IN THE ARBITRATION UNDER CHAPTER TEN OF THE
UNITED STATES-COLOMBIA TRADE PROMOTION AGREEMENT AND THE ICSID CONVENTION

AMEC FOSTER WHEELER USA CORPORATION, PROCESS CONSULTANTS, INC., AND JOINT VENTURE FOSTER WHEELER USA CORPORATION AND PROCESS CONSULTANTS, INC.

Claimants

-and-

REPUBLIC OF COLOMBIA,

Respondent.

ICSID CASE NO. ARB/19/34

SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 10.20.2 of the United States-Colombia Trade Promotion Agreement ("U.S.-Colombia TPA" or "Agreement"), 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.[1]

Article 10.16 (Submission of a Claim to Arbitration)

2. Article 10.16.1 provides in relevant part (emphases added):

> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached [a relevant obligation] and (ii) that the claimant <u>has incurred loss or damage by reason of, or arising out of, that breach</u>; and

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

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim (i) that the respondent has breached [a relevant obligation] and (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach[.]

3. As the United States has previously explained with respect to substantively identical language in NAFTA Articles 1116(1) and 1117(1), to submit a claim to arbitration, an investor must establish that (i) a relevant obligation has been breached, and (ii) that the claimant or its enterprise (a) has incurred loss or damage (b) by reason of, or arising out of, that breach.[2] As the text of Article 10.16.1 makes clear, an investor may submit a claim only once the respondent Party "*has* breached" a relevant obligation, and also "*has* incurred loss or damage by reason of, or arising out of" (*i.e.*, caused by) that breach. (Emphasis added). Thus, there can be no claim under Article 10.16.1 until an investor has suffered harm from an alleged breach. The breach and loss must have already occurred prior to the submission of a claim to arbitration. No claim based solely on speculation as to future breaches or future loss may be submitted.

4. Moreover, if the measures of which an investor complains have not yet been applied to it, the claim is not ripe and may not be brought.[3] Article 10.16.1 does not embrace hypothetical claims – *e.g.*, that a loss may be incurred in the future if circumstances ripen into an actual breach of an obligation under the Agreement. The issue of ripeness therefore turns on the determination of whether the challenged measure had harmed claimant "by the time [c]laimant submitted its claim to arbitration."[4]

[2] *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Statement of Defense of Respondent United States of America, ¶ 39 (April 8, 2005) ("*Glamis* Statement of Defense"); *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States of America, at 109 (Sept. 19, 2006).

[3] *See Glamis* Statement of Defense, ¶ 40 (explaining that the "California measures of which Glamis complains have not been applied to it. As a result, Glamis' claim challenging those measures is not ripe.").

[4] *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award, ¶ 335 (June 8, 2009).

Claims Based on Judicial or Administrative Adjudicatory Proceedings

5. It is well-established that the international responsibility of States may not be invoked with respect to non-final judicial acts,[5] unless recourse to further domestic remedies is obviously futile or manifestly ineffective.[6] As such, non-final judicial acts cannot be the basis for claims under Chapter Ten of the U.S.-Colombia TPA, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. Rather, an act of a domestic court (or administrative tribunal) that remains subject to appeal has not ripened into the type of final act that is sufficiently definite to implicate state responsibility, unless such recourse is obviously futile or manifestly ineffective.

Notice of Intent

6. A State's consent to arbitration is paramount.[7] Indeed, given that consent is the "cornerstone" of jurisdiction in investor-State arbitration,[8] it is axiomatic that a tribunal lacks

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[5] *Apotex Inc. v. United States of America*, NAFTA/ICSID No. UNCT/10/2, Award on Jurisdiction and Admissibility, ¶ 282 (June 14, 2013) ("*Apotex* Award on Jurisdiction") ("[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."); JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 108 (2005) ("For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself.").

[6] *See, e.g., Apotex* Award on Jurisdiction, ¶ 284 ("Because each judicial system must be allowed to correct itself, the 'obvious finality' exception must be construed narrowly. It requires an actual unavailability of recourse, or recourse that is proven to be '*manifestly ineffective*' – which, in turn, requires more than one side simply proffering its best estimate or prediction as to its likely prospects of success, if available recourse had been pursued." (Emphasis in original) (citation omitted)).

