IN THE ARBITRATION UNDER CHAPTER 10 OF THE
DOMINICAN REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT
AND THE ICSID ADDITIONAL FACILITY RULES BETWEEN

CORONA MATERIALS, LLC,

Claimant/Investor

-and-

DOMINICAN REPUBLIC,

Respondent/Party.

ICSID Case No. ARB(AF)/14/3

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 10.20.2 of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), the United States of America makes this submission on questions of interpretation of the Agreement. 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 10.18.1 (Limitations Period)

2. Article 10.18.1 requires a claimant to submit a claim to arbitration within three years of the "date on which the claimant first acquired, or should have first acquired, knowledge" of (i) the alleged breach, and (ii) loss or damage incurred by the claimant or enterprise.[1]

3. Article 10.18.1 refers to knowledge of the alleged breach and loss first acquired as of a particular "date." Such knowledge cannot be acquired at multiple points in time or on a recurring basis. Accordingly, a continuing course of conduct cannot renew the limitations period under Article 10.18.1. A legally distinct injury, by contrast, can give rise to a separate limitations period under CAFTA-DR Chapter Ten.

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

4. A tribunal constituted under CAFTA-DR Chapter Ten is bound by the terms of the agreement. Article 10.18.1 expressly requires a claimant to submit a claim to arbitration within three years of the date on which the claimant "first acquired, or should have first acquired" knowledge of breach and loss.

5. 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 in that series."[2] To allow an investor to do so would, as the tribunal in *Grand River* recognized, "render the limitations provisions ineffective[.]"[3] 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. Accordingly, once a claimant *first* acquires (or should have acquired) knowledge of breach and loss, subsequent transgressions by the State Party arising from a continuing course of conduct, as opposed to a legally distinct injury, do not renew the limitations period under Article 10.18.1. In the case of a challenge to a measure adopted or maintained by a Party, the exhaustion of local remedies will not give rise to a legally distinct injury, unless the institutions to whom appeal has been made commit some new breach of the applicable standard.[4] Moreover, when a court decision is being challenged, the limitations period will not begin without a final decision of a State's highest judicial authority.

6. The interpretation provided by the Tribunal in *UPS v. Canada* with respect to this point is misplaced. That tribunal found that "it was true generally in the law" that continuing courses of conduct constituting continuing breaches may renew claims limitation periods under international law.[5] Irrespective of whether the tribunal in *UPS v. Canada* properly characterized the law, a general rule would not override the specific requirements of Article 10.20.1, which operates as a *lex specialis* and governs the operation of the limitations period for claims brought under CAFTA-DR Chapter Ten.[6] Acquiring more detailed information about the breach or the

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[2] *Grand River* Decision on Jurisdiction ¶ 81 (interpreting the claims limitation language in NAFTA Chapter Eleven, which is identical to CAFTA-DR Article 10.18.1 for all relevant purposes).

[3] *Id.*

[4] James Crawford, Special Rapporteur, Second Report on State Responsibility, International Law Commission, 51st Sess., U.N. Doc. A/CN.4/498 (1999) ¶ 140.

[5] *United Parcel Service, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Award ¶ 28 (May 24, 2007).

[6] *See, e.g. Spence International Investments, LLC, Berkowitz et al. v. The Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America ¶ 8 (April 17, 2015). States routinely establish specific rules in international agreements that define governing rights and duties in lieu of general principles of international law, reflecting the maxim *lex specialis derogate legi generali.* The *lex specialis* provision of the International Law Commission's Articles on State Responsibility confirms this point. Under that provision, the Articles "do not apply where and to the extent that" issues of state responsibility "are governed by special rules of international law." *Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, art. 55, International Law Commission, 53rd Sess. (2001). Moreover, the *UPS* tribunal's reliance on the *Feldman* Interim Decision was misplaced. That decision did not hold that a permanent course of conduct by the respondent would extend the time limitations period. The tribunal merely acknowledged that because the NAFTA

loss does not reset the limitations period. As other NAFTA tribunals have held, knowledge of loss or damage incurred does not require knowledge of the full or precise extent of loss or damage.[7]

7. Finally, because the claimant bears the burden to establish jurisdiction under Chapter Ten, including with respect to Article 10.18.1,[8] the claimant must prove the necessary and relevant facts (*i.e.*, the date when such knowledge of breach and loss was first acquired) to establish that its claims fall within the three-year claims limitation period.

