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

THIRD 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. The United States makes this third submission in order to address the questions posed by the Tribunal to the disputing parties in Procedural Order No. 7, dated November 23, 2018. 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 not addressed below.

NAFTA Article 1117 ("own [ ] or control [ ] directly or indirectly") and VCLT Article 31(3)(c)

2. Procedural Order No. 7 notes that the Tribunal "must determine the proper interpretation" of the phrase "own [ ] or control [ ] directly or indirectly" in NAFTA Article 1117. The Tribunal refers in this connection to Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("VCLT"), which provides that: "[t]here shall be taken into account, together with the context: . . . any relevant rules of international law applicable in the relations between the parties." Specifically, the Tribunal has requested submissions by the disputing parties (and Non-Disputing Parties) discussing: "which, if any, rules of international law exist that are (i) applicable in the relations between the three NAFTA Parties and (ii) relevant within the meaning of Article 31(3)(c), such that the Tribunal must ('shall') 'take into account' any such rules when interpreting Article 1117?" The Tribunal has also requested views as to whether or not Article XXVIII(n) of the General Agreement on Trade in Services ("GATS"), by way of example, is a relevant rule of international law applicable in the relations between the NAFTA Parties.

3. For the following reasons, the United States does not view the definition contained in Article XXVIII(n) of the GATS as a relevant rule of international law, within the meaning of the VCLT Article 31(3)(c), that the Tribunal is required to take into account in interpreting NAFTA Article 1117.

4. The United States observes that Article 31(3)(c) operates as only one part of the treaty interpretation framework reflected in the VCLT. In other words, reference to relevant rules of international law applicable in the relations between the parties to a treaty may provide one means of helping to interpret a treaty provision. But Article 31(3)(c) may not be applied to the exclusion of other means of determining a treaty's meaning, including in particular Article 31(1) of the VCLT, which provides the general rule 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 [the treaty's] *object* and *purpose*." (Emphasis added.)

5. For a rule of international law to be "taken into account" for the purposes of Article 31(3)(c), it must be, among other considerations, "relevant."[1] Here, the external treaty provision cited by the Tribunal – i.e., the definition of "juridical person" in Article XXVIII(n) of the GATS – does not constitute a "relevant" rule of international law applicable between the parties that must be taken into account under Article 31(3)(c) when interpreting NAFTA Article 1117(1).

6. Properly understood, NAFTA Article 1117(1) and the definition of "juridical person" in Article XXVIII(n) of the GATS are distinct. (By contrast, as discussed further below, the customary international law rules governing the status of corporations with respect to international claims are rules applicable in the relations between the parties that must be taken into account.)

7. NAFTA Articles 1116 and 1117 are jurisdictional standing provisions, located in Section B – Settlement of Disputes between a Party and an Investor of Another Party, and claims brought thereunder are limited to the type of loss or damage available under the particular Article invoked. Articles 1116 and 1117 "set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by an investor."[2] As the United States has explained on several occasions, these articles were carefully and purposefully drafted against the background of two existing principles of customary international law addressing the status of corporations with respect to international claims.[3] The first of these principles is that no claim by or on behalf of a shareholder may be

[1] The United States views in this submission are confined to the question of whether Article XXVIII(n) of the GATS is a "relevant" rule of international law applicable between the parties, within the meaning of the VCLT Article 31(3)(c), that the Tribunal is required to take into account in interpreting NAFTA Article 1117.

[2] *See* North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I, 103d Cong., 1st Sess., at 145 (1993).

[3] *See, e.g.*, *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶¶ 6-10 (Sept. 18, 2001) ("Articles 1116 and 1117 of the NAFTA serve distinct purposes. Article 1116 provides recourse for an investor to recover for loss or damage suffered by it. Article 1117 permits an investor to bring a claim on behalf of an investment for loss or damage suffered by that investment."); *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Seventh Submission of the United States of America ¶¶ 2-10 (Nov.

asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares.[4] The second principle is that no international claim may be asserted against a State on behalf of the State's own nationals.[5]

8. Article 1117(1) provides a limited carve-out to these background principles of customary international law, which principles should be taken into account in interpreting Article 1117(1). In this sense, those background principles of customary international law are "relevant rules of international law applicable in the relations between the [NAFTA] parties" consistent with VCLT Article 31(3)(c).

9. Without Article 1117(1)'s carve-out, the application of these background principles would leave a common situation without a remedy. Investors often choose to make an investment through a separate enterprise, such as a corporation, incorporated in the host State. If the host State were to injure that enterprise in a manner that does not directly injure the investor, no remedy would ordinarily be available under customary international law. In such a case, the loss or damage is directly suffered only by the enterprise. As the investor has not suffered a direct loss or damage, it cannot bring an international claim. Nor may the enterprise maintain an international claim against the State of which it is a national under the principle of non-responsibility. However, Article 1117(1)'s carve-out to customary international law is purposefully limited by the requirement that the "investor own[] or control[] directly or

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6, 2001) (same); *GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Submission of the United States of America ¶¶ 2-18 (June 30, 2003); *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Submission of the United States of America ¶¶ 4-9 (May 21, 2004); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶¶ 4-22 (Dec. 29, 2017).

