

IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE  
UNITED STATES-KOREA FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES

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*Claimant*

*-and-*

THE REPUBLIC OF KOREA,

*Respondent.*

HKIAC CASE NO. 18117

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**SUBMISSION OF THE UNITED STATES OF AMERICA**

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1. The United States of America hereby makes this submission pursuant to Article 11.20.4 of the United States-Korea Free Trade Agreement (“KORUS” or “Agreement”), which authorizes a non-disputing Party to make oral and written submissions to a Tribunal regarding the interpretation of the Agreement. The United States does not take a position on how the interpretations apply to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

**Expedited Review Mechanisms in U.S. International Investment Agreements**

2. In August 2002, an arbitral tribunal constituted under NAFTA Chapter Eleven concluded that it lacked authority to rule on the United States’ preliminary objection that, even accepting all of the claimant’s allegations of fact, the claims should be dismissed for “lack of legal merit.”<sup>1</sup> The tribunal ultimately dismissed all of claimant’s claims for lack of jurisdiction, but only after three more years of pleading on jurisdiction and merits and millions of dollars of additional expense.<sup>2</sup>

3. In all of its subsequent investment agreements concluded to date, the United States has negotiated expedited review mechanisms that permit a respondent State to assert preliminary objections in an efficient manner.

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<sup>1</sup> *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Partial Award ¶¶ 109, 126 (Aug. 7, 2002) (quoting U.S. submission).

<sup>2</sup> *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part VI (Aug. 3, 2005) (deciding that the tribunal lacked jurisdiction over any of the claims and, even if the tribunal had jurisdiction, the claims would have failed on the merits).

## **Articles 11.20.6 and 11.20.7 of the KORUS**

4. The KORUS contains such expedited review mechanisms in Article 11.20, at subparagraphs 6 and 7, which provide, in relevant part:

6. Without prejudice to a tribunal's authority to address other objections as a preliminary question, 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 11.26 or that a claim is manifestly without legal merit.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment.

[. . .]

(c) In deciding an objection under this paragraph that a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 11.26, 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.

[. . .]

7. In the event that the respondent so requests within 45 days of the date the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 6 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

5. Paragraphs 6 and 7 establish complementary mechanisms for a respondent State to seek to efficiently and cost-effectively dispose of claims that cannot prevail as a matter of law, potentially together with any preliminary objections to the tribunal's competence. Additionally, the provisions leave in place any mechanism that may be provided by the relevant arbitral rules to address other objections as a preliminary question. As such, the Agreement, like other agreements incorporating this

language, “draws a clear distinction between three different categories of procedures for dealing with preliminary objections.”<sup>3</sup>

6. Paragraph 6 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 11.26. Paragraph 6 clarifies that its provisions operate “[w]ithout prejudice to a tribunal’s authority to address other objections as a preliminary question.” Paragraph 6 thus provides a further ground for dismissal, in addition to “other objections,” including those with respect to a tribunal’s competence.

7. Subparagraph (a) requires that a respondent submit any such objection “as soon as possible after the tribunal is constituted,” and generally no later than the date for the submission of the counter-memorial. This contrasts with the expedited procedures contained in paragraph 7, which authorize a respondent, “within 45 days after the tribunal is constituted,” to make an objection under paragraph 6 and any objection that the dispute is not within the tribunal’s competence.

8. Subparagraph (c) states that, for any objection under paragraph 6, a tribunal “shall assume to be true” the factual allegations supporting a claimant’s claims. The tribunal “may also consider any relevant facts not in dispute.” This evidentiary standard facilitates an efficient and expeditious process for eliminating claims that lack legal merit. Subparagraph (c) does not address, and does not govern, other objections, such as an objection to competence, which the tribunal may already have authority to consider.

