IN THE ARBITRATION UNDER CHAPTER TWELVE OF THE
UNITED STATES-COLOMBIA TRADE PROMOTION AGREEMENT AND THE UNCITRAL ARBITRATION RULES

ALBERTO CARRIZOSA GELZIS, FELIPE CARRIZOSA GELZIS AND ENRIQUE CARRIZOSA GELZIS,

Claimants,

-and-

THE REPUBLIC OF COLOMBIA,

Respondent.

PERMANENT COURT OF ARBITRATION CASE NO. 2018-56

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. The United States of America makes this submission pursuant to Article 10.20.2 of the United States-Colombia Trade Promotion Agreement ("U.S.-Colombia TPA" or "Agreement"),[1] which authorizes a non-disputing Party to make oral and written submissions to a Tribunal regarding the interpretation of the Agreement. The United States does not take a position on how the interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

ENTRY INTO FORCE OF THE U.S.-COLOMBIA TPA

2. Pursuant to Article 23.4.1 of the U.S.-Colombia TPA, the Agreement entered into force on May 15, 2012.[2]

3. Under principles of international law governing the interpretation of international agreements,[3] "[u]nless 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 entry into force of the treaty with respect to that Party."[4]

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[1] Article 10.20 is part of Section B of Chapter Ten, and thus incorporated into Chapter Twelve by Article 12.1.2(b). Section B encompasses Articles 10.15 through 10.27, and only those articles.

[2] U.S. Treaties in Force at 91 (Jan. 1, 2019), available at https://www.state.gov/treaties-in-force/ (last visited Apr. 3, 2020).

[3] Article 10.22.1 provides that the Tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." (Emphasis added.)

[4] Vienna Convention on the Law of Treaties, art. 28, 1155 U.N.T.S. 331 (May 22, 1969). Although the United States is not a party to the Vienna Convention on the Law of Treaties, it has recognized since at least 1971 that the Convention is the "authoritative guide to treaty law and practice." *See* Letter from Secretary of State Rodgers to

4. A host State's conduct prior to the entry into force of an obligation may be relevant in determining whether the State subsequently breached that obligation. Given the rule against retroactivity, however, there must exist "conduct of the State after that date which is itself a breach."[5] As the *Berkowitz* tribunal observed, "pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right. Pre-entry into force acts and facts cannot . . . constitute a cause of action."[6] Further, "[t]he 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."[7]

5. As the tribunal in *Feldman* held when discussing this issue for the NAFTA: "[g]iven that the NAFTA came into force on January 1, 1994 no obligation 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."[8]

6. Finally, as Judge Gerald Fitzmaurice explained in his separate opinion in the *Northern Cameroons* case before the International Court of Justice: "An act which did not, in relation to a party complaining of it, constitute a wrong at the time it took place, obviously cannot *ex post facto* become one."[9]

ARTICLE 12.1: SCOPE OF COVERAGE AND INVESTOR-STATE ARBITRATION

7. Article 12.1.1 (Scope of Coverage), provides *inter alia* that Chapter Twelve "applies to measures adopted or maintained by a Party relating to: (a) financial institutions of another Party; [and] (b) investors of another Party, and investments of such investors, in financial institutions in the

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President Nixon transmitting the Vienna Convention on the Law of Treaties, 92d Cong., 1st Sess. At 1 (Oct. 18, 1971); *see also* Article 13 (International obligation in force for a State) of the International Law Commission's "Responsibility of States for internationally wrongful acts," which provides "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." U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

[5] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award ¶ 70 (Oct. 11, 2002) ("*Mondev* Award"). As the *Mondev* tribunal also observed, "there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage." *Id.* ¶ 58. *See also Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15, 129 (Dec. 2) (Separate Opinion of Judge Fitzmaurice) ("An act which did not, in relation to the party complaining of it, constitute a wrong at the time it took place, obviously cannot *ex post facto* become one.").

[6] *Spence Int'l Invests., LLC, Berkowitz et al. v. Republic of Costa Rica*, CAFTA/ICSID Case No. UNCT/13/2, Interim Award (Corrected) ¶¶ 217, n.174 (May 30, 2017) (noting that it took "the same view with respect to pre-entry into force omissions").

[7] *Id.* ⁋ 222 (quoting *Mondev* Award ¶ 70 (reasoning "[a]ny 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")).

[8] *Marvin Roy Feldman Karpa v. United Mexican States* (NAFTA/ICSID Case No. ARB(AF)/99/1/), Interim Decision on Preliminary Jurisdictional Issues ¶ 62 (Dec. 6, 2000).

[9] Separate Opinion of Judge Gerald Fitzmaurice in *Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15, 129 (Dec. 2).

