent BIT decisions highlight a critical ambiguity in international law concerning the effect of elements of a composite act occurring before a treaty comes into force. While the international law temporal rule ensures that the breach of the international law obligation cannot begin with the elements of the composite act occurring before the treaty comes into force, neither the rule, nor the reasons behind the rule, say anything about whether these elements can be considered for other purposes.

The ILC has attempted to fill this lacuna by clarifying that elements of a composite act occurring before a treaty comes into force can be 'taken into account' in determining whether elements occurring after that date breach the treaty. However, decisions of the European Court of Human Rights hearing claims for breaches of 'duration' obligations highlight the ambiguity of the phrase 'take into account'; some chambers appear to have practically added the conduct before the treaty came into force to that occurring afterwards in

[60] ibid (n 14) para 62: 'The common thread weaving together each act or omission into a single conduct attributable to the Respondent is *not* a subjective element or intent, but a converging action towards the same result . . . [emphasis added]'.

[61] ibid (n 14) para 68.

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determining if there has been a breach, whereas others have practically ignored the previous conduct.

The ILC attempted to clarify the ambiguity surrounding the meaning of 'take into account' by providing examples. The commentary to the Articles says that previous elements can be considered to determine the intent behind, and the factual basis of, later acts. However, these examples provide little direction. The examples can be interpreted narrowly to allow tribunals to consider declarations of intent or the facts necessary for the later impugned conduct to occur. Yet, the examples can also be interpreted broadly, to allow tribunals to consider actions as evidence of intent or elements of the impugned conduct itself. Furthermore, the ILC commentary does not explain whether the examples are exhaustive or whether international tribunals can consider conduct occurring before a treaty comes into force for other purposes.

The *Tecmed* and *Generation Ukraine* decisions, in particular, highlight the ambiguity surrounding the circumstances under which tribunals can consider elements of a composite act occurring before a treaty comes into force. The *Tecmed* Tribunal practically added Mexico's allegedly wrongful conduct occurring before the treaty came into force to that conduct occurring after that date in finding that Mexico breached its obligations in the Mexico–Spain BIT. Conversely, the *Generation Ukraine* Tribunal refused to consider facts before the treaty came into force for anything other than determining if the claimant had property rights that could be expropriated by later conduct. While the tribunals gave vastly different weight to the elements of the composite act alleged to occur before the respective BITs came into force, both can be interpreted as consistent with the ILC Articles and commentary.

The ambiguity surrounding the effect of elements of a composite act occurring before a treaty comes into force is unfortunate. Claimants and respondents have little idea about the validity of a claim impugning acts occurring before and after a treaty comes into force. Moreover, tribunals have little direction on which to draw in determining what effect to give those elements.

Both tribunals and treaty drafters can take steps to resolve this ambiguity. Tribunals can help build a coherent body of law by precisely identifying the purposes for which they are considering elements of a composite act occurring before a treaty comes into force or why considering those elements fulfils no valid purpose. Treaty drafters can include in their increasingly detailed treaties notes clarifying the precise purposes for which tribunals can consider actions occurring before the treaty comes into force. Such a note could clarify whether tribunals are, indeed, just limited to considering declarations of intent or the facts necessary for the later impugned conduct to occur or if tribunals have greater discretion to consider previous conduct and broaden the circumstances under which States can be held liable for composite acts beginning before a treaty comes into force.

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