[7] *See, e.g.*, ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 74 (1st ed. 2009) ("Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself."); *William Ralph Clayton et al. v. Government of Canada*, NAFTA/UNCITRAL PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 229 (Mar. 17, 2015) ("General international law also provides that a state is not automatically subject to the jurisdiction of international adjudicatory bodies to decide in a legally binding way on complaints concerning its treatment of a foreign investor, but must give its consent to that means of dispute resolution. The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent, in Chapter Eleven, to an overall enhancement of their exposure to remedial actions by investors.").

[8] As explained by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) when submitting the then-draft ICSID Convention to the World Bank's Member Governments, "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre." Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ¶ 23 (Mar. 18, 1965).

jurisdiction in the absence of a disputing party's consent to arbitrate.[9] 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."[10]

7. 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 have only consented to arbitrate investor-State disputes under Chapter 10, Section B where an investor submits a "claim to arbitration under this Section in accordance with this Agreement."[11]

8. Article 10.16 authorizes a claimant to submit a claim to arbitration either on its own behalf or on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly.[12] Article 10.16.2 requires, however, 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')." (Emphasis added). Article 10.16.2 further provides that this notice "*shall specify*":

> (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
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> (b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
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> (c) the legal and factual basis for each claim; and

[9] *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, ¶ 71 (July 15, 2016) ("*Renco* Partial Award on Jurisdiction") ("It is axiomatic that the Tribunal's jurisdiction must be founded upon the existence of a valid arbitration agreement between Renco and Peru."); *see also* CHRISTOPH SCHREUER, THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 831 "Consent to Arbitration" (Peter Muchlinski et al., eds., 2008) (explaining that "[l]ike any form of arbitration, investment arbitration is always based on agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction."); CHRISTOPHER F. DUGAN ET AL., INVESTOR STATE ARBITRATION 219 (2008) (explaining that "[t]he consent of the parties is the basis of the jurisdiction of all international arbitration tribunals").

[10] U.S.-Colombia TPA Article 10.17.1.

[11] *Id.*

[12] U.S.-Colombia TPA Article 10.16.1.

(d) the relief sought and the approximate amount of damages claimed.

(Emphasis added)

9. A disputing investor that does not deliver a Notice of Intent at least 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*. A respondent's consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration.[13]

10. The procedural requirements in Article 10.16.2 are explicit and mandatory, as reflected in the way the requirements are phrased (*i.e.*, "shall deliver;" "shall specify"). These requirements serve important functions, including to provide a Party time to identify and assess potential disputes, to 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's Notice 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[.]"[14]

11. For all of the foregoing reasons, a tribunal cannot simply overlook an investor's failure to comply with the requirements of Article 10.16.2. Rather, satisfaction of the requirements of

[13] U.S.-Colombia 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.

[14] *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).

Article 10.16.2 through submission of a valid Notice of Intent must precede submission of a Notice of Arbitration by at least 90 days in order to engage respondent's consent to arbitrate.[15]

Article 10.18.2(b) (Waiver Requirement)

12. 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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> [. . .]
>
> (b) the notice of arbitration is accompanied,
>
> (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.

13. The waiver requirements under Article 10.18.2(b) are, as with the Notice requirement discussed above, among the requirements upon which the Parties have conditioned their consent in Article 10.17. An effective waiver is therefore a precondition to the Parties' consent to arbitrate claims, and accordingly, a tribunal's jurisdiction under Chapter Ten of the U.S.-Colombia TPA.[16]

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[15] *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 the corollary provisions of 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).

[16] *Renco* Partial Award on Jurisdiction, ¶ 73 ("[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*

14. Similar to provisions found in many of the United States' other international investment agreements,[17] Article 10.18.2(b) is a "no U-turn" waiver provision. As such, it 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 of the submission of an effective waiver is the date on which the claim has been submitted to arbitration, assuming all other relevant procedural requirements have been satisfied.

15. Compliance with Article 10.18.2(b) entails both formal and material requirements.[18] As to the formal requirements, the waiver must be in writing, "clear, explicit and categorical."[19] As the *Renco* tribunal stated, interpreting a waiver provision in the U.S.-Peru Trade Promotion Agreement identical to Article 10.18.2(b), because Article 10.18.2(b) is a "no U-turn" provision, it requires an investor to "definitively and irrevocably" waive all rights to pursue claims in another forum once claims are submitted to arbitration with respect to a measure alleged to have breached the Agreement.[20] This conclusion, as the *Renco* tribunal rightly observed, results from the language requiring the investor to provide a written waiver of "'*any* right to initiate or continue before *any* [forum] *any* proceeding with respect to *any* measure alleged to constitute a breach . . . '"[21] The waiver required by Article 10.18.2(b) is thus "intended to operate as a 'once

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Award, §§ 16-17; *Detroit International Bridge Co. 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").

