IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ADDITIONAL FACILITY RULES BETWEEN

B-MEX, LLC AND OTHERS,

Claimants

-and-

UNITED MEXICAN STATES,

Respondent

ICSID CASE NO. ARB(AF)/16/3

SECOND SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the United States of America makes this submission on questions of interpretation of the NAFTA. Consistent with the United States' written notice of July 20, 2018, the United States makes this submission in order to address some of the questions posed by the Tribunal to the disputing parties in Procedural Order No. 5, dated June 4, 2018. The United States also refers to its submission of February 28, 2018, to the extent that that submission addresses the questions posed by the Tribunal in Procedural Order No. 5. The United States does not take a position, in this submission, on how the interpretations offered below apply to the facts of this case, and no inference should be drawn from the absence of comment on any issue or question posed by the Tribunal not addressed below.

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

2. Procedural Order No. 5 asks about the relevant point(s) in time at which an investor of a Party, making a claim under Article 1117 on behalf of an enterprise of another Party, must own or control that enterprise directly or indirectly.[1] Article 1117(1) provides, in pertinent part, that "[a]n *investor of a Party*, on behalf of an enterprise of *another Party* that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under" Chapter Eleven, Section A.[2]

[1] Procedural Order No. 5, ¶ 1(i) (June 4, 2018).

[2] NAFTA art. 1117(1) (emphasis added).

3. An investor of a Party – other than the respondent NAFTA Party – must own or control directly or indirectly the relevant enterprise continuously between three critical dates: the time of the purported breach, the submission of a claim to arbitration, and the resolution of the claim.[3]

Time of the Purported Breach

4. As provided in Article 1117, in pertinent part, an investor of a Party may submit to arbitration a claim that "*the other Party has breached*" an obligation under Section A. (Emphasis added.) Article 1101 (Scope and Coverage) clarifies that Chapter Eleven applies to measures adopted or maintained by a Party relating to, *inter alia*,[4] "investors of *another Party*" and "investments of investors of *another Party* in the territory of the Party[.]"[5] "[A]n enterprise is an 'investment'" as defined in Article 1139. Thus, because the substantive obligations of Section A apply to "investors of *another Party*," or "investments of investors of *another Party* in the territory of the Party," an investor of another Party, *i.e.,* a Party other than the respondent Party, must own or control directly or indirectly the investment [*i.e*., the enterprise] at the time of the purported breach. If the requisite difference in nationality does not exist, there can be no breach, as there was no obligation under Chapter Eleven, Section A at the time of the purported breach. And pursuant to Article 1117, what may be submitted to arbitration under Chapter Eleven, Section B, are claims that the respondent State "*has breached*" an obligation under Section A.[6]

Submission of the Claim to Arbitration

5. An investor of a Party other than the respondent Party must also own or control the enterprise directly or indirectly at the time of submission of the claim to arbitration: "[a]n investor of a Party, on behalf of an enterprise of another Party that . . . the investor *owns or*

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[3] This conclusion is consistent with the customary international law principle of "non-responsibility," according to which an individual or entity cannot maintain an international claim against its own State. In this connection, Article 1117(4) notably provides that an investment (*e.g*., an enterprise) may not make a claim on its own behalf. *See Article 1117 - Claim by an Investor of a Party on Behalf of an Enterprise, in* MEG KINNEAR, ANDREA KAY BJORKLUND, ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, SUPPLEMENT NO. 1, 1117-5 (Kluwer Law International 2006) (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 459–461 (6th ed. 2003); JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXTS, AND COMMENTARIES 264–265 (2002)).

[4] Article 1101(c) clarifies that Chapter Eleven also applies to measures adopted or maintained by a Party relating to: "with respect to Articles 1106 and 1114, all investments in the territory of the Party."

[5] NAFTA art. 1101(1) (emphasis added). These terms are further defined in Article 1139: "investment" includes an "enterprise" and the phrase "investment of an investor of a Party" is specifically defined as "an investment [*e.g.*, an enterprise] owned or controlled directly or indirectly by an investor of such Party."

