IN THE ARBITRATION UNDER CHAPTER TEN OF THE U.S.-COLOMBIA TRADE PROMOTION AGREEMENT AND THE 2021 UNCITRAL ARBITRATION RULES

SEA SEARCH-ARMADA LLC,

Claimant

-and-

THE REPUBLIC OF COLOMBIA,

Respondent.

PCA CASE NO. 2023-37

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 10.20.2 of the U.S.-Colombia Trade Promotion Agreement ("TPA") and the Tribunal's letter of November 20, 2023, the United States of America makes this submission on questions of interpretation of the TPA. 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.[*]

Articles 10.22.1 and 10.20.5 (Governing Law and Expedited Proceedings on Jurisdictional Objections)

2. TPA Article 10.22.1 states in relevant part that "the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[1] General principles of international law concerning the burden of proof in international arbitration provide

[*] 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.

[1] U.S.-Colombia TPA Art. 10.22.1. Pursuant to Article 10.22.2, the tribunal shall apply applicable rules of international law, along with the law of the respondent, to claims brought under Article 10.16.1(a)(i)(C) if the rules of law are not specified in an investment agreement or otherwise agreed to.

that a claimant has the burden of proving its claims, and if a respondent raises any affirmative defenses, the respondent must prove such defenses.[2]

3. 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 be proven at the jurisdictional stage."[3] As the tribunal in *Bridgestone v. Panama* stated when assessing Panama's jurisdictional objections regarding a claimant's purported investments, raised under the provision of the U.S.-Panama Trade Promotion Agreement for an expedited decision on jurisdiction, "[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 the jurisdictional requirements at issue were met.[4]

4. An objection to jurisdiction under TPA Article 10.20.5 is distinguishable in this regard from an objection under TPA Article 10.20.4 that "as a matter of law, a claim submitted is not a

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[2] BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS 334 (2006) ("[T]he general principle [is] that the burden of proof falls upon the claimant . . . ."); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) ("*Feldman* Award") ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.") (quoting Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, at 14, WT/DS33/AB/R (May 23, 1997)).

[3] *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶ 61 (Apr. 15, 2009) ("*Phoenix* Award"); *Vito G. Gallo v. Government of Canada*, NAFTA/UNCITRAL PCA Case No. 55798, Award ¶ 277 (Sept. 15, 2011) ("*Gallo* Award") ("Both parties submit, and the Tribunal concurs, that the maxim 'who asserts must prove,' or *actori incumbit probatio*, applies also in the jurisdictional phase of this investment arbitration: 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 . . . ."); *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) ("*Bridgestone* Decision on Expedited Objections") (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"); *see also Cortec Mining Kenya Ltd., Cortec (Pty) Ltd. and Stirling Capital Ltd. v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award ¶ 250 (Oct. 22, 2018) (finding that "[t]he Claimants bear the onus of establishing jurisdiction under the BIT and under the ICSID Convention. The onus includes proof of the facts on which jurisdiction depends").

[4] *Bridgestone* Decision on Expedited Objections ¶ 153.

claim for which an award in favor of the claimant may be made under Article 10.26." TPA Article 10.20.4(c) includes a provision requiring a tribunal to assume the facts alleged by a claimant as true for the purposes of "deciding an objection under [that] paragraph." Article 10.20.4 does not address, and does not govern, other preliminary objections, such as an objection to competence. As correctly noted by the tribunal in *Renco Group v. Peru*, when discussing the substantively identical language in the U.S.-Peru Trade Promotion Agreement, objections to competence do not fall within the scope of Article 10.20.4 objections.[5] That tribunal further stated that "the underlying scheme established by the provisions and the plain language found in the text make it clear that competence objections were not intended to come within the scope of the Article 10.20.4 objections."[6] Consequently, as the *Bridgestone* tribunal observed, "[a]s a matter of textual analysis, Article 10.20.4(c) only applies to an objection under Article 10.20.4 and not to objections as to the competence of the Tribunal."[7] As such, when a respondent raises jurisdictional objections, including under Article 10.20.5, there is no requirement that a tribunal assume a claimant's factual allegations to be true.

Article 10.28 (Definition of Investment)

5. Article 10.28 states, in pertinent part, that "investment" means "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."

6. Article 10.28 further states that the "[f]orms that an investment may take include" the assets listed in the subparagraphs. Subparagraph (g) lists "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law."[8]

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[5] *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections under Article 10.20.4, ¶ 198 (Dec. 18, 2014).

[6] *Id.* ¶ 192.

[7] *Bridgestone* Decision on Expedited Objections, ¶ 110.

