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

MERRILL & RING FORESTRY, L.P.,

Claimant/Investor,

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), the United States of America makes this submission on a question of interpretation of the NAFTA. No inference should be drawn from the absence of comment on any issue not addressed below. The United States takes no position on how the interpretive positions it offers below apply to the facts of this case.

2. All claims under NAFTA Chapter Eleven must be brought within the three-year limitations period set out in Article 1116(2) and Article 1117(2). Although a legally distinct injury can give rise to a separate limitations period under NAFTA Chapter Eleven, a continuing course of conduct does not renew the limitations period under Article 1116(2) or Article 1117(2).

3. Article 1116(2) reads as follows:

> "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."[1]

[1] Article 1117(2) likewise imposes a three-year limitations period on claims that are brought by investors on behalf of an enterprise. Under Article 1117(2), investors are barred from bringing a

4. Accordingly, Article 1116(2) requires an investor to submit a claim to arbitration within three years of the date on which the investor *first* acquired knowledge (either actual or constructive) of: (i) the alleged breach, and (ii) loss or damage incurred by the investor. Knowledge of loss or damage incurred by the investor under Article 1116(2) does not require knowledge of the extent of loss or damage.[2]

5. An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under Article 1116(2), that knowledge is acquired on a particular "date." Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis.

6. Both the *Grand River* and *Feldman* tribunals observed that Article 1116(2) introduces a "clear and rigid" limitation defense, which is not subject to any "suspension," "prolongation," or "other qualification."[3]

7. Notably, the *Grand River* tribunal rejected an argument put forward by the claimants that the limitations period under Article 1116(2) or Article 1117(2) applied separately to "each contested measure"[4] in that dispute:

> "[T]his analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries."[5]

8. Without addressing the *Grand River* decision, however, the *UPS* tribunal adopted a different view, finding that "continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitations period accordingly" under Article 1116(2) or Article 1117(2).[6] The *UPS* tribunal found that renewal of the limitations period under Article 1116(2) or Article 1117(2) is not contrary to the "first acquired" language in those provisions, because such a reading of that language "logically would mean

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claim on behalf of an enterprise "if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage."

[2] *See Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 87 (Oct. 11, 2002); *Grand River* Decision on Jurisdiction ¶ 78.

[3] *Grand River Enterprises Six Nations Ltd. v. United States of America* (UNCITRAL), Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006); *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002).

[4] *Grand River* Decision on Jurisdiction ¶ 81 (emphasis omitted).

[5] *Id.*

[6] *United Parcel Service v. Canada* (UNCITRAL), Award ¶ 28 (May 24, 2007).

that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquires further information confirming the conduct or allowing more precise computation of loss."[7]

9. But as the *Mondev* and *Grand River* tribunals confirmed, knowledge of loss under Article 1116(2) or Article 1117(2) does not require knowledge of the precise amount of loss.[8] Nor does the *UPS* tribunal provide any reason for renewing a limitations period when an investor acquires "further information confirming" an alleged breach.

10. Under the *UPS* tribunal's reading of Article 1116(2), for any continuing course of conduct the term "first acquired" would in effect mean "last acquired," given that the limitations period would fail to renew only after an investor acquired knowledge of the state's *final* transgression in a series of similar and related actions. Accordingly, the specific use of the term "first acquired" under Article 1116(2) is contrary to the *UPS* tribunal's finding that a continuing course of conduct renews the NAFTA Chapter Eleven limitations period.

11. Notably, the only support cited by the *UPS* tribunal as "buttress[ing]" its conclusion,[9] the Interim Decision on Preliminary Jurisdictional Issues in the *Feldman* case, in fact does not support the conclusion that a continuing course of conduct renews the limitations period under Article 1116(2). Rather, the *Feldman* tribunal's ruling on Article 1117(2) in its Interim Decision was limited to the meaning of "make a claim" under that provision; the tribunal found that an investor "make[s] a claim" under Article 1117(2) upon delivery of its notice of arbitration, and not upon delivery of its notice of intent.[10]

12. The *Feldman* tribunal separately observed that the NAFTA has no retroactive effect, and thus could not apply to acts or omissions that occurred before January 1, 1994, the date on which the NAFTA entered into force.[11] The tribunal added that if there had been a "permanent course of action" which began prior to the NAFTA's entry into force, the tribunal would have retained jurisdiction over the "post-January 1, 1994 part" of the alleged activity.[12] But the tribunal's hypothetical "permanent course of action" addressed a narrow jurisdictional issue: whether the lack of jurisdiction over actions occurring

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[7] *Id.*

[8] *See supra* note 2.