[17] 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.

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

[19] *Renco* Partial Award on Jurisdiction, ¶ 74; *Waste Management I* Award, § 18 at 229.

[20] *Renco* Partial Award on Jurisdiction, ¶¶ 95-96.

[21] *Id.*, ¶ 95 (Emphasis in original).

and for all' renunciation of all rights to initiate claims in a domestic forum, whatever the outcome of the arbitration (whether the claim is dismissed on jurisdictional or admissibility grounds or on the merits)."[22] That is, the waiver requirement seeks to give the respondent certainty, from the very start of arbitration under the Agreement, that the claimant is not pursuing and will not pursue proceedings in another forum with respect to the measures challenged in the arbitration.[23] Accordingly, a waiver containing any conditions, qualifications or reservations will not meet the formal requirements and will be ineffective.

16. 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 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[.][24]

17. 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."[25] Thus, if a claimant initiates or continues proceedings with respect to the measure in another forum despite meeting the formal requirements of filing a

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[22] *Id.*, ¶ 99.

[23] *See* U.S.-Colombia TPA Article 10.18.2(b).

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

[25] *See Commerce Group* Award, ¶ 80.

waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute.[26]

18. Article 10.18.2(b) requires a claimant's waiver to encompass "any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16," except as provided in Article 10.18.3. 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)."[27] As the tribunal in *Commerce Group* observed, the waiver provision permits other concurrent or parallel domestic proceedings where claims relating to different measures at issue in such proceedings are "separate and distinct" and the measures can be "teased apart."[28]

19. For a waiver to be and remain effective, any juridical person or persons that a claimant directly or indirectly owns or controls, or that directly or indirectly control the claimant, must likewise abstain from initiating or continuing proceedings in another forum as of the date of filing the waiver (and thereafter) with respect to the measures alleged to constitute a Chapter Ten breach. To allow otherwise would permit a claimant to circumvent the formal and material requirements under Article 10.18.2(b) through affiliated corporate entities, thereby rendering the waiver provision ineffective. This in turn would frustrate the purpose of the waiver provision in Article 10.18.2 of the Agreement.

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[26] *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 Bridge* Award, ¶ 336.

[27] *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award, ¶ 118 (Jan. 26, 2006) (In construing the waiver provision under the NAFTA, the tribunal held, "[o]ne 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.").

[28] *Commerce Group* Award, ¶¶ 111-112 (holding that the waiver barred the claimant from pursuing a claim in a domestic proceeding that was "part and parcel" of its claim in a pending CAFTA-DR arbitration, because the measures subject to the claims in the respective proceedings could not be "teased apart"). Article 10.18.2 does not require a waiver of domestic proceedings where the measure at issue in the U.S.-Colombia TPA arbitration is, for example, only tangentially or incidentally related to the measure at issue in the domestic proceedings.

20. 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 State's general discretion to consent to arbitration.[29] 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 on the date on which the effective waiver was filed, assuming all other requirements have been satisfied, and not the date of the Notice of Arbitration. However, where a claimant files an effective waiver subsequent to the constitution of the 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. Under such circumstances, the tribunal would lack jurisdiction *ab initio*.

21. Notwithstanding Article 10.18.2(b), the claimant (or the claimant and the enterprise) may initiate or continue domestic or other dispute settlement proceedings only in very narrow circumstances, where the action:

> seeks <u>interim injunctive relief</u> 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 <u>sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration</u>.

Article 10.18.3 (Emphasis added) (footnote omitted).

[29] *Renco* Partial Award on Jurisdiction, ¶ 173; *see also Railroad Development* Decision on Jurisdiction, ¶ 61 (finding that "the Tribunal has no jurisdiction without the 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).

22. In the context of judicial or administrative adjudicatory proceedings, for example, continued participation in such proceedings, including appeals, will not ordinarily fall within these narrow circumstances. At the same time, as discussed above with respect to Article 10.16.1 (Submission of a Claim to Arbitration), a claim in the absence of judicial finality in the context of judicial or administrative adjudicatory proceedings will be insufficiently ripe to constitute an international delict, unless recourse to further remedies is obviously futile or manifestly ineffective.