[6] NAFTA art. 1117(1) (emphasis added). This conclusion is supported also by the reasoning in *Waste Management II*, where the respondent argued, *inter alia*, that it was not aware of the nationality of the enterprise at the time of breach. The Tribunal noted that for purposes of Article 1117, it was the nationality of the investor that directly or indirectly owns or controls the enterprise that matters, and that the relevant enterprise was owned or controlled indirectly by the U.S. claimant "at the time the actions said to amount to a breach of NAFTA occurred." *Waste Management, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/00/3, Award ¶¶ 80-85 (Apr. 30, 2004).

controls directly or indirectly, *may submit to arbitration under this Section* a claim that the other Party has breached an obligation under" Chapter Eleven, Section A.[7]

6. As the use of the present tense of "owns or controls" indicates, an investor of a Party other than the respondent NAFTA Party, must own or control the enterprise directly or indirectly <u>at the time of submission of the claim to arbitration</u>.[8] Indeed, the tribunal in *Loewen v. United States of America* held that it lacked jurisdiction over Raymond Loewen's Article 1117 claim (premised on indirect ownership or control of a U.S. enterprise through the Loewen Group, Inc., or "TLGI") because he could not show the requisite ownership or control at the time the claim was submitted to arbitration.[9]

Date of the Resolution of the Claim

7. An investor of a Party other than the respondent Party must also own or control the relevant enterprise directly or indirectly through the resolution of the claim. Article 1117's reference to "this Section" is a reference to Section B, which encompasses relevant dispute settlement procedures leading up to, during, and through the resolution of a claim.[10] In this connection, multiple articles concerned with aspects of the dispute settlement process subsequent to the submission of a claim refer to the "disputing investor" or the "disputing parties."[11] "Disputing parties" are defined in Article 1139 as a "disputing investor" and the disputing [NAFTA] Party, and a "disputing investor" is further defined as an investor "that makes a claim under Section B" (*i.e.*, "an investor of *another Party*").

8. Article 1136(5), for example, provides that a "Party whose investor was a party to the arbitration" can invoke the procedures of NAFTA Chapter Twenty and seek a decision from a panel established by the Free Trade Commission enforcing the award against the "disputing Party." The procedure established by this provision, which is analogous to a traditional espousal claim, assumes a continuing connection between an investor of a Party other than the respondent Party and such non-disputing Party through the time of the award, so as to allow that non-disputing Party to pursue a State-to-State arbitration on behalf of the investor.

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[7] NAFTA art. 1117(1) (emphasis added). Article 1117's reference to "this Section," is a reference to Section B entitled "Settlement of Disputes between *a Party* and an *Investor of Another Party*." (Emphasis added.)

[8] Article 1137 clarifies the time when a claim is considered submitted to arbitration; namely, when the request for arbitration or notice of arbitration is received – either by the ICSID Secretary-General or the disputing Party, depending on the instrument and rules under which the claim is submitted.

[9] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award, at 69-70 (June 26, 2003) ("*Loewen* Award").

[10] In this connection, it is important to recall that Article 1117(4) prohibits the investment itself (*i.e.,* the relevant enterprise) from bringing a claim, and as previously noted, Article 1121(2) requires the enterprise to waive its right to obtain relief from an administrative tribunal or court under the law of the disputing Party, except for injunctive, declaratory or other extraordinary relief not involving the payment of damages.

[11] For example, Articles 1124 (Constitution of a Tribunal), Article 1125 (Agreement to Appointment of Arbitrators), Article 1126 (Consolidation), Article 1130 (Place of Arbitration), Article 1134 (Interim Measures of Protection), and Article 1136 (Finality and Enforcement of an Award), among other provisions, all refer to the "disputing investor" or the "disputing parties."

9. The conclusions above are consistent with the well-established principle of international law[12] that an individual or entity cannot maintain an international claim against its own State.[13] As the United States has long maintained[14] with respect to the rule of "continuous nationality," and as the tribunal in *Loewen v. United States of America* explained: "In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*."[15]

Article 1121: Conditions Precedent to Submission of a Claim to Arbitration & Article 1122: Consent to Arbitration

10. In Procedural Order No. 5, the Tribunal asked about the disputing investor's consent to arbitration and the NAFTA Party's consent to the submission of a claim to arbitration "*in accordance with the procedures set out in this Agreement*," as stated in Article 1121(1) and (2) and Article 1122(1).[16]

11. Article 1121 (Conditions Precedent to Submission of a Claim to Arbitration) provides in pertinent part that a disputing investor "may submit a claim to arbitration *only if*" the investor (or both the investor and the enterprise) "*consent[s] to arbitration in accordance with the procedures set out in this Agreement*" and waives its/their right to pursue redress in other fora.[17] (Emphasis added.) By comparison, Article 1122 (Consent to Arbitration) provides in pertinent

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[12] NAFTA art. 1131(1) ("Governing Law") provides that a Chapter Eleven tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

[13] *See* n.3, *supra*.