Article 10.18.2(b) (Waiver Requirement)

8. One of the preconditions to the Parties' consent to arbitrate claims under Chapter Ten of the CAFTA-DR is the waiver required by Article 10.18.2. That provision states in relevant part that:

> 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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came into effect on January 1, 1994, no obligations adopted under the NAFTA existed before that date and the tribunal's jurisdiction could not extend before that date. *See Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 62 (Dec. 6, 2000). With respect to the claims limitation provisions of Chapter Eleven, the tribunal only had occasion to decide whether the language "make a claim" referred to the notice of intent or the notice of arbitration – an issue not relevant in the context of CAFTA-DR where a claim is expressly deemed submitted to arbitration with the notice of arbitration. *See* CAFTA-DR, Article 10.16.4. Importantly, however, the *Feldman* tribunal did not consider a scenario where the notice of arbitration was submitted separately from a claimant's waiver. This question is considered below in in this submission.

[7] *See Grand River* Decision on Jurisdiction ¶ 78 ("[T]he Tribunal's views parallel those of the NAFTA Tribunal in *Mondev*. The claimant there also faced difficulties arising from the time limitations of Articles 1116(2) and 1117(2). The claimant sought to surmount these with the argument that it could have certain knowledge that it had incurred injury from events prior to the limitations period only after it knew the outcome of subsequent litigation that stood to quantify the extent of loss. The Tribunal did not agree, finding that 'a Claimant may know that it has suffered loss or damage even if the extent of quantification of the loss or damage is still unclear.'").

[8] *See Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections ¶¶ 2.8, 2.9, 2.11, 2.15 (June 1, 2012) (noting in the context of jurisdictional objections, including with respect to *ratione temporis* and Article 10.18.1 of the CAFTA-DR, that "all relevant facts supporting [ ] jurisdiction must be established by the Claimant at [the] jurisdictional stage," that "the Claimant has to prove that the Tribunal has jurisdiction," and that "the Claimant has the burden to prove facts necessary to establish jurisdiction (as it positively asserts)"); *Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction and Admissibility ¶ 150 (June 14, 2013) ("Apotex (as Claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal's jurisdiction[.]") (citing *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶¶ 58-64 (Apr. 15, 2009) (summarizing previous decisions, 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")).

> 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.

9. Under the ordinary meaning of this provision, a claim cannot be submitted unless and until it is accompanied by a waiver that complies with Article 10.18.2(b). Therefore, a Notice of Arbitration that is unaccompanied by a valid waiver does not constitute a claim that is capable of being submitted for purposes of any provision of Chapter Ten, including, and in particular, Articles 10.16.4 and 10.18.1. Where a valid waiver is filed subsequent to a Notice of Arbitration, the claim will be considered to have been submitted on the date on which the waiver, and not the Notice of Arbitration, was submitted.

Article 10.5 (Minimum Standard of Treatment)

10. CAFTA-DR Article 10.5.1 requires that each Party "accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." CAFTA-DR Article 10.5.2 specifies that:

> For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

11. These provisions demonstrate the States Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in CAFTA-DR Article 10.5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law.[9] The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[10]

[9] A fuller description of the U.S. position is set out in *Methanex v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America (Nov. 13, 2000); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot* (June 27, 2002); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Sept. 19, 2006); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America (Dec. 22, 2008). Submissions of the United States in investor-State arbitrations may be found on the U.S. Department of State website, *available at* http://www.state.gov/s/l/c3433.htm.