Article 10.20 (Conduct of the Arbitration)

Preliminary Objections

23. The U.S.-Colombia TPA contains an expedited review mechanism for preliminary objections in Article 10.20. Article 10.20.4 provides in relevant part (emphases added):

> 4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.
>
> [. . .]
>
> (c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

24. Article 10.20.4 authorizes a respondent to make "any objection" that, "as a matter of law," a claim submitted is not one for which the tribunal may issue an award in favor of the claimant under Article 10.26. Article 10.20.4 clarifies that its provisions operate "[w]ithout prejudice to a tribunal's authority to address other objections as a preliminary question." Article

10.20.4 thus provides a further ground for dismissal, in addition to "other objections," including those with respect to a tribunal's competence.

25. Subparagraph (c) states that, for any objection under Article 10.20.4, a tribunal "shall assume to be true" the "factual allegations" supporting a claimant's claim "in the notice of arbitration (or any amendment thereof)[.]"[30] This standard facilitates an efficient and expeditious process for eliminating claims that lack legal merit.[31]

26. The tribunal, however, only must assume to be true the factual allegations in support of the claim put forth in the notice of arbitration (or any amendment thereof). In other words, although further factual allegations may be put before the tribunal later, those need not be assumed to be true in determining an objection under Article 10.20.4.[32] Article 10.20.4(c) also does not require a tribunal to assume that a claimant's legal allegations or mere conclusions unsupported by relevant factual allegations are correct.[33] Moreover, given that Article 10.20.4(c) allows a tribunal to "consider any relevant facts not in dispute," nothing prevents a respondent from raising or addressing such undisputed facts in the context of a preliminary objection under that provision.

27. Subparagraph (c) does not address, and does not govern, other preliminary objections, such as an objection to competence, which the tribunal may already have authority to consider.

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[30] *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, ¶ 189(c) (Dec. 18, 2014) ("*Renco* Decision on Preliminary Objections") ("[T]he tribunal is required to adopt an evidentiary standard which assumes that all of claimant's factual allegations in support of its claim as set out in the pleadings are true").

[31] *See* Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 834 (Chester Brown ed., 2013) ("Caplan & Sharpe") (noting that Article 28(4) of the 2012 U.S. Model BIT, which mirrors Article 10.20.4 in relevant part, "follows a principal negotiating objective of the Trade Promotion Act—namely, 'seeking to improve . . . mechanisms to eliminate frivolous claims and to deter the filing of frivolous claims' in investment disputes.").

[32] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, ¶ 90 (Aug. 2, 2010) (observing in the context of the substantively identical provision in the CAFTA-DR that "it is only the notice (or amended notice) of arbitration which benefits from a presumption of truthfulness: there is to be no assumption of truth as regards factual allegations made elsewhere, for example in other written or oral submissions made by a claimant to the tribunal under the procedure for addressing the respondent's preliminary objection.").

[33] *Id.* ¶ 91 (observing that the substantively identical provision in the CAFTA-DR pertains only to factual allegations and "does not include any legal allegations. It could not therefore include a legal allegation clothed as a factual allegation. Nor could it include a mere conclusion unsupported by any relevant factual allegation without depriving the procedure of any practical application.").

As correctly noted by the tribunal in *Renco*, 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.[34] 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 …."[35] Consequently, as the *Bridgestone* tribunal, interpreting the substantively identical provisions of the U.S.-Panama Trade Promotion Agreement, 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."[36] As such, when a respondent raises other preliminary objections, there is no requirement that a tribunal "assume to be true claimant's factual allegations."

Article 10.28 (Definition of Investment)

28. 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."

29. Article 10.28 further states that the "[f]orms that an investment may take include" the assets listed in the subparagraphs. Subparagraph (e) of the definition lists "turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts." Ordinary commercial contracts for the sale of goods or services typically do not fall within the list in subparagraph (e).[37] Subparagraph (g) lists "licenses, authorizations, permits, and similar rights

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[34] *Renco* Decision on Preliminary Objections, ¶ 198 (Dec. 18, 2014).

[35] *Id.,* ¶ 192.

[36] *Bridgestone Licensing Services, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, ¶ 110 (Dec. 13, 2017).

[37] U.S.-Colombia TPA Article 10.28, footnote 12 indicates also that "claims to payment that are immediately due and result from the sale of goods or services, are less likely to have [the] characteristics" of an investment.

conferred pursuant to domestic law;"[38] and subparagraph (h) lists "other tangible or intangible, movable or immovable property, and related property rights[.]"

30. 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.[39] 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.

31. 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.

Respectfully submitted,

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[38] *Id.*, 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 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."

[39] Caplan & Sharpe, at 767-68.