[14] *See* U.N. Int'l Law Commission, *Comments and Observations Received by Governments*, at 41-43, U.N. Doc. A/CN.4/561 (Jan. 27, Apr. 3 and 12, 2006) (comments of the United States of America on Draft Article 5 of the ILC Draft Articles on Diplomatic Protection) (urging that the ILC Draft Articles state that nationality must be continuously maintained from the date of injury to the date of the resolution of the claim); *accord Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Memorial of the United States of America on Matters of Jurisdiction and Competence Arising from the Restructuring of The Loewen Group, Inc., at 10-20 (Mar. 1, 2002).

[15] *Loewen* Award ¶ 225; *see* ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW: PEACE 512-13 (9th ed. 1992) ("[F]rom the time of the occurrence of the injury until the making of the award, the claim must continuously and without interruption have belonged to a person or to a series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom it is put forward.") (footnote omitted). In this connection, the *Loewen* tribunal in dismissing Raymond Loewen's Article 1117 claim for lack of jurisdiction also noted that he had failed to show the requisite ownership or control at the time of TLGI's restructuring (i.e., through to the resolution of the claim). *Loewen* Award at 69-70. *See also* Andrea K. Bjorklund, *Commentary on NAFTA Chapter 11: Article 1117, in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 503, n.193 (Chester Brown ed. 2013).

[16] Procedural Order No. 5, ¶ 4 (June 4, 2018). Specifically, the Tribunal has inquired whether the phrase "in accordance with the procedures set out in this Agreement" modifies the term "arbitration" in Articles 1121 and 1122 or whether the phrase modifies the phrase "submission of a claim" in Article 1122.

[17] Except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, as set out in Article 1121. *See*, *e.g.*, *Detroit Int'l Bridge Co. v. Government of Canada*, NAFTA/PCA Case No. 2012-25, Award on Jurisdiction ¶ 293 (Apr. 2, 2015) ("*Detroit Int'l Bridge* Award on Jurisdiction") ("The only exceptions allowed are those set out in Article 1121, *i.e.*, proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of Canada.").

part that "[e]ach [NAFTA] Party *consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement*." (Emphasis added.) Article 1121 addresses the disputing investor's consent in the context of a requirement for submitting a claim, and Article 1122 addresses the consent of the NAFTA Parties to the submission of a claim in the context of their standing offer to arbitrate. In each case, consent is qualified, and is only applicable "in accordance with the procedures set out in this Agreement."

12. The phrase "in accordance with the procedures set out in this Agreement," in both Articles 1121 and 1122, refers to all procedures relevant to arbitrating a Section B claim – wherever those procedures appear in the NAFTA. While these procedures are principally set out in Section B, the ordinary meaning of "procedures set out in this Agreement" includes relevant procedures found elsewhere in the NAFTA and cannot be read as limited to those procedures set forth in Articles 1123-1138. For example, relevant procedures found elsewhere in the Agreement include those detailed in Article 2103(6). Also known as NAFTA's "tax filter," that provision sets out detailed procedures that an investor must follow before it may invoke Article 1110 (Expropriation and Compensation) as a basis for a claim involving taxation measures. Specifically, the investor must refer the issue of whether a taxation measure is not an expropriation for a determination to the competent authorities "at the time that it gives notice under Article 1119." Only where the competent authorities do not agree to consider the issue, or having agreed to consider it, fail to agree that the measure is not an expropriation within six months of referral, may the investor then "submit its claim to arbitration under Article 1120."[18]

13. By expressing consent to arbitration "in accordance with the procedures set out in this Agreement," as Article 1121 requires the investor to do, an investor consents to and accepts all of the procedures in the NAFTA that may be relevant to arbitration under Chapter Eleven, Section B. As explained by the tribunal in *ICS Inspection and Control Services*, a disputing investor may only accept or decline a State Party's standing offer to arbitrate "but cannot vary its terms[:]"

> The investor, regardless of the particular circumstances affecting the investor or its belief in the utility or fairness of the conditions attached to the offer of the host State, must nonetheless contemporaneously consent to the application of the terms and conditions of the offer made by the host State, or else no agreement to arbitrate may be formed.[19]

14. The NAFTA Parties' standing offer of consent to the submission of a claim to arbitration in Article 1122(1) is also provided only "in accordance with the procedures set out in this Agreement." As explained above, those procedures include all procedures in the NAFTA

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[18] Among other examples, Article 1415 (Investment Disputes in Financial Services) requires a tribunal, upon request by a disputing Party that has invoked Article 1410, to defer the matter to the Financial Services Committee of the NAFTA Parties for a decision or report before the tribunal may proceed. Article 1113 (Denial of Benefits) details yet another procedure that may, depending on the circumstances, be applicable to Chapter Eleven, Section B arbitrations.