[10] *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 259 (Nov. 13, 2000); *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 615 (June 8, 2009) ("The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an

12. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in Article 1105(1), concerns the obligation to provide "fair and equitable treatment." This includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Denial of justice in its historical and "customary sense" denotes "misconduct or inaction of the judicial branch of the government" and involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process."[11] Aliens have no cause for complaint at international law about a domestic system of law provided that it conforms with "a reasonable standard of civilized justice" and is fairly administered.[12]

13. Instead, a denial of justice arises, for example, when the final act of a State's judiciary constitutes a "notoriously unjust"[13] or "egregious"[14] administration of justice "which offends a sense of judicial propriety."[15] There can be no denial of justice without a final decision of a State's highest judicial authority,[16] unless seeking appeal would be obviously futile or manifestly

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absolute bottom, below which conduct is not accepted by the international community."); *see also* Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L. PROC. 51, 58 (1939).

[11] EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 330 (1925) ("BORCHARD"); J.L. BRIERLY, THE LAW OF NATIONS 286-87 (1963) (defining a denial of justice as "an injury involving the responsibility of the state committed by a court of justice").

[12] BORCHARD at 198 ("Provided the system of law conforms with a reasonable standard of civilized justice and provided that it is fairly administered, aliens have no cause for complaint in the absence of an actual denial of justice.") (footnote omitted).

[13] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44 (2005) (citing J. Irizarry y Puente, *The Concept of "Denial of Justice" in Latin America*, 43 MICH. L. REV. 383, 406 (1944)) ("PAULSSON"); *id*. at 4 ("[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner.") (emphasis omitted); *Chattin Case (United States of America v. Mexico)*, 4 R. INT'L ARB. AWARDS 282, 286-87 (1927), *reprinted in* 22 AM. J. INT'L L. 667, 672 (1928) ("Acts of the judiciary … are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.") (emphasis omitted).

[14] PAULSSON at 60 ("The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice.").

[15] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award ¶ 132 (June 26, 2003) ("*Loewen* Award") (a denial of justice may arise where there has occurred a "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety").

[16] *See, e.g.*, *See Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 282 (June 14, 2013); (noting that denial of justice claims "depend upon the demonstration of a systemic failure in the judicial system. Hence, a claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself."); C. F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 198 (2004) ("the alien must proceed to the highest court in the whole system, which may include more than one line of tribunals or courts where the legal system of the respondent or host state has a multiple hierarchy of fora which can provide redress") ("AMERASINGHE"); GREEN HACKWORTH, 5 DIGEST OF INTERNATIONAL LAW 526 (1943) ("generally speaking, exhaustion of available judicial remedies is a prerequisite to a valid complaint that the alien has been denied justice."); ALWYN FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 311-12 (1938) ("responsibility [of a State] is engaged as the result of a definitive judicial decision by a court of last resort which

ineffective.[17] This rule applies to claims of denial of justice brought under treaties, such as the CAFTA-DR, that require claimants to waive their rights to pursue claims before other fora in order to submit a claim to arbitration.[18]

14. The United States reserves its rights under CAFTA-DR Article 10.20.2 to supplement this submission once all materials have been made available to it consistent with CAFTA-DR Article 10.21.

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Respectfully submitted,

Lisa J. Grosh
Assistant Legal Adviser
Office of International Claims and Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

violates an international obligation of the State"); *Christo G. Pirocaco* (U.S. v. Turkey), NIELSEN'S OPINIONS AND REPORT 587, 592-93 (1937) ("As a general rule, a denial of justice resulting from improper action of judicial authorities can be predicated only on a decision of a court of last resort.").

[17] AMERASINGHE at 206.

[18] *Loewen* Award ¶¶ 158-64; Carlo Focarelli, *Denial of Justice*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 29 (2013), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e775?rskey=3JY63I&result=1&prd=EPIL (noting that in such scenarios "arbitration may be immediately resorted to for any complaint other than denial of justice, while this latter does not occur and cannot therefore be invoked before the exhaustion of local effective remedies."); PAULSSON at 108 (speaking with reference to waiver language similar to that in CAFTA-DR Article 10.18.2(b) "[i]n the particular case of denial of justice, however, claims will not succeed unless the victim has indeed exhausted municipal remedies, or unless there is an explicit waiver of a type yet to be invented.").