[9] *UPS* Award ¶ 28.

[10] *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 44 (Dec. 6, 2000).

[11] *See id.* ¶ 62.

[12] *Id.*

before the NAFTA's entry into force ruled out the possibility of jurisdiction over the portion of a permanent course of action that might occur after the NAFTA's entry into force. Such a jurisdictional question did not concern the relevance, for time-bar purposes, of an alleged course of action that begins, and continues, after entry into force.

13. Nor does the Award on the merits in the *Feldman* case support the renewal of the limitations period under Article 1116(2) based on a continuing course of conduct.[13] The time-bar issues considered by the *Feldman* tribunal did not address the "first acquired" language under Article 1116(2) and Article 1117(2) in connection with a continuing course of conduct. Rather, the tribunal considered whether state action short of "formal and authorized recognition" of a claim could "either bring about interruption of the running of limitation or estop the Respondent State from presenting a regular limitation defense."[14] The tribunal found that no such interruption or estoppel applied.[15]

14. Finally, the *UPS* tribunal characterized as "true generally in the law" its finding that limitations periods are renewed by continuing courses of conduct.[16] Whatever the merits of this characterization, such a general rule would not override the specific requirements of Article 1116(2), which operates as a *lex specialis* and governs (together with Article 1117(2)) the operation of the limitations period for claims brought under NAFTA Chapter Eleven.[17]

15. In the *Grand River* case, the tribunal did not dismiss the claimants' challenge to certain later-in-time measures—specifically, "legislative actions occurring within" the three-year limitations period—because the NAFTA time-bar provisions did not "preclude Claimants from seeking to show that they suffered legally distinct injury on account of" those legislative acts.[18]

16. At the same time, however, the *Grand River* tribunal made clear that when a "series of similar and related actions by a respondent state" is at issue, an investor cannot evade the limitations period under Article 1116(2) by basing

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[13] *See Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002).

[14] *Id.* ¶ 63.

[15] *Id.*

[16] *UPS* Award ¶ 28.

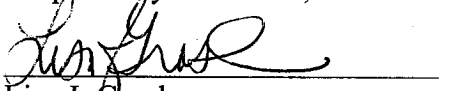
[17] States routinely establish specific rules in international agreements that define governing rights and duties in lieu of general principles of international law, reflecting the maxim *lex specialis derogate legi generali*. The *lex specialis* provision of the International Law Commission's Articles 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).

[18] *Grand River* Decision on Jurisdiction ¶ 101.

its claim on "the most recent transgression" in that series.[19] To allow an investor to do so would "seem[] to render the limitations provisions ineffective[.]"[20] An ineffective Article 1116(2), in turn, would fail to promote the goals served by time-limit restrictions generally, which include ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential defendants and third parties.[21]

17. Accordingly, once an investor first acquires knowledge of breach and loss, subsequent transgressions by the state arising from a continuing course of conduct do not renew the limitations period under Article 1116(2).

Respectfully submitted,



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[19] *Id.* ¶ 81.

[20] *Id.*

[21] *See, e.g.*, GRAEME MEW, THE LAW OF LIMITATIONS 13 (LexisNexis, 2d ed. 2004) ("'[T]he state has an interest in promoting legal certainty. Not only potential defendants, but third parties need to have confidence that rights are not going to be disturbed by a long-forgotten claim.'") (quoting 1998 consultation paper by the English Law Commission); BIN CHENG, GENERAL PRINCIPLES OF LAW 380 (1987) ("It is considered that long lapse of time inevitably destroys or obscures the evidence of the facts and, consequently delay in presenting the claim places the other party in a disadvantageous position. For, if it had not previously been warned of the existence of the claim, it would probably not have accumulated and preserved the evidence necessary for its defence").