9. Paragraph 7 provides an expedited procedure for deciding preliminary objections, whether permitted by paragraph 6 or the applicable arbitral rules. If the respondent makes a request within 45 days of the date of the tribunal’s constitution, “the tribunal shall decide on an expedited basis an objection under paragraph 6 and any objection that the dispute is not within the tribunal’s competence.” Paragraph 7 thus modifies the applicable arbitration rules by *requiring* a tribunal to decide on an expedited basis any paragraph 6 objection as well as any objection to competence, provided that the respondent makes the request within 45 days of the date of the tribunal’s constitution.<sup>4</sup>

10. As noted, paragraph 7 of Article 11.20 of the Agreement provides that the tribunal shall decide on an expedited basis “an objection under paragraph 6 *and any objection that the dispute is not within the tribunal’s competence*” (emphasis supplied), emphasizing that objections asserted under paragraph 6 are distinct from objections to the tribunal’s competence. As correctly noted by the tribunal in *The Renco Group*, when discussing this language in the Trade Promotion Agreement between the United States and Peru, “this sentence provides additional and cogent confirmation that the Treaty drafters intended to draw a clear demarcation between Article 10.20.4 objections and objections to competence, and that the latter do not fall within the

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<sup>3</sup> *Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Decisions as to the Scope of the Respondent’s Preliminary Objections under Article 10.20.4, ¶ 191 (Dec. 18, 2014) (discussing these mechanisms in the United States-Peru Trade Promotion Agreement). In that case, the United States explained in detail how the two mechanisms provided for in paragraphs 4 and 5 of that Agreement function differently. Submission of the United States ¶¶ 4-12 (Sept. 10, 2014).

<sup>4</sup> Article 11.16.5 provides that the relevant arbitral rules shall govern the arbitration “except to the extent modified by this Agreement.”

scope of the Article 10.20.4 objections.”<sup>5</sup> 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 ....”<sup>6</sup>

11. The distinction drawn in paragraph 7 between an “objection under paragraph 6” and an objection as to the tribunal’s competence demonstrates that the requirements in paragraph 6 are not incorporated into the paragraph 7 mechanism when it is being used to address the latter. As held recently by the *Bridgestone* tribunal, interpreting the substantively identical provisions of the U.S.-Panama Trade Promotion Agreement: “As 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.”<sup>7</sup>

12. As such, when a respondent invokes paragraph 7 to address objections to competence, there is no requirement that a tribunal “assume to be true claimant’s factual allegations.” To the contrary, there is nothing in paragraph 7 that removes a tribunal’s authority to hear evidence and resolve disputed facts. Moreover, paragraph 7 provides that a tribunal “shall . . . issue a decision or award” on the preliminary objections, and paragraph 7 provides for extensions of time as may be necessary to accommodate this result. As recognized by the *Bridgestone* tribunal: “Where 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.”<sup>8</sup>

13. Finally, nothing in the text of paragraph 7 alters the normal rules of burden of proof. In the context of an objection to competence, the burden is on a claimant to prove the necessary and relevant facts to establish that a tribunal is competent to hear a claim.<sup>9</sup> It is well-established that where “jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.”<sup>10</sup> A tribunal may not assume facts in order to establish its jurisdiction when those facts are in dispute.<sup>11</sup>

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<sup>5</sup> *Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Decisions as to the Scope of the Respondent’s Preliminary Objections under Article 10.20.4, ¶ 198 (Dec. 18, 2014).

<sup>6</sup> *Id.* ¶ 192.

<sup>7</sup> *Bridgestone Licensing Services, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections ¶ 110 (Dec. 13, 2017).

<sup>8</sup> *Id.* ¶ 118.

<sup>9</sup> *Apotex Inc. v. United States of America*, NAFTA/UNCITRAL, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility ¶ 150 (June 14, 2013) (“*Apotex I & II Award*”) (“Apotex (as Claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal’s jurisdiction[.]”).

<sup>10</sup> See, e.g., *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶ 61 (Apr. 15, 2009) (“*Phoenix Action Award*”); *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.”).

<sup>11</sup> *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award ¶ 155 (Aug. 2, 2006) (“If, in order to rule on its own competence, the Arbitral Tribunal is obligated to analyze facts and substantive

### **Article 11.28 (Definition of “Investment”)**

14. KORUS Article 11.28 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.

15. As the chapeau makes clear, this definition encompasses “every asset” that an investor owns or controls, directly or indirectly, that has the characteristics on an investment. Article 11.28 further states that the “[f]orms that an investment may take include” the assets listed in the subparagraphs. Subparagraph (h) of the definition lists, among forms that an investment may take, “tangible or intangible, movable or immovable property.” The enumeration of a type of an asset in Article 11.28, however, 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.<sup>12</sup>

### **Article 11.18: Conditions and Limitations on Consent of Each Party (Limitations Period)**

16. Article 11.18.1 of the KORUS provides that:

No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 11.16.1 and knowledge that the claimant (for claims brought under Article 11.16.1(a)) or the enterprise (for claims brought under Article 11.16.1(b)) has incurred loss or damage.

