IN THE ARBITRATION UNDER CHAPTER TEN OF THE DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT (CAFTA-DR) AND THE ICSID ARBITRATION RULES BETWEEN

FERNANDO PAIZ ANDRADE AND ANABELLA SCHLOESSER DE LEON DE PAIZ

Claimants

-and-

REPUBLIC OF HONDURAS,

Respondent.

ICSID CASE NO. ARB/23/43

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 10.20.2 of the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR" or "Treaty"), the United States of America makes this submission on questions of interpretation of the Treaty. The United States does not take a position, in this submission, on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.[1]

Article 10.4 (Most-Favored-Nation Treatment)

2. Article 10.4 provides that each Party shall accord to investors and covered investments of the other Party "treatment no less favorable than that it accords, in like circumstances," to investors and investments of any other Party or of any non-Party (*i.e.*, a third State) "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other

[1] In footnotes to this submission, the symbol ¶ denotes the relevant paragraph(s) of the referenced document and the symbol § denotes the relevant section(s) of the referenced document.

disposition of investments" in its territory. This obligation thus prohibits nationality-based discrimination between investors and investments "in like circumstances."[2]

3. To establish a breach of Article 10.4, a claimant has the burden of proving that it or its investments: (1) were accorded "treatment"; (2) were in "like circumstances" with investors or investments of any other Party or of any non-Party; and (3) received treatment "less favorable" than that accorded to investors or investments of any other Party or of any non-Party.[3]

4. Determining whether an investor or investment identified by a claimant is in like circumstances with the claimant or its investment is a fact-specific inquiry. As one tribunal observed, "[i]t goes without saying that the meaning of the term will vary according to the facts of a given case. By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations."[4] The United States understands the term "circumstances" to denote conditions or facts that accompany treatment as opposed to the treatment itself. Thus, identifying appropriate comparators for purposes of the "like circumstances" analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics. When determining whether a claimant was in like circumstances with comparators, it or its investment should be compared to an investor or investment of a third State that is alike in all relevant respects *but for* the nationality of ownership. Whether treatment is accorded in like circumstances under Article 10.4 depends on the totality of the circumstances,

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[2] *See, e.g.*, *Mercer International Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Award ¶ 7.7 (Mar. 6, 2018) (accepting the positions of the United States and Mexico that the National Treatment and Most-Favored Nations obligations are intended to prevent discrimination on the basis of nationality).

[3] *See, e.g.*, *Mercer International Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB(AF)/12/3, Submission of the United States of America ¶ 13 (May 8, 2015) (interpreting similar language in NAFTA, noting that "[n]othing in the text of Articles 1102 or 1103 [of the NAFTA] suggests a shifting burden of proof. Rather, the burden to prove a violation of these articles, and each element of its claim, rests and remains squarely with the claimant."); *see also Riverside Coffee, LLC v. Republic of Nicaragua*, CAFTA/ICSID Case No. ARB/21/16, Submission of the United States of America ¶¶ 2-3 (Mar. 15, 2024); *Sargeant Petroleum, LLC v. Dominican Republic*, CAFTA/ICSID Case No. ARB(AF)/22/1, Submission of the United States of America ¶¶ 18-19 (Nov. 9, 2023); *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America ¶ 55 (June 21, 2019) (interpreting similar language in the U.S.-Peru TPA).

[4] *See, e.g.*, *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award on the Merits of Phase 2 ¶ 75 (Apr. 10, 2001).

including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.[5]

5. Moreover, if the claimant does not identify treatment that is actually being accorded with respect to an investor or investment of a non-Party or another Party in like circumstances, no violation of Article 10.4 can be established.[6] In other words, a claimant must identify a measure adopted or maintained by a Party through which that Party accorded more favorable treatment, as opposed to speculation as to how a hypothetical measure might have applied to investors of a non-Party or another Party. Additionally, a Party does not accord "treatment" through the mere existence of provisions in its other international agreements such as conditions to consent, procedural provisions, umbrella clauses, or clauses that impose autonomous fair and equitable treatment standards. Treatment accorded by a Party could include, however, measures adopted or maintained by a Party in connection with carrying out its obligations under such provisions.