[4] This is so because, as recently reaffirmed by the International Court of Justice in *Diallo*, "international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders." *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2010 I.C.J. 639, ¶¶ 155-156 (Judgment of Nov. 30) (noting also that "[t]his remains true even in the case of [a corporation] which may have become unipersonal"). As the *Diallo* Court further reaffirmed, quoting *Barcelona Traction*: "a wrong done to the company frequently causes prejudice to its shareholders." *Id.* ¶ 156 (*quoting Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3, ¶ 44 (Second Phase, Judgment of Feb. 5) ("*Barcelona Traction*")). Nonetheless, "whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed." *Id. See also Barcelona Traction* ¶ 46 ("[A]n act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected."). Thus, only *direct* loss or damage suffered by shareholders is cognizable under international law. *See Barcelona Traction* ¶ 47 ("Whenever one of his direct rights is infringed, the shareholder has an independent right of action."). The United States notes that some authors have asserted or proposed exceptions to this rule.

[5] *See, e.g.*, JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXTS, AND COMMENTARIES 264 (2002) (observing, in connection with Article 44(a) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, that the "nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility"); 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 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).

indirectly" the enterprise, thereby excluding non-controlling minority shareholders, who are limited to bringing claims under Article 1116. This carefully crafted dichotomy between the types of claims that may be brought against a NAFTA Party pursuant to Articles 1116(1) and 1117(1) serves also to reduce the risk of multiple actions with respect to the same disputed measures.

10. Article 1117(1) does not include a definition of what constitutes ownership or control, whether direct or indirect, of the enterprise. As the United States has previously explained,[6] the omission of a definition for "control" in the NAFTA accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.[7]

11. By contrast, Article XXVIII(n) of the GATS provides specific definitions and thresholds for determining whether a "juridical person" is "owned" or "controlled" by "persons of a Member." A "juridical person" is "owned" by persons of a WTO Member if more than 50 percent of the equity interest in the juridical person is beneficially owned by persons of that Member, whereas a juridical person is "controlled" by persons of a WTO Member "if such persons have the power to name a majority of its directors or otherwise to legally direct its actions."

12. These definitions appear in a multilateral agreement – the GATS – that is concerned with, among other things, the liberalization of trade in services among WTO Members.[8] The chapeau of Article XXVIII ("Definitions") provides that such definitions are "[f]or the purpose of this Agreement[.]" Article XXVIII(n) defines thresholds for ownership and control for the purpose of determining the scope and applicability of the GATS and the obligations and specific commitments made under it. Thus, these definitions are building blocks for multilateral services rules, and reflect the logic and architecture of the GATS as a whole.

13. Moreover, the GATS definitions form part of rules whose alleged breach can only be adjudicated through state-to-state dispute settlement. The WTO dispute settlement system does

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[6] *See B-Mex, LLC and Others v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/16/3, First Submission of the United States of America ¶ 15 (Feb. 28, 2018); *see also Italba Corp. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Submission of the United States of America ¶ 4 (Sept. 11, 2017) (stating the same in the context of Article 1 of the Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment).

[7] *See Hearing Before the Committee on Foreign Relations of the United States Senate on the Bilateral Investment Treaties with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova, and Romania*, S. Hrg. 103-292, 103rd Cong., 1st Sess., 27 (Sept. 10, 1993) (Responses of the U.S. Department of State to Questions Asked by Senator Pell) (the term "control" is left undefined in U.S. Model BITs "because these [determinations] involve factual situations that must be evaluated on a case-by-case basis"); *see also* KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 116 (2009) ("a determination of whether an investor controls a company requires factual determinations that must be made on a case by case basis").

[8] *See* GATS preamble (listing several objectives, including the "establish[ment of] a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization," and the "early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations").

not permit individuals or companies to assert claims.[9] In contrast, as discussed above, NAFTA Article 1117(1) is a jurisdictional standing provision designed to address and differ from customary international law rules with respect to corporate ownership, to enable qualifying investors to bring individual claims for damages on behalf of an enterprise.

14. These differences, among others, confirm that GATS Article XXVIII(n) is not a relevant rule of international law, within the meaning of the VCLT Article 31(3)(c), that the Tribunal is required to take into account in interpreting NAFTA Article 1117.

Respectfully submitted,

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[9] *See, e.g.*, WTO Dispute Settlement Understanding, Articles 4, 6 (confirming that only Members have the ability to file a request for consultations and a request for the establishment of a WTO panel); WTO dispute settlement system training module, "Introduction to the WTO dispute settlement system," Sec. 1.4, *available at* https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s4p1_e.htm ("The only participants in the dispute settlement system are the Member governments of the WTO . . . . [P]rivate individuals or companies do not have direct access to the dispute settlement system . . . .").