[19] *ICS Inspection and Control Services Ltd. v. Republic of Argentina,* UNCITRAL/PCA Case No. 2010-9, Award on Jurisdiction ¶ 272 (Feb. 10, 2012); *see id.* ¶¶ 243-262 (concluding that, because the claimant had not satisfied a pre-arbitral requirement, the tribunal had no jurisdiction over the dispute).

relevant to the arbitration of claims under Section B, inclusive necessarily of those relevant to the submission of a claim, *i.e.*, as those set out in Article 1119 (Notice of Intent to Submit a Claim to Arbitration) and Article 1120 (Submission of a Claim to Arbitration). If, by contrast, the NAFTA Party's standing offer of consent were understood to refer only to the subset of procedures set forth in Articles 1123-1138, the NAFTA Party would be consenting in advance to arbitrate claims with investors *regardless* of compliance even with the waiver requirement in Article 1121. Such an interpretation is untenable and contrary to the decisions of multiple NAFTA tribunals finding that compliance with the waiver requirement is a prerequisite to engage the NAFTA Party's consent.[20] Other tribunals interpreting nearly identical provisions in other treaties are in accord.[21]

15. Thus, Articles 1119-1120 (among other provisions) contain procedures that must be complied with in order to engage the consent of the NAFTA Party to the submission of a claim to arbitration. While it is true that a notice of intent does not legally commit an investor to submit a claim to arbitration, that does not mean that the procedures detailed in Article 1119 are immaterial to the subsequent submission of a claim. Indeed, the article is entitled "Notice of Intent to *Submit a Claim* to Arbitration." (Emphasis added.) Moreover, the article refers to a "disputing investor," which is defined in Article 1139 as "an investor that makes a claim under Section B."[22] And the procedures that the disputing investor must fulfill are mandatory (*e.g.*,

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[20] For example, the *Waste Management I* tribunal recognized that the consent by the NAFTA Parties to the submission of a claim to arbitration under Chapter Eleven, Section B was conditioned on the "fulfillment, *inter alia*, of the prerequisites laid down in Article 1121." *Waste Management, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/98/2, Award ¶ 16 (June 2, 2000). In holding that it lacked jurisdiction over the dispute, the tribunal noted that the claimant had breached "one of the requisites laid down by NAFTA Article 1121(2)(b)" because, while the formal requisites (presentation in writing, delivery to the disputing party and inclusion in the submission of the claim to arbitration) were met, the waiver submitted was legally ineffective. *Id.* ¶¶ 23, 31; *see also Detroit Int'l Bridge* Award on Jurisdiction ¶¶ 336-37 ("As a consequence, DIBC's failure to waive its rights to continue the Washington Litigation deprives the Tribunal of jurisdiction to arbitrate DIBC's claims in this case. Accordingly, the Tribunal does not have jurisdiction in this case, because of DIBC's failure to comply with NAFTA Article 1121."). Similarly, the *Methanex* tribunal concluded that the NAFTA Parties' consent to arbitrate requires a disputing investor to satisfy not only Articles 1101 and 1116 or 1117, but also "all pre-conditions and formalities required under Articles 1118-1121." *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, First Partial Award ¶ 120 (Aug. 7, 2002). "Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established." *Id.*

[21] For example, the tribunal in *RDC v. Guatemala* found that the waiver requirement must be met "before the consent of the Respondent to arbitration is perfected." *Railroad Development Corp. v. Republic of Guatemala*, CAFTA/ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, ¶ 56 (Nov. 17, 2008) (comparing the text of CAFTA-DR Article 10.18 and NAFTA Article 1121, and noting that: "The title of Article 10.18 ('Conditions and Limitations on Consent of Each Party'), when read with the ensuing text and in particular the first sentence of paragraph 2 ('No claim may be submitted to arbitration under this Section unless…') leads the Tribunal to the conclusion that these differences in drafting are immaterial. 'Only if' and 'unless' have the same meaning and, whether the term 'precedent' is used or not, the conditions set forth in Article 10.18 need to be met before the consent of the Respondent to arbitration is perfected."); *see also Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 193 (July 15, 2016) (concluding the claimant had not complied with the waiver requirement of Article 10.18(2)(b) of the United States-Peru Trade Promotion Agreement; that this failure could not be unilaterally cured by the claimant; and that as such the tribunal had no jurisdiction).