Article 10.18.1 (Limitations Period)

6. Article 10.18.1 of the CAFTA-DR provides:

> No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

7. Article 10.18.1 imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute.[7] As is made explicit by Article 10.18.1, the Parties did

[5] *See, e.g.*, *S.D. Myers, Inc. v. Government of Canada,* NAFTA/UNCITRAL, First Partial Award ¶ 250 (Nov. 13, 2000) (in the context of NAFTA, determining that an "assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest").

[6] U.N. Conference on Trade & Dev., UNCTAD Series on Issues in International Investment Agreements II, *Most-Favoured-Nation Treatment*, 23-24 (2010) (noting that a comparison between two foreign investors in like circumstances is required to assess an alleged breach of an MFN treatment clause).

[7] Investment tribunals interpreting the CAFTA-DR have routinely reached this conclusion. *See, e.g.*, *Corona Materials, LLC v. Dominican Republic*, CAFTA/ICSID Case No. ARB(AF)/14/3, Award on the Respondent's

not consent to arbitrate an investment dispute if "more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach" and "knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage." Accordingly, a tribunal must find that a claim satisfies the requirements of, *inter alia*, Article 10.18.1, in order to establish a Party's consent to (and therefore the tribunal's jurisdiction over) an arbitration claim. Because a claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Ten,[8] including with respect to Article 10.18.1, a claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.[9]

Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA ¶ 280 (May 31, 2016) (finding that the tribunal lacks jurisdiction due to application of the time bar); *Spence Int'l Invests., Berkowitz et al. v. Republic of Costa Rica*, CAFTA/ICSID Case No. UNCT/13/2, Interim Award (Corrected) ¶¶ 235-236 (May 30, 2017) ("*Berkowitz* Interim Award") (addressing the time-bar defense as a jurisdictional issue); *see also Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility ¶¶ 82-83 (Jan. 30, 2018) ("*Resolute* Decision on Jurisdiction and Admissibility") (holding that compliance with the time bar specified in NAFTA Articles 1116 and 1117 "goes to jurisdiction"); *Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility ¶¶ 314, 335 (June 14, 2013) ("*Apotex* Award") (parties treated the United States' time-bar objection as a jurisdictional issue, and the tribunal expressly found that NAFTA Article 1116(2) deprived it of "jurisdiction *ratione temporis*" with respect to one of the claimant's alleged breaches); *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 2 (Revised) ¶ 18 (May 31, 2005) (finding that that "an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for purposes of Article 21(4)" of the UNCITRAL Arbitration Rules (1976)).

[8] *Pac Rim Cayman LLC v. Republic of El Salvador*, CAFTA/ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections ¶ 2.8 (June 1, 2012) (finding "that it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant's CAFTA claims on the basis of an assumed fact (*i.e.*, alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that '*prima facie*' or other like standard is limited to testing the merits of a claimant's case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal's jurisdiction directly depends, such as the Abuse of Process, Ratione Temporis and Denial of Benefits issues in this case."). *See also Apotex* Award ¶ 150; *Vito G. Gallo v. Government of Canada*, NAFTA/PCA Case No. 2008-03, Award ¶ 277 (Sept. 15, 2011) ("[A] claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage . . . ."); *Mesa Power Group, LLC v. Government of Canada*, NAFTA/PCA Case No. 2012-17, Award ¶ 236 (Mar. 24, 2016) ("It is for the Claimant to establish the factual elements necessary to sustain the Tribunal's jurisdiction over the challenged measures."); *Phoenix Action, Ltd. v. The Czech Republic,* ICSID Case No. ARB/06/5, Award ¶¶ 58-64 (Apr. 15, 2009) (summarizing relevant investment treaty arbitral awards and concluding that "if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established *prima facie*] at the jurisdictional stage"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶¶ 190-192 (Nov. 14, 2005) (finding that claimant "has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction"); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction ¶ 79 (Apr. 22, 2005) (acknowledging claimant had to satisfy the burden of proof "required at the jurisdictional phase").

[9] *See also Berkowitz* Interim Award ¶¶ 163, 239, 245-246.