[8] U.S.-Colombia TPA footnote 14 states that "[w]hether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics

7. The enumeration of a type of an asset in Article 10.28 is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.[9] Article 10.28's use of the word "including" in relation to "characteristics of an investment" indicates that the list of identified characteristics, *i.e.*, "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk," is not an exhaustive list; additional characteristics may be relevant. The determination as to whether a particular instrument has the characteristics of an investment is a case-by-case inquiry, involving an examination of the nature and extent of any rights conferred under the State's domestic law.

8. While Article 10.28 does not expressly provide that each type of investment must be made in compliance with the laws of the host state, it is implicit that the protections in Chapter Ten only apply to investments made in compliance with the host state's domestic law at the time that the investment is established or acquired.[10] Moreover, to come within the categories of

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of an investment are those that do not create any rights protected under domestic law." *Id.*, footnote 15 notes that "[t]he term 'investment' does not include an order or judgment entered in a judicial or administrative action."

[9] Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 767-68 (Chester Brown ed., 2013).

[10] This requirement is necessarily implied, for example, in the definition of "enterprise," the first item listed in Article 10.28, which is defined at Article 1.3 as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association." *See also* CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶ 6.110 (2nd ed. 2017) ("[A]n investment that is made in breach of the laws of the host State will not qualify as an investment under an investment treaty. *This will be the case even where the applicable treaty does not contain an express requirement of compliance with the laws of the host State*." (emphasis added)). *See also Ampal-American Israel Corp. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction ¶ 301 (Feb. 1, 2016) (concluding, in applying a treaty that lacked an express legality requirement (the United States-Egypt bilateral investment treaty), that "[i]t is a well-established principle of international law that a tribunal constituted on the basis of an investment treaty has no jurisdiction over a claimant's investment which was made illegally in violation of the laws and regulations of the Contracting State."); *Mamidoil Jetoil Greek Petroleum Products S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award ¶¶ 359-60 (Mar. 30, 2015) ("[T]he Tribunal shares the widely-held opinion that investments are protected by international law only when they are made in accordance with the legislation of the host State. States accept arbitration and accept to waive part of their immunity from jurisdiction to encourage and protect investments in international conventions. In doing so, they cannot be expected to have agreed to extend that mechanism to investments that violate their laws; likewise, it cannot be expected that States would want illegal investments by their nationals to be protected under those international conventions. This principle . . . applies to the substance of the protection when the relevant international instrument, such as the ECT in this case, does not specifically refer to a requirement of legality."); *Blusun S.A. v. Italian Republic*, ICSID Case No. ARB/14/3, Award ¶ 264 (Dec. 27, 2016) ("[I]t is true that the ECT does not lay down an explicit requirement of legality, but the Tribunal concludes

investment described in Article 10.28(g), a "license[], authorization[], permit[], or other right[]" must have been "conferred pursuant to domestic law." As a general matter, however, trivial violations of the applicable law will not put an investment outside the scope of Article 10.28.[11]

Article 10.1.3 (Non-Retroactivity)

9. Article 10.1.3 states: "[f]or greater certainty, this Chapter does not bind any 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 Agreement."[12] Whereas a host State's conduct prior to the entry into force of an obligation may be relevant in considering whether the State subsequently breached that obligation, under the rule against retroactivity, there must exist "conduct of the State after that date which is itself a breach."[13] To that effect, the *Carrizosa v. Colombia* tribunal observed with respect to the same provision of the U.S.-Colombia TPA, "unless the post-treaty

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that it does not cover investments which are actually unlawful under the law of the host state at the time they were made because protection of such investments would be contrary to the international public order.").

[11] *See, e.g.*, *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction ¶¶ 85-86 (Apr. 29, 2004) (noting, in a dispute under a treaty that included an express legality requirement, that "to exclude an investment on the basis of . . . minor errors would be inconsistent with the object and purpose of the Treaty"); *Metal-Tech Ltd v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award ¶ 165 (Oct. 4, 2013) (stating with respect to the underlying treaty's legality requirement that "the subject-matter scope of the legality requirement" covers issues including "non-trivial violations of the host State's legal order").

[12] The phrase "for greater certainty" signals that the sentence it introduces reflects what the agreement would mean even if that sentence were absent. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 115 U.N.T.S. 331, Article 28 ("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."). While the United States is not a party to the VCLT, 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 Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties, October 18, 1971, *reprinted in* 65 DEP'T ST. BULL. 684, 685 (1971). *See also 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) ("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.").