[22] In this connection, while Article 1118 (Settlement of a Claim through Consultation and Negotiation) also refers to the "disputing parties," that Article does not require consultations or negotiations ("The disputing parties should first attempt to settle a claim through consultation or negotiation." (emphasis added)). In contrast, Article 1119 provides that the "disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to

"the disputing investor shall"). (Emphasis added.) Thus, even if some investors may choose not to submit a claim to arbitration after providing a notice of intent, where an investor *does* submit a claim, the investor's earlier compliance with the mandatory procedures set forth in Article 1119 is necessary to engage the disputing Party's consent to the submission of that claim to arbitration.[23]

16. It is for these reasons, as the United States has long maintained, that the "procedures set out in this Agreement" required to engage the NAFTA Parties' consent and form the agreement to arbitrate necessarily include Articles 1116-1121.[24] All three NAFTA Parties agree that their consent to the submission of any claim to arbitration is conditioned upon the satisfaction of the relevant procedural requirements.[25] Their common, concordant, and consistent views form a

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arbitration at least 90 days before the claim is submitted, which notice shall specify: . . ." (Emphasis added.) Thus, while both Articles 1118 and 1119 are "procedures," consent to arbitrate and consent to the submission of a claim to arbitration may still be in "accordance" with those procedures even if the disputing parties do not engage in consultations or negotiations.

[23] And, as noted above, with respect to claims of expropriation based on taxation measures, an investor must refer the issue to the competent authorities at the same time as it gives its notice of intent under Article 1119 – further underscoring that the notice of intent is a procedural prerequisite to the submission of a claim.

[24] *See, e.g., B-Mex, LLC and Others v. United Mexican States,* NAFTA/ICSID Case No. ARB(AF)/16/3, Submission of the United States of America ¶ 4 (Feb. 28, 2018); *Resolute Forest Products Inc. v. Government of Canada,* NAFTA/PCA Case No. 2016-13, Submission of the United States of America ¶ 2 (June 14, 2017) ("Under Article 1122, the scope of a NAFTA Party's consent to arbitrate an investment dispute is limited by the procedural conditions set out in Chapter Eleven. Those procedures include, *inter alia*, the requirements of Articles 1116 and 1117."); *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Third Submission of the United States of America ¶ 7 (July 24, 2000) (noting that the content of the agreement to arbitrate "clearly includes the procedural prerequisites for submitting a claim to arbitration" and that no "claim may be submitted unless the prerequisites for submitting a claim to arbitration specified in the NAFTA have been satisfied."); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 74 (Nov. 13, 2000) ("NAFTA Article 1122(1) provides that '[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.' Thus, only when an investor has fulfilled each of the requirements set forth in Section B of Chapter Eleven has the NAFTA Party consented to have that investor's claim submitted to arbitration."); *Mondev Int'l Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Counter-Memorial on Competence and Liability of Respondent United States of America, at 74 (June 1, 2001) ("The United States' consent to arbitrate, however, encompassed only those claims as to which the NAFTA's procedures had been followed, including Article 1119. *See* NAFTA art. 1122(1).").

[25] *See, e.g., Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶ 2 (July 26, 2014) (stating that pursuant to Article 1122, no Chapter Eleven claim may be submitted to arbitration unless the required procedures were satisfied); *Clayton/Bilcon v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶ 22 (Dec. 29, 2017) ("Under Article 1122, the scope of a NAFTA Party's consent to arbitrate an investment dispute is conditioned on compliance with the procedural requirements of Chapter Eleven."); *Resolute Forest Products Inc. v. Government of Canada*, NAFTA/PCA Case No. 2016-13, Submission of Mexico pursuant [to] NAFTA Article 1128, ¶¶ 2, 3 (June 14, 2017) (noting its agreement with Canada that consent to arbitration cannot be established pursuant to Article 1122 unless the claim has been brought in accordance with NAFTA's procedural requirements); *Detroit Int'l Bridge Co. v. Government of Canada*, NAFTA/PCA Case No. 2012-25, Submission of Mexico pursuant [to] Article 1128 of NAFTA ¶ 3 (Feb. 14, 2014) (stating that Article 1122's offer to arbitrate required compliance with the requirements of Article 1121); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Canada pursuant to NAFTA Article 1128, ¶¶ 50-52 (Apr. 30, 2001) (explaining that a Chapter Eleven tribunal has "no jurisdiction to arbitrate a claim where the investor does not comply with the requirements of Section B"; that the "mandatory requirements that must be complied with to bring a claim" include Articles 1119, 1120 and 1121, that "the NAFTA Parties' consent to investor-State dispute settlement" is conditioned upon "accordance with the