Party's territory[.]" If a claim falls within the scope of Chapter Twelve, it may not be arbitrated under any other Chapter of the U.S.-Colombia TPA.[10]

8. The chapeau of Article 12.1.2 further provides in relevant part that Chapter Ten applies to "measures described in paragraph 1 ***only to the extent that***" Chapter Ten or Articles thereof "are incorporated into this Chapter." (Emphasis added.) Article 12.1.2.(b) then goes on to incorporate into Chapter Twelve the dispute resolution provisions of Chapter Ten, Section B, "solely" with respect to claims brought under the specific Chapter Ten Articles incorporated into Chapter Twelve. Thus, Article 12.1.2(b) provides that:

> Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter **solely** for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and Information Requirements), as incorporated into this Chapter. (Emphasis added.)

9. By using the word "solely," the Parties expressly identified the only obligations found in Chapter Ten that they were willing to arbitrate under Chapter Twelve. The Parties did not consent to arbitrate any investor claims based on other substantive obligations found in Chapter Ten. Nor did the Parties consent to arbitrate investors' claims based on any of the substantive obligations contained in Chapter Twelve, which remain subject only to State-to-State dispute resolution in Chapter Twenty-One.

10. The NAFTA was the first international trade and investment agreement of the United States to provide for investor-State arbitration of financial services matters in a separate chapter. Financial Services matters, including investor-State arbitration, are contained in Chapter Fourteen of the NAFTA.[11] The *Fireman's Fund* tribunal considered the scope of NAFTA Chapter Fourteen and explained how the NAFTA Parties arrived at the more limited scope of investor-State arbitration for claims falling within the scope of that chapter than for NAFTA's Investment Chapter:

> The regulations concerning financial services were not the same in all three countries, but each of the State Parties was clear that challenges to such regulations or interpretations of the regulations and the relevant authorities should

[10] *See, e.g.*, U.S.-Colombia TPA Article 10.2.3, providing that Chapter Ten "does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Twelve (Financial Services)."

[11] With regard to the interpretations of the US-Colombia TPA and NAFTA offered by claimants in certain expert witness statements by Mr. Olin L. Wethington, the United States would note the following:

1. Only the government of the United States is authorized to offer interpretations of treaties on behalf of the United States. Mr. Wethington, as a former official, is not authorized to offer such interpretations.
2. Before offering any testimony as an expert witness regarding official subjects or based upon his official activities or official information to which he had access – which Mr. Wethington's witness statements expressly state that he has done here – U.S. law required Mr. Wethington to obtain the approval of the General Counsel of the U.S. Department of Treasury ("U.S. Treasury"). *See* 31 C.F.R. § 1.11(f). Mr. Wethington did not do so before providing his witness statements and the U.S. Treasury has sent Mr. Wethington a formal letter informing him that, among other things, his testimony was in violation of U.S. law.
3. The United States is not aware of any contemporaneous evidence that supports Mr. Wethington's view of the scope of investor-state dispute settlement in the financial services chapter of NAFTA.

> not be committed to investor-State arbitration under the NAFTA. On the other hand, investment in financial institutions across borders was to be encouraged, and investors were to be protected through the NAFTA from expropriation and measures tantamount to expropriation.
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> The solution arrived at in the NAFTA was to include a separate Chapter Fourteen on Financial Services. The expropriation provisions of the NAFTA as set out in Chapter Eleven, including the provisions for investor-State arbitration, were made applicable to claims under Chapter Fourteen, but claims based on other provisions designed to protect cross-border investors and investments, including provisions for National Treatment and Most-Favored-Nation Treatment, are excluded from the competence of an arbitral tribunal in a case involving investment in financial institutions. Chapter Fourteen contains no counterpart to Article 1105 concerning Minimum Standard of Treatment.[12]

11. Further, the *Fireman's Fund* tribunal correctly noted that the NAFTA Parties did not consent to arbitrate National Treatment claims or Minimum Standard of Treatment claims for financial services matters. Rather, such claims were subject to State-to-State dispute resolution, not investor-State dispute resolution. The *Fireman's Fund* tribunal explained:

> Several provisions of Chapter Eleven [the Investment Chapter] are incorporated into Chapter Fourteen, including, as here relevant, Article 1110 concerning Expropriation and Compensation, and Articles 1115-1138 concerning the procedural aspects of dispute resolution by a tribunal such as the present one. Article 1102 on National Treatment and Article 1105 on Minimum Standard of Treatment are not incorporated into Chapter Fourteen. Accordingly, if the measures alleged to have been taken on behalf of the Government of Mexico are covered by Chapter Fourteen, this Tribunal lacks jurisdiction of the claims under Articles 1102 and 1105. Chapter Fourteen contains no counterpart to the Minimum Standard of Treatment provision of Chapter Eleven; it does contain, in Article 1405, a counterpart to the national treatment provision in Chapter Eleven, and indeed a claim for breach of Article 1405 is made in the present arbitration. However, Article 1405 is not included among the provisions to which the procedural provisions of Chapter Eleven apply (Articles 1115-1138), and Article 1414 makes clear that claims under Article 1405 are subject to state-to-state dispute settlement pursuant to Chapter Twenty, not to investor-state dispute settlement under Chapter Eleven.
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> In sum, if the measures challenged in this arbitration are covered by Chapter Fourteen, the claims brought under Articles 1102, 1105, and 1405 must be dismissed, and only the claim for expropriation pursuant to Article 1110 remains to be decided by this Tribunal.[13]

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[12] *Fireman's Fund Ins. Co. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/02/01/, Award ¶¶ 2, 3 (July 17, 2006).

[13] *Fireman's Fund Ins. Co. v. Mexico*, NAFTA/ICSID Case No. ARB(AF)/02/01/, Decision on the Preliminary Question ¶¶ 66, 67 (July 17, 2003).

12. Likewise here, the Parties to the U.S.-Colombia TPA did not consent to investor-State arbitration of any claims other than those explicitly incorporated into Chapter Twelve via Article 12.1.2(b). Therefore, an investor-State tribunal has no jurisdiction to consider claims not explicitly set out in 12.1.2(b).

13. The U.S.-Colombia TPA Parties did agree, however, to subject such claims to State-to-State dispute resolution, just as the NAFTA Parties did.[14] Pursuant to Article 21.2.1, the U.S.-Colombia TPA Parties subjected disagreements regarding "all disputes between the Parties regarding the interpretation or application of" the TPA to State-to-State dispute resolution procedures.[15] Chapter Twenty-One of the TPA sets forth the procedures for State-to-State dispute resolution, although the procedures are modified with respect to disputes arising under Chapter Twelve pursuant to Article 12.18.

MOST-FAVORED-NATION (MFN) TREATMENT

14. Article 12.3.1 provides:

> Each Party shall accord to investors of another Party, financial institutions of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another Party treatment no less favorable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of any other Party or of a non-Party, in like circumstances.

15. As a threshold matter, as discussed above in paragraphs 8, 9 and 12, no claim brought via Article 12.3.1 may be brought by an investor against a State Party to the TPA. Thus, an MFN claim brought via Article 12.3.1 alleging that a Party extended more favorable treatment to a third-Party investor or investment than was accorded to the investor or investment of the other Party cannot be the subject of investor-State arbitration. As a result an investor-State Tribunal has no jurisdiction to consider any procedural or substantive treatment extended by a TPA Party to a third-State investor or investment through a multilateral or bilateral agreement that a TPA Party has with a third State. Any other conclusion would eviscerate the carefully crafted decision the TPA Parties made to make only certain obligations in the financial services sector subject to investor-State arbitration. Rather, the TPA Parties agreed that any MFN claims may only be subject to State-to-State dispute resolution.

16. In the context of a State-to-State claim, the requirements to establish a breach of Article 12.3.1 with respect to an investor or investment are summarized as follows:[16] a complaining

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[14] *See* First Submission of Canada in *Fireman's Fund Ins. Co. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/02/01/ ¶ 16 (Feb. 27, 2003) (explaining that "[a]s a general rule, disputes arising under Chapter Fourteen are subject to the general State-to-State dispute settlement provisions of Chapter Twenty, as modified by Article 1414.").

[15] U.S.-Colombia TPA Article 21.2.1 (emphasis added).

[16] The United States has set forth, on many occasions, the requirements to establish a breach of the MFN provisions in the investment chapters of its free trade and trade promotion agreements in the context of an investor-State claim. *E.g.*, Submission of the United States of America in *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Peru*, (ICSID Case No. UNCT/18/2, U.S-Peru TPA) ¶¶ 54-57 (June 21, 2019) available at https://www.state.gov/wp-content/uploads/2019/08/US-Article-Submission-in-Gramercy-v-Peru-21-June-2019.pdf

State has the burden of proving that an investor of that State or that investor's investment[17] (1) was accorded "treatment"; (2) was in "like circumstances" with the identified non-Party investors or investments; and (3) received treatment "less favorable" than that accorded to the identified non-Party investors or investment.[18]

17. With respect to the third component of an MFN claim noted in the preceding paragraph, pursuant to Article 12.9.3,[19] a complaining State must also establish that the alleged non-conforming measures (NCM) that constituted "less favorable" treatment are not subject to the reservations contained in Annex II of the TPA. In particular, in Annex II both Parties "reserve[d] the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement."[20] Thus, a tribunal has no jurisdiction to consider any more favorable treatment extended pursuant to such agreements.

DEFINITION OF "INVESTMENT"

18. Footnote 15 to Article 10.28(g) (Definitions) explains that "[t]he term "investment" "does not include an order or judgment entered in a judicial or administrative action."[21]

19. Footnote 15 applies to investor-State arbitration conducted pursuant to Chapter Twelve of the U.S.-Colombia TPA by virtue of Article 12.20, which defines "investment" to mean the same as that in Article 10.28, with certain exceptions not relevant here.

(last visited April 4, 2020); Submission of the United States of America in *Omega Engineering LLC and Mr. Oscar Rivera v. Panama*, (ICSID Case No. ARB/16/42, U.S.-Panama TPA) ¶¶ 2-10 (Feb. 3, 2020) available at https://www.state.gov/wp-content/uploads/2020/03/US-Submission-in-Omega-Mr.-Rivera-v.-Panama-508.pdf (last visited April 4, 2020); Submission of the United States of America in *Vento Motorcycles, Inc. v. Mexico*, (ICSID Case No. ARB(AF)/17/3, NAFTA) ¶¶ 2-8 (Aug. 23, 2019) available at https://www.state.gov/wp-content/uploads/2020/01/US-Article-1128-Submission-Vento-Motorcycles-v-Mexico-2019.08.23-508.pdf (last visited Apr. 7, 2020).

[17] *A priori*, a complaining State must identify a comparator in "like circumstances," without which no breach of Article 12.3.1 may be established. Unlike MFN clauses in other treaties, Article 12.3.1 expressly requires a complaining State to demonstrate that investors of a non-Party "in like circumstances" were afforded more favorable treatment. Ignoring the "in like circumstances" requirement would serve impermissibly to excise key words from the Agreement.

[18] Article 12.3.1 is intended to prevent discrimination on the basis of nationality between third-State investors (or investments) and investors (or investments) of the other Party that are in like circumstances It is not intended to prohibit all differential treatment among investors or investments. Rather, it is designed only to ensure that the Parties do not treat entities that are "in like circumstances" differently based on nationality. *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* NAFTA/ICSID Case No. ARB(AF)/98/3 Award ¶ 139 (June 26, 2003); *Mercer Int'l 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).

[19] Article 12.9.3 provides that: "A non-conforming measure set out in a Party's Schedule to Annex I or II as a measure to which Article 10.3 (National Treatment), 10.4 (Most-Favored-Nation Treatment), 11.2 (National Treatment), or 11.3 (Most-Favored-Nation Treatment) does not apply shall be treated as a nonconforming measure not subject to Article 12.2 or 12.3, as the case may be, to the extent that the measure, sector, subsector, or activity set out in the non-conforming measure is covered by this Chapter."

[20] U.S.-Colombia TPA, Annex II, Schedule of the United States, at II-US-8; Annex II, Schedule of Colombia, at II-COL-4.

[21] Per Article 23.1 of the U.S.-Colombia TPA, footnotes are an integral part the TPA.

CONSULTATION AND NEGOTIATION

20. Article 10.15 provides (emphasis added):

> In the event of an investment dispute, the claimant and the respondent **should** initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.

21. Article 10.15 is part of Section B of Chapter Ten and is thus incorporated into Chapter Twelve by Article 12.1.2(b).

22. The use of the word "should" in Article 10.15 indicates that "consultation and negotiation" are not legally required to submit a claim to arbitration. The United States has interpreted the word "should" in this manner in similarly worded consultation provisions in other international investment agreements to which the United States is a party.[22]

NOTICE OF INTENT TO SUBMIT A CLAIM TO ARBITRATION

23. The Parties to the U.S.-Colombia TPA consented to arbitration pursuant to Article 10.17, which provides in relevant part that "[e]ach Party consents to the submission of a claim to arbitration under this Section **in accordance with this Agreement**."[23]

24. Article 10.16 authorizes a claimant to submit a claim to arbitration either on its own behalf or on behalf of an enterprise;[24] however, Article 10.16.2 requires that "[a]t least 90 days before submitting any claim to arbitration under this Section, a claimant **shall** deliver to the respondent a written notice of its intention to submit the claim to arbitration ('notice of intent')."[25]

25. Articles 10.16 and 10.17 are both in Section B of Chapter Ten and are thus both incorporated into Chapter Twelve by Article 12.1.2(b).

26. Pursuant to Article 10.17, the Parties to the U.S.-Colombia TPA did not provide unconditional consent to arbitration under any and all circumstances. Rather, the Parties consented to arbitration only "in accordance with" the terms of the TPA.

27. A disputing investor who does not deliver a Notice of Intent ninety (90) days before it submits a Notice of Arbitration or Request for Arbitration fails to satisfy the procedural requirement under Article 10.16.2 and so fails to engage the respondent's consent to arbitrate. Under such circumstances, a tribunal will lack jurisdiction *ab initio*. As discussed below with respect to Article 10.18, a respondent's consent cannot be created retroactively; consent must

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[22] *See* Submission of the United States of America in *B-Mex, LLC and Others v. United Mexican States* NAFTA/ICSID Case No. ARB(AB)/16/3/ at 4, n.9 (Feb. 28, 2018) available at https://www.state.gov/wp-content/uploads/2019/05/U.S.-1128-Submission-B-Mex-LLC-and-others-v.-Government-of-Mexico.pdf (last visited Apr. 4, 2020).

[23] Article 10.17.1 (emphasis added).

[24] Article 10.16.1.

[25] Article 10.16.2 (emphasis added).

exist at the time a claim is submitted to arbitration.[26] Unlike the claimant's consent required by Article 10.18.2, however, which must accompany and be in conjunction with a Notice of Arbitration, satisfaction of the requirements of Article 10.16 through submission of a valid Notice of Intent must *precede* submission of a Notice of Arbitration by 90 days.[27]

28. The procedural requirements in Article 10.16 are not merely technical "niceties" but are explicit treaty requirements (*i.e.*, "shall deliver;" "shall specify") that serve important functions. These functions include providing a Party time to identify and assess potential disputes, coordinate among relevant national and subnational officials, and to consider, if they so choose, amicable settlement or other courses of action prior to arbitration. Such courses of action may include preservation of evidence or the preparation of a defense. As recognized by the tribunal in *Merrill & Ring v. Canada*, rejecting a belated attempt to add a claimant in that case, the safeguards found in Article 1119 of the NAFTA (the NAFTA's counterpart to Article 10.16'sNotice of Intent requirement) "cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim[.]"[28]

29. For all of the foregoing reasons, a tribunal cannot simply overlook an investor's failure to comply with the requirements of Article 10.16, including in the context of determining whether the receipt of a Notice of Arbitration constitutes the valid and timely submission of a claim. Article 10.18.1 provides that a claimant may not make a claim if more than three years have elapsed from the date on which the investor or enterprise first acquired, or should have first acquired, knowledge of the alleged breach and loss.[29] Because a Notice of Intent under Article 10.16.2 must precede a Notice of Arbitration by 90 days, an investor has two years and 275 days to take steps that can lead to the submission of a valid and timely claim to arbitration under Chapter Ten or Chapter Twelve. Thus, for example, claimants or claims included in a Notice of Arbitration that were not included in a Notice of Intent delivered at least 90 days earlier have not been validly submitted to arbitration, and that Notice of Arbitration cannot toll the period of limitations for those claims or claimants. As the *Grand River* and *Feldman* NAFTA tribunals

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[26] TPA Article 10.16.4 defines when a claim is considered "submitted to arbitration" as being when the "request for arbitration" or "notice of arbitration" is received, depending on which set of arbitral rules has been selected.

[27] *Waste Management, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/98/2, Award ¶¶ 4-5 (June 2, 2000) ("*Waste Management I* Award") (noting ICSID's refusal to accept a request for arbitration under a similar Notice of Intent requirement in the NAFTA because of claimant's failure to satisfy "one of the procedural requirements to be met by the Claimant, namely, mandatory notice of intent to submit the claim to arbitration under NAFTA Article 1119," and noting that the claimant's request was not accepted until "the formal defect . . . had been remedied by notice of intent to submit a claim to arbitration being forwarded to the body designated by the Government of Mexico" and the elapse of more than 90 days).

[28] *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/07/1, Decision on a Motion to Add a New Party ¶ 29 (Jan. 31, 2008).

[29] Article 10.18.1 in its entirety provides that "[n]o 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."

Article 1117(2) in its entirety provides that "[a]n investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage."

observed when interpreting similar provisions in the NAFTA (Articles 1116(2) and 1117(2)), the time-limitations provisions contained in the NAFTA are "clear and rigid" and not subject to any "suspension," "prolongation," or "other qualification."[30]

WAIVER REQUIREMENT

30. Article 10.18.2 of the U.S.-Colombia TPA states in relevant part:

> 2. No claim may be submitted to arbitration under this Section unless:
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> . . .
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> (b) the notice of arbitration is accompanied,
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> (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and
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> (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers
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> of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

31. Article 10.18 is part of Section B of Chapter Ten and is thus incorporated into Chapter Twelve by Article 12.1.2(b), subject to the terms of that provision.

32. The waiver requirements under Article 10.18.2(b) are among the requirements upon which the Parties have conditioned their consent in Article 10.17, as noted above. An effective waiver is therefore a precondition to the Parties' consent to arbitrate claims, and accordingly, a tribunal's jurisdiction, under Chapters Ten and Twelve of the U.S.-Colombia TPA.[31]

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[30] *Grand River v. United States of America*, NAFTA/UNCITRAL, Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006); *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002).

[31] *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award ¶ 73 (July 15, 2016) ("*Renco* Partial Award") ("[C]ompliance with Article 10.18(2) is a condition and limitation upon Peru's consent to arbitrate. Article 10.18(2) contains the terms upon which Peru's non-negotiable offer to arbitrate is capable of being accepted by an investor. Compliance with Article 10.18(2) is therefore an essential prerequisite to the existence of an arbitration agreement and hence the Tribunal's jurisdiction."); *see also Waste Management I* Award §§ 16-17 at 228-29 (June 2, 2000); *Detroit International Bridge Company v. Canada*, NAFTA/PCA Case No. 2012-25, Award on Jurisdiction ¶¶ 291, 336-337 (Apr. 2, 2015) ("*Detroit Bridge* Award"); *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, CAFTA-DR/ICSID Case No. ARB/09/17, Award ¶¶ 79-80 (Mar. 14, 2011) ("*Commerce Group* Award"); *Railroad Development Corp. v. Republic of Guatemala*, CAFTA-DR/ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction under CAFTA Article 10.20.5 ¶ 56 (Nov. 17, 2008) ("*Railroad Development* Decision on Jurisdiction").

33. Similar to provisions found in many of the United States' international investment agreements,[32] Article 10.18.2(b) is a "no U-turn" waiver provision, which permits claimants to elect to pursue any proceeding (including in domestic court) without relinquishing their right to assert a subsequent claim through arbitration under the Agreement, subject to compliance with the three-year limitations period for claims under Article 10.18.1. However, Article 10.18.2(b) makes clear that as a condition precedent to the submission of a claim to arbitration under the Agreement, a claimant must submit an effective waiver together with its Notice of Arbitration. The date on which the claim has been submitted to arbitration for purposes of Article 10.18.1 is therefore the date of the submission of an effective waiver, assuming all other relevant procedural requirements have been satisfied.

34. Compliance with Article 10.18.2(b) entails both formal and material requirements.[33] As to the formal requirements, the waiver must be in writing and "clear, explicit and categorical."[34] The waiver must relinquish any right to initiate or continue any action with respect to measures challenged in the arbitration, excluding an action that seeks "interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration."[35] As the written waiver is to "accompany" the Notice of Arbitration, it must be submitted at the same time as the Notice of Arbitration.

35. As to the material requirements, a claimant must act consistently and concurrently with the written waiver by abstaining from initiating or continuing proceedings in another forum with respect to the measures alleged to constitute a breach of the obligations of Chapter Ten incorporated into Chapter Twelve as of the date of the waiver and thereafter. In relation to a similar waiver provision in NAFTA Chapter Eleven, the *Waste Management I* tribunal held,

> the act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued. . . . [I]t is clear that the waiver required under NAFTA Article 1121 calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions. **Moreover, such an abdication of rights ought to have been made effective as from the date of submission of the waiver**[.][36]

36. As the tribunal in *Commerce Group* explained in relation to an identical waiver provision contained in the CAFTA-DR Chapter Ten, "[a] waiver must be more than just words; it must accomplish its intended effect."[37] Thus, if a claimant initiates or continues proceedings with

[32] For example, waiver provisions similar to Article 10.18.2 of the U.S.-Colombia TPA can be found in Article 10.18.2 of the U.S.-Peru Trade Promotion Agreement, Article 1121 of NAFTA, Article 10.18.2 of the Dominican Republic-Central American Free Trade Agreement ("CAFTA-DR"), and Article 26 of the 2012 U.S. Model Bilateral Investment Treaty.

[33] *Renco* Partial Award ¶ 73; *see also Waste Management I* Award § 20 at 230; *Commerce Group* Award ¶¶ 79-80.

[34] *Renco* Partial Award ¶ 74; *Waste Management I* Award § 18 at 229.

[35] U.S.-Colombia TPA, art. 10.18.3.

[36] *Waste Management I* Award § 24 at 231-232 (emphasis added).

[37] *See Commerce Group* Award ¶ 80.

respect to the measure in another forum despite meeting the formal requirements of filing a waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute.[38]

37. Article 10.18.2(b) requires a claimant's waiver to encompass "any proceedings with respect to any measure alleged to constitute a breach referred to in Article 10.16." The phrase "with respect to" should be interpreted broadly. This construction of the phrase is consistent with the purpose of this waiver provision: to avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty)."[39]

38. If all formal and material requirements under Article 10.18.2(b) are not met, the waiver is ineffective and will not engage the respondent State's consent to arbitration or the Tribunal's jurisdiction *ab initio* under the Agreement. A tribunal is required to determine whether a disputing investor has provided a waiver that complies with the formal and material requirements of Article 10.18.2(b). However, a tribunal itself has no authority to remedy an ineffective waiver. The discretion whether to permit a claimant to either proceed under or remedy an ineffective waiver lies with the respondent State alone, as a function of the latter's State's general discretion to consent to arbitration.[40] Where an effective waiver is filed subsequent to the Notice of Arbitration but before constitution of the tribunal, the claim will be considered submitted to arbitration only on the date on which the effective waiver was filed, assuming all other requirements have been satisfied, not the date of the Notice of Arbitration. However, where a claimant files an effective waiver subsequent to the constitution of a tribunal, the only available relief (unless the respondent State agrees otherwise) is the dismissal of the arbitration, as the tribunal would have been constituted before the proper submission of the claim to arbitration and thus without the consent of the respondent State as contemplated in Article 10.17.1, and the tribunal would therefore lack jurisdiction *ab initio*.

DUAL CITIZENSHIP

39. Article 12.20 (Definitions) defines "Investor of a Party" to mean (emphasis added):

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

[38] *Id.* ¶ 115 (noting that the waiver was invalid and lacked "effectiveness" because claimants failed to discontinue domestic proceedings in El Salvador, so there was no consent of the respondent and the tribunal lacked jurisdiction); *see also Detroit* Award ¶ 336.

[39] *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 118 (Jan. 26, 2006) ("*Thunderbird* Award").

[40] *Renco* Partial Award ¶ 173; *see also Railroad Development* Decision on Jurisdiction ¶ 61 (finding that "the Tribunal has no jurisdiction without agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver" and that "[i]t is for the Respondent and not the Tribunal to waive a deficiency under [CAFTA-DR] Article 10.18 or to allow a defective waiver to be remedied"); *Waste Management I* Award § 31 at 238-239 (holding that the waiver deposited with the first notice of arbitration did not satisfy NAFTA Article 1121 and that this defect could not be made good by subsequent action on the part of the claimant).

40. An individual submitting a claim to arbitration who is a dual citizen of both TPA Parties must have his or her dominant and effective nationality be that of the TPA Party which is not the respondent continuously between three critical dates: the time of the purported breach, the submission of a claim to arbitration, and the resolution of the claim.

41. In order to submit a claim to arbitration under Chapter Twelve, the investor must be "an investor of a Party" other than the respondent Party at the time of submission to arbitration. Pursuant to Article 10.16(1),[41] only a "claimant" may submit a claim to arbitration, whether on its own behalf or on behalf of an enterprise that it owns or controls. In accordance with Article 10.16(4), in a proceeding under the UNCITRAL Arbitration Rules, a claim is "deemed submitted to arbitration" when the claimant's notice of arbitration and statement of claim are received by the respondent. Article 12.20 defines a "claimant" as "an investor of a Party that is a party to an investment dispute with another Party." (Emphases added.) Accordingly, if the investor is a natural person, and that person had the dominant and effective nationality[42] of the respondent Party at the time of submission of the claim, then the investor would not be, *at that time,* a party to a dispute with *another Party* (*i.e.*, with a Party other than the investor's own).

42. Further, the claimant also must be "an investor of a Party" other than the respondent Party at the time of the purported breach. Article 12.1(1) (Scope and Coverage) states in relevant part that Chapter Twelve "applies to measures adopted or maintained by a Party relating to: (a) financial institutions of another Party; (b) investors of another Party, and investments of such investors, in financial institutions in the Party's territory[.]" The substantive investment obligations of Chapter Ten, Section A, that have been incorporated into Chapter Twelve thus create obligations with respect to treatment accorded to "financial institutions of another Party" and/or "investors of another Party" and/or to "investments of such investors in financial institutions in the Party's territory." Thus, in order for the dispute to come within the scope of Chapter Twelve, the investor must be "an investor of another Party", *i.e.*, a Party other than the respondent Party, at the time of the purported breach. If the requisite difference in nationality does not exist (meaning, in a case of a natural person with dual nationality, dominant and effective nationality of the non-disputing Party), there can be no breach, as there was no obligation under the relevant Chapter Ten, Section A provisions, as incorporated into Chapter Twelve, at the time of the purported breach. And pursuant to Articles 10.16.1 and 12.1.2(b), the only claims that may be submitted to arbitration under Chapter Ten, Section B (as incorporated into Chapter Twelve), are claims "that the respondent has breached an obligation under Section A." (Emphasis added.)