[13] *Mondev Int'l Ltd. v. United States of America*, NAFTA/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."); International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, art. 13 (U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001)) ("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.").

conduct . . . is itself capable of constituting a breach of the [treaty], independently from the question of (un)lawfulness of the pre-treaty conduct, claims arising out of such post-treaty conduct would also fall outside the Tribunal's jurisdiction."[14] This echoes the *Berkowitz v. Costa Rica* tribunal's earlier decision under the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) that "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."[15]

Article 10.18.1 (Limitations Period)

10. Article 10.18.1 of the TPA 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.

11. Article 10.18.1 imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute.[16] As is made explicit by Article 10.18.1, the Parties did

[14] *Astrida Benita Carrizosa v. Colombia*, ICSID Case No. ARB/18/5, Award ¶ 153 (Apr. 19, 2021) (finding "no jurisdiction to assess the lawfulness of the [respondent's] pre-treaty conduct, be it under the [treaty] or under any other source, such as customary international law").

[15] *Spence Int'l Invests., Berkowitz et al. v. Costa Rica*, CAFTA/ICSID Case No. UNCT/13/2, Interim Award (Corrected) ¶ 222 (May 30, 2017) ("*Berkowitz* Interim Award"). The "for greater certainty" clause in CAFTA-DR Article 10.1.3 is identical to the "for greater certainty" clause in Article 10.1.3 of the TPA.

[16] Investment tribunals interpreting similarly worded treaty provisions have routinely reached this conclusion. *See, e.g., 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); *Berkowitz* Interim Award ¶¶ 235-236 (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") (deciding 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

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 the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Ten, including with respect to Article 10.18.1,[17] the claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.[18]

12. The limitations period is a "clear and rigid" requirement that is not subject to any "suspension," "prolongation," or "other qualification."[19] 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,[20] subsequent transgressions by a Party arising from a continuing

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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 the purposes of Article 21(4)" of the UNCITRAL Arbitration Rules (1976)).

[17] *See Apotex I & II* Award ¶ 150. *See also Gallo* Award ¶ 277 ("[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, 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* 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").

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

[19] 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"); *Feldman* Award ¶ 63; *Apotex I & II* Award ¶ 327 (quoting *Grand River* Decision on Objections to Jurisdiction).

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

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.[21]

13. 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.[22] To allow a claimant to do so would "render the limitations provisions ineffective."[23] 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 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.

14. With regard to knowledge of the "alleged breach" for claims of expropriation under Article 10.7, for example, a breach is manifest where a Party (1) takes a measure (or measures) that effects a direct or indirect expropriation and (2) fails to do so in conformity with at least one of the four criteria set forth in subparagraphs (a) through (d) of Article 10.7.1. In order to establish the first point, the claimant must demonstrate that the government measure(s) at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner."[24] Thus, with respect to an expropriation claim, a claimant has actual or

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[21] *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.").

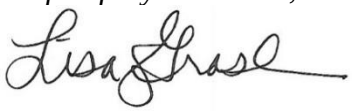
[22] *Grand River* Decision on Objections to Jurisdiction ¶ 81.

[23] *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 U.S.-Peru TPA. *See Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 348 (June 8, 2009) ("*Glamis* Award").

[24] *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Interim Award ¶¶ 100-102 (June 26, 2000). *See also Glamis* Award ¶ 357 ("[A] panel's analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: '[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto . . . had ceased to exist.' The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures

constructive knowledge of the "alleged breach" once it has (or should have had) knowledge of all elements required to make a claim under Article 10.7 – including that the destruction of, or interference with, the economic value of the investment is sufficient to constitute a taking. That date, however, need not coincide with the last of the government measures that are alleged to have harmed the claimant's investment. For example, a claimant may have actual or constructive knowledge that previous measures in the series already expropriated its investment. Similarly, a claimant may have actual or constructive knowledge that the interference with the economic value of its investment is sufficient to constitute a taking before that investment has lost all of its value.[25]

Respectfully submitted,



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'substantially impair[ed] the investor's economic rights, *i.e.*, ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.'") (citations omitted); *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶¶ 149-154 (Jan. 12, 2011); *Feldman* Award ¶ 152; *Cargill, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award ¶ 360 (Sept. 18, 2009) (deciding that expropriation under customary international law requires "a radical deprivation of a claimant's economic use and enjoyment of its investment").

[25] *See Berkowitz* Interim Award ¶¶ 264-265 (finding that claimants had at least constructive knowledge of the expropriation no later than the dates of the government's decrees of expropriation, and arguably on the dates of the government's declarations of public interest, in respect to each property, notwithstanding that claimants remained in possession of the properties); *id*. ¶ 298 (finding that "the relevant question is not whether the MINAET was the last line of measures affecting the Claimants' property rights but rather when did the Claimants first acquire knowledge of the breach"). *See also International Technical Products Corp. v. Islamic Republic of Iran*, Award No. 196-302-3 (Oct. 28, 1985), 9 IRAN-U.S. CL. TRIB. REP. 206, 241 (1985) ("What is decisive is the time by which Claimants had irreversibly lost possession and control of the property.").