subsequent practice that "shall be taken into account" by the Tribunal in interpreting the NAFTA.[26] As the recent decision of the *Mobil II* tribunal correctly noted after examining the views (many contained in non-disputing Party submissions) of "all three NAFTA Parties in their practice subsequent to the adoption of NAFTA," subsequent practice establishing agreement of the parties regarding the interpretation of the treaty is "entitled to be accorded considerable weight."[27]

17. The Tribunal in the present case has also inquired as to whether the principle of "*effet utile*" requires a treaty interpreter to give effect to the Parties' choice to use the term "conditions precedent" in the header of Article 1121, but not in the headers of Articles 1119 and 1120.[28] Article 31(1) of the Vienna Convention on the Law of Treaties provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The interpretations that the United States has set forth herein comport with this general rule of interpretation.

18. As explained above, Article 1121 (Conditions Precedent to …") requires that an investor consent to arbitrate "in accordance with the procedures set out in this Agreement." This condition means that the investor must accept all procedures in the NAFTA that may pertain to arbitration under Chapter Eleven, Section B, including those set forth in Articles 1119-1120. An

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procedures set out in this Agreement" and that the "[f]ailure to observe these requirements means that an investor cannot access the dispute settlement mechanism under Section B of Chapter Eleven."); *Mondev Int'l Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Second Submission of Canada Pursuant to NAFTA Article 1128, ¶¶ 7-31 (July 6, 2001) (accord).

[26] Pursuant to Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties, this subsequent agreement or subsequent practice of the NAFTA Parties "shall be taken into account." Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), arts. 31(3) (a)-(b) ("VCLT") ("There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[.]"). The International Court of Justice concluded that Article 31 of the VCLT reflects customary international law. *See*, *e.g.*, *Kasikili/Sedudu Island (Botswana v. Namibia)*, 1999 I.C.J. 1045, 1059 (Judgment of Dec. 13). Although the United States is not a party to the VCLT, it has recognized since at least 1971 that the Convention is the "authoritative guide" to treaty law and practice. *See* Letter of Submittal from Secretary of State Rogers to President Nixon transmitting the VCLT (Oct. 18, 1971), *reprinted in* 65 DEP'T ST. BULL. 684, 685 (1971).

[27] *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility ¶ 158 (July 13, 2018). The tribunal further noted that: "The Tribunal accepts that there is a difference between the importance of a Free Trade Commission decision on interpretation and the importance of other forms of subsequent practice. The former is binding upon the Tribunal by virtue of NAFTA Article 1131, whereas Article 31(3)(b) of the Vienna Convention directs only that the latter kind of practice should be 'taken into account' in relation to interpretation. Moreover, the Tribunal accepts that the fact that the three States have not elected to move to a decision of the Free Trade Commission is significant. Nevertheless, it considers that there might be many reasons for the absence of a Free Trade Commission decision and it does not believe that the subsequent practice of the three NAFTA Parties can be disregarded merely because it takes forms different from a Commission decision." *Id.* ¶ 160.

[28] Procedural Order No. 5, ¶ 2 (June 4, 2018). The principle of *effet utile,* or *ut res magis valeat quam pereat*, has been defined as an interpretive principle whereby an interpreter: "doit présumer que les auteurs d'un traité, en adoptant les termes d'une disposition, ont entendu leur donner une signification telle que cette disposition puisse recevoir une application effective." THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, Vol. I 804, n.167 (Olivier Corten and Pierre Klein eds., 2011) (citing J. Salmon, ed., *Dictionnaire du droit international public* (Brussels: Bruylant/AUF, 2001), p. 416).

investor that has not accepted the NAFTA procedures has not consented to arbitration under Chapter Eleven. Because the acceptance of these procedures forms part of the investor's consent as a "condition precedent" to arbitrate, there is no need to insert the phrase "conditions precedent" in the header of each and every relevant NAFTA article (including Articles 1119-1120) containing a procedure that could be relevant to an arbitration under Chapter Eleven, Section B. The status of the NAFTA procedures as conditions precedent is thus clear from the header of Article 1121, combined with that Article's incorporation through the investor's consent of all "the procedures set out in this Agreement."

Respectfully submitted,

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