43. Where the requisite nationality does not exist at the operative times set out above, the respondent Party has not consented to the submission of a claim to arbitration at the outset, and the tribunal therefore lacks jurisdiction *ab initio* under Article 10.17[43]: "Each Party consents to

[41] Article 10.16 is incorporated into Chapter Twelve by Article 12.1.2(b).

[42] The United States does not address here the relevant factors for determination of dominant and effective nationality under customary international law. For clarity, it should be noted that where U.S. embassies or consulates provide facilitative assistance to U.S. nationals abroad in connection with disputes between those nationals and other countries, such officials typically do not make a legal determination with respect to a dual national's dominant and effective nationality in order to provide such assistance.

[43] Article 10.17 is incorporated into Chapter Twelve by Article 12.1.2(b).

the submission of a claim to arbitration under this Section [B] in accordance with this Agreement." (Emphasis added.)

44. The conclusions above are consistent with the well-established principle of international law[44] that an individual or entity cannot maintain an international claim against its own State. The policy underlying the "dominant and effective nationality" test as included in the definition of "investor of a Party" is to ensure consistency with this principle. As the United States has long maintained[45] with respect to the rule of "continuous nationality," and as the tribunal in *Loewen v. United States of America* explained: "In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*."[46] In the absence of continuous nationality of the claimant as set forth above, a tribunal lacks jurisdiction over the relevant claim.[47]

BURDEN OF PROOF

45. Article 10.22.1 provides in relevant part that the Tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

46. Article 10.22 is part of Section B of Chapter Ten and is thus incorporated into Chapter Twelve by Article 12.1.2(b), subject to the terms of that provision.

47. General principles of international law concerning the burden of proof in international arbitration provide that a claimant has the burden of proving its claims, and if a respondent raises any affirmative defenses, the respondent must prove such defenses.

48. In the context of an objection to jurisdiction, the burden is on the claimant to prove the necessary and relevant facts to establish that a tribunal has jurisdiction to hear its claim. Further, it is well-established that where "jurisdiction rests on the existence of certain facts, they have to

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[44] Article 10.22.1 requires tribunals to decide the issues in dispute in accordance with the U.S.-Colombia TPA and applicable rules of international law.

[45] *See* Comments and Observations Received by Governments, U.N. Doc. A/CN.4/561, at 41-43 (Jan. 27 and Apr. 3 and 12, 2006) (comments of the United States of America on Draft Article 5 of the ILC Draft Articles on Diplomatic Protection) (urging that the ILC Draft Articles state that nationality must be continuously maintained from the date of injury to the date of the resolution of the claim); *accord The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Memorial of the United States of America on Matters of Jurisdiction and Competence Arising from the Restructuring of The Loewen Group, Inc., at 10-20 (Mar. 1, 2002); Submission of the United States of America in *Vento Motorcycles, Inc. v. Mexico*, NAFTA/ICSID Case No. ARB(AF)/17/3 ¶¶ 26-33 (Aug. 23, 2019) available at https://www.state.gov/wp-content/uploads/2020/01/US-Article-1128-Submission-Vento-Motorcycles-v-Mexico-2019.08.23-508.pdf (last visited Apr. 7, 2020).

[46] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 225 (June 26, 2003) ("*Loewen* Award"); *see* JENNINGS & WATTS, OPPENHEIM'S INTERNATIONAL LAW 512-13 (9th ed. 1992) ("[F]rom the time of the occurrence of the injury until the making of the award, the claim must continuously and without interruption have belonged to a person or series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom it is put forward.") (footnote omitted).

[47] *Loewen* Award, at 69 (June 26, 2003) (deciding, in the *dispositif*, that the tribunal had no jurisdiction due to a lack of continuous nationality).

be proven at the jurisdictional stage."[48] As the tribunal in *Bridgestone v. Panama* stated when assessing Panama's jurisdictional objections regarding a claimant's purported investments under the U.S.-Panama Trade Promotion Agreement, "[b]ecause the Tribunal is making a final finding on this issue, the burden of proof lies fairly and squarely on [the claimant] to demonstrate that it owns or controls a qualifying investment."[49]

Respectfully submitted,

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[48] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶ 61 (Apr. 15, 2009)*; Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction ¶ 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 Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections ¶ 118 (Dec. 13, 2017) (stating that "[w]here an objection as to competence raises issues of fact that will not fall for determination at the hearing of the merits, the Tribunal must definitively determine those issues on the evidence and give a final decision on jurisdiction.").

[49] *Bridgestone Licensing Services*, Decision on Expedited Objections ¶ 153.