8. The limitations period is a "clear and rigid" requirement that is not subject to any "suspension," "prolongation," or "other qualification."[10] An investor *first* acquires knowledge of an alleged breach and loss under Article 10.18.1 as of a particular "date." Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As the *Grand River* tribunal recognized in interpreting the analogous limitations provisions under Articles 1116(2) and 1117(2) of the NAFTA,[11] subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period once an investor knows, or should have known, of the alleged breach and loss or damage incurred thereby.[12]

9. Thus, where a "series of similar and related actions by a respondent state" is at issue, a claimant cannot evade the limitations period by basing its claim on "the most recent transgression" in that series.[13] To allow a claimant to do so would "render the limitations provisions ineffective[.]"[14] An ineffective limitations period would undermine and be contrary to the State party's consent because, as noted above, the Parties did not consent to arbitrate an investment dispute if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach and knowledge that the claimant has incurred loss or damage.

10. With regard to knowledge of "incurred loss or damage" under Article 10.18.1, a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage

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[10] The substantively identical NAFTA Chapter Eleven limitations period has been described as "clear and rigid" and not subject to any "suspension, prolongation or other qualification." *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006) ("*Grand River* Decision on Objections to Jurisdiction"); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002); *Apotex* Award ¶ 327 (quoting *Grand River* Decision on Objections to Jurisdiction).

[11] *See Grand River* Decision on Objections to Jurisdiction ¶ 81.

[12] *See Resolute* Decision on Jurisdiction and Admissibility ¶ 158 ("[W]hether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant.").

[13] *Grand River* Decision on Objections to Jurisdiction ¶ 81.

[14] *Id.* Thus, although a legally distinct injury can give rise to a separate limitations period, a continuing course of conduct does not extend the limitations period under Article 10.18.1. Moreover, while measures taken outside of the three-year limitations period may be taken into account as background or contextual facts, such measures cannot serve as a basis for a finding of a breach under Article 10 of the CAFTA-DR. *See Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 348 (June 8, 2009).

cannot be precisely quantified until some future date.[15] Moreover, the term "incurred" broadly means "to become liable or subject to."[16] Therefore, an investor may have "incurred" loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate.[17]

11. As noted, Article 10.18.1 requires a claimant to submit a claim to arbitration within three years of the "date on which the claimant first acquired, or should have first acquired, knowledge" of the alleged breach, and loss or damage incurred by the claimant. For purposes of assessing what a claimant should have known, the United States agrees with the reasoning of the *Grand River* tribunal: "a fact is imputed to [sic] person if by exercise of reasonable care or diligence, the person would have known of that fact."[18] As that tribunal further explained, it is appropriate to "consider in this connection what a reasonably prudent investor should have done in connection with extensive investments and efforts such as those described to the [t]ribunal."[19] Similarly, as the *Berkowitz* tribunal found, endorsing the reasoning in *Grand River* with respect to the analogous limitations provision in the CAFTA-DR, "the 'should have first acquired knowledge' test . . . is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known."[20]

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[15] *See Mondev International Ltd. v. United States of America,* NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶ 87 (Oct. 11, 2002) ("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.").

[16] "Incur," MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/incur (last visited Mar. 17, 2025); *see also United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999) (finding that to "incur" means to "become liable or subject to" and that "a person may become 'subject to' an expense before she actually disburses any funds").

[17] *Grand River* Decision on Objections to Jurisdiction ¶ 77; *see also Berkowitz* Interim Award ¶ 213 (finding "the date on which the claimant first acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred").

[18] *Grand River* Decision on Objections to Jurisdiction ¶ 59.

[19] *Id*. ¶ 66 ("In the Tribunal's view, parties intending to participate in a field of economic activity in a foreign jurisdiction, and to invest substantial funds and efforts to do so, ought to have made reasonable inquiries about significant legal requirements potentially impacting on their activities . . . . This is particularly the case in a field that the prospective investors know from years of past personal experience to be highly regulated and taxed by state authorities.").

[20] *Berkowitz* Interim Award ¶ 209.

Respectfully submitted,

Lisa J. Grosh
Assistant Legal Adviser
John D. Daley
Deputy Assistant Legal Adviser
David M. Bigge
Chief of Investment Arbitration
Mary T. Muino
Attorney Adviser
Office of International Claims and
Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

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