17. As is made explicit by Article 11.18, the Parties to the KORUS 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 . . . or the enterprise . . . has incurred loss or damage.” Thus, a tribunal must find that a claim satisfies the requirements, *inter alia*, of Article 11.18.1 in order to establish a Party’s consent to (and therefore the tribunal’s jurisdiction over) the claim. The Article thus imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of the dispute.<sup>13</sup> And because the claimant bears the burden of proof with respect to the

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normative provisions that constitute premises for the definition of the scope of the Tribunal’s competence, then it has no alternative, but to deal with them ....”).

<sup>12</sup> Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 755, 767-768 (Chester Brown ed., 2013).

<sup>13</sup> 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); *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica*, CAFTA/UNCITRAL, ICSID Case No. UNCT/13/2, Interim Award ¶¶ 235-236 (Oct. 25, 2016) (“*Spence Interim Award*”) (addressing the time-bar defense as a jurisdictional issue); see also *Resolute Forest Products, Inc. v. Government of Canada*, NAFTA/UNCITRAL, PCA

factual elements necessary to establish jurisdiction under Chapter Eleven, including with respect to Article 11.18.1,<sup>14</sup> a claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.<sup>15</sup>

18. The limitations period set out in Article 11.18.1 requires a claimant to submit a claim to arbitration within three years from the date the investor or enterprise “first acquired, or should have first acquired, knowledge” of (i) the alleged breach, and (ii) loss or damage incurred by the investor or enterprise. This limitations period is a “clear and rigid” requirement that is not subject to any “suspension,” “prolongation,” or “other qualification.”<sup>16</sup>

19. An investor or enterprise *first* acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Article 11.18.1, knowledge is acquired 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 with respect to the substantively identical limitations period in the NAFTA,<sup>17</sup> a continuing course of conduct by the host State does not renew the limitations period, once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby. Accordingly, once a claimant *first* acquires (or should have first acquired) knowledge of breach and loss, subsequent transgressions by the

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Case No. 2016-13, Decision on Jurisdiction and Admissibility ¶¶ 82-83 (Jan. 30, 2018) (holding that compliance with the time bar specified in NAFTA Articles 1116 and 1117 “goes to jurisdiction”); *Apotex I & II* Award ¶¶ 314, 335 (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 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)).

<sup>14</sup> *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* Award ¶¶ 58-64 (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”).

<sup>15</sup> *Spence* Interim Award ¶¶ 163, 239, 245-246.

<sup>16</sup> 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 ¶ 29 (July 20, 2006) (“*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”); *Apotex I & II* Award ¶ 327 (quoting *Grand River* Decision on Jurisdiction).

<sup>17</sup> *Grand River* Decision on Jurisdiction ¶ 81.

respondent Party arising from a continuing course of conduct do not renew the limitations period under Article 11.18.1.<sup>18</sup>

20. With regard to knowledge of “incurred loss or damage” under Article 11.18.1, the term “incur” broadly means “to become liable or subject to.”<sup>19</sup> 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. As the *Grand River* tribunal correctly held, “damage or injury may be incurred even though the amount or extent may not become known until some future time.”<sup>20</sup>

21. With regard to knowledge of the “alleged breach” under Article 11.18.1, a “breach” of an international obligation exists “when an act of th[e] State is not in conformity with what is required of it by that obligation.”<sup>21</sup> In the context of Article 11.6, a breach is manifest where a KORUS 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 11.6.1. Where, at the time of the expropriation, a host State does not compensate or make provision for the prompt determination of compensation, the breach occurs at the time of the taking.<sup>22</sup> In contrast, “when a State provides a process for fixing adequate compensation, but then ultimately fails to promptly determine and pay such compensation,” a breach of the compensation obligation may occur later, subsequent to the time of the taking.<sup>23</sup>

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<sup>18</sup> Although a legally distinct injury can give rise to a separate limitations period, as the *Grand River* tribunal made clear, when 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. *Id.*

<sup>19</sup> “Incur,” Merriam-Webster Online Dictionary, available at <https://www.merriam-webster.com/dictionary/incur>; 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”).

