IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES

TENNANT ENERGY, LLC,

Claimant

-and-

GOVERNMENT OF CANADA,

Respondent.

PCA CASE NO. 2018-54

SECOND SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the United States of America makes this submission on questions of interpretation of the NAFTA. 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.

Article 1116(2) (Limitations Period)

2. Article 1116(2) provides:

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

3. Article 1116(2) imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute.[1] As is made explicit by Article 1116(2), the Parties did

[1] *See, e.g., 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 I & II* 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

not consent to arbitrate an investment dispute if "more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." Accordingly, a tribunal must find that a claim satisfies the requirements of, *inter alia*, Article 1116 in order to establish a Party's consent to (and therefore the tribunal's jurisdiction over) an arbitration claim. Because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction,[2] the claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.[3]

4. The limitations period is a "clear and rigid" requirement that is not subject to any "suspension," "prolongation," or "other qualification."[4] An investor *first* acquires knowledge of an alleged breach and loss under Article 1116(2) 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,[5] 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.[6]

5. Thus, where a "series of similar and related actions by a respondent state" is at issue, an investor cannot evade the limitations period by basing its claim on "the most recent transgression

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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)). *See also Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's 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., LLC, 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).

[2] *Apotex I & II* Award ¶ 150. *See also Vito G. Gallo v. Government of Canada*, NAFTA/UNCITRAL, 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."); *see also Phoenix Action, Ltd. v. 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 phase"); *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").

[3] *Berkowitz* Interim Award ¶¶ 163, 239, 245-246.

[4] *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 Feldman v. Mexico*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002); *Apotex I & II* Award ¶ 327 (quoting *Grand River* Decision on Objections to Jurisdiction).

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

[6] *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.").

in that series."[7] To allow an investor to do so would "render the limitations provisions ineffective[.]"[8] An ineffective limitations period would fail to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties. An ineffective limitations period would also undermine and in effect change 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.

6. With regard to knowledge of "incurred loss or damage" under Article 1116(2), a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date.[9] Moreover, the term "incur" broadly means "to become liable or subject to."[10] Therefore, an investor may "incur" 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.[11]

7. As noted, Article 1116(2) requires a claimant to submit a claim to arbitration within three years of the "date on which the investor first acquired, or *should have first acquired*, knowledge" of (i) the alleged breach, and (ii) loss or damage incurred by the investor. (Emphasis added). 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."[12] 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 Tribunal."[13] Similarly, as the *Berkowitz* Tribunal held, endorsing the reasoning in *Grand River* with respect to the identically worded limitations provision in the CAFTA-DR,

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

[8] *Id.*

[9] *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.").

[10] "Incur," MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/incur (last visited Feb. 15, 2021); *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").

[11] *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").

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

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

"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."[14]

Article 1116(1) (Investor of a Party)

8. Article 1116(1) (Claim by an Investor of a Party on Its Own Behalf) provides:

> 1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> and that the investor has incurred loss or damage by reason, or arising out of, that breach.

9. An investor may bring an arbitration pursuant to two provisions in Chapter Eleven: Articles 1116 (on an investor's own behalf) and 1117 (on behalf of an enterprise, under specified conditions). A tribunal has no jurisdiction to hear a claim under Chapter Eleven unless a claimant also satisfies at least one of these provisions. Thus, if an investor wants to bring a claim on its own behalf, it must satisfy the terms of Article 1116.

10. Under Article 1116(1), an investor who wishes to pursue a claim must allege that "another Party" has breached specified obligations in the NAFTA and further that "*the* investor has incurred loss or damage by reason of, or arising out of, *that breach*." (Emphases added.) By using the words "the investor" and "that breach," Article 1116(1) requires that the investor bringing the claim be the same investor who suffered loss or damage as a result of the alleged breach. Article 1116(1) does not authorize a different investor to bring a claim on behalf of the investor who suffered the loss or damage as a result of the alleged breach.[15]

11. Thus, a claimant (*i.e.*, the investor bringing the claim) must be the same investor who sought to make, was making, or made the investment[16] at the time of the alleged breach, and incurred loss or damage thereby. There is no provision in Chapter Eleven which authorizes an investor to bring a claim for an alleged breach relating to a different investor.

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[14] *Berkowitz* Interim Award ¶ 209.

[15] Where the "investor of a Party" that suffered the loss or damage as a result of the alleged breach is an enterprise, whether that investor remains the same investor following a corporate reorganization requires a case-specific and fact-based inquiry.

[16] NAFTA Article 1139 defines an "investor of a Party" as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment[.]"

12. Other provisions in Chapter Eleven serve as context[17] for the interpretation of Article 1116, and further confirm that the investor bringing the claim must be the same "investor of a Party" that incurred loss or damage by reason of the alleged breach.

13. Article 1121(1)(b) requires that an investor bringing a claim under Article 1116 waive its "right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party."

14. This waiver provision ensures that a respondent need not litigate concurrent and overlapping proceedings in multiple forums (domestic or international), and minimizes not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty)."[18]

15. This provision could be rendered meaningless if the investor bringing the claim could be a different investor from the investor who had made the investment at the time of the alleged breach (the "original investor"), because only the claimant, and not the original investor, would be required by Article 1121(1)(b) to sign a waiver of other remedies. This would allow the original investor to bring, for example, an action for damages in a domestic court with respect to the same measure, potentially subjecting the respondent to two proceedings for the same alleged breach and defeating the purpose of Article 1121(1)(b).

Respectfully submitted,

Lisa J. Grosh
Assistant Legal Adviser
John D. Daley
Deputy Assistant Legal Adviser
Nicole C. Thornton
Chief of Investment Arbitration

[17] Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."). 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 President Nixon transmitting the Vienna Convention on the Law of Treaties, 92d Cong., 1st Sess. at 1 (Oct. 18, 1971).

[18] *International Thunderbird Gaming Corp. v. Mexico*, NAFTA/UNCITRAL, Award ¶ 118 (Jan. 26, 2006) ("In construing Article 1121 of the NAFTA, one must also take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.").

Nathaniel E. Jedrey
Attorney Adviser
Office of International Claims and
Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

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