<sup>20</sup> *Grand River* Decision on Jurisdiction ¶ 77 (citations omitted); see also *Spence* 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”).

<sup>21</sup> Articles on Responsibility of States for Internationally Wrongful Acts, art. 12, U.N. Doc. A/RES/56/83 (2001).

<sup>22</sup> See *Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award ¶ 72 (Oct. 11, 2002) (“Article 1110 requires that the nationalization or expropriation be ‘on payment of compensation in accordance with paragraphs 2 through 6’. The word ‘on’ should be interpreted to require that the payment be clearly offered, or be available as compensation for taking through a readily available procedure, at the time of the taking. That was not the case here, and accordingly, if there was an expropriation, it occurred at or shortly after the rights in question were lost.”). A breach of KORUS Article 11.6 will occur unless a State Party observes its obligation to refrain from an uncompensated taking at the time of the expropriation by, for example, fixing, guaranteeing, or offering compensation. See *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Rejoinder on Competence and Liability of Respondent United States of America, at 43 (Oct. 1, 2001) (citing authorities); see also *SEDCO, Inc. v. National Iranian Oil Co.*, Award No. 59-129-3, 10 IRAN-U.S. CL. TRIB. REP. 180, 204 n.34 (Mar. 27, 1986) (describing a “taking itself” as wrongful “[i]f . . . no provision for compensation is made contemporaneously with the taking, or one is made which clearly cannot produce the required compensation, or unreasonably insufficient compensation is paid at the time of taking”) (Sep. Op. of Judge Brower); *Liberian Eastern Timber Corp. (LETCO) v. Government of the Republic of Liberia*, Award (Mar. 31, 1986), in 2 ICSID REP. 343, 366 (1994) (finding Liberian Government deprived LETCO of its concession unjustifiably for failure to be “accompanied by payment (or at least the offer of payment) of appropriate compensation”).

<sup>23</sup> See Comments of the United Kingdom on the Draft Articles on State Responsibility ¶ 59 (“the breach does not arise until local procedures have definitively failed to deliver proper compensation,” e.g., “have so failed within the

22. Thus, with respect to an expropriation claim, a claimant has actual or constructive knowledge of the “alleged breach” once it has (or should have had) knowledge of all elements required to make a claim under Article 11.6. 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 a series already expropriated its investment.<sup>24</sup> Rather, as noted above, the operative date is the date on which the claimant first acquired actual or constructive notice of facts sufficient to make a claim under Article 11.6.

*Respectfully submitted,*



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time limits implied by the requirement of promptness”) (emphasis added); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award ¶¶ 422, 425 (Mar. 10, 2015) (“The Tribunal has already established that the LECUPS is a modern law, compliance with which in principle meets the requirements of Art. 6(c) of the BIT. Nevertheless, . . . the Tribunal concludes that the Bolivarian Republic has failed to offer a plausible explanation to justify the delay of more than four years in setting and paying the fair value due in compliance with the LECUPS, which in turn implies that the requirement under Art. 6(c) of the BIT that compensation be paid ‘without undue delay’ has not been met.”); *Goldenberg Case (Germany v. Romania)*, 2 R.I.A.A. 901, 909 (Sept. 27, 1928) (“[T]he requisition carried out by the German military authorities did not *initially* constitute an ‘act contrary to the law of nations’. In order for this situation to continue, it was necessary, however, that within a reasonable delay, the claimants obtain equitable compensation. But such was not the case, the compensation, allocated several years after the requisition, amounting to barely a sixth of the value of the expropriated goods.”) (translation by counsel; emphasis in original) (“[L]a réquisition opérée par l’ autorité militaire allemande ne constituait pas *initialement* un ‘acte contraire au droit des gens’. Pour qu’il continuât à en être ainsi, il fallait, cependant, que dans un délai raisonnable, les demandeurs obtinissent une indemnité équitable. Or tel n’a pas été le cas, l’indemnité, allouée plusieurs années après la réquisition, atteignant à peine le sixième de la valeur des biens expropriés.”).

<sup>24</sup> See e